



Australian
Human Rights
Commission

Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

2 October 2014

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (Committee) in its Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill).
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth). It is Australia's national human rights institution.
3. This submission addresses a number of human rights concerns raised by the Bill. It does not, however, purport to be a comprehensive analysis of all the human rights implications of the proposed legislation. That has not been possible within the time constraints of the Inquiry.
4. The Commission acknowledges the critical importance of ensuring that our security and law enforcement agencies have appropriate powers to protect our national security and to protect the human rights of other citizens, including protecting the Australian community from terrorism. Human rights law provides significant scope for such agencies to have expansive powers, even where they impinge on individual rights and freedoms. Such limitations on rights must, however, be clearly expressed, unambiguous in their terms, and must be necessary and proportionate responses to potential harms.
5. The Commission commends the Commonwealth for preparing a thorough Explanatory Memorandum and a detailed Statement of Compatibility with Human Rights in relation to the Bill. The Statement of Compatibility identifies a large number of human rights that are potentially affected by the proposed legislation. However, the Commission considers that the reasoning in the Statement of Compatibility is not as expansive as it could be in assessing how limitations on human rights are justified, and in particular in its analysis of whether those limitations are necessary and proportionate to achieving a legitimate objective.
6. The Commission is concerned at the extremely short time given to the public to make submissions in the present inquiry. This has necessarily restricted the scope and depth of the Commission's examination of the Bill. There appears to be a real risk that the full scope of the Bill's restrictions on fundamental rights and freedoms, and the justifications for those restrictions, will not be fully explored in the course of the Inquiry. Further, the supporting materials do not appear to support the view that, at least with respect to all aspects of the Bill, the passage of the Bill is sufficiently urgent to warrant the limited period for review and consultation, given the potential impact of the Bill on human rights.
7. The Commission recommends that certain provisions of the Bill not be passed. In addition, the Commission makes a number of recommendations about ways the Bill's impact on human rights could be ameliorated.

2 Summary

8. While the Bill is entitled the ‘Counter-Terrorism (Foreign Fighters)’ Bill, its provisions are not limited to those subject areas. The Bill amends or repeals a large number of statutes. This submission addresses the following matters dealt with in the Bill:
 - a. The extension of sunset provisions relating to control orders, preventative detention orders; stop, search and seizure powers, and ASIO’s special warrant powers
 - b. ASIO questioning warrants
 - c. Prohibited travel to declared areas
 - d. Customs’ detention powers
 - e. Emergency visa cancellation powers
 - f. The power to cancel welfare payments
9. The Commission considers that in several instances, the Bill goes beyond what can be reasonably justified to achieve legitimate purposes. We make 15 recommendations to address these concerns about risk to human rights.

3 Recommendations

10. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1: the provisions of the Bill postponing the sunset dates for preventative detention orders, control orders, stop, search, and seizure powers, and questioning and detention warrants should not be passed.

Recommendation 2: the proposed amendment to s 29(1)(bb) of the Intelligence Services Act 2001 (Cth) should not be passed.

Recommendation 3: the proposed amendment to s 34D(4)(b) should not be passed in its present form.

Recommendation 4: The provisions of the Bill relating to declared areas should not be passed in its present form.

Recommendation 5: If recommendation 4 is not accepted, it is recommended that:

- a. **Section 119.3 be amended so that the Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area; and**

- b. The exception contained in s 119.2(3) be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 6: If the Committee does not accept recommendations 4 or 5(b):

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared zones in s 119.2(3) to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b. the Bill be amended so that it is a defence to a charge of entering or remaining in a declared zone if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

Recommendation 7: Item 2 of Schedule 3 of the Bill, which would alter the definition of a ‘serious Commonwealth offence’, not be passed.

Recommendation 8: Item 3 of Schedule 3 of the Bill be amended, so that a customs official may only detain a person on the basis of a reasonable suspicion that the person intends to commit an offence if the suspected intended offence would be a terrorist act.

Recommendation 9: Item 6 of Schedule 3 of the Bill not be passed.

Recommendation 10: The proposed amendment to s 219ZJB(5) of the Customs Act not be passed.

Recommendation 11: Proposed s 134C of the Migration Act be amended to provide that the Minister *may* cancel a visa following advice from ASIO, and that the cancellation power is only enlivened if ASIO has reasonable grounds to suspect that the person might pose a risk to security

Recommendation 12: the Attorney-General’s discretion to issue security notices in relation to welfare payments be defined to include a consideration that ‘the receipt of welfare payments was relevant to the assessed security risk posed by the individual’.

Recommendation 13: The Attorney-General’s discretion to issue security notices include a consideration of the effect of welfare cancellation on all affected parties, including any family members and children.

Recommendation 14: consideration be given to establishing a payment nominee system for ‘parental leave pay’, ‘dad and partner pay’ and ‘social security payments’ where an individual has dependent family members, particularly children.

Recommendation 15: Consideration should be given to establishing a role of a Special Advocate to appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons for welfare cancellation from an individual.

4 Human Rights Framework

11. The measures contained in the Bill affect a number of the human rights contained in the International Covenant on Civil and Political Rights (ICCPR).¹ The measures discussed in this submission will particularly affect the rights against arbitrary detention (article 9), the freedom of movement (article 12), and the right to privacy (article 17).
12. In addition, Schedule 2 of the Bill, which deals with stopping certain welfare payments, raises concerns about article 26 of the *Convention on the Rights of the Child* (CRC).² This right is discussed separately in Part 10 of this submission.

4.1 Article 9 – Right not to be subject to arbitrary detention

13. Article 9 of the ICCPR relevantly provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- ...
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

4.2 Article 12 – Freedom of Movement

14. Article 12 of the ICCPR provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

4.3 Article 17 – the Right to Privacy

15. Article 17 of the ICCPR provides:
 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.

4.4 Permissible limitations of human rights

16. None of the rights described above is absolute. However, any limitations must:
 - a. Be **lawful**. That means that any limitations on a human right must be provided for by law. Legislation must be sufficiently specific, and detail the precise circumstances in which interferences with rights may be permitted. Laws must be precise and clear enough to allow individuals to regulate their conduct, and should provide effective remedies in the case of abuse.
 - b. Be **necessary** to achieve a legitimate objective, which objective is consistent with the provisions and aims of the ICCPR.
 - c. Be **proportionate** to achieving the legitimate objective.
17. The Office of the High Commissioner for Human Rights has recently stated, in relation to the right to privacy:

[A] limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available. Moreover, the limitation placed on the right (an interference with privacy, for example, for the purposes of protecting national security or the right to life of others) must be shown to have some chance of achieving that goal. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Furthermore, any limitation to the right ... must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary.³
18. These remarks apply equally to the limitation of other rights in the ICCPR, including articles 9 and 12.⁴
19. Legislation may validly restrict human rights to protect national security, or to protect the human rights of other citizens, provided that the restrictions meet these requirements.

5 Extension of sunset provisions: Control Orders; Preventative Detention Orders; Stop, Search and Seizure Powers; Special Warrant Powers

20. The Bill proposes to extend the sunset provisions currently in place in relation to:
 - a. The issuing of control orders under division 104 of the Criminal Code
 - b. The issuing of preventative detention orders under division 105 of the Criminal Code
 - c. Certain stop, search and seizure powers under division 3A of the *Crimes Act 1914* (Cth)
 - d. ASIO's ability to obtain questioning and detention warrants under division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).
21. The relevant parts of the Criminal Code and the Crimes Act are due to expire in December 2015.⁵ The relevant provisions of the ASIO Act are due to expire in July 2016.⁶
22. Control orders may impose significant restrictions on freedom of movement and the right to privacy. In some circumstances, they may impose conditions amounting to detention for the purposes of article 9 of the ICCPR.
23. Preventative detention orders allow the detention of persons without charge. They necessarily involve a very serious limitation on the rights protected, by article 9 of the ICCPR.
24. The relevant stop, search and seizure powers involve restrictions on the freedom of movement and the right to privacy.
25. Questioning and detention warrants issued under the ASIO Act will necessarily involve very significant limitations of the rights in articles 9 and 17 of the ICCPR.
26. It is probable that a number of other human rights may also be restricted by the operation of these provisions in various circumstances.
27. As noted above, for restrictions on human rights to be permissible, the government must demonstrate that they are necessary.
28. The Commonwealth has, in the Explanatory Memorandum for the Bill, made general statements about the need to extend to operation of the relevant provisions to address the enduring threat posed by terrorism.⁷
29. With respect to the continuation of the power to issue control orders, the Commonwealth claims that this is necessary to implement a recommendation made by the Council of Australian Governments (COAG).⁸ The Explanatory

Memorandum also refers to ‘the increasing threat the escalating terrorist situation in Iraq and Syria poses to the security of all Australians’.⁹

30. It is true that COAG has recommended that the control order provisions in the Criminal Code be extended.¹⁰ However in the same report, COAG went on to say:

We consider however that the present safeguards are inadequate and that substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held.¹¹

31. COAG has recommended that the preventative detention order provisions be abolished.¹² The former Independent Security Legislation Monitor has criticised the control order, preventative detention order, and ASIO detention warrant regimes.¹³
32. In these circumstances, the Commission considers that the Government has not established that the extension of the sunset clauses is necessary and proportionate to a legitimate aim. This is especially so as the relevant provisions are not due to expire for over 12 months. There is no urgency in relation to the passage of these items of the Bill.
33. Similarly, the Commission considers that Item 133 of Schedule 1 of the Bill should not be passed. That item would amend s 29(1)(bb) of the *Intelligence Services Act 2001* (Cth). That provision currently requires the Committee to review the operation of the questioning and detention warrant provisions of the ASIO Act by no later than 26 July 2016. The Bill would delay that date until 26 July 2026. The Commission considers that the review required by s 29(1)(bb) should proceed. That review would constitute an opportunity to determine whether the warrant powers are justified in the present security environment and should be retained.
34. The Commission considers that a similar review should be conducted before any decision is made to extend the operation of the other provisions discussed above that are currently subject to sunset provisions.

Recommendation 1: the provisions of the Bill postponing the sunset dates for preventative detention orders, control orders, stop, search, and seizure powers, and questioning and detention warrants should not be passed.

Recommendation 2: the proposed amendment to s 29(1)(bb) of the Intelligence Services Act 2001 (Cth) should not be passed.

6 ASIO Questioning Warrants

35. As noted above, ASIO currently has the power to apply for questioning warrants. ASIO may only apply for such a warrant if the Attorney-General is satisfied that ‘relying on other methods of collecting that intelligence would be ineffective’.¹⁴

36. The Bill proposes to change this standard. It would amend s 34D(4)(b) of the ASIO Act to provide that the Minister need only be satisfied that ‘having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.’ This amendment is made in response to a recommendation made by the INSLM.¹⁵
37. The Commission considers that this amended standard is not consistent with Australia’s human rights obligations. Human rights may only be limited where a measure is necessary and proportionate to a legitimate objective. A questioning warrant necessarily entails a severe curtailment of liberty. It can only be justified where no less intrusive alternatives exist. The Commission considers that the present standard more appropriately protects the right against arbitrary detention and the right to privacy.

Recommendation 3: the proposed amendment to s 34D(4)(b) should not be passed in its present form.

7 Declared Areas

38. Item 110 of the Bill would introduce a new offence into the Criminal Code of entering or remaining in a declared area.
39. Proposed s 119.3 of the Criminal Code would allow the Foreign Affairs Minister to ‘declare an area’ in a foreign country if he or she is ‘satisfied that a listed terrorist organisation is engaging in a hostile activity’ in that area. A ‘listed terrorist organisation’ is an organisation that has been designated as a terrorist organisation by regulation made under s 102 of the Criminal Code. A declaration of an area would be a legislative instrument and therefore subject to the requirements of the *Legislative Instruments Act 2003* (Cth). Declarations would expire after three years.¹⁶
40. Under proposed s 119.2, it would be an offence for a person to enter or remain in a declared area, unless they did so solely for one or more legitimate purposes. The Bill specifies a limited number of permissible purposes.¹⁷
41. A person accused of entering or remaining in a declared area would bear an evidential burden – that is, they would need to adduce evidence that they were in a declared area solely for one or more legitimate purposes.
42. The Commission considers that this provision is likely to impermissibly infringe the freedom of movement protected by article 12 of the ICCPR.
43. The Commonwealth states that the provision is designed to:

‘equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.’¹⁸

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44. The Commission notes that the *Crimes (Foreign Incursions) Act 1978* (Cth) already prohibits engaging in hostile activities in foreign countries.¹⁹ The explanation for the creation of the new offence given in the Explanatory Memorandum is therefore not sufficient to justify the creation of the new offence.
45. The Commission further notes that the Minister can make a declaration in relation to an area if she is satisfied that a terrorist organisation is ‘engaging in a hostile activity’ in that area. The extent of any such hostile activity is not stated to be a relevant factor. The declaration power would be enlivened if the Minister were satisfied that a terrorist organisation were engaged in only a very small amount of ‘hostile activity’ in a particular area. It therefore cannot be assumed that entry into a declared area will necessarily found a strong inference that a person enters with the intent to engage in hostile activities or to engage in some way with a listed terrorist organisation.
46. The Commission is concerned that the provision will criminalise conduct that is not *malum in se*. Intent to engage in terrorist activity, or any other insurgent or violent activity, is not an element of the offence.
47. Further, the list of legitimate purposes for which a person may enter or remain in a declared area is limited. For instance, it does not include visiting friends, transacting business, retrieving personal property or attending to personal or financial affairs. It includes making a news report, but only if the person is ‘working in a professional capacity as a journalist.’ It does not include undertaking religious pilgrimage.
48. There are, then, likely to be many innocent reasons a person might enter or remain in a declared zone that would not bring a person within the scope of the exception in the Bill. This concern is compounded by the fact that a person will be required to show they were in the zone *solely* for a specified legitimate purpose or purposes. So, for instance, if a person travelled to a declared zone to visit their parents, and also to attend a friend’s wedding, they would not be protected by the exception.
49. The Commission notes that the list of legitimate purposes for travel to a declared area can be expanded by regulation. Such expansion would, of course, only operate prospectively. In any event, in the event the offence is retained in its current form in the Bill, the list of legitimate purposes identified in the Bill itself should be as comprehensive as possible.
50. The Commission considers that it would be difficult, if not impossible, to devise a comprehensive list of legitimate reasons for travel in the abstract. The Commission therefore recommends that, if the relevant provisions are passed, the exception contained in s 119.2(3) be amended to provide that s 119.2(1) does not apply if a person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.
51. If the Committee does not accept this recommendation, the Commission recommends that detailed consideration be given to expanding the list of legitimate purposes for travel to declared areas described in s 119.2(3).

52. In addition, the Commission recommends that the Bill be amended to include a defence which is available to persons who travel to a declared area for an innocent purpose which is not included in the list of legitimate purposes in proposed s 119.3.

Recommendation 4: The provisions of the Bill relating to declared areas should not be passed in its present form.

Recommendation 5: If recommendation 4 is not accepted, it is recommended that:

- c. **Section 119.3 be amended so that the Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area; and**
- d. **The exception contained in s 119.2(3) be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.**

Recommendation 6: If the Committee does not accept recommendations 4 or 5(b):

- c. **Detailed consideration be given to expanding the list of legitimate reasons for travel to declared zones in s 119.2(3) to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and**
- d. **the Bill be amended so that it is a defence to a charge of entering or remaining in a declared zone if a person establishes they were in a country for a purpose other than engaging in a hostile activity.**

8 Customs Detention Powers

- 53. Section 219ZJB of the *Customs Act 1901* (Cth) currently allows a customs officer to detain a person in a designated place, such as a port or airport, if the officer has reasonable grounds to suspect that that the person is committing, or has committed (inter alia) a 'serious Commonwealth offence'. A serious Commonwealth offence is currently defined to be one relating to a subject matter described in s15GE of the Crimes Act, which attracts a term of imprisonment of 3 years or more.
- 54. The Bill would amend the definition of a 'serious Commonwealth offence' to mean any Commonwealth offence which is punishable by imprisonment of 12 months or more.
- 55. It is not clear why the government considers that this change of definition is necessary or appropriate. The Explanatory Memorandum merely observes

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that that the amendment would allow the current detention power ‘to be exercised in relation to a greater range of Commonwealth offences.’²⁰

56. Offences relating to terrorism generally carry significantly higher sentences than the current three year limit. The types of offences most obviously related to the exercise of the customs detention power in the context of the Bill are offences relating to travelling abroad to engage in hostile activities or entering declared areas. The maximum penalties for those offences would be life imprisonment and 10 years’ imprisonment respectively.
57. As noted above, any restriction on the freedom from arbitrary detention and the freedom of movement must be shown to be necessary and proportionate to achieve a legitimate objective. The Commission considers that that has not been demonstrated with respect to the new definition of ‘serious Commonwealth offence.’
58. The Bill would also amend s 219ZJB(1)(b) of the Customs Act to allow a customs official to detain a person where the official suspects the person *intends* to commit an offence. This provision would allow the detention of a person who has taken no steps towards the commission of an offence.
59. The power of a customs officer would not be subject to the constraints that apply, for instance, to obtaining a preventative detention order or which would attach to a detention warrant.
60. Preventative detention can, in exceptional circumstances, be justified where it is necessary to protect severe threats to national security or the rights of other persons (for instance, their right to life). The Commission acknowledges that it is foreseeable, in exceptional circumstances, that short term preventative detention by a customs official of a person intending to commit an act of terrorism might be justified. However, the amendment 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.
61. The Commission considers that this goes considerably beyond what is justified to protect national security or other human rights. The Commission recommends that Item 3 of Schedule 3 of the Bill be amended so that insofar as a customs official is empowered to detain a person on the grounds of a reasonable suspicion that the person *intends* to commit an offence, the official may only detain a person in relation to an offence that would constitute a terrorist act as defined in the Criminal Code.
62. The Customs Act does not set a definite limit on the length of time for which a person may be detained. It rather provides that a person detained must be handed over to a police officer as soon as practicable. The Commission notes that the Bill will change this to a requirement that a detained person be ‘made available’ to a police officer as soon as practicable.²¹
63. The Act currently provides that if a person is detained by a customs officer for over 45 minutes, the officer must inform the person of their right ‘to have a

family member or another person notified of the person's detention.²² However, s 219ZJB(7) contains the following exception:

An officer who is detaining the person under this section may refuse to notify a family member or another person of the person's detention if the officer believes on reasonable grounds that such notification should not be made in order to:

- (a) safeguard the processes of law enforcement; or
- (b) protect the life and safety of any person.

64. The Bill proposes to amend the Customs Act to allow a customs officer to detain a person for up to four hours before requiring them to notify that person of their right to contact a family member.
65. The HRC has also held that detention incommunicado is an aggravated form of detention, and can violate both articles 9 and article 7 of the ICCPR.²³
66. The Explanatory Memorandum gives the following justification for this amendment:

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 is detained, especially in order to determine whether the notification to a family member or other person should or should not be made. Therefore, it is proposed to amend subsection 219ZJB(5) to increase the timeframe from 45 minutes to 4 hours.²⁴

67. Given the exception in s 219ZJB(7), the Commission does not consider that this amendment has been shown to be necessary and proportionate to a legitimate purpose.

Recommendation 7: Item 2 of Schedule 3 of the Bill, which would alter the definition of a 'serious Commonwealth offence', not be passed.

Recommendation 8: Item 3 of Schedule 3 of the Bill be amended, so that a customs official may only detain a person on the basis of a reasonable suspicion that the person intends to commit an offence if the suspected intended offence would be a terrorist act.

Recommendation 9: Item 6 of Schedule 3 of the Bill not be passed.

Recommendation 10: The proposed amendment to s 219ZJB(5) of the Customs Act not be passed.

9 Visa Cancellation

68. The Minister for Immigration and Border Protection already has a number of powers to cancel visas under the *Migration Act 1958* (Cth).
69. The Bill proposes to introduce a new emergency cancellation power, in the following terms:

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134B The Minister must cancel a visa held by a person if:

- (a) there is an assessment made by ASIO for the purposes of this section; and
- (b) the assessment 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
- (c) the assessment contains a recommendation that all visas held by the person be cancelled under this section; and
- (d) the person is outside Australia.

70. If ASIO does not supply a further security assessment within 28 days to the effect that the person *is* a risk to security, the cancellation of the visa is revoked. If, on the other hand, ASIO does advise that the person is a risk to security, the visa cancellation is made permanent.²⁵
71. The Commission notes that the Minister is *obliged* to cancel a person's visa if they receive a relevant security assessment from ASIO in relation to a person. The advice from ASIO triggering the cancellation is to the effect that ASIO 'suspects' that the person 'might be' a risk to security. This is a very low threshold.
72. The cancellation of a person's visa could, in some circumstances, have very severe consequences for that person. If the visa were a protection visa, it could foreseeably prevent a person from returning to Australia in circumstances where they were exposed to the risk of persecution, torture, or inhuman or degrading treatment. In certain cases, the cancellation might amount to denying the visa holder the right to enter their 'own country', contrary to article 12(4), even if they are not an Australian citizen.²⁶ It could also interfere with the person's family life, in violation of articles 17 and 23 of the ICCPR.
73. In these circumstances, the Commission is concerned by the assertion in the Statement of Compatibility with Human Rights that 'Australia generally only owes human rights obligations to those within its territory and/or jurisdiction.'²⁷ That statement is true insofar as it goes. However, the Commission considers that for the purposes of international human rights law, a person whose Australian visa is cancelled will, for that purpose, necessarily be within Australia's jurisdiction.²⁸
74. Given the above, the Commission considers that the Bill should be amended to make the Minister's emergency cancellation power discretionary. That would allow the Minister to take into account at least some of the matters discussed above. Further, the cancellation power should not be enlivened unless ASIO has at least reasonable grounds for its suspicion that a person might be a risk to security.
75. The Bill would also give the Foreign Minister the power to cancel the visas of family members of a person whose visa is cancelled as a result of an adverse security assessment.²⁹ That power would be enlivened even if those persons were children, or posed no threat to security. The cancellation of family member's visas could affect a number of human rights, including the

rights to be free from inhuman or degrading treatment, the right to freedom from interference with family life, and the right of a child that their best interests be a primary consideration.³⁰ It could also render them liable to mandatory detention in violation of article 9 of the ICCPR. The Commission notes that the Statement of Compatibility with Human Rights states that these rights will be taken into account by the government's policies and administrative decision making processes.³¹

Recommendation 11: Proposed s 134C of the Migration Act be amended to provide that the Minister *may* cancel a visa following advice from ASIO, and that the cancellation power is only enlivened if ASIO has reasonable grounds to suspect that the person might pose a risk to security

10 Cancellation of Welfare Payments

76. Schedule 2 of the Bill contains provisions which allow for the cancellation of certain welfare benefits to persons whose visas or passports are cancelled on national security grounds.

10.1 *Relevant human rights*

77. The provisions of Schedule 2 affect article 26 of the *Convention on the Rights of the Child*.
78. Article 26 of the *Convention on the Rights of the Child* provides:
1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

10.2 *Discussion*

79. Schedule 2 of the Bill amends the *A New Tax (Family Assistance) Act 1999*, the *Paid Parental Leave Act 2010* and the *Social Security Act 1991* to provide that welfare payments may be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been cancelled, on national security grounds.
80. The Explanatory Memorandum states that this is to 'ensure that the Government does not support individuals who are fighting or training with extremist groups'³².
81. In the Commission's view the cancellation of welfare payments where individuals are responsible for providing for children may violate the right of

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children to benefit from social security under article 26 of the Convention on the Rights of the Child.

82. The proposed provisions set out a similar procedure for cancelling payments under each of the above Acts. 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.³³
83. The Attorney-General will have discretion to issue a security notice where either:
 - a. 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
 - b. The Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.³⁴
84. The Foreign Affairs Minister and the Immigration Minister will also have a discretion whether to advise the Attorney-General of the passport or visa cancellation.³⁵
85. The Explanatory Memorandum states 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 and the cancellation of welfare would not adversely impact the requirements of security'. It also states that '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'.³⁶
86. The Commission notes these statements in the Explanatory Memorandum, and accepts that it is a legitimate aim of the Commonwealth to seek to control the transfer of funds to terrorist organisations. However, the Commission is concerned that 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.
87. The Commission recommends that the Attorney-General's discretion to issue security notices³⁷ be defined to include a consideration that 'the receipt of welfare payments was relevant to the assessed security risk posed by the individual'. The Commission also recommends that the Attorney-General's discretion include a consideration of the effect of welfare cancellation on the individual, including any family members and children.
88. The Commission is 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. The welfare payments that may be

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cancelled are ‘family assistance’, ‘parental leave pay’, ‘dad and partner pay’ as well as ‘social security payments’ and ‘concession cards’. Further, a person cannot be paid ‘family assistance’ on behalf of an individual aged 19 or less who has been classified as a security risk.³⁸

89. The Commission notes that under proposed s 57GJ(2) of the *A New Tax System (Family Assistance) Act 1999*, the Attorney-General may recommend that payments of ‘family assistance’ of the individual be paid to a payment nominee of the individual under part 8B of the *Family Assistance Administration Act*. The Explanatory Memorandum states that ‘this provision enables payment to be made on behalf of the individual’s family but ensures that the individual does not receive the benefit of family assistance. This ensures that where possible, children of the individual are not detrimentally affected because of the individual’s conduct’.³⁹
90. A similar procedure does 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 his or her children. The Commission recommends that consideration be given to establishing a payment nominee system for ‘parental leave pay’, ‘dad and partner pay’ and ‘social security payments’ where the individual has dependent family members, particularly children.
91. The Commission is also concerned about the lack of review rights for individuals who have had their welfare payments cancelled. Proposed s 57GR of the *A New Tax System (Family Assistance) Act 1999* removes decisions relating to the cancellation of family assistance payments or the nominee payments from internal review, review to the Social Security Appeals Tribunal and review to the Administrative Appeals Tribunal. Proposed s 278K of the *Paid Parental Leave Act 2010* and proposed s 38V of the *Social Security Act 1991* make similar provision for decisions relating to the cancellation of paid parental leave, dad and partner leave as well as social security payments and concession cards.
92. Further, item 8 of Schedule 2 amends Schedule 2 of 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. 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’.⁴⁰
93. In practice, the ability to challenge decisions of the Foreign Affairs Minister, the Immigration Minister or the Attorney-General without reasons will be extremely limited. The Commission considers that sufficient information should be provided to an individual to enable them to understand the information the Ministers and the Attorney-General relied upon. Consideration should also be given to establishing a role of a Special

Advocate to appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons from an individual.

94. The Explanatory Memorandum notes that individuals will be able to seek review of the decision to cancel a visa or the cancellation of, or refusal to issue a passport. This includes merits review of an adverse security assessment made by ASIO in support of those decisions under the *Administrative Appeals Tribunal Act 1975*.⁴¹

Recommendation 12: The Attorney-General's discretion to issue security notices in relation to welfare payments be defined to include a consideration that 'the receipt of welfare payments was relevant to the assessed security risk posed by the individual'.

Recommendation 13: The Attorney-General's discretion to issue security notices include a consideration of the effect of welfare cancellation on all affected parties, including any family members and children.

Recommendation 14: Consideration be given to establishing a payment nominee system for 'parental leave pay', 'dad and partner pay' and 'social security payments' where an individual has dependent family members, particularly children.

Recommendation 15: Consideration should be given to establishing a role of a Special Advocate to appear in judicial review proceedings where there is a national security reason to withhold part or all of the reasons from an individual.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). At

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (viewed 1 October 2014).

² *Convention on the Rights of the Child*, done at New York, 20 November 1989, [1991] ATS 4.

³ Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age* UN Doc A/HRC/27/37 (2014), [23].

⁴ See UNHRC *General Comment 31* (2004) CCPR/C/21/Rev.1/Add. 13, [6]; UNHRC, *General Comment 16* (1988), UNHCR *General Comment 27* (1999) CCPR/C/21/Rev.1/Add.9; UN Doc. HRI/GEN/1/Rev.1; UNHCR *Draft General Comment 35* (2014), CCPR/C/GC/R.35/Rev.3.

⁵ Criminal Code, ss 104.32 and 105.53; *Crimes Act 1914*, s 3UK.

⁶ ASIO Act, s 34ZZ.

⁷ Eg Explanatory Memorandum, p 128, [741]; p 134, [785].

⁸ Explanatory Memorandum, p. 125, [712].

⁹ Explanatory Memorandum, p. 128, [742].

¹⁰ *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), p 54 [215] (available at <http://www.coagctreview.gov.au/Report/Pages/default.aspx>).

¹¹ *Ibid.*

¹² *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013), p 68.

¹³ Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) pp 44, 67 (available at <http://www.dpmc.gov.au/INSLM/index.cfm>).

¹⁴ ASIO Act, s 34D(4)(b).

¹⁵ Explanatory Memorandum, p 85, [460].

¹⁶ Proposed s 119.3(4).

¹⁷ Proposed s 119.2(3).

- ¹⁸ Explanatory Memorandum, p 139 [827].
- ¹⁹ The Bill would repeal this Act and enact equivalent provisions in the *Criminal Code*.
- ²⁰ Explanatory Memorandum p 182, [1144].
- ²¹ Proposed s 219ZJB(3).
- ²² *Customs Act 1901* (Cth), s 219ZJB(5).
- ²³ UNHRC, *General Comment 20* (1992), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), [11].
- ²⁴ Explanatory Memorandum, p 183, [1153].
- ²⁵ Proposed s 134C.
- ²⁶ *Nystrom v Australia*, UNHRC Communication No 1557 of 2007, UN Doc CCPR/C/102/D/1557/2007.
- ²⁷ Statement of Compatibility with Human Rights, p 62, [307].
- ²⁸ Cf *Montero v. Uruguay*, UNHRC Communication No. 106/1981, U.N. Doc. CCPR/C/OP/2 at 136.
- ²⁹ Proposed section 134F.
- ³⁰ CRC article 3.
- ³¹ Statement of Compatibility, [308]ff.
- ³² Explanatory Memorandum, p. 169 [1051].
- ³³ Proposed s 57GI of the *A New Tax System (Family Assistance) Act 1999*, proposed s 278B of the *Paid Parental Leave Act 2010*, proposed s 38M of the *Social Security Act 1991*.
- ³⁴ Proposed s 57GJ of the *A New Tax System (Family Assistance) Act 1999*, proposed 278C of the *Paid Parental Leave Act 2010*, proposed s 38N of the *Social Security Act 1991*.
- ³⁵ Proposed s 57GK & s 57GL of the *A New Tax System (Family Assistance) Act 1999*, proposed s278D & s278E of the *Paid Parental Leave Act 2010*, proposed s 38P & s 38Q of the *Social Security Act 1991*.
- ³⁶ Explanatory Memorandum, 169 [1054].
- ³⁷ Proposed s57GJ of the *A New Tax System (Family Assistance) Act 1999*, proposed s278C of the *Paid Parental Leave Act 2010*, and proposed s 38N of the *Social Security Act 1991*.
- ³⁸ Proposed s 57GI(7) of the *A New Tax System (Family Assistance) Act 1999*.
- ³⁹ Explanatory Memorandum, 172 [1074].
- ⁴⁰ Explanatory Memorandum, 180 [1133].
- ⁴¹ Explanatory Memorandum, 180 [1134].