



**Australian
Privacy
Foundation**

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02/10/2014

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

Dear Sir/Madam,

Re: Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

We thank you for the opportunity to comment on this bill.

The Bill is broad ranging and poses concerns for the Foundation that extend beyond the privacy (and other rights) of suspected terrorists.

The Explanatory Memo (227pp) for the Bill emphasises that action under the proposed legislation will be lawful, reasonable, necessary and proportionate as a response to “grave” or “serious” threats to the lives of Australians. The detail of the Bill raises some questions about these assertions.

CONSULTATION PERIOD

Allowance of a week for consideration of a 158 page Bill (amending 22 Acts) and 227 page Memo is derisory. The very short period for public comment is not justified by recurrent reference to dangers and threats.

The APF has strong concerns regarding the short time frame for submissions given, the complexity and depth of the bill, and its potentially serious impact on traditional freedoms and the rule of law. We submit that the provided timeframe is entirely unreasonable, and should be extended to ensure proper analysis and commentary can take place to ascertain the reliability of the Explanatory Memo in identifying potential issues, and cover the issues raised by the Bill's potential application.

COVERAGE

Although the emphasis is on “lawful” responses to people who are engaged in or foster terrorist activity, the Bill provides for measures that will cover many Australians, for example all international travellers. It includes provisions (Part IAAA) that would allow entry under an assumed identity into the premises of the neighbours of suspected terrorists (the threshold for suspicion has been lowered) and for retrospective disclosure - after say six months - to the suspected terrorist that the person's premises have been searched. Such searching includes scope for seizure of laptops and other devices, and presumably the communications with persons not suspected of terrorist actions.

The Memo recurrently refers to action as being “in accordance” with the Australian Privacy Principles (APPs). As with the emphasis on “lawful”, that is not necessarily a great comfort, given the wide exemptions from the benefits of the Privacy Act.

GOVERNANCE

Light touch monitoring of some provisions- eg Part IAAA - is to be undertaken by the Commonwealth Ombudsman as the Law Enforcement Ombudsman rather than by IGIS, with no reference to extra resourcing that would be required. The efficacy of the monitoring - ‘regulatory theatre’, with apologies to Bruce Schneier - could be challenged by the Foundation. In matters of national security it would make sense to have one for example antiterrorism law regulator (on the UK model) rather than have the Commonwealth Ombudsman doing little more than look at AFP statistics.

The Government indicates that it has adopted several recommendations in reports by the Independent National Security Legislation Monitor (INSLM), presumably consistent with the Government’s statement in May that the INSLM’s work is done. That adoption is a metric of the INSLM’s credibility and could be referred by the Foundation in emphasising the need for ongoing scrutiny of national security law through bodies such as the INSLM. Note paragraph 239 of the Memo.

The Bill features the emphasis on authorisation by the Attorney-General and by AFP/ASIO officers (potentially junior officers) that we have seen in recent proposals, along with an emphasis on agency guidelines (which proved so effective in the AFP search of Seven Network promises regarding the supposed Corby payment) and “important internal safeguards”. There is strong concern that action can be authorised by a member of the Administrative Appeals Tribunal (ie someone who is not a judge and indeed may not have a law degree) rather than by a judge or magistrate.

SCANNING ALL ENTRIES/EXITS

Schedule 5 (p65 in Explanatory Memo) covers extension of SmartGate and eGates - the biometric ‘automated border clearance system’ - to cover ALL people entering/leaving Australia, rather than just non-citizens. The extension permits disclosure of information. Data collection, storage and disclosure will be ‘in accord’ with the APPs, although safeguards under s 258B of the *Migration Act* will not apply (ie if you want to know what’s taking place you’ll need to read a sign at the gate or the DIBP website, and in practice won’t have a choice).

Under ‘advanced passenger processing’ airlines and operators of maritime vessels will alert DIBP that a person intends to leave Australia prior to that individual appearing at the gate.

CONTROL ORDERS

There will a lower threshold for seeking and granting (by A-G) control orders - s 104.2(2)(a).

The Foundation supports the ‘Miranda’ style provision in 104.12(1)(b), where controlled people are to be alerted to their (very limited) rights.

s 104.5(3)(d) provides for tracking through electronic handcuffs of people under control orders. There should be particular scrutiny and limitations of the use of this technology, as it may seem to offer an easy way in to intrusive, oppressive surveillance of individuals not convicted of any offence.

s 104.22(3) places restrictions on misuse of biometric info, ie for other than ensuring compliance with the control order. There should be audit requirements to ensure compliance with this

restriction.

PREVENTIVE DETENTION

Preventive detention will likely become known by individuals not affected by the order, their neighbours, family and friends, and this information may have adverse impacts on a range of such people, none of whom may be involved in terror related activities or suspicion thereof.

The tenor of much of the Bill is to rely on what's in the mind of an AFP officer (and the A-G) rather than in the mind of a court. If the provisions of the Bill further reducing and undermining traditional civil rights are to be enacted, it is important to preserve the rule of law by interposing a judicial officer's independent scrutiny at the critical steps.

For instance, in relation to the proposal that only an AFP officer need be satisfied that a suspect requires preventive detention, given the very serious breach of many normal criminal procedural protections and the extreme nature of the powers of such detention, it is more appropriate that a court be the decision maker satisfied. (These powers have been rarely used in the past, and courts can be convened at short notice, so there is no practicality barrier to re-introducing this important safeguard against in appropriate use of such powers.)

AML/CTF

Attorney-General's Department will become a designated agency with access to AUSTRAC financial intelligence, claimed to result in "administrative efficiencies" and better policy.

There should be protections against improper use of such wide ranging financial surveillance information for purposes unrelated to the objects of this Act.

OTHER

Civil liberties organisations will presumably have issues with provisions regarding advocacy of terrorism (see eg s 80.3), with cancellation-without-notice of passports and visas, with non reviewable seizure of travel documents, and with removal of social services support for people who have not been convicted of an offence.

Some of the range of de facto administrative punishments and adverse impacts on such people will become known, and this information will cast the person affected and those around them in a profoundly prejudicial light. Given the seriousness of these impacts on not only persons not convicted of a terror offence but on related persons not even suspected, consideration should be given to effective means to remedy such adverse impacts. Any immunities offered to officers involved should be conditional on reasonableness and lack of improper motive.

Thank you for your consideration.

Yours sincerely

Mark Walkom

APF Secretary

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>