3

Schedules 2 to 7

Introduction

3.1 This chapter addresses the main issues arising from Schedules 2 to 7 of the Bill, which contain provisions relating to:

- stopping welfare payments (Schedule 2)
- Customs' detention powers (Schedule 3)
- cancelling visas on security grounds (Schedule 4)
- identifying persons in immigration clearance (Schedule 5)
- identifying persons entering or leaving Australia through advance passenger processing (Schedule 6), and
- seizing bogus documents (Schedule 7).

3.2 As with its discussion of Schedule 1 in chapter 2, the Committee has focussed on those issues that were of most concern, informed by evidence from inquiry participants.

Schedule 2 – Welfare payments

3.3 Schedule 2 of the Bill amends a number of laws to provide for the cancellation of welfare payments for 'individuals of security concern'.[1] The Attorney-General stated in his second reading speech that these amendments 'will ensure that the Government does not inadvertently

1 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 68.

support individuals engaged in conduct that is considered prejudicial to Australia's national security'.[2]

3.4 In its submission, the Law Council of Australia suggested that these measures respond to public outrage in July 2014 that Khaled Sharrouf, who was allegedly photographed executing Iraqi soldiers, received a disability support pension for several months.[3] The Committee did not receive any other evidence to indicate how widespread this issue might be.

Overview of proposed amendments

3.5 Schedule 2 amends the *A New Tax System (Family Assistance) Act 1999,* the *Paid Parental Leave Act 2010*, the *Social Security (Administration) Act 1991*, the *Social Security (Administration) Act 1999*, and the *Administrative Decisions (Judicial Review) Act 1977*.[4] These amendments provide that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been refused, on national security grounds.

3.6 The Explanatory Memorandum states:

> This is to ensure that the Government does not support individuals who are fighting or training with extremist groups. It is for the benefit of society's general welfare that individuals engaged in these activities do not continue to receive welfare payments.[5]

3.7 Currently, welfare payments can only be suspended or cancelled if the individual no longer meets social security eligibility rules, such as participation requirements, and residence (offshore longer than 6 weeks) or portability qualifications.[6]

3.8 The new provisions will require the cancellation of a person's welfare payment when the Attorney-General provides a security notice to the Minister for Social Services.[7] The Attorney-General will have discretion to issue a security notice where either:

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2 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 68.

3 Law Council of Australia, *Submission 12*, p. 44.

4 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [CTLA(FF) Bill], *Explanatory Memorandum*, p. 55.

5 CTLA(FF) Bill, *Explanatory Memorandum*, p. 55.

6 Australian Secret Intelligence Organisation, *Submission 11*, p. 10.

7 CTLA(FF) Bill, *Explanatory Memorandum*, p. 55

- the Foreign Affairs Minister has notified the Attorney-General that the individual has had their application for a passport refused or had 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 Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.[8]

3.9 The Foreign Affairs Minister and the Immigration Minister will have discretion as to whether to advise the Attorney-General of the passport or visa cancellation.[9]

3.10 The Australian Security Intelligence Organisation (ASIO) advocated that the 'discretionary aspect of the Attorney-General's decision making process will enable the requirements of security to be considered on a case by case basis'.[10] The Explanatory Memorandum states that, in making the decision to issue a security notice

> it would be appropriate for the Attorney General to have regard to relevant human rights considerations. In particular, the discretion means the Attorney-General is able to consider the individual circumstances of each case, including the applicable security concerns, the effect of welfare cancellation on the individual (including the availability of other sources of income), and the purposes for which the welfare payments are used.[11]

3.11 ASIO may also provide the Attorney-General with further information 'to assist his consideration of welfare cancellation for an individual'.[12] ASIO explained that its advice to the Attorney-General would address, for each case

> the extent of the nexus between the receipt of welfare payments and the assessed conduct of security concern. ASIO's advice will also address the likely impact of welfare payment cancellation, given the individual's particular circumstances and the security and operational environment, to support the case by case consideration and ensure the best overall security outcome is achieved.[13]

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8 CTLA(FF) Bill, *Explanatory Memorandum*, p. 55.

9 CTLA(FF) Bill, *Explanatory Memorandum*, p. 55.

10 Australian Secret Intelligence Organisation, *Submission 11*, p. 11.

11 CTLA(FF) Bill, *Explanatory Memorandum*, p. 56.

12 Australian Secret Intelligence Organisation, *Submission 11*, p. 11.

13 Australian Secret Intelligence Organisation, *Submission 11*, p. 11.

3.12 The Bill as drafted does not require the Attorney-General to consider any criteria when exercising the discretion.

3.13 In his second reading speech, the Attorney-General stated his expectation that this new power 'will only be used in exceptional circumstances where welfare payments are assisting or supporting criminal activity'.[14] The Explanatory Memorandum elaborated that:

> Welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual... It is not intended that every person whose passport or visa has been cancelled on security grounds would have their welfare payments cancelled, but would occur only in cases where it is appropriate or justified on the grounds of security.[15]

3.14 Where the Attorney-General has issued a security notice against an individual to the Minister for Social Services, the Secretary of the Department for Social Services will be required to take reasonable steps to notify the affected individual of the cessation of welfare payments. The Explanatory Memorandum explains however that 'in practice, notifying individuals who may be participating in overseas conflicts may not be possible'.[16]

3.15 The Bill also provides that in specific cases where family assistance payments (for example, family tax benefits and the single income family supplement) have been cancelled as a result of the security notice, the Attorney-General can recommend the appointment of a nominee to receive that payment on the individual's behalf.[17] The whole or a part of any amount that would have been payable may instead be paid to a payment nominee under Part 8B of the *Family Assistance Act*.[18] In determining the nominee to receive the payment, the Explanatory Memorandum notes:

> In practice it may be very difficult to contact the individual, especially if they are overseas fighting. In these circumstances, the parent is unable to fulfil their responsibilities and duties as a parent. Accordingly, the Secretary [of the Department of Social

14 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 65.

15 CTLA(FF) Bill, *Explanatory Memorandum*, p. 55.

16 CTLA(FF) Bill, *Explanatory Memorandum*, p. 56.

17 See proposed section 57GI (4) of the Bill.

18 CTLA(FF) Bill, *Explanatory Memorandum*, p. 57.

> Services] would appoint a nominee so that the benefit could still be paid to assist the child.[19]

3.16 The Committee notes however that these nominee arrangements are limited specifically to family assistance payments, and do not cover other payments captured under the Bill, including parental leave pay, dad and partner pay, or a social security payment.[20]

3.17 A security notice issued by the Attorney-General comes into force on the day it is given to the Minister for Social Services and remains in force until it is revoked.[21] Under the proposed amendments, the Attorney-General may revoke a security notice in writing.[22]

Review and oversight under the proposed amendments

3.18 Schedule 2 also amends the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that section 13 of the ADJR Act will not apply to decisions made in relation to welfare cancellations. This means that the decisions of the Foreign Affairs Minister, Immigration Minister and Attorney-General to issue notices will be reviewable under the ADJR Act but there will be no requirement to provide reasons for the decision.[23]

3.19 The Explanatory Memorandum states that 'this is because the decision to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia's security at risk'.[24]

3.20 The IGIS advised that although the original security assessment from ASIO to the Minister for Foreign Affairs or the Minister for Immigration in relation to the travel documents or visa may be inspected by the IGIS, decisions of the Attorney-General to issue a security notice and cancel an individual's welfare payments fall outside IGIS jurisdiction.[25]

Stakeholder feedback

3.21 A number of human rights organisations, welfare groups, academics and think tanks submitted concerns regarding the amendments contained in Schedule 2.[26] For example, the Australian Human Rights Commission was

19 CTLA(FF) Bill, *Explanatory Memorandum*, p. 57.

20 Australian Human Rights Commission, *Submission 7*, p. 18.

21 For example, see proposed section 57GN of the Bill.

22 For example, see proposed section 57GO of the Bill.

23 CTLA(FF) Bill, *Explanatory Memorandum*, p. 56.

24 CTLA(FF) Bill, *Explanatory Memorandum*, p. 56.

25 Inspector-General of Intelligence and Security, *Submission 1*, p. 9.

26 Professor Ben Saul, *Submission 2*, p. 2; Australian Human Rights Commission, *Submission 7*, pp. 17-18; Law Council of Australia, *Submission 12*, p. 45; Australian Lawyers Alliance, *Submission*

generally concerned that the 'wide range of welfare payments that may be cancelled under the proposed provisions, will negatively affect the families of individuals, including children'.[27]

3.22 The Welfare Rights Centre (Sydney) similarly submitted that:

> The consequences of cancelling a person's income support payments may be severe [and] … the bar on receiving income support payments may be indefinite and may, in practice, be difficult if not impossible for a person to challenge.[28]

3.23 The Welfare Rights Centre (Sydney) also questioned whether there were existing powers that could be used to respond to instances where welfare payments were funding terrorist activity.[29]

3.24 In addition to more general concerns, inquiry participants raised concerns around the following specific issues, which are addressed below:

- the Attorney General's wide-ranging discretion to issue security notices without limitation
- that the cancellation of welfare payments will continue indefinitely
- the absence of reasons given to individuals subject to a security notice and the review mechanisms available to challenge that decision, and
- the limitation on nominee arrangements to family assistance payments only.

Attorney-General's discretion to issue security notices

3.25 As the Bill is currently drafted, the Attorney-General is not required to consider any criteria or supporting evidence when exercising the discretion to issue a security notice and cancel an individual's welfare payments. A number of individuals and organisations recommended that the Bill be amended to require the Attorney-General's decision to be made on reasonable grounds, after considering legislated criteria.

3.26 For example, Professor Ben Saul advocated that the cancellation of welfare payments could 'only be justified as necessary and proportionate where there is evidence that such payments are being used to contribute to terrorism'.[30] Further, Professor Saul submitted:

15, p. 5; Welfare Rights Centre (Sydney), *Submission 14*, p. 2; Castan Centre for Human Rights Law, *Submission 17*, p. 7; councils for civil liberties across Australia, *Submission 25*, p. 19; and Pirate Party Australia, *Submission 32*, p. 2.

27 Australian Human Rights Commission, *Submission 7*, pp. 17-18.

28 Welfare Rights Centre (Sydney), *Submission 14*, pp. 1-2.

29 Welfare Rights Centre (Sydney), *Submission 14*, p. 2.

30 Professor Ben Saul, *Submission 2*, p. 2.

> Pre-emptive restriction in the absence of concrete evidence of abuse of welfare cannot be justified given the importance of social security to the survival of a person still present in Australia. Nor is it justifiable to withdraw payments to punish a person for their involvement with terrorism, where the payments have not been misused.[31]

3.27 The Law Council of Australia also questioned the lack of specific criteria. Noting that it is not the Bill's intent that every passport/visa cancellation/refusal will result in the issuing of a security notice, the Law Council expressed concerned that there is no limitation upon the discretion to do so.[32] Accordingly, the Law Council recommended that the Attorney-General's decisions should be made on 'reasonable grounds', having regard to key criteria including:

- whether there are reasonable grounds to suspect that a person is or will be directly involved in activities which are prejudicial to security (based on ASIO's security assessment),
- whether there are reasonable grounds to suspect that a person's welfare payments are being or will be used to support these activities,
- the necessity and likely effectiveness of cancelling welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses, and
- the likelihood that the prejudicial risk of the person to security may be increased as a result of issuing the security notice.[33]

3.28 Similarly, the Australian Human Rights Commission noted that, although it is a legitimate aim of the Government to seek to control the transfer of public monies to terrorist organisations:

> The intention of limiting the number of cases where welfare payments are cancelled is not incorporated into the substantive provisions of the Bill. Rather, the discretion of the Attorney-General, the Foreign Affairs Minister and the Immigration Minister in giving notices is left undefined.[34]

3.29 To address these concerns, the Australian Human Rights Commission recommended that the Attorney-General's discretion to issue security notices be defined to 'include a consideration that the "receipt of welfare payments was relevant to the assessed security risk posed by the

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31 Professor Ben Saul, *Submission 2*, p. 2.

32 Law Council of Australia, *Submission 12*, p. 45.

33 Law Council of Australia, *Submission 12*, pp. 11-12.

34 Australian Human Rights Commission, *Submission 7*, p. 17.

individual"'.[35] In addition, the Commission recommended that the Attorney-General's discretion include 'a consideration of the effect of welfare cancellation on the individual, including any family members and children'.[36]

3.30 The Welfare Rights Centre (Sydney) also recommended that Schedule 2 be amended to include 'legislative restrictions on the circumstances when the Attorney-General may exercise this discretion'.[37]

Cancellation of payments will continue indefinitely

3.31 The Bill currently provides that the Attorney-General's decision to issue a security notice and cancel welfare payments will operate indefinitely.[38] The Law Council of Australia recommended that the Attorney-General should be required to regularly consider whether revocation of a security notice is warranted.[39]

3.32 Similarly, the Welfare Rights Centre (Sydney) commented that the Explanatory Memorandum did 'not explain why this matter should be left up to the unrestrained discretion of the Attorney-General or why there is no provision for periodic reassessment of these decisions'.[40]

Reasons and review

3.33 A number of inquiry participants expressed concern regarding the ability of affected individuals to access reasons for the Attorney-General's decisions, and the ability of that decision to be reviewed.[41]

3.34 For example, the Law Council of Australia expressed concerns regarding the review and reasons provisions in Schedule 2, commenting that the lack of reasons 'may reduce the effectiveness of judicial review'.[42] To address its concern, the Law Council recommended that 'merits review should be available by the Administrative Appeals Tribunal Security Division in respect of the Attorney-General's decision to issue a security notice'.[43] Furthermore:

35 Australian Human Rights Commission, *Submission 7*, pp. 17, 19.

36 Australian Human Rights Commission, *Submission 7*, pp. 17, 19

37 Welfare Rights Centre (Sydney), *Submission 14*, p. 2.

38 For example, see proposed section 57GO of the Bill.

39 Law Council of Australia, *Submission 12*, pp. 12, 46.

40 Welfare Rights Centre (Sydney), *Submission 14*, p. 2.

41 Professor Ben Saul, *Submission 2*, p. 2; Australian Human Rights Commission, *Submission 7*, p. 18; Law Council of Australia, *Submission 12*, p. 45; Welfare Rights Centre (Sydney), *Submission 14*, p. 3; councils for civil liberties across Australia, *Submission 25*, p. 19; and Pirate Party Australia, *Submission 32*, p. 2.

42 Law Council of Australia, *Submission 12*, p. 45.

43 Law Council of Australia, *Submission 12*, pp. 12, 46.

> Consideration could also be given to ensuring that a minimum standard of disclosure of information must be given to the subject about the reasons for the allegations against him or her. This would be sufficient to enable effective instructions to be given in relation to those allegations.[44]

3.35 Similarly, the Australian Human Rights Commission expressed concern regarding the current oversight mechanisms, commenting that 'in practice, the ability to challenge [these] decisions… will be extremely limited'.[45] The Commission considered that sufficient information should be provided to an individual 'to understand the information … relied upon'.[46] In evidence, Professor Gillian Triggs suggested that

> where payments are being blocked, stopped, for the reason of suspecting terrorism, there should be some sort of monitoring through an advocacy or appeals process that would allow the family to argue that they need that payment for perfectly legitimate reasons…We are very worried that this will cut the entire family out because one member of the family—a brother, sister, father or mother—has engaged in these activities. Again, it brings us back to this point about discretion and oversight, and we have suggested that there be some form of appeal process to some form of advocate... We would like to see that in there so that we can catch those cases where perfectly innocent members of the family are going to be jeopardised.[47]

3.36 In its submission, the Australian Human Rights Commission recommended the establishment of a 'Special Advocate' who would 'appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons from an individual'.[48]

3.37 The Welfare Rights Centre (Sydney) supported the Commission's recommendation for a Special Advocate as a mechanism to address its concerns regarding the current review mechanism.[49] The Welfare Rights Centre (Sydney) considered the Bill as currently drafted limits the right to review, and commented that 'this right may be practically ineffective given the possibility that evidence may be kept secret from the person on national security grounds'.[50] Professor Ben Saul similarly noted that the

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44 Law Council of Australia, *Submission 12*, p. 46.

45 Australian Human Rights Commission, *Submission 7*, p. 18.

46 Australian Human Rights Commission, *Submission 7*, p. 18.

47 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 15.

48 Australian Human Rights Commission, *Submission 7*, p. 19.

49 Welfare Rights Centre (Sydney), *Submission 14*, p. 3.

50 Welfare Rights Centre (Sydney), *Submission 14*, p. 3.

Bill's current limitation on the right to review may be contrary to the *International Covenant on Economic, Social and Cultural Rights*.[51]

Extending nominee arrangements for all affected welfare payments

3.38 As discussed above, the Bill currently provides for the receipt of cancelled family assistance payments by a nominee. However, these arrangements do not extend to the full range of welfare payments which can be cancelled under the Bill. The Australian Human Rights Commission noted that the power to make family assistance payments to a nominee did not apply to 'parental leave pay', 'dad and partner pay' or a 'social security payment' despite these payments also potentially assisting an individual to provide for children.[52] The Commission therefore recommended extending the power to make payments to a nominee in the event that the latter payments were cancelled.[53] The Law Council of Australia similarly recommended that a payment nominee should be required to act in the best interests of a child or dependants.[54]

Committee comment

3.39 The Committee believes that cancelling welfare payments that are used to finance, sustain or assist terrorist activity both domestically and abroad is a reasonable proposition.

3.40 The Committee is concerned that the Bill grants the Attorney-General unencumbered discretion to issue a security notice and cancel welfare payments. The Bill does not require the Attorney-General to give consideration to any specific matters when making this decision, nor does it require the decision to be made on reasonable grounds or evidence that public monies are being used to finance, sustain or assist terrorism.

3.41 To address this concern, the Committee recommends that the proposed sections 56GJ, 278C, 38N of Schedule 2 (Part 1) of the Bill be amended to require the Attorney-General to make the decision to issue a security notice on reasonable grounds, having regard to:

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

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51 Professor Ben Saul, *Submission 2*, p. 2.

52 Australian Human Rights Commission, *Submission 7*, p. 18.

53 Australian Human Rights Commission, *Submission 7*, p. 19.

54 Law Council of Australia, *Submission 12*, pp. 12, 46.

3.42 The Committee notes the Australian Human Rights Commission's recommendation that the nominee provisions of family assistance payments be extended to other welfare payments captured by the Bill. Responding to these concerns, the Attorney-General's Department advised the Committee that

> except for the family assistance payments, the social security system is otherwise based on a scheme of individual entitlements, not dependency based payments, and it is therefore not normally necessary to provide for alternative payment arrangements.[55]

3.43 Amending the Bill to require the Attorney-General to give due consideration to the likely effect of the cancellation of welfare payments on any dependents, as proposed above, would address the Committee's concerns in this area.

Recommendation 29

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

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

3.44 While noting that the Bill provides mechanisms for the Attorney-General to repeal a security notice and reinstate welfare payments to the affected individual, the Committee is concerned that the Bill could allow a security notice issued by the Attorney-General to continue indefinitely.

3.45 The Committee is of the view that the Attorney-General should be required to conduct an initial review 12 months after issuing a security notice, and conduct ongoing reviews every 12 months for the time period the notice remains active. The Committee believes that this requirement will provide an appropriate balance to the Attorney-General's wide-ranging discretion granted in the Bill.

55 Attorney-General's Department, *Supplementary Submission 8.1*, p. 37.

3.46 When reviewing these decisions, the Committee considers that the Attorney-General should have regard to any new evidence and security assessments in combination with the following criteria:

- whether there remains reasonable grounds to suspect that the individual is, or will be, directly involved in activities which are prejudicial to security (with consideration given to ASIO's security assessment)
- whether there are reasonable grounds to suspect that the resumption of welfare payments will be used to support these activities
- the necessity and likely effectiveness of the ongoing cancellation of welfare payments in addressing the prejudicial risk, having regard to the availability of alternative responses, and
- submissions made by the affected individual and their family in regards to the ongoing cancellation of the payment.

Recommendation 30

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

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

3.47 Some stakeholders called for the establishment of a Special Advocate in relation to the proposed amendments contained in Schedule 2. The Committee notes that the INSLM examined whether special advocates would improve the fairness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in his Third Annual Report. The INSLM concluded that Australia should not pursue such a system, commenting that:

> The INSLM does not believe that a special advocate can provide the court with assistance to an extent that would remedy the fair trial issues that would arise where a defendant's lawyer was excluded from the court during argument over whether potentially critical and exculpatory evidence should be adduced in a criminal proceeding.[56]

56 Independent National Security Monitor, *Third Annual Report*, p. 152.

3.48 The Committee also notes the recent recommendation from COAG for a 'nationwide system of "special advocates"… [which] could allow each State and Territory to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures whenever necessary'.[57] The Committee notes that the Government is yet to respond formally to the COAG report, and observes that some of the recommendations made in that report are included in this Bill. The Committee will await the final response from the Government on the matter of special advocates.

Schedule 3 – Customs detention powers

3.49 Schedule 3 of the Bill proposes amendments to the *Customs Act 1901* (the Customs Act) in regards to the powers of Customs officers to detain a person and to conduct a search of a person.

3.50 The Explanatory Memorandum states that the amendments are to 'overcome vulnerabilities in the detention power of Customs'.[58] Specifically, the Explanatory Memorandum states that the amendments to Customs' detention powers encompass:

- extending 'serious Commonwealth offence' to any Commonwealth offence that is punishable upon conviction by imprisonment for a period of 12 months or more,
- expanding the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence,
- expanding the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours.[59]

3.51 Schedule 3 also includes a proposed amendment to extend the power to conduct a search of a person 'where it is to prevent the concealment, loss or destruction of information relating to a threat to national security'.[60]

3.52 In explaining how these powers would enhance the national security capacity of Customs officers, the Australian Customs and Border Protection Service (Customs), commented that:

57 COAG, *Final Report of the COAG Review of Counter-terrorism legislation,* March 2013, viewed 10 October 2014, <http://www.coagctreview.gov.au/Report/Pages/default.aspx>, Recommendation 30, pp 59–60.

58 CTLA(FF) Bill, *Explanatory Memorandum*, p. 8.

59 CTLA(FF) Bill, *Explanatory Memorandum*, p. 57.

60 CTLA(FF) Bill, *Explanatory Memorandum*, p. 58.

> Customs officers, at points of ingress and egress into the country, intervene where there is intelligence or other assessments indicating that persons are carrying prohibited goods or goods that are subject to duty or excise. The powers we are seeking under this bill will extend the horizon of our officers in terms of aspects where there may be a threat to our national security or the security of a foreign country. The material we would be seeking to evidence that suspicion or that belief comprises things such as extremist material carried on digital devices, undeclared excess currency and things of that nature that would indicate to our officers that there is a suspicion or a belief that these persons are a threat to national security or are going to be engaged in some activity that relates to terrorism.[61]

Serious Commonwealth offence

3.53 The Attorney-General described the proposed expanded detention powers of Customs officers as measures to 'ensure Australia's borders remain safe and secure' as the amendments aim to 'prevent individuals from travelling outside of Australia where their intention is to commit acts of violence' and prevent 'these individuals from returning to Australia with greater capacity to carry out terrorist attacks on Australian soil'.[62]

3.54 The Customs Act currently provides for the detention of a person if the customs officer suspects on reasonable grounds that the person has committed or is committing a serious Commonwealth offence.[63] The current definition of a 'serious Commonwealth offence' is an offence which involves particular conduct (including threats to national security, espionage, sabotage, violence, firearms, theft, forgery, money laundering, fraud, prohibited imports) and is punishable by at least three years' imprisonment.[64]

3.55 The Bill proposes a new definition of 'serious Commonwealth offence' as any Commonwealth offence which is punishable by at least one year's imprisonment. Evidence to the inquiry focused on how this expanded definition may inappropriately go beyond the objectives of the Bill to strengthen counter-terrorism measures.

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61 Mr Roman Quaedvlieg, Deputy Chief Executive Officer, *Committee Hansard*, Canberra, 3 October 2014, p. 46.

62 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 24 September 2014, p. 65.

63 Section 219ZJB of the Customs Act.

64 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 23; Law Council of Australia, *Submission 12*, p. 39. See also section 219ZJA, Customs Act 1901; section 15GE, Crimes Act 1914.

3.56 The Gilbert + Tobin Centre of Public Law queried the rationale for the definitional change relating to offences from three years down to one year, noting that all of the terrorism offences are punishable by much higher penalties.[65] Their submission stated that:

> It is not clear why this definition needs to be relaxed to cover offences of between 1 and 3 years' imprisonment when all of the terrorism offences are punishable by much higher penalties (ranging from 10 years to life imprisonment). One possibility is that customs officers would be able to justify searches relating to the prevention of terrorism by demonstrating reasonable suspicion as to some more minor offence.[66]

3.57 Refuting the suggestion that this expanded definition may be required for 'the prevention of terrorism by demonstrating reasonable suspicion as to some more minor offence', Gilbert + Tobin argued that such a situation would be covered by the power for detention on national security grounds which is proposed in the Bill. They concluded that evidence has not been provided to justify the broadened definition of a serious Commonwealth offence.[67]

3.58 Similarly Mr John Howell, lawyer for the Australian Human Rights Commission, raised concerns regarding the justification provided for the change and its application beyond suspected terrorist activities:

> The principal concern really is the lack of justification in the explanatory memorandum for changing the definition of a 'serious Commonwealth offence' … The real concern there is that the explanatory memorandum, the statement of compatibility, are all ostensibly addressed at combating terrorist type offences. The current definition of 'serious Commonwealth offence' relates to a number of different offences a Customs official can detain a person who is in the course of committing or has committed—one of a list of offences. All of those offences at the moment have to have a minimum term of imprisonment of three years … I suppose the real question is: has a justification for this change being given? It certainly would capture many, many things that are not terrorism related. All the important terrorism related offences have very significantly higher terms of imprisonment attached to them than

65 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 23. Gilbert + Tobin noted that the exception to this is the offence of associating with members of a terrorist association which is punishable by three years imprisonment. However, even this offence would qualify under the existing definition of a serious Commonwealth offence.

66 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 23.

67 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 23.

> the current minimum term given in the legislation pre-amendment.[68]

3.59 Consequently the Australian Human Rights Commission considered, in respect of this proposed definitional change, that the infringement on the rights to freedom from arbitrary detention and the freedom of movement had not been demonstrated to be necessary and proportionate to achieve a legitimate objective.[69]

3.60 Reiterating these concerns regarding the expanded powers of Customs officers to detain in relation to a wider range of offences, the councils for civil liberties across Australia stated that:

> It is not clear to us how this general increase in the powers of customs officers, who are not subject to the same discipline as police, to detain people is connected with the general terrorism purposes of this legislation.[70]

3.61 The Law Council of Australia indicated that 'it is not clear why the definition of a "serious Commonwealth offence" is being redefined in a manner which is inconsistent with the Crimes Act' and this proposal would appear to extend beyond the Bill's counter-terrorism purpose. The Law Council noted that '[t]he potential effect of the proposed provision will be that Customs officers will be able to detain people for comparatively minor offences' and went on to note that this may extend to detention by a Customs officer on suspicion that a person 'is *intending* to commit a minor offence'.[71]

3.62 In this context, the Law Council raised concerns that:

> The definition of 'national security' is very broad and would rest on Customs officers making judgments about whether a matter was a threat to Australia's international relations, defence, law enforcement and security interests.[72]

3.63 The Law Council questioned whether this amendment is necessary, and argued that a threat to national security or security of a foreign nation is likely to fall within the current definition of a 'serious Commonwealth offence'. The Council summarised its position, stating that it

> is not persuaded that a different definition of a 'serious Commonwealth offence' for the *Customs Act 1901* (Cth) applying other than that advanced by the *Crimes Act 1914* (Cth) is needed or

68 Mr John Howell, Lawyer, *Committee Hansard*, Canberra, 3 October 2014, p. 14.

69 Australian Human Rights Commission, *Submission 7*, p. 13.

70 Councils for civil liberties across Australia, *Submission 25*, p. 19.

71 Law Council of Australia, *Submission 12*, pp. 40-41.

72 Law Council of Australia, *Submission 12*, p. 41.

> justified and is concerned that lowering the threshold to offences punishable by only 1 year imprisonment may not be an effective counter-terrorism measure as terrorism offences are punishable by far higher penalties.[73]

3.64 The submission from the Attorney-General's Department described Schedule 3 as 'addressing the shortcomings in the current powers of Customs' officers under the Customs Act 1901 to detain persons of interest'.[74] However no rationale is advanced for the expanded definition proposed and how this may address the suggested shortcomings in the current definition.

Grounds for detention

3.65 The Bill proposes amending the detention powers of Customs officers, in particular the threshold for the grounds for detention, the period of detention and the place of detention.

3.66 Currently a Customs officer may detain a person where the officer 'has reasonable grounds to suspect that the person has committed, or is committing, a serious Commonwealth offence or a prescribed State or Territory offence'.[75] Schedule 3 proposes extending the operation of these powers to 'is committing or intends to commit'.

3.67 The councils for civil liberties across Australia disagreed with the expanded grounds for detention by Customs, and argued that a person 'should not be detained on the basis of the amorphous opinion of an official of the state that they are a threat to the national security of somebody'.[76]

3.68 Professor Triggs, President of the Australian Human Rights Commission, cautioned that the word 'intends' would allow a Customs officer to detain a person when

> no steps have been taken toward the commission of the offence. This is a very, very extreme basis on which detention can take place. … We have very low level threshold of merely suspecting, and you are suspecting something which is in the mind of somebody but without outside objective acts and steps taken towards the commission of it. All I am saying is that by going that far, lowering the threshold to the extent that you have, means that

73 Law Council of Australia, *Submission 12*, p. 10.

74 Attorney-General's Department, *Submission 8*, p. 6.

75 Section 219ZJB(1)(b) of the Customs Act

76 Councils for civil liberties across Australia, *Submission 25*, p. 19.

> one has to be more cautious than ever about the level of safeguards.[77]

3.69 While acknowledging that preventative detention may be justified in the situation of an intention to commit an act of terrorism, the Australian Human Rights Commission expressed concern at the scope of the powers, especially given the proposed change in the 'serious Commonwealth offence definition':

> However the amendment as proposed by the Bill would allow detention where a customs official reasonably suspects that a person intends to commit any of a large number of comparatively minor non-terrorism-related offences.
>
> The Commission considers that this goes considerably beyond what is justified to protect national security or other human rights.[78]

3.70 Similarly, the Australian Lawyers Alliance suggested that the shift to 'intend to commit' and 'reasonable suspicion' as the basis on which Customs officers may detain a person 'significantly widens the powers of an officer to detain a person'.[79]

3.71 The Law Council of Australia described the shift in threshold grounds for detention as 'extraordinary' and argued they must be 'properly justified'.[80]

3.72 In the supplementary submission provided by the Attorney-General's Department, it was argued that:

> In exercising these powers, the current thresholds whereby an officer of Customs can detain a person if the officer has reasonable grounds to suspect that the person has committed or is committing a serious Commonwealth offence may result in situations where despite information received from partner agencies or the behaviour or documentation presented by the passenger, detention may not be possible. This is why the operation of section 219ZJB is proposed to be amended to include where an officer has reasonable grounds to suspect that a person is intending to commit a serious Commonwealth offence.[81]

77 Professor Triggs, *Committee Hansard*, Canberra, 3 October 2014, p. 14.

78 Australian Human Rights Commission, *Submission 7*, p. 13.

79 Australian Lawyers Alliance, *Submission 13*, p. 7.

80 Law Council of Australia, *Submission 12*, p. 41.

81 Attorney-General's Department, *Submission 8.1*, p. 18.

Period of detention

3.73 Currently the Customs Act provides that if a person is detained for a period greater than 45 minutes, then the person has the right to have a family member or another person notified. The period before notification was referred to as 'detention incommunicado' by some submitters. The Bill proposes extending this allowable timeframe of detention incommunicado from 45 minutes to four hours.

3.74 Under the current Act a Customs officer has the discretion to

> refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard law enforcement or to protect the life and safety of another person.[82]

3.75 The Bill proposes expanding the scope of a Customs officer's discretion to include 'safeguarding national security or the security of a foreign country' as additional circumstances that an officer may take into account when determining if notification of detention is made to a family member or other person.

3.76 In explanation of the change in time limit from 45 minutes to four hours, the Explanatory Memorandum states that

> it is considered that there may also be vulnerabilities with regard to the time and opportunity for the officer of Customs to undertake sufficient enquiries once a person has been detained, especially in order to determine whether notification to a family member or other person should or should not be made.[83]

3.77 The Gilbert + Tobin Centre of Public Law recommended against extending the current time limit of 45 minutes, noting that an officer has discretionary powers to deny contact and that the Bill proposes expanding these grounds to include national security.[84]

3.78 Similarly, given the seriousness of detention incommunicado, the Australian Human Rights Commission did not consider that the amendment had 'been shown to be necessary and proportionate to a legitimate purpose'.[85] The Australian Lawyers Alliance also voiced concern at the extended timeframe proposed.[86] The Australian National

82 CTLA(FF) Bill, *Explanatory Memorandum*, p.183.

83 CTLA(FF) Bill, *Explanatory Memorandum*, p. 183.

84 Gilbert + Tobin Centre of Public Law, *Submission 3*, pp. 23-24.

85 Australian Human Rights Commission, *Submission 7*, p. 13.

86 Australian Human Rights Commission, *Submission 7*, p. 13.

Imams Council noted that this proposal 'considerably widens current provisions' where Customs can detain a person.[87]

3.79 A submission from the Islamic Council of Queensland, Council of Imams Queensland, Queensland Association of Independent Legal Services, and 818 individual signatories questioned the need for such a substantial increase in the allowable period of detention. Their submission stated:

> We recommend a reduction in the detention powers offered to Customs from 4 hours to 90 minutes. This is double the current allowance and is far more reasonable than the sixfold increase proposed.[88]

3.80 The Law Council of Australia acknowledged the requirement for an appropriate period for Customs officers to undertake inquiries once a person is detained, especially where the matter relates to security issues and may trigger a visa suspension or other action. However the Law Council questioned whether four hours of detention incommunicado is 'a reasonable restriction as claimed in the Explanatory Memorandum'.[89]

Detainee made available to a police officer

3.81 The Law Council of Australia raises concerns regarding the consequences of wording changes requiring Customs to ensure that a person is 'delivered, as soon as practicable, into the custody of a police officer' to the proposed wording that a person is 'made available, as soon as practicable to a police officer'.

3.82 The Explanatory Memorandum states that 'this amendment reflects current practice whereby the person is made available to a police officer from Customs detention'.[90]

3.83 Given the strictly temporary nature of the Customs detention power, the Law Council noted concern if this change was interpreted as 'simply letting a police officer know that a person is being detained and asking if the police intend to respond'.[91] The Law Council questioned the purpose of the amendment and suggested that if the intention

> is to allow a situation in which the police collect the individual, rather than Customs taking him or her to the nearest police station, then a different amendment could be included which

87 Australian National Imams Council, *Submission 35*, p. 3.

88 Islamic Council of Queensland, Council of Imams Queensland, Queensland Association of Independent Legal Services, and 818 individual signatories, *Submission 30*, p. 3.

89 Law Council of Australia, *Submission 12*, p. 41.

90 CTLA(FF) Bill, *Explanatory Memorandum*, p. 182.

91 Law Council of Australia, *Submission 12*, p. 42.

> clarifies that as well as delivery, the police may collect the individual from Customs.[92]

Oversight

3.84 Alongside the proposed expansion in Customs detention powers, new administrative arrangements are intended to reflect the changed roles of officers controlling Australia's borders. From 1 July 2015 the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service will be consolidated into a single Department of Immigration and Border Protection. At this time the Australian Border Force, a single frontline operational border agency, will be established within the department. In relation to these changes, Mr Chris Dawson, Chief Executive Officer of the Australian Crime Commission, commented that

> we know that the border force, for instance, is a new entity that is going to come up out of the ground and emerge in immigration and the traditional Customs type of inspection. That of itself requires not only the legislative change but also both cultural and departmental change and that operational engagement to make sure that there are no cultural impediments.[93]

3.85 The use and operation of detention powers by Customs officers falls within the oversight of the Ombudsman who may investigate following a complaint or initiate an own motion investigation. However there is no current requirement for Customs to report to the Ombudsman on the frequency of use of the Customs' detention powers.

3.86 With the proposed expanded grounds for detention, the lowering of the threshold of suspicion, and the increase in the allowable period of detention without contact, additional oversight was raised by some witnesses as an issue. The Law Council of Australia recommended

> a positive obligation being placed on Customs to report to the Commonwealth Ombudsman on when a person has been detained under section 219 ZJB of the Customs Act, whether, and at what period during the detention, the officer informed the person that he or she is allowed to notify a family member that they are being detained, and the result of the detention, including whether the matter was referred to a law enforcement officer.[94]

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92 Law Council of Australia, *Submission 12*, p. 42.

93 Mr Chris Dawson, Chief Executive Officer, Australian Crime Commission, *Committee Hansard*, Canberra, 8 October 2014, pp. 23–24.

94 Law Council of Australia, *Submission 12*, p. 42.

Committee comment

3.87 The Committee acknowledges that the threat of Australians leaving to fight overseas, and returning to Australia with potentially violent intentions brings a change to the role of Customs officers and those controlling our borders. Customs officers may be called on to make rapid decisions relating to national security threats and to act on reasonable suspicions they may have as to a person's intent. It is appropriate that the changing role of Customs officers at our borders be supported by amendments to their enabling legislation, as provided for in this Bill.

3.88 The Committee notes concerns relating to the expanded definition of 'serious Commonwealth offence'. The proposed definition substantially extends the powers of Customs officers to detain a person for more minor offences which may not be related to suspicion of a terrorism activity.

3.89 The expanded power to detain is intended to allow Customs officers to better assist law enforcement agencies in relation to the detection and investigation of serious Commonwealth offences. However, the Committee is not satisfied that expanding the definition as proposed is justified on these grounds. The amendment would capture a range of a suspected criminal activity which would seemingly have little connection to terrorism activity.

3.90 Every other proposal contained in this Bill is designed to counter threats to national security or terrorist activity. There has been no evidence before the Committee which demonstrates how the proposal fits within these purposes. There has also been no evidence which demonstrates why offences which carry a minimum 12-month imprisonment penalty are an appropriate trigger for the existing detention powers.

3.91 Accordingly, the Committee is not convinced that the new definition is necessary in a counter-terrorism legislative framework. Consequently, the Committee does not support the measure, unless the Attorney-General is able to provide to the Parliament further explanation on its necessity and how it would enable a greater role for Customs in dealing with threats to national security or terrorist activity.

Recommendation 31

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

3.92 Further, neither the Explanatory Memorandum nor other evidence to this inquiry has provided a clear explanation as to why the extended period of four hours detention is required without contacting a detainee's family member or another person. The Committee accepts the need for Customs officers to have the powers to detain persons in certain circumstances. The Committee supports the inclusion of national security as additional grounds for refusing contact during a period of detention. The Committee accepts that the current 45 minute allowable detention period without notification to family or friends may not be sufficient for adequate checks to be conducted.

3.93 However, the Committee has seen no explanation as to why the current 45 minute period should be so substantially increased, and why an intermediate time is not sufficient. Detention incommunicado is a serious infringement of a person's fundamental rights, and would be exercisable by an officer in circumstances where there is only a suspicion of intent.

3.94 Accordingly the Committee considers that the scope of this power must be balanced by a shorter permissible period of detention incommunicado than that proposed in the Bill. The Committee suggests a two hour period is more appropriate in balancing the seriousness of a national security threat with an individual's rights. Beyond this time a Customs officer may still exercise the power to refuse contact if it is considered that notification should not be made to safeguard law enforcement processes, the life and safety of another person, or the new circumstances to safeguard national security or the security of a foreign country.

Recommendation 32

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

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

3.95 Alongside the increased responsibilities and the expanded powers proposed in this Bill must come greater training, oversight and accountability for Customs officers working in frontline positions at Australia's borders.

3.96 In particular, the Ombudsman will assume greater oversight and the Committee encourages the Ombudsman to oversee training procedures for Customs officers that equip them in the reasoned exercise of these powers as required. Regarding the use of Customs detention powers, the Committee recommends that instances of detention and the length of detention form part of regular reporting to the Ombudsman, including information as to whether a person is then made available to a police officer.

3.97 Moreover, where a Customs officer exercises their power to refuse a person contact with a family member or other person, the Committee believes that notice of this action should be provided to the Ombudsman within seven days.

3.98 In regards to the change in wording requiring a Customs officer to 'make available to a police officer' a detainee, rather than 'deliver to police officer', the Committee considers it worthwhile to clarify in the Explanatory Memorandum the intent of the wording change.

Recommendation 33

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

Schedule 4 – Cancelling visas on security grounds

3.99 Schedule 4 of the Bill will amend the *Migration Act 1958* (Migration Act) to enable a visa to be cancelled on security grounds.

3.100 The amendment in the Bill is designed to address a gap in the existing regime whereby temporary action may need to be taken to mitigate a security risk. Specifically, the Explanatory Memorandum outlines that:

> 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.[95]

3.101 This provision adds to the range of tools currently available to manage the risks a non-citizen may pose, including:

> where ASIO makes an assessment that a permanent visa holder is a direct or indirect risk to national security, existing section 501 of the Migration Act provides the capacity for a permanent visa holder in Australia to be considered for visa cancellation. Further, section 116 of the Migration Act provides for the cancellation of a temporary visa *onshore*, and a temporary or permanent visa *offshore* on the grounds that the visa holder has been assessed as posing a direct or indirect risk to the Australian community (within the meaning of the ASIO Act).[96]

3.102 Justifying the nature of the amendment, ASIO outlined in its submission that it considered:

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95 CTLA(FF) Bill, *Explanatory Memorandum*, p. 61.

96 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 60–61.

> This amendment provides an appropriate and proportionate mechanism to respond to potential security threats posed by non-citizens intending to travel to Australia where there is insufficient time for ASIO to assess new information that the person is directly or indirectly a risk to security.[97]

3.103 The Law Council of Australia, while accepting the need for the amendments, expressed concern with aspects of the amendments, including:

> Cancellation under the proposed provision will be mandatory, will be without notice or notification, not required to adhere to the principles of natural justice5 and will not be merits reviewable. These features of the proposal challenge rule of law principles, which require the use of Executive power to 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.[98]

Criteria and process for cancelling visa

3.104 The Bill will *require* the Minister for Immigration to cancel a visa held by a person if an assessment provided by ASIO contains:

- advice that ASIO suspects that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), and
- a recommendation that all visas held by the person be cancelled.[99]

Mandatory requirement

3.105 In relation to the Minister being *required* to cancel the visa on the advice of ASIO, the Australian Human Rights Commission, on the basis of the effect of such a cancellation, called for the decision to cancel the visa to be discretionary rather than mandatory. The Commission noted that this would allow the Minister to consider the potential consequences of such a cancellation, including human rights ramifications.[100]

3.106 The Law Council of Australia similarly advocated that the Bill

97 Australian Security Intelligence Organisation, *Submission 11*, p. 10

98 Law Council of Australia, *Submission 12*, p. 30

99 Proposed section 134B of the CTLA(FF) Bill.

100 Australian Human Rights Commission, *Submission 7*, p. 15

> ensure that the emergency cancellation power is discretionary not mandatory, permitting the decision maker to have regard to the circumstances of the case.[101]

3.107 In response to concerns about the mandatory nature of the cancellation power, the Department of Immigration and Border Protection stated

> mandatory cancellation is appropriate in this context, given that the purpose of the emergency cancellation proposal is to enable a response to the perceived imminent security threat.[102]

3.108 Additionally, the Explanatory Memorandum to the Bill outlines that the Minister is already required to cancel a visa as a consequence of an ASIO assessment that a person is a risk to security.

> Under the existing provisions, the consequence of an ASIO assessment of 'is a risk to security', for a visa holder who is outside Australia, is that the Minister must cancel the visa. Cancellation is mandatory for both temporary and permanent visas. For example, a permanent visa holder may have resided in Australia for several years. If that person departs Australia and, as a consequence of the person's activities overseas, is assessed by ASIO to be a risk to security, the visa must be cancelled. The visa can be cancelled with notice (under section 116) or without notice (under section 128).[103]

Threshold test

3.109 The threshold for the emergency cancellation of a visa is lower than that for a permanent cancellation (*might* be a direct or indirect risk to security compared with *is* a direct or indirect risk to security).

3.110 The Gilbert + Tobin Centre of Public Law expressed concern in relation to the threshold level that ASIO only needs to *suspect* the person *might* be a direct or indirect risk to security. Gilbert + Tobin went on to argue that:

> This sets a very low threshold, and could be said of 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, we believe that a higher standard for imposing the initial cancellation would be appropriate to sensibly confine the power.

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101 Law Council of Australia, *Submission 12*, p. 31

102 Attorney-General's Department, *Supplementary Submission 8.1*, p. 19.

103 CTLA(FF) Bill, *Explanatory Memorandum*, p. 187. This requirement is contained in sections 116 and 128 of the *Migration Act 1958* and paragraphs 2.43(1)(b) and 2.43(2) of the Migration Regulations 1994.

> The legislation should require 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.[104]

3.111 This position was supported by the Australian Human Rights Commission.[105]

3.112 In response, ASIO advised that

> it is their view that it is implicit that this assessment must be based on reasonable grounds, and ASIO will apply this standard when preparing a security assessment for the purposes of the emergency visa cancellation provisions.[106]

Timeframes for initial and permanent cancellation

3.113 The emergency cancellation will only apply for 28 days. This is designed to 'enable ASIO additional time to further consider the security risk posed by that individual.'[107] In the Attorney-General's Department supplementary submission, ASIO provided an example to further justify the need for this amendment:

> There may be circumstances where ASIO obtains intelligence in respect of a person who is planning to travel to Australia imminently, that indicates the person presents as a security risk. In such circumstances ASIO may be unable to meaningfully assess the extent and nature of the security risk and conduct a security assessment investigation prior to the person's travel.[108]

3.114 The amendment also defines the process that is to occur during and at the end of the 28 days to ensure due regard is given to whether the cancellation will be made permanent or not. Specifically, the cancellation will:

- be revoked if:
  - ⇒ ASIO recommends the cancellation of the visa be revoked, and
  - ⇒ a security assessment is not furnished by ASIO within the 28 days that recommends against revocation having assessed that the person is, directly or indirectly, a risk to security

104 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 22.

105 Australian Human Rights Commission, *Submission 7*, p. 15.

106 Attorney-General's Department, *Supplementary Submission 8.1*, p. 19.

107 CTLA(FF) Bill, *Explanatory Memorandum*, p. 61.

108 Attorney-General's Department, *Supplementary Submission 8.1*, pp. 18-19.

- not be revoked (made permanent) if within the 28 days ASIO provide an assessment recommending the cancellation not be revoked on the basis that person is, directly or indirectly, a risk to security.[109]

3.115 The amendments require the person to be notified where a decision is made to not revoke the cancellation (the point at which the cancellation is permanent). However, this notification is not required in circumstances where ASIO have advised that a notice not be given due to the security of the nation.

3.116 The IGIS observed in her submission that the provisions are silent on whether multiple, consecutive cancellations are possible.[110] On this point, the Explanatory Memorandum noted:

> There is no provision for ASIO to seek an extension of the 28 day period in circumstances where additional time is required to conclude an assessment. ASIO can, however, issue a further assessment under section 134B, which would require the reinstated visa to again be cancelled. This would restart the 28 day period. While it is not intended to unreasonably fetter ASIO in the task of assessing security risks, it is also not intended that this mechanism would be used in serial fashion to continue extending the period within which ASIO must form an opinion about whether a person is a risk to security. The operation of the emergency cancellation power will be monitored and reviewed within the established framework of accountability measures applying to ASIO.

3.117 The IGIS also noted:

> Temporary cancellation requests are not subject to AAT review and such requests, particularly any cases of multiple requests, will be subject to IGIS scrutiny.[111]

Consequential cancellation of visas

3.118 The amendments will, in circumstances where a person's visa has been permanently cancelled, provide the Minister with the discretion to cancel visas held by any other person solely because the first person held a visa.

3.119 The Gilbert + Tobin Centre of Public Law expressed concern with this element of the amendments, specifically drawing the Committee's attention to the effect it could have:

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109 Proposed section 134C of the CTLA(FF) Bill.

110 Inspector-General of Intelligence and Security, *Submission 1*, pp. 8-9.

111 Inspector-General of Intelligence and Security, *Submission 1*, p. 9.

> Where those family members are in Australia, they would be exposed to immediate detention and/or deportation. If this power is to be included in the legislation, it should at least require that notice be given for these consequential cancellations.[112]

3.120 On this point, the Australian Human Rights Commission welcomed that

> the Statement of Compatibility with Human Rights states that [a number of human rights] will be taken into account by the government's policies and administrative decision making processes.[113]

3.121 The Law Council of Australia however sought 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 the CROC.[114]

3.122 While the amendments outline that this cancellation may be without notice, the Department of Immigration and Border Protection (DIBP) provided advice that:

> In response to concerns raised regarding the notification of consequential cancellations, DIBP has advised that for visas cancelled consequentially it is intended that former visa holders will be notified of the cancellation of their visa, the grounds on which their visa was cancelled and the effect of that visa cancellation on their status, including review rights, if available.[115]

Committee comment

3.123 As is the case for the temporary suspension of Australian and foreign travel documents (as provided for in Schedule 1 to the Bill), the Committee supports measures directly aimed at preventing persons who constitute a security risk from traveling to Australia. The Committee sees the reforms in this schedule as necessary and appropriate to the stated aims of the Bill.

3.124 The Committee notes comments about the mandatory nature of the requirement to cancel a visa on advice from ASIO which does not provide the Minister with any discretion. While there were differing views in the

112 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 22.

113 Australian Human Rights Commission, *Submission 7*, p. 16.

114 Law Council of Australia, *Submission 12*, p. 31.

115 Attorney-General's Department, *Supplementary Submission 8.1*, p. 19.

Committee on the appropriateness of the Bill directing a Minister in such a way, the Committee notes the policy rationale behind this approach. Firstly, the approach is consistent with the existing mandatory requirement for the Minister to cancel a visa where the holder of the visa has been assessed by the ASIO to be directly or indirectly a risk to security.[116] Secondly, given the nature of the advice, the Committee considers it appropriate that security is the only consideration and that other factors should not be relevant to the Minister's decision.

3.125 The Committee also notes the thresholds provided for in the legislation, noting that the lower threshold only applies for what operates as a temporary cancellation. Cancellation can then only be made permanent if the higher threshold is met.

3.126 In response to concerns that the provisions may enable rolling cancellations of a person's visa (on a lower threshold) without requiring a permanent cancellation (on the higher threshold), the Committee notes that ASIO does not intend to use the provisions in a serial fashion. It is also satisfied that the existing oversight mechanisms ensure there is sufficient oversight of ASIO's use of these provisions.

3.127 Finally, the Committee considers that the powers enabling the Minister to cancel other visas that were issued on the basis of the visa that has been cancelled are appropriate. This approach is also consistent with existing provisions in the Migration Act. The Committee considers that the discretionary nature of this power will enable the Minister in these circumstances to have due regard to all the appropriate factors as outlined in the Explanatory Memorandum.

Schedule 5 – Identifying persons in immigration clearance

3.128 The amendments contained in Schedule 5 will amend the Migration Act to enable an 'authorised system'[117] such as SmartGate or eGates, to perform 'accurate biometric identification of all persons entering and departing Australia'.[118] The Explanatory Memorandum argues that:

116 See sections 116 and 128 of the *Migration Act 1958* and paragraphs 2.43(1)(b) and 2.43(2) of the Migration Regulations 1994.

117 Automated Border Clearance systems (SmartGate and eGates) are 'authorised systems' to perform the immigration clearance function for arriving passengers, and border processing for departing passengers. The authorised system confirms the identity of a traveller by biometrically comparing the photograph contained in the passport to a live image of the traveller's face and conducts visa and alert checks.

118 CTLA(FF) Bill, *Explanatory Memorandum*, p. 66.

> The ability to accurately collect, store and disclose biometric identification of all persons increases the integrity of identity, security and immigration checks of people entering and departing Australia.[119]

3.129 Currently, for both arrivals and departures, the Migration Act only allows an 'authorised officer' (not an 'authorised system') to obtain personal identifiers from non-citizens by way of an identification test under section 166, 170 and 175 of the Migration Act.[120] Amendments to sections 166, 170 and 175 of the Migration Act will authorise a 'clearance authority' (defined as an officer or a system) to collect and retain personal identifiers (specifically a photograph of the person's face and shoulders) of citizens and non-citizens who enter or depart Australia.

3.130 The proposed amendments would mean that when the traveller presents their travel document to the authorised system, the system will be able to determine whether the traveller is the same person to whom the travel document (such as a passport) was issued and whether the document satisfies the test as being a genuinely issued document.[121]

3.131 The Attorney-General's Department advised the Committee that while the numbers of travellers departing Australia will vary each year, in the 2013-14 financial year there were a total of 8.08 million departures by travellers on Australian travel documents.[122]

3.132 At a public hearing, Mr Stephen Allen, First Assistant Secretary, Border, Refugee and Onshore Services Division, DIBP, stated:

> This is an extension of what is already happening for inwards processing, where we are gradually phasing out the manual face-to-passport check and replacing it with the automated or biometric check. That is being done on the basis that it is both more efficient in terms of processing time and also more effective, in that the biometric check is very much more accurate than a manual face-to-passport check by an officer.[123]

3.133 The amendments would allow these systems of 'verifying an image which is already stored by the Australian government'.[124] The image capture at

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119 CTLA(FF) Bill, *Explanatory Memorandum*, p. 65.

120 CTLA(FF) Bill, *Explanatory Memorandum*, p. 65.

121 CTLA(FF) Bill, *Explanatory Memorandum*, p. 66.

122 Attorney-General's Department, *Submission 8.1*, pp. 20-21.

123 Mr Stephen Allen, First Assistant Secretary, Border, Refugee, Onshore and Services Division, *Committee Hansard*, Canberra, 3 October 2014, p. 44.

124 Mr Allen, *Committee Hansard*, Canberra, 3 October 2014, p. 44.

the immigration clearance point will be stored on a secure DIBP database.[125]

Disclosure for specified purposes

3.134 The amendments will also permit the disclosure of that information for specified purposes.[126] The Attorney-General's Department submitted that the Migration Act already contains a number of specified purposes for which this information will be collected and used by the DIBP and Customs.[127] The Department further submitted:

> Amendments will be made to these sections to ensure that it is permissible to disclose identifying information in order to identify, or authenticate the identity of persons (including Australian citizens) who may be a security concern to Australia or a foreign country.[128]

3.135 Commenting on the safeguards surrounding disclosure, Mr Stephen Allen of DIBP argued that the 'protections lie in the reasons for the exchange [of sensitive personal information]. It is not so much in the organisations it can be shared with; it is the reasons for the exchange—not for any general purpose'.[129] Mr Allen further explained:

> The safeguards exist in the requirement for any sharing to be done for specified purposes, but there are also those safeguards around the protection of the database itself, so that it can only be accessed by authorised users of the database and it is protected from external intrusion… I can understand that in general people are concerned when the government stores personal information of any kind. The safeguards behind this are designed to ensure that people are first of all informed up front of why this information is being collected and secondly assured of the circumstances under which it will be shared, and those circumstances are required circumstances rather than general circumstances. So, it is intended to be shared only for purposes of national security or serious similar concerns. And, as I said, the actual safeguards around the security of the information itself are designed to provide further assurances.[130]

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125 Mr Allen, *Committee Hansard*, Canberra, 3 October 2014, p. 44.

126 CTLA(FF) Bill, *Explanatory Memorandum*, pp. 65-66.

127 Attorney-General's Department, *Supplementary Submission 8.1*, p. 19. See also section 5A(3), *Migration Act 1958*.

128 Attorney-General's Department, *Supplementary Submission 8.1*, p. 20.

129 Mr Allen, *Committee Hansard*, Canberra, 3 October 2014, p. 45.

130 Mr Allen, *Committee Hansard*, Canberra, 3 October 2014, p. 45.

3.136 The Attorney-General's Department outlined the safeguards that are in place:

- An offence will be committed for non-permitted disclosure of the personal information covered by the amendments, which carries a two year imprisonment term, as well as a financial penalty in certain circumstances.
- Customs officers are currently required to comply with the *Privacy Act 1988* and the Australian Privacy Principles contained within.
- All personal information collected via SmartGate or eGates (including photographs) will be treated in the same way as information that is collected manually.
- SmartGate or eGates will also comply with the *Privacy Act 1988*, specifically Australian Privacy Principle 5 which requires persons to be notified of a number of matters before personal information is collected. Travellers will be notified through signs, information sheets and information on DIBP and Customs websites.
- Captured images will be stored on a DIBP server under the controls and certification processes of the Australian Signals Directorate.
- Images will only be available to authorised officers with regular audits undertaken to ensure that only authorised officers maintain access.
- All images will be kept in accordance with the *Archives Act 1983* and 'utilised for the purposes of biometric algorithm improvements and improved passenger facilitation'.[131]

Additional biometric data to be prescribed in regulations at a later date

3.137 The amendments will also allow additional biometric data (such as fingerprints and iris scans) to be prescribed in the Migration Regulations 1994 at a later date.[132] The Explanatory Memorandum explains that the DIBP

> does not intend to make new regulations in relation to this provision at this time as automated border clearance systems only need to collect a person's photograph of their face and shoulders to confirm their identity. Should the need arise, and technology improve, other personal identifiers such as a persons' fingerprints or iris scan may be prescribed in the Migration Regulations.[133]

131 Attorney-General's Department, *Supplementary Submission 8.1*, p. 21.

132 See Clause 166(1)(d)(ii) and 170(1)(d)(ii) of the Bill; CTLA(FF) Bill, *Explanatory Memorandum*, p. 66; Mr Allen, *Committee Hansard*, Canberra, 3 October 2014, p. 44.

133 CTLA(FF) Bill, *Explanatory Memorandum*, p. 66.

Schedule 6 – Advance passenger processing

3.138 Schedule 6 of the Bill amends the Migration Act to extend Advance Passenger Processing (APP) arrangements to departing air and maritime travellers.[134] These amendments extend current APP arrangements which require airlines to provide passenger data for all travellers arriving in Australia.[135]

3.139 The Explanatory Memorandum explains the intention of the APP system is to 'prevent entry to Australia of any identified high-risk travellers'.[136] Further, the intention is to overcome the

> current situation of the DIBP and Customs being only aware that a person is intending to depart Australia when the traveller arrives at the outward immigration processing point. This is particularly problematic when a traveller only presents for check-in or boarding at the airport or seaport a short time before their flight or maritime vessel departs, and DIBP and Customs do not have sufficient time to respond or address any potential alerts or threats in relation to that traveller.[137]

3.140 The APP system will provide DIBP and Customs forewarning of a person's intention to travel at the point that they check in for their flight. The Explanatory Memorandum notes that in the context of the foreign fighter threat and persons intending to depart Australia to engage in foreign conflicts, 'this advance notice allows appropriate security response to persons of interest'.[138]

3.141 The amendments also would impose an infringement regime for airlines and maritime vessels that fail to comply with the reporting requirement. The proposed infringement regime will mirror the existing regime for inbound travellers: either prosecution or a financial penalty in lieu of prosecution. The financial penalty rate will be the same as for arrivals, currently $1 700 for each breach.[139]

134 CTLA(FF) Bill, *Explanatory Memorandum*, p. 9.
135 CTLA(FF) Bill, *Explanatory Memorandum*, p. 69.
136 CTLA(FF) Bill, *Explanatory Memorandum*, p. 69.
137 CTLA(FF) Bill, *Explanatory Memorandum*, p. 69.
138 CTLA(FF) Bill, *Explanatory Memorandum*, p. 69.
139 CTLA(FF) Bill, *Explanatory Memorandum*, p. 69.

Schedule 7 – Seizing bogus documents

3.142 Schedule 7 of the Bill amends the Migration Act to introduce the power to retain 'bogus' documents presented or provided to DIBP. Schedule 7 also amends the *Citizenship Act 2007* by introducing a definition of 'bogus documents' and related documents.[140]

3.143 All persons who seek to enter Australia must provide a passport or valid travel document that details the person's personal information and has a facial image. Currently, inspection of documents takes place in public, which may include DIBP officers conducting a visual inspection of document/s and asking persons questions about the documents presented. The Explanatory Memorandum states that while the overwhelming majority of documents are legitimate, 'a small number are bogus'.[141] The Explanatory Memorandum continues:

> Where a bogus document is detected currently, the DIBP officer has no option but to return the bogus document to the person who provided it. 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.[142]

3.144 Under the proposed amendments, the seizure of bogus documents would take place during routine inspection of documents, which may be in a public place, and the retention of documents may occur in view of other members of the public.[143]

3.145 The amendment provides that where a DIBP officer 'reasonably suspects' that a document presented is bogus, the officer may seize the document.[144] A 'bogus document' is currently defined in section 97 of the Migration Act:

> in relation to a person, means a document that the Minister reasonably suspects is a document that:
>
> - purports to have been, but was not, issued in respect of the person; or
> - is counterfeit or has been altered by a person who does not have the authority to do so; or

140 CTLA(FF) Bill, *Explanatory Memorandum*, p. 9.
141 CTLA(FF) Bill, *Explanatory Memorandum*, p. 71.
142 CTLA(FF) Bill, *Explanatory Memorandum*, p. 71.
143 CTLA(FF) Bill, *Explanatory Memorandum*, p. 72.
144 Proposed section 487ZJ(1) of the CTLA(FF) Bill.

- was obtained because of a false or misleading statement, whether or not made knowingly.[145]

3.146 The proposed amendments will add new sections to the Migration Act to provide a prohibition on a person providing a bogus document/s within the meaning of section 97 for any purpose relating to DIBP's functions or activities under the Migration Act. A document presented or provided to DIBP which meets the definition in section 97, will then be subject to forfeiture to the Commonwealth.[146] A person presenting such documents may seek to recover the document or a seek a declaration that the document is not 'bogus'. If proceedings are not instituted, the document will be deemed to be forfeited to the Commonwealth at the end of the 90 day period, and it will then be disposed of, or retained for court proceedings.[147]

3.147 The amendments require that the officer seizing documents will be required to give written notice as soon as practicable.[148] A person suspected of presenting bogus documents may institute proceedings against the Commonwealth within 90 days of the written notice being issued.[149]

3.148 Similarly, Schedule 7 of the Bill will add new sections to the *Citizenship Act 2007*. The Explanatory Memorandum explains:

> As under the *Migration Act,* applicants for citizenship also provide a wide range of documents to DIBP, and the amendments to the *Citizenship Act* are for the same purposes as amendments to the *Migration Act*.[150]

Interaction with the *Privacy Act 1988*

3.149 As the proposed amendments in Schedules 5, 6 and 7 relate primarily to privacy rights under domestic and international law, the Privacy Commissioner submitted an overview of the Bill's interactions with the *Privacy Act 1988* and that Act's overview mechanisms of personal information held by government authorities. The Privacy Commissioner submitted:

> The starting position is that generally Australian government agencies affected by the amendments proposed in the Bill are

145 CTLA(FF) Bill, *Explanatory Memorandum*, p. 72.

146 CTLA(FF) Bill, *Explanatory Memorandum*, p. 72.

147 Proposed sections 487ZK and 487ZL of the CTLA(FF) Bill.

148 Proposed section 487ZJ(2) of the CTLA(FF) Bill.

149 Proposed section 487ZJ(2)(3) and (4) of the CTLA(FF) Bill.

150 CTLA(FF) Bill, *Explanatory Memorandum*, p. 72.

> required to comply with the Australian Privacy Principles contained in the Privacy Act when handling personal information, including personal information collected for the purpose of upholding Australia's national security.[151]

3.150 The Privacy Commissioner stated that Australian Privacy Principles are 'legally binding' and set out the standards, rights and obligations in relation to the collection, use, disclosure, holding and access to 'personal information'.[152] Further, the Principles require that a government agency only collects information that is 'reasonably necessary for, or directly related to, the agency's functions and activities'.[153] Under the *Privacy Act 1988*, government agencies are only permitted to

> use and disclose that personal information for the purpose for which the information was collected unless an exception applies to permit the information to be used or disclosed for a secondary purpose. Importantly, those exceptions include where the use or disclosure is authorised or required by an Australian law.

3.151 The Privacy Commissioner explained:

> Where the proposed measures in the Bill authorise the collection, use or disclosure of personal information, this brings the activity within the 'authorised or required by law' exceptions… to permit the collection, use or disclosure without contravening the *Privacy Act*. However, even where a particular collection, use or disclosure is authorised by law, the relevant agency must still comply with other obligations contained [in the *Privacy Act*] when handling the information (including those relating to providing notice and ensuring the quality and security of the information).[154]

3.152 The Australian Federal Police, the Department of Immigration and Border Protection, the Attorney-General's Department and the Australian Transaction Reports and Analysis Centre are required to comply with the *Privacy Act 1988*.[155] The personal information handling practices of Australia's intelligence agencies are not within the jurisdiction of the Act. Rather, these agencies – including how they collect, store and use personal information – are overseen by the Inspector General of Intelligence and Security.[156]

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151 Office of the Australian Information Commissioner, *Submission 28*, p. 2.

152 Office of the Australian Information Commissioner, *Submission 28*, p. 2.

153 Office of the Australian Information Commissioner, *Submission 28*, p. 2.

154 Office of the Australian Information Commissioner, *Submission 28*, p. 2.

155 Office of the Australian Information Commissioner, *Submission 28*, p. 2; Mr Timothy Pilgrim, Privacy Commissioner, *Committee Hansard*, Canberra, 8 October 2014, p. 1.

156 Office of the Australian Information Commissioner, *Submission 28*, p. 2.

Stakeholder feedback

3.153 Few organisations provided feedback on the proposed amendments in Schedules 5, 6 and 7. The Law Council of Australia submitted:

> The Law Council has not had time to consider the amendments proposed in Schedules 5 and 6 in any detail but notes that the measures proposed in Schedule 5 (use of automated border processing control systems to identify persons in immigration clearance) and Schedule 6 (extending Advance Passenger Processing (APP) have the potential to impact on the privacy of a vast array of individuals, including those that pose no risk to Australia's national security.[157]

3.154 In a supplementary submission, the Law Council further commented:

> The amendments [in Schedule 5] proposed in the Bill appear to broaden the purposes for which certain biometric material can be shared between agencies. At the same time, these Schedules make changes to the existing legislative safeguards governing the collection, use and sharing of biometric material under the Migration Act. This has the potential to have significant privacy implications, including implications for how sensitive personal information (that may in the future include material such as fingerprints) is stored and destroyed.[158]

3.155 The Law Council recommended that Schedules 5 and 6 be reviewed by the Privacy Commissioner and that a Privacy Impact Assessment be prepared to 'enable the public to have a clear sense as to what impact these changes will have on their privacy rights'.[159]

3.156 Australian Lawyers for Human Rights and the Australian Privacy Foundation also raised concerns about the impact of the proposed amendments in Schedules 5, 6 and 7 on privacy rights in Australia.[160] More specifically, Australian Lawyers for Human Rights submitted its concern that 'thresholds are … lowered', commenting that the amendments to the Migration Act 'enable Department of Immigration officers to retain personal identity documents where they only 'suspect' that the documents are bogus'.[161]

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157 Law Council of Australia, *Submission 12*, p. 31.

158 Law Council of Australia, *Submission 12.1*, p. 4.

159 Law Council of Australia, *Submission 12*, p. 31; see also Ms Leonie Campbell, Co-Director, Criminal Law and Human Rights Division, Law Council of Australia, *Committee Hansard*, Canberra, 3 October 2014, p. 59.

160 Australian Lawyers for Human Rights, *Submission 15*, p. 8; Australian Privacy Foundation, *Submission 20*, pp. 1–4.

161 Australian Lawyers for Human Rights, *Submission 15*, p. 5.

3.157 The Privacy Commissioner, Mr Timothy Pilgrim, observed that:

> There is always a risk when you are aggregating and collecting vast amounts of personal information, and when you add to those you increase the risk. The responsibility lies with the agency—the department in this case—to make sure they are making the right steps to make sure they are adding additional protections to their systems to protect that information... We need to make sure that, where it is being authorised by law, there is due consideration given in terms of making sure that it is commensurate with the need to collect that information—why is it being collected? And then we also need to make sure that we have appropriate levels of protection in place for it. That is where our responsibility comes into play in oversighting what sort of security measures those types of organisations such as the department have in place to protect that information.[162]

3.158 However, the Privacy Commissioner also submitted that he did not have any significant concerns with Schedules 5, 6 and 7. The Commissioner noted his authority under the *Privacy Act 1988* to be able to conduct Privacy Assessments when it is deemed by the Commissioner as 'appropriate to undertake one of those assessments'.[163] The Commissioner elaborated:

> In doing that, we would be looking at the data holding security measures that the department would have in place to ensure that it is meeting the requirements of Data Security Principle APP 11 in the act, which requires agencies to take reasonable steps to protect that personal information. One of the things we would be looking at is the ability of the agency—the department in this case—to work with other appropriate agencies in the security area to make sure that they are working to keep those systems to as high a level as possible to meet any particular risk or threat that there may be to that information being inappropriately accessed. If that information were to be inappropriately accessed, the department itself would be possibly in breach of the Privacy Act and, therefore, we would be able to take some remedial steps.[164]

3.159 More specifically, in respect of Schedule 5, the Commissioner submitted:

> I am mindful that the proposed amendment does allow for the making of regulations prescribing additional categories of

162 Mr Pilgrim, *Committee Hansard*, Canberra, 8 October 2014, p. 2.

163 Mr Pilgrim, *Committee Hansard*, Canberra, 8 October 2014, p. 2.

164 Mr Pilgrim, *Committee Hansard*, Canberra, 8 October 2014, p. 2.

> biometric information (referred to in the Migration Act as personal identifiers), such as fingerprints and iris scans. I appreciate the need to ensure that the law is able to accommodate changes in technology and, therefore, do not raise any concerns about this amendment. In saying this, I would, however, expect that any proposal to extend the types of biometric information prescribed in the regulations would be subject to appropriate public consultation. In addition, I would welcome any invitation to provide feedback on the likely privacy impacts of such a proposal.[165]

3.160 Similarly, the Privacy Commissioner submitted that the amendments contained in Schedule 6 concerning advance passenger processing

> do not purport to expand the types of personal information collected, only to extend the reporting obligation to include travellers and crew that are departing Australia. Further, that the information collected is information that is already collected by the border authorities when the passenger or crew member presents at the border.[166]

3.161 The Privacy Commissioner did not make comment on the amendments contained in Schedule 7 enabling the seizure of 'bogus documents'.

Committee comment

3.162 The Committee is generally supportive of the amendments contained in Schedules 5, 6 and 7 of the Bill.

3.163 However, given the quantity of sensitive personal information proposed to be collected, stored, shared and used by government agencies under Schedules 5 and 6, the Committee believes that the efficacy of measures taken to protect the privacy of this information should be reviewed. The Committee therefore recommends that the Privacy Commissioner review and report on the operation of these clauses by 30 June 2015.

Recommendation 34

The Committee recommends that the Privacy Commissioner undertake a Privacy Assessment of the data collected and stored by the Department of Immigration and Border Protections and Customs, and report to the Attorney-General by 30 June 2015, with specific regard to the collection,

165 Office of the Australian Information Commissioner, *Submission 28*, pp. 5–6.

166 Office of the Australian Information Commissioner, *Submission 28*, p. 6.

storage, sharing and use of that data by the government agencies within the remit of the Commissioner's jurisdiction.

3.161 The Committee has significant concerns about the amendments contained in Schedule 5 that will permit additional categories of biometric data (such as fingerprints and iris scans) to be added to the Migration Regulations without those proposals being subject to sufficient parliamentary approval or public comment.

3.162 The Committee appreciates the need for laws to accommodate changes in technology. However, given the sensitive nature of this data, the Committee considers that listing the collection of more personal information (such as fingerprints and iris scans) in regulations is an inappropriate mechanism for such an important policy. A formal legislative amendment would be a more appropriate avenue to scrutinise these proposals. The Committee recommends the provisions in the Bill that would allow the collection of this additional information be prescribed in regulations at some later point in time be removed from the Bill.

3.163 Any future amendments to Australian law to enable the collection of this additional information should also be referred to this Committee for public inquiry.

Recommendation 35

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

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

3.164 The Committee also considers that the Privacy Commissioner should be consulted in the policy-development stage of any proposal to amend Australian laws to allow for the collection of additional personal information. The Privacy Commissioner advised the Committee of the benefits that can be gained through government agencies developing a privacy impact statement in collaboration with the Commissioner's

office.[167] Among other benefits, a privacy impact statement could be done in a way to help better inform the Parliament as well as the public, and could also consider whether any additional safeguards need to be built into the legislative proposal to add additional protections to that information.

3.165 The Committee is of the view that the Privacy Commissioner's involvement at this early stage would better inform the Parliament's consideration of the collection, storage and use of this sensitive personal information.

Recommendation 36

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

Concluding comments

3.166 The Committee notes that in evidence to the inquiry, the IGIS indicated that the *Inspector-General of Intelligence and Security Act 1986* provides her with sufficient authority to oversight the new ASIO powers contained in this Bill.[168]

3.167 Further, while noting some resource implications, the Commonwealth Ombudsman expressed confidence that his office had the relevant expertise and experience to perform the inspection roles and other oversight activities that would result from the proposed legislation.[169]

3.168 Throughout its inquiry, the Committee was very mindful that its review of the proposed legislation has coincided with a heightened level of security threat to Australians and our interests overseas. As ASIO and the AFP highlighted to the Committee in their evidence, a major reason for this

167 Mr Pilgrim, *Committee Hansard*, Canberra, 8 October 2014, p. 3. See also <http://www.oaic.gov.au/privacy/privacy-resources/privacy-guides/guide-to-undertaking-privacy-impact-assessments>.

168 IGIS, *Submission 1*, p. 3; Ms Vivienne Thom, IGIS, *Committee Hansard*, Canberra, 2 October 2014, pp. 6–7.

169 Commonwealth Ombudsman, *Submission 10*, p. [2]; Mr Richard Glenn, Acting Commonwealth Ombudsman, *Committee Hansard*, Canberra, 3 October 2014, p. 66.

increased threat level is Australians travelling overseas to train with, fight for or otherwise support extremist groups, and the risks posed by those persons on their return to Australia. The Committee heard that such persons are likely to be further 'radicalised', with the result that they are both more able and more willing to commit terrorism offences.[170]

3.169 The Committee restates that the legislative amendments proposed in this Bill were requested by security and law enforcement agencies to enhance their ability to respond to an increased threat from terrorism. In this context, the Committee fully supports the intent of the Bill.

3.170 The Committee notes its previous recommendations in relation to the resourcing of the IGIS and the appointment of the INSLM. The Committee reiterates its recommendation that the Monitor is appointed urgently.

3.171 The Committee notes that the Commonwealth Ombudsman made representations to the Committee regarding a lack of resources and further, that these issues are being pursued in ongoing discussions with the Attorney-General's Department.

3.172 The recommendations the Committee has made in its report are intended to further strengthen the provisions of the Bill including the safeguards, transparency and oversight mechanisms. The Committee commends its recommendations to the Parliament and recommends the Bill be passed.

Recommendation 37

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

Dan Tehan MP
Chair

October 2014

170 AFP, *Submission 36*, pp. 2–3; ASIO, *Submission 11*, pp. 2–4.