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The Parliament of the Commonwealth of Australia

# **Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014**

**Parliamentary Joint Committee on Intelligence and Security**

October 2014  
Canberra

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ISBN 978-1-74366-228-1 (Printed version)

ISBN 978-1-74366-225-0 (HTML version)

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## **Membership of the Committee**

**Chair** Mr Dan Tehan MP

**Deputy Chair** Hon Anthony Byrne MP

**Members** Mr Andrew Nikolic AM, CSC, MP

Senator David Bushby

Hon Tanya Plibersek MP

Senator the Hon Stephen Conroy

Hon Philip Ruddock MP

Senator the Hon John Faulkner

Hon Bruce Scott MP

Senator David Fawcett

Senator the Hon Penny Wong







## **Terms of reference**

On 24 September 2014, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was referred to the Committee by the Attorney-General.



## List of abbreviations

AAT	Administrative Appeals Tribunal
ADJR	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFP	Australian Federal Police
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APP	Advance Passenger Processing
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
AUSTRAC	Australian Transaction Report and Analysis Centre
COAG	Council of Australian Governments
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	<i>Criminal Code Act 1995</i>
DIBP	Department of Immigration and Border Protection
DNSW	Delayed notification search warrants
Foreign Evidence Act	<i>Foreign Evidence Act 1994</i>

Foreign Incursions Act	<i>Crimes (Foreign Incursions and Recruitment) Act 1978</i>
ICCPR	International Covenant on Civil and Political Rights
IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
LPP	Legal Professional Privilege
Migration Act	<i>Migration Act 1958</i>
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PMV	Politically motivated violence
TIA Act	<i>Telecommunications (Interception and Access) Act 1979</i>
QW	Questioning warrant



## List of recommendations

The Committee's recommendations appear in the order in which the corresponding measures appear in the report. The order does not reflect the priority that the Committee places on each issue.

### 2 Schedule 1—Main counter-terrorism amendments

#### Recommendation 1

The Committee recommends that the Attorney-General amend the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to remove the ability of 'members' or 'part-time senior members' of the Administrative Appeals Tribunal to be eligible issuing officers for a delayed notification search warrant.

#### Recommendation 2

The Committee recommends that the Attorney-General amend the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to reduce the extension of a notification period for a delayed notification search warrant without requiring Ministerial authorisation from 18 to 12 months.

#### Recommendation 3

The Committee recommends that additional exemptions be included in the offence provisions relating to disclosure of information on delayed notification search warrants in proposed section 3ZZHA of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to explicitly enable:

- disclosure of information in the course of obtaining legal advice,
- disclosure of information by any person in the course of inspections by the Commonwealth Ombudsman, or as part of a complaint to the Commonwealth Ombudsman or other pro-active disclosure made to the Commonwealth Ombudsman, and

- communication of information by Commonwealth Ombudsman staff to the Commonwealth Ombudsman or other staff within the Office of the Commonwealth Ombudsman in the course of their duties.

**Recommendation 4**

The Committee recommends that the Attorney-General amend the Explanatory Memorandum of the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to confirm that the Commonwealth Director of Public Prosecutions must take into account the public interest, including the public interest in publication, before initiating a prosecution for the disclosure of information relating to a delayed notification search warrant.

**Recommendation 5**

Whilst there were differing views within the Committee, the Committee recommends that the Attorney-General further clarify the meaning of the terms 'encourage', 'advocacy' and 'promotion' by amendment to either the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 or its Explanatory Memorandum in light of the evidence provided during the Committee's inquiry.

**Recommendation 6**

The Committee recommends that the Attorney-General amend the Explanatory Memorandum of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 to clarify the meaning of 'promotion' in relation to statements of support for the objectives or activities of a terrorist organisation as defined by the Criminal Code.

**Recommendation 7**

The Committee recommends that the Attorney-General review all current listings of terrorist organisations under the Criminal Code to determine whether additional names or aliases should be added to any listings.

**Recommendation 8**

The Committee recommends that the Attorney-General notify the Committee of any proposed Regulation to alter the listing of a terrorist organisation by adding or removing a name or alias. The Committee also recommends that it have the power to determine if it wishes to review any proposed changes to listings.

**Recommendation 9**

The Committee recommends that the Government consider requiring that a control order can only be based on a foreign conviction where the conduct giving rise to the conviction would constitute a terrorism related offence in Australia.

**Recommendation 10**

The Committee notes that the Attorney-General's Department and the Australian Federal Police have flagged the possibility of further enhancements to the control order regime given ongoing examination of the application process and purposes for which a control order can be sought.

Should further changes be proposed, the Committee recommends that these amendments are referred to this Committee with appropriate time for inquiry and review.

**Recommendation 11**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended:

- to ensure that a preventative detention order is only able to refer to a *description* in circumstances where the person's true name is not known and not able to be determined based on reasonable inquiries.
- to enable a preventative detention order to refer to an *alias* (as well as, or instead of a description) instead of a name where the person's name is not known and not able to be determined based on reasonable inquiries.

The Committee also recommends that the Bill be amended so that where a description is included in the preventative detention order, it has sufficient detail so as to identify beyond reasonable doubt the person to whom it applies.

**Recommendation 12**

The Committee recommends the existing preventative detention order regime be amended to specify that where the Ombudsman is required to be notified of certain events by the Australian Federal Police, this notification is required to take place as soon as is reasonably practicable.

**Recommendation 13**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended so that the following powers sunset 24 months after the date of the next Federal election:

- control order regime in Division 104 of the Criminal Code Act 1995
- preventative detention order regime in Division 105
- the stop, search and seizure powers relating to terrorism offences in Division IIIA of the *Crimes Act 1914*

- questioning and questioning and detention warrant regime in the *Australian Security Intelligence Organisation Act 1979*

The Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a review of each of the powers listed above 18 months after the next Federal election.

The Committee recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the INSLM to finalise a review of the operation of each of these powers 12 months after the next Federal election.

#### **Recommendation 14**

The Committee recommends that the functions of the Parliamentary Joint Committee on Intelligence and Security be extended to encompass the counter-terrorism activities of the Australian Federal Police, including, but not limited to, anything involving classified material.

#### **Recommendation 15**

The Committee recommends that the definition of ‘subverting society’ in proposed section 117.1 of the Criminal Code be replaced with a cross-reference to the conduct contained in the definition of ‘terrorist act’ in section 100.1 of the Criminal Code.

#### **Recommendation 16**

The Committee recommends that the Attorney-General consider amending the definition of ‘engaging in a hostile activity’ in proposed section 117.1 of the Criminal Code to constrain it to conduct that would be considered to be a ‘serious offence’ if undertaken within Australia. The definition of ‘serious offence’ for the purposes of this section should be made in consideration of other comparable areas of Australian criminal law.

#### **Recommendation 17**

The Committee recommends that the Attorney-General remove from, or more specifically define, acts prejudicial to the ‘international relations’ of Australia in the definition of ‘prescribed organisation’ contained in clause 117.1(2) for the proposed foreign incursions and recruitment offences.

#### **Recommendation 18**

The Committee recommends that proposed subsection 119.3(2)(b), which explicitly enables the Minister to declare an entire country for the purposes of prohibiting persons from entering, or remaining, in that country, be removed from the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

**Recommendation 19**

The Committee recommends that the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to insert a clause that enables the Parliamentary Joint Committee on Intelligence and Security to conduct a review of the declaration of each area made under proposed section 119.3, within the disallowance period for each declaration. The clause should be modelled on the existing subdivision 102.1A of the Criminal Code in relation to the listing of terrorist organisations.

**Recommendation 20**

If legislated, the Committee recommends that subclause 119.2(6), relating to the proposed offence for entering, or remaining in, a declared area, sunset two years after the next Federal election.

**Recommendation 21**

If legislated, the Committee recommends that the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to complete a public inquiry into the 'declared area' provisions in clauses 119.2 and 119.3 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, including the list of 'legitimate purposes', 18 months after the next Federal election.

The Committee further recommends that the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the 'declared area' provisions 12 months after the next Federal election.

**Recommendation 22**

The Committee recommends that proposed section 27D of the *Foreign Evidence Act 1994*, which currently applies only to public officials and persons connected to public officials, be broadened to apply in circumstances where any person has directly obtained material as a result of torture or duress.

**Recommendation 23**

The Committee recommends that the Government broaden the definition of 'duress' in proposed Part 3A of the *Foreign Evidence Act 1994* to include other threats that a reasonable person might respond to, including threats against a person's assets, personal associates or other third parties.

**Recommendation 24**

The Committee recommends that proposed Part 3A of the *Foreign Evidence Act 1994* be amended, based on section 165 of the *Evidence Act*



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1995, to require courts to provide appropriate direction to juries, where necessary, about the potential unreliability of foreign evidence admitted under Part 3A.

#### **Recommendation 25**

The Committee recommends that the Attorney-General amend the Explanatory Memorandum to make it clear that the definition of 'politically motivated violence' must be read with reference to the opening words in the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation Act 1979*.

#### **Recommendation 26**

The Committee recommends that proposed subsection 22A(2) of the *Australian Passports Act 2005* and proposed section 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* be amended so that the Director-General of ASIO or a Deputy Director-General must suspect on reasonable grounds the factors necessary to apply for the suspension of travel documents.

#### **Recommendation 27**

The Committee recommends the ability of the Foreign Affairs Minister to delegate the power to suspend a travel document be limited to the Secretary of the Department of Foreign Affairs and Trade.

#### **Recommendation 28**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to require the Attorney-General or Minister for Justice to conduct:

- a review of the decision to issue a certificate under paragraph 38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* or proposed subsection 48A(4) of the *Australian Passports Act 2005* within 12 months of issuing that certificate; and
- ongoing reviews every 12 months for the time period the certificate remains active.

### **3 Schedules 2 to 7**

#### **Recommendation 29**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to require the Attorney-General to make a decision to issue a security notice 'on reasonable grounds', having regard to:

- whether there are reasonable grounds to suspect that a person is, or will be, directly involved in activities which are prejudicial to security (with consideration given to ASIO's security assessment); and
- the likely effect of the cancellation of welfare payments on any dependents and what alternative arrangements might apply.

**Recommendation 30**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to require the Attorney-General to conduct:

- an initial review of the decision to issue a security notice within 12 months of making that decision; and
- ongoing reviews every 12 months after for the time period the security notice remains active.

**Recommendation 31**

Unless the Attorney-General is able to provide to the Parliament further explanation on the necessity of the proposed definition of 'serious Commonwealth offence' for the purposes of the *Customs Act 1901* and how it would enable a greater role for Customs in dealing with national security threats or terrorist activity, the Committee recommends that the definition be removed from the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

**Recommendation 32**

The Committee recommends that the allowable period of detention by a Customs officer without notification to a family member or other person be extended from 45 minutes to two hours, rather than four hours as proposed in the Bill.

The Committee notes that this does not deny a Customs officer's power to refuse contact beyond this period on grounds of national security, security of a foreign country, safeguarding law enforcement processes or to protect the life and safety of another person.

**Recommendation 33**

The Committee recommends that information on the frequency of the use of Customs detention powers is included in the Department's annual report. Further where a Customs officer exercises the power to refuse contact with a family member or other person on the grounds of national security, security of a foreign country, safeguarding law enforcement processes or to protect the life and safety of another person, then notice of this should be provided to the Ombudsman within seven days.

**Recommendation 34**

The Committee recommends that the Privacy Commissioner undertake a Privacy Assessment of the data collected and stored by the Department of Immigration and Border Protections and Customs, and report to the Attorney-General by 30 June 2015, with specific regard to the collection, storage, sharing and use of that data by the government agencies within the remit of the Commissioner's jurisdiction.

**Recommendation 35**

The Committee recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be amended to remove the ability to prescribe the collection of additional categories of biometric information within the Migration Regulations.

Should this information be required by relevant agencies to ensure Australia's border security, further legislative amendments should be proposed by the Government and referred to this Committee with appropriate time for inquiry and report.

**Recommendation 36**

The Committee recommends the Government consult with the Privacy Commissioner and conduct a privacy impact statement prior to proposing any future legislative amendments which would authorise the collection of additional biometric data such as fingerprints and iris scans.

**Recommendation 37**

The Committee commends its recommendations to the Parliament and recommends that the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 be passed.

