Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

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Contents

Key issues for debate .............................................................. 5
Commencement ................................................................. 6
Purpose of the Bill .................................................................... 6
Structure of the Bill ............................................................... 6
Background ............................................................................ 7
Changl7ng terrorism environment ........................................ 7
Events leading to the introduction of the Bill ......................... 8
Committee consideration ..................................................... 9
Policy position of non-government parties/independents ...... 9
Australian Labor Party ......................................................... 9
Australian Greens ................................................................. 10
Other minor parties and independents ................................ 11
Position of major interest groups ....................................... 11
Inspector-General of Intelligence and Security .................. 11
Australian Human Rights Commission ............................... 12
Human rights groups ............................................................ 12
Law groups and legal experts .............................................. 13
Muslim groups .................................................................... 14
Civil liberties, media organisations and privacy groups ...... 15
Financial implications ......................................................... 15
Statement of Compatibility with Human Rights ............... 15

Date introduced: 24 September 2014
House: Senate
Portfolio: Attorney-General
Commencement: See page six of this Digest for details.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Schedule 1—Main counter-terrorism amendments............ 16

Timing of extensions and opportunity for review............. 17

Need for and length of new and extended sunset clauses ................................................................. 17

Lack of statutory review prior to the expiry of sunset provisions ................................................................................................. 18

Inserting a new offence of advocating terrorism in the Criminal Code ......................................................................................... 19

Limiting the defence of humanitarian aid for the offence of treason ......................................................................................... 19

Amendments relating to the listing of terrorist organisations ......................................................................................... 19

Definition of terrorism offence ................................................................. 20

Part 5.5 of the Criminal Code ......................................................................................... 21

Part 5.5 of the Criminal Code: Foreign incursions and recruitment ......................................................................................... 21

Subverting society ......................................................................................... 22

Removing the requirement for the application of rules of evidence under the Foreign Evidence Act 1994 ........................................... 23

Travel document suspension and exemptions for notice of passport refusal or cancellation ............................................... 24

Suspension powers......................................................................................... 24

Issue: adequacy of safeguards ......................................................................................... 25

Issue: delegation of power to suspend Australian travel documents ......................................................................................... 25

Issue: agency instead of individual making request ......................................................................................... 26

Withholding notice of travel document cancellation or refusal ......................................................................................... 26

Delayed notification search warrants ......................................................................................... 26

Scope—offences and agency ......................................................................................... 28

Threshold tests ......................................................................................... 28

Issue of warrants ......................................................................................... 28

Distinguishing features of DNSWs ......................................................................................... 29

Offence for unauthorised disclosure ......................................................................................... 29

Issue: public interest disclosures and seeking legal advice ......................................................................................... 30

Issue: matters for which a defendant bears an evidential burden ......................................................................................... 30

Time limits and notice requirements ......................................................................................... 31

Safeguards, accountability and reporting ......................................................................................... 31

ASIO questioning warrants and questioning and detention warrants ......................................................................................... 32

Extension of sunset period and delay of PJCIS review ......................................................................................... 33

Delaying Parliamentary review by ten years ......................................................................................... 33

Reduction of threshold for Attorney-General’s consent to warrant application ......................................................................................... 34
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of force</td>
<td>34</td>
</tr>
<tr>
<td>Offence for destroying or tampering with records and things</td>
<td>35</td>
</tr>
<tr>
<td>Control orders</td>
<td>35</td>
</tr>
<tr>
<td>Extension of sunset period</td>
<td>36</td>
</tr>
<tr>
<td>Expanding the grounds on which COs may be sought</td>
<td>37</td>
</tr>
<tr>
<td>Issue: new ground of conviction for terrorism offences</td>
<td>38</td>
</tr>
<tr>
<td>Amending the threshold for requesting a CO</td>
<td>39</td>
</tr>
<tr>
<td>Other COAG recommendations</td>
<td>39</td>
</tr>
<tr>
<td>Preventative detention orders</td>
<td>39</td>
</tr>
<tr>
<td>Extension of sunset period</td>
<td>40</td>
</tr>
<tr>
<td>Amendments to issuing criteria</td>
<td>41</td>
</tr>
<tr>
<td>Enabling applications by telephone or electronic means</td>
<td>42</td>
</tr>
<tr>
<td>Enabling PDOs to be made where a person’s full name is not known</td>
<td>42</td>
</tr>
<tr>
<td>Issue: whether questioning should be allowed under a PDO</td>
<td>42</td>
</tr>
<tr>
<td>Extending the operation of stop, search and seizure powers for a further ten years</td>
<td>43</td>
</tr>
<tr>
<td>Lowering the threshold for arrest for terrorism offences</td>
<td>43</td>
</tr>
<tr>
<td>Information-sharing between AUSTARC and the Commonwealth Attorney-General’s Department</td>
<td>43</td>
</tr>
<tr>
<td>Facilitating background checks for the purposes of preventing foreign incursions and recruitment</td>
<td>44</td>
</tr>
<tr>
<td><strong>Schedule 2—Stopping welfare payments</strong></td>
<td>44</td>
</tr>
<tr>
<td>International comparisons</td>
<td>45</td>
</tr>
<tr>
<td>Current social security residency requirements and portability rules</td>
<td>45</td>
</tr>
<tr>
<td>No eligibility for social security while in gaol</td>
<td>47</td>
</tr>
<tr>
<td>Key issues and provisions</td>
<td>47</td>
</tr>
<tr>
<td>Cancellation of payments or concession cards following the issue of a security notice</td>
<td>47</td>
</tr>
<tr>
<td>Specific provisions for family assistance payments</td>
<td>48</td>
</tr>
<tr>
<td>Who will the measures affect?</td>
<td>48</td>
</tr>
<tr>
<td>Concerns over the impact of the measures</td>
<td>48</td>
</tr>
<tr>
<td>Ministers have previously not had the power to determine individual welfare entitlements</td>
<td>49</td>
</tr>
<tr>
<td>Limitations on appeal procedures</td>
<td>50</td>
</tr>
<tr>
<td>Alternative policies</td>
<td>50</td>
</tr>
<tr>
<td>Comment</td>
<td>51</td>
</tr>
<tr>
<td><strong>Schedule 3: Customs’ detention powers</strong></td>
<td>51</td>
</tr>
<tr>
<td>Issue: lack of justification for expansion of the definition of serious Commonwealth offence</td>
<td>52</td>
</tr>
<tr>
<td>Issue: need for and practicality of detention on national security grounds</td>
<td>53</td>
</tr>
</tbody>
</table>
Issue: concerns about how detention and questioning powers are used ......................................................... 53

Schedule 4—Cancelling visas on security grounds .......... 53
Emergency Visa Cancelling Power ............................................. 54
Comment .............................................................................. 54
Revoking the emergency cancellation of visas ............... 55
Effect of Revocation .............................................................. 55
Notice of Cancellation ............................................................. 55
Effects of cancellation on other visas .............................. 55
Comment .............................................................................. 56

Schedule 5—Identifying persons in immigration clearance ................................................................. 56
Identification tests .................................................................. 57
Personal identifiers .................................................................. 57
Collection, access and disclosure of information ............ 58

Schedule 6—Identifying persons entering or leaving Australia through advance passenger processing .......... 58
Advance passenger processing .............................................. 59

Schedule 7—Seizing bogus documents ............................. 60
Comment .............................................................................. 60

Concluding comments ........................................................ 61
Key issues for debate

Key issues for debate in relation to **Schedule 1 - Main counter-terrorism amendments** of the Bill include:

- whether the case has been made to extend the control order, preventative detention, Australian Security Intelligence Organisation questioning and detention powers, and stop, search and seizure provisions for a further ten years, and if so, what review mechanisms should accompany that extension (pages 16–19)
- the need for, and appropriateness of, the introduction of a new offence of ‘advocating terrorism’ (page 19)
- whether the proposed ‘declared area’ offences are appropriate and reasonable, including considering if the exceptions to the offence amount to a reverse onus of proof (pages 21–23)
- the adequacy of the safeguard of the court’s discretion in removing the application of the rules of evidence for terrorism-related material gathered under the Foreign Evidence Act 1994 (pages 23–24)
- the adequacy or otherwise of accountability for, and safeguards relating to, amendments concerning suspension and cancellation of travel documents (pages 24–26)
- whether amendments should be made to the proposed offence for disclosing information about delayed notification search warrants to explicitly permit public interest reporting (pages 29–30)
- the proposed additions to the grounds on which control orders may be made (pages 37–38) and
- the consequences and desirability of lowering the arrest threshold for police to “reasonably suspects” in relation to the investigation of terrorism offences (page 39).

Key issues for debate in relation to **Schedule 2 - Stopping welfare payments** will be:

- whether the measure is necessary given existing eligibility rules and counter-terrorism laws, and the lack of evidence that benefits are being used in support of terrorist activities and
- concerns about the impact on families, limited review and appeal mechanisms, and the extent of the Attorney-General’s powers in determining individual welfare entitlements (pages 47–51).

Key issues for debate of amendments to the **Customs Act 1901** in **Schedule 3 - Customs’ detention powers** will be:

- the significant expansions proposed to existing powers to detain persons on law enforcement grounds and
- the necessity and appropriateness of the proposed power to detain persons on national security grounds (pages 51–53).

Key issues for debate in relation to **Schedule 4 – Cancelling visas on security grounds** will be:

- whether the emergency cancellation of visas is necessary given the existing powers in the Migration Act 1958 (pages 53–55)
- whether the revocation of cancellation provisions are workable (page 55)
- if the threshold for determining whether the Australian Security Intelligence Organisation (ASIO) suspects a person *might be* a direct/indirect risk to security is too low, thereby causing significant disruption to a great number of travellers (pages 54–55) and
- the appropriateness of consequential cancellations of visas of family members of cancelled visa holders (pages 55–56).

Key issues relating to **Schedule 5 – Identifying persons in immigration clearance** and **Schedule 6 – Identifying persons entering or leaving Australia through advance passenger processing** concern the increased reporting on passengers leaving Australia, and whether the privacy impacts of the collection, access to, retaining and disclosure of information have been sufficiently addressed (pages 56–60).
Commencement

Sections 1 to 3 commence on the day the Act receives Royal Assent. Schedules 1 and 2 commence on the 28th day after the Act receives Royal Assent. Schedules 3 to 5 will commence on the day after this Act receives Royal Assent. Schedule 6 will commence on 1 July 2015. For commencement details on Schedule 7 of the Bill, refer to the commencement table in the Bill with reference to the commencement of the Migration Amendment (Protection and Other Measures) Act 2014.

Purpose of the Bill

The purpose of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill) is to make extensive amendments to several existing Commonwealth Acts, to address the Government’s response to the increased threat of terrorism posed by Australians engaging in, and returning from, conflicts in foreign States.

The Bill represents the Government’s response to several recommendations in reports of the Independent National Security Legislation Monitor (INSLM), particularly the Fourth Annual Report of March 2014, and recommendations of the Council of Australian Governments (COAG) Review of Counter Terrorism Legislation, which was tabled on 14 May 2013.¹

Structure of the Bill

The Bill is presented in seven Schedules.


Schedule 3 would amend the Customs Act to expand existing powers to detain persons on law enforcement grounds and enable detention on national security grounds.

Schedule 4 would amend the Migration Act 1958 to create the new emergency power to cancel visas where a person outside Australia might be a direct or indirect risk to national security.

Schedule 5 would amend the Migration Act to enable the collection of personal identifiers by authorised systems, from all persons (citizens and non-citizens) entering and departing Australia or who travel between ports in Australia on an overseas vessel, and the collection of information from travel documents. Schedule 5 also sets out how information may be accessed and disclosed in order to assist in identifying and authenticating the identity of a person who may be a national security risk.

Schedule 6 would amend the Migration Act to extend the Advanced Passenger Processing arrangements to passengers departing Australia by air or sea.

Schedule 7 would amend the Migration Act and the Australian Citizenship Act 2007 (Citizenship Act) to enable retention of bogus documents when they are presented or provided to the Department of Immigration and Border Protection (DIBP).

Each Schedule addresses separate issues. For that reason, this Digest will firstly provide background relevant to the Bill as a whole, including committee consideration, policy positions of non-government parties and

independents and views of key stakeholders. It will then treat each Schedule of the Bill separately, providing background relevant to specific measures, analysis of the provisions and identification of key issues together.

Background

The Bill is long and contains significant measures. The Government intends to pass the legislation quickly. The Government argues that the measures are urgent and necessary to respond to the threat posed by Australians fighting with overseas terrorist and insurgent groups and returning here (‘foreign fighters’) and individuals within Australia who are supporting foreign conflicts by means such as financing or otherwise facilitating persons’ travel to overseas conflicts. Australia’s intelligence agencies estimate that around 60 Australians are fighting with terrorist organisations in Syria and Iraq and that a further 100 are playing support roles in Australia. The Bill is also the Government’s response to reviews of existing anti-terrorism legislation that have been completed in recent years, most notably by the INSLM. The Bill has been referred to two parliamentary committees for consideration and report by 17 October 2014. As discussed throughout the Bills Digest, stakeholders have raised concerns at the short time for consideration and questioned the necessity for the urgent passage of all or parts of the Bill.

Changing terrorism environment

In the last ten years, following the Iraqi insurgency, the nature of terrorism and violent extremism has changed the way that governments around the world have responded to prevent terrorist-related violence and deaths. Most recently, the issue of foreign fighters has been a key concern for countries around the world. Recent estimates indicate over 12,000 people from at least 81 countries are involved in the Syrian conflict, most fighting with terrorist and insurgent groups. While the majority are from Arab countries, several hundred are from Russia and a further 2,500 from Western nations. At the United Nations Security Council meeting on 24 September 2014, States unanimously adopted Resolution 2178 condemning violent extremism, underscoring a need to prevent travel and support for foreign terrorist fighters. Part of the resolution confirmed that States should:

consistent with international law, prevent the “recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts”.

[Further], expressing concern over the establishment of international terrorist networks, the Council underscored the “particular and urgent need” to prevent the travel and support for foreign terrorist fighters associated with the Islamic State in Iraq and the Levant (ISIL), Al-Nusra Front (ANF) and other affiliates or splinter groups of Al-Qaeda.

In that context, the Council, through the resolution, decided that all States shall ensure that their legal systems provide for the prosecution, as serious criminal offences, of travel for terrorism or related training, as well as the financing or facilitation of such activities.

The continued conflict in Syria and the ease with which foreign fighters have been able to travel through Turkey to get to areas of conflict have led to significant concerns that foreign fighters returning to Australia pose a significant and real threat to the security of Australia. The Attorney-General, George Brandis, noted in April 2014 that ‘per capita, Australia is one of the largest sources of foreign war fighters to the Syrian conflict from countries outside the region. This is probably due to the large migrant population from countries in the region such as Lebanon. The problem may be a considerable threat to Australia’s national security. For instance, of the 30 Australians known to have fought or trained with overseas extremist groups between 1990 and 2010, 25

4. Information about the INSLM and links to Reports can be found on the ‘Independent National Security Legislation Monitor’ page of the Department of Prime Minister and Cabinet’s website, accessed 13 October 2014.
7. Ibid. For the full resolution, see UNSC, Resolution 2178, 24 September 2014, accessed 6 October 2014.
returned to Australia, and eight of them were later convicted of terrorism-related offences for conduct engaged in following their return.\(^9\) In this context however, it is important to note that the concept of foreign fighters and incursions is not new and Australia has had legislation in place to address these matters since the introduction of the *Foreign Incursions Act*. This Bill will repeal the *Foreign Incursions Act* and insert the provisions from that Act into the *Criminal Code* (proposed Part 5.5; item 110, Schedule 1).

**Events leading to the introduction of the Bill**

In the days following the commencement of the new Senate in July 2014, the Government proposed legislation to address national security issues, including the plan to detain Australians suspected of engaging in jihad who are returning from Iraq and Syria.\(^10\) One catalyst to the announcement was the revelation that a convicted Australian terrorist, Khaled Sharrouf, used his brother’s passport to travel to Syria and engage in fighting.\(^11\)

On 10 July 2014, IS (Islamic State, or Islamic State of Iraq and the Levant), was re-listed as a terrorist organisation in Australia, under section 102.1(3) of the *Criminal Code*.\(^12\) The group has been known by various titles:

Islamic State is an organisation which has been known under several different names. The first listing of the group for proscription purposes was in 2005 under the Arabic name that it formerly used. It was relisted in 2007 under the same name. In 2008 and 2010 and July 2013, it was relisted under the name ‘al-Qaeda in Iraq’, or AQI. More recently, the group was also listed under the name ‘Islamic State of Iraq and the Levant’—ISIL. On 29 June this year, the group proclaimed an Islamic caliphate in areas it controls, and it changed its name to the Islamic State. The use of the name ‘Islamic State’ does not represent a change in the leadership, membership or methods of the group that was originally proscribed in 2005, but reflects the explicit name change of the group, the expansion of its operating area and announcement of an Islamic caliphate. Legal advice provided to the Attorney-General confirmed that it would be appropriate to make new regulations under the new name of ‘Islamic State’ but with the retention of the well-known aliases, including ISIS and ISIL. The use of the label ‘Islamic State’ for this Criminal Code listing does not in any way legitimate the organisation’s claim to have established a caliphate; rather, the relisting of the group as the Islamic State is very important so as the continuity of the terrorist activities of this organisation is reflected, and is also critically important to ensure the clear application of the terrorist listing legislation.\(^13\)

The first of three Bills addressing matters of national security was introduced on 16 July 2014 and was passed on 1 October 2014. The *National Security Legislation Amendment Act (No. 1) 2014* contains measures to allow the Australian Security Intelligence Organisation (ASIO) and law enforcement greater powers to address the changing terrorism environment.\(^14\) This Bill is the second, and a third is proposed to be introduced later in 2014 to require telecommunications companies to retain persons’ telecommunications metadata, for at least two years, for the purposes of law enforcement.\(^15\)

On 12 September 2014, prior to the introduction of the Bill, the outgoing Director-General of ASIO, David Irvine, recommended that the National Terrorism Public Alert System terror threat level be changed from medium to high, meaning a terrorist attack is likely.\(^16\) Less than a week later, law enforcement conducted a counter-terrorism operation which was reported as the biggest in the nation’s history, with over 800 armed officers targeting households in the cities of Sydney and Brisbane.\(^17\) The number of arrests and charges emerging from

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\(^12\) *Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014*, accessed 14 October 2014.


\(^17\) Australian Federal Police (AFP), *15 people detained as part of major counter terrorism investigation*, media release, 18 September 2014, accessed 2 October 2014.
the operation has not yet been high, however 15 people were detained and one person was charged with conspiracy to commit a terrorist attack.\(^{18}\) Melbourne raids also occurred on 30 September 2014 as part of a separate counter-terrorism operation, resulting in a man being charged with terrorist financing.\(^{19}\)

This Bill was then released, in an unusual step, by the Government, a day prior to its introduction to the Parliament. During the weeks leading up to the domestic action, the Prime Minister, Tony Abbott, also confirmed that Australia would send military force to fight ISIS, resulting in Australian Air Force planes conducting air strikes in Iraq in early October 2014.\(^{20}\)

As well as proposing a new broad offence of advocating terrorism, in a direct response to the conflict in Syria and Iraq, the Government has proposed new offences in the Criminal Code including proposed section 119.2 (item 110 of Schedule 1) which will make it an offence for a person to enter or remain in an area declared by the Minister for Foreign Affairs to be a declared area. The Minister for Foreign Affairs will declare an area in a foreign country if he or she is satisfied that a listed terrorist organization is engaging in a hostile activity in that area of the foreign country. This and other measures are considered in the Bills Digest. Background relevant to specific measures is provided separately in the analysis of each Schedule to the Bill.

**Committee consideration**

The Bill has been referred to both the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 17 October 2014. Details are at the respective inquiry homepages: [PJCIS inquiry page](https://www.aph.gov.au/Parliamentary_Business/Committees/Intelligence_Security/PJCIS); [Legal and Constitutional Affairs inquiry page](https://www.aph.gov.au/Parliamentary_Business/Committees/Legal_Constitutional_Affairs).\(^{21}\)

The Senate Standing Committee on Legal and Constitutional Affairs decided that because the PJCIS is inquiring into the Bill, it would not call for or accept submissions, or conduct any hearings.

The Senate Standing Committee on the Scrutiny of Bills made available a standalone and extensive Alert Digest on 15 October 2014.\(^{22}\) In the time available, this Digest has not addressed all the matters raised by the Committee, but notes that the Committee has sought further detail and justification from the Attorney-General on many aspects of the Bill, including:

- the rationale for requiring a 14 day suspension of passport period which is a broad discretionary power with possible undue trespass on a person’s rights and liberties
- lowering the arrest threshold for arrest for terrorism offences
- the evidential burden of proof as it applies to the proposed ‘declared area’ offence
- whether the declaration by the Minister for Foreign Affairs is disallowable, and if not, why
- the limitations on the reviewability of decisions relating to welfare payments
- the extension of sunset provisions and
- the advocating terrorism offence.

**Policy position of non-government parties/independents**

**Australian Labor Party**

The Opposition has stated a commitment to work with the Government to ensure passage of the Bill through the Parliament, but has reserved its position on the specifics of the various schedules until they have been

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scrutinised by the PJCIS. Opposition Leader, Bill Shorten, reportedly wrote to the Prime Minister to assure the Government that the Bill would be expedited through the Parliament, but has publicly stated that the details of the Bill need to be considered carefully:

... [the Bill] needs to be investigated and debated. We need to hear from the security agencies, we need to hear from stakeholders. Our message is that we approach this with goodwill. We don’t approach this with partisanship.23

Prior to the Bill’s introduction, Mr Shorten stated that the Australian Labor Party (ALP) wanted to ensure that the legislation provided necessary powers to security agencies but did not infringe on ‘democratic freedoms’:

A very few Australians, poisoned by fanaticism, travelling to this war zone [Iraq] with the intention of participating in this conflict, do represent a threat to our national security. We will give the legislation that addresses the problem of these foreign fighters the careful consideration it deserves. Labor believes that our security agencies and national institutions should have the powers and resources they need to keep Australians safe from the threat of terrorism.

We also believe in safeguarding fundamental democratic freedoms. We must ensure that in legislating to protect our national security that parliament is careful not to damage the very qualities and liberties that we are seeking to defend from terrorist threat. As we work through the government’s legislation, Labor will continue to ensure that the national security imperatives are appropriately balanced with the importance of protecting our democratic freedoms.24

Shadow Attorney-General, Mark Dreyfus, has indicated that a number of specific provisions have the support of the Opposition, including:

• new powers to temporarily suspend travel documents to prevent Australians travelling to participate in foreign conflicts and

• expanding the range of foreign evidence that can be used in Australian courts to prosecute those who fight abroad.25

The Opposition has stated concerns with provisions in Schedule 1 which would criminalise travel to declared areas in foreign countries and place the evidential burden on the person who travelled to the declared area, to prove their purpose was innocent. Mr Dreyfus described the measure as unprecedented, stating, ‘it appears to curtail, not only the right to the freedom of movement, but also the right to silence and the presumption of innocence’.26 Mr Dreyfus stated that the Opposition was also concerned that the Bill would extend the current preventative detention regime.27

**Australian Greens**

The Australian Greens (Greens) have stated similar concerns with these particular provisions. Greens Legal Affairs spokesperson, Senator Penny Wright, stated that they would move amendments to remove the provisions in the Bill that would make it an offence to travel to declared areas. Senator Wright stated ‘it is already a criminal offence for Australians to travel overseas with the intent of engaging in hostile activities – these draconian laws are unnecessary and will have the same effect as a reversal of the onus of proof’.28

Senator Wright also expressed concerns that the preventative detention regime would be extended despite recommendations of the COAG Review Committee and the Independent National Security Legislation Monitor (INSLM) that it be repealed.29

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26. Ibid.
27. Ibid.
Other minor parties and independents

A number of cross-bench senators have expressed concerns about certain provisions. Prior to the Bill’s introduction, Senators David Leyonhjelm and Bob Day had reportedly taken issue with proposed bans on travel to certain areas and the evidential burden being placed on the person travelling. Senator Leyonhjelm stated his opposition to any measure which meant that ‘you commit an offence unless you can prove you’re innocent ... It just goes against all of our rights and freedoms as a free society’. 30 In a submission to the PJCIS inquiry, Senator Leyonhjelm reiterated his concerns about the declared areas offence and outlined concerns about delayed notification search warrants (including the proposed offence for unauthorised disclosure), the proposed offence of advocating terrorism, and extending sunset periods by a further ten years. 31

The Palmer United Party will reportedly support the measures proposed in the Bill. 32

Position of major interest groups

The views of most major interest groups are set out in their submissions and evidence to the PJCIS. 33 The following presents only a summary of some of the key interest groups’ positions on the Bill. The views of stakeholders on particular measures are also discussed, where relevant, in the sections of this Bills Digest analysing the respective measures.

Almost all of the submissions to the PJCIS iterated support for measures aimed at protecting Australians from terrorism. Most of the submissions addressed concerns as to the effectiveness of the proposed measures in achieving this aim, their proportionality to the threat and whether there was adequate justification for particular provisions. Almost all of the submissions expressed concern at the short timeframe for reviewing the Bill and providing evidence to the Committee.

Forty three religious, community, legal and human rights organisations and academics, including Amnesty International, Civil Liberties Australia, the Human Rights Law Centre and the Media, Entertainment & Arts Alliance (MEAA) issued a joint statement on 15 October 2014 that calls on the Australian Parliament ‘not to pass the Bill without a more comprehensive public consultation on the necessity of the laws and their compliance with domestic and international human rights obligations’. 34 The statement identified the extension of sunset clauses for a range of existing powers and the new offences for advocating terrorism and travel to declared areas as key concerns.

Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS), Vivienne Thom, is an independent statutory officer who reviews the activities of Australia’s intelligence agencies. The IGIS’s submission noted that the Bill would provide new powers to ASIO but that the IGIS would retain sufficient authority to provide oversight of these new powers. 35

The IGIS’s submission to the PJCIS noted that the Bill proposed an expansion of the definition for the term ‘security’ under the ASIO Act. The IGIS noted that the expanded definition of ‘security’ would mean that ASIO’s powers could be used in a broader range of circumstances than currently permitted; in particular, that ‘ASIO will have the legislative authority to use its powers to gather intelligence about criminal conduct overseas that is not associated with terrorism or activity that would ordinarily be described as relevant to national security’. 36

The IGIS also noted that proposed changes to ASIO’s powers to suspend travel documents and temporarily cancel visas would increase the importance of the IGIS’s oversight role, in light of limitations on other types of review. 37 The IGIS stated a concern that the Bill proposes that ASIO the entity, rather than a particular individual

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33. PJCIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, op. cit.
36. Ibid.
37. Ibid.
such as the Director-General of Security, would make recommendations in relation to the suspension of travel documents and the cancellation of visas. The submission suggested that it is better practice for such decisions to be made by nominated individuals who are then accountable for decisions. 38

**Australian Human Rights Commission**

The Australian Human Rights Commission (AHRC) raised a number of significant issues with the measures proposed in the Bill and made recommendations to either amend some provisions or not pass them at all. The AHRC stated the measures contained in the Bill would affect a number of human rights set out in the *International Covenant on Civil and Political Rights (ICCPR)*—particularly the rights against arbitrary detention, rights to freedom of movement and the right to privacy. 39 The AHRC also stated that the welfare provisions in Schedule 2 raised concerns regarding rights under the *Convention on the Rights of the Child (CROC)*. 40

The AHRC holds that in several instances, ‘the Bill goes beyond what can be reasonably justified to achieve legitimate purposes’. 41 The President of the AHRC, Gillian Triggs, outlined for the PJCIS the AHRC’s core concerns with the Bill:

Firstly, many of these amendments, as you will be aware, significantly lower the thresholds of existing law and the words ‘may’ and ‘might’ and ‘suspicion’ are used rather than words that require reasonableness and higher levels of ‘shall’ and so on. So they are drafting differences but quite profound in lowering these thresholds to levels that we think raise concerns. In broad terms we would like to see a greater use of the concept of reasonableness of belief and we would like to see proper procedural safeguards as a practical matter. Many human rights are protected through proper safeguards rather than necessarily substantive provisions.

The other area is a general concern about overreach and that is that many of the draft changes change current laws in ways that are not really justified adequately in the explanatory memorandum ... the difficulty is that, in trying to assess whether or not these provisions are an overreach, we cannot do it because we do not know how proportionate they are in relation to facts to which we do not have access. So, in a way, the only way one can be reasonably sure, in a mature democracy such as Australia’s, that these are not a serious overreach is to have safeguard provisions or oversight provisions which can ensure that these laws do not go further than is really necessary to protect the interests that a sovereign nation like Australia has and the very deep obligation to protect the interests of its citizens. 42

**Human rights groups**

Human Rights Watch submitted a number of concerns with the Bill to the PJCIS in regards to the proposed new offences for advocating terrorism and travel to declared areas, and the extended use of control orders and preventative detention. 43 Its submission stated:

Human Rights Watch believes these measures are unnecessary and ineffectual in the fight against terrorism, while simultaneously depriving individuals of fundamental rights in violation of international law. We are concerned that the proposed amendment would enshrine into law excessive restrictions on freedom of expression and freedom of movement and exacerbate problems under existing law pertaining to preventative detention and control orders. 44

Amnesty International expressed similar concerns with these measures and urged the PJCIS to recommend that the Bill not be passed. Amnesty International rejected the assessment of the Bill’s Statement of Compatibility

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38. Ibid.
40. Ibid.
41. Ibid., p. 4.
44. Ibid.
with Human Rights, stating ‘Not only is the bill incompatible with a range of Australia’s human rights obligations, but sufficient safeguards to ensure proportionality for the limiting of these rights has not been established’.  

**Law groups and legal experts**

The former INSML, Bret Walker SC, did not make a submission to the PJCIS, but provided evidence at a hearing. He noted that several of the recommendations he made as INSML were taken up ‘more or less favourably’ in the Bill, particularly travel document suspensions, an amendment to questioning warrants and lowering the threshold of arrest for terrorism and foreign incursions-related offences. He indicated that while he had recommended changes to terrorism and foreign incursions-related offences, he found the way such amendments were dealt with in the Bill problematic, including use of the term ‘subverting society’ in the context of hostile activities. Mr Walker also confirmed that despite the recent raising of the terrorism alert level and first use of the preventative detention regime, he stood by his recommendations to repeal the control order, preventative detention and questioning and detention regimes and reiterated his support for post-release orders for terrorist convicts in place of the control order regime. Finally, he indicated that while he was not a big proponent of sunset clauses, where they are used, they should always be accompanied by a statutory requirement mandating a review, preferably by a parliamentary committee, shortly before their expiry.

The Law Council of Australia (LCA) presented a detailed submission to the PJCIS and made recommendations in relation to most of the key measures. The LCA was supportive of the Bill’s objective, to protect Australians from the threat of terrorism, but stated that, in its view, there was a need to ensure a proportional response to this threat. The LCA found that:

> ... certain provisions of the Bill do not appear to take into account the broad range of existing terrorist-related offences and exceptional law enforcement and intelligence gathering powers already available. Some provisions of the Bill (such as the proposed new offence of entering a declared area, new powers to suspend travel documents and extended powers to detain and/or question people without charge) have the potential, if misused or mistakenly used, to impact significantly on the lives and rights of Australians who have no criminal intention or pose no risk to national security. The proportionality of the response in these areas must be justified.

The LCA stated the Bill’s measures could be enhanced by further drawing on the recommendations of the COAG Review and the INSML.

The Gilbert + Tobin Centre of Public Law (Gilbert+Tobin) presented a detailed submission to the PJCIS. It supports the proposed introduction of a power to temporarily suspend passports and the relaxation of current restrictions on adducing foreign evidence. However, Gilbert+Tobin found that some of the proposed provisions are unworkable, some in need of significant amendment and there were a number they did not support. Gilbert+Tobin opposed the Bill’s proposals to extend certain sunset clauses, the proposed declared area offence, the extended penalties for hostile activities, the proposed definition for ‘subverting society’, the proposed offence for advocating terrorism, and the proposed inclusion of encouragement and promotion of terrorism as grounds for proscribing a terrorist organisation.

Ben Saul, Professor of International Law at the University of Sydney, made a submission that raised similar concerns with the proposed declared area offences, the advocating terrorism offence, the proposed definition of ‘subverting society’, the extension of the preventative detention regime and control orders, the extension of ASIO’s detention powers, the absence of judicial review provisions for certain decisions, the cessation of welfare payments for those issued with a security notice and the length of the proposed sunset provisions.

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46. As at the time of writing, the office of INSML had been vacant since April 2014.
48. Ibid.
Saul stated that Australia’s legislative response to the terrorist threat, when compared internationally, ‘is distinctive for its over-reaction, lack of proportion, and inattention to fundamental rights’.

Greg Carne, Associate Professor at the University of New England School of Law, raised similar concerns with the proposed designated area offence, the extension of a range of sunset clauses and changes to the preventative detention regime, removal of the review process for ASIO questioning and detention warrants, exclusionary standards for the provisions allowing for foreign evidence to be admissible in terrorism related proceedings, proposed changes to the arrest threshold for terrorism offences, and with the collection and transmission of personal information relating to individuals departing Australia. The submission made a number of suggested amendments to address perceived shortcomings or potential problems with the proposed measures.

Australian Lawyers for Human Rights (ALHR) took issue with the impact a number of measures would have on human rights and raised concerns that the Bill’s provisions are disproportionate in effect, reduce the oversight of the courts and are inconsistent with international human rights standards. ALHR were particularly concerned that the provisions would prevent many decisions from being subject to judicial review, stating: ‘laws which remove full judicial review are a direct affront to Australia’s international legal obligations, the separation of powers and the rule of law and have no place on the law books of a democratic nation State’.

The Castan Centre for Human Rights Law took issue with a wide range of the proposed measures in their submission to the PJCIS. The Castan Centre was particularly concerned with the extension of ASIO’s coercive powers and amendments in regards to ASIO’s use of serious or deadly force. The Castan Centre also raised issues with the proposed introduction of a ‘covert search warrant regime’ into Commonwealth law, new grounds for which control orders may be sought, and the extension of the preventative detention regime. The submission raised concerns with the expanded definition of ‘hostile activity’, increased penalties, and with the new regime for ‘declared areas’ which it said would once again make ‘criminal liability in Australia turn upon the foreign policy opinions of the executive government’ and would discriminate against some Australians based on their country of origin (those more likely to have connections to conflict zones).

**Muslim groups**

The Muslim Legal Network NSW’s (the Network) submission raised similar concerns with many of the Bill’s provisions as have been raised by other law groups, discussed above. In particular, the Network was concerned with the proposed advocating terrorism offences, the declared area offences, proposed changes to the Australian Customs and Border Protection Service’s (Customs’) detention powers, the proposed delayed notification search warrant regime, and the use of foreign sourced evidence in terrorism-related proceedings. The Network cited the expansive definition of ‘advocating terrorism’ as ‘likely to give rise to the discrimination of ethnic, racial and religious groups’ which would further marginalise those at risk of radicalisation and, in turn, increase the risk of terrorism. The Network was also concerned that the definition was broad enough to apply to individuals referring to stories from the Quran, Bible or Torah and would restrict the free exercise of religion.

The Australian National Imams Council also recommended that the proposed advocating terrorism definition be removed from the Bill and that the declared area provisions be removed or amended to include specific

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52. Ibid., p. 2.
55. Ibid., p. 10.
57. Ibid., pp. 4–5.
58. Ibid., pp. 5–6.
59. Muslim Legal Network (NSW) and Australian Turkish Advocacy Alliance, Submission to PJCIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, October 2014, accessed 10 October 2014.
60. Ibid., p. 4.
illegitimate purposes for travel to an area as giving rise to an offence. The Council was also concerned at the proposed changes to Customs’ detention powers and that this would lead to an increased number of innocent travellers being detained for questioning and missing their flights.

The Islamic Council of Victoria (ICV) raised similar concerns as the law groups discussed above. The ICV, while recognising the need for measures to protect Australians from terrorism, found:

... the proposed measures are counterproductive to this aim and in fact could be a source of discon
tent and marginalisation for members of the Australian Muslim community. Many of these laws are so intrusive and rely on such a low level of evidence as a basis to target citizens that it is not difficult to see how Australians who are subjected to these laws could encounter them as a provocation to act out.

Civil liberties, media organisations and privacy groups

Councils for civil liberties from across Australia made a joint submission to the PJCIS, as did a large group of media organisations, highlighting concerns that a range of provisions would encroach on important civil liberties and rights. The MEAA made similar points. Its submission focused in particular on extending sunset periods by a further ten years, proposed amendments to terrorism offences and specific concerns about the application of the proposed declared areas offences and the offence for unauthorised disclosures about delayed notification search warrants to journalists.

Submissions from the Australian Information Commissioner and the Australian Privacy Foundation also highlighted the interaction between the proposed provisions and privacy law. Their submissions also raised issues of concern with how some amendments would impact on the privacy of individuals and the collection and transmission of personal information.

Financial implications

The Explanatory Memorandum states that the mechanism for compensation in the case of damage to electronic equipment operated under a delayed notification search warrant is expected to have a minimal impact on Government revenue.

The Acting Commonwealth Ombudsman has stated that its new oversight function under the proposed delayed notification search warrant regime will have resource implications for his office and that he ‘look[s] forward to working with the Attorney-General’s Department to seek to address these issues’.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Statement of Compatibility recognises that the Bill engages and limits a broad range of human rights and freedoms, but concludes that those limitations ‘are reasonable,

63. Ibid., p. 3.
70. The Statement of Compatibility with Human Rights can be found at page three of the Explanatory Memorandum to the Bill.
necessary and proportionate to achieving a legitimate objective’, notably protecting Australians from terrorism threats. The Government therefore considers that the Bill is compatible.

A number of submissions to the PJCIS argue, however, that certain amendments are incompatible with these international instruments. Some submissions have also raised issues with the explanations and justifications provided by the Statement of Compatibility (see ‘Position of major interest groups’ section) above.

The Parliamentary Joint Committee on Human Rights had not reported on the Bill at the time of publication.

Schedule 1—Main counter-terrorism amendments

Information on the many separate measures in Schedule 1 is ordered by the measures’ likely importance or prominence during debate, instead of following the order of provisions in the Bill.

Extension and inclusion of sunset periods

Sunset clauses currently apply to four existing counter-terrorism measures, in particular:

- control orders, preventative detention orders and stop, search and seizure powers for suspected terrorist acts and offences are subject to a ten-year sunset clause due to expire in December 2015 and
- the questioning warrant (QW) and questioning and detention warrant (QDW) powers are subject to a ten-year sunset clause due to expire in July 2016, with a statutory review by the PJCIS due by January 2016.

The Bill would extend each of these measures for an additional ten years (that is, to December 2025 and July 2026) and delay the statutory review of the QW and QDW powers by ten years.

Reviews by the INSLM and the COAG Review Committee have recommended repeal of some of the measures as well as significant amendments. Despite this, only broad justification has been provided in the second reading speech and Explanatory Memorandum for their extension, and only in the case of QWs and QDWs is any reference made to the continuing need for those particular powers. Otherwise, the rationale provided is the enduring nature of the terrorist threat and:

In light of the increasing threat the escalating terrorist situation in Iraq and Syria poses to the security of all Australians, both here in Australia and overseas, it is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.

Information on each of these measures, current sunset periods and review recommendations is provided in the separate sections on each measure that follow. However, beyond the question of the continuing necessity for the powers, two fundamental questions apply across all these measures:

- why is it considered necessary to extend the sunset clauses now, in a Bill that is being given truncated Parliamentary consideration on the grounds of urgency, when none are due to expire for at least another 14 months (and in the case of QWs and QDWs, even longer)? and
- why is it considered necessary to extend the sunset clause by a further ten years, as opposed to a shorter period?

The Bill would also apply a ten-year sunset clause to the offence in proposed section 119.2 of the Criminal Code of entering or remaining in a declared area. The Explanatory Memorandum does not explain why a period of ten years has been proposed.

A further question is why the extended and new sunset clauses are not, with the exception of QWs and QDWs, accompanied by provisions requiring review of the measures close to the end of the sunset periods, to inform a decision on whether or not they should be further extended or potentially made permanent.

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71. Ibid., pp. 3–75 (quote taken from page 75).
74. Explanatory Memorandum, p. 128 in relation to control orders and p. 134 in relation to preventative detention orders (identical text). Briefer justification is provided on pp. 92–93 in relation to stop, search and seizure powers. For QWs and QDWs, see p. 89 and the relevant section of this Digest.
75. Item 110 of Schedule 1, proposed subsection 119.2(6).
Timing of extensions and opportunity for review

The first of these questions goes to the issue of the continuing necessity of the powers to the extent that extending the measures in the current Bill provides inadequate opportunity for the in-depth scrutiny that such a determination properly requires. This point has been raised in several of the key submissions to the PJCIS’s inquiry into the Bill, with some recommending that the extensions to sunset clauses be removed from the Bill and considered separately.76 At a hearing for that inquiry, Professor George Williams stated:

Unfortunately, what we are seeing on this occasion is a removal of the opportunity for appropriate review ...

I would also say that the absence of an appropriate opportunity for review is problematic in terms not only of whether to extend the sunset clauses but also of the nature of the regimes ... It means, unfortunately, that I approach the sunset clause provisions with grave concern because, in my view, they actually make a mockery of how these clauses are meant to operate and they risk setting a very dangerous precedent for how parliament approaches like clauses in other legislation.77

At the same hearing, the PJCIS put the question of timing to government officers, one of whom suggested that the referral of the Bill to the PJCIS provided an opportunity to review the powers now instead of in one or two years’ time.78 This provoked a strong response from Opposition members of the PJCIS, who stated that the PJCIS was not reviewing and could not review the powers more broadly through its inquiry into the Bill, with Mr Byrne stating “The key thing here is that we do not have the capacity to adequately review those intrusive powers. I just want to make that very clear”.79 In that context, it is worth noting that the same committee’s previous review of just one of the four measures currently proposed for extension (the QW and QDW provisions) took place over a period of ten months (January–November 2005), considered 113 submissions and involved four public and five private hearings.80 In the report on that review, the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJC-AAD, now the PJCIS) provided a view on the purpose of retaining a sunset clause:

A sunset clause, which means that the legislation must be introduced anew, ensures that the public and parliamentary debate on the need for the powers will be regularly held and of the most focussed kind. The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate.81

Pressed further on the matter, an officer from the Attorney-General’s Department (AGD) ultimately confirmed that there was no urgency associated with extending the measures, stating ‘there is certainly no immediate reason; the powers exist at the moment, that is correct’.82

Need for and length of new and extended sunset clauses

As is the case in relation to the sunset clause for the proposed declared areas offence, the Explanatory Memorandum does not explain why a further period of ten years has been chosen for the existing sunset clauses. This is particularly notable in the instance of the proposed extension of the stop, search and seizure provisions, because the COAG Review Committee specifically recommended an extension of five years.83 AGD’s submission to the PJCIS’s inquiry into the Bill simply states that ten years was chosen for consistency with the

76. Gilbert+Tobin, Submission to PJCIS, op. cit., pp. 2–5; AHRC, Submission to PJCIS, op. cit., pp. 9–10; CLCs, Submission to PJCIS, op. cit., pp. 5–6; MEAA, Submission to PJCIS, op. cit., p. 4.
77. G Williams, Evidence to PJCIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 3 October 2014, accessed 9 October 2014. See also G Carne, Submission to PJCIS, op. cit.
78. J Lowe (First Assistant Secretary, National Security Law and Policy Division, Attorney-General’s Department (AGD)), Evidence to PJCIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 3 October 2014, accessed 7 October 2014.
81. Ibid., p. 106.
82. J Lowe, Evidence to PJCIS, op. cit.
period applied to the control order regime. The COAG Review Committee recommended that the control order regime be retained, but did not stipulate whether the sunset clause should be removed entirely or extended for some further period.

On the question of length, an officer from AGD indicated that it was the Australian Government’s preference to remove the existing sunset clauses altogether, and that a compromise of extending them by ten years was the result of consultation with the community and state and territory governments. The QW and QDW powers were initially enacted with a three-year sunset clause. When it reviewed the provisions in 2005, the PJC-AAD indicated that ‘three years is a brief period of time for consideration of the operation of any legislation, particularly legislation that is to be used only as a last resort’ and accordingly recommended a renewed sunset clause of five-years.

A variety of opinions have been expressed by stakeholders on this issue (though stakeholders arguing for the non-renewal of measures or delay of any decision until closer to their current expiry date did not tend to suggest an alternative sunset period). In particular:

- Professor Ben Saul suggested three years
- the AHRC and ALHR suggested three to five years
- Professor George Williams suggested five years ‘would maybe be the outer limit that would normally be countenanced in this context’
- the Australian Defence Association suggested somewhere between five and ten years would be appropriate, and stated that specifically in relation to COs, an extension to 2025 seems reasonable and
- the former INSLM stated that he found sunset provisions problematic and that a period of ten years appeared arbitrary, stating that sunset clauses should either be ‘really very short’ or not used at all, in which case there would be ‘trust in future parliaments to amend, repeal, leave in force laws as the future parliaments see fit in light of circumstances that cannot possibly be predicted at the moment’.

Asked to choose between those two options, he said he would ‘probably’ choose the latter. He also pointed out that while a sunset clause provides a date before which a decision must be taken, it does not prevent parliaments from acting earlier—if a future Parliament thought it appropriate, provisions could be repealed or amended before that date.

Lack of statutory review prior to the expiry of sunset provisions

As noted above, the Bill would amend a provision requiring review of the QW and QDW powers by the PJCIS to delay it from July 2016 to July 2026. It would not, however, require any review of the other provisions to which sunset clauses would apply. In addition to the stakeholder and committee views outlined above, the former INSLM argued that where sunset clauses are used, they should always be accompanied by a statutory review prior to the expiry of sunset provisions.
requirement mandating a review, preferably by a parliamentary committee, shortly before their expiry.\textsuperscript{95} Associate Professor Greg Carne also strongly supported a statutory review requirement, pointing to the delays associated with the COAG Review as an example of what might otherwise occur.\textsuperscript{96}

**Inserting a new offence of advocating terrorism in the Criminal Code**

Division 80 of the *Criminal Code* contains offences relating to treason (80.1) and urging violence (80.2). **Proposed section 80.2C** (at item 61 of Schedule 1) is unanticipated and does not seek to implement a specific recommendation. The new offence, with a maximum penalty of five years’ imprisonment, would prohibit a person advocating the doing of a terrorist act or terrorism offence; and is reckless as to whether another person will engage in a terrorist act. This offence seems unnecessarily broad, defining advocacy as counsels, promotes, encourages or urges, and potentially captures unintended conduct. For example, as Gilbert+Tobin explained, the idea of promotion could:

\begin{quote}
... encompass a general statement of support for terrorism that is posted online, with no particular audience in mind. Secondly, the proposed offence would require only that the person is ‘reckless as to whether their words will cause another person to engage in terrorism. By contrast, the offence of incitement requires that the person intends that the conduct should occur.\textsuperscript{97}
\end{quote}

The proposed offence seems unnecessary, particularly when there are existing offences relating to incitement that would likely cover the field in this area. Parliamentary scrutiny and debate may reveal more justification for the offence but in its current form, it raises significant concerns. Gilbert+Tobin continue:

> In any conflict there will be difficult lines as to what acts it is legitimate to encourage or promote, but clearly there should be scope in a free democratic society to adopt differing viewpoints on such difficult and divisive issues. Determining right and wrong in a foreign conflict is far too difficult an issue to expose individuals to criminal liability for encouraging or promoting the acts of one side. Certainly, there will be serious cases (such as the recent beheadings conducted by Islamic State) where most people would agree that the conduct is so morally reprehensible that it cannot be justified in any civilised society. But an offence that criminalises the encouragement or promotion of terrorism would apply beyond such cases to a wide range of grey areas and difficult moral questions.\textsuperscript{98}

Similar statements are made by the LCA who recommend that the offence *not be progressed* until certain issues have been considered and dealt with, including: the need for the offence in light of existing offences and consideration of how the new offence would intersect with the broad potential range of conduct captured under the ‘terrorist act’ definition.\textsuperscript{99}

**Limiting the defence of humanitarian aid for the offence of treason**

Within Division 80, Section 80.1AA of the *Criminal Code* proscribes the offence of materially assisting enemies with treason. There is an existing exception, where the defendant bears the evidential burden, if the person’s conduct is done in way of or for the purposes of, the provision of aid of humanitarian nature. The proposed amendment is designed to capture conduct where the person is engaged in acts of treason but may, for example, take some first aid equipment with them and therefore be able to rely on the defence of humanitarian aid. **Item 59, Schedule 1** of the Bill would insert the term ‘solely’ to ensure that the humanitarian aid defence is limited and cannot be broadly interpreted. Note also, there is an existing defence of acts done in good faith.

**Amendments relating to the listing of terrorist organisations**

**Item 64** of Schedule 1 would amend the criteria by which an organisation can be listed as a terrorist organisation under the *Criminal Code*. Paragraph 102.1(1A) of the *Criminal Code* will be amended by the addition of the words ‘promotes’ and ‘encourages’, which are undefined terms. Following the passage of the Bill, an organisation can be listed as a terrorist organisation if the organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act.

\begin{itemize}
\item \textsuperscript{95} Ibid., p. 41.
\item \textsuperscript{96} G Carne, Submission to PJCIS, op. cit., pp. 4–5, accessed 8 October 2014.
\item \textsuperscript{97} Gilbert+Tobin, Submission to PJCIS, op. cit., p. 14.
\item \textsuperscript{98} Ibid.
\item \textsuperscript{99} LCA, Submission to PJCIS, op. cit., p. 18.
\end{itemize}
This is a significant amendment in that it could have broad-reaching prosecutorial consequences for the members of the organisation. In its current form, the concept of a terrorist organisation, with no binding criteria, is broad. The proposed amendment has the potential to isolate community groups who gather to discuss political and religious matters, threatening freedom of speech in Australia’s democracy. Gilbert + Tobin also make this point that:

... a more general danger with expanding the definition of advocacy is that it may further alienate sections of Australia’s Muslim population. The proposed reforms would do so by making it easier to criminalise organisations that are engaged in public debates on current events overseas. This may contribute to perceptions that the government is unfairly targeting Muslim communities with its counter-terrorism powers. 100

It is not clear whether the intention is to cover any members of the organisation or if it intends to target the leaders of the organisation. Further, it would be necessary that the advocacy be attributable to an identifiable person so as not to create a risk of being an association offence. On this basis, the LCA submitted that ‘the power to proscribe an organisation on the basis of advocacy alone is unjustified and disproportionate and section 102.1(1A) should be repealed.’ 101 The Explanatory Memorandum provides a weak justification for the inclusion of the terms ‘promotes’ and ‘encourages’ into paragraph 102.1(1A)(a) as being ‘consistent with section 3 of the United Kingdom’s Terrorism Act 2000, which provides that an organisation is concerned in terrorism if it promotes or encourages terrorism.’ 102

**Definition of terrorism offence**

A ‘serious terrorism offence’ under the Crimes Act applies to the powers under Part IAA of the same Act to search, gather information and arrest persons. A ‘serious terrorism offence’ means a ‘terrorism offence except for the offence of associating with a terrorist organisation under section 102.8, or offences against the control order and preventative detention order regimes in Divisions 104 and 105 or Part 5.3 of the Criminal Code.’ 103

The INSLM reported that there needed to be consistency in the definition of terrorism offence:

There is no reason in principle or policy to distinguish UN Charter Act terrorism financing offences which implement Australia’s international counter-terrorism obligations under [UNSC Resolution] 1373 and relate to potentially very serious terrorism financing activity, from terrorism offences under the Criminal Code. 104

The INSLM went on to recommend, in **Recommendation VI/6** of the 2014 report, that the definition be amended to include an offence against Part 3 of the Charter of the United Nations Act 1945 (UN Charter Act), insofar as it relates to terrorism, and an offence against Part 4 of that Act. 105

**Items 35-38** would address this, so that the definition would apply to offences against Part 4 of the UN Charter Act, Part 5 to the extent that it relates to the Charter of the United Nations (Sanctions – Al Qaida) Regulations 2008 and offences against Subdivision B of Division 80 of the Criminal Code (Treason provisions). There has not been remarkable attention from stakeholders on these amendments. However, the Scrutiny of Bills Committee did note, and sought further justification for, the retrospective commencement of **item 38**. That item:

... provides that the new (expanded) definition of terrorism offence in subsection 3(1) of the Crimes Act 1914 will apply in relation to any terrorism offence, whether the offence occurs before on, or after commencement of this item. The proposed amendment will have the effect that a number of provisions in the Crimes Act concerning terrorism offences will apply in relation to an expanded number of offences. 106

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100. Gilbert + Tobin, Submission to PICIS, op. cit., p. 17.
101. LCA, Submission to PICIS, op. cit., p. 18.
102. Explanatory Memorandum, p. 121.
106. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 15.
Part 5.5 of the Criminal Code

Part 5.5 of the Criminal Code: Foreign incursions and recruitment

Proposed Part 5.5 of the Criminal Code, inserted by item 110, would contain offences and provisions based on the Foreign Incursions Act, which would be repealed by Part 2 of Schedule 1. The new Part would modernise the provisions of the Foreign Incursions Act and ‘addresses the anomalies and mismatches identified by the INSLM in the 2014 report to ensure that the provisions complement other counter-terrorism laws and enhance the overall effectiveness of the framework.’

Key amendments to note here are the increase in the penalty for engaging in hostile activity as well as intending to engage in hostile activity, to life imprisonment. The LCA recommended that there be a distinction between the penalties for preparatory conduct and actual harm.

Proposed section 119.1 will create the foreign incursion offence. That is, an offence for entering foreign countries with the intention of engaging in hostile activities, with the maximum penalty being imprisonment for life. Similarly, if the person does engage in a hostile activity in a foreign country, the maximum penalty is life imprisonment.

The Bill would create a new offence of entering a ‘declared area’ in which a terrorist organisation is engaging in hostile activity. Proposed subsection 119.2(1) would create the offence of a person entering, or remaining in an area in a foreign country that has been declared (under proposed section 119.3) by the Foreign Affairs Minister.

Proposed paragraph 119.2(1)(c) specifies that a person, for the purposes of the offence provision, is an Australian citizen or resident, or is a holder of a visa under the Migration Act or has voluntarily put himself or herself under the protection of Australia. The maximum penalty for the offence is imprisonment for 10 years.

Proposed subsection 119.2(3) would note exceptions to the offence, including solely providing humanitarian aid, satisfying an obligation to appear before a court or similar judicial body, performing an official duty for any Australian jurisdiction, performing an official duty for a foreign government where it is not in violation of Australian law, performing a duty for the United Nations, working as a journalist or assisting a journalist, making a bona fide visit to a family member, any other purpose as prescribed by regulation.

Proposed subsections 119.2(4) and (5) would separately exclude any person’s service in or with a foreign government’s armed forces or any other armed force as declared the Foreign Affairs Minister under proposed subsection 119.8(1).

The section would cease to have effect 10 years after commencement (proposed subsection 119.2(6)).

Reaction and commentary to the proposed offence have suggested that this offence is reversing the onus of proof, requiring the defendant to show reason for their travel to the declared area. If the defendant fails to provide satisfactory evidence that their reason for travel falls under an exception, the offence is likely to be proven. The Government is presently pursuing an argument that as an evidential burden this is not a reversal of the onus of proof. However, it is a legal technicality to describe this as an evidential burden, not a legal burden and therefore not reversing the onus of proof. To counter this point, the Parliament might consider the general considerations for placing an evidential burden on the defendant and that there may be legal uncertainty on the current proposals:

- is the matter only one that is in the defendant’s knowledge? In this case, possibly not because the prosecution may be able to aduce evidence as to the reasons the defendant entered or remained in the declared area
- is the matter central to the question of culpability? Yes, and therefore, the prosecution should bear the burden to prove, on the evidence, that the defendant was not in the declared area for any of the proscribed exceptions. Does the offence carry a low penalty? No, the offence carries a penalty of ten years imprisonment. Again, given this gravity, the prosecution should bear all responsibility for proving beyond reasonable doubt that the offence has been committed and
- does the conduct proscribed pose a threat to public health and safety? It is arguable that this provision, as a stand-alone, does not pose a threat to public health and safety. That is, a person entering or remaining in a declared area is not, in and of itself, a threat.

108. LCA, Submission to PICIS, op. cit., p. 33.
The scrutiny by the relevant parliamentary committees will likely have given these arguments more extensive consideration. However, by way of comparison, the Prime Minister of the United Kingdom, David Cameron, rejected proposals from the Mayor of London, Boris Johnson, to criminalise in the United Kingdom any travel to certain individual countries or to change the criminal standard of proof. He said in September 2014 ‘the government [is] clear that it would be wrong to deal with the gap by fundamentally changing core principles of our criminal justice system’. 109

Additionally, the United Nations Resolution, passed in late September 2014, stresses that actions taken against foreign fighters must be consistent with international laws, including those governing human rights, refugees and humanitarian concerns. In this regard, an opinion piece in the New York Times noted that:

... the potential for exaggerating the terrorism threat and overreaching with criminal laws that encourage the use of racial profiling to target some citizens, like Muslims, or persecution of adversaries is very real both in democracies and authoritarian regimes.

For instance, Parliament in France last week overwhelmingly approved a sweeping new antiterrorism bill that raises serious civil liberties concerns. Meanwhile, President Abdel-Fattah el-Sisi of Egypt, who ordered a bloody crackdown against Islamists that killed more than 1,000 people and imprisoned 20,000, told The Associated Press in an interview that the world’s alarm over Islamic extremism vindicates his approach. 110

Prima facie, it would be possible to draft an offence with the same intention in a different way to protect the defendant’s rights, particularly a presumption of innocence. At this point, there is no comparable provision in other jurisdictions. The desired result may be more robust if it were to be drafted as: ‘A person commits an offence if he or she returns to Australia after being in a declared area without reasonable excuse. Reasonable excuse includes family, humanitarian, government or similar purposes.’

The presumption, in the current drafting, is that if a person has travelled to the declared areas that he or she is connected with the training or other engagement with terrorist organisations.

The penalty of ten years imprisonment for an offence where there is no direct intention to harm is significant.

The subjectivity, too, of the exceptions of providing humanitarian aid, making a bona fide family visit and to some extent the journalist defence, is extremely concerning because of their inherent fallibility.

Note also, proposed subparagraph 119.3(2)(b), as drafted, would allow the declaration to cover an entire country if the Foreign Affairs Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity throughout the country.

Subverting society

Within proposed Part 5.5 of the Criminal Code, proposed subsection 117.1(3) would define a new phrase ‘engages in subverting society’ which the Explanatory Memorandum outlines is to replace the previous undefined phrase of ‘engaging in armed hostilities in the foreign state’ (in the Foreign Incursions Act, to be repealed). 111 The proposed change is justified on the grounds that the latter is not appropriate in the current environment because it is limited to occurrences when in a formal state of war. However the amendment will result in a broader range of conduct being captured by the offence. The Explanatory Memorandum states that this particularly amendment is a technical clarification; however, it would seem that the meaning and effect of the provision is quite different to what presently exists. 112

In terms of commentary or sources on this particular point, the INSLM in the 2014 report stated that the euphemism “engaging in armed hostilities” found in paragraph 6(3)(aa) of the Foreign Incursions Act will often in practice and always in ambition involve unlawful killing – precisely the core concept informing the definition of “terrorist act” in the Criminal Code. 113 This was in the context of recommending consistency between the Code

112. Ibid., p. 137.
and the Foreign Incursions Act. The INSLM did not go on to recommend broadening or otherwise amending the term.

This proposed amendment may attract criticism as being excessively broad and perhaps unnecessary given the range of existing laws that could capture the prescribed conduct. It is possible a person who engages in subverting society as defined is likely to be doing it in protest or dissent of something and it may be a difficult offence to prove. The phrase has raised some concern, in particular because it may unintentionally expand the kinds of conduct that would trigger the foreign incursion offences. Gilbert + Tobin argues:

> The Explanatory Memorandum states that subverting society is ‘similar to that which constitutes a “terrorist act” in section 100.1. This is generally accurate but at the same time misleading. The definition of “subverting society” would include the list of harms referred to in the definition of a “terrorist act” in the Criminal Code and it would incorporate the same exception for political advocacy and protects. However, the definition of “subverting society” does not include other important elements in the definition of a “terrorist act”, namely that an act is done or a threat is made with a particular intention (to influence a government by intimidation, or to intimidate a section of the public) and a particular motive (to advance a political, religious, or ideological cause). In the absence of these additional requirements, some of the harms listed in the definition of terrorism would constitute much less serious offences (such as vandalism and assault).

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**Removing the requirement for the application of rules of evidence under the Foreign Evidence Act 1994**

The proposed amendments have not yet received much attention from stakeholders, most likely due to the short timeframe for consideration of the Bill and interest from the media focusing on other aspects of the Bill such as the declared area offences or the proposed extensions to various sunset clauses. However, the changes to the Foreign Evidence Act will have a substantial impact on the presumption of innocence and the defendant’s right to a fair trial.

The INSLM recommended, in March 2014, that consideration should be given to examining the merits of amendments to the Evidence Act 1995 and the Foreign Evidence Act 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. What the Government has proposed by these amendments does implement that recommendation to some extent but possibly with the unintended consequence that what is proposed is a threat to the defendant’s right to a fair trial, under Article 14 of the ICCPR. The Statement of Compatibility justifies any potential infringement of this right by noting the discretion of the court to direct that evidence not be adduced if to do so would have a substantial adverse effect on the defendant’s right to a fair hearing. Additionally, in a criminal proceeding, the defence will be able to challenge any evidence presented and the prosecution will still have to prove all elements of the offence beyond reasonable doubt. The Parliamentary Joint Committee on Human Rights will no doubt closely scrutinise these amendments.

Presently, evidence is frequently obtained or shared with foreign countries under the Mutual Assistance in Criminal Matters Act 1987. The Explanatory Memorandum notes that this is not always practicable and that some countries are not willing or able to provide the requested evidence to Australia. This, however, seems a broad and somewhat vague justification for what is, effectively, a removal of the rules of evidence for any evidence obtained and presented by this means.

**Item 125** would allow for a broader range of evidence, “foreign material”, to be presented, in terrorism-related proceedings when it has been obtained outside of the mutual assistance regime, for example, by police-to-police cooperation, or agency-to-agency cooperation. **Proposed section 27B** would allow a senior Australian Federal Police (AFP) member (defined by item 121 as the Commissioner, Deputy Commissioner, or senior executive AFP employee or equivalent) to provide a statement on oath about how the material was obtained by the foreign

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118. Explanatory Memorandum, p. 152.
authority and how it came into the possession of the AFP. The section would also allow, but not require, the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain the material through the formal mutual assistance channels. This certificate is only a discretionary measure for the Attorney-General and is therefore not a strong safeguard for the admissibility of certain evidence.

The amendments, also inserting proposed Part 3A (item 125, Schedule 1) to the Foreign Evidence Act, would remove the requirement in terrorism-related proceedings to comply with rules of evidence under Commonwealth, state or territory laws that would ordinarily apply to exclude the material. Instead, under proposed section 27C, the court would have the discretion to consider whether adding the material would have a substantial adverse effect on the right of a defendant to receive a fair trial.

Note too, that proposed section 27D would explicitly exclude foreign material or foreign government material that is inadmissible if the court finds that the material, or information contained in the material, was obtained directly as a result of torture or duress (as defined by proposed subsection 27D(3)) by a person defined in proposed subsection 27D(2). This provision upholds Australia’s international obligations under Article 15 of the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT).

Travel document suspension and exemptions for notice of passport refusal or cancellation

Suspension powers

The Bill will amend the Passports Act, Foreign Passports Act, ASIO Act and ADJR Act to respond to Recommendations V/3, V/4 and V/5 of the INSLM’s 2014 report.

As a ‘competent authority’, ASIO may submit a request to the Minister for Foreign Affairs (the Minister) under existing subsection 14(1) of the Passports Act for refusal or cancellation of an Australian passport if it suspects on reasonable grounds that:

• if a person is issued with an Australian passport, he or she would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and

• the person should be refused a passport in order to prevent him or her from engaging in that conduct.

The INSLM strongly agreed with ASIO that withholding passports is an important means of preventing Australians from travelling overseas to engage in terrorist activities or training, and considered the risks associated with Australians fighting in Syria and returning to Australia ‘worryingly real’.119 The INSLM went on to recommend provisions enabling ASIO to request, with the Director-General’s approval, an interim passport suspension where it is considering issuing an adverse security assessment in relation to a person (Recommendation V/4; an adverse security assessment would accompany a request to refuse or cancel a passport). The temporary suspension power was recommended based on two factors:

• the rapidity with which international travel arrangements can be made and

• the need to preserve the quality of ASIO’s security assessments instead of providing faster but potentially less reliable assessments.120

The INSLM suggested that the request should not be subject to merits or judicial review (except under subsection 75(v) of the Constitution), but that this should be coupled with a strict timeframe, safeguards against multiple requests in relation to the same person and provisions to make ASIO liable to pay the person’s lost travel costs if an adverse security assessment is not issued during the suspension period.121

Item 21 of Schedule 1 would insert proposed section 22A into the Passports Act, under which:

• ASIO may request the Minister to suspend all of a person’s Australian travel documents if it suspects on reasonable grounds that those documents should be suspended in order to prevent the person from leaving Australia to engage in conduct that might prejudice the security of Australia or a foreign country and

• the Minister may, on receiving such a request, suspend the person’s Australian travel documents for 14 days.

120. Ibid., pp. 46–48.
**Item 23** would insert **proposed section 24A** into the *Passports Act* to enable an officer (such as a Customs officer or a member of a police force) to demand that a person surrender a document if it has been suspended under **proposed section 22A**. Under **proposed subsection 24A(2)** it would be an offence, punishable by up to six months’ imprisonment, ten penalty units or both, not to comply with such a request.\(^{122}\) This is equivalent to section 24, which applies to cancelled or invalid Australian travel documents, but the penalty is half that which applies to the offence under that section. Under **proposed subsection 24A(3)**, a document obtained under section 24A must be returned once the suspension ends, unless it is cancelled.

**Items 129** and **131** of Schedule 1 would make equivalent amendments to the *Foreign Passports Act* by inserting **proposed sections 15A** and **16A** respectively, in response to **Recommendation V/5** of the INSLM’s 2014 report.\(^{123}\) The Minister would be able to order that a person’s foreign travel documents be surrendered for up to 14 days to prevent them leaving Australia.

**Item 34** would insert proposed paragraph 36(ba) into the ASIO Act to provide that other than subsections 37(1), (3) and (4), Part IV of the ASIO Act will not apply to a request under proposed section 22A of the Passports Act. This means that such requests would not be subject to the notice and merits review requirements set out in that Part. This would be consistent with the INSLM’s suggestion in relation to review, however the INSLM did not comment on notice requirements.

**Issue: adequacy of safeguards**

As noted above, the INSLM suggested that a suspension request not be subject to review. However, under the Bill the Minister’s decision to suspend a person’s Australian travel documents would also not be subject to review. No provision is made for a person to seek a review by the Minister, as exists under section 48 of the *Passports Act* for decisions to refuse or cancel an Australian travel document, or by the Administrative Appeals Tribunal (AAT), as exists under section 50 of the *Passports Act* and section 16 of the *Foreign Passports Act*.

**Item 1** of Schedule 1 would amend the *ADJR Act* to exempt decisions made under **proposed section 22A** of the *Passports Act* and **proposed section 15A** of the *Foreign Passports Act* from its operation.\(^{124}\) The Explanatory Memorandum states that this is necessary to avoid compromising security agency operations and defeating the national security purposes of the new mechanisms.\(^{125}\) The Bill also fails to take up the INSLM’s suggestion that ASIO be required to reimburse a person’s lost travel costs if their travel documents are not cancelled within the 14 day suspension period. The Explanatory Memorandum does not address why that suggestion has not been implemented. This would be an important protection in the context of the lack of review rights.

Under **proposed subsection 22A(3)**, ASIO would be prevented from making any further suspension requests in relation to the same person unless its grounds for suspicion include new information. The LCA has suggested that this should be accompanied by a provision limiting the number of consecutive requests that may be made. It also suggests inclusion of a requirement for ASIO to report to the Attorney-General and the IGIS on the use of the suspension provisions.\(^{126}\)

**Issue: delegation of power to suspend Australian travel documents**

Section 51 of the *Passports Act* enables the Minister to delegate powers under certain provisions to certain officers, including ‘a person, or a person who is one of a class of persons, authorised in writing by the Minister under section 52’.\(^{127}\) **Item 26** would amend section 51 to include decisions to suspend a passport under **proposed section 22A** among the powers that may be delegated. The IGIS has pointed out that it would be possible to delegate that decision to one or more ASIO employees, and that if that happened, arrangements would need to be put in place to ensure the independence of such decisions.\(^{128}\) AGD stated that the Minister has not delegated powers to cancel Australian travel documents and that ‘there is no intention to delegate the

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122. A penalty unit is currently equal to $170: *Crimes Act*, op. cit., section 4AA.
125. Explanatory Memorandum, p. 77.
126. LCA, Submission to PICIS, op. cit., pp. 26–27.
128. IGIS, Submission to the PICIS, op. cit., p. 8.
power to suspend Australian travel documents to ASIO staff.\(^{129}\) It would be preferable for such an option not to be available in the first place.

**Issue: agency instead of individual making request**

As noted above, the provisions enable a request to be made by ASIO for suspension of travel documents. The IGIS suggested that both the ability to oversight the provisions and accountability for their use would be improved if the provisions were amended so that it was an individual (for example, the Director-General), rather than the agency, making the request. This is in part because it would be difficult to determine that ASIO as an organisation holds a reasonable suspicion of the relevant matters.\(^{130}\)

**Withholding notice of travel document cancellation or refusal**

**Item 25** would insert proposed section 48A into the Passports Act to provide that in certain circumstances, the Minister is not required to notify a person of a decision to refuse to issue an Australian passport or cancel an Australian travel document. This would implement **Recommendation V/3** of the INSLM’s 2014 report.\(^{131}\) The INSLM considered that the Minister should not be required to notify a person where to do so would be prejudicial to security or to the investigation of an offence listed in Schedule 1 to the Passports Determination. The Minister will not be required to notify a person if:

- the request to refuse or cancel the passport was made by ASIO, and a certificate is in force under paragraph 38(2)(a) of the ASIO Act in relation to the security assessment relating to the request (a certificate may provide that the Attorney-General is satisfied that withholding notification of assessment is ‘essential to the security of the nation’);\(^{132}\)
- the request to refuse or cancel the passport was made by the AFP, and a certificate is in force under proposed subsection 48A(4), under which a certificate may provide that the Minister responsible for the Australian Federal Police Act 1979 is satisfied that notification of the decision would ‘adversely affect a current investigation’ of a listed offence (note that this is lower than the ‘prejudicial’ threshold recommended by the INSLM).

The range of offences in relation to which a certificate may be issued under proposed subsection 48A(4) is narrower than under Schedule 1 to the Passports Determination and is restricted mainly to terrorism-related offences.

**Proposed subsection 48A(7)** would provide that the section overrides the notice requirements that would usually apply under section 27A of the Administrative Appeals Tribunals Act 1975.\(^{133}\) That provision will apply if neither certificate remains in force in relation to the decision to cancel a person’s passport. The LCA notes the absence of any positive obligation under section 38 of the ASIO Act or proposed subsection 48A(4) of the Passports Act for the issuer of a certificate to revisit a certificate and revoke it where the circumstances that led to its issue no longer apply, and suggests the imposition of such requirements.\(^{134}\)

**Delayed notification search warrants**

Regular search warrant schemes require the officers executing a warrant to provide a copy of the warrant to the owner or occupier of the premises and allow that person to observe the search. This means that once a search is conducted, suspects are aware of police interest in their activities. This can present difficulties for law enforcement, particularly in the context of investigations into multiple suspects over an extended period:

> If members of a terrorist group are alerted to investigator’s knowledge of their activities, the success of the law enforcement operation could be jeopardised. For example, a suspect whose premises are searched under the current regime would be notified of police interest in their activities. A suspect could then undertake counter-

\(^{129}\) AGD, Supplementary submission to the PICIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, n.d., p. 29, accessed 15 October 2014.


\(^{131}\) The INSLM’s recommendation also applied to the Foreign Passports Act. AGD states that such an amendment is not required to achieve the objective of the recommendation: AGD, Submission to PICIS, op. cit., Attachment B.

\(^{132}\) ASIO Act, op. cit.

\(^{133}\) Administrative Appeals Tribunals Act 1975, accessed 10 October 2014.

\(^{134}\) LCA, Submission to PICIS, op. cit., pp. 28–29.
surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways.135

As the name suggests, delayed notification search warrants (DNSWs) fall between regular search warrant schemes (such as that provided under Division 2, Part IAA of the Crimes Act) and covert search warrant schemes (such as the one utilised by ASIO for intelligence).136 Covert search warrant schemes allow searches to be conducted without any notification of the owner or occupier of premises in the same fashion as other covert methods, such as surveillance devices and telecommunications interception. Victoria, Queensland, Western Australia and the Northern Territory provide for covert search warrants for suspected terrorism offences.137 DNSWs are available in New South Wales for suspected terrorism and other types of offences.138 DNSW schemes enable searches to be undertaken covertly, but require the owner or occupier to be notified and provided with information about the search at a later date. The AFP explains further:

The proposed DNSW regime will allow the AFP to identify and collect information about: other suspects involved in terrorist activity, the proposed location of and methodology for any planned attack, and the means of communication among suspects. In addition, the proposed DNSW regime would give the AFP the opportunity to identify and decipher any encryption techniques a suspect may be using to protect electronic communications. The ability to examine and potentially overcome these techniques without the knowledge of the suspect would facilitate the ongoing lawful monitoring of communications while preserving evidential material.139

A DNSW regime for the investigation of suspected Commonwealth terrorism and other serious offences was included in the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007 (previously 2006; NIP Bill), which was passed by the Senate on 8 August 2007 but lapsed at the dissolution of Parliament ahead of the 2007 Federal election.140 The Senate Standing Committee on Legal and Constitutional Affairs inquired into the NIP Bill and made three recommendations for amendments to the proposed DNSW scheme.141 Two of those recommendations—that the range of offences to which the scheme applies be narrowed and that the Ombudsman be required to report to the Minister on inspections of DNSW records every six months instead of annually—are reflected in the Bill. The third recommendation, relating to the impersonation of another person in order to conduct a search without being detected, has not. The recommendation to apply the same approval process to that power as must be followed for the acquisition of an assumed identity would be disproportionate to, and impractical in relation to, the much narrower scope of executing a DNSW.

Item 51 will insert proposed Part IAAA into the Crimes Act to establish a DNSW regime for the investigation of Commonwealth terrorism offences. This will implement Recommendation VI/2 of the INSLM’s 2014 report, including the INSLM’s suggestion that the threshold tests for issue of a DNSW proposed in the NIP Bill be replicated.142 The approval processes, powers exercisable under warrant and provisions relating to retention and return of things seized mirror those in the regular search warrant regime in Division 2, Part IAA of the Crimes Act and related provisions in Division 4C of the same part. Key features of the proposed DNSW scheme, and those which distinguish it from the regular search warrant regime are outlined below.

135. Explanatory Memorandum, p. 95.
Scope—offences and agency

A DNSW may be issued for an ‘eligible offence’, defined in proposed subsection 3ZZAA(4) as a terrorism offence (defined in section 3 of the Crimes Act) punishable by imprisonment for seven years or more. This will mean that the only terrorism offences in the Criminal Code for which a DNSW may not be issued will be those of associating with terrorist organisations under section 102.8, for which the maximum penalty is imprisonment for three years.\(^{143}\) The penalty threshold of imprisonment for seven years or more is the same as the general threshold that applies for access to telecommunications interception powers.\(^{144}\)

‘Eligible agency’ and ‘authorised agency’ will both be defined to mean the AFP (proposed subsection 3ZZAA(3) and proposed section 3ZZAC), and ‘eligible officer’ will mean a member or special member of the AFP (proposed section 3ZZAC), meaning DNSWs may only be issued to and executed by the AFP. Another person may be authorised by an eligible officer to assist in the execution of a DNSW, under the definition of ‘person assisting’ in proposed section 3ZZAC.

Threshold tests

Proposed subsection 3ZZBA sets out the ‘conditions for issue’ of which both the AFP Commissioner or delegate and the issuing authority must be satisfied:

A person is satisfied that the conditions for issue of a delayed notification search warrant are met in respect of particular premises if the person:

(a) suspects, on reasonable grounds, that one or more eligible offences have been, are being, are about to be or are likely to be committed; and

(b) suspects, on reasonable grounds, that entry and search of the premises will substantially assist in the prevention or investigation of one or more of those offences; and

(c) believes, on reasonable grounds, that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier of the premises or any other person present at the premises.

Issue of warrants

Under proposed section 3ZZBB, the Commissioner or delegate may authorise an eligible officer to apply for a DNSW if satisfied that the conditions for issue are met. Authorisations must generally be in writing, but may be given orally if the Commissioner or delegate is satisfied it is an urgent case or that the delay associated with giving a written authorisation would frustrate the effective execution of the DNSW. If authorisation is provided orally, the Commissioner or delegate must make a written record within seven days. An application may then be made to an ‘eligible issuing officer’ under proposed section 3ZZBC. Under proposed section 3ZZAD, ‘eligible issuing officer’ will mean certain judges of the Federal Court of Australia or a Supreme Court who consent and are declared by the Minister under proposed section 3ZZAE and certain members of the AAT nominated by the Minister under proposed section 3ZZAF.

Under subsection 3ZZBD(1), an eligible issuing officer may issue a DNSW if an application is made in accordance with proposed section 3ZZBC and he or she is ‘satisfied, by information on oath or affirmation, that the conditions for issue are met’. Proposed subsection 3ZZBD would list matters the eligible issuing officer must consider in determining whether a DNSW should be issued. Included among these matters are:

- the extent to which executing the warrant would assist in the investigation or prevention of the relevant offence
- the existence of alternative means of obtaining the evidence or information sought
- the nature and seriousness of the offence and
- the extent to which the privacy of any person is likely to be affected.

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\(^{143}\) Criminal Code, op. cit.

\(^{144}\) Telecommunications (Interception and Access) Act 1979, section 5D, accessed 3 October 2014.
Proposed section 3ZZBF would provide for an application for a DNSW to be made by telephone, fax or other electronic means in urgent cases or where the delay associated with an application made in person would frustrate the effective execution of the DNSW. In order to issue a DNSW under that section, an eligible issuing officer must be satisfied, in addition to the matters outlined above, of the urgency or the frustration that would otherwise occur.

Proposed section 3ZZBJ would provide that where an eligible issuing officer is not satisfied that a DNSW should be issued, he or she may treat the application as if it were an application for a normal search warrant and if satisfied of the relevant matters, issue a normal search warrant.

Item 40 of Schedule 1 will insert a note in subsection 3C(1) under the definition of ‘issuing officer’ for the purpose of the normal search warrant regime in Division 2 of Part IAA of the Crimes Act to clarify that any applications for normal search warrants and DNSWs relevant to the same investigation can be determined by one eligible issuing officer.

Distinguishing features of DNSWs

Proposed section 3ZZBE would set out the information that must be included in a DNSW, while proposed Division 3 of proposed Part IAAA would provide the parameters for the exercise of powers under a DNSW. Key powers that would distinguish DNSWs from normal search warrants include:

- entering adjoining premises solely for the purpose of entering and exiting the warrant premises where reasonably necessary (proposed paragraphs 3ZZBD(2)(e), 3ZZBE(1)(f) and 3ZZCA(1)(b))
- entering warrant or adjoining premises without the knowledge of the occupier of the premises or any other person present at the premises (proposed subsection 3ZZCA(2))
- placing things in substitution for things seized or moved so as to conceal that action, and re-entering premises in order to return things seized or moved and retrieve substitute items (proposed paragraphs 3ZZBE(1)(k) and (l) and 3ZZCA(1)(j) and (l) and subsection 3ZZCA(3))
- impersonating another person to the extent reasonably necessary to execute a DNSW (proposed paragraph 3ZZCA(1)(c)) and
- doing anything reasonably necessary to conceal any actions undertaken under a DNSW (proposed paragraph 3ZZCA(1)(k)).

Proposed section 3ZZCD would require the officer executing a DNSW to have a copy of the DNSW in his or her possession, or be in a position to produce it without delay, but would not require it to be produced.

Offence for unauthorised disclosure

Under proposed subsection 3ZZHA(1), a person would commit an offence if:

- the person discloses information (to which the fault element of intention would apply) and
- the information relates to an application for, or the execution of, a DNSW; a report of an executing officer to the Commissioner about the DNSW; or a notice to the occupier of the warrant premises or adjoining premises (to which the fault element of recklessness would apply).\(^{145}\)

The maximum penalty would be imprisonment for two years.

Several exceptions to the offence would be provided under proposed subsection 3ZZHA(2):

\[\begin{align*}
\text{(a)} & \quad \text{the disclosure is in connection with the administration or execution of this Part;} \\
\text{(b)} & \quad \text{the disclosure is for the purposes of any legal proceeding arising out of or otherwise related to this Part or of any report of any such proceedings;} \\
\text{(c)} & \quad \text{the disclosure is in accordance with any requirement imposed by law;} \\
\text{(d)} & \quad \text{the disclosure is for the purposes of:}
\end{align*}\]

\(^{145}\) Automatic fault elements will apply to the matters in these first two dot points in accordance with section 5.6 of the Criminal Code.
(i) the performance of duties or functions or the exercise of powers under or in relation to this Part; or

(ii) the performance of duties or functions or the exercise of powers by a law enforcement officer, an officer of the Australian Security Intelligence Organisation, a staff member of the Australian Secret Intelligence Service or a person seconded to either of those bodies;

(e) the disclosure is made after a warrant premises occupier’s notice or an adjoining premises occupier’s notice has been given in relation to the warrant;

(f) the disclosure is made after a direction has been given under subsection 3ZZDA(4) or 3ZZDB(4) in relation to the warrant [directions given by an eligible issuing officer if the occupier cannot be identified or located].

A defendant would bear an evidential burden in relation to an exception in accordance with section 13.3 of the Criminal Code. The Explanatory Memorandum does not provide any justification for including these matters as defences for which a defendant bears an evidential burden instead of elements of the offence that the prosecution must prove.

**Issue: public interest disclosures and seeking legal advice**

The Explanatory Memorandum states that the offence is modelled on a similar offence for disclosing information about controlled operations under section 15HK of the Crimes Act. However, it contains no equivalent defence for disclosures for the purpose of obtaining legal advice in relation to a DNSW, and it would seem that this should be rectified.

There is also no exception for public interest disclosures. Under the Public Interest Disclosure Act 2013 (PID Act), an AFP officer would be protected from civil, criminal and administrative liability for making a ‘public interest disclosure’ in relation to a DNSW (‘whistleblowing’), provided the disclosure is in accord with the Act. Types of ‘disclosable conduct’ include, for example, conduct that contravenes an Australian law, involves corruption or abuse of public office, is an abuse of trust, or constitutes maladministration.

However, proposed subsection 3ZZHA(2) does not provide an equivalent exception for persons not covered by the PID Act, such as journalists. The Commonwealth Director of Public Prosecutions has the discretion not to prosecute an offence if it considers it is not in the public interest to do so. However, an exception or defence to the proposed offence would provide much clearer protection for public interest disclosures.

**Issue: matters for which a defendant bears an evidential burden**

Matters should generally only be cast as a defence, thereby placing an evidential burden on the defendant, where they are ‘peculiarly within the defendant’s knowledge and not available to the prosecution’. It is difficult to see how the matters in proposed paragraphs 3ZZHA(2)(e) and (f) (that is, that an occupier has received notice of the execution of the DNSW or directions have been given where the occupier could not be found) would be peculiarly within the knowledge of the defendant. Accordingly, it would be more appropriate to include those matters as elements of the offence to be proven by the prosecution.

The Scrutiny of Bills Committee has commented on the lack of any justification in the Explanatory Memorandum for casting the matters in proposed subsection 3ZZHA(2) as defences and sought the Attorney-General’s advice on the rationale of the proposed approach.
Time limits and notice requirements

Proposed paragraph 3ZZBE(1)(h) would provide that a date of expiry must be specified in a DNSW, and that it must be no more than 30 days after the date of issue.

Proposed paragraph 3ZZBE(1)(i) would provide that the time by which notice of entry must be given to the occupier of the warrant premises and where relevant the occupier of an adjoining premises, must be specified in the DNSW, and that it must be no more than six months after the date of issue. An eligible issuing officer would be able to extend this period under proposed section 3ZZDC if satisfied that there are reasonable grounds for continuing to delay notice of entry. Under proposed subsection 3ZZDC(6), any extension:

(a) must not extend the time by more than 6 months on any one occasion; and

(b) must not extend the time to more than 18 months after the day on which the delayed notification search warrant was issued unless:

(i) the Minister is satisfied on reasonable grounds that there are exceptional circumstances justifying the extension, and that it is in the public interest to do so; and

(ii) the Minister has issued a certificate approving the application for the extension; and

(iii) the eligible issuing officer is satisfied that there are exceptional circumstances justifying such an extension.

Under proposed subsection 3ZZDC(3), this general rule would be modified if a person is charged with an offence and the prosecution intends to rely on evidence obtained under a DNSW. In such cases, notice would need to be given as soon as practicable after the person has been charged, and no later than whichever occurs first—the expiry of the notice period or the time of service of the brief of evidence by the prosecution.

Proposed sections 3ZZDA and 3ZZDB set out the contents that would be required in notices of entry to be given to occupiers of the warrant premises and, where relevant, adjoining premises, respectively. Both types of notices must be accompanied by a copy of the DNSW. If an occupier cannot be identified or located, an eligible issuing officer may give such directions as he or she sees fit.

Safeguards, accountability and reporting

The proposed DNSW scheme includes extensive safeguards and accountability mechanisms.

Proposed sections 3ZZBH and 3ZZBI would create offences for providing false or misleading information in an application for a DNSW and providing false or misleading information or engaging in certain types of conduct in relation to DNSWs sought by telephone, fax or other electronic means. Each of the offences has a maximum penalty of imprisonment for two years.

Proposed Division 6 of proposed Part IAAA sets out record-keeping and reporting requirements, including:

• written reports by executing officers or applicants to the Commissioner as soon as practicable after the DNSW is executed, or if it is not executed, the expiry of the warrant (proposed section 3ZZFA)

• annual written reports from the Commissioner to the Minister detailing information on applications, DNSWs, and things done under DNSWs, which must be provided not more than three months after the end of each financial year and tabled by the Minister in both Houses of Parliament (proposed section 3ZZFB)

• six-monthly written reports from the Commissioner to the Ombudsman detailing the number of applications, and DNSWs issued and executed (proposed section 3ZZFC)

• record keeping requirements (proposed section 3ZZFD) and maintenance of a detailed register of DNSWs (proposed section 3ZZFE).

Proposed Division 7 would provide comprehensive powers for the Ombudsman to inspect records and obtain information relating to DNSWs, including an offence under proposed section 3ZZGD with a maximum penalty of imprisonment for six months for failure to cooperate. Proposed section 3ZZGB would require the Ombudsman to inspect records relating to DNSWs at least once every six months. Proposed section 3ZZGH would require the Ombudsman to report to the Minister as soon as practicable after 1 January and 1 July each year, and for the Minister to table copies of the report in both Houses of Parliament.
ASIO questioning warrants and questioning and detention warrants

Division 3, Part III of the ASIO Act, enacted in 2003, provides for the issue of questioning warrants (QWs) and questioning and detention warrants (QDWs) in relation to suspected terrorism offences where other means of collecting the relevant intelligence would be ineffective. The warrants are intended as intelligence gathering and preventative tools, not investigative tools. As such, a person is questioned on the basis that they can provide information about a potential terrorism offence rather than on suspicion of having committed an offence, and detained on the basis of preventing the person from damaging evidence or alerting someone involved in a terrorism offence to the fact it is being investigated. A person may actually be detained under either warrant type; the distinction is when a person may be detained and by whom it is authorised.

- A QW issued under section 34E requires a person to appear before a ‘prescribed authority’ (a judge or member of the AAT prescribed under section 34B) for questioning either immediately after being notified of the warrant or at a time specified in the warrant.

- A QDW issued under section 34G authorises a person to be taken into custody by a police officer, brought immediately before a prescribed authority for questioning and detained until the relevant statutory time limit expires (the longest period permitted is seven days from when the person was first brought before a prescribed authority).

- Under section 34K, which applies to both warrant types, detention or further detention of the person are among the directions a prescribed authority may make while a person is before it.

As at the time of ASIO’s submission to the PJCIS’s inquiry into the Bill, no QDWs had been issued or requested and 16 QWs had been issued.

The provisions were subject to a three-year sunset clause and a requirement that the PJC-AAD (now the PJCIS) review the operation, effectiveness and implications of the provisions six months before the end of the sunset period. The PJC-AAD’s report on its review concluded that the provisions were useful and to date had been used within the bounds of the law and administered in a professional way. However, the PJC-AAD considered the laws should continue to be subject to a sunset clause, and recommended a range of amendments, many of which were aimed at improving the clarity of the provisions, accountability mechanisms and legal representation and access to complaints mechanisms.

The ASIO Legislation Amendment Act 2006 implemented some of the PJC-AAD’s recommendations, extended the sunset clause by ten years (to 22 July 2016) instead of the five years recommended by the PJC-AAD, and required another review by the PJCIS by 22 January 2016.

The INSLM reviewed the provisions in 2012, including a study of all the files associated with every QW. The INSLM found that ASIO and other Commonwealth officers had complied with all statutory provisions and that questioning under QWs had ‘played a role in informing intelligence assessments and progressing terrorism investigations.’ The INSLM made nine recommendations for improvements to the QW provisions and that those relating to QDWs be repealed. The INSLM considered that less restrictive but equally effective means were available to achieve the objectives of QDWs (including detention under a QW) and that accordingly, QDWs were both unnecessary and unjustified. One of the grounds on which the INSLM considered QDWs to be unjustified was that the determination that immediate detention of a person is required under the sunset clause by ten years (to 22 July 2016) instead of the five years recommended by the PJC-AAD, and required another review by the PJCIS by 22 January 2016.

The INSLM considered that less restrictive but equally effective means were available to achieve the objectives of QDWs (including detention under a QW) and that accordingly, QDWs were both unnecessary and unjustified. One of the grounds on which the INSLM considered QDWs to be unjustified was that the determination that immediate detention of a person is necessary rests with the Attorney-General (under subsection 34F(4)), not the ‘issuing authority’ (a judge...
appointed under 34AB). The INSLM was of the view that this took QDWs ‘over or too close to the line’ set by Article 9(1) of the ICCPR (the right to freedom from arbitrary detention).161

Under the Bill, both QWs and QDWs would be retained. The Bill would implement two of the INSLM’s nine recommendations on QWs in full and one in part.162

Extension of sunset period and delay of PJCIS review

**Item 33** of Schedule 1 of the Bill would extend the sunset period that applies to Division 3 of Part III of the *ASIO Act* by a further ten years to July 2026. The Explanatory Memorandum states:

> The Government is of the view that there are realistic and credible circumstances in which it may be necessary to conduct coercive questioning of a person for the purposes of gathering intelligence about a terrorism offence – as distinct from conducting law enforcement action, or obtaining a preventive order under Divisions 104 and 105 of the Criminal Code – particularly in time critical circumstances. Intelligence is integral to protecting Australia and Australians from the threat of terrorism, and it is important to ensure that ASIO has the necessary capabilities to perform this function. The threat of terrorism is pervasive and has not abated since the enactment of Division 3 of Part III in 2003. On this basis, the Government is satisfied that there is a continued need for these powers.163

It also states that reviews of the provisions by the INSLM (2012), the PJC-AAD (2005) and continuing oversight by the IGIS have not identified any impropriety in their use.164 ASIO’s submission to the PJCIS’s inquiry into the Bill notes the raising of the terrorism alert level and states that it ‘strongly believes the current security environment, including the risk of onshore attacks’ justifies the amendment.165

The Explanatory Memorandum does not address the INSLM’s recommendation that Part 2 of Division 3 (questioning and detention warrants) be repealed. In evidence to the PJCIS’s inquiry into the Bill, the former INSLM confirmed that he continues to hold the view that QDWs should be repealed, despite the increase in the terrorism alert level.166

As noted in the separate section on sunset provisions, several stakeholders consider this measure should be removed from the Bill and extension of the provisions considered separately after the statutory review currently set for 2016. The LCA and Professor Saul go further, arguing that QDWs should simply be repealed in line with the INSLM’s recommendation.167 Responding to those suggestions in a supplementary submission, AGD stated ‘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’.168

**Delaying Parliamentary review by ten years**

**Item 133** of Schedule 1 of the Bill would amend paragraph 29(1)(bb) of the *Intelligence Services Act* to require the PJCIS to review Division 3 of Part III of the *ASIO Act* by January 2026 instead of January 2016.169

The purpose of the PJCIS reviewing the provisions by January 2016 would be to inform a decision on whether they should remain in force beyond July 2016. Extending the operation of the provisions by a further ten years before such a review has been undertaken denies the PJCIS a chance to thoroughly consider the provisions and denies the Government and the Parliament the benefits of the PJCIS’s considered views.

Associate Professor Carne argued that this amendment:

> … would (a) set a dangerous precedent whereby the legislated periodic review accountability mechanisms over exceptional powers can be peremptorily and hastily set aside due to a [sic] executive claim of present circumstances

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161. Ibid., Chapter V (quote taken from p. 106).
162. Recommendations IV/1 and IV/6 would be implemented in full and Recommendation IV/3 in part.
163. Explanatory Memorandum, p. 89.
164. Ibid.
165. ASIO, Submission to PJCIS, op. cit., p. 6.
166. Walker, Evidence to PJCIS, op. cit.
167. LCA, Submission to PJCIS, op. cit., pp. 49–51; B Saul, Submission to PJCIS, op. cit.
or expediency and (b) also produce a legislative elision or slippage from the exceptional or unusual nature of such powers to their legislative normalisation and permanence.\textsuperscript{170}

While the PJCIS has been asked to inquire into the Bill, as noted earlier in this Digest, that is quite different to a review of the ‘operation, effectiveness and implications’ of these provisions that would have been required by January 2016. In a 2012 article, McGarrity, Gulati and Williams pointed to the earlier pairing of committee review and sunset clause in relation to these provisions as an example of the ‘potential force of sunset clauses’:

… the Coalition [Government] responded positively to the Joint Committee’s report. It agreed in full with six recommendations and in part with a further six. The amendments, as incorporated into the \textit{ASIO Amendment Act 2006} (Cth), clarified aspects of the operation of the powers as well as adding safeguards for individuals subjected to a warrant. The latter included the creation of explicit rights for the subject of a questioning warrant to contact a lawyer and to apply for financial assistance, and better facilitated the ability of the subject to make complaints in relation to the conduct of ASIO officers. The decision to amend the Special Powers Regime reveals the potential force of sunset clauses. The imminent expiry of the legislation meant that the Coalition government was forced to make a decision in relation to the legislation - to decide whether to renew the legislation, repeal it or make amendments. The need to make a decision, combined with the public spotlight shone on the legislation by the Joint Committee’s review, placed pressure on the government to address problems with the legislation in a meaningful way.\textsuperscript{171}

\textbf{Reduction of threshold for Attorney-General’s consent to warrant application}

One of the criteria of which the Attorney-General must currently be satisfied in order to consent to a request for a QW under subsection 34D(4) of the \textit{ASIO Act} is that ‘relying on other methods of collecting that intelligence would be ineffective’. The INSLM considered that this requirement limits both the use and effectiveness of QWs as an investigative tool. As long as other general safeguards, such as the Attorney-General’s Guidelines issued under section 8A of the \textit{ASIO Act} and the written statement of procedures for QWs required under section 34C, remain in place, the INSLM considered the ‘last resort’ test should be replaced with something less restrictive.\textsuperscript{172}

\textbf{Item 28} would repeal and replace paragraph 34D(4)(b) so that it will instead require that ‘having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued’. This will partially implement \textbf{Recommendation IV/1} of the INSLM’s 2012 report. However, that part of the recommendation was balanced by another part, which was ‘The issuing authority as well as the Attorney-General should be required to consider all the prerequisites for the issue of QWs, rather than the issuing authority [under section 34E] taking the consent of the Attorney-General as conclusive of some of them’.\textsuperscript{173} That part of the recommendation has not been implemented in the Bill. Accordingly, this measure implements the part of the INSLM’s recommendation that would make the test for a QW less stringent, without adopting the part that would make it more stringent. The Explanatory Memorandum provides no explanation as to why that is the case.

\textbf{Use of force}

Section 34V of the \textit{ASIO Act} governs the use of force in the execution of a QW or QDW. A general limitation on the use of potentially lethal force is provided in paragraph 34V(3)(a), under which a police officer must not:

… do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer).

Paragraph 34V(3)(b) provides a more specific limitation in instances where a person is attempting to escape being taken into custody by fleeing that, as well as the test above, ‘the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be taken into custody in any other manner’. The INSLM considered that this additional requirement was essentially redundant and should

\begin{itemize}
\item \textsuperscript{170} G Carne, Evidence to PJCIS, op. cit., p. 8.
\item \textsuperscript{171} ‘Sunset clauses in Australian anti-terror laws’, op. cit., p. 324.
\item \textsuperscript{172} \textit{Declassified annual report}, 2012, op. cit., pp. 71–74.
\item \textsuperscript{173} Ibid., p. 74.
\end{itemize}
therefore be removed.\footnote{Ibid., pp. 77–80 (Recommendation IV/3).} \textbf{Item 32} would implement that recommendation by repealing and replacing subsection 34V(3).

\section*{Offence for destroying or tampering with records and things}

Section 34L of the ASIO Act provides for offences related to giving information and producing things in the context of QWs and QDWs. \textbf{Recommendation IV/6} of the INSLM’s report was inclusion of an additional offence of ‘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’.\footnote{Explanatory Memorandum, p. 87.}

\textbf{Item 30} would insert \textbf{proposed subsection 34L(10)} to make it an offence with a maximum penalty of imprisonment for five years if:

\begin{itemize}
\item[(a)] the person has, in accordance with a warrant issued under this Division, been requested to produce a record or thing; and
\item[(b)] the person engages in conduct; and
\item[(c)] as a result of the conduct, the record or thing is unable to be produced, or to be produced in wholly legible or usable form.
\end{itemize}

The maximum penalty is the same as applied to other offences under section 34L.

The recommendation related to engaging in conduct with the \textit{intent of preventing} something from being produced. Due to the application of automatic fault elements under the \textit{Criminal Code}, the fault element of intention would apply to the conduct and the fault element of recklessness would apply to the result of the conduct in \textbf{proposed subsection 34L(10)}. The Explanatory Memorandum provides appropriate justification for this.\footnote{Ibid., p. 83.}

\section*{Control orders}

Control orders (COs) were introduced by the \textit{Anti-Terrorism Act (No. 2) 2005}.\footnote{Anti-Terrorism Act (No. 2) 2005, Part 1 of Schedule 4, accessed 2 October 2014.} The introduction of the Bill for this Act followed on from the London bombings in July 2005 and the subsequent agreement to strengthen counter-terrorism laws reached at the special meeting of the COAG in September 2005 (COAG Agreement).\footnote{COAG, \textit{Communique, special meeting on counter-terrorism}, 27 September 2005, accessed 10 October 2014.}

The purpose of the CO regime in Division 104 of the \textit{Criminal Code}, enacted in 2005, is ‘to allow obligations, prohibitions and restrictions to be imposed on a person ... for the purpose of protecting the public from a terrorist act’.\footnote{Criminal Code, op. cit., section 104.1.}

A senior AFP member may seek the Attorney-General’s written consent to request an interim CO if he or she:

\begin{itemize}
\item considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act or
\item suspects on reasonable grounds that the person has provided training to, or received training from, a terrorist organisation listed under the Criminal Code Regulations 2002.\footnote{Ibid., subsection 104.2(2); Criminal Code Regulations 2002, accessed 10 October 2014.}
\end{itemize}

Following consent from the Attorney-General, an application for a CO may be made to an issuing court. An interim CO may be made that imposes one or more of the following obligations, prohibitions and restrictions, as set out in subsection 104.5(3):

\begin{itemize}
\item[(a)] a prohibition or restriction on the person being at specified areas or places;
\item[(b)] a prohibition or restriction on the person leaving Australia;
\item[(c)] a requirement that the person remain at specified premises between specified times each day, or on specified
days;
(d) a requirement that the person wear a tracking device;
(e) a prohibition or restriction on the person communicating or associating with specified individuals;
(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
(g) a prohibition or restriction on the person possessing or using specified articles or substances;
(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
(i) a requirement that the person report to specified persons at specified times and places;
(j) a requirement that the person allow himself or herself to be photographed;
(k) a requirement that the person allow impressions of his or her fingerprints to be taken;
(l) a requirement that the person participate in specified counselling or education.\(^{181}\)

The interim CO must specify a day on which the person may attend the court so it can confirm or revoke the order, or declare it to be void.\(^{182}\) COs may be varied and can remain in force for up to 12 months.\(^{183}\)

The CO regime was one of the more controversial aspects of the Anti-Terrorism Act (No. 2) 2005. Some of the key issues concerned the impact of the procedures for *ex parte* interim COs on the principles of natural justice and procedural fairness, the breadth of the threshold for the issue of COs, the adequacy of procedures to ensure a fair hearing and the inclusion of a criminal offence for breaching a CO.\(^{184}\)

In accordance with the COAG Agreement, the CO regime is subject to a ten-year sunset clause. In its report on the Anti-Terrorism Bill (No. 2) 2005, the Senate Standing Committee on Legal and Constitutional Affairs recommended the sunset period be reduced to five years, but this was rejected by the government of the day.\(^{185}\)

The CO regime has been reviewed by the INSLM, which in 2012 recommended it be repealed and replaced with post-conviction orders, and by the COAG Review Committee, which in 2013 recommended it be retained, but with additional safeguards and protections included, stating ‘the present safeguards are inadequate and ... substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held’.\(^{186}\)

Under the Bill, the CO regime would be retained and expanded. The Bill would also implement two of the COAG Review Committee’s ten recommendations for amendment in full and another in part.\(^{187}\) The INSLM made three recommendations for amendments to the CO regime if it were, against its main recommendation, retained.\(^{188}\) None of them would be implemented by the Bill.

**Extension of sunset period**

**Items 86 and 87** of Schedule 1 of the Bill would extend the sunset period that applies to Division 104 of the Criminal Code by a further ten years to December 2025. The Explanatory Memorandum provides the following broad justification:

> … This amendment recognises the enduring nature of the terrorist threat and the important role of control orders in mitigating and responding to that threat

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181. [Criminal Code](#), op. cit.
182. ibid., paragraph 104.5(1)(e).
183. ibid., section 104.20 and paragraphs 104.5(1)(f) and 104.16(1)(d).
187. Recommendations 32 (no change to maximum duration of a CO) and 36 would be implemented in full and Recommendation 34 in part.
In light of the increasing threat the escalating terrorist situation in Iraq and Syria poses to the security of all Australians, both here in Australia and overseas, it is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.\footnote{189}

The AFP stated in its submission to the PJCIS’s inquiry into the Bill:

> The advantage of the control order regime is that it is a preventative measure which has the flexibility to be tailored (through specifically imposed conditions) to the particular threat the individual is suspected of posing to the community. The use of control orders in appropriate circumstances allows police to effectively monitor the person’s movements and minimise the risk of future terrorist activity. The AFP considers that control orders remain a necessary and proportionate preventative measure and form an important part of the counter-terrorism toolkit.\footnote{190}

The Explanatory Memorandum does not address the INSLM’s recommendation that Division 104 be repealed or the failure to implement most of the COAG Review Committee’s recommended improvements. In evidence to the PJCIS’s inquiry into the Bill, the former INSLM confirmed that he continues to hold the view that COs should be repealed and replaced with post-conviction orders, despite the increase in the terrorism alert level.\footnote{191}

As noted in the separate section on sunset provisions, several stakeholders consider this measure should be removed from the Bill and extension of the provisions considered separately closer to the date they are due to expire. In that context, Professor Williams and Gilbert+Tobin note the uniqueness of these provisions among comparable nations and the fact that the United Kingdom repealed and replaced its CO regime (upon which Australia’s was modelled) with a less restrictive regime of ‘temporary prevention and investigation measures’.\footnote{192} The LCA argues that COs should be repealed in line with the INSLM’s recommendation.\footnote{193}

**Expanding the grounds on which COs may be sought**

Under subsection 104.2(2) of the Criminal Code there are two alternative grounds on which a senior AFP member may seek the Attorney-General’s consent to request an interim CO. The first concerns prevention of a terrorist act. The second is that a senior AFP member ‘suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation’.\footnote{194}

**Item 71 of Schedule 1** would repeal and replace paragraph 104.2(2)(b) so that consent may be sought if the senior AFP member suspects on reasonable grounds that the person has:

- (i) provided training to, received training from or participated in training with a listed terrorist organisation; or
- (ii) engaged in a hostile activity in a foreign country (within the meaning of subsection 117.1(1)); or
- (iii) been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1).

The first of these would expand the existing ground to capture participating in training with a listed terrorist organisation. This would mirror an amendment to one of the terrorist organisation offences made by **item 69 of Schedule 1**.

The second relates to offences in proposed Part 5.5 of the Criminal Code (Foreign incursions and recruitment) to be inserted by **item 110 of Schedule 1**. The Explanatory Memorandum states that this will address a gap in the control order regime identified by law enforcement agencies that prevents them from seeking an order against a person who has engaged in foreign fighting activity.\footnote{195} The issue of Australians fighting with overseas terrorist groups had not risen to prominence when the INSLM considered and made recommendations on the CO regime.

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\footnote{189}{Explanatory Memorandum, p. 128.}
\footnote{190}{AFP, Submission to the PJCIS, op. cit., p. 5.}
\footnote{191}{B Walker, Evidence to PJCIS, op. cit.}
\footnote{192}{B Saul, Submission to PJCIS, op. cit., paragraph 104.2(2)(b).}
\footnote{193}{Criminal Code, op. cit., paragraph 104.2(2)(b).}
\footnote{194}{Gilbert+Tobin, Submission to PJCIS, op. cit., pp. 2–3. For information on ‘temporary prevention and investigation measures’, see Independent Reviewer of Terrorism Legislation (UK)(IRTL), ‘TPIMs/control orders’, IRTL website, accessed 9 October 2014.}
\footnote{195}{LCA, Submission to PJCIS, op. cit., pp. 49–51; B Saul, Submission to PJCIS, op. cit.}
However, the COAG Review Committee provided some relevant commentary. Commenting on instances where a control order might be sought because a prosecution for a terrorist offence is not a feasible or possible alternative, it stated:

... In private session, the Committee was provided with material that satisfied us that there is a real risk that Australian citizens presently undergoing training overseas with extremist groups may return to Australia with extremist convictions or terrorist capability, posing a threat that those persons and/or their associates may consider carrying out some form of serious terrorist activity. It may well be the case that the intelligence which demonstrates this threat would not be able to sustain a conviction at trial in a criminal court of law. This may be because the information comes from a source that needs to be protected. It may be in a form that does not easily translate into evidence that satisfies the criminal standard. Again, it may be information that is obtained through intelligence exchanged at the international level, thus embodying a need for confidentiality. Whatever the reason, a prosecution may not be feasible or possible.

In these situations, it must be recognised that prosecution, although a clear first choice, cannot always suffice as a single antidote to terrorism risk ... 196

**Issue: new ground of conviction for terrorism offence**

The third ground (suspicion on reasonable grounds that a person has been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act) is more problematic, for three main reasons.

- The INSLM considered that some sort of post-release order would be appropriate for terrorist convicts if they can be ‘shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness’ (emphasis added). 197 The proposed new ground requires no such assessment to be made. This is mitigated to some degree by the requirement under paragraph 104.4(1)(d) for a court making an order to be satisfied on the balance of probabilities that all aspects of an order are reasonably necessary and reasonably adapted for the purpose of protecting the public from a terrorist act.

- In relation to foreign convictions:
  - not all foreign offences ‘relating to terrorism’ would necessarily be mirrored in Australia’s terrorism offence regime and
  - foreign convictions will not always have been obtained in accordance with the procedural protections concerning criminal investigations and trials that apply in Australia, and in relation to which Australia has international obligations. 198 For example, a person may have been convicted in absentia and in questionable circumstances, as recently occurred in Egypt. 199 In this context, AGD has pointed to the requirement for the AFP member requesting a CO to provide any facts he or she is aware of that relate to why a CO should not be made.

- Less importantly, the threshold of suspicion on reasonable grounds does not make sense in the context of an Australian conviction, which police should be able to confirm either has or has not occurred.

If the proposed conviction ground is to proceed, amendments should be considered to address at least the first two of those issues, for example by:

- implementing the INSLM’s suggestions on post-release orders and
- examining the LCA’s recommendation that a court be required to be satisfied that a foreign conviction resulted from a fair trial, and does not involve matters such as those for which mutual assistance requests may be refused. 200

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198. Gilbert+Tobin, Submission to PICIS, op. cit., p. 7; LCA, Submission to PICIS, op. cit., p. 22.
200. AGD, Supplementary submission to PICIS, op. cit., p. 23.
201. LCA, Submission to PICIS, op. cit., p. 22.
Amending the threshold for requesting a CO

There is currently an inconsistency between the two existing grounds on which consent to request an interim CO may be sought, whereby:

- paragraph 104.2(2)(a) requires that a senior AFP member ‘considers on reasonable grounds’ that the order in the terms to be requested would substantially assist in preventing a terrorist act’ and
- paragraph 104.2(2)(b) requires that a senior AFP member ‘suspects on reasonable grounds’ that the person has provided training to, or received training from, a listed terrorist organisation.

Recommendation 27 of the COAG Review Committee was that the higher threshold of ‘considers on reasonable grounds’ should be applied to both grounds.202

Item 70 would amend paragraph 104.2(2)(a) to change the required threshold to ‘suspects on reasonable grounds’, thereby taking the opposite approach to that recommended by the COAG Review Committee. The Explanatory Memorandum states that this ‘follows law enforcement advice that the current threshold for seeking consent ... is too high’ and notes that the threshold that applies to the issue of a CO will remain unchanged.203 The former INSLM had no concerns with this approach, stating ‘there is an element of hairsplitting in the difference between “considers” and “suspects.”’.204

Other COAG recommendations

Subsection 104.5(3) sets out the obligations, prohibitions and restrictions that a court may impose under an interim CO. Item 75 would amend paragraph 104.5(3)(c) to provide that a requirement for a person to remain at particular premises between specified times of each day, or on specified days, be restricted to no more than 12 hours within any 24 hours (there is currently no limit specified). This comes close to implementing Recommendation 34 of the COAG Review Committee, which recommended a restriction to ten hours in any one day.205

Section 104.12 sets out requirements about service, explanation and notification of an interim CO to the person to whom it relates. Recommendation 32 of the COAG Review Committee was that this section 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’.206 Item 78 would implement that recommendation by inserting proposed subparagraphs 102.12(1)(b)(iv)–(ix). Items 80 and 85 would make similar amendments to sections 104.17 (Service of a declaration, or a revocation, variation or confirmation of a CO) and 104.26 (Service and explanation of a varied control order) respectively.

Preventative detention orders

Like COs, preventative detention orders (PDOs) were introduced in the Commonwealth jurisdiction by the Anti-Terrorism Act (No. 2) 2005, following on from the COAG Agreement. The purpose of the PDO regime in Division 105 of the Criminal Code is to allow a person to be taken into custody for a limited time period in order to either prevent an imminent terrorist act from occurring or preserve evidence of, or in relation to, a recent terrorist act.207

A member of the AFP may apply to a senior member of the AFP for a PDO against a person 16 years of age or older, for an initial period of 24 hours. An order extending the period of detention to 48 hours may only be granted by certain members of the judiciary and certain members of the AAT.208

PDOs were the most controversial aspect of the Anti-Terrorism Bill (No. 2) 2005, with key concerns centred around the adequacy of procedural safeguards (or lack thereof), access to the courts and information on which

203. Explanatory Memorandum, p. 123.
204. B Walker, Evidence to PICIS, op. cit.
206. Ibid., p. 61.
208. Ibid., section 105.2 and Subdivision B of Division 105.
the PDO is based, conditions of detention and standards of treatment, discretion to prohibit contact with the outside world and restrictions on access to lawyers.\textsuperscript{209}

In accordance with the COAG Agreement, the PDO regime is subject to a ten-year sunset clause. In its report on the Anti-Terrorism Bill (No. 2) 2005, the Senate Standing Committee on Legal and Constitutional Affairs recommended the sunset period be reduced to five years, but this was rejected by the government of the day.\textsuperscript{210}

The PDO regime has been reviewed by the INSLM and the COAG Review Committee, both of which recommended the repeal of the provisions. The INSLM’s recommendation was made on the basis that:

- as was the case at the time the PDO regime was introduced, it remained the case that no reason had been provided as to why existing powers such as arrest are not sufficient, particularly given the early stage of offending that is captured by the terrorism offences
- discussions with the AFP ‘strongly suggested that “in a real, practical, urgent sense” the ability to arrest a person is a more efficient and effective process for dealing with imminent terrorist threats than the complex and time consuming process of a PDO’ and
- because a person detained under a PDO cannot be questioned by police or ASIO, even on a voluntary basis, opportunities to gain valuable information and further lines of inquiry are lost.\textsuperscript{211}

The COAG Review Committee noted the suggestion of James Renwick SC that the availability and use of PDO laws ‘may have saved lives, and protected the public in the London bombing situation; or at least it may have preserved evidence and assisted investigation more effectively’.\textsuperscript{212} It also noted that arrest without reasonable prospects of conviction could expose police to significant criticism. However, the majority of the COAG Review Committee was persuaded ‘by a singular and compelling feature revealed’ in submissions it received—namely that evidence from Victorian, South Australian and WA police services ‘unequivocally suggested that, from an operational perspective, they would be unlikely to use the preventative detention regime’.\textsuperscript{213}

At the time of the INSLM and COAG Review Committee reports, PDOs, which are also available under state laws, had not been used. PDOs were used for the first time in September 2014 using state laws, to detain three men as part of Operation Appleby, a joint counter-terrorism operation involving the AFP, ASIO and NSW Police.\textsuperscript{214}

Under the Bill, the PDO regime would be retained and amendments made that would make them more accessible. The INSLM made three recommendations for amendments to the PDO regime if it were, against its main recommendation, retained.\textsuperscript{215} The Bill would implement one of them in full and another in part.\textsuperscript{216}

**Extension of sunset period**

**Items 107 and 108 of Schedule 1 of the Bill would extend the sunset period that applies to Division 105 of the *Criminal Code* by a further ten years to December 2025.** The Explanatory Memorandum provides the same broad justification as it does for retaining COs (see the equivalent section of this Digest on COs beginning on page 35 of this Digest).\textsuperscript{217} This is particularly surprising given both the INSLM and the COAG Review Committee recommended repeal of PDOs. In its submission to the PJCIS’s inquiry into the Bill, the AFP states:

> ... the AFP notes that these recommendations were made prior to any use of preventative detention orders in Australia, and prior to the significant recent changes to the terrorist threat environment. The detention of three men under NSW preventative detention order legislation as part of Operation APPLEBY in September 2014 demonstrates, in the AFP’s view, the operational utility and necessity of this special preventative power. The AFP considers the retention of the Commonwealth preventative detention regime as a key measure of the Bill.

\textsuperscript{209} For further details of the legislation and concerns raised at the time, see the references included in footnote 184.

\textsuperscript{210} Provisions of the Anti-Terrorism Bill (No. 2) 2005, op. cit., p. 56.


\textsuperscript{212} COAG Review report, op. cit., p. 69.

\textsuperscript{213} Ibid., pp. 68–71 (quotes taken from p. 69).


\textsuperscript{216} Recommendation III/3 would be implemented in full and Recommendation III/2 in part.

\textsuperscript{217} Explanatory Memorandum, p. 134.
... in the AFP’s view, the current terrorist threat environment points to an increase in the likelihood that the police will need to use such powers to take rapid, preventative action to ensure a terrorist attack is not carried out on Australian soil.\textsuperscript{218}

The point about PDOs being useful in circumstances where rapid preventative action is required stands in contrast to evidence the AFP previously provided the INSLM (noted in the background above).

In evidence to the PJCIS’s inquiry into the Bill, the former INSLM confirmed that he continues to hold the view that PDOs should be repealed, despite the increase in the terrorism alert level.\textsuperscript{219} Asked in a radio interview if his view had changed at all given PDOs had since been used, he stated that it was not until a future INSLM has investigated whether the use of them in that instance was ‘truly an addition to what’s useful over and above ordinary arrest powers’ that it would be possible to determine ‘whether they have any purpose at all’.\textsuperscript{220}

As noted in the separate section on sunset provisions, several stakeholders consider this measure should be removed from the Bill and extension of the provisions considered separately closer to the date they are due to expire. In that context, Professor Williams and Gilbert+Tobin note the uniqueness of these provisions among comparable nations.\textsuperscript{221} The LCA and Professor Saul go further, arguing that PDOs should simply be repealed in line with previous review recommendations.\textsuperscript{222}

**Amendments to issuing criteria**

Under subsection 105.4(4) of the *Criminal Code*, an AFP member may apply for, and an issuing authority may issue, a PDO if satisfied that ‘there are reasonable grounds to suspect’ one of a number of matters (paragraph 105.4(4)(a)) and two other tests are met (paragraphs 105.4(4)(b) and (c)). Paragraph 105.4(4)(a) requires satisfaction of an objective test, but not a subjective test—the AFP member or issuing authority is not required to hold that suspicion themselves.

The INSLM considered that the dual subjective and objective test of ‘suspects on reasonable grounds’, as applies in the context of arrest, is more appropriate:

> Requiring an official actually to believe, as well as requiring his or her grounds to be reasonable in the opinion of a reviewing court, is an important combination safeguard against the arbitrary detention of a person.

**Item 88** would repeal and replace subsection 105.4(4) to partially implement [Recommendation III/1 of the INSLM’s 2012 report](Declassified annual report, 2012, op. cit., p. 52 (Recommendation III/3)) by making the recommended change in relation to the AFP member applying for the order, but not the issuing authority making an order.

Currently, a PDO may be issued under subsection 105.4(6) if the issuing authority is satisfied that:

- (a) a terrorist act has occurred within the last 28 days; and
- (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
- (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

The INSLM suggested an amendment on the basis of the inconsistency that arose between two parts of the test and the impracticality of the ‘necessary’ threshold, which ‘requires more than a satisfaction that there is an unacceptably high risk of the evidence not being preserved, or that the evidence probably will not be preserved. It requires satisfaction that the destruction, loss, etc of the evidence will occur’.\textsuperscript{223} **Item 89** would implement that recommendation by amending the threshold in paragraph 105.4(6)(b) to ‘reasonably necessary’.

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218. AFP, Submission to the PJCIS, op. cit., pp. 4–5.
221. G Williams, Evidence to PJCIS, op. cit.; Gilbert+Tobin, Submission to PJCIS, op. cit., pp. 2–3.
222. LCA, Submission to PJCIS, op. cit., pp. 47–48; B Saul, Submission to PJCIS, op. cit.
Enabling applications by telephone or electronic means

Section 105.7 of the Criminal Code sets out requirements relating to applications for PDOs. Under paragraph 105.7(2)(a), applications must be made in writing. Item 90 would repeal and replace that paragraph to enable applications to be made by telephone, fax, email or other electronic means if the AFP member making the application considers it necessary because of urgent circumstances. This is the same threshold as applies to applications for urgent interim COs by telephone or electronic means under section 104.6 of the Criminal Code.

Related items would insert proposed subsection 105.7(2B) (item 91) and amend section 105.8 (making an initial PDO, items 92, 93 and 95) to make additional provision for how such applications are dealt with, including requiring the issuer to be satisfied that an application by alternative means is necessary due to urgency. These requirements are less stringent than those that apply for COs. In particular, if an urgent interim control order is made, subsection 104.7(5) requires the applicant to provide the issuing court any information included in the request not already sworn or affirmed in such form within 24 hours. It is not clear why an equivalent requirement has not been included in relation to PDOs.

Items 97–101 will make equivalent amendments to section 105.15 (relating to a prohibited contact order in relation to a person for whom a PDO is being sought). Items 102–106 will make equivalent amendments to section 105.16 (relating to a prohibited contact order in relation to a person for whom a PDO is already in force).

Enabling PDOs to be made where a person’s full name is not known

Items 94 and 96 will amend paragraphs 105.8(6)(a) and 105.12(6)(a) respectively to enable a description of a person to be included in an interim PDO or a continued PDO in place of a person’s name. These amendments are proposed to ensure PDOs may still be made where a person’s full name is not known, but the person can be adequately identified by other means, such as a partial name or nickname.226 Equivalent provision is made in subsection 3E(5) of the Crimes Act for search warrants issued in relation to a person, and similar provisions are included in certain ASIO warrant powers inserted or amended by the National Security Legislation Amendment Act (No. 1) 2014.225 It is unclear why such amendments are proposed in relation to PDOs but not COs.

Issue: whether questioning should be allowed under a PDO

As noted above, one of the reasons the INSLM and the COAG Review Committee recommended the repeal of PDOs was that a person detained under a PDO cannot be questioned, even voluntarily. In a detailed submission to the PJCIS’s inquiry into the Bill, Members of Parliament Christian Porter and Jason Wood argue:

... consideration ought to be given to allowing the questioning of detained persons on a voluntary basis, principally for intelligence purposes, but also for evidentiary purposes. The right to silence would be preserved due to the voluntary nature and participation in the questioning (unlike the compulsive power exercised by ASIO pursuant to questioning warrants). Whilst it is not suggested that additional safeguards would be required beyond the question of voluntariness, if a contrary view is taken, State legislative regimes have made it clear that safeguards can be put in place to protect against any suggestion of involuntariness.226

They are also of the view that there are no clear constitutional impediments to such amendments.227

In its submission to the inquiry, the AFP states it ‘is not requesting that the legislation should be changed to permit questioning. The purpose of a preventative detention order is preventative rather than investigative’ (emphasis in original).228 In evidence, the AFP indicated the lack of questioning powers had not been a problem in practice in relation to the recent first use of PDOs, with the National Manager Counter Terrorism going on to state:

Obviously, as a law enforcement officer, I am after as many powers as I can to enable my officers to do their job, but I think that needs to be balanced. It certainly needs to be balanced in relation to humans rights issues and other

227. Ibid., pp. 29–30.
228. AFP, Submission to PJCIS, op. cit., p. 5.
AGD officers indicated the department remained concerned that a court would exclude evidence so obtained on the basis of unfairness, and pointed out the proposed lower threshold for arrest in relation to terrorism offences (items 46 and 47 of Schedule 1) would help to address any difficulties in transitioning between powers exercisable on arrest and under a PDO.\textsuperscript{230}

**Extending the operation of stop, search and seizure powers for a further ten years**

Under Part IAA, subsection 3UK(1) of the *Crimes Act*, the provisions are presently due to sunset at the end of 10 years after the day the Division commenced, that is, 2015. Item 43 of the Bill will amend this to be 15 December 2025, extending the sunsetting period for a further 10 years.

**Lowering the threshold for arrest for terrorism offences**

Under section 3W of the *Crimes Act 1914*, a constable may arrest a person for any offence without a warrant if he or she ‘believes on reasonable grounds’ that the person has committed or is going to commit a terrorism offence. The proposed amendments will lower the arrest threshold so that police will only have to ‘suspect’, not ‘believe’ on reasonable grounds that a person has or is committing a terrorism offence.

**Proposed section 3WA**, at item 47, would allow a constable to arrest a person for any terrorism offence or an offence against section 80.2C of the *Criminal Code* (item 61—advocating terrorism) if the constable suspects on reasonable grounds that the person has committed or is committing the offence; and proceeding by summons against the person would not achieve prescribed purposes under *proposed paragraph 3WA(1)(b)*.

The Explanatory Memorandum notes that ‘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.’\textsuperscript{231}

However:

... given the gravity of charging someone with a terrorism offence [or offence of advocating terrorism] – in that they automatically lose their liberty for long periods if charged, because bail is almost impossible to secure – a proportionate response by government would be to ensure police to do not arrest on mere suspicion.\textsuperscript{232}

The LCA, in its submission to the PJCIS, stated that it considers that proposed section 3WA of the *Crimes Act* should be reconsidered:

The Law Council questions whether a different test for terrorism offences in relation to arrest is desirable. The Law Council notes in this regard that the former INSLM while recommending that 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 suspect’, in section 3W of the *Crimes Act 1914*, a ‘special rule for terrorism offences in relation to arrest’ would ‘be hard to justify’.\textsuperscript{233}

**Information-sharing between AUSTRAC and the Commonwealth Attorney-General’s Department**

The Bill would insert and define AGD in the Act as a designated agency for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (*AML/CTF Act*). The definition does not clarify that it is intended to cover the Commonwealth Attorney-General’s Department. Generally state and territory Attorneys-General administer a Department of Justice however the West Australian equivalent is also called the Attorney-General’s Department. Item 2 could be amended to put it beyond doubt that the definition is intended to cover the Commonwealth Attorney-General’s Department.

\textsuperscript{229} M Gaughan, Evidence to PJCIS, op. cit.

\textsuperscript{230} J Lowe and K Horsfall, Evidence to PJCIS, op. cit.

\textsuperscript{231} Explanatory Memorandum, p. 93.

\textsuperscript{232} G Barns, *Foreign fighters laws passed during terror hysteria will be unjust and anti-democratic*, *The Guardian* (online), 24 September 2014, accessed 10 October 2014.

\textsuperscript{233} LCA, Submission to PJCIS, op. cit., p.20.
The Bill would allow disclosures of, and access to, information including the financial intelligence data holdings of the Australian Transaction Reports and Analysis Centre (AUSTRAC). The Explanatory Memorandum states that ‘this will allow AGD to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government’s national security response to foreign fighters.’

Section 122 of the AML/CTF Act creates a disclosure offence, of disclosing to another person information obtained under section 49 (general provision relating to the disclosure of information relating to suspicious transfer, threshold transfers and international funds transfers). Presently this includes the AUSTRAC CEO, staff, consultants or others working for AUSTRAC under paragraphs 122(1)(a)-(d). Item 6 of Schedule 1 would remove these categories of ‘entrusted investigating officials’. The Explanatory Memorandum does not make the effect of these provisions clear. It is assumed that removing these categories makes it therefore permissible for AUSTRAC to share financial intelligence data with officers at AGD.

**Facilitating background checks for the purposes of preventing foreign incursions and recruitment**

The amendments made to the *AusCheck Act 2007* by items 9 and 10 are to facilitate AusCheck background checks for purposes related to prevention of foreign incursions and recruitment. The foreign incursions and recruitment offences would be inserted by item 110 of Schedule 1 in proposed Part 5.5 of the *Criminal Code*, following the repeal of the *Foreign Incursions Act*. 235

**Schedule 2—Stopping welfare payments**

Schedule 2 proposes amendments to the *A New Tax System (Family Assistance) Act 1999* (the FA Act), the *Paid Parental Leave Act 2010* (the PPL Act), the *Social Security Act 1991* (the SS Act), and the *Social Security Administration Act 1999* (SS Admin Act) so that family assistance, paid parental leave and social security payments and concession cards can be cancelled for individuals whose passports or visas have been cancelled or refused on national security grounds. The proposed amendments would require the cancellation of a person’s welfare payment where the Attorney-General provides a security notice to the Minister for Social Services. The Attorney-General could issue such a security notice where:

- an individual’s application for a passport was refused or their passport cancelled on the basis that the individual ‘would be likely to engage in conduct that might prejudice the security of Australia or a foreign country’ or
- the individual has had their visa cancelled on security grounds.

The payments that could be cancelled following the issuing of a security notice against an individual include Family Tax Benefit Part A and Part B, Paid Parental Leave Pay, Dad and Partner Pay and social security income support payments such as pensions and allowances. Any concession cards held by the individual will also be cancelled. The two main child care fee assistance payments, the Child Care Benefit and the Child Care Rebate, will not be affected by the proposed measures.

These measures were announced by the Prime Minister, Tony Abbott, and Minister for Social Services, Kevin Andrews, on 16 August 2014. The Prime Minister described the measures as necessary to ensure the Commonwealth was not funding ‘terrorism tourism’:

> ... the Government is seeking new power to give us the capacity to remove social security benefits in the case of an adverse security assessment made against individuals.

> Now, this is a new power that will be used with discretion but nevertheless we do believe that particularly for people who are heading overseas there should be the ability, in the hands of the Government, to remove social security benefits from them.

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234. Explanatory Memorandum, p. 78.
235. Note that this legislation is not up to date on ComLaw. Alternatively, refer to the [austlii.edu.au](http://austlii.edu.au) version, accessed 9 October 2014.
237. Details of these payments can be found on the [Department of Human Services](http://www.dhs.gov.au) website, accessed 7 October 2014.
238. T Abbott (Prime Minister) and K Andrews (Minister for Social Services), *New counter-terrorism measures for a safer Australia—cancelling welfare payments to extremists*, media release, 16 August 2014, accessed 25 September 2014.
The last thing we want is terrorism tourism on the taxpayer and there will be no terrorism tourism on the taxpayer as a result of these measures ... 239

The announcement followed media reporting two days prior, which suggested that ‘a significant number [of people] were receiving unemployment, disability or family payments while at the same time being members of the Islamic State or the al-Qaeda linked al-Nusra Front’. 240 It suggested that more than a dozen suspected members of these groups had had their welfare payments cancelled while they were overseas. 241

In July 2014, the Weekend Australian reported that suspected IS militant Khaled Sharrouf had continued to receive a Disability Support Pension (DSP) after leaving Australia for Syria. 242 Sharrouf had reportedly left Australia in December 2013, using his brother’s passport, and continued to have his DSP paid until February 2014 when the payment was cancelled. 243 Minister for Human Services, Marise Payne, told The Weekend Australian, in response to questions on the Sharrouf case, that existing laws did not allow authorities to cancel the payments of Australians suspected of involvement in criminal or extremist behavior but ‘recent events have highlighted the need for further measures to ensure Australians engaged in terrorist activities are not receiving payments’. 244 While the Minister did not comment on the specifics of the Sharrouf case, it would appear that the major issue was the fact that he had departed Australia on his brother’s passport and, therefore, the Department of Human Services was not notified of his absence from Australia until weeks after his departure. Generally, DSP can be paid for temporary absences from Australia for up to six weeks but, in cases where a person is considered to be departing Australia permanently, then payments are cancelled upon departure (see section on residency requirements and portability rules below). 245

**International comparisons**

Australia is not alone in seeking to limit the use of government benefits or payments in support of terrorist activities. In the United Kingdom (UK), the Government has made use of asset freezing provisions under terrorism financing laws to prevent individuals suspected of involvement in terrorism or terrorist groups from accessing income support. 246 More recently, a number of countries in Europe have stopped payments to suspected foreign fighters and their families by strictly enforcing existing eligibility requirements. 247

**Current social security residency requirements and portability rules**

The proposed measures will potentially affect two different groups: ‘foreign fighters’ outside of Australia and individuals considered a security risk residing in Australia. In terms of the former, there are already restrictions in place regarding the payment of social security while a person is overseas. A key eligibility requirement for access to social security in Australia is residency, and there are tight restrictions on whether payments can continue whilst a person is temporarily absent from Australia. 248

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239. T Abbott (Prime Minister) and K Andrews (Minister for Social Services), Transcript of joint doorstop interview: Lithgow: new counter-terrorism measures for a safer Australia—cancelling welfare payments to extremists, media release, 16 August 2014, accessed 25 September 2014.


241. Ibid.


243. Ibid.

244. Ibid.


It is a basic qualification requirement for almost all social security, family assistance and paid parental leave payments that a person must be an Australia resident. There are only a few payments that can be paid where a person leaves Australia permanently to reside overseas.

Under section 7(3) of the SS Act, a broad range of factors need to be taken into account to determine whether a person is residing in Australia including the nature of their accommodation in Australia, their family relationships, employment or financial ties with Australia, any assets located in Australia, travel outside of Australia and ‘any other matter’ relevant to determining whether they intend to remain permanently in Australia.

No single factor should be taken as a decisive indicator that a person is residing in Australia and decisions must be based on the balance of all available evidence.

Foreign fighters may retain strong physical connections to Australia, such as property, as well as family relationships. However, travelling outside of Australia to engage in hostilities in foreign countries, particularly for an extended period of time, will call into question the person’s eligibility under a number of the criteria used to assess whether or not they reside in Australia.

Where a person receiving an income support payment travels overseas, their payments will generally only continue for a short period—for most payments, for up to six weeks at a time. This is known as the ‘portability’ of the payment. As noted above, some pension payments are, in certain circumstances, payable to those who leave Australia permanently to reside overseas. Where a person leaves Australia for an absence that is not temporary and their payment is not payable overseas, payment is stopped on departure. An example is Newstart Allowance, which is not normally payable at all while the person is absent overseas.

It is a requirement under the SS Admin Act that if a person who applies for or is in receipt of a social security payment intends to leave Australia they must notify Centrelink of their intention to do so.

Family assistance payments such as Family Tax Benefit can be paid during temporary absences from Australia for up to 56 weeks (extensions can be granted in special circumstances). As with social security payments, a person must meet residency requirements and payments are not made to those who go overseas and no longer intend to reside in Australia.

Paid Parental Leave payments have similar residency and temporary absence rules as family assistance payments.

For foreign fighters who meet other eligibility requirements, social security payments could only be paid for the applicable portability period, or, if the person failed to notify Centrelink of their intention to travel overseas, their payment could be cancelled or suspended on those grounds.

249. The Age Pension does not require a person to be resident in Australia in order to qualify for payment, however, the person must have been resident in Australia for ten years or more (or have an exemption) and be of Age Pension age. An individual’s period of residence in Australia during their working life can also affect their rate of pension payment while living overseas, if their working life residence in Australia is less than 35 years. See: DSS, ‘3.4.1.10 Qualification for Age’, Guide to social security law, DSS website, accessed 1 October 2014; DSS, ‘7.1.1.10 Overview of portability legislation’, Guide to social security law, DSS website, accessed 1 October 2014.

250. The only payments payable while a person is permanently resident overseas are the Age Pension, Wife Pension, Widow B Pension and the Disability Support Pension (in special circumstances). In order to qualify for these payments, however, the person must have been resident in Australia for ten years or more (or have an exemption). An individual’s period of residence in Australia during their working life can also affect their rate of pension payment while living overseas, if their working life residence in Australia is less than 35 years. See: DSS, ‘3.4.1.10 Qualification for Age’, Guide to social security law, DSS website, accessed 1 October 2014; DSS, ‘7.1.1.10 Overview of portability legislation’, Guide to social security law, DSS website, accessed 1 October 2014; DSS, ‘7.1.2.20 Portability table’, Guide to social security law, DSS website, accessed 1 October 2014.

251. Social Security Act 1991 (Cth), section 7(3).

252. DSS, ‘3.1.1.10 Residence requirements’, op. cit.

253. Newstart Allowance is payable for temporary absences under special circumstances, such as acute family crises, for a humanitarian purpose or in order to seek eligible medical treatment. See DSS, ‘7.1.2.10 General rules of portability’, Guide to social security law, DSS website, accessed 1 October 2014.


255. DSS, ‘2.1.2.30 Temporary absence from Australia’, Family assistance guide, DSS website, accessed 1 October 2014.

256. Ibid.

257. See DSS, ‘2.2.4 PPL Scheme Australian Residency Test & Absences from Australia for PLP’, Paid parental leave guide, DSS website, accessed 1 October 2014.

258. Social Security (Administration) Act 1999 (Cth), section 81.
No eligibility for social security while in gaol

Social security payments are not payable to a person while they are in gaol—whether in Australia or any other foreign countries or territories. A person is considered to be in gaol if detained in prison or another place (such as a remand centre or psychiatric institution) while under sentence after being convicted of an offence; or, if they are undergoing a period of custody in prison pending trial or sentencing for an offence.259

The Bill proposes to amend social security law so that payments can be cancelled following the issue of a security notice by the Attorney-General in relation to a person, even if that person meets all other eligibility requirements and has not been charged or convicted of any offence.

Key issues and provisions

Schedule 2 proposes to insert similar provisions into the SS Act, the FA Act and the PPL Act, respectively, to allow for the cancellation of a person’s social security, family assistance or paid parental leave payments, or concession cards, where it is considered that they ‘might prejudice the security of Australia or a foreign country’.260 As noted above, the payments that could be cancelled include Family Tax Benefit Part A and Part B, Paid Parental Leave Pay, Dad and Partner Pay and social security income support payments such as pensions and allowances. The two main child care fee assistance payments, the Child Care Benefit and the Child Care Rebate, will not be affected by the proposed measures.261

The following discusses the amendments to the SS Act as an example of the main amendments.

Cancellation of payments or concession cards following the issue of a security notice

Item 6 of Schedule 2 would insert proposed Part 1.3B into the SS Act. The new part would set out the situations in which the Attorney-General may issue a security notice in relation to a person and the consequences of such a notice being issued. Proposed section 38N would provide for the Attorney-General to give the Minister for Social Services a security notice where either the Foreign Affairs Minister or Immigration Minister has provided a notice to the Attorney-General under circumstances set out in proposed new sections 38P and 38Q.

Proposed section 38P would provide for the Foreign Affairs Minister to give the Attorney-General notice where the Foreign Affairs Minister has refused to issue an Australia passport to an individual or has cancelled an Australian passport in situations where a competent authority suspects on reasonable grounds that the person might prejudice the security of Australia or a foreign country.262

Proposed section 38Q provides for the Immigration Minister to give the Attorney-General notice where the Immigration Minister has cancelled a person’s visa under various provisions in the Migration Act because:

- the person has been assessed by ASIO as a direct or indirect risk to security or
- the person’s visa has been subject to an ‘emergency cancellation on security grounds’ under proposed new section 134B of the Migration Act (inserted by item 4 of Schedule 4 of the Bill).

Proposed section 38M would set out the consequences of the Attorney-General issuing a security notice in relation to an individual on the basis of a notice under new sections 38P or 38Q, and providing this to the Minister for Social Services. Essentially, where a security notice has been issued in relation to a person:

- the person is not qualified for a social security payment, social security payments are not payable to that person, and no payment is to be paid to that person
- the person is not qualified for a concession card (such as a Pensioner Concession Card or Health Care Card) and
- any social security payment or concession card the person is currently entitled to is cancelled.

Security notices would be considered to be in force from the day they are provided to the Minister for Social Services until they are revoked by the Attorney-General (proposed new sections 38S and 38T).

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259. DSS, ‘3.1.4.10 Situations that Constitute Being in Gaol or Psychiatric Confinement’, Guide to social security law, DSS website, accessed 1 October 2014.
260. See simplified outline of each division at item 2, item 4 and item 6 of Schedule 2 of the Bill.
261. See Note 2 at proposed subsection 57GI(1) of the FA Act, at item 2 of Schedule 2.
262. Passports Act, op. cit., subparagraph 14(1)[a][i].
Specific provisions for family assistance payments

The proposed amendments to the FA Act would apply in the same way as the amendments to the SS Act with two key exceptions. Firstly, proposed subsection 57GI(4) (at item 2) would allow for the security notice to direct any family assistance payments that would otherwise be payable to the individual who is the subject of the security notice, to a payment nominee. Payment nominees can be specified by the Department of Human Services (DHS) under Part 8B of the A New Tax System (Family Assistance) (Administration) Act 1999 (the FA Admin Act). This provision, specific to family assistance payments, allows for benefits that are intended to assist with the costs of raising children to continue to be paid, most likely to another family member such as a partner, while ensuring that the person who is the subject of the security notice is unable to access the funds. Proposed subsection 57GI(5) would ensure that paragraph 219TD(2)(b) of the FA Admin Act does not apply and DHS does not have to gain written consent or take into consideration the wishes of the person subject to a security notice in appointing a payment nominee. Proposed subsection 57GI(6) would also ensure that section 219TN of the FA Admin Act does not apply and the payment nominee will not have to act in the best interests of the person subject to the security notice. The Explanatory Memorandum states that these provisions are necessary to implement the objective of the reforms.

Secondly, proposed subsection 57GI(7) would set out that, where a security notice has been issued in relation to an individual aged 19 or less, then that individual cannot be considered a Family Tax Benefit (FTB) child or regular care child and, therefore, family assistance payments cannot be claimed in relation to the individual. This provision would mean that where a young person is the subject of a security notice, then the young person’s parent or carer cannot receive any family assistance paid in relation to that young person.

Who will the measures affect?

No information has been provided as to the extent of the problem the proposed measures are intended to address. The Explanatory Memorandum and the Attorney-General’s second reading speech do not refer to any specific problem with individuals currently receiving welfare payments who are either participating in foreign conflicts or engaged in activities that prejudice security. The Attorney-General stated that the measures were intended to ensure that ‘the Government does not inadvertently support individuals engaged in conduct that is considered prejudicial to Australia’s national security’. As such, it would appear the measures are intended to address a potential rather than an identified problem.

At this point, the only data available is the suggestion from media reports that a ‘significant number’ of foreign fighters in Syria were receiving welfare payments. The design of the provisions means that only those who have, or apply for, a passport and those residing in Australia on a permanent visa can be subject to a security notice. This is primarily because the measures are intended to target those fighting or considering fighting with extremist groups overseas. There is, however, no requirement under the provisions to only issue security notices to those intending to travel overseas—any passport or permanent visa holder could have their welfare payments cut following a request from ASIO or other competent authority and the issuing of a security notice.

Concerns over the impact of the measures

A number of commentators have raised concerns that the proposed measures could potentially undermine counter-terrorism efforts. Professor Michele Grossman from Victoria University has suggested that cutting off the support offered by income support could push vulnerable individuals towards extremist groups as they seek support. Professor Greg Barton (Monash University) and Dr Anne Aly (Curtin University) have also warned of the risk that the measures would be seen as targeting/marginalising the Muslim community.

The former INSLM urged caution in implementing any measures that treat people who have not been charged or convicted of any crime as less deserving of equal treatment as others:

263. See Explanatory Memorandum, p. 171.
264. Explanatory Memorandum, p. 171.
268. Ibid.
I’m not happy with treating people as persona non grata; as treating people as deserving of less equality of treatment as everybody else in the community before they have been charged, tried and convicted.

After that, I think that there are a number of things that could justifiably be done. But I think we’ve got to be very careful. I think these laws actually do make some attempt to distinguish between the individual themselves and, perhaps, dependent children. So there is some attempt to accommodate those differences.

But I’m bound to say that treating people worse than others before they’ve been charged, tried and convicted is a serious matter about which we should think, I think, more carefully before putting that into effect.269

Some submissions to the PJCIS inquiry highlighted concerns that the proposed amendments undermine key principles of the social security system. For example, the Castan Centre for Human Rights Law stated:

Eligibility for family assistance and other social security benefits should be determined by the relevant statutory criteria that reflect basic principles of need and the right to a decent material standard of living. People deemed to be of “bad character” are not deserving of homelessness or starvation, and nor are their families — the whole suggestion is abhorrent.270

The Welfare Rights Centre in Sydney’s submission stated:

The consequences of cancelling a person’s income support payments may be severe. This measure permits the Attorney-General to exercise this power on the basis of evidence and information that may be kept secret from the person whose entitlement to income support practice, be difficult if not impossible for a person to challenge.

The measure therefore encroaches significantly on the rights to social security and an adequate standard of living. It should be clearly shown to be necessary and appropriately tailored to achieving its objectives.271

While the Welfare Rights Centre supported targeted measures to prevent social security payments being used for terrorist activities, where there is evidence this is occurring, it opposed the proposed measures on the basis that they had not been clearly shown to be necessary or appropriately targeted.272

Ministers have previously not had the power to determine individual welfare entitlements

A key feature of social security, family assistance and paid parental leave law is that the Minister has no powers to make decisions on a case-by-case basis. All of the main eligibility conditions and applicable payment rates are set out in the legislation and the Minister’s powers (in regards to payment entitlements) are primarily limited to making determinations under the legislation as to the details of particular conditions and administrative procedures. Again, these determinations are never in regards to decisions on individual entitlements and, in most cases, are subject to disallowance by the Parliament. This feature of social security and family assistance law is in contrast with the Migration Act, which provides significant discretionary powers to the Immigration Minister to make decisions on individual cases.273

The amendments proposed by Schedule 2 will undermine this key feature of social security, family assistance and paid parental leave by allowing the Attorney-General to make discretionary decisions as to an individual’s entitlement to social security, family assistance or paid parental leave. The amendments allow the Foreign Affairs and Immigration Ministers and the Attorney-General a large amount of discretion as to their decision making but no such discretion is provided to the Minister for Social Services and no input from this Minister, the Department of Social Services (DSS) or DHS is required for these other portfolio ministers to make their decisions.

The Explanatory Memorandum suggests that the Attorney-General consider a range of circumstances in exercising their discretion to issue a security notice, such as the effect of welfare cancellation on the

271. Welfare Rights Centre (Sydney), Submission to PJCIS, op. cit., p. 2.
272. Ibid.
However, there are no requirements under the legislation for any particular considerations to be made, or for other considerations to be made such as the impact of cancellation on the affected individual’s family and others reliant on their income.

**Limitations on appeal procedures**

In addition to the broad discretion given to Ministers, the provisions will place limitations on the current appeal and review procedures available to those affected by decisions made under social security, family assistance and paid parental leave law. The proposed amendments contain provisions to ensure that decisions to cancel welfare payments (or pay them to a nominee) as a result of a security notice in relation to an individual will not be considered decisions under social security, family assistance or paid parental leave law. These provisions will mean that these decisions cannot be reviewed by Authorised Review Officers in DHS, nor by the Social Security Appeals Tribunal or the AAT (the initial sequence for appeals of decisions made under the social security, family assistance and paid parental leave law). Decisions to cancel welfare payments can only be appealed to the Federal Court or the High Court.

Decisions by the Foreign Affairs Minister, the Immigration Minister and the Attorney-General to issue notices will be reviewable under the *ADJR Act*, however, proposed amendments to this Act will mean that there will be no requirement to provide reasons for these decisions. The Explanatory Memorandum states that this is because the decision to issue notices will be based on security advice which may be highly classified or could include information that would put Australia’s security at risk if disclosed to the applicant. Such restrictions will make any appeals of these decisions very difficult.

Reviews may be sought of decisions to refuse or cancel a passport or to cancel a visa, the decisions which can trigger an issuing of a security notice by the Attorney-General through the normal procedures for these types of decisions. Adverse security assessments made by ASIO in support of these decisions could also be reviewed by the AAT.

While there are some appeal avenues open to those affected by the proposed measures, they are severely limited when compared to the current arrangements open to those affected by decisions under social security, family assistance and paid parental leave law.

**Alternative policies**

If the intent of the policy is to ensure that government transfers are not used in support of terrorist activities then a number of alternatives exist beyond simply cancelling the payments of those deemed a security risk. For example, income management, which is currently used to restrict the spending of some welfare recipients, could be applied to the same target group residing in Australia. Such a policy would ensure that a certain portion, or the whole amount, of an individual’s welfare payments could only be spent on priority items such as mortgage, rent, utilities and food. This could achieve a similar outcome as the proposed measures, stopping payments being sent overseas or being used in support of terrorist activities, while not denying all assistance to the person and their family to cover basic living expenses.

In the UK, designated individuals whose financial assets have been frozen are able to apply for a licence to use their funds to purchase specific goods or services. The Bill’s proposed measures do not provide for this kind of arrangement with the only discretion being whether to cancel a person’s payments or not. A licence arrangement would work in a similar way to income management, allowing affected individuals to purchase priority items or meet basic living expenses.

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274. Explanatory Memorandum, p. 56.
275. See proposed section 57GR of the *FA Act*; proposed section 278K of the *PPL Act*; and proposed section 38V of the *SS Act*.
276. Explanatory Memorandum, p. 56.
277. Ibid.
278. Ibid.
279. This option was briefly discussed in the PJCIS hearings on the Bill: PJCIS, *Proof committee Hansard*, 3 October 2014, p. 15, accessed 8 October 2014.
280. See DHS, ‘*Income management*’, DHS website, accessed 8 October 2014.
Alternatively, the payment nominee provisions for family assistance payments could be extended to social security and paid parental leave payments, allowing for financial support intended to support a family to still be provided, just not to the individual deemed a security risk.

Such alternatives could only apply to those residing in Australia who have their payments cancelled under the proposed measures as it would be very difficult for the Australian government to control the expenses of those who have travelled overseas. As discussed above, most recipients of income support would be ineligible to continue receiving their payments while engaged in conflicts overseas and would have their payments cancelled under existing residency and portability rules. However, some pension and family assistance payments can continue to be paid while a person is overseas for long periods. For this group, it might be necessary to allow for the cancellation of payments based on the cancellation of their passport/visa in order to ensure funds are not supporting terrorism. Here the policy alternative is restricting the proposed cancellation measures to those who are overseas, while applying separate measures to those still residing in Australia.

Another alternative policy for the overseas group is to make changes to the residency and portability criteria to specify that information from security agencies regarding a person’s participation in overseas conflicts/terrorist activities are to be taken into consideration in determining whether a person is permanently residing in Australia or not.

Comment

The proposed amendments risk undermining key principles underpinning Australia’s social protection system:

- that all those who meet the eligibility criteria and need support are eligible for assistance from the welfare system unless they have been gaol
- that ministers cannot make decisions regarding eligibility for social security on a case by case basis and
- that individuals be given reasons for decisions and have clear avenues for review and appeal.

While there exists a risk that some of the financial support provided through the social security system could be used to support terrorist activities, there is little evidence as to how significant a risk this is and in what ways existing social security and anti-terrorism laws are inadequate. The one case of a foreign fighter receiving social security that has been publicly reported on, that of Khaled Sharrouf, was addressed under existing legislation once the Department of Human Services had been notified that he had left the country (after security agencies failed to prevent his departure).281

Strict residency and portability requirements would prevent recipients of most payments from remaining eligible while engaged in foreign conflicts. For those residing in Australia, there are laws against facilitating or financing terrorism and anyone convicted of such offences and gaol would no longer be eligible for social security. The proposed amendments do not strengthen these existing laws, rather they extend to the security agencies and the Attorney-General broad discretionary powers to cancel welfare payments to anyone whose passport or visa has been cancelled/not granted on security grounds—that is, even if they are not been tried or have not been convicted of any offence and continue to meet all other eligibility requirements.

Serious concerns with the amendments have been raised by the former INSLM, welfare groups, human rights organisations and academics; particularly in regards to the cancellation of payments of those residing in Australia. While none have questioned the objective of the proposed measures, there have been calls for caution, more evidence as to the need for these particular measures and further consideration of alternative policies which would achieve the same ends. These calls have considerable weight, given the implications of the measures for affected individuals and their families, and for the social security system.

Schedule 3: Customs’ detention powers

Division 1BA of Part XII of the Customs Act provides powers for Customs officers to detain a person who is in a designated place (such as a port or airport) for the purposes of law enforcement cooperation. Schedule 3 of the Bill would amend that Division to:

- expand the power to detain a person on law enforcement grounds

• enable a person to be detained on national security grounds
• extend the period a person may be detained before being informed of the right to have someone informed of their detention and
• expand the grounds on which an officer may refuse to notify someone of a person’s detention.

Under section 219ZJB of the Customs Act, an officer may detain a person if he or she is in a designated place and the officer has reasonable grounds to suspect the person has committed or is committing a serious Commonwealth offence or a prescribed state or territory offence. The officer must both notify a police officer and deliver the person to a police officer as soon as practicable, and must immediately release the person if they cease to have the required suspicion.

Item 2 would repeal and replace the definition of ‘serious Commonwealth offence’, which is currently defined to have the same meaning as in section 15GE of the Crimes Act, namely a Commonwealth offence with a maximum penalty of at least three years imprisonment and that relates to one of the listed matters. It would now mean any Commonwealth offence with a maximum penalty of imprisonment of 12 months or more, enabling these powers to be exercised in relation to a broader range of offences.

Item 3 would amend paragraph 219ZJB(1)(b) to allow a person to also be detained if the officer has reasonable grounds to suspect the person intends to commit a serious Commonwealth offence or a prescribed state or territory offence. The Explanatory Memorandum states that the grounds on which a suspicion might be held include information from partner agencies (this would include ASIO and Australian or overseas law enforcement agencies) or the person’s documentation or behaviour.\(^{282}\)

Under subsection 219ZJB(5), an officer detaining the person must, subject to subsection 219ZJB(7), inform him or her of the right to have a family member or another person notified of their detention if the person is detained for longer than 45 minutes. Item 6 would extend the period a person may be detained before being informed of that right from 45 minutes to four hours. The AHRC and Gilbert+Tobin have questioned the need for this amendment, given the proposed expansion of subsection 219ZJB(7) (see below).\(^{283}\) However, the Explanatory Memorandum indicates that the main reason is to provide Customs additional time to make inquiries to determine whether it is appropriate for another person to be notified of the person’s detention (that is, the time is required precisely to determine whether to invoke subsection 219ZJB(7)).\(^{284}\)

Subsection 219ZJB(7) allows the officer to refuse to notify another person of the detention if the officer believes on reasonable grounds that notification should not be made in order to safeguard the processes of law enforcement or protect the life and safety of any person. Item 7 would expand the reasons for which an officer may refuse to notify another person of a person’s detention to include safeguarding national security or the security of a foreign country.

Item 8 would insert proposed section 219JZCA to enable a person to be detained if he or she is in a designated place and the officer is satisfied on reasonable grounds that a person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country. Item 1 would amend section 219ZJA to provide that ‘national security’ has the same meaning as in the National Security Information (Criminal and Civil Proceedings) Act 2004 (namely, Australia’s defence, security, international relations or law enforcement interests).\(^{285}\) The proposed section is otherwise equivalent to section 219ZJB as amended by the Bill.

Under section 219ZJJ, the information that must generally be provided to a parent or guardian of a person aged under 18 years detained under Division 18A includes the reason for the minor’s detention. Item 13 would amend subparagraph 219ZJJ(1)(b)(iv) to provide that this will not be required where a minor is detained on national or foreign security grounds under proposed section proposed section 219JZCA.

**Issue: lack of justification for expansion of the definition of serious Commonwealth offence**

The Explanatory Memorandum provides no specific justification for the significant expansion of the definition of serious Commonwealth offence. Commenting on the ‘enhanced detention powers’ more broadly, it states that

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282. Explanatory Memorandum, p. 182.
they ‘are part of a targeted response to the threat posed by foreign fighters ... The detention powers of Customs constitute an important preventative and disruption mechanism’. However, given all terrorism offences attract maximum penalties of three years or more, that justification has no relevance to the proposed expansion of the definition of serious offence to capture offences punishable by 12 months or more. In the absence of alternative justification it is not clear why this amendment is required, and the AHRC, Gilbert+Tobin, LCA and Civil Liberties Councils (CLCs) argue that it should not proceed.

**Issue: need for and practicality of detention on national security grounds**

There appears to be a degree of overlap and accordingly, potential redundancy, in the amendments proposed in Schedule 3 when taken as a whole. In particular, it is not clear why, given the new power to detain someone on suspicion of intent to commit an offence, there is still a need for a new power to detain on security grounds. There would appear to be few, if any, circumstances in which an officer satisfied on reasonable grounds that a person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country would not also have reasonable grounds to suspect that the person has committed, is committing or intends to commit, a serious Commonwealth offence or a prescribed state or territory offence.

It is also unclear what basis police will have to deal with someone handed over to them after being detained on national security grounds. The AFP’s powers under the *Crimes Act* and the *Australian Federal Police Act 1979* are generally exercisable where an officer has reasonable grounds to suspect a person has committed, is committing or in some cases, might commit, an offence. If a Customs officer does not have reasonable grounds to suspect the person has committed, is committing or intends to commit an offence, it seems unlikely a police officer to whom that person is handed over would be able to meet the relevant threshold either.

**Issue: concerns about how detention and questioning powers are used**

Muslim stakeholder groups are particularly concerned about the proposed amendments to the *Customs Act*. They have indicated that under existing powers, there has already been a recent increase in questioning and detention of individuals at airports and express concern that further expanding these powers will have a disproportionate impact on civil liberties. The ICV stated that the use of such powers has sometimes been unwarranted and discriminatory:

> The powers of Border Security/Customs Officers are unclear. In past weeks, members of the Muslim community have been targeted at airports and detained and questioned for hours by Border Security for no valid reason or risk to national security. Australian Muslims going about their business have felt particularly targeted by Border Security at airports based on their faith identity. Several members have missed flights and have endured financial setbacks to restore travel arrangements which were interrupted due to Border Security questioning. This, for the most part has been unwarranted and discriminatory in its targeting of Muslim travellers.

**Schedule 4—Cancelling visas on security grounds**

Section 116 of the *Migration Act* contains the power to cancel a visa (temporary onshore visas or temporary or permanent offshore visas) on certain grounds, one of which is that the presence of the person in Australia is, or would be, a risk to the health, safety or good order of the Australian community. Subsection 117(2) provides that a permanent visa cannot be cancelled under section 116 if the holder of the visa is in the migration zone and was immigration cleared on last entering Australia.

Subsection 501(3) provides that the Minister may cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass the character test (set out in subsection 501(6)) and is satisfied that the refusal or cancellation of the visa is in the national interest. The rules of natural justice do not apply in relation to these provisions.

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286. Explanatory Memorandum, p. 58.
289. ICV, Submission to PJCIS, op. cit.; Australian National Imams Council, Submission to PJCIS, op. cit.; Muslim Legal Network, Submission to PJCIS, op. cit.
290. ICV, Submission to PJCIS, op. cit.
**Item 4 of Schedule 4** would insert **proposed Subdivision FB** into Division 3 (Visas for non-citizens) of Part 2 (Control of arrival and presence of non-citizens) of the *Migration Act*. This Subdivision would provide for the emergency cancellation of a visa on security grounds.

The Explanatory Memorandum claims that the current provisions are inadequate:

> these existing cancellation provisions do not adequately address the situation where ASIO receives intelligence about a permanent or temporary visa holder who is outside Australia, where that intelligence raises the possibility that that visa holder is a risk to the Australian community, but that intelligence alone is not sufficient to enable ASIO to furnish an adverse security assessment to meet existing legal thresholds in the *Migration Act*. This measure will enhance the Government’s capacity to respond to prospective security threats in a responsive and proportionate manner. In limited circumstances, it will be both desirable and necessary that a visa be cancelled on the basis of the nature and extent of the security risk that a person might pose, as temporary mitigating action to permit further investigation and evaluation of the individual.  

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The Explanatory Memorandum further notes:

> The lower threshold is provided to cater for emergency situations where a person may be planning to travel to Australia and might present a risk to security. Visa cancellation under this power will allow ASIO further time to assess whether the person is a risk, while the person remains outside Australia, rather than having to deal with the person in Australia. The exclusive focus on visa holders outside Australia is reflected in paragraph 134B(d) which limits the cancellation power to visa holders who are outside Australia.  

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**Proposed section 134A** would provide that the rules of natural justice do not apply to a decision made under the **proposed Subdivision FB**. The rules of natural justice or procedural fairness relate to ‘the right to be given a fair hearing and the opportunity to present one’s case, the right to have a decision made by an unbiased or disinterested decision-maker, and the right to have that decision based on logically probative evidence’.  

293

**Emergency Visa Cancelling Power**

**Proposed section 134B** would establish the power for the emergency cancellation of a visa on security grounds. The Minister must cancel a visa for a person outside Australia:

- if ASIO has made an assessment for the purposes of this section and
- the assessment contains advice that a person might be a risk to security either directly or indirectly and
- the assessment recommends that all visas held by the person be cancelled under this section.

**Comment**

The LCA notes that the *Migration Act* already contains a number of powers for the Minister to cancel a visa of a non-citizen who poses a security threat to the Australian community. While the LCA accepts that the need for these amendments can be demonstrated, concerns are raised about the safeguards on their implementation.  

Cancellation will be mandatory, without notice to the person, not required to adhere to the principles of natural justice and not merits reviewable. In the LCA’s view, ‘these features challenge rule of law principles, which require that the use of Executive Power be subject to independent oversight and used in a way that respects procedural fairness, including the right of a person to be notified of a decision that impacts directly on his or her most basic individual rights’.  

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The LCA recommended that the power be discretionary not mandatory.

296

Gilbert+Tobin consider that the Bill sets a very low threshold in determining whether a person ‘might be’ a direct or indirect risk to security which could be applied to large numbers of people returning from foreign countries. ‘Given that the power would cause significant disruption and inconvenience to individuals who are later shown not to pose any risk to security, [Gilbert and Tobin] believe that a higher standard for imposing initial

292. Ibid., p. 189.
294. LCA, Submission to PJCIS, op. cit., p. 30.
295. Ibid.
296. Ibid., p. 31.
cancellation would be appropriate to sensibly confine the power.”\textsuperscript{297} They suggest that the ‘Bill should suggest that ASIO suspects on reasonable grounds that a person might be a direct or indirect risk to security. This threshold would be consistent with the proposed power to temporarily suspend passports and travel documents.’\textsuperscript{298}

The AHRC highlights certain severe consequences for a person on a protection visa, which could prevent a person returning to Australia in circumstances where the person is exposed to the risk of persecution, torture or inhuman or degrading treatment.\textsuperscript{299} The Commission further notes that cancellation might amount to denying a person the right to their ‘own country’ even if they are not an Australian citizen.\textsuperscript{300}

\textbf{Revoking the emergency cancellation of visas}

\textit{Proposed section 134C} concerns decisions related to revoking the cancellation of visas. \textit{Proposed section 134C} has two grounds on which to revoke a cancellation. \textit{Proposed subsection 134C(2)} would provide that the Minister \textit{must revoke} the cancellation of a visa as soon as practicable after a period of 28 days—\textit{proposed subsection 134C(5)}. However, the Minister \textit{must not revoke} the cancellation if ASIO has made an assessment for the purposes of this section which contains advice to the effect that the former holder of the visa is a risk to security, either directly or indirectly within the meaning of section 4 of the \textit{ASIO Act} and recommends that the cancellation of the visa not be revoked—\textit{proposed subsection 134C(3)}.

\textit{Proposed subsection 134C(4)} would set out the second ground of revocation. If ASIO has made an assessment before the end of the 28 day period and recommends that the cancellation of the visa be revoked, the Minister must revoke the cancellation as soon as practicable after the assessment is made.

\textbf{Effect of Revocation}

\textit{Proposed subsection 134D(1)} would provide that once the cancellation of a visa has been revoked, without limiting its operation before cancellation, the visa has effect as if it were granted on revocation. In effect it is a new visa. \textit{Proposed subsection 134D(2)} would enable the Minister to vary the time that the visa is in effect or the period in which or date until which the visa permits the visa holder to travel to, enter or remain in Australia.

These provisions accord with provisions in section 133 that concern the revocation of cancellations of visas under section 128. The Explanatory Memorandum notes:

\begin{quote}
The purpose of the provision is to give the Minister discretion to extend the validity of the visa to compensate the visa holder for the time that was lost during the period that the visa was cancelled.
\end{quote}

\textbf{Notice of Cancellation}

The Minister must give notice of the cancellation to the former visa holder under \textit{proposed subsection 134E(1)} if the Minister decides to cancel a visa and not to revoke the cancellation. However, if ASIO considers that notice not be given to the person because it considers it essential to the security of the nation, then notice may only be given as soon as reasonably practicable after ASIO advises the Minister that it is no longer essential that notice be withheld—\textit{proposed subsection 134E(2)}. Otherwise, the Minister must give notice as soon as reasonably practicable after the Minister decides under \textit{proposed subsection 134C(3)} not to revoke the cancellation. \textit{Proposed subsection 134E(3)} would provide that the notice must state that the visa was cancelled under \textit{proposed section 134B} and be given to the person in the prescribed way. Failure to give notice of a cancellation would not affect the validity of the decisions under \textit{proposed sections 134B} and \textit{134C(3)}—\textit{proposed subsection 134E(4)}.

\textbf{Effects of cancellation on other visas}

Other visas may be affected by the cancellation of the relevant person’s visa. \textit{Proposed subsection 134F(1)} would provide that if a person’s visa is cancelled under \textit{proposed section 134B}, and the Minister decides not to revoke the cancellation and the person is notified of the cancellation, then under \textit{proposed subsection 134F(2)}

\begin{itemize}
\item \textsuperscript{297.} Gilbert+Tobin, Submission to PJCIS, op. cit., p. 22.
\item \textsuperscript{298.} Ibid.
\item \textsuperscript{299.} AHRC, Submission to PJCIS, op. cit., p. 15.
\item \textsuperscript{300.} Ibid.
\item \textsuperscript{301.} Explanatory Memorandum, p. 190.
\end{itemize}
another person who holds a visa because the relevant person held a visa may have their visa cancelled by the Minister without notice. In other words, family members may be affected.

Comment
The LCA raised concerns for the visa holder’s family where consequential cancellation of visas occur. The LCA recommends that the emergency power be discretionary not mandatory and ‘to enshrine in legislation the policy principles outlined in the Explanatory Memorandum that are intended to apply to consequential visa cancellations, such as those that seek to implement some of Australia’s relevant obligations under CROC.’ The LCA explains:

While the Explanatory Memorandum suggest that the decision to cancel the visas of family members would be ‘discretionary and merits reviewable and a range of factors will be considered under policy —this includes consideration of family unity principles, the best interests of the child and possible legal consequences of the cancellation decision such as detention and removal’, the Bill does not seek to enshrine these principles into the Migration Act.

Gilbert+Tobin raise concerns about cancelling other visas that would affect family members of the visa holder where they could be subject to immediate detention or deportation. They suggest notice be given for these consequential cancellations. Similar views were put forward in the submission by the AHRC.

Schedule 5—Identifying persons in immigration clearance
On 5 September 2014, the Minister for Immigration and Border Protection, Scott Morrison, announced the roll-out of next generation automated departure eGates in mid-2015 at Australia’s eight major international airports. This represents part of the Coalition Government’s additional funding of $158 million to boost counter-terrorism capacity at the borders. The Minister noted:

eGate technology ensures frontline officers can facilitate travellers more efficiently with less manual intervention, enabling them more time to focus on traveller interactions, intelligence gathering, enforcement and targeting activity, which are key to preventing threats at the border.

Item 1 of Schedule 5 would repeal paragraph 5A(3)(g) of the Migration Act and substitute it with proposed paragraphs 5A(3)(g) and (ga). Section 5A sets out the meaning of personal identifier. Existing paragraph 5A(3)(g) provides that the purpose of this paragraph is to enhance the Department’s ability to identify non-citizens who have a criminal history, who are of character concern or who are of national security concern. Proposed paragraph 5A(3)(g) would provide that one of the purposes of identifiers is to enhance the Department’s ability to identify non-citizens with a criminal history or who are of character concern. In addition proposed paragraph 5A(3)(ga) will provide that another purpose of identifiers is to assist in identifying persons who may be a security concern to Australia or a foreign country. This paragraph encompasses not only non-citizens but citizens as well.

Existing section 166 (Immigration clearance) requires persons entering Australia to present certain evidence of identity. Item 3 would replace existing paragraph 166(1)(c) with proposed paragraph 166(1)(c), which will require a person to comply with any requirement made by a clearance authority to provide one or more personal identifiers before leaving a port with permission (under paragraph 172(1)(a)(i)) or leaving a prescribed place with permission (under paragraph 172(1)(b)(ii)) or is refused immigration clearance (under paragraph 172(1)(c)). Existing subsection 166(1)(c) referred to non-citizens and prescribed circumstances existing before the clearance officer can request personal identifiers. These references have removed in the proposed new paragraph, which means that the provision now includes citizens and there is no requirement for prescribed
circumstances to exist before a clearance authority can require the provision of personal identifiers to the clearance authority or the authorised system such as eGate.

**Proposed paragraph 166(1)(d)** would provide that a person who has provided information to the authorised system is required to provide a photograph or other image of the person’s face and shoulders and any other identifier referred to in subsection 166(5) that is prescribed by the regulations.

The Explanatory Memorandum notes:

> The purpose of this amendment is to ensure that authorised systems such as eGate can collect and retain personal identifiers without having to “require” a person to provide those personal identifiers. This reflects that facial images will always be collected and retained when a person uses an authorised system and enables other personal identifiers, intended to be collected by the authorised system, to be prescribed in the regulations in future.\(^{309}\)

However, the LCA considers that Schedules 5 and 6 have the potential to impact on the privacy of a number of individuals including many who pose no threat to national security. In view of this the LCA recommends that the ‘Committee ensure that the provisions of the Schedules are reviewed by the Office of the Privacy Commissioner and that a Privacy Impact Assessment is prepared to enable the public to have a clear sense as to what impact these changes will have on their privacy rights’.\(^{310}\)

**Identification tests**

**Item 11** would repeal subsection 166(7) and substitutes **proposed subsection 166(7)**. A person would be considered not to have complied with the requirement to provide a personal identifier under **proposed paragraph 166(1)(c) or (d)** unless the personal identifiers have been obtained by identification tests carried out by an authorised officer or an authorised system. Currently subsection 166(7) refers to a non-citizen providing personal identifiers by means of identification tests carried out by an authorised officer. This new provision would include citizens and refer to identification tests carried out by an authorised officer and an authorised system such as eGate.

**Personal identifiers**

Subsection 170(1) provides that a person, either a citizen or non-citizen, who travels on an overseas vessel between Australian ports may be required at either or both ports to present prescribed personal identifiers to verify their identity and provide any information to a clearance officer or an authorised system required by the Act or the regulations.\(^{311}\)** Item 15** would insert **proposed paragraphs 170(c) and (d)**. These paragraphs would require that a person comply with any requirements to provide one or more personal identifiers referred to in existing subsection 170(2A), and if the person presents evidence to an authorised system, that the person provide a photograph or image of their face and shoulders and any other personal identifier referred to in subsection 170(2A) that is prescribed by the regulations.

Subsection 170(2A) lists the following identifiers:

- a photograph or image of the person’s face and shoulders
- the person’s signature
- any other personal identifier in the person’s passport or other travel document and
- any other personal identifier prescribed in regulations.

Subsection 175(1) requires that a person on board or about to board a vessel that is to leave Australia, whether it calls at other places in Australia or not before leaving, present evidence to a clearance officer or an authorised system. The evidence includes:

- if the person is a citizen: the person’s Australian passport or prescribed other evidence of the person’s identity and Australian citizenship
- if the person is a non-citizen, evidence of the person’s identity and permission to remain in Australia

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310. LCA, Submission to PJCIS, op. cit., p. 32.
311. Section 5 of the Migration Act defines vessel as including an aircraft or an installation.
any information required by the Act or the regulations, including a person’s signature.

Item 28 would insert proposed paragraphs 175(1)(c) and (d), which mirror proposed paragraphs proposed paragraphs 170(c) and (d), discussed above.

Collection, access and disclosure of information

Item 39 would insert proposed section 175B to deal with the collection, access to, and disclosure of personal information under Division 5 of Part 2 of the Migration Act, which is concerned with immigration clearance. Proposed subsection 175B(1) would enable a clearance authority to collect information including personal identifiers from documents presented to them.

Proposed subsection 175B(2) would provide that personal information collected under Division 5 of Part 2 may be accessed, used and disclosed in the same way as identifying information (as defined in section 336A), as set out in Part 4A of the Migration Act. The provisions of Part 4A that would apply are:

- section 336D—authorising access to identifying information
- section 336E—disclosing identifying information. (However, the offence provision in subsection 336E(1) will not apply to Division 5) and
- section 336F—authorising identifying information to foreign countries.

Currently section 336D allows the Secretary to authorise a specified person or class of persons to access identifying information as specified in an authorisation. Subsection 336D(2) provides that the Secretary must specify the purpose or purposes for which the access is authorised. The purposes are set out in subsection 336D(2). Currently, the purpose stated in paragraph 336D(2)(g) is for the purposes of the Migration Act or regulations or of the Citizenship Act or the regulations under that Act. Item 57 would repeal that paragraph and substitute it with proposed 336D(2)(g), which would allow access to identifying information for the purposes of:

- the Migration Act or an instrument under the Act
- the Citizenship Act or an instrument under that Act
- the Customs Act or an instrument under that Act or
- any other law of the Commonwealth prescribed by the regulations.

A similar provision, proposed paragraph 336E(2)(ba), would be inserted by item 59 into subsection 336E(2), which defines a permitted disclosure.

Schedule 6—Identifying persons entering or leaving Australia through advance passenger processing

In a media release of 10 September 2014, the Minister for Immigration and Border Protection announced that the Coalition Government will invest $34.8 million in an expansion of Australia’s Advance Passenger Processing (APP) systems. The Minister noted:

APP is currently used by airlines to send inbound traveller data to border agencies, confirming authority to travel and providing advance warning of threats to law enforcement, security and border agencies. The measure would expand the existing APP information requirements for airlines to send data in relation to travellers departing Australia. This would give border protection authorities earlier notice, at airline check-in, on who is presenting to travel. That would give our authorities more time to establish bona fides and set in place any operational interventions that may be required. APP on departure would also enable the deployment of Australia’s automated e-gates for departing passengers which will greatly improve our ability to verify identity on departure.312

The Explanatory Memorandum notes:

The phrase ‘whether or not after calling at places in Australia’ which is included in new subsection 245LA(1), but not subsection 245L(1), is included to reflect that a person may board a flight or voyage that will depart Australia before that flight or voyage’s final stop in Australia, and it may be desirable to receive a report about that person before

312. S Morrison (Minister for Immigration and Border Protection), New measures at our borders to protect against terrorist threat, media release, 10 September 2014, accessed 13 October 2014.
they board the aircraft or ship, rather than before the aircraft or ship departs Australia. This reflects a fundamental difference between departing and arriving flights and voyages.  

**Advance passenger processing**

Division 12B of Part 2 of the *Migration Act* is concerned with reporting on passengers and crew of aircraft and ships. Section 245L concerns reporting on passengers and crew arriving in Australia at an airport or port. **Item 12** would insert **proposed section 245LA**, a similar provision applying to aircraft and ships departing from Australia, whether or not they are calling at one or more places in Australia beforehand.

Under **proposed subsection 245LA(2)**, the operator of an aircraft or ship would be required to report on each passenger who is on or expected to be on the flight or voyage. This is done by means of the approved primary reporting system for passengers. A report would also be required on each member of the crew that is on, or expected to be on, the flight or voyage or part of the flight or voyage. There would be an obligation to comply even if the information is personal information (Note 1 to the subsection)

The Explanatory Memorandum notes that:

> The purpose of this note is to clarify that disclosure by the operator of the aircraft or ship of personal information under subsection 245LA(2) is authorised by law, and so falls under the exception provided by paragraph 6.2(b) of Australian Privacy Principle 6.  

There is an existing offence for non-compliance with reporting obligations contained in section 245N. **Proposed subsection 245LA(3)** would provide that if a ship or aircraft calls at one or more places within Australia before departing Australia, and the regulations only prescribe a report from the last place in Australia to a place outside Australia, then a report is required for each passenger or crew member on that part of the flight or voyage.

**Proposed subsection 245LA(5)** would set out the deadlines that must be adhered to when providing reports on passengers or crew members.

One or more reports may be required—**proposed subsection 245LA(6)**.

**Proposed section 245LB** would set out how information collected under Division 12B is to be dealt with. The Department may collect personal information (including personal identifiers) in a report provided under this Division—**proposed subsection 245LB(1)**.

**Proposed subsection 245LB(2)** would provide that personal information collected under Division 12B of Part 2, and subsections 64ACA(11) or 64ACB(8) of the *Customs Act*, may be accessed, used and disclosed in the same way as identifying information (as defined in section 336A), as set out in Part 4A of the *Migration Act*. The provisions of Part 4A that would apply are:

- section 336D—authorising access to identifying information
- section 336E—disclosing identifying information. (However, the offence provision in subsection 336E(1) will not apply to Division 5) and
- section 336F—authorising identifying information to foreign countries.

As soon as information is reported under sections 245L or 245LA it must be disclosed (including personal identifiers) to Customs—**proposed 245LB(3)**.

**Proposed subsection 245LB(4)** would provide that this section does not affect the interpretation of any other provision of, or any instrument made under, the *Migration Act*. The Explanatory Memorandum states that the purpose of this provision is to ensure that section 245LB:

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313. Explanatory Memorandum, p. 212.
314. Explanatory Memorandum, p. 213. Australian Privacy Principle 6 relates to the use or disclosure of personal information. Paragraph 6.2(b) allows such use or disclosure if it is “required or authorised by or under an Australian law or a court/tribunal order” - Privacy Act 1988, accessed 16 October 2014.
315. Subsection 64ACA(11)(passenger reports) and subsection 64 ACB(8) (Crew reports) of the *Customs Act* requires Customs to provide reports to DIBP as soon as possible after the information is collected.
Schedule 7—Seizing bogus documents

The purpose of Schedule 7 is to amend the Migration Act and the Citizenship Act to enable the DIBP to retain bogus documents presented to them. Currently where such bogus documents are detected, officers have no option but to return the documents to the person. The Explanatory Memorandum notes:

While DIBP does take action so that the person does not obtain a benefit as a result of using a bogus document at the time (for example, DIBP may refuse a visa application based on a bogus birth date) the document remains available to the person to continue to use it for potentially fraudulent purposes.\(^{317}\)

Item 3 would insert Division 1 into Part 9 (Miscellaneous) of the Migration Act to deal with bogus documents. Proposed subsection 487ZJ(1) would prohibit a person (whether a citizen or non-citizen) from giving, presenting, producing or providing a bogus document to an officer, an authorised system, the Minister, a tribunal or any other person or body performing a function or purpose related to the Act, or cause a document to be so given et cetera. A bogus document so given would be forfeited to the Commonwealth—proposed subsection 487ZJ(2).

Bogus documents would be able to be seized under proposed section 487ZJ. If an officer suspects that a document is forfeited under proposed subsection 487ZJ(2), the officer may seize the document. Written notice of the seizure of the document must be given to the person who presented it to the official as soon as practicable after it is seized—proposed subsection 487ZJ(2).

Proposed subsection 487ZJ(3) would set out the list of requirements that must be contained in the notice. Proposed paragraph 487ZJ(3)(d) would provide that the notice should state that the document will be condemned as forfeited unless the person commences court proceedings against the Commonwealth (within 90 days of receiving the notice) to recover the document or seek a declaration that the document is not forfeited.

Proposed section 487ZK concerns a document that has been condemned as forfeited. Proposed subsection 487ZK(1) would provide that if a document has been seized under proposed subsection 487ZJ(1) and the person who presented the document to the official under proposed subsection 487ZJ(1) is not the owner, the owner may, within a specified time limit, institute proceedings in court to recover the document or for a declaration that the document is not forfeited. Proceedings may be commenced even if a seizure notice has not been given.\(^{318}\)

If the person who presented the document, or document owner does not institute proceedings before the end of the period specified in the notice, the document would be condemned as forfeited to the Commonwealth at the end of the period—proposed subsection 487ZK(3). If proceedings are instituted, the document would be condemned as forfeited to the Commonwealth unless there was an order for the owner or person to recover the document or a declaration that the document is not forfeited—proposed subsection 487ZK(4).

Item 8 would insert Division 1 (Bogus documents) into Part 3 (Other matters) of the Citizenship Act. The provisions to be inserted into the Citizenship Act would mirror those inserted into the Migration Act in item 3 of Schedule 7 (described above).

Comment

The LCA in its submission to the PJCIS questions whether proposed amendments in Schedule 7 ‘seek to replicate or replace the amendments proposed in the Migration Amendment (Protection and Other Measures) Bill 2014 that is currently before Parliament and that has been subject to an extensive inquiry by the Senate Committee on Legal and Constitutional Affairs’. The LCA strongly recommends the Committee have regard to the evidence provided to the Senate Committee on Legal and Constitutional Affairs’ inquiry before enacting these proposed reforms.\(^{319}\)

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\(^{316}\) Explanatory Memorandum, p. 216.

\(^{317}\) Explanatory Memorandum, p. 71.

\(^{318}\) Notice of seizure is required under proposed subsection 487ZJ(2).

\(^{319}\) LCA, Submission to PJCIS, op. cit. p. 32.
Concluding comments

The passage of the Bill is a high priority for the Government, and the Opposition is reportedly supportive of its expedited passage through Parliament. The short timeframe provided to the PJCIS for its inquiry has meant that there has been a constrained time period to consider and scrutinise the detail of the proposals. That in itself was a key concern emphasised by many of the stakeholders that made submissions or provided evidence to the PJCIS. Forty three religious, community, legal and human rights organisations and academics have issued a joint statement calling on the Australian Parliament not to pass the Bill until there has been an opportunity for further consultation on, and scrutiny of, the measures it contains. While significant attention has been on the counter-terrorism measures in Schedule 1, the remaining schedules also need measured review as to their appropriateness, proportionality and impact on individuals’ rights and privacy.

The Bill would implement a number of recommendations of the INSLM and the COAG Review Committee. It also contains several amendments that are in direct contradiction to these recommendations. Governments are under no obligation to accept all the recommendations made by reviews, but where they are proposing to go against them, it is considered good practice to properly justify the reasons for doing so. This has not always occurred in relation to the Bill, with the most notable example the lack of justification advanced for extending the preventative detention regime, which was recommended for repeal by both the INSLM and the COAG Review Committee. The Bill also contains several instances of the Government taking up parts of recommendations in order to expand existing powers, but failing to take up parts of the same or related recommendations about safeguards to complement and balance those powers.

In the short time provided for committee consideration and public hearing, stakeholders have raised significant concerns regarding the proposed new offence of ‘advocating terrorism’ as well as seeking further justification for the burden placed on a defendant for entering or remaining in a ‘declared area’. There will no doubt be robust debate, by both parliamentary committees and the broader Parliament about the need for both offences and arguments as to whether the provisions would inappropriately or disproportionately limit a person’s rights and freedoms. Similarly, the changes to the rules relating to the use of foreign evidence need to be closely scrutinised.

The Government has conceded that there is no pressing need for the sunset clauses that apply to the control order, preventative detention, ASIO questioning and detention powers, and stop, search and seizure provisions to be extended now instead of closer to the dates on which they are due to expire. Consideration should be given to dealing with the extension of these measures separately in a way that facilitates closer Parliamentary and public scrutiny and debate.
Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

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