



Australian Government  
Attorney-General's Department

October 2014

**Parliamentary Joint Committee on  
Intelligence and Security**

**Counter-Terrorism Legislation  
Amendment (Foreign Fighters) Bill 2014**

**Attorney-General's Department Submission**

## Introduction

1. The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on Intelligence and Security with this submission as part of the Committee's examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.
2. The Bill was introduced into the Senate on 24 September 2014 by the Attorney-General, Senator the Hon George Brandis QC, and referred to the Committee on that date for reporting by 17 October 2014.

## Background

3. The escalating security crisis in Iraq and Syria poses an increasing terrorist threat to the security of all Australians both here in Australia and overseas. The Australian Government is particularly concerned about Australians who travel to conflict zones and return to Australia with skills and intentions acquired from fighting or training with proscribed terrorist groups. Around 60 Australians are participating in the conflict zones in Syria and Iraq. In total, as many as 160 Australians are assessed to be involved in or supporting the Syria and Iraq conflicts both onshore and offshore, from engagement in fighting to providing support such as funding or facilitation. These individuals pose a significant risk to Australia and Australians.
4. Australia has a range of national security and counter-terrorism legislation in place, including criminal offences for engaging in hostile acts overseas and provisions authorising the cancellation of passports in limited circumstances. However, the dynamic and fluid nature of the challenges Australia faces means the current legislation does not sufficiently address the domestic security threats posed by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas.

### Reviews of national security legislation

5. The Bill includes measures identified through a comprehensive review of national security legislation, including consideration of the recommendations of independent reviews conducted since 2011. These include the *Final Report of the COAG Review of Counter Terrorism Legislation* (the COAG Review) and the annual reports of the Independent National Security Legislation Monitor (INSLM). Implementation of the Government's responses to the recommendations in these reviews will assist to mitigate the domestic security threats posed by Australians' involvement in conflict overseas. In particular, the INSLM's fourth annual report focuses on the threat posed by Australians traveling abroad to engage in terrorist or foreign

incursion activity and the potential for them to return to Australia with an increased capability to commit terrorist acts.

6. In addition to issues raised through formal reviews, 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. In reviewing existing legislation, consideration has been given to ensuring the effective use of powers in the current context, while maintaining and, if necessary strengthening, safeguards.

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

7. This Bill forms part of the Government's comprehensive reform agenda to strengthen Australia's national security and counter terrorism legislation. It will address the most pressing gaps in our counter-terrorism legislative framework, focusing on measures that will have the greatest impact on prevention and disruption of domestic terrorist threats.

8. This Bill will enhance the ability of law enforcement, intelligence and border protection agencies to respond to the significant domestic security implications associated with Australians participating in foreign conflicts. It will improve the ability of these agencies to prevent and disrupt Australians from traveling to fight in overseas conflicts such as the current conflict in Syria and Iraq and mitigate the threat posed by those returning from such conflicts.

9. The amendments will address identified issues with currently available powers to arrest, detain, monitor, investigate and prosecute in relation to individuals traveling to and returning from foreign conflict zones. In particular, the introduction of new offences for advocating terrorism, and for entering or remaining in a declared area, will apply to behaviours of security concern that have become more acute in the current context. The broadening of the criteria for listing terrorist organisations will enhance the Australian government's ability to keep terrorist organisation listings up-to-date in the increasingly fluid security environment.

10. Key measures in the Bill include

- **updating the available criminal offences so they are relevant and address the modern foreign fighter threat by**
  - introducing provisions in the *Criminal Code Act 1995* to make it an offence to advocate terrorism and to intentionally travel to, or remain in, a declared area without a legitimate purpose
  - creating a new offence for destroying or tampering with a record or thing to prevent its production under an ASIO questioning warrant and make other appropriate enhancements to the regime, and
  - simplifying the provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978* and move them to the *Criminal Code Act 1995*, including clarifying the requirement to prove a person intended to engage in a hostile activity in ‘a/any’ foreign State, limiting the exception to where the ‘sole purpose’ is providing humanitarian aid, and amending certain definitions and penalties to be consistent with terrorism offences in the Criminal Code
- **preserving key counter-terrorism measures due to expire by**
  - providing for the continuation of the control order and preventative detention order regimes in the *Criminal Code Act 1995* and certain powers relevant to the investigation of terrorism related offences in the *Crimes Act 1914* for a further 10 years beyond 2015, and the questioning and detention warrant regimes in the *Australian Security Intelligence Organisation Act 1979* beyond July 2016
- **enhancing the control order regime by**
  - including additional criteria for control orders where:
    - the person has engaged in armed hostilities in a foreign state, and
    - the person has been convicted of a terrorism offence
  - amending the criteria for control orders on training grounds to include participating in training with a terrorist organisation, in alignment with the proposed amendment to the training offence
  - making the threshold for an AFP applicant to request a control order consistent across all criteria as ‘suspects on reasonable grounds’

- requiring the AFP member serving an order on a person to advise the person of appeal/review rights
- inserting a maximum curfew period of 12 hours within a 24 hour period for curfew conditions
- allowing AFP to use telecommunications interception, under warrant, to investigate the breach of a control order
- **enhancing the preventative detention order regime by**
  - enabling applications for initial preventative detention orders and prohibited contact orders to be made orally or electronically in urgent circumstances
  - requiring that the AFP applicant must ‘suspect on reasonable grounds’, the matters set out in the issuing criteria
  - providing that a person must be satisfied that it is ‘reasonably necessary’ to detain the subject for one of the purposes listed, and
  - providing for orders to be made where the person’s full name is not known provided the person can be identified
- **broadening the criteria and streamlining the process for the listing of terrorist organisations by**
  - authorising the Attorney-General to add, remove or alter aliases of a listed terrorist organisation, where satisfied the alias or aliases are those of the listed terrorist organisation
  - broadening the terrorist organisation listing criteria in relation to advocacy, and
  - expanding the relevant training offence to include participating in training with a terrorist organisation
- **providing law enforcement agencies with the tools needed to investigate, arrest and prosecute those supporting foreign conflicts by**
  - introducing a delayed notification search warrant scheme—with appropriate safeguards and limits—to allow a search warrant to be executed without the knowledge of the occupier of the premises to ensure suspects are not immediately alerted to the investigation

- requiring compliance with notices under s 3ZQN of the *Crimes Act 1914* relating to serious terrorism offences as soon as practicable and no later than 14 days—s 3ZQN notices are often used to assist the AFP in obtaining bank account information from financial institutions
- reducing the arrest threshold for terrorism offences (including foreign incursions offences) to ‘suspects’ on reasonable grounds, and
- allowing courts greater flexibility to admit material obtained from overseas in terrorism related proceedings, providing that the material was not obtained as a result of torture or duress
- **strengthening protections at Australia’s borders by**
  - enhancing border security by ensuring certain biometric information can be appropriately obtained, retained and used
  - addressing shortcomings in the current powers of Customs officers under the *Customs Act 1901* to detain persons of interest, and to introduce a new set of circumstances in which a person may be detained by a Customs officer in a designated place (such as an airport)
  - better supporting the use of automated border processing technology (known as e-Gate) to collect and retain personal identifiers of citizens and non-citizens in immigration clearance or upon departure, and to permit the disclosure of that information, and
  - requiring air and sea carriers to provide information in advance on departing travelers through an approved reporting system
- **preventing the facilitation of participation in foreign conflicts by**
  - ensuring welfare payments can be terminated for people who have been assessed as a serious threat to Australia’s national security where the person’s visa or passport has been cancelled
  - improving the ability of the Australian Security Intelligence Organisation to request the cancellation of a visa based on security concerns and introduce a power to suspend Australian passports and seize foreign passports for 14 days, and
  - removing the requirement to immediately notify an individual of the cancellation of a passport to avoid alerting the individual to the existence of an investigation, and

- **implementing other supporting amendments to**

- create consistency in the definition of ‘terrorist act’ across a number of Acts
- amend the definition of a ‘terrorist offence’ in the *Crimes Act 1914* to include foreign incursions and treason offences and offences against Part 4 of the *Charter of the United Nations Act 1945* and Part 5 of that Act insofar as it relates to terrorism—providing that certain powers can be used in relation to these offences, and
- list the Attorney-General’s Department as a designated agency under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to allow the department to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government’s foreign fighters national security response.

11. Tables attached to this submission set out those measures which have been introduced in response to the recommendations of the COAG Review (**Attachment A**) and the INSLM (**Attachment B**).

## Conclusion

12. The department trusts that this information is of assistance to the Committee. The department is willing to provide any other assistance to the Committee in undertaking this inquiry.

## Attachment A—Responses to recommendations in the COAG Review of Counter-Terrorism Legislation

Recommendation	Response
<b>Criminal Code Act 1995</b>	
<p><b>Rec 17: s 102.5 – ‘Participation’ in training</b></p> <p>The Committee recommends the offence in section 102.5 be amended to include ‘participation’ in training.</p>	<p>Items 68 and 69 of Schedule 1 of the Bill implement this recommendation in full by extending section 102.5 to cover participation in training. This will prevent unintended gaps arising in the coverage of these offences, which could occur if there are no formally defined teaching and learning roles in a training session.</p> <p>Similar amendments will also be implemented by items 71 and 73 of the Bill to ensure the complementary criteria for seeking a control order at subsections 104.2(2) and 104.4(1) also include participation in training.</p>
<p><b>Rec 26: Retention of control orders</b></p> <p>The Committee considers that the control order regime should be retained with additional safeguards and protections included.</p>	<p>Items 86 and 87 of Schedule 1 of the Bill implement this recommendation by extending the sunset provisions for Division 104 (control orders) at section 104.32 until 15 December 2015. Control orders play an important role in protecting the public from terrorist threats. They ensure that law enforcement agencies have a legal basis on which to take action to prevent a terrorist threat from eventuating where an arrest or a prosecution is not open, but a person nonetheless presents a credible risk to public safety. This is particularly relevant in respect of emerging threats presented by Australians returning from conflict zones overseas.</p> <p>Statutory safeguards applying to Division 104 are extensive and to date control orders have been</p>



<b>Recommendation</b>	<b>Response</b>
	used judiciously and appropriately. The Bill also implements certain recommendations of the COAG Review that improve these safeguards—see <b>recommendations 32 and 34</b> below.
<p><b>Rec 32: Information concerning appeal rights</b></p> <p>The Committee recommends that section 104.12 should be amended to provide that the information to be given to a person the subject of an interim control order include information as to all appeal and review rights available to that person or to the applicant in the event that an interim order is confirmed, varied or revoked.</p>	<p>Items 77-81, 84 and 85 of Schedule 1 of the Bill implement this recommendation by including in paragraph 104.12(1)(b), section 104.17 and paragraph 104.26(1)(c) an express requirement for the AFP member serving notice of the control order on the subject of the order to provide information on appeal and review rights in relation to the order.</p> <p>While the existence of general rights of appeal could reasonably be expected to be within the knowledge of a person’s legal representative, the express requirement would ensure that this matter is brought to the attention of the subject of an interim order.</p>
<p><b>Rec 34: Curfew condition</b></p> <p>The Committee recommends that a prohibition or restriction under section 104.5(3)(c) – a curfew order – be generally no greater in any case than 10 hours in one day.</p>	<p>Item 75 of Schedule 1 of the Bill implements this recommendation in part.</p> <p>Section 104.5(3)(c) is intended to place restrictions on a person’s movement for part of a day, rather than authorising a form of home detention. This reflects the ordinary meaning of the term ‘curfew’.</p> <p>Specifying an indicative maximum curfew period provides an additional safeguard by making clear the above intention, while retaining appropriate flexibility to tailor the conditions of orders to the circumstances of individual cases. The amendment to section 104.5(3)(c) provides a maximum</p>

Recommendation	Response
	curfew of 12 hours within a 24-hour period. This is based on a maximum curfew duration prescribed in the bail, sentencing and dangerous sexual offenders legislation of some States.
<b><i>Crimes (Foreign Incursions and Recruitment) Act 1978</i></b>	
<p><b>Rec 41: hostile activities in foreign States, s 6</b></p> <p>The Committee recommends an amendment to section 6(1)(a) to remove the need to prove an intention to engage in hostile activity in a particular foreign State.<sup>1</sup></p> <p>See also recommendation III/2 of the INSLM’s fourth annual report at <b>Attachment B</b></p>	<p>Item 110 of Schedule 1 of the Bill inserts new Part 5.5—Foreign incursions and Recruitment into the Criminal Code. This new part in the Criminal Code replaces the need for the <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i>, which is repealed by Item 144.</p> <p>New paragraph 119.1(1)(a) in Part 5.5 implements this recommendation by amending the offence so that what needs to be proven is the intention of engaging in a hostile activity “in that or any other foreign country”. This will enhance the capability of law enforcement agencies in relation to the investigation and prosecution of Australian persons who are suspected of participating in foreign conflicts overseas, who may have traveled to the conflict zone via one or more other countries.</p>
<b><i>Crimes Act 1914</i></b>	
<p><b>Rec 44: sunset provision</b></p> <p>If the search and seizure powers in the <i>Crimes Act 1914</i> (Cth) are renewed in</p>	<p>Items 43-45 of Schedule 1 of the Bill implement this recommendation in part by extending the sunset provisions in section 3UK by 10 years, rather than 5 years as recommended. This is consistent with the response to recommendation 26 (above) in relation to the renewal of control orders</p>

<sup>1</sup> Section 6(1)(a) of the *Crimes (Foreign Incursions and Recruitment Act) 1978* (Cth) creates an offence in respect of entering a foreign state with intent to engage in a hostile activity in that foreign state.

<b>Recommendation</b>	<b>Response</b>
2016, the Committee recommends amending s 3UK to provide that the relevant provisions should cease to exist as at the expiry date, which will be a 5-year period. <sup>2</sup>	

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<sup>2</sup> Section 3UK of the *Crimes Act 1914* (Cth) provides that a police officer must not exercise powers under Division 3A (powers in relation to terrorist acts and terrorism offences) after 10 years from commencement. (The sunset date for the exercise of these powers is 15 December 2015.)

## Attachment B—Responses to recommendations in the Independent National Security Legislation Monitor’s Annual Reports

Recommendation	Response
<p><b>Second annual report – 20 December 2012</b></p>	
<p><i>Criminal Code Act 1995</i></p>	
<p><b>Rec III/1: issuing criteria – subjective and objective belief (s 105.4(4)(a))</b></p> <p>If PDOs are to be retained in general, the threshold tests for them should require both the AFP applicant and issuing authority to hold an actual belief as to the prerequisite matters, as well as the grounds for that belief being reasonable. (Hence, para 105.4(4)(a) of the Code should be amended to read “suspects on reasonable grounds” rather than “reasonable grounds to suspect”.)</p>	<p>Item 88 of Schedule 1 of the Bill implements this recommendation in part, by amending the threshold for the AFP applicant, but not the issuing authority. This is consistent with provisions in other Commonwealth legislation authorising the issuing of warrants, which require the applicant to suspect the relevant matters on reasonable grounds and the issuing authority to be satisfied as to the existence of reasonable grounds for the applicant’s suspicion.</p>

<b>Recommendation</b>	<b>Response</b>
<p><b>Rec III/3: issuing criteria – evidence preservation (s 105.4(6))</b></p> <p>If PDOs are to be retained in general, the necessity requirement in para 105.4(6)(b) should be amended to require that it be “reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act”.</p>	<p>Item 89 of Schedule 1 of the Bill implements this recommendation by aligning the issuing criteria in paragraphs 105.4(6)(a) and (b) to ensure that a consistent standard is applied to the issuing criteria in relation to evidence preservation orders, which will prevent the risk of ambiguity or uncertainty as a result of interpretative differences in the terms “necessary” and “reasonably necessary”.</p>
<p><b><i>Australian Security Intelligence Organisation Act 1979—Part III, Division 3</i></b></p>	
<p><b>Rec IV/1: Roles of issuing authority and Attorney-General</b></p> <p>The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of questioning warrants (QWs), rather than the issuing authority taking the consent of the Attorney-General as conclusive of some of them.</p>	<p>Item 28 of Schedule 1 of the Bill implements this recommendation in part.</p> <p>The Bill does not implement the recommendation that would require the Issuing Authority to consider all the prerequisites for the issuing of questioning warrants, rather than taking the consent of the Attorney-General as conclusive of them. When the questioning warrant provisions were enacted, a distinction was made between certain criteria of which the Attorney-General is required to be satisfied, and those criteria of which the Issuing Authority (a judicial officer) must also be satisfied. The criterion that ‘all other methods of obtaining the intelligence would be ineffective’ was considered a criterion appropriate for the Attorney-General’s consideration, as this would involve an assessment of a broader range of factors than the specific facts and circumstances of the particular case at hand. In particular, making a judgement as to whether</p>

<b>Recommendation</b>	<b>Response</b>
<p>The last resort requirement for QWs should be replaced with a prerequisite that QWs can only be sought and issued where the Attorney-General and the issuing authority are “satisfied that it is reasonable in all the circumstances, including consideration whether other methods of collecting that intelligence would likely be as effective”.</p>	<p>other methods of obtaining the intelligence would be ineffective is a matter best assessed by a person with a detailed understanding of ASIO’s operational methods and capabilities.</p> <p>As the Attorney-General has portfolio responsibility for ASIO, is regularly briefed on its operations, and approves other types of ASIO special powers warrants, this is a matter on which the Attorney-General is well-placed to decide. Having to explain ASIO’s practices and capabilities to an Issuing Authority may be time and resource intensive, and may risk further exposure of sensitive methodologies and capabilities.</p> <p>The Bill does amend the ‘last resort’ criterion at paragraph 34D(4)(b) to one of ‘reasonableness’, noting that it will still require an assessment as to whether other methods of obtaining that intelligence would likely be as effective. This will ensure that ASIO can seek a questioning warrant in time-critical operational circumstances, based on an assessment that this is likely to be the best intelligence gathering tool in those circumstances. As noted in the INSLM’s report, the Attorney-General’s Guidelines, made under section 8A of the ASIO Act, contain a number of important safeguards, including requirements that ASIO have regard to proportionality and intrusiveness of its methods of obtaining intelligence.</p>
<p><b>Rec IV/3: Use of force in the execution of a Questioning Warrant (s 34V(3))</b></p> <p>The requirement in subparagraph 34V(3)(b)(ii) of the ASIO Act that there be</p>	<p>Item 32 of Schedule 1 of the Bill implements this recommendation by removing subparagraph 34V(3)(b)(ii).</p>

<b>Recommendation</b>	<b>Response</b>
no alternative way of taking a person into custody should be removed.	
<p><b>Rec IV/6: Extension of offences in relation to giving information and producing things in accordance with a QW (s 34L)</b></p> <p>The offence of failing to produce a record or thing should be amended to include the wilful destruction of a record or thing, as well as tampering with a record or thing with the intent to prevent it from being produced, or from being produced in a legible form.</p>	<p>Item 30 of Schedule 1 of the Bill implements this recommendation by inserting new subsection 34L(10). This amendment will ensure that there are no gaps in the offence provision for persons who wilfully destroy or tamper with a record or thing so that it cannot be produced as required under the warrant.</p>
<p><b>Third annual report – 7 November 2013</b></p>	
<p><b>Rec III/18: Definition of terrorism offences for the purpose of Div 3A of</b></p>	<p>Item 37 of Schedule 1 of the Bill implements this recommendation by including in the definition of <i>terrorism offence</i> in subsection 3(1) of the Crimes Act an offence against either Part 4 of the <i>Charter of the United Nations Act 1945</i> (UN Charter Act), or Part 5 of that Act, to the extent that it</p>

Recommendation	Response
<p><b>Part IAA of the Crimes Act</b></p> <p>Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Div 3A of Part IAA of the Crimes Act.</p> <p>See also fourth annual report rec VI/6</p>	<p>relates to the <i>Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008</i>.</p> <p>This amendment applies to the definition of terrorism offence for the whole of the Crimes Act and is particularly important for:</p> <ul style="list-style-type: none"> <li>• Division 3A of Part 1A which provides powers in relation to terrorist acts and terrorism offences</li> <li>• Section 15AA which relates to bail not being granted in certain cases</li> <li>• Section 19AG which relates to non-parole periods for sentences for certain offences</li> <li>• New section 3WA in Part 1AA which inserts a new power of arrest without a warrant for a terrorism offence or offence of advocating terrorism</li> <li>• New Part 1AAA which inserts the delayed notification search warrant scheme, and</li> <li>• Part 1C which provides powers to detain a person for the purpose of investigating a terrorism offence.</li> </ul> <p>Regulations to apply United Nations Security Council Sanctions (UNSC) are made under Part 3 of the UN Charter Act and offences relating to these regulations are provided for in Part 5 of that Act. Most UNSC sanctions regimes do not relate to terrorism but to country-specific conflict situations. As the <i>Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008</i> are specifically related to terrorism, offences against them are included in the definition of terrorism offence.</p>



Recommendation	Response
<p><b>Rec III/19: Definition of terrorism offences for the purpose of Part IC of the Crimes Act</b></p> <p>Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Part IC of the Crimes Act.</p> <p>See also fourth annual report rec VI/6</p>	<p>Item 37 of Schedule 1 of the Bill implements this recommendation—see Rec III/18: Definition of terrorism offences for the purpose of Division 3A of Part IAA of the Crimes Act above.</p>
<p><b>Fourth annual report – 28 March 2014</b></p>	
<p><b>Rec III/1:</b></p> <p>The wording of the provisions of subsection 100.1(1) of the Criminal Code concerning intimidation of the public or a section of the public, and of paragraph 6(3)(b) of the Foreign Incursions Act concerning causing the public in a foreign</p>	<p>This recommendation is implemented as part of item 110 of Schedule 1 of the Bill, which inserts new Part 5.5—Foreign incursions and Recruitment into the Criminal Code. New paragraph (c) of the definition of <i>engage in hostile activity</i> in new section 117.1 replicates the language in subparagraph (c)(ii) of the definition of terrorist act in section 100.1(1) of the Criminal Code.</p>

Recommendation	Response
<p>State to be in fear, should be exactly consistent. The Foreign Incursions Act version should explicitly include the fear of a section of the public.</p>	
<p><b>Rec III/4: Humanitarian exception</b></p> <p>Subsection 7(1B) of the Foreign Incursions Act should be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC<sup>3</sup>, the UN or its agencies, and agencies contracted or mandated to work with the UN or its agencies, (as well as entities with the status of deductible gift recipients in the category overseas aid funds under applicable income tax legislation)</p>	<p>In his third annual report, the INSLM identified a problem with existing humanitarian exceptions in terrorism related offences, including the Foreign Incursions Act.</p> <p style="padding-left: 40px;">The INSLM does not accept that a distinction should be drawn between funds provided for bombs and funds hopefully provided for hospitals or orphanages.</p> <p>However he noted that the genuinely humanitarian activities of people in humanitarian agencies such as the ICRC should not fall within Australia’s counter-terrorism offences, including offences in the Foreign Incursions Act.</p> <p>The INSLM does not believe that a broad humanitarian exception to the offence at subsection 7(1) is required as activity that is “merely” humanitarian in nature will be unlikely to be:</p> <ul style="list-style-type: none"> <li>• an act that is preparatory to the commission of an offence against section 6 (incursions into foreign States for the purpose of engaging in hostile activities)</li> <li>• intended to prepare a person to commit an offence against section 6, or</li> <li>• done with the intention of committing, supporting or promoting the commission of an offence</li> </ul>

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<sup>3</sup> International Committee of the Red Cross

Recommendation	Response
	<p>against section 6.</p> <p>Therefore, this recommendation reflects the INSLM’s position that while there is unlikely to be a need for an exception to subsection 7(1) to protect those involved in legitimate charitable work, any exception should be limited to certain organisations operating as neutral and independent actors.</p> <p>The recommendation has not been implemented in the form envisioned by the INSLM. Rather than providing for exceptions for specific organisations, the exception is instead further narrowed to ensure that it cannot be used as a defence where the activity subject to the offence could have a dual or multiple purpose that is other than humanitarian.</p> <p>This is implemented as part of item 110 of Schedule 1 of the Bill, which inserts new Part 5.5— Foreign incursions and recruitment into the Criminal Code. New subsections 119.4(1)-(5) and 119.5(1) and (2) implement offences corresponding to those found in subsection 7(1) of the Foreign Incursions Act. Subsections 119.4(7) and 119.5(4), respectively, provide an exception for these offences “if the person engages in conduct <b>solely</b> by way of, or for the purposes of, the provision of aid of a humanitarian nature”. The drafting note provides that a defendant bears an evidential burden in relation to these matters.</p> <p>New paragraph 119.2(3)(a) provides a similar exception for the new offence of entering, or remaining in, declared areas. This applies if a person enters, or remains in, the area solely for one or more of the legitimate purposes, which include “providing aid of a humanitarian nature”.</p>

<b>Recommendation</b>	<b>Response</b>
<p><b>Rec III/5: definition of recruit</b></p> <p>The definitions of “recruit” under subsection 102.1(1) of the Criminal Code and subsection 3(1) of the Foreign Incursions Act should be consistent.</p>	<p>This recommendation is implemented as part of item 110 of Schedule 1 of the Bill, which inserts new Part 5.5—Foreign incursions and Recruitment into the Criminal Code. The new definition of recruit provided at section 117.1 is consistent with that used in subsection 102.1(1) of the Criminal Code.</p>
<p><b>Rec III/6: Consistent penalty provisions for recruitment offences</b></p> <p>The penalty provisions in section 102.4 of the Criminal Code and section 8 of the Foreign Incursions Act should be equivalent.</p>	<p>This recommendation is implemented as part of item 110 of Schedule 1 of the Bill, which inserts new Part 5.5—Foreign incursions and Recruitment into the Criminal Code. The penalty for offences against the new section 119.6 (recruiting persons to join organisations engaged in hostile activities against foreign governments) is imprisonment for 25 years, consistent with section 102.4 (recruiting for a terrorist organisation) of the Criminal Code.</p>
<p><b>Rec III/7: Consistent penalty provisions for foreign incursions and terrorist act offences, and for corresponding preparation offences</b></p> <p>The penalty provisions in sections 101.1 and 101.6 of the Criminal Code and 6 and</p>	<p>This recommendation is implemented as part of item 110 of Schedule 1 of the Bill, which inserts new Part 5.5—Foreign incursions and Recruitment into the Criminal Code. The penalty for offences against the new section 119.1 (incursions into foreign countries with the intention of engaging in hostile activities), section 119.4 (preparations for incursions into foreign countries for purpose of engaging in hostile activities) and section 119.5 (allowing use of buildings, vessels and aircraft to commit offences) are imprisonment for life, consistent with section 101.1 (terrorist acts) and section 101.6 (other acts done in preparation for, or planning, terrorist acts) of the Criminal</p>

<b>Recommendation</b>	<b>Response</b>
7 of the Foreign Incursions Act <sup>266</sup> should be equivalent.	Code.
<p><b>Rec IV/2: Admission of foreign evidence</b></p> <p>Consideration should be given to examining the merits of amendments to the <i>Evidence Act 1995</i> and the <i>Foreign Evidence Act 1994</i> so as to permit the collection of information and its admission into evidence, from foreign countries, where political circumstances or states of conflict render impracticable the making of a request of the government of that country, for assistance in gathering evidence.</p>	<p>This recommendation is implemented by items 115-126 of Schedule 1 of the Bill which amends the Foreign Evidence Act. In achieving the objectives of this recommendation, no amendments to the <i>Evidence Act 1995</i> were required.</p> <p>The INSLM stated that ‘as long as that safeguard remains to protect the integrity of criminal proceedings for terrorist etc offences regarding the use of foreign evidence, it justifies serious consideration being given to further liberalizing availability of foreign information as admissible evidence.’ These amendments are directed towards allowing the court greater discretion as to whether to admit foreign evidence, taking into account the probative value of the evidence in terrorism-related proceedings. The amendments aim to avoid a situation where evidence is automatically excluded on the basis of a technical rule of evidence that may have no substantial bearing on the defendant’s right to a fair trial.</p>
<p><b>Rec V/3: Withholding notification of passport cancellation</b></p> <p>The ASIO Act, Passports Act and the</p>	<p>This recommendation is implemented by items 24 and 25 of Schedule 1 of the Bill. In order to achieve the objective of the recommendation, only the Passports Act needed to be amended.</p>

<b>Recommendation</b>	<b>Response</b>
<p>Foreign Passports (Law Enforcement and Security) Act 2005 should be amended to enable the Attorney-General to issue a certificate that he or she is satisfied that notification of the grounds in support of a request for a passport cancellation (or part of the statement), or notification of the fact of cancellation, would be prejudicial to an ongoing law enforcement investigation into an offence listed in Schedule 1 to the Passports Determination or would be prejudicial to security. The Minister for Foreign Affairs should not be required to disclose to the person the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, or to give notice of a passport cancellation, where a certificate applies.</p>	
<p><b>Rec V/4: Interim passport suspension</b></p>	<p>This recommendation is implemented by items 11-23, 26 and 34 of Schedule 1 of the Bill.</p> <p>Items 11-23 and 26 amend the Passports Act to enable the Minister for Foreign Affairs to suspend</p>

<b>Recommendation</b>	<b>Response</b>
<p>The ASIO Act and Passports Act 274 should be amended to enable ASIO, by its Director-General to make a request for an interim passport suspension where ASIO is considering issuing an adverse security assessment.</p>	<p>a person's Australian travel documents for a period of 14 days if requested by ASIO. Under new section 22A, ASIO will be able to make a request that the Minister for Foreign Affairs order the suspension if it suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country and that all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.</p>
<p><b>Rec V/5: Interim passport suspension for foreign passports</b></p> <p>The Foreign Passports (Law Enforcement and Security) Act 2005 275 should be amended so as to include a power to suspend the capacity to use a foreign passport for the purposes of departing Australia in circumstances similar to those that would permit the interim suspension of an Australian passport.</p>	<p>This recommendation is implemented by items 127-131 of Schedule 1 of the Bill which amend the Foreign Passports Act to provide a complementary power to the new suspension mechanism under the Passports Act. The Minister for Foreign Affairs already has the ability to order the surrender of a person's foreign travel documents if requested by ASIO. The proposed amendment will allow ASIO to make a request for the 14-day surrender of a person's foreign travel documents at a lower threshold than that provided for under the existing provisions.</p>
<p><b>Rec VI/1: Amending a regulation proscribing a terrorist organization to</b></p>	<p>This recommendation is implemented by item 67 of Schedule 1 of the Bill, which inserts a new section 102.1AA 'Including or removing names of prescribed terrorist organisations' into the Criminal Code. This amendment will allow a terrorist organisation listing to be kept up-to-date with rapid changes to aliases or names by which an organisation is also known, provided that the</p>

<b>Recommendation</b>	<b>Response</b>
<p><b>add a new alias or aliases</b></p> <p>A regulation proscribing a terrorist organization for the purposes of para (b) of the definition of “terrorist organisation” in subsection 102.1(1) of the Criminal Code, should be capable of being amended to add a new alias or aliases where the Attorney-General is satisfied that the alias or aliases are those of the listed terrorist organization (that is, they are in fact aliases of the listed terrorist organization and not separate organizations). The Governor-General should be permitted to make the regulation without the need for the Attorney-General to be satisfied that the organization meets the statutory criteria for proscription under the Criminal Code. A decision to include a new alias or aliases should be made without consultation of the States or Territories unless there is a demonstrated need to do so. Where there is consultation, this</p>	<p>Attorney General remains satisfied that the alias is the same entity as the listed organisation. The Attorney-General’s authority to declare the addition, amendment or omission of an alias would not extend to the title of a regulation. Any change to the name of a title of a regulation would require the making of a new regulation, which would require consultation in the normal way.</p>



<b>Recommendation</b>	<b>Response</b>
<p>should not unduly delay the making of the regulation.</p>	
<p><b>Rec VI/2: Delayed notification search warrant scheme</b></p> <p>A delayed notification search warrant scheme for the investigation of terrorism offences should be enacted.</p>	<p>This recommendation is implemented by item 51 of Schedule 1 of the Bill, which inserts a new Part IAAA—Delayed notification search warrants into the Crimes Act. These amendments are a response to the challenge posed by current requirements to notify the occupier of the premises in relation to the execution of a search warrant. Such notification alerts suspects of police interest in their activities, and can disrupt the investigation allowing a person to avoid further detection, conceal or destroy evidence, or notify their associates, who may not yet be known to police. The item introduces a new scheme, limited to terrorism offences, to allow delaying notification of the execution of the warrant. This will give the AFP the significant tactical advantage of allowing an investigation to remain confidential. An application for a delayed notification search warrant will be subject to multiple levels of scrutiny and authorisation. Extensive safeguards will ensure that the Bill balances the legitimate interests of law enforcement in preventing serious terrorism offences with the need to protect important human rights.</p>
<p><b>Rec VI/3: Arrest threshold</b></p> <p>Consideration should be given to examining the merits of the “reasonable grounds to believe” grounds for the power of arrest, with a view to generally amending it to “reasonable grounds to</p>	<p>This recommendation is implemented by item 47 of Schedule 1 of the Bill, which inserts a new section 3WA. This section gives constables the power to arrest a person without a warrant for a terrorism offence or an offence against new section 80.2C of the Criminal Code where the constable suspects on reasonable grounds that the person has committed or is committing a terrorism offence or an offence against section 80.2C. The amendment is intended to enable law enforcement agencies to disrupt terrorist activity at an earlier stage.</p>

<b>Recommendation</b>	<b>Response</b>
<p>suspect”, in sec 3W of the Crimes Act 1914.</p>	<p>The threshold for ‘suspecting’ on reasonable grounds is lower than that of ‘believing’ on reasonable grounds, which is the existing threshold in section 3W. However, there would need to be some factual basis for the suspicion and there would need to be more than idle wondering. An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions.</p>
<p><b>Rec VI/4: Compliance with section 3ZQN notice within 14 days</b></p> <p>The power to obtain documents relating to serious terrorism offences in section 3ZQN of the Crimes Act 1914 should provide for compliance with the notice as soon as practicable and no later than 14 days.</p>	<p>This recommendation is implemented by item 50 of Schedule 1 of the Bill, which amends section 3ZQN of the Crimes Act so that a notice issued under the section must specify the day by which a person is to comply with that notice.</p> <p>That day must be at least 14 days from the giving of the notice or, if the authorised AFP officer believes that it is appropriate to specify an earlier day, having regard to the urgency of the situation, a day that is at least 3 days from the giving of the notice.</p>
<p><b>Rec VI/6: Definition of “terrorism offence” in the <i>Crimes Act 1914</i></b></p> <p>The definition of “terrorism offence” in subsection 3(1) of the Crimes Act should be amended to include an offence against the Foreign Incursions Act, an offence</p>	<p>This recommendation is implemented by items 36 and 37 of Schedule 1 of the Bill.</p> <p>Item 36 amends the definition of terrorism offence in subsection 3(1) of the Crimes Act to include offences against Part 5.5 of the Criminal Code. This new part in the Criminal Code is created by Item 110 of Schedule 1 of the Bill and replaces the <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i>, which is repealed by Item 144.</p> <p>Item 37 amends the definition of terrorism offence in relation to offences under the UN Charter Act—see INSLM’s Third Annual Report Rec III/18: Definition of terrorism offences for the purpose</p>

<b>Recommendation</b>	<b>Response</b>
against Part 3 of the UN Charter Act insofar as it relates to terrorism, and an offence against Part 4 of the UN Charter Act.	of Division 3A of Part IAA of the Crimes Act above.