



Australian Government

Independent National Security Legislation Monitor

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28th March 2014

BRET WALKER SC

ONE NATIONAL CIRCUIT
BARTON ACT

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Independent National Security Legislation Monitor

BRET WALKER SC

**ONE NATIONAL CIRCUIT
BARTON ACT**

28th March 2014

The Hon Tony Abbott MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I present herewith my report for the period 1st July 2013 to 28th March 2014.

The preparation of an annual report by this office is required by section 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth). This report is my last annual report: the length of the period under review reflects the cessation of my holding of this office on 21st April 2014. The report is unclassified and is suitable to be laid before both Houses of Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bret Walker'.

Bret Walker

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CHAPTER I SUMMARY AND GENERAL COMMENT

I.1 Annual review

The accident of timing created by my appointment on 21st April 2011 and the provisions for annual reports on work during years ending on 30th June, means that, like the INSLM's First Annual Report, this Fourth Annual Report is for a truncated period. The period of office for the INSLM may not exceed three years,¹ and I was appointed for three years.

The recommendations made in this Report by the INSLM concerning Australia's CT Laws² are collected in **Appendix A**.

A bibliography, supplementary to those in previous years, comprises **Appendix B**.

The consultations, hearings and other attendances by the INSLM since the Third Annual Report are listed in **Appendix C**, together with an important acknowledgement.

The Issues for Consideration identified in the INSLM's First Annual Report have been dealt with in the passages in subsequent reports identified in **Appendix D**.

I.2 Summary

Chapter II reports that Part IIIAAA of the *Defence Act 1903* (Cth) is with one exception appropriate (in the sense discussed in Chapter II of the INSLM's First Annual Report). The call out powers are also, based on the same considerations, necessary (again, in the sense discussed in Chapter II of the INSLM's First Annual Report). Mercifully, there are no empirical data to enable the INSLM to report whether, in practice, these provisions for the call out powers are effective (again, in the sense discussed in Chapter II of the INSLM's First Annual Report). However, the INSLM has not found any reason to doubt the suitability of these laws to achieve their intended purpose, in practical terms. That does not mean that continuing consultation should not be had, in particular with ADF officers experienced in the area, to detect in advance any curable defects in the efficient deployment of lawful military force against terrorism in Australia.

The one exception noted above consists of non-compliance of Division 3B of Part IIIAAA of the Defence Act with ICCPR. The ADF should not be authorized to kill innocent passengers and crew in airliners.

Chapter III seeks to reconcile with the CT Laws the related legislation comprising the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). There are defects in Commonwealth statutory powers and authorities desirable to counter terrorism, in relation to that overlap. The matters concerning which the INSLM makes recommendations in this area are relatively urgent, given the currency and gravity of the involvement of Australians in Syria.

¹ subsec 12(1) of the INSLM Act

² Being those listed in Appendix 1 of the INSLM's First Annual Report

Chapter IV confronts what may be an intractable difficulty in the proper administration of criminal justice in countering terrorism: the typical need to investigate and prove events and circumstances that took place in foreign countries. Some of the most significant examples of these countries suffer from extraordinary breakdowns of law and order.

Chapter V is also actuated by some urgency pointed up by current experiences in Syria. We need more rapid control of the way passports are used to facilitate travel for the purposes of terrorist activity. The topic engenders a broader and deeper concern with dual citizenship.

Chapter VI is the INSLM's response to matters raised by agencies, themselves in response to the INSLM's request for suggestions as to practical improvements to the laws governing their counter-terrorist activities. It is intended to advance effectiveness while observing appropriateness.

I.3 Statutory conclusions

I report, pursuant to para 29(1)(a) of the INSLM Act, that I have carried out the duties required by paras 6(1)(a) and (b) of the INSLM Act. Subject to the matters that culminate the recommendations made in this Fourth Annual Report, I report that (within the meanings explained in Chapter II of the INSLM's First Annual Report) the CT Laws are effective, appropriate and necessary.

I also report that I have not seen anything to suggest that the CT Laws have been used during the period under review for matters unrelated to terrorism and national security, as required to be addressed under para 6(1)(d) of the INSLM Act.

I.4 Epilogue

Observations concerning governmental non-response to the INSLM's Second Annual Report, as well as to the COAG Review of Counter-Terrorism Legislation, were made in the INSLM's Third Annual Report delivered on 7th November 2013. They may be updated today by the statement that nothing has happened since then in public.

It can be said that most of the recommendations in the INSLM's Third Annual Report itself were designed to enhance the capacity of Australian authorities and agencies to detect, investigate and prosecute terrorist offences. The official silence since those recommendations were made prompts repetition of the comment first expressed in the INSLM's Third Annual Report: "When there is no apparent response to recommendations that would increase powers and authority to counter terrorism, some skepticism may start to take root about the political imperative to have the most effective and appropriate counter-terrorism laws".

The INSLM Act itself is a statute related to the CT Laws. In the opinion of the outgoing INSLM, it should be improved in two respects. First and not very importantly, there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.

Second and very importantly, there should be no possibility of reappointment of the INSLM. The nature of the task should not only involve quasi-judicial tenure (during the term of appointment)

so as to remove fear of the Executive, but there should as well be no hope of preferment from the Executive. As a corollary of this suggested repeal of subsec 12(2) of the INSLM Act and its replacement by a prohibition on reappointment, consideration should be given to the enlargement of the term of office probably to four years and possibly to five years. In turn, this may well reduce the pool of willing appointees considerably.

Official contact by the Executive and Parliament during my tenure as INSLM was had once with a Senate Estimates Committee and once privately with the PJCIS. On neither occasion was the INSLM Act itself in question.

There was no prior consultation with the INSLM before it was announced that repeal of the INSLM Act would be sought by the government as part of the reduction of red tape. (The Secretary of the Department of the Prime Minister and Cabinet visited the office as a matter of courtesy to notify me of that decision.)

The Explanatory Memorandum for the Bill to repeal the INSLM Act, the *Independent National Security Legislation Monitor Repeal Bill 2014* (Cth), forecast that I would have “conducted a comprehensive review of Australia’s national security legislation” by the expiry of my term of office. It states that the end of my term of office “brings to an end this thorough review”. The other organs of government with responsibility for the CT Laws have made no detectable response to any previous reports. The proposed repeal of the INSLM Act has been explained as “designed to reduce bureaucracy and streamline government” by removing “duplication of responsibilities and between different levels of Government”. The INSLM is not aware of any other officer, agency or “level” of government doing what Parliament required to be done by the INSLM Act enacted in 2010.

I thank the agencies and their officers, and departmental officers, who have responded to and cooperated with the INSLM over the last three years.

The Explanatory Memorandum refers to “existing independent oversight bodies” instancing IGIS, Parliamentary committees and Parliament itself. As to IGIS, there would be a very large question of deployable resources were the task undertaken by the INSLM required to be undertaken by IGIS. As to Parliamentary committees, engagement has been sparse. As to Parliament, the record is blank.

Given the enacted purposes of the office of INSLM, I dissent from its description as red tape.

CHAPTER II DEFENCE ACT 1903 CALL OUT POWERS

II.1 Introduction

The provisions of Part IIIAAA of the *Defence Act 1903* (Cth) (“**Defence Act**”) may generally be described as empowering and regulating the call out of the ADF in case of specified emergencies, including a terrorist threat. Of their nature, therefore, they are important in several respects. First, they concern the deployment of the most forceful lawful power in Australia to protect national security, and the lives and welfare of Australians affected by terrorism. Second, they concern the application of military force in civil life on home territory – traditionally and properly, a context that calls for great restraint. Third, they contemplate the use of lethal force, and so present the most acute case of possible exceptions or qualifications to international human rights obligations.

In the INSLM’s First Annual Report, the importance and elaborateness of these provisions were briefly noted.³ The investigation and consideration by the INSLM anticipated in 2011 were not completed until the beginning of 2014. In part, these provisions were not given priority in 2012 and 2013, because it remains the case that the only implementation of these provisions occurred without relevant incident. There are really no empirical data to judge any better in early 2014 than when these provisions were enacted whether they are appropriate and effective.

However, in the INSLM’s view these provisions generally meet acceptable standards, within the meaning of secs 3,6 and 8 of the INSLM Act.

The INSLM raised concerns with ADF officers about the elaborateness of these provisions and especially the prerequisites and safeguards involved in using these powers in an emergency.⁴ Concerns were also raised about the onerous personal professional responsibility placed on members of the ADF resorting to lethal force in carrying out their duties in Australia’s use of these powers.

The INSLM was very impressed with the care and thoughtfulness with which the officers who discussed these matters at private hearings with the INSLM addressed both of these topics of concern. In the upshot, detailed exposition of the reasons for provisional concern would be unnecessary, because those concerns were allayed by the persuasive evidence and argument from the ADF representatives at these hearings.

In short, therefore, the Defence Act call out powers are not inappropriately elaborate as to procedures nor excessively demanding as to individual responsibility.

This left one discrete topic of questionable compliance with ICCPR. For the reasons that follow, the legislated power to shoot down a passenger aeroplane believed to be carrying innocent passengers or crew cannot pass without grave doubt as to its propriety.

³ INSLM’s First Annual Report at 60

⁴ cf Blunn, Baker and Johnson, *Statutory Review of Part IIIAAA of the Defence Act (Aid to Civilian Authorities)*, Department of Defence (January 2004), at paras 47-50

II.2 Taking measures against aircraft

It is notorious that innocent passengers and crew of airliners were killed on 11th September 2001 by the terrorists who destroyed the Twin Towers, damaged the Pentagon and were thwarted in Pennsylvania. One plausible explanation of the fate of the fourth aircraft is the willingness of some of its innocent passengers and crew to sacrifice themselves (and all the others) in order to prevent the terrorists from killing others on the ground.

Should the CT Laws permit authorized force in Australia entailing the killing of innocent passengers and crew on board an aeroplane considered by the authorities to be bound on a murderous terrorist course? Do Australia's international obligations, including its human rights and counter-terrorist obligations, permit such laws and conduct under them? Whatever the answer to the last question, should such laws exist?

The primacy and centrality of the human rights to life and security of person codified in Arts 6 and 9 of ICCPR were discussed in the INSLM's First Annual Report.⁵ As to the first, Art 6(1) provides that "No one shall be arbitrarily deprived of his life".

The whole of ICCPR, in accordance with Art 1 of the *Universal Declaration of Human Rights*, is pervaded by a spirit that declares and seeks to protect the equal dignity of individual humans.⁶ Similar provisions of what may now be regarded as universal human rights discourse are found or reflected in various national constitutions and bills of rights. Australia is not among those nations, but is bound by ICCPR. The INSLM is bound as well to report on compliance of the CT Laws with Australia's international obligations including ICCPR.⁷

As it happens, the *Grundgesetz* of the Federal Republic of Germany (the Basic Law, or constitution) includes basic rights to similar effect. The translations found in **Appendix E** demonstrate the material identity for present purposes between Art 6 of ICCPR and Art 1(1) of the German Basic Law and between Art 9 of ICCPR and Art 2(2) of the German Basic Law.

The call out provisions of the Defence Act include in Division 3B of Part IIIAAA detailed provisions to create and regulate powers relating to aircraft. They are reproduced in **Appendix F**. They are admirably plain in their intent and expression, but for one small matter.

In terms, that is within Division 3B itself, no reference is found to the use of force (which is referred to) resulting in the death of a person. The "measures" authorized and controlled by these provisions are described as being "against aircraft". It is not unmanned drones that constitute the object of the force authorized by these provisions. Common sense, context and the provisions of Division 4, next to be noted, show that the reference to "aircraft" is a metonymy: the aircraft contains the people. Thus, the permission for a member of the ADF in specified circumstances to take measures including the use of force against an aircraft whether or not it is airborne expressly extends to "destroying the aircraft" – and thereby killing in all likelihood some or all of the persons on board.

⁵ at 18-21

⁶ eg, expressly, Arts 2(1), 2(3)(b), 3, 10(1), 14(1), 26

⁷ see the INSLM's First Annual Report Chapters I, II and III

The provisions of Division 4 in Part IIIAAA of the Defence Act regulate in detail the use of force in exercising a power such as this power under Division 3B. In short, the force must be such “as is reasonable and necessary in the circumstances”.⁸ In particular, there is a prohibition against using force against a person in such a way as “is likely to cause the death of... the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or to prevent serious injury to, another person”, including the ADF member using the force.⁹

In general terms, these are unexceptionable provisions, of a kind found in many statutes in relation to the authority to use and constraints imposed on physical force in the course of official duty - such as, most obviously, civilian police services.¹⁰ However, in the opinion of the INSLM it is unique for the familiar concepts behind the phrase “reasonable and necessary” (probably intended to mean “reasonably necessary”) to involve serious contemplation of deliberately killing innocent people about whom no suspicion is held at all that they are participating in wrongdoing. For example, in the view of the INSLM it would be unthinkable to suggest that a police officer could lawfully shoot a bystander unwittingly blocking the line of fire between the officer and a fleeing criminal, invoking reasonable necessity as justification. A prison guard could not invoke reasonable necessity to justify destroying a motor vehicle known to contain a baby in order to foil an attempt to escape by a prisoner headed for that vehicle.

At the risk of stating the obvious, that is because no ordinary calculus of decency would permit the reduction of the dignity of the innocent victims in those scenarios to merely instrumental rôles, diminishing their humanity to the status of inconvenient obstacles in the way of preventing crime or apprehending offenders. This usual and proper ethical response is in no way cast into doubt by the officer’s or guard’s confidence or certainty that, if the bystander or baby were not subject to these lethal expedients, the criminals would most likely get away with it.

A common scenario raised in relation to terrorism and related military conduct turns on the dilemma presented by possible suicide bombers. What if they are also victims rather than perpetrators? What if that remains a real possibility, the truth of which cannot be discovered in the brief moments before he or she gets within lethal blast range of soldiers or civilians? Should he or she be shot, in all likelihood dead, before that point is reached?

It is probably not ultimately useful to approach the human rights compliance of laws for shooting down passenger aircraft by the false analogy with suicide-bombers-who-are-not-really-suiciding. There is no such doubt or ambiguity in the case of a passenger airliner known to contain ordinary passengers and crew where there is no real possibility at all that every one of those people is a perpetrator.

There is also a broader risk of fallacious reasoning based on imagined scenarios, where apparently legal reasoning is pushed beyond bearable limits to accommodate circumstances not actually ever encountered. The classic example in the area of counter-terrorism is, of course, the unfortunate controversy concerning the use of torture in the so-called case of a ticking bomb, supposedly to obtain information to prevent its explosion.

⁸ subsec 51T(1) of the Defence Act

⁹ para 51T(2)(a) of the Defence Act

¹⁰ see INSLM’s Second Annual Report IV.5

In the opinion of the INSLM, at bottom a necessary element in the purported justification of laws such as Division 3B of Part IIIAAA of the Defence Act must be some crude form of utilitarian head count – along the lines of it being right to kill 200 people in order to save 2000 people, even if all of them are innocent. It is worth noting at once that this kind of ghastly calculus should always, to be fair and accurate, include the worrying qualification that the prospect of the 2000 being otherwise doomed is a matter of possibility or probability, rather than certainty – whereas the act sought to be justified, killing the 200, is for all practical purposes certain, such as shooting down a passenger airliner.

ICCPR does not contemplate this as a permissible approach to the qualification of the human rights recognized in it, the observance of which is binding on Australia. It suffices to note the non-derogable status of Art 6.¹¹ Nor does the somewhat diffuse jurisprudence on the notion of arbitrariness involved in the Art 6 right to life (ie a right not to be “arbitrarily” deprived of it) currently provide any footing for treating the existence of a law, however disproportionate in its substance, as producing compliance.

The significance of identifying and repelling this travesty of utilitarian thought extends beyond the merits of authorizing lethal force to counter terrorism. It applies as well to broader, even global, issues of civil society, in a populous and urbanizing world, where incurable infectious diseases threaten our lives. At present, at least in the opinion of the INSLM, the range of decent responses to the detection of persons suffering that kind of disease does not include culling them - as opposed to quarantining them.

On 15th February 2006, the Bundesverfassungsgericht (Federal Constitutional Court) of the Federal German Republic, by its First Senate, ruled that a federal law purporting to authorize on materially similar terms the shooting down of airliners in Germany was invalid, including for non-compliance with the basic right to life and guarantee of human dignity, protected in the German Basic Law.¹² The researches of the INSLM, which included inquiries of AGD and ADF, have not thrown up any other instances of a formal consideration of such laws in terms of human rights compliance.

The status of the German court and the sufficiency of resemblance of its mode of reasoning to that which is cogent in Australian jurisprudence lead the INSLM to regard this decision¹³ as a very weighty ground to doubt the appropriateness of Division 3B of Part IIIAAA of the Defence Act.

Recommendation II/1: The provisions of Division 3B of Part IIIAAA of the Defence Act should be amended so as to exclude from the range of permissible measures against aircraft any action calculated to kill innocent passengers and crew.

¹¹ Art 4(1) and (2) of ICCPR

¹² The Basic Law provisions are found in **Appendix E**. Relevant excerpts of the reasons of the court are found in **Appendix G**. (The translation, which does not appear completely idiomatic English, is from the court’s official website.) It should be noted that the aviation law in question was also invalid (“void”) because it could not be supported by the federal legislative competence in question, concerned with the distribution of powers in the federation. In terms of our approach to authority, the human rights holding might be argued to be obiter.

¹³ cited as 1 BvR 357/05

CHAPTER III AUSTRALIANS AND ARMED CONFLICTS ABROAD

III.1 Introduction

The basic criminal prohibitions of terrorism in Australia's CT Laws are extra-territorial in their application to conduct, consistently with Australia's international obligations to assist in countering terrorism.¹⁴ Engaging in violence, threatening violence, planning violence or lending support to those intent on such conduct are elements of terrorist offences in the CT Laws notwithstanding some or (in some cases) all of the charged conduct occurs outside Australia. (Particular requisite connexions between an accused person and the territory or polity of Australia are matters of detail immaterial to the present topic.)

The paradigm case for the extra-territorial operation of the CT Laws is an Australian citizen causing another person's death in another country with the intention of advancing a political cause and with the intention of influencing by intimidation the government of that foreign country (or another foreign country), or the government of part of such other country.¹⁵ As noted in Chapter II above, there is nothing hypothetical about that case – it is typically the most serious form of involvement by Australians presently in the Syrian internecine conflict.

However, it is not only in Part 5.3 of the Criminal Code that such conduct is criminalized by Australia. The Criminal Code provisions of the CT Laws overlap considerably with the provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* (“**Foreign Incursions Act**”). The nature and extent of, and complications involved in, that overlap render the Foreign Incursions Act a law of the Commonwealth that relates to Australia's CT Laws, within the meaning of subpara 6(1)(a)(ii) of the INSLM Act. The Foreign Incursions Act has been reviewed by the INSLM, with a particular focus on the question whether it and the Criminal Code provisions effectively discharge Australia's international obligations to criminalize terrorism.

The kind of violent conduct aimed at by these provisions ranges from clandestine solitary attacks through the operations of small secret cells of conspirators and up to virtually military operations of relatively large organized groups. Consideration of the CT Laws and the Foreign Incursions Act by the INSLM therefore also involves framing the enquiry by reference to the relevant legal regulation of genuine and proper military operations as well as IHL provisions such as the *Geneva Conventions*.

As explained below, the CT Laws and the Foreign Incursions Act present some anomalies and mismatches that detract from their effectiveness as laws to criminalize terrorism.

¹⁴ These international obligations and the resultant extra-territoriality of Australia's CT Laws are noted and discussed in eg Chapters I and VII of the INSLM's First Annual Report, Chapter VI of the INSLM's Second Annual Report and Chapters II and VI of the INSLM's Third Annual Report.

¹⁵ See eg subsec 101.1(1), read with sec 15.4 and subpara 16.1(1)(c)(i), and the definition of “terrorist act” in sec 100.1 para (b) and subpara (c)(i) and in para 100.1(2)(c), and in para 100.1(4)(a), all of the Criminal Code.

III.2 Foreign Incursions Act – core offence

The central prohibition of the scheme of offences created by the Foreign Incursions Act is against entering a foreign State with intent to engage there in a “hostile activity” or engaging in such an activity in a foreign State.¹⁶ The connexion with Australia providing the justification for this extra-territorial criminal legislation is the accused person being an Australian citizen, or ordinarily resident in Australia, or present in Australia at an antecedent time for a relevantly connected purpose.¹⁷

Important carve-outs from these offence provisions apply to conduct by way of service with the armed forces of a government of a foreign State, or “any other armed force” declared by the Attorney-General as one for which the permission of recruitment in Australia “is in the interests of the defence or international relations of Australia”.¹⁸

It follows that, quite apart from the meaning of “hostile activity”, discussed below, the application of the Foreign Incursions Act is critically affected by the question whether the conduct that would otherwise be prohibited hostile activity was with a foreign government’s armed forces or some other armed force approved by the Australian Executive. The Foreign Incursions Act thereby requires explicit attention by the Australian Executive to the identification of the milieu in which, say, an Australian engages in hostile activity in Syria. Is he serving with the Syrian government’s armed forces? If so, there is no subsec 6(1) offence – subject to the complication of an exception to the carve-out, discussed below.

Whether or not one uses the language of diplomatic recognition, it is nonetheless an unavoidable aspect of the application of the Foreign Incursions Act to consider what the position of the Australian Government (meaning the Executive) is or was at the relevant time concerning the “government” of a foreign State such as Syria.

III.3 Carve-out for service in armed forces

Although not within the carve-out provisions noted above, there is an obvious if redundant provision in sec 5 of the Foreign Incursions Act to exempt acts done in accordance with a person’s duty to the Commonwealth in relation to the defence of Australia, from the operation of the statute. That state of affairs is one that may be addressed by a Ministerial certificate to negative effect – but only as prima facie evidence.¹⁹ (Consideration and recommendations made further below concerning other certificates being prima facie evidence only arguably may, but probably should not, provide grounds to doubt the appropriateness of that merely prima facie effect.)

There may, of course, be room for genuine dispute or uncertainty as to whether a person’s service does constitute “service in any capacity in or with ... the armed forces of the government of a foreign State”, within the meaning of para 6(4)(a) of the Foreign Incursions Act. Borderline cases perhaps raised by what in former times were labelled “irregular” forces can easily be

¹⁶ subsec 6(1) of the Foreign Incursions Act

¹⁷ subsec 6(2) of the Foreign Incursions Act

¹⁸ subsecs 6(4) and 9(2) of the Foreign Incursions Act

¹⁹ subsec 11(2) of the Foreign Incursions Act

envisaged to present current difficulties in currently realistic locales, such as Syria, Lebanon, Afghanistan, Iraq and Somalia.

These difficulties are in the nature of things, rather than as a result of statutory drafting. The concept and language employed by the expression “armed forces” are at least familiar, and are not inappropriate as matters for a prosecution to grapple with factually in cases where it is properly raised.

On the other hand, the attribution of armed forces as being those “of the government of a foreign State” is a significantly different aspect of the prosecution task. On any view, it involves an assessment of and conclusions about the military and political affairs of another independent sovereign state,²⁰ with the usual and judicially well understood implications that process may have for the international relations of Australia.

The other possibility for an armed forces carve-out is in the alternative to the foreign governmental armed forces envisaged by para 6(4)(a) of the Foreign Incursions Act. The second alternative provided by para 6(4)(b) is an armed force other than an armed force within para 6(4)(a). The reference in para 6(4)(b) to a declaration under subsec 9(2), which in turn is directed to the non-application or qualified application of subsec 9(1), means that it is the non-governmental character of those “other” armed forces that is essential.²¹

The notion of non-governmental armed forces engaging in hostile activities in a foreign State, in which, say, an Australian may be serving, obviously raises as a typical possibility the more or less organized military operations by rebels or insurgents in conflicts in the nature of a civil war. The key criterion “of the interests of the defence or international relations of Australia” in subsec 9(2) as used for the purposes of para 6(4)(b) of the Foreign Incursions Act necessarily involves the taking of an official attitude by the Australian Executive which may loosely be regarded as approval of such military operations involving Australians.

There has never been such a declaration under subsec 9(2) of the Foreign Incursions Act. (Indeed the only declarations, details of which are contained in **Appendix H** relate to the armed forces of the governments of the foreign States of Singapore and Papua New Guinea.)

It would not be surprising if Australia were to refrain from picking winners, so to speak, by making declarations under subsec 9(2) for the purposes of para 6(4)(b) of the Foreign Incursions Act. By definition, as noted above, such official action by Australia would be to favour Australians fighting for rebels or insurgents against the government forces of a foreign State, or perhaps against other opposed rebels and insurgents instead or as well as against those foreign governmental forces. By way of illustration, there has been no subsec 9(2) declaration in relation to any non-(or anti-)governmental forces in Syria, and the INSLM is not aware of any suggestions from any source that such an action by the Australian Executive should be taken. (As discussed below, there has been Australian Executive action which if anything is to the opposite effect.)

²⁰ definition of “foreign State” para (a), in subsec 3(1) of the Foreign Incursions Act

²¹ See para 9(1)(a) of the Foreign Incursions Act.

However, in the presently difficult to imagine state of affairs that the Commonwealth Parliament has provided for in precise terms, in subsec 9(2) of the Foreign Incursions Act, the emphasis for the purposes of the review by the INSLM of the effectiveness of these laws, including reasonably appropriate means to prosecute offences, is on the thoroughly political nature of the judgement conveyed by a subsec 9(2) declaration. It turns on a decision which would in practice always be the outcome of Cabinet deliberations, and from its nature would particularly involve not only the Attorney-General but also the Minister of Defence and the Minister for Foreign Affairs and Trade. It is a disallowable instrument, meaning that its merits are committed to the votes of Members of each of the Houses of Parliament.²²

It is unthinkable that the gist of a declaration under subsec 9(2) of the Foreign Incursions Act conveying approval for Australians to fight in rebel forces in a foreign civil war (because the Australian Executive considers that to be in the interests of the defence or international relations of Australia) should ever be subject to overriding by judicial decision or by the implications of a jury verdict. Simply, for the reasons elaborated further below, this is the kind of judgement which cannot be canvassed in an Australian court. It should be regarded as conclusively determined by the fact of the declaration.

And, for subsec 9(2) declarations, so it is. The existence of the declaration will have the effect of disapplying criminal provisions, beyond the reach of any merits based judicial review. This may have implications for the appropriateness of some of the evidentiary certificates with merely prima facie effect, as discussed further below.

III.4 Exceptions to armed forces carve-out

The rôle of judgements by the Australian Executive involving its disapproval and political assessments of Australia's international interests is also central in the currently topical exception to the armed forces carve-out.

The purpose and effect of the exception created by subsecs 6(5) and (6) of the Foreign Incursions Act are to deprive a person entering a foreign State with intent to engage in a hostile activity there or a person engaging in such hostile activity, of the answer that he was doing so by way of service in a foreign State's governmental armed forces. The nub of these provisions is to deprive such a person of that answer if he or she engages in that conduct "while in or with" a prescribed organisation.²³

A prescribed organisation for these purposes may be so because it is a terrorist organisation within the meaning of para (b) of that term's definition in subsec 102.1(1) of the Criminal Code. That means it has been prescribed under the Criminal Code by a regulation, upon the Attorney-General being satisfied on reasonable grounds to the effect that it is engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act.²⁴

²² subsec 9(4) of the Foreign Incursions Act and subsec 48(4) of the *Acts Interpretation Act 1901* (Cth)

²³ paras 6(5)(b) and (6)(b) of the Foreign Incursions Act

²⁴ subsec 102.1(2) (and also subsec 102.1(1A)) of the Criminal Code.

It follows from this possibility that the Commonwealth Parliament has quite precisely envisaged, so it seems, that a person who would otherwise have the answer that what he was doing was by way of service in a foreign State's governmental armed forces, may be deprived of that answer if that service was in or with a terrorist organisation. That is, the whole or a relevant part of that foreign State's governmental armed forces can be regarded as a terrorist organisation – and for the purpose of applying very serious criminal offence provisions.

The other way an organisation may be prescribed so as to provide an exception to the armed forces carve-out is that a regulation is made in accordance with subsec 6(8) of the Foreign Incursions Act. The Attorney-General must be satisfied on reasonable grounds of one or other of the following matters in order for such a regulation to be made. Under para 6(8)(c), the matter is engagement in, preparing, planning, assisting in or fostering a terrorist act as defined in sec 100.1 of the Criminal Code, thus reflecting in part the proscription of a terrorist organisation under the Criminal Code.²⁵

Another matter to ground prescribing an organisation under subsecs 6(5) and (6) of the Foreign Incursions Act is being engaged in (etc) a serious violation of human rights.²⁶ Given that this concept will include the arbitrary killing or infliction of physical harm as well as deprivation of fundamental civil rights related to political participation, it can readily be seen that this is another means by which the Australian Government is expressly permitted by the Commonwealth Parliament to brand the government of a foreign State as one whose armed forces contain or comprise an organisation of this nefarious kind. That kind of judgement is, it need hardly be said, a very serious matter for the conduct of Australia's international relations.

The two other matters to ground prescribing an organisation under subsecs 6(5) and (6) under the Foreign Incursions Act are being engaged in (etc) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth²⁷ or an act prejudicial to the security, defence or international relations of the Commonwealth.²⁸ The components of the judgements required of the Minister in order for regulations to be made under these matters, as well, plainly involve political judgements uniquely within the competence of the Executive as they concern international relations and military affairs.

No-one would seriously suppose that the Executive conclusions resulting in prescribing organisations, albeit with serious criminal consequences, should be open to challenge let alone contradiction in or by a court, whether by a judge's decision or a jury's verdict. Judicial review under the *Constitution*, obviously, must be available to ensure the legality of such a regulation, but in no sense as to its merit, factually or politically.²⁹

²⁵ The Criminal Code proscription has a further ground of advocacy of terrorism, which is not available for the Foreign Incursions Act.

²⁶ para 6(8)(a) of the Foreign Incursions Act

²⁷ para 6(8)(b) of the Foreign Incursions Act

²⁸ para 6(8)(d) of the Foreign Incursions Act

²⁹ Thus a judicial review court would have jurisdiction to decide whether the Minister was "satisfied on reasonable grounds" of one or other of the relevant matters concerning an organisation. The requirement for "reasonable grounds" in some senses approaches a merits review, but remains conceptually distinct from reposing the final decision on the merits in a court of law.

A point to be made concerning these provisions is the firm allocation to the Executive of the military and international relations, and foreign policy discretion, considerations. In the view of the INSLM, that allocation is fundamentally important and correct beyond argument. Accordingly, as discussed further below, certain evidentiary certificate provisions in the Foreign Incursions Act are of dubious worth.

III.5 Hostile activity in a foreign State

The central notion of “hostile activity in a foreign State” to which the Foreign Incursions Act is directed is defined in almost banal terms, by subsec 6(3). It includes the near circularity of defining “engaging in a hostile activity ...” as “engaging in armed hostilities ...”.³⁰ (It strains credulity that the Commonwealth Parliament has any concern with unarmed hostilities.) Otherwise, the concept turns on the governmental element of a foreign State,³¹ or “causing by force or violence the public in a foreign State to be in fear of suffering death or personal injury”.³²

Insofar as the central concept of hostile activity turns on the governmental character of the target, the critical rôle of a judgement by the Australian Executive concerning the government of a foreign State is unavoidable. Administrative practice that claims to refrain from the recognition of foreign governments cannot sidestep this reality.

The phrasing of para 6(3)(b) bears comparison with the core of Australia’s definition of terrorism, viz causing death or serious physical harm with the intention of intimidating the public or a section of the public.³³ In the INSLM’s opinion, there is no reason for this variation in language to convey what is surely the same substantial matter. As a further matter of substance, it is a considerable defect in the drafting of para 6(3)(b) of the Foreign Incursions Act, compared with the corresponding provisions in the Criminal Code, that the subject of the relevant fear is “the public in the foreign State” and not also part of that public, as is explicitly stipulated in the Criminal Code. Sectarian, ethnic and political differences in foreign States are calculated to produce conduct that intimidates or arouses fear in a part or section of that foreign State’s public to the satisfaction of opposing parts or sections of that same foreign State’s public.

Recommendation III/1: The wording of the provisions of subsec 100.1(1) of the Criminal Code concerning intimidation of the public or a section of the public, and of para 6(3)(b) of the Foreign Incursions Act concerning causing the public in a foreign State to be in fear, should be exactly consistent. The Foreign Incursions Act³⁴ version should explicitly include the fear of a section of the public.

Reflection on the published nature of the conflict in Syria and the involvement of foreign fighters (including Australian) suggest a further defect in subsec 6(3) of the Foreign Incursions Act. The provision appears to have been framed upon the supposition, neat in concept but unreal in

³⁰ para 6(3)(aa) of the Foreign Incursions Act

³¹ paras 6(3)(a), (c) and (d) of the Foreign Incursions Act

³² para 6(3)(b) of the Foreign Incursions Act

³³ See the definition of “terrorist act” subpara (c)(ii) in subsec 100.1(1) and paras 100.1(2)(a), (c) and (d) of the Criminal Code. As to the primacy of the fundamental human right to life justifying the CT Laws, see the INSLM’s First Annual Report at pp 9-10.

³⁴ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

practice, that acts against a foreign government calling for Australian criminal sanction would be committed in the territory of that foreign government. The proximity of Turkey, Lebanon and Iraq to Syria demonstrates the inadequacy of that approach. It would be most undesirable, in the INSLM's opinion, for an Australian caught shooting at a convoy of Assad supporters while they were in Lebanon but bound for Syria, to escape the offence provisions of the Foreign Incursions Act by pointing to the object of their force, violence and hostilities as the government of Syria rather than Lebanon.

The COAG Review of Counter-Terrorism Legislation held similar concerns, and recommended an amendment to remove the need to prove an intention to engage in hostile activity in a particular foreign State.³⁵ The COAG Review found:-

...In most cases, it is difficult to envisage how an intention to engage in hostile activity overseas could be proven without the prosecution establishing some nexus with a specified foreign State. However, there is evidence to suggest that there are individuals, radicalised by a militant ideology, who are desirous of contributing to terrorist activities in various theatres of violence in North Africa and the Middle East. Against this background, investigating agencies are handicapped by the need in the current legislation to prove a particular foreign State as the target destination of hostile activity. It may be that the individual concerned transits in a third country to receive guidance as to his or her ultimate destination. It may even be the case that this individual's hostile objective is first contemplated at this point.

The Act does not allow investigating Australian agencies and the CDPP to intervene at an appropriately preparatory stage. The reality is that evidence illuminating a particular target in a particular foreign State in a relatively porous region may only become apparent at a stage where Australian agencies are forced to rely on collaboration with investigating agencies in these same countries. In these circumstances, it is preferable that where there exists sufficient evidence of an individual's intention to engage in hostile activity overseas, Australian criminal law can capably intervene prior to that individual's departure from Australia.³⁶

Recommendation III/2: Paragraph 6(1)(a) and the provisions of subsec 6(3) of the Foreign Incursions Act³⁷ should be redrawn to replace the definite article "the" before the phrase "foreign State" in paras 6(1)(a) and 6(3)(a), (c) and (d) with the indefinite article "a".

III.6 Ministerial consent

The Attorney-General's consent is required for a prosecution under the Foreign Incursions Act.³⁸ This is entirely appropriate for such offences, given the offending involves conduct against a "government". The requirement for the Attorney-General's consent to prosecutions under the Foreign Incursions Act is however inconsistent with the Criminal Code terrorism offences, which are also tied to conduct against a "government" (as well as the case of acts to intimidate

³⁵ *Report of the COAG Review of CT Laws* (2013), Recommendation 41. See discussion at paras 297-299

³⁶ *Report of the COAG Review of CT Laws* (2013), paras 298-299

³⁷ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

³⁸ sec 10 of the Foreign Incursions Act

the public or a section of the public).³⁹ There is no requirement for the Attorney-General to consent to a prosecution for a terrorism offence under Part 5.3 of the Criminal Code.

It is appreciated that the institution of the Director of Public Prosecutions is generally regarded as a beneficial improvement in the desirable impartiality required for the initiation and conduct of criminal proceedings. However, the integral element of a foreign governmental and political aspect in terrorism offences with an overseas connexion inherently gives the Australian Executive a proper rôle in such decision-making.

Permission at the outset, rather than compulsion and ongoing control, strikes a proper balance in light of these concerns. And the inconsistency between the Foreign Incursions Act and the Criminal Code in this regard should be eliminated, so as to reduce the risk of an anomalous factor influencing the prosecutorial selection of charges in a particular case.

Recommendation III/3: The Criminal Code should be amended to require the Attorney-General's consent for all prosecutions for an offence against Part 5.3 of the Criminal Code.

III.7 Exception for humanitarian aid

Subsection 7(1) contains offences related to preparations for incursions into foreign States for the purpose of engaging in hostile activities. However, subsection 7(1B) of the Act provides that a person "shall not be taken to have committed an offence against this section merely because of doing an act by way of, or for the purposes of, the provision of aid of a humanitarian purpose". Given the elements of the subsec 7(1) offences, it is difficult to imagine what need there is for an exception to protect those involved in legitimate charitable work. This is because an activity that is "merely" humanitarian in nature will be unlikely to be an act that is preparatory to the commission of an offence against sec 6 (incursions into foreign States for the purpose of engaging in hostile activities), nor is it likely to be intended to prepare a person to commit an offence against sec 6, or to be done with the intention of committing, supporting or promoting the commission of an offence against sec 6.

In addition to the doubtful necessity of such an exception, there are obvious difficulties of proof associated with having a humanitarian exception to subsec 7(1), not least because of the problems associated with collecting admissible evidence of activities in foreign jurisdictions.⁴⁰

The INSLM has previously reported on the inappropriateness of broad humanitarian exceptions to terrorism offences under the Criminal Code, as well as to terrorism financing offences under the UN Charter Act and related sanctions Regulations.⁴¹ There are strong policy reasons for limiting humanitarian exceptions to those involved in activities on behalf of dedicated agencies of humanitarian aid which, by virtue of their nature and standing,⁴² are most unlikely ever to fall foul of Australia's counter-terrorism laws, including the Foreign Incursions Act.

The Senate Committee examining the 2004 amendments to the Foreign Incursions Act sought

³⁹ As discussed below, intimidation of the public even if only a section of the public, is calculated to influence government, and is essentially political.

⁴⁰ See Chapter IV for more on this topic.

⁴¹ See INSLM's Third Annual Report, V.2, V.3 and V.5, as well as Recommendation V/2.

⁴² eg Médecins sans Frontières

confirmation from AGD that the amendments to the Foreign Incursions Act would not apply to Australian people who work in communities to provide medical or community aid assistance where terrorist organisations operate in those areas. AGD responded that Australians providing medical or community aid assistance would not commit an offence under the Foreign Incursions Act:-

So long as a person does not commit a ‘hostile activity’ the person is not liable for an offence against section 6 of the Act. To commit a hostile activity, a person must do an act with the intention of achieving the objectives listed in sub-section 6(3). Those objectives include, for example, the overthrow by force or violence of the government of a foreign state, engaging in armed hostilities, and causing by force or violence the public in a foreign state to be in fear of suffering death or personal injury.⁴³

The humanitarian exception in subsec 7(1B) of the Foreign Incursions Act poses difficulties for police and prosecutors. Deputy Commissioner Peter Drennan of the AFP has described this as follows:-

“The real difficulty is being able to prove what the money is used for,” Mr Drennan said. “... People may be giving money to someone who says they are providing humanitarian aid but it could end up buying boxes of bullets for machine guns”.⁴⁴

The AFP submitted to the INSLM that:-

To ameliorate concerns over the ability of people to provide humanitarian support in times of crises, the AFP would support consideration being given to a system whereby a relevant Minister had the power to declare certain aid organisations as being able to provide aid in certain scenarios. This would ensure that aid is able to be provided when required, while ensuring that funds are only used for legitimate purposes. It would also provide confidence to those who give funds to organisations with the expectations they will be used for legitimate purposes....the AFP considers it a possible solution to the issues faced, both in Syria and future situations.⁴⁵

Consideration by the INSLM of this AFP suggestion was greatly assisted by consideration of previous submissions made in 2010 on a somewhat similar notion from non-governmental organizations and charities involved in this kind of work. Specific consultation with representatives of constituent members of the Australian Council for International Development confirmed the importance of proceeding with care along these lines.

First, experience in the field justifies avoiding any procedure that specifically identifies one of these organizations as designated or approved or cooperative, from the point of view of the Australian Government, and specifically for counter-terrorist purposes. It would not be principled, practical or useful for any such list to be kept secret, and its publication would

⁴³ *Attorney-General’s Department Submission*, Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Anti-terrorism Bill 2004, p4

⁴⁴ Rachel Olding “How ‘lion’ Ahmad Moussalli died in Syrian war a mystery” *Sydney Morning Herald* 20th February 2014 <http://www.smh.com.au/national/how-lion-ahmad-moussalli-died-in-syrian-war-a-mystery-20140219-330y8.html#ixzz2vn7tv93b>

⁴⁵ *AFP Submission to the INSLM*, 21st March 2014

increase difficulties in places of conflict where suspicions may be decisive in the capacity of organizations to provide humanitarian aid.

Second, the compilation and maintenance of any such list specifically for counter-terrorist purposes would be yet another administrative and regulatory burden on such organizations as well as on Commonwealth officials. It would be difficult to justify as a special extra cost.

Third, there are already non-specific but closely controlled systems to authenticate and supervise the fundraising and other charitable operations of such organizations in Australia for the purpose of providing humanitarian aid abroad. The most obvious example is the list of deductible gift recipients (“**DGR**”) in the category of overseas aid funds for the purposes of income tax legislation. Australian citizens and residents anxious to relieve suffering in areas of foreign conflict can be encouraged to select appropriate conduits from those approved organizations, without requiring any further administrative burdens on the organizations or government. Similarly, Australian citizens and residents with genuine enthusiasm to assist in kind and not merely with money can be encouraged to offer their services to such organizations.

Fourth, the administration of a specific list of approved organizations to channel humanitarian aid to fields of overseas conflict that would otherwise arguably constitute aid to terrorism, would very likely give rise to grievances by and among such organizations who failed to achieve designation. In the case of any such organization that nonetheless retained DGR tax status, this would be most invidious. Further, it would render more acute the first concern noted above – by way of implications raised about those other organizations who did make a specific counter-terrorist list.

For these reasons, Recommendation V/2 made in the INSLM’s Third Annual Report has been reconsidered. The tentative suggestion made in it⁴⁶ is withdrawn. The inclusion of NGOs, being agencies other than “the UN or its agencies”, is highly desirable. But the implementation of a specific list to do so, for the purposes of counter-terrorist legislation creating offences by way of assistance to terrorism and exceptions for humanitarian aid, would be counter-productive.

Recommendation III/4: Subsection 7(1B) of the Foreign Incursions Act⁴⁷ should be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC, the UN or its agencies, and agencies contracted or mandated to work with the UN or its agencies, (as well as entities with the status of deductible gift recipients in the category overseas aid funds under applicable income tax legislation).⁴⁸

III.8 Consistent definition of “recruit”

The non-exhaustive definitions of “recruit” under the Foreign Incursions Act and for the purposes of Division 102 of Part 5.3 Criminal Code (Terrorist organisations) should be consistent. Currently, recruit under the Foreign Incursions Act includes “procure, induce and

⁴⁶ “... or (perhaps) agencies of like character designated by a Minister”

⁴⁷ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

⁴⁸ Recommendation V/2 in the INSLM’s Third Annual Report should be understood as varied accordingly in relation to the statutes and regulations recommended to be amended in it.

incite”⁴⁹ while recruit for the purposes of Division 102 of Part 5.3 of the Criminal Code includes “induce, incite and encourage”.⁵⁰

Recommendation III/5: The definitions of “recruit” under subsec 102.1(1) of the Criminal Code and subsec 3(1) of the Foreign Incursions Act⁵¹ should be consistent.

III.9 Penalties for quasi-terrorist activities

Section 8 of the Foreign Incursions Act provides a penalty of imprisonment for 7 years for the offence of recruiting to “a body or association of persons the objectives of which are or include any of the objectives referred to in subsection 6(3)”. As noted above, those provisions largely overlap with the substance of the Criminal Code definition of a terrorist act. That is why it makes a sort of sense for a terrorist organisation under the Criminal Code to be the exception from the armed forces carve-out in the Foreign Incursions Act, as discussed above.

The INSLM cannot conceive of any sensible basis to regard recruitment to a sec 8 Foreign Incursions Act incursion as very greatly less culpable than recruitment to a Criminal Code terrorist organisation. Indeed, for the reasons noted above they would appear to be the same level of culpability. Yet under the Criminal Code, the penalty provided is 25 years imprisonment if intentional, and 15 years if reckless.⁵² The Foreign Incursions Act penalty is 7 years. Furthermore, the Foreign Incursions Act being silent about the fault element of the offence under sec 8, intention is the fault element for the conduct of recruiting.⁵³

The comparison of 25 years and 7 years is quite intolerable, in the view of the INSLM. It bespeaks an incoherent Australian approach to a topical problem. It provides an invidious possibility of unexaminable prosecutorial discretion in relation to the selection of charges available for such serious conduct. The INSLM has not found any serious suggestion to justify this anomaly.

Recommendation III/6: The penalty provisions in secs 102.4 of the Criminal Code and 8 of the Foreign Incursions Act⁵⁴ should be equivalent.

It seems clear that many if not all of the kinds of conduct criminalized by secs 6 and 7 of the Foreign Incursions Act could also be charged as terrorist offences under the Criminal Code. The euphemism “engaging in armed hostilities” found in para 6(3)(aa) of the Foreign Incursions Act will often in practice and always in ambition involve unlawful killing – precisely the core concept informing the definition of “terrorist act” in the Criminal Code.

In the INSLM’s view, the only plausible explanation for the comparison next noted of the penalty provisions in the two statutes is unwitting anachronism. It detracts from a coherent legislated criminal law response to modern terrorism.

⁴⁹ see subsec 3(1) of the Foreign Incursions Act, which also defines “incite” to include “encourage”.

⁵⁰ subsec 102.1(1) of the Criminal Code

⁵¹ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

⁵² sec 102.4 of the Criminal Code

⁵³ subsec 5.6(1) of the Criminal Code

⁵⁴ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

The stipulated maximum penalty for an Australian killing a Syrian soldier in Syria under the Foreign Incursions Act is imprisonment for 20 years,⁵⁵ and for doing an act preparatory to that killing it is imprisonment for 10 years.⁵⁶ The stipulated maximum penalty for an Australian killing a Syrian soldier in Syria under the Criminal Code is imprisonment for life,⁵⁷ and for doing an act preparatory to that killing it is imprisonment for life.⁵⁸

Recommendation III/7: The penalty provisions in secs 101.1 and 101.6 of the Criminal Code and 6 and 7 of the Foreign Incursions Act⁵⁹ should be equivalent.

III.10 Recruitment for foreign States' armed forces

As the law stands, in general terms Australians may enlist or take commissions in foreign armed forces. An obvious exception that does not need elaboration is in the case of enemy States, dealt with by a variety of offences the most significant of which would be treason.

Fortunately, there are very few States, if any at present, which would qualify as enemies of Australia. Also fortunately, there are quite a few States correctly regarded, formally or informally, as allies of Australia. Australian citizens, with or without so-called dual citizenship, are not prevented, in general, by Australian law from serving in the armed forces of such foreign States.

Conditions of service in the Australian Defence Force closely regulate such possibilities, again for obvious reasons. In any event, exchange, training and liaison positions are routinely employed for the benefit of Australia: that is, Australian members of the ADF in or with friendly foreign armed forces, and members of foreign armed forces acting similarly with the ADF. For the purposes of discussion further below in this Report, it should be explicitly noted that the INSLM regards that practice as wholly good. Of course, it is carried out under the system of military discipline which is the mark of a proper armed force.

The provisions of sec 9 of the Foreign Incursions Act at first sight jar with the practical reality of Australians in foreign armed forces. It provides 7 years imprisonment as the maximum penalty for recruiting in Australia for a foreign armed force. Inquiries by the INSLM have not revealed whether anyone has ever, in Australia, induced another person to serve with the armed forces of, say, the UK or the USA, or whether no-one has ever cared to find out. Probably, at least in those cases, it does not matter much, at present.

On the other hand, given the considerations discussed further below provoked by the current situation in Syria,⁶⁰ it is to be expected that there should be concern on the part of the Australian Government if there were recruitment in Australia of persons to serve in the armed forces either of the government of Syria or of the anti-government forces in Syria. Significantly, the provisions of para 9(1)(a) of the Foreign Incursions Act explicitly treat indifferently an armed force "in a foreign State, whether the armed force forms part of the armed forces of the

⁵⁵ subsec 6(1) of the Foreign Incursions Act

⁵⁶ sec 7 of the Foreign Incursions Act

⁵⁷ sec 101.1(1) of the Criminal Code

⁵⁸ subsec 101.6(1) of the Criminal Code

⁵⁹ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

⁶⁰ See **Appendix J**

government of that foreign State or otherwise”. At least at this juncture, the Foreign Incursions Act does not care to pick sides in a civil war.

However, as noted above, the possibility of a declaration under subsec 9(2) of the Foreign Incursions Act manifestly does contemplate the Australian Executive picking sides, perhaps hoping to choose winners, in a civil war. For reasons elaborated further below, for the purposes of a coherent and effective counter-terrorist policy on the part of Australia, informed by paramount international law, this approach may be less than desirably clear as to the principle in question, and also less than desirably nuanced for a flexible Australian conduct of international relations.

III.11 Executive Certificates

Important provisions of the Foreign Incursions Act, under sec 11, permit different kinds of proof of critical matters going to elements of various offences. For the reasons that follow, some of those provisions are misconceived, and should be amended so as to allocate to the Executive rather than to the judiciary (or a jury) matters best determined by executive certificate. In the INSLM’s view, this course would decrease considerably the difficulties of proof of political matters in foreign countries, and thus enhance the prospect of appropriate prosecutions being initiated and successfully so.

(An alternative response to the difficulties posed by foreign political instability for effective Australian CT Laws is considered further below.)

The different kinds of certificates created by sec 11 of the Foreign Incursions Act are described in **Appendix I**. In short, there is one certificate that is conclusive evidence of the matters stated in it, concerning specified territory being or being in “an independent sovereign state”.⁶¹ As discussed more extensively in Appendix I, that is a long established subject matter for conclusive executive certificates at common law. It is no reflection on the capacity of the Australian judiciary to decide matters of international law to note that the political questions and matters of arguable judgement involved in such a conclusion about foreign territory are better left to the Australian Executive, which has the constitutional function and duty to conduct the international relations of the nation. Further, the spectacle of an Australian court differing from the Australian Executive on the recognition of a foreign sovereign and the extent of that foreign sovereign’s domain is embarrassing to the point of intolerable. The spectacle of one court differing from another court, by dint of different bodies of evidence, on such a question is quite as bad.

It follows that, in the opinion of the INSLM, subsec 11(1) is just as it should be. The reasons why this is so cast doubt on some of the provisions next considered.

By way of contrast, prima facie effect only is given to a certificate to the effect that an alleged act is not such as to constitute a person “acting in the course of the person’s duty to the Commonwealth in relation to the defence of Australia”.⁶² That certificate addresses a contention that may be raised by the defence, with the effect of requiring the prosecution to negative that character of the alleged act. Its particular focus is on the possibility that, far from committing a

⁶¹ subsec 11(1) of the Foreign Incursions Act

⁶² subsec 11(2) and sec 5 of the Foreign Incursions Act

crime, the accused was in fact carrying out a very important duty to the country.

These considerations plainly justify the subsec 11(2) certificate being prima facie evidence only, so as to permit (if also effectively oblige) the defence to adduce evidence or present argument casting a reasonable doubt on the prosecution case in this regard.

It follows that subsec 11(2) is also just as it should be. However, the reasons for this being so also cast doubt on the remaining two certificates, now to be considered.

At first sight, the certificate envisaged to state that a specified organization was not an armed force or part of an armed force of the government of a specified foreign State⁶³ could be regarded in the same light as the subsec 11(2) certificate, addressing as it does a possible defence contention. The matter of substance is the possibility that, far from being a crime, the alleged conduct was legitimately military, albeit not for Australia.⁶⁴ Given that one of the possibilities is such military service in an armed force specifically approved by the Minister,⁶⁵ it would be grotesque for such service also to be criminal.

To this point, there is justification for the subsec 11(3A) certificate to be prima facie evidence only. But, in the opinion of the INSLM, full and proper consideration of the substance of a subsec 11(3A) certificate removes that justification. At the expense of a possible evidentiary case or argument for the defence, these provisions should not have merely prima facie effect. The reason for this view is the essential similarity between the kind of governmental judgement involved in the matters conclusively certified under subsec 11(1) and those involved in the matters certified under subsec 11(3A). Both kinds of matter belong among the topics best left exclusively to the Executive without possibility of variance between the Executive and the judiciary, or between particular judicial decisions.

That is because the attribution of an organization as being an armed force or part of an armed force of the “government of a foreign State” involves possibly fraught political questions, the conduct of international relations and the formation of contestable judgements. These are qualities that render the subject matter of a subsec 11(3A) certificate much better proved conclusively than merely prima facie, by the executive certificate.

Discussions over the last couple of years by the INSLM with investigating and prosecution authorities, and consideration by the INSLM from the point of view of defence counsel, of these issues result in one abiding impression. In cases not merely hypothetical but currently quite likely to occur in practice, it can be very difficult to thread the needle of what might be called the official status or not of persons fighting in foreign conflicts such as civil war. Those difficulties should not prevent the prosecution in appropriate cases of persons whose violent conduct abroad (executed or planned) would otherwise constitute an offence under the Foreign Incursions Act.

In the opinion of the INSLM, it would not run counter to accepted standards of fairness in the stipulation of criminal offences or the conduct of criminal trials for the lack of governmental status of a specified organization engaged in a foreign conflict to be withdrawn from the forensic

⁶³ subsec 11(3A), and para 6(4)(a) and subsec 6(5) of the Foreign Incursions Act

⁶⁴ see III.10 above

⁶⁵ see III.3 above

contest. As argued above, it is at least within the spirit of the common law discussed in Appendix I. It is also in accordance with the capacity of the Executive, in an unexceptionable way, to prescribe an organization so as to deprive an accused of the possible answer that he was serving in a foreign military,⁶⁶ or to approve a foreign non-governmental armed force, for recruitment of and service by Australians.⁶⁷

Finally, there is the very important prima facie certificate provided for under subsec 11(3) of the Foreign Incursions Act. It amounts to certification that a group and its activities are a “government”, given its use of the familiar international law test of “effective governmental control...”.⁶⁸

As noted above,⁶⁹ the identification of foreign groups and activities as “government” is a central concept to the Foreign Incursions Act.⁷⁰ It is the paradigm of matters traditionally conclusively certified at common law by the Executive in judicial proceedings, both civil and criminal. In the opinion of the INSLM, the description of a group and its activities as a foreign “government” could have been supplied by way of a so-called factum as an element in a criminal offence, coming into existence by way of an executive act such as the promulgation of a regulation or the gazetting of a notice.

No doubt the change in diplomatic practice, or at least ostensibly so, described in Appendix I, explains why no such formal recognition, so to speak, of foreign governments is intended by our Government. But it would be too high a price to pay for the somewhat dubious and inconsistently practised advantages of that changed diplomatic approach for otherwise sound prosecutions of for example Australians fighting abroad to fail, perhaps even never to be brought at all. To be effective, laws criminalizing terrorist or similar conduct abroad should have at least modest prospects of being enforced.

The combined submissions of the AGD and DFAT on this topic, as discussed in Appendix I, seek to justify the subsec 11(3) certificate having merely prima facie effect. In the opinion of the INSLM, their position should be rejected, largely for the reasons noted above and in the setting explained in Appendix I. In particular, there has been no sensible justification given for departing from the policy and principle of the common law (echoed in subsec 11(1), as it happens) in removing such judgements from a court and leaving it where it naturally lies, being the Executive.

Nor do these submissions mitigate to any degree the obstacle a merely prima facie effect places in the way of a favourable assessment of the prospects of success in a prosecution in which the defence is virtually invited by the merely prima facie stipulation to question the governmental character of their alleged targets. In the opinion of the INSLM, the conduct of Australia’s international relations by the Executive should not thus be accompanied by an accused person casting doubt on the deliberate assessment by the Australian Executive that the target of the lethal attack by the accused was a foreign “government” as opposed to foreign rebels or a foreign

⁶⁶ paras 6(4)(a) and (6)(b), and subsecs 6(7) and (6)(8) of the Foreign Incursions Act; and III.3 and III.4 above

⁶⁷ subsec 9(2) and para 6(4)(b) of the Foreign Incursions Act; see III.3 above

⁶⁸ subsec 3(1) of the Foreign Incursions Act, definition of “government”

⁶⁹ eg III.2 and III.5 above

⁷⁰ eg para 6(3)(a) of the Foreign Incursions Act

deposed régime.

Leaving subsec 11(3) as it is leaves the position in the worst of both worlds. The embarrassment is created of a contradictory disparity between the executive and judicial arms of the Australian Government on a matter of Australia's diplomatic stance in relation to a foreign conflict, including the identity of the group in which the function of government is reposed. If anything, such an embarrassment is worse than the state of affairs supposedly justifying the supposed cessation of Australia recognizing governments (as opposed to recognizing states).⁷¹

The AGD and DFAT submissions assert that a subsec 11(3) certificate would be limited in its effect to particular criminal proceedings, and would not “necessarily constitute” the recognition by Australia of a foreign government as a matter of international law.

The first proposition is literally correct, in that a subsec 11(3) certificate exists and may be used only for the purposes of tender in particular proceedings. As a matter of principle and practice, however, a subsec 11(3) certificate should not be seen in such a confined way. First, it would be alarming to put it mildly to contemplate subsec 11(3) certificates in different proceedings but about the same alleged government, being in anything but identical terms. The constitutional and political cogency of executive certificates at common law or under statutory provisions would be undermined by different certificates about the very same proposition in different proceedings.

The second proposition is also literally correct, with a heavy emphasis on the word “necessarily”. It is no doubt not as a rule of international law (if there really be rules in this particular area) that such a certificate would always be sufficient on its own to demonstrate that Australia had thereby for all purposes recognized the specified foreign government. On the other hand, and as a matter of substance, of course the solemn and serious executive act of certifying the existence and character of the specified foreign government, under subsec 11(3), would be part and parcel of the overall circumstances relevant to the issue. The fact that at present subsec 11(3) provides only prima facie evidentiary effect could not be thought to render the act of the Executive in giving a certificate under its provisions any less solemn and serious and any less a manifestation of Australia's position on that matter of its international relations, than if the certificate had conclusive effect.

In the opinion of the INSLM, if the concept of a foreign “government” is to be retained as a central concept in the criminalizing of Australians fighting in conflicts abroad, the artificial and undesirable difficulties posed for such prosecutions by the merely prima facie effect of a subsec 11(3) certificate should be addressed. The topical currency of this issue in light of the Syrian conflict described in **Appendices J, K and L** suggests that attention should be paid to this improvement in the laws addressing conduct that is also terrorist conduct in most cases, as soon as possible.

Recommendation III/8: The provisions of subsecs 11(3) and (3A) of the Foreign Incursions Act⁷² should be amended so as to substitute the word “conclusive” for the phrase “prima facie”,

⁷¹ “Supposedly”, because as discussed in **Appendix I** and the scholarly literature there cited, neither the British nor Australian experiences before and after their respective ostensible changes of practice have been consistently in accordance with the current claims as to that practice, from time to time.

⁷² The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

in relation to the evidentiary effect of executive certificates concerning effective governmental control in a specified foreign State or part thereof, and concerning the non-governmental armed force character of a specified organization.

III.12 Immunity for pro-government fighting

As explained above,⁷³ fighting for a foreign government as opposed to fighting against a foreign government is generally not criminalized by the Foreign Incursions Act. It may be time to revisit that policy judgement, which has historical explanation in an international concern to outlaw the use of mercenaries. Even in that context, pro-government mercenaries are dealt with differently from anti-government mercenaries. This reflects an Australian observance of the intent of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* opened for signature etc by the General Assembly of the UN on 4th December 1989. The influence of that Convention, although not binding as an international obligation of Australia, can be seen in the matters set out in **Appendix M**.

The Convention excludes members of relevant armed forces, and includes other people recruited for the purpose of participating in concerted violence aimed at overthrowing a “government...”⁷⁴

At present, there is an uneven patchwork of Australian legislation regulating by criminal sanction the participation of Australians in violent conflict abroad. In broad summary, the Criminal Code counter-terrorist provisions, based on the definition of “terrorist act” in sec 100.1 of the Criminal Code, are indifferent to the question whether the act is pro-government or anti-government. This is so because, although one aspect of the requisite purpose of a terrorist act is the coercing or influencing by intimidation of a government, an alternative is intimidation of the public or a section of the public – and governments can notoriously engage in such conduct. Similarly, the requisite motive for a terrorist act includes a political cause, which can of course be espoused by government forces. The possible application of terrorist offences under the Criminal Code to actions in, say, a foreign civil war is apparent.

The same may be said for the important reflection of international humanitarian law in Chapter 8 of the Criminal Code, and in particular, Division 268, Subdivisions F and G which would apply to foreign civil wars. The war crimes punishable under secs 268.69-268.94 of the Criminal Code are, as must be so from their nature, equally liable to be committed by pro-government fighters as well as anti-government fighters.

Among the important differences between these Criminal Code terrorism offences and these Criminal Code war crimes, for present purposes, is the very preliminary or inchoate nature of some terrorist offences, and the application of notions drawn from the international law of war, part of IHL, that informs the war crimes – eg distinctions between combatants and civilians, and proportionality of means. There is considerable overlap – murder, in effect, is equally punishable as a terrorist offence or a war crime under the Criminal Code.⁷⁵ However, a terrorist offence consisting of unlawful killing will be committed in circumstances that would be lawful and most

⁷³ esp III.3 above

⁷⁴ Art 1, para 2 (a)(i)

⁷⁵ eg subsec 101.1(1) and para 100.1(2)(c); sec 268.70 of the Criminal Code

likely considered commendable by a participant in a foreign civil war acting in accordance with relevant military codes and IHL standards. This difference exists so as to criminalize terrorism and to accept (even admire) soldiering, notwithstanding both activities are calculated to influence affairs by creating fear in a government or a population.

This critical element of overlap and difference is among the reasons for the recommendation made in the INSLM's Second Annual Report,⁷⁶ for the express delineation of terrorist acts so as to exclude conduct governed by IHL.⁷⁷

It should be noted that the status of being a mercenary, colloquially understood or as defined in the Convention, is irrelevant to the commission of terrorist offences or war crimes under the Criminal Code.

The function of the Foreign Incursions Act in relation to foreign civil wars, such as Syria, is difficult to fit into a scheme of principled distinction such as marks terrorism vs war crimes. Of course, the concern of the Foreign Incursions Act approaches at a different angle, so to speak, including that of recruitment and entry with intent into a foreign territory (as well as preliminary activities). But the principal prohibition, criminalized in the Foreign Incursions Act, is against engaging in a hostile activity in a foreign State, which includes doing an act with specified violent intentions.⁷⁸ These will comprehend homicide. But unless the Attorney-General has effectively described the armed forces of the beleaguered foreign government as terrorist or as serious violators of human rights,⁷⁹ it will be an answer by an Australian killing in a foreign civil war to a charge under the Foreign Incursions Act that he was serving in the foreign government's armed forces in some capacity or other.

III.13 Autonomous sanctions

The regulation, including criminalization, of the kind of conduct which leads to violent participation by an Australian in a foreign civil war is rendered yet more complex by the system for imposing so-called autonomous sanctions (as opposed to sanctions required as a matter of international obligation). Under the *Autonomous Sanctions Act 2011* (Cth), which is explicitly for the purpose of facilitating the conduct of Australia's external affairs, sanctions have been imposed on North Korea, Fiji, Iran, Libya, Myanmar, Syria and Zimbabwe.⁸⁰ That is, very serious policy choices by Australia in the conduct of its international relations have been manifested by regulations that criminalize certain dealings with or in relation to those countries. On any view, they convey Australia's official national and governmental disapproval of the conduct of other sovereign states.

The autonomous sanctions which apply to Syria enable the designation of "a person or entity that the Minister is satisfied is providing support to the Syrian régime". A person or entity that "the Minister is satisfied is responsible for human rights abuses in Syria" (including the use of

⁷⁶ Recommendation VI/3 (printed "VI.3"), and see VI.9.

⁷⁷ **Appendix N** elaborates the reasons why conduct governed by IHL should thereby not be governed by the Foreign Incursions Act any more than by the counter-terrorist provisions of the Criminal Code.

⁷⁸ para 6(1)(b) and subsec 6(3) of the Foreign Incursions Act

⁷⁹ eg under subsecs 6(5), (6), (7) and (8) of the Foreign Incursions Act

⁸⁰ see the INSLM's Third Annual Report III.13, fn 124

violence against civilians and other abuses) may also be designated and this designation requires no connection to the Syrian régime.⁸¹

The Australian Government has stated its position on Syria, and the reasons for the imposition of sanctions as follows:-

Australia's position

The Australian Government deplores the violence and suffering that is occurring in Syria. Australians condemn all acts of violence against civilians, whoever is responsible.

The Government remains committed to a unified international response on Syria. Australia is continuing to work with like-minded countries to maintain pressure on the Syrian Government to end the violence and commit to an inclusive process of political transition.

Australia implemented new sanctions against Syria on 21 August 2012, restricting trade in precious metals and diamonds, luxury goods, and newly minted currency and with the oil, gas and petrochemical sectors. These new measures are in addition to existing asset freezes and travel bans on 106 individuals and 28 entities and an embargo on the provision of military equipment and assistance.

Australia's sanctions specifically target the Syrian regime, not the Syrian people. They include sanctions against senior government figures, including President Assad, who are connected with the violence and abuses of human rights.⁸²

DFAT and AGD submitted to the INSLM that:-

Australia has implemented legislative restrictions on Australians providing services to specific countries related to a military activity, or the use of arms or related matériel, through a number of sanctions regimes. The provisions are sufficiently broad to capture fighting in foreign countries subject to such sanctions, whether for the armed forces of the foreign state or for other groups. For example, under regulation 5(4) of the *Autonomous Sanctions Regulations 2011*, fighting in Syria constitutes a sanctioned service, i.e. a service that assists with, or is provided in relation to a military activity, or the use of an export sanctioned good (arms or related matériel). The provision of a sanctioned service is prohibited under regulation 13. Contravening this prohibition is an offence under s. 16 of the *Autonomous Sanctions Act 2011*.

As noted by then Minister for Foreign Affairs, the Hon Stephen Smith, in his second reading speech on the Autonomous Sanctions Bill 2010 “[autonomous sanctions] are highly targeted measures intended to apply pressure on regimes to end the repression of

⁸¹ reg 6 of the *Autonomous Sanctions Regulations 2011* (Cth). Currently all designated persons and entities under the Autonomous Sanctions Regulations (Syria) have a connection to the Syrian régime.

⁸² Australian Government, factsheet, *Ongoing Violence in Syria*

human rights, to end the repression of democratic freedoms, or to end regionally or internationally destabilising actions”. Applying autonomous sanctions measures by regulation allows the necessary flexibility for the Government to respond to international developments in a timely way.⁸³

As things presently stand, the combination of sanctions on goods and services under the *Autonomous Sanctions Regulations 2011* (Cth) in relation to Syria⁸⁴ appears to prevent the supply of arms to any side in the civil war, and perhaps to be also indifferent concerning soldiering, depending whether the expression “military activity” equally applies to the more or less informal anti-Assad forces as it clearly does to the Assad forces in uniform. However, in relation to the Ministerial designation of persons aimed at by these Regulations in relation to Syria one possibility concerns a person the Minister is satisfied “provides support to the Syrian regime”, while the other concerns a person the Minister is satisfied is “responsible for human rights abuses in Syria, including...the use of violence against civilians”.⁸⁵ Only the first possibility has been taken up by an actual current designation. Thus, at present, the overt position of the Australian Government in this regard singles out the pro-government forces, notwithstanding the notorious commission of human rights abuses by all sides in the civil war. The INSLM has not observed or been informed of any embarrassment or awkwardness in the conduct of Australia’s international relations arising from the way the Syrian civil war has been addressed through the autonomous sanctions system. Neither has there been any suggestion, from those administering the various statutes, of any particular difficulties arising from the manifest differences between the various Criminal Code, Foreign Incursions Act and Autonomous Sanctions provisions.

Nonetheless, it is apparent from the autonomous sanctions imposed to date in relation to Syria that the kind of participation by Australians in that civil war that is sought to be prohibited, including by criminal sanction, extends more or less to both sides (or, more accurately, to all sides) in that conflict. The significance for the INSLM’s review of the effectiveness and appropriateness of the CT laws and associated Foreign Incursions Act and Autonomous Sanctions Act, in the present and acute context of Syria, is that a theme, however unevenly presented, emerges of an Australian intent to assist in the suppression of deplorable and illegitimate violence committed by Australians in foreign armed conflicts.

III.14 Proscription of unapproved fighting by Australians abroad?

In the course of the INSLM’s review of this aspect of the CT Laws and related legislation, the focus began with the repeated apprehensions expressed by those seeking to implement the CT Laws in order to prevent terrorist acts in Australia, to the effect that the return of trained and desensitized (perhaps radicalized) Australians from foreign conflicts such as Syria was a plain terrorist threat regardless what side, party, faction or group the returning Australian had fought with. Nothing found in the ensuing course of the review by the INSLM cast any doubt on the substance and common sense of that approach. References to these concerns may be found in Appendix J.

⁸³ *AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence)*, 18th February 2014

⁸⁴ reg 4, item 4(a) in the table, reg 5(4), item 4 in the table

⁸⁵ reg 6(1), item 7 in the table

If the return of such Australians regardless of their allegiance abroad presents a terrorist threat, it surely makes sense to consider the effectiveness of Australia's CT Laws to prevent, by criminally sanctioned deterrents, such Australians going abroad for those purposes in the first place. That approach draws attention to the inconsistent treatment explained above, between the various statutory approaches.

In the opinion of the INSLM, the elimination of unjustified inconsistency in the basal policies sought to be advanced by these various statutory provisions is quite urgent. A repeated observation in the INSLM's investigations of this matter was to the effect of the excessively complicated and problematic coverage of the kind of conduct amenable to practical proof in a prosecution for conduct of a kind being committed in and in relation to the civil war in Syria.

The overly complicated interaction (to put it kindly) of the provisions discussed above justifies lawyers' law reform alone. But that would not suffice to support a recommendation for revisiting these provisions, given the INSLM's pessimism about the legislative drafting being done any better the next time around. We should probably resign ourselves to a national style of prolix palimpsest in our overly sophisticated statute book.

But the aim of improving the effectiveness of the CT Laws and related legislation, regardless of style, presents an important issue of substance. Should Australians be permitted to fight abroad?

Of course, the affirmative answers to that question provide the footing for a principled and relatively simple means of preventing (or at least criminalizing) the kind of conduct currently understood to increase the threat of terrorism in Australia – the return of Australian fighters in foreign civil wars or other armed conflicts.

All the acceptable (in the view of the INSLM) affirmative answers to the fundamental question posed above describe situations calculated to reduce to an entirely acceptable degree that risk of increased terrorist threat. First, members of Australian armed forces will fight abroad as part of their duties, as and when required – and in accordance with the laws of war. That provides no footing for individuals shooting women and children of a different religion in a shattered Syrian village.

Second, members of Australian armed forces should, as frequently as the Australian authorities deem fit, be seconded to or otherwise associated with foreign armed forces for training, observation or even active service purposes – controlled as to the foreign deployment in the first place by Australian orders, and thereafter again subject to the laws of war. This positively beneficial possibility for Australians to fight abroad also provides no footing to justify the kind of conduct which is generally deplored.

For the same reasons of Australia's sovereign capacity to conduct its international relations according to circumstances and perceptions as they change from time to time, Australians not in Australian armed forces should, in the view of the INSLM, retain some opportunities to enlist and fight in foreign armed forces – so long as they are not disapproved at the relevant time by the Australian Government, acting through its Executive by a judgement given statutory force. In essence, although not very effectively, the Foreign Incursions Act already harbours this notion.

From the point of view of national security and the related conduct of international relations,

with which the INSLM is concerned, there do not appear to be any further attractive affirmative answers to the fundamental question of Australians fighting abroad.

One serious candidate remains, perhaps. That is, participation in revolutionary or rebellious forces against tyrants, or liberation movements by people seeking self-determination from a foreign sovereign. Romantically or otherwise, that kind of fighting abroad by a country's nationals is well known and highly regarded by some people. It is very controversial, and always fraught - as recollections of Spain, Ireland and the Balkans will suffice to prompt agreement. In a largely settler society such as Australia, there may be real or imagined loyalties elsewhere to further the claimed merits of such conduct.⁸⁶

The difficulty with such possibilities is the lack of a bright line to ascertain whether such conduct abroad would be subject to the truncated version of the laws of war contained in Common Art 3 of the Geneva Conventions. The discipline and regulation of the IHL-informed law of war are not guaranteed to be present in such ventures. A constant possibility is that the conduct of Australians engaged in such ways in hostilities abroad would be the commission of terrorist acts within the meaning of the Criminal Code.

The clarity available to answer the question whether somebody is serving in a military force and the lack of clarity in answering the question whether somebody not in a military force is nonetheless engaged in “an armed conflict that is not an international armed conflict”, together suggest that legal regulation of Australians fighting abroad should supply clarity rather than not.

An approach which can and should be generalized can be seen in elements of the Foreign Incursions Act and the Autonomous Sanctions Act, including the concern of the former to borrow from the counter-terrorist provisions of the Criminal Code. An important aspect of these existing approaches is the capacity for the Australian Executive (with statutory force and authority) to form an adverse or disapproving judgement of governmental and violent activities, for and against a government, in a foreign country. Conversely, the provisions of the Foreign Incursions Act providing for specific permission to recruit for foreign armed forces illustrate an existing capacity for the Executive, with statutory force and authority, to signify in effect its approval of the military aspects of a foreign sovereign.⁸⁷

As has been noted above, these aspects of the existing legislation are explicitly and inherently for the purposes of Australia's conduct of its international relations, and protection of its national security.

For these reasons, all these provisions should be revisited with a view to controlling by Australian legislation the lawfulness of Australians fighting abroad as follows. First, military service for Australia may require it. Second, military service for Australia may require or permit service with the armed forces of a foreign sovereign. Third, an Australian should not otherwise fight abroad, except with an organization or other armed force expressly approved in advance by the Australian Government.

⁸⁶ The cognate problem, as the INSLM sees it, of multiple passports or citizenships is addressed in Chapter V.

⁸⁷ Submissions considered and rejected by the INSLM as to the adequacy of the current provisions in this regard are noted in **Appendix O**.

The intent of this simple scheme would be to minimize with a view to eliminating the spectacle of Australians engaging in ideologically inspired fighting otherwise than for Australia or with its governmental approval, and with impunity. It would also outlaw conduct as a mercenary. It would have the consequence that Australians fighting abroad would be regulated by the laws of war, in the IHL sense, and as enacted in the Criminal Code.

Finally, it would promote Australia's substantive engagement in requiring its citizens (and residents) to refrain from conduct contrary to one of the most important of Australia's international obligations. The first of the Purposes of the UN includes the maintenance of international peace and security and the taking of effective collective measures for the prevention of threats to the peace. The only explicit exception to the prohibition against the threat or use of force in international relations is for the purposes of self-defence.⁸⁸ The prohibition by Australia of Australians fighting abroad is not calculated to compromise our right to self-defence. It may be that there have developed, or are in the course of being developed, some other exceptions to the UN Charter's ban against war.⁸⁹ None of those of which the INSLM is aware contemplates the propriety of encouraging one's nationals to decide for themselves to fight in foreign wars. It is to be recalled that the preamble to the UN Charter bespeaks a determination to save succeeding generations from the scourge of war and for that end among others to ensure that armed force shall not be used save in the common interest.⁹⁰

In the opinion of the INSLM, these considerations amount to "compelling grounds of public interest"⁹¹ to restrict the liberty of Australian individuals to fight abroad. In order to assist in preventing or reducing the terrorist risk constituted by returning fighters, to simplify the law, and to enact plainly the principled basis of the Australian Executive determining matters in its international relations, the complications and inconsistencies discussed above should be eliminated. The fact that, in doing so, Australia would signify vigorous engagement in the project to outlaw the waging of war or other violent conflict, except as sanctioned by international law, provides an extra and formidable justification for the exercise.

Recommendation III/9: The provisions of the Foreign Incursions Act⁹², and particularly secs 6 and 9, should be amended so as to provide for an exception to offences under the Act for service in foreign military forces or participation in foreign armed conflicts only if and when by express determination given statutory force the Australian Executive has determined to provide that exception in that case.

⁸⁸ Arts 2(4) and 51 of the UN Charter

⁸⁹ see generally Abraham D Sofaer, *The Best Defense?: Legitimacy and Preventive Force* (2010)

⁹⁰ **Appendix P** elaborates the application of these UN Charter provisions to situations such as civil war.

⁹¹ *cf Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries*, August 1976 at para 42. Select relevant quotes from that Report are found in **Appendix Q**.

⁹² The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

CHAPTER IV FOREIGN EVIDENCE

IV.1 Introduction

The extra-territorial reach of the CT Laws is a marked feature of them. Experience to date, including currently, throws up many cases where most or a critical portion of the possibly criminal conduct is committed in another country. The AFP and ASIO files read and considered by the INSLM during the last three years leave no doubt that this pattern will continue indefinitely. It is an aspect of terrorism that explains the concerted international efforts, including the creation of treaty obligations, to counter terrorism.

This is not to suggest that there are no terrorist threats which are purely domestic, so to speak. It does mean, however, that consideration of obtaining and eventually tendering evidence of events and circumstances in other countries is a constant feature of Australia's counter-terrorist work.

Discussions held by the INSLM with ASIO, AFP and the DPP in particular confirm the INSLM's own view as practising counsel that the problem of overseas evidence is peculiarly challenging for the prosecution of terrorist offenders.

It is not necessary or suitable to give detailed illustrations of this problem. It should suffice to note the inherent and circumstantial difficulties of some typical aspects of terrorist offending. What did the suspected person ("POI") say at the Pakistani training camp about his motives for being there? What was bought with the funds transmitted to Somalia by the intermediary in Australia to whom the POI gave money? What is known about the nature and status of a Martyrs Brigade with whose apparent members the POI has been observed, and how do they translate to being or not being part of a foreign government's armed forces? There are many similar kinds of questions to be confronted in many counter-terrorist investigations.

At the end of the day, there will always be some cases of incurable problems for the adequacy of evidence to support a putative prosecution. The INSLM does not suggest that procedural laws be altered to the point of distorting the basal standard of a fair trial – far from it. However, it would be equally wrong to suppose that the present state of enacted law affecting the use of foreign evidence (in the sense discussed above) is beyond critical scrutiny, or possible improvement. If, without rendering trials unfair, more information can be used as evidence than is presently the case, in relation to terrorist offences, that would be, in the INSLM's view, a worthwhile improvement.

It would be an improvement because, to the observation of the INSLM, and as confirmed by evidence and submissions from relevant agencies, not merely prosecutions but also investigations are presently stillborn on account of problems of foreign evidence, that might otherwise have succeeded.

IV.2 Foreign evidence from surveillance devices

The *Surveillance Devices Act 2004* (Cth) ("**Surveillance Devices Act**") prohibits the authorization of, or the use of, surveillance devices under the authority of a warrant in a foreign country without the consent of an "appropriate consenting official" in relation to that country:-

appropriate consenting official, in relation to a foreign country, means an official of that country having authority in that country to give consent to the use of surveillance devices in that country or on a vessel or aircraft registered under the laws of that country.⁹³

The INSLM accepts that the AFP has significant, legitimate operational requirements to use surveillance devices in foreign countries under the authority of warrant to investigate terrorism offences. The INSLM considers that the AFP should be permitted to use surveillance devices in a foreign country without the consent of the government of that country where the Attorney-General is satisfied that as a matter of practicability it would be reasonably unlikely that the consent of an ‘appropriate consenting official’ could be obtained.

Countries in the middle of a civil war such as Syria or failed States such as Somalia, are two current examples where it could be assumed that it would be reasonably unlikely that the consent of an “appropriate consenting official” could be obtained by the AFP for the purposes of using surveillance devices to investigate terrorist activity by Australians overseas and to collect evidence of such activity for prosecution. The AFP submitted to the INSLM that:-

This requirement is not feasible in circumstances where the relevant foreign jurisdiction is in a state of armed conflict and has a dysfunctional government or where the legitimacy of a government is not recognised by Australia (such as is Syria). The situation is compounded in Syria where the Australian government has recognised the opposition force as representatives of the people. It is questionable that consent given by a representative of the opposition would meet the legislative definition within section 42 of the SDA.⁹⁴

Currently, evidence obtained from surveillance undertaken in a foreign country cannot be tendered in evidence to a court unless the court is satisfied that the surveillance was agreed to by an appropriate consenting official of the foreign country.⁹⁵

Where the foreign country in question has a government in the sense of an effective exercise of governmental control being available, considerations of international relations, non-interference in internal affairs of another sovereign country as well as matters of practicality and utility combine to show the manifest merit of this legislation. But what of the very cases of civil war or the absence of real government, in places where those very circumstances conduce to a risk of terrorism in Australia? Can or should this legislation address those situations where the safeguards required by it could never be achieved?

Recommendation IV/1: Consideration should be given to amending the Surveillance Devices Act⁹⁶ to enable the Attorney-General to waive the requirement for the consent of an “appropriate consenting official” in the authorization and use of surveillance devices. The Attorney-General would need to be satisfied that it would be reasonably unlikely that the consent of an “appropriate consenting official” could be obtained as a matter of practicability. Appropriate amendments would need to be made to sec 43 of the Surveillance Devices Act to enable the

⁹³ see secs 41-43 of the Surveillance Devices Act

⁹⁴ *AFP Submission to the INSLM*, 21st March 2014

⁹⁵ sec 43 of the Surveillance Devices Act

⁹⁶ The Surveillance Devices Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

admission of the evidence into an Australian court proceeding where the court is satisfied that an Attorney-General's certificate was in place.

IV.3 Operational constraints

The INSLM agrees with AGD that "Australia needs to ensure that criminals cannot evade prosecution because the evidence or proceeds of their crimes are in different countries".⁹⁷ The difficulty, or rather impossibility, of working with police or prosecution authorities in some foreign states means that the AFP cannot seek the cooperation of overseas police in their investigations through police-to-police assistance.⁹⁸ Nor can the AFP seek the provision of mutual legal assistance, described by AGD as "an important tool in obtaining evidence for the investigation and prosecution of transnational crime, particularly...terrorism offences".⁹⁹

The AFP submitted to the INSLM:-

The AFP does not have the jurisdiction to use its investigative powers to collect evidence located overseas. Any operational activities undertaken by the AFP outside of Australia can only be done with the consent of the foreign jurisdiction, in accordance with local laws and procedures. Obtaining evidence must be done pursuant to formal mechanisms for international crime cooperation (mutual legal assistance).

Obtaining admissible evidence from a foreign country under Australian law is substantially compounded in circumstances where the country is experiencing serious internal conflict, the government is dysfunctional, or Australia has no official relationship with the government of the relevant country, whether in the context of international crime cooperation or otherwise.

Even where such evidence is available and can be gathered by the AFP, requirements for the admissibility of evidence under Australian law are relatively onerous, especially in relation to evidence gathered overseas.¹⁰⁰

With particular reference to Syria, AFP advised:-

The current situation in Syria is complicated by the fact that the Assad Government controls certain section of the country, where rival opposition groups hold quasi-control

⁹⁷ *Mutual Assistance*, Attorney-General's Department

<http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx>

⁹⁸ Police-to-police assistance involves cooperation between police in Australia and police in another country. Police-to-police assistance is often used at the early investigation stage or to obtain evidence that does not require the use of coercive powers. Examples of police-to-police assistance include exchange of intelligence information or preliminary enquiries to determine whether evidence of an offence is located in a foreign country.

⁹⁹ *Factsheet – Mutual Assistance overview*, Attorney-General's Department. Mutual assistance is the process countries use to obtain government to government assistance in criminal investigations and prosecutions. Mutual assistance to and from Australia is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth). Australia can provide and request a broad range of assistance to and from foreign countries. Examples of mutual assistance include executing search warrants to obtain evidence and taking evidence from a witness for Australian criminal proceedings.

¹⁰⁰ *AFP Submission to the INSLM*, 21st March 2014

over other section of the State. Gaining police-to-police assistance in such scenarios is almost impossible. Further, it is unlikely that evidence gathered by government or quasi-government forces would meet the high evidentiary threshold requirements under Australian law.¹⁰¹

Using a hypothetical but plausible example, how does the AFP collect admissible evidence of the bombing of a government building in Damascus, for the purpose of a criminal prosecution in Australia of the person alleged to have carried out the bombing? It is this sort of example that has led the INSLM to consider how the rules for the admission of foreign evidence into Australian criminal proceedings may be improved to facilitate the prosecution of serious terrorist and foreign incursions offences. Using the above hypothetical example, perhaps evidence of a bombing in Damascus may be appropriately conveyed to a jury otherwise than by direct evidence. It would likely require admission of hearsay evidence and be evidence of a kind that would require a reliability warning.

The INSLM was advised that:-

The AFP have encountered cases where prosecutions have not been pursued due to concerns over the admissibility of evidence gathered overseas. There are also cases where investigations are not even pursued initially as the evidence required to establish a charge is located overseas and there is no real likelihood of a successful prosecution. For this reason, the AFP would support consideration being given to the relevant Commonwealth laws governing the admissibility of evidence that is obtained outside of Australia, based on a presumption of inclusion, rather than exclusion. There remain a number of legislative and common law safeguards that would prevent clearly prejudicial or inappropriate material being relied upon in trials....

[Currently under the Foreign Evidence Act 1994] even if evidence is deemed admissible, a court can still exclude the evidence if it considers it in the interest of justice to do so.¹⁰²

IV.4 Admissibility and fairness provisions

It is clear from the *Evidence Act 1995* (Cth) that the general law of evidence does not and could not equate admissibility with reliability, or vice versa. Nor are they complete statements of when it would be fair for evidence to be considered. Neither did the common law take those approaches. The relation between the three concepts, one would hope, is very close and meaningful but they are not conceptual equivalents.

Thus, evidence can be admitted against an accused, but be the subject of a warning to the jury because it “may be unreliable”, requiring the jury being warned “of the need for caution in determining whether to accept the evidence and the weight to be given to it”.¹⁰³

Admissible evidence may be excluded in the exercise of judicial discretion on the basis of a

¹⁰¹ AFP Submission to the INSLM, 21st March 2014

¹⁰² AFP Submission to the INSLM, 21st March 2014

¹⁰³ subsec 165(1) and para 2(c) of the Evidence Act 1995

possibility that it might be “unfairly prejudicial to a party”, or “misleading or confusing”.¹⁰⁴ A judge must exclude otherwise admissible evidence tendered in criminal proceedings by the prosecution “if its probative value is outweighed by the danger of unfair prejudice to the defendant”.¹⁰⁵

Furthermore, fundamental powers of a court to control the conduct of proceedings and to protect against abuse of process remain, in general terms, available to safeguard the acceptable fairness of trials.¹⁰⁶

The history of the law of evidence, both its intermittent development at common law and the disparate statutory enactments at different times and in different places, shows the propriety of considering possible improvements by way of considerable qualifications to exclusionary rules which are themselves based on fundamental notions of fairness. One major example is the various ways in which the rule against hearsay has been entrenched upon by statutory provisions permitting the tender of business records to prove the truth of their contents. This has occurred very widely, and overall to a most beneficial end, notwithstanding the founding of the rule against hearsay on fundamental principles. These include the necessity for the sake of fairness of permitting an accused to confront and challenge by questioning evidence tendered against him - and bank records cannot be cross-examined.

The *Foreign Evidence Act 1994* (Cth) is of importance as showing the propriety of statutory attempts to accommodate the difficulties of obtaining information and tendering evidence where they derive from facts occurring in another country. However, it is of little or no importance, in practice, for the very kinds of cases that the experience of the agencies show will be repeatedly encountered in countering terrorism.

This is because there is unfortunately very limited scope, if any at all, for the making of requests or obtaining of testimony and exhibits as a result of requests, pursuant to Part 3 of the *Foreign Evidence Act 1994*. The provisions governing that procedure¹⁰⁷ presuppose a level of functioning government including judicial authorities that will be quite unrealistic in many cases.

This is doubly unfortunate, given that Parliament has expressly considered the exigencies of criminal proceedings in countering terrorism, and related wrongdoing, so far as they necessitate foreign evidence. The ground giving rise to a discretion to exclude foreign material, otherwise admissible under the *Foreign Evidence Act 1994*, is specially expressed for cases of “a designated offence”, defined to include terrorism offences under the *Criminal Code*, offences under the *Foreign Incursions Act* and offences under the *UN Charter Act*.¹⁰⁸

In such cases, the discretion to exclude otherwise admissible foreign material exists only “if the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing”.¹⁰⁹ This is clearly intended to

¹⁰⁴ secs 135 and 136 of the *Evidence Act 1995*

¹⁰⁵ sec 137 of the *Evidence Act 1995*

¹⁰⁶ sec 11 of the *Evidence Act 1995*

¹⁰⁷ secs 21 – 23 of the *Foreign Evidence Act 1994*

¹⁰⁸ sec 3 of the *Foreign Evidence Act 1994*

¹⁰⁹ para 25A(1)(d) of the *Foreign Evidence Act 1994*

restrict the scope of the exclusionary power compared with the general provision giving the discretion upon “satisfaction that having regard to the interests of the parties to the proceeding justice would be better served if the foreign material were not adduced as evidence”.¹¹⁰

In the opinion of the INSLM, the expression of the safeguard for terrorism etc offences, in sec 25A of the Foreign Evidence Act 1994, accords with common law fairness and the requirements for the exercise of judicial power under the Constitution. So long as that safeguard remains to protect the integrity of criminal proceedings for terrorist etc offences regarding the use of foreign evidence, it justifies serious consideration being given to further liberalizing the availability of foreign information as admissible evidence.

In particular, efforts should be made to devise means of obtaining information in situations where the cooperation of foreign government authorities is unavailable for reasons other than their considered refusal to cooperate - such as their lack of effective control or presence in the relevant territory. The INSLM supposes that such cases should be closely regulated so as to involve the Executive direction of Australia’s international relations, perhaps by means of appropriate certificates.¹¹¹

Further, once obtained, the admission of such information as evidence in prosecutions of alleged terrorist etc offenders must be conditioned on specially adapted warnings as well as the fair-trial safeguard noted above.

None of these tentative proposals should be understood as detracting one iota from the requirement of proof beyond reasonable doubt of criminal guilt including all its necessary elements, nor as altering the general allocation of the burden of that proof on the prosecution. For these reasons, the INSLM accepts that an attempt to enlarge the scope of foreign information that may become foreign evidence in proceedings to prosecute terrorism etc offences may be more trouble than it is worth. That is, it might emerge upon detailed consideration that ought involve close consultation with the legal profession and other civil society interlocutors, that problematic and untestable aspects of such foreign evidence will very often leave reasonable doubts outstanding.

Recommendation IV/2: Consideration should be given to examining the merits of amendments to the Evidence Act 1995 and the Foreign Evidence Act 1994¹¹² so as to permit the collection of information and its admission into evidence, from foreign countries, where political circumstances or states of conflict render impracticable the making of a request of the government of that country, for assistance in gathering evidence.

¹¹⁰ subsec 25(1) of the Foreign Evidence Act 1994

¹¹¹ cf the discussion in **Appendix I**

¹¹² The Evidence Act 1995 and the Foreign Evidence Act 1994 being related laws for the purposes of subpara 6(1)(a) (ii) of the INSLM Act.

CHAPTER V PASSPORT CANCELLATION AND CITIZENSHIP ISSUES

V.1 Introduction

The right to travel is not absolute as a matter of common law, statute law or international law. As was submitted to the INSLM:-

It is historically evident that the right to travel has never been conferred upon an individual as an absolute right...Blackstone having commented that while a subject has a general common law right to leave the realm, it is subject to the Crown's prerogative right to restrain him with a writ of *ne exeat regno* (Latin for "let him not go out of the kingdom"). Blackstone further remarked that the exercise of this prerogative power upon an individual's personal liberty is potentially necessary for the safeguard of the Commonwealth.¹¹³

Australia's international obligations under 1373 require Australia to take measures to "prevent the movement of terrorists and terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identify papers and travel documents".¹¹⁴

Section 7 of the *Australian Passports Act 2005* (Cth) ("**Passports Act**") provides Australian citizens with a statutory entitlement to be issued an Australian passport¹¹⁵ and an Australian passport may only be lawfully refused or cancelled in circumstances allowed for under the Passports Act.¹¹⁶ The Minister for Foreign Affairs may cancel an Australian passport,¹¹⁷ including where a competent authority has made a request for cancellation.¹¹⁸ A competent authority may make such a request for reasons which relate to Australian law enforcement matters, international law enforcement cooperation and the potential for harmful conduct.¹¹⁹

The UN Human Rights Committee has described Article 12(2) of ICCPR as providing everyone the right to leave any country, including his or her own (both leaving temporarily and for permanent emigration).¹²⁰ This right is said to include the right to obtain the necessary travel documents (eg passport) required to travel internationally.¹²¹ Article 12(3) of ICCPR sets out the permissible restrictions on this right. It is the INSLM's view that the restrictions on the right to an Australian passport under the Passports Act are consistent with Australia's obligations under Art 12(3) of ICCPR as they are enshrined in law, consistent with other ICCPR rights and are reasonably necessary for one or more of the enumerated purposes (protecting national security,

¹¹³ *Lip Yi Chong Submission to the INSLM*, 19th March 2014, p2 quoting Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Garland, reprint, 1978) vol I, 136-7

¹¹⁴ Art 2, para (g) of 1373

¹¹⁵ subsec 7(1) of the Passports Act. There is no common law right to a passport.

¹¹⁶ subsec 7(2) of the Passports Act

¹¹⁷ subsec 22(1) of the Passports Act

¹¹⁸ para 22(2)(d) of the Passports Act

¹¹⁹ secs 12-14 of the Passports Act

¹²⁰ See UN Human Rights Committee, *General Comment 27: Freedom of Movement*, para 8

¹²¹ See UN Human Rights Committee, *General Comment 27: Freedom of Movement*, para 9

public order, public health or morals, the rights and freedoms of others).¹²²

Article 12(4) provides that no-one shall be arbitrarily deprived of the right to enter his or her own country. An Australian who has his or her passport cancelled while overseas does not have their right to re-enter Australia arbitrarily deprived. The Minister for Foreign Affairs may issue a provisional travel document to a person who is overseas at the time their passport is cancelled to facilitate their re-entry into Australia.¹²³

The INSLM has received advice from security and law enforcement agencies about the value of passport cancellations in preventing Australians from travelling to foreign conflict zones to take part in hostilities or engage in terrorist activities. The details necessary to substantiate in full that value should not be disclosed.¹²⁴ They are nonetheless convincing, in the opinion of the INSLM. In response to the escalation of Australians travelling to Syria, and those planning and attempting to do so, there has been an increase in the number of passports cancelled by the Minister for Foreign Affairs on security and other grounds (as discussed below).

There should be procedures for cancelling an Australian passport to prevent travel where there is a sufficiently cogent ground to believe that the person intends to travel overseas to engage in terrorist or foreign incursions activities. This would involve some overlap with existing grounds for cancellation, but is desirable because the existing grounds do not sufficiently plainly encompass the specific concern with terrorist or foreign incursions activities.

The INSLM has discussed with agencies the practical difficulties faced in utilizing the legislation to cancel passports in contemporary circumstances, including clandestine and rapid decisions and arrangements for travel to areas of conflict such as Syria. Recommendations to enhance the legal capacity of agencies to affect the use of passports in order to prevent such nefarious travel are detailed below.

However, as the INSLM has reported in relation to the efficacy of control orders, there is no guaranteed or complete efficacy of these measures. It is the operational efforts to surveil an individual and collect evidence that matter above all else.¹²⁵ However, as a passport is required for legal entry into foreign countries and to leave Australia by commercial aeroplane or ship will require proof of eligibility to enter the destination country, virtually always departure from Australia will require possession of a valid passport. At least, its lack would pose very great obstacles to all but the most determined and resourceful wishful travellers.

Part 4 of the Passports Act contains a range of offences relating to Australian travel

¹²² A similar right to freedom of movement and permitted restrictions is found in Arts 13 and 29 of the *Universal Declaration of Human Rights 1948* (adopted by the General Assembly albeit not legally binding as such on Australia).

¹²³ see sec 9 of the Australian Passports Act and secs 6.4 and 6.5 of the *Australian Passports Determination 2005* (Cth). The High Court has held that administrative procedures do not deny re-entry into Australia by an Australian citizen, recognizing they “may be necessary, in the public interest, to enable the entry of non-citizens to be prevented or controlled and to enable proper administrative records and procedures to be kept or followed in relation to the arrival and departure of citizens and non-citizens alike”: *Air Caledonie International v R* (1988) 165 CLR 462 at 470.

¹²⁴ cf subsecs 21(2A) and (3) of the INSLM Act

¹²⁵ II.13 of the INSLM’s Second Annual Report

documents.¹²⁶ This includes offences for the improper use or possession of an Australian travel document under sec 32 of the Passports Act.

Individuals can still use fraudulent means to travel abroad, as the recent case of an Australian man who did not hold an Australian passport departing Australia on his brother's passport demonstrates.¹²⁷ It is an offence for a person to provide their Australian travel document (that is, a travel document issued to them) to another person reckless as to whether the document is or will be used by the other person in connection with travel.¹²⁸

Individuals may also attempt to conceal their travel to certain countries as the case of Joseph Thomas shows. On 23rd October 2008, Joseph Thomas was convicted of one count of possessing a false passport contrary to para 9A(1)(e)¹²⁹ of the *Passports Act 1938* (Cth) and was sentenced to nine months' imprisonment.¹³⁰

The lack of effective border controls in many States, such as Afghanistan, Iraq and Somalia as well as the use of foreign passports by dual citizens mean that it is difficult for security and law enforcement agencies to prove (or in some cases even know) that individuals (including those designated under sanctions regimes) have travelled to conflict zones. In some cases, individuals are able to enter and depart foreign States without leaving any record.¹³¹

V.2 Passport cancellation as a counter-terrorism measure

A competent authority¹³² may request the Minister for Foreign Affairs cancel a passport where

¹²⁶ Except for the offence of failure to notify an officer of a lost or stolen Australian travel document under sec 41 (which carries a maximum penalty of one year imprisonment or 20 penalty units or both), all offences under Part 4 carry a maximum penalty of ten years imprisonment or 1,000 penalty units or both.

¹²⁷ On December 6th 2013, Khaled Sharrouf departed the country by fraudulently using the valid passport of another person. Sharrouf was convicted under Operation Pendennis-Eden and was released from custody in October 2009. Sharrouf was arrested in 2005 during Operation Pendennis and, in August 2009, pled guilty to the charge of possessing things (namely six clocks and 140 batteries) which were connected with the preparation of a terrorist act or acts knowing of that connection. Sharrouf was sentenced to a minimum of three years and 11 months imprisonment, which he served and was released on parole in October 2009. Sharrouf was charged with possessing an unauthorised firearm on November 26th 2013 and on December 18th 2013, he was charged with two offences for falsely using Australian travel documents belonging to another person.

¹²⁸ subsec 32(3) of the Passports Act – with a penalty of ten years imprisonment or 1,000 penalty units or both

¹²⁹ The relevant provisions at the time were“(e) has in his or her possession or under his or her control: (i) an Australian passport that has been falsified; or (ii) a document (not being an Australian passport) that purports to be an Australian passport... (g) is guilty of an offence and is punishable, on conviction, by a fine not exceeding \$5,000 or imprisonment for a period not exceeding 2 years”.

¹³⁰ *R v Thomas* [2008] VSC 620 (29 October 2008). Note: Thomas was charged with the offence on 18 November 2004 and was convicted on re-trial. For further discussion of this case, including the control order case in relation to Thomas, see 11.6.1 of the INSLM's Second Annual Report. The maximum penalty for that offence at the time was two years imprisonment. The *Passports Act 1938* (Cth) has been superseded by the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth). Since 1 July 2005, it has been an offence under subsec 36(1) of the *Australian Passports Act 2005* (Cth) to possess false Australian travel documents, with a maximum penalty of ten years imprisonment or 1,000 penalty units or both.

¹³¹ See Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new regimes* (2009) pp128-129 and UNSC, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003) on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them*.

¹³² Defined in subsec 14(3) of the Passports Act to include AFP and ASIO

the competent authority suspects on reasonable grounds that if an Australian passport were issued to a person, the person would be likely to engage in conduct that:-

- i. might prejudice the security of Australia or a foreign country;
- ii. might endanger the health or physical safety of persons (whether in Australia or a foreign country);
- iii. might interfere with the rights or freedoms of other persons (whether in Australia or a foreign country) set out in ICCPR;
- iv. might constitute an indictable offence under the Australian Passports Act; or
- v. might constitute an indictable offence against an offence specified in Schedule 1 to the Australian Passports Determination 2005 (Cth) (“**Passports Determination**”)¹³³;

and the person should be refused an Australian passport in order to prevent the person from engaging in the conduct.¹³⁴

A decision to cancel a passport on any of the above grounds is a reviewable decision, and can be reviewed by the Administrative Appeals Tribunal (“**AAT**”).¹³⁵ The Minister is required to give to the person whose interests are affected by the decision a notification of the making of the decision and their right to have the decision reviewed.¹³⁶

It is not hard to imagine that Australians seeking to travel to Syria to engage in hostilities could in some cases be suspected on reasonable grounds of being likely to engage in one or more of these behaviours, and that the person should be refused an Australian passport in order to prevent the person from engaging in the conduct.

By comparison, a British passport is issued, withdrawn or refused to be issued in accordance with powers under the Royal Prerogative and there is no entitlement to a passport and no statutory right to have access to a passport. There are criteria for the refusal or withdrawal of such a passport on public interest grounds. The public interest criteria were updated in a Written Ministerial Statement on 25th April 2013. These criteria provide that a passport may be refused to or withdrawn from a person whose past, present or proposed activities, actual or suspected, are believed by the UK Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest.¹³⁷ The UK Home Secretary has described the discretionary power to refuse or cancel a passport as follows:-

¹³³ para 14(1)(a) of the Passports Act as well as sec 3.3 and Schedule 1 to the Passports Determination

¹³⁴ para 14(1)(b) of the Passports Act

¹³⁵ see secs 48-50 of the Passports Act

¹³⁶ sec 27A of the *Administrative Appeals Tribunal Act 1975* (Cth) (“**AAT Act**”). Subsection 27A(1) provides that “a person who makes a reviewable decision must take such steps as are reasonable in the circumstances to give to any person whose interests are affected by the decision notice, in writing or otherwise: (a) of the making of the decision; and (b) of the right of the person to have the decision reviewed”.

¹³⁷ Written statement to Parliament, UK Secretary of State for the Home Department, *The issuing, withdrawal or refusal of passports*, 25th April 2013. The application of the discretionary power is described in the statement as being directed at cases “in which the Home Secretary believes that the past, present or proposed activities (actual or suspected) of the applicant or passport holder should prevent their enjoyment of a passport facility whether overseas travel was or was not a critical factor”. <https://www.gov.uk/government/speeches/the-issuing-withdrawal-or-refusal-of-passports>

For example, passports may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organised criminal activity.

This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes has become increasingly apparent with developments in various parts of the world.¹³⁸

The AFP, as a competent authority,¹³⁹ may request the Minister for Foreign Affairs to cancel a passport where the competent authority believes on reasonable grounds that:-

A person is the subject of an arrest warrant issued in Australia in respect of an indictable offence or has been prevented from travelling internationally due to a law of the Commonwealth (including an order made under such a law), or by order of a court, or as a result of a condition of bail, surety, recognisance, parole conditions etc.¹⁴⁰ Similar provisions apply in relation to the cancellation of passports in relation to serious foreign offences.¹⁴¹

As discussed above, a passport cancellation may be requested where the competent authority suspects on reasonable grounds that if an Australian passport were issued to a person, the person would be likely to engage in conduct that might constitute an indictable offence under the Passports Act; or might constitute an indictable offence specified in Schedule 1 to the Passports Determination, and the person should be refused an Australian passport in order to prevent the person from engaging in the conduct. Schedule 1 to the Passports Determination includes a range of serious offences including terrorism, but does not include terrorism financing offences under Division 103 of the Criminal Code, offences against Part 3 of the UN Charter Act in so far as it relates to terrorism or Part 4 of the UN Charter Act. Nor does it include offences against the Foreign Incursions Act.

The INSLM reiterates that there is no reason in principle or policy to distinguish UN Charter Act terrorism financing offences which implement Australia's international counter-terrorism obligations under 1373 and relate to potentially very serious terrorism financing activity, from terrorism offences under the Criminal Code. Nor is there a reason to distinguish terrorism financing offences from other terrorism offences under the Criminal Code.

The Foreign Incursions Act criminalizes politically motivated violence, including conduct that would fit within the meaning of "terrorist act" under the Criminal Code. The definition of "politically motivated violence" under sec 4 of the ASIO Act includes "acts that are offences punishable under the [Foreign Incursions Act]".¹⁴² The Foreign Incursions Act also criminalizes

¹³⁸ Written statement to Parliament, UK Secretary of State for the Home Department, *The issuing, withdrawal or refusal of passports*, 25th April 2013

¹³⁹ Competent authority defined in subsecs 12(3) and 13(3) of the Passports Act

¹⁴⁰ sec 12 of the Passports Act

¹⁴¹ sec 13 of the Passports Act

¹⁴² para (c) of the definition of "politically motivated violence" under sec 4 of the ASIO Act

engaging in hostile activity with an organization which is a proscribed terrorist organization under the Criminal Code. There is no reason in principle or policy to distinguish between the offences under the Foreign Incursions Act, which cover potentially very serious terrorist activity, from terrorism offences under the Criminal Code.

The INSLM is strongly of the view that offences against the Foreign Incursions Act, Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act should be included in the offences in Schedule 1 to the Passports Determination.

Recommendation V/1: Part 1 of Schedule 1 to the Australian Passports Determination 2005¹⁴³ should be amended to include offences against Division 103 of the Criminal Code (financing terrorism).

Recommendation V/2: Part 2 of Schedule 1 to the Australian Passports Determination 2005¹⁴⁴ should be amended to include offences against the Foreign Incursions Act, Part 3 of the UN Charter Act in so far as it relates to terrorism and Part 4 of the UN Charter Act.

Under the Passports Act, ASIO as a competent authority¹⁴⁵ may request on security grounds that an Australian passport be cancelled or an application for an Australian passport be declined.¹⁴⁶ ASIO can provide security assessment advice (in the form of a security assessment) to the Department of Foreign Affairs and Trade requesting the Minister for Foreign Affairs cancel or refuse an Australian passport for security reasons (not limited to counter-terrorism reasons). The Minister's decision comes within the definition of "prescribed administrative action" under the ASIO Act.¹⁴⁷

ASIO's security assessment informs the decision of the Minister for Foreign Affairs whether to act on ASIO's recommendation and cancel the Australian passport or refuse an application. Part IV of the ASIO Act outlines the actions to be taken by ASIO if it issues an adverse security assessment to Australian citizens and permanent residents and the appeal mechanisms available, including the right to an unclassified statement of reasons and appeal to the AAT. As discussed above, a decision to cancel a passport on security grounds is a decision that can be reviewed by the AAT.¹⁴⁸ The Minister is required to give to the person whose interests are affected by the decision a notification of the making of the decision and their right to have the decision reviewed.¹⁴⁹

To inform the Minister's decision, ASIO may provide a "qualified security assessment" which generally means that ASIO "has identified information relevant to security, but is not making a recommendation [in relation to cancelling/refusing a passport]" or an "adverse security assessment" in which ASIO "recommends that a 'prescribed administrative action'

¹⁴³ The Australian Passports Determination 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁴⁴ The Australian Passports Determination 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁴⁵ subsec 14(3) of the Passports Act

¹⁴⁶ subpara 14(1)(a)(i) of the Passports Act

¹⁴⁷ para 35(1)(c) of the definition of "prescribed administrative action" under the ASIO Act

¹⁴⁸ see secs 48-50 of the Passports Act

¹⁴⁹ sec 27A of the *Administrative Appeals Tribunal Act 1975* (Cth)

[cancelling/refusing a passport] be taken”.¹⁵⁰

Under sec 54 of the ASIO Act, merits review of an adverse or qualified security assessment is available through the Security Appeals Division of the AAT. The AAT conducts proceedings in private, may inform itself on any matter in such manner as it considers appropriate and is not bound by the rules of evidence. Judicial review of the process of ASIO making a security assessment is available under subsec 39B(1) of the *Judiciary Act 1903* (Cth) and sec 75(v) of the *Constitution*.

The Minister for Foreign Affairs has a discretionary power to cancel a passport or refuse an application, and must only do so if he or she is satisfied of the relevant prescribed matters. The Minister receives advice from ASIO but is not exercising the power at the direction or behest of ASIO. The Federal Court in *Habib v Minister for Foreign Affairs*¹⁵¹ rejected an argument on behalf of the applicant that the Minister did not independently exercise their discretion “but rather impermissibly made a decision at the behest of the Director-General of Security at ASIO” and the “Minister was engaged in a process of “rubber-stamping””.

The court concluded that “the Minister did in fact give independent consideration to the exercise of the discretion conferred by s 14(2) and did not make that decision at the behest of the Director-General of Security”. The court was satisfied that “the sequence of events and the notations made by the Minister expose the fact that the Minister did not satisfy himself simply by reference to the request made by the Director-General. Those notations expose the fact that the Minister was seeking, and apparently receiving further advice, as to the decision to be made”. In particular, the Minister had considered advice from the Australian Government Solicitor, discussed the matter with the Secretary of DFAT and sought further information from ASIO before making a decision.

Where ASIO provides an adverse or qualified security assessment in relation to the cancellation or refusal of an Australian passport, the Department of Foreign Affairs and Trade is generally required to notify the person who is the subject of the assessment within 14 days.¹⁵² However, if the Attorney-General issues a certificate under subsec 38(2) of the ASIO Act that he or she is satisfied that:-

- (a) the withholding of notice to a person of the making of a security assessment in respect of the person is essential to the security of the nation; or
- (b) the disclosure to a person of the statement of grounds contained in a security assessment in respect of the person, or of a particular part of that statement, would be prejudicial to the interests of security;

then subsec 38(1) does not require a notice to be given in relation to a security assessment to which a certificate under paras 38(2)(a) or 38(2)(b) applies.

¹⁵⁰ *The Security Assessment function*, ASIO Information Brief, 10th September 2013 p2. For the legislative definitions of these terms see subsec 35(1) of the ASIO Act.

¹⁵¹ [2010] 192 FCR 148 per Flick J at [79]-[83]

¹⁵² subsec 38(1) of the ASIO Act

ASIO has described the important rôle of withholding passports as a means of protecting national and international security as follows:-

Withholding passports is an important means of preventing Australians from travelling overseas to engage in activities prejudicial to national security – for example, to train, support or participate in terrorism. It may also be used to help prevent an Australian already overseas from participating – or further participating – in activities that are prejudicial to the security of Australia or another country.¹⁵³

The INSLM strongly agrees with this conclusion.

Since July 2013, over 30 passports have been cancelled on national security grounds, compared to 18 passport cancellations for the entire 2012-13 financial year and 7 passports in 2011-12.

Number of passport cancellations subject to adverse security assessments¹⁵⁴

Financial Year	Number of passports subject to adverse security assessments
FY to 11 Feb 2014	33
2012-13	18
2011-12	7
2010-11	7
2009-10	8

The Attorney-General has described the passport cancellations as a “lagging indicator” of the scale of the threat posed by Syria-bound individuals, stating:- “This is a problem that took off very fast...in the middle of last year. The numbers went from hardly any to more than 100 in a matter of months. The rate of acceleration has eased but it’s still an upward trend line”.¹⁵⁵ The INSLM shares this concern about the upward trend of Australians seeking to travel to Syria to take part in armed hostilities - whether against, or for, the Assad regime.

The INSLM has reviewed the Passports Act (and the provisions of the ASIO Act that relate to that Act) for its efficacy as a counter-terrorism tool in preventing those suspected of involvement in terrorism and foreign incursions activities from travelling abroad.

ASIO has advised the INSLM that prior to the Syrian conflict the primary overseas conflict zone attracting Australian travellers was the Afghanistan/Pakistan theatre. ASIO investigated 30 Australians who travelled to Afghanistan or Pakistan between 1990 and 2010 to train at extremist camps and/or fight with extremists. Of these, 19 were engaged in activities of security concern after their return to Australia. Of the 19, eight were convicted in Australia of terrorism-related offences and five are still serving prison sentences, while others were charged with terrorism offences overseas.¹⁵⁶

¹⁵³ ASIO’s Report to Parliament 2012-2013, p16

¹⁵⁴ Information provided by ASIO to the INSLM, 18th February 2014. Figures correct as of 18th February 2014.

¹⁵⁵ Attorney-General, Senator the Hon George Brandis QC, quoted in Paul Maley “Aussie fighters leading Syrian terror groups”, *The Australian*, 18 Feb 2014 p2

¹⁵⁶ Information provided by ASIO to the INSLM, 18th February 2014.

While the Syrian conflict is not directly comparable to conflicts in Afghanistan and Pakistan in the 1990s and 2000s, the potential for individuals who travel to foreign conflict zones, including Syria, to become engaged in activities of security concern after their return to Australia, including committing terrorism offences within Australia, is worryingly real. In the INSLM's opinion, it justifies urgent attention to the possibility of improving the CT Laws to enhance their prevention and protective efficacy.

V.3 Protection of sensitive information regarding passport cancellations

The INSLM supports all of the existing grounds for passport cancellation and has discussed with agencies how passport cancellation operates in practice, and whether improvements could be made to better enable law enforcement and security agencies to utilise passport cancellation as a means of preventing terrorism and foreign incursions offences, and countering threats to Australia's security and to international security.

As a result of these discussions, the INSLM considers that if the Attorney-General is satisfied, and issues a certificate that he or she is satisfied, that:-

- a. the disclosure to the person of the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, would be prejudicial to an ongoing law enforcement investigation into an offence listed in Schedule 1 to the Passports Determination; or
- b. the disclosure to the person of the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, would be prejudicial to security; or
- c. notifying a person of the cancellation of their passport would be prejudicial to an ongoing law enforcement investigation into an offence listed in Schedule 1 to the Passports Determination; or
- d. notifying a person of the cancellation of their passport would be prejudicial to security;

then the Minister for Foreign Affairs should not be required to disclose to the person the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, or to give notice of a passport cancellation, where a certificate applies.

Provisions regulating the disclosure of security and law enforcement information are well accepted. Requirements for the protection of law enforcement and security information in the context of passport cancellations exist under the ASIO Act, AAT Act and Passports Act (as well as under the NSI Act and at common law by way of PII). It is intended that the INSLM's recommendation would strengthen these existing frameworks. The INSLM's recommendations have the same policy rationale as delayed notification search warrants – that is, disclosure to the person affected by the search would be prejudicial to an ongoing security or law enforcement investigation. Clearly, disclosure to the person of the grounds for their passport cancellation, or the fact of cancellation itself, may in many if not all cases have this potential.

Equivalent provisions should apply as well, for the sake of appropriate efficacy, to the possibility of the seizure of foreign passports under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).

Recommendation V/3: The ASIO Act, Passports Act and the Foreign Passports (Law Enforcement and Security) Act 2005¹⁵⁷ should be amended to enable the Attorney-General to issue a certificate that he or she is satisfied that notification of the grounds in support of a request for a passport cancellation (or part of the statement), or notification of the fact of cancellation, would be prejudicial to an ongoing law enforcement investigation into an offence listed in Schedule 1 to the Passports Determination or would be prejudicial to security. The Minister for Foreign Affairs should not be required to disclose to the person the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, or to give notice of a passport cancellation, where a certificate applies.

V.4 New temporary suspension power

The INSLM accepts that there is a real and high potential threat to Australia's national security, and a threat of terrorism (not only to Australia), posed by Australians travelling to become involved in activities of security concern in overseas conflicts. As such, the INSLM favours ASIO being provided with the ability to request that the Minister for Foreign Affairs temporarily cancel a passport on security grounds where ASIO is considering issuing an adverse security assessment in relation to that individual. This is intended to strengthen ASIO's ability to prevent Australians from travelling in circumstances where the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country. The prevention of Australians engaging in such activity is obviously of high worth from a counter-terrorism perspective.

It is clear to the INSLM from investigation of ASIO's work in this regard that the challenge of providing professionally acceptable security assessments in a timely way is a major one. It would be a terrible compromise to accept low quality assessments under the pressure of the urgency to prevent imminent travel by a suspected person. The INSLM has not observed any lapse of standards in that direction. (The IGIS would no doubt regard any such backsliding in a most adverse light.)

It is also clear to the INSLM, in consideration of current operations, that international travel can be arranged very quickly. The law authorizing and regulating the making of security assessments should be adapted to give Australians the intended protection of the current system by means of which adverse security assessments lead to the cancellation of passports – and thus that law should permit in appropriate cases a calibrated slowdown of travel that may be for malevolent purposes.

ASIO advised the INSLM that:-

The Minister for Foreign Affairs has the ability to refuse or cancel an individual's Australian passport, including at the request of ASIO on national security grounds. This

¹⁵⁷ The ASIO Act, Passports Act and the Foreign Passports (Law Enforcement and Security) Act 2005 being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

form of administrative action provides the government, through the Minister for Foreign Affairs, with a powerful tool to seek to prevent individuals from travelling overseas to engage in activities prejudicial to the security of Australia or another nation, such as travelling overseas to engage in terrorism.

The introduction of a capability to temporarily prevent the use of an individual's Australian passport for a defined and limited period would enhance the ability of government to respond effectively to emerging security threats. It would strengthen ASIO's operational agility, by enabling the taking of temporary action to prevent the use of an individual's passport proportionate to the security threat posed. This would include circumstances where ASIO becomes aware at short notice of security dimensions to an individual's imminent travel or receives no intelligence warning that an individual of security concern intends to travel overseas.

The ability to temporarily prevent the use of an individual's passport would enable ASIO to appropriately respond to such circumstances with agility and proportionality to the threat posed.¹⁵⁸

AGD advised the INSLM:-

The Department's view is that an interim hold/suspension mechanism for Australian passports can be formulated to ensure the mechanism is consistent with Australia's international obligations provided they are enshrined in law, consistent with other rights under the ICCPR and necessary for the purpose of protecting national security.¹⁵⁹

The INSLM shares this view.

The AFP advised the INSLM that:-

[A temporary passport cancellation power] would have a high preventative value, not only in relation to the individual concerned, but also to the community in general. Interdicting against individuals can prevent them from travelling to foreign conflicts and potentially being injured, killed or returning with increased skills and motivation. If killed in conflict, their death could be used for propaganda purposes and/or be an element for further radicalisation of others.¹⁶⁰

The INSLM shares these hopes and this apprehension.

In order to be an effective counter-terrorism measure, such an interim passport cancellation request would not require the issuing of a security assessment by ASIO. The request could be made with the approval of the Director-General of ASIO and would not require external approval. Nor would it be subject to merits or judicial review (except, of course, under sec 75(v) of the *Constitution*). The Inspector General of Intelligence and Security would, and should, have

¹⁵⁸ ASIO Submission to the INSLM, 21st March 2014

¹⁵⁹ AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

¹⁶⁰ AFP Submission to the INSLM, 21st March 2014

oversight of ASIO's actions in respect of the proposed interim passport cancellation scheme.

That said, the trade-off would need to be a strict timeframe on the interim cancellation. It may be that an initial period of 48 hours, followed by extensions of up to 48 hours at a time for a maximum period of seven days may be appropriate. The INSLM is mindful that these timeframes are somewhat arbitrary. Timeframes should be the subject of further discussion with relevant agencies and civil society interlocutors.

Extensions should be approved by the Director-General of ASIO based on advice from ASIO officers about the individual's adverse security assessment process. If the Director-General is satisfied that the adverse security assessment process is being undertaken appropriately but further time is needed to determine whether to issue an adverse security assessment, then a further period of up to 48 hours could be approved. If an adverse security assessment in relation to the person is not issued before the interim passport cancellation expires, then ASIO should have to pay to the person the lost travel costs of the person (eg airline ticket and cancellation accommodation). Where an adverse security assessment is issued during the interim passport cancellation period then ASIO would not have to pay the lost travel costs.

Safeguards should be included in the interim passport cancellation scheme to ensure ASIO could not make multiple interim passport cancellation requests in respect of the same person except where valid reasons (such as genuinely new information) exist for making subsequent requests for an interim passport cancellation.

Recommendation V/4: The ASIO Act and Passports Act¹⁶¹ should be amended to enable ASIO, by its Director-General to make a request for an interim passport suspension where ASIO is considering issuing an adverse security assessment.

Some Australians will have more than one passport, because of dual (or multiple) citizenships. The *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) permits the Minister for Foreign Affairs to force the physical surrender of such foreign passports by an Australian.¹⁶² The grounds for that equivalent of the cancellation of an Australian passport are for present purposes the same as may lead to such cancellation.

In the opinion of the INSLM, the purpose of preventing travel which is sufficiently connected with the prospect of engaging in terrorist acts or illegal foreign incursions conduct is every bit as important to the security of Australia and Australians in the case of an Australian with a foreign passport or passports as it is in the case of an Australian with only an Australian passport. It follows that the desirable efficacy of the proposed interim power of suspension of an Australian passport should be assisted by a corresponding power of interim interference with the use of a foreign passport in similar circumstances.

Recommendation V/5: The Foreign Passports (Law Enforcement and Security) Act 2005¹⁶³ should be amended so as to include a power to suspend the capacity to use a foreign

¹⁶¹ The ASIO Act and the Passports Act being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁶² sec 15 of the Foreign Passports (Law Enforcement and Security) Act 2005

¹⁶³ The Foreign Passports (Law Enforcement and Security) Act 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

passport for the purposes of departing Australia in circumstances similar to those that would permit the interim suspension of an Australian passport.

V.5 The decision in *BLBS and Director-General of Security* [2013] AATA 820

In the case of *BLBS and Director-General of Security*¹⁶⁴, the applicant sought review of ASIO's adverse security assessment and of the decisions made by the Minister for Foreign Affairs to cancel the applicant's Australian passport and order surrender of his foreign travel documents.

The INSLM has considered whether the application of the *Edwards* direction by the AAT in its review process was appropriate. The INSLM does not consider that an *Edwards* direction¹⁶⁵, which is concerned with establishing proper limits around the determination of criminal guilt by virtue of a person's lies, should be transferred to an administrative setting as was done in *BLBS*.¹⁶⁶ The AAT is not a court, and the AAT Act expressly provides that it is not bound by the rules of evidence. *Edwards* was identified by the AAT in *BLBS* as "not only a rule of evidence but... [r]ather sound principles... of logic that courts have recognised should apply to all deliberative fact finding. So understood they govern the circumstances in which Australian jurisprudence will permit lies to be regarded as relevant to proof of a denied circumstance".¹⁶⁷ AGD (with whom ASIO agreed) submitted to the INSLM that:-

The purported application of the *Edwards* direction as a principle, drawn as it is from the rules of evidence applicable to criminal trials, requires careful consideration when being applied in an administrative setting. While a tribunal is not a court, the absence of the technical requirements to follow the rules of evidence must not displace due process, natural justice or procedural fairness. However, AGD agrees that relevant principles can be drawn from case law which involve the application of logic to fact finding and go to the assessment of the probative value of the material on which the AAT seeks to rely.¹⁶⁸

ASIO's security assessment function does not lend itself to easy application of the *Edwards* direction. ASIO specifically focuses on "investigating high consequence threats to national security, regardless of whether or not a crime has been committed".¹⁶⁹ A security assessment is the result of an ASIO intelligence investigation and is an intelligence assessment – not an assessment of criminal guilt. In conducting an intelligence investigation to determine the nature and extent of any threat to Australia's security, ASIO makes intelligence assessments not determinations of guilt based on formal rules of evidence. Intelligence gathering and collection is not amendable to regulation by formal rules of evidence and it is not appropriate that an *Edwards* direction be applied to ASIO security assessments.

¹⁶⁴ [2013] AATA 820

¹⁶⁵ *Edwards v R* (1993) 178 CLR 193

¹⁶⁶ The *Edwards* direction allows lies to be used, in certain circumstances, as evidence to be relied upon by a court in a criminal trial to determine guilt. In *Edwards*, the court held that for a lie to be capable of being relied upon to prove guilt that lie "must relate to a material issue" and the telling of the deliberate lie "must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie" per Deane, Dawson and Gaudron JJ at [209]

¹⁶⁷ [2013] AATA 820 at [139]

¹⁶⁸ *AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence)*, 18th February 2014

¹⁶⁹ *The concept of security intelligence*, ASIO, 10th September 2013

Paragraph 14(1)(a) of the Passports Act requires that a competent authority “suspects on reasonable grounds” that if an Australian passport were issued to a person, the person “would be likely” to engage in the prescribed conduct set out in subparas 14(1)(a)(i)-(v) of the Passports Act. The AAT held in *BLBS* that the words “suspects on reasonable grounds” convey the meaning given to them by the High Court of Australia in *George v Rockett* (1990) 170 CLR 104¹⁷⁰ and accordingly:-

80. ASIO is not required to prove, or be satisfied on the balance of probabilities, that the person would be likely to engage in that conduct: it need only suspect on reasonable grounds that the person would be likely to do so. The relatively modest degree of actual apprehension required for ASIO have such a suspicion is explained in *George v Rockett*;

...

83. To satisfy s 14(1)(a) a competent authority must suspect on reasonable grounds that if a passport were issued to BLBS he would be likely to engage in some form of conduct. The kind of conduct that will satisfy the statutory test is that specified in (i)-(v).

84. Those adjectival clauses do not qualify the degree of satisfaction required for ASIO to assess that BLBS would be likely to engage in some particular conduct—they merely describe the categories of potential conduct permissibly relevant to a request that ASIO can make to the Minister for Foreign Affairs under the Passports Act. A request can be made only if the suspected conduct falls within one of the categories defined in s 14(1)(a)(i)-(v).

It is not clear from the AAT’s decision what the meaning of “would be likely” is. It is not clear whether it would enable ASIO to issue a security assessment if it suspects on reasonable grounds that there is a real risk (however small) of a person engaging in activities of security concern if the person’s passport is not cancelled.

In *BLBS*, ASIO submitted that the meaning of the term “would be likely” must be discerned in the light of the explanatory memorandum which referred to “real and not remote possibility”, submitting that so understood, it required a low or very low threshold of satisfaction. ASIO submitted that the test provided for in s 14(1) would be met “if there was some basis for an actual apprehension that, if the applicant’s Australian passport was not cancelled and his foreign travel document was not surrendered, there was more than an insubstantial or negligible risk (in the order of 10% or less) that he might engage in politically motivated violence either in Australia or overseas”.¹⁷¹ The applicant on the other hand submitted that ““*likely*” must mean something more than a “*real and not remote possibility*”. A “*substantial likelihood*” was argued to be a preferable approximation to the phrase “*would be likely to*” than the expression a “*real and not remote possibility*”. A passport could not be refused, it was submitted unless ASIO could demonstrate that there were reasonable grounds to believe that there was a substantial likelihood that the suspected conduct would be undertaken by BLBS”.¹⁷²

¹⁷⁰ [2013] AATA 820 at [75]

¹⁷¹ [2013] AATA 820 at [70]

¹⁷² [2013] AATA 820 at [71]

These are important issues, that would be critical in many cases. The INSLM does not regard them as in any way authoritatively settled by the decision and reason in *BLBS*.

The INSLM considers there is value in clarifying the meaning of “would be likely” in para 14(1)(a) to ensure the officers of ASIO and other competent authorities apply the correct legislative test. The appropriate meaning should be determined by reference to the aim of sec 14 itself, to cancel passports for reasons relating to *potential* for harmful conduct.

Recommendation V/6: The meaning of “would be likely” in para 14(1)(a) of the Passports Act¹⁷³ should be clarified to ensure the officers of ASIO and other competent authorities apply the correct legislative test. The appropriate meaning should be determined by reference to the aim of sec 14 itself, to cancel passports for reasons relating to *potential* for harmful conduct. An amendment should expressly adopt the “real and not remote possibility” contained in the original Explanatory Memorandum.

V.6 Dual citizenship and fighting in foreign conflicts

The discussion of passport cancellation above evokes the broader issue of citizenship and involvement in terrorism or foreign incursions offences.¹⁷⁴

The INSLM was advised that “it is more difficult to prevent or investigate the travel of a person who holds dual or multiple citizenships as they have access to multiple travel documents that may not be able to be tracked by Australian authorities”.¹⁷⁵ The AFP has also advised the INSLM that “while authorities from bordering countries to Syria are assisting the AFP in regards to Australians travelling there, it is difficult to keep tabs on every person who travels to Syria as some have dual passports and others enter the country away from designated border crossings”.¹⁷⁶

It is possible to hold citizenship of two or more countries if the laws of those countries allow this – there is nothing in the *Australian Citizenship Act 2007* (Cth) (“**Citizenship Act**”) prohibiting this. Since 2002, Australia has allowed its citizens to hold dual, or multiple, citizenship. Prior to 4 April 2002, under sec 17 of the *Australian Citizenship Act 1948* (Cth), an Australian citizen 18 years or over who did an act or thing whose sole or dominant purpose was to acquire a foreign citizenship lost their Australian citizenship. Section 17 was repealed by the *Australian Citizenship Legislation Amendment Act 2002* (Cth).¹⁷⁷

In hindsight, the INSLM does not regard that repeal as very wise. The arguments in favour of

¹⁷³ The Passports Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁷⁴ For a legislative analysis of the rights and responsibilities of Australian citizenship see Sangeetha Pillai “The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis” (2014) 37 *MULR* (in issue 3, forthcoming).

¹⁷⁵ *AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence)*, 18th February 2014

¹⁷⁶ *AFP Submission to the INSLM*, 14th October 2013

¹⁷⁷ This change came about as a response to one of the recommendations made by the Australian Citizenship Council in its report *Australian Citizenship for a New Century*, released in February 2000. The Government’s response to the report, *Australian Citizenship – A Common Bond*, accepted all the Citizenship Council’s recommendations, including Recommendation 49, which recommended repealing sec 17.

retaining sec 17 included that a person holding more than one citizenship has pledged allegiance to more than one country and so has questionable loyalty to Australia, and possession of more than one citizenship may lead to difficulties where Australian citizens are also citizens of a country with which Australia is at war. The INSLM considers these to be sound arguments. They resonate in relation to the INSLM's inquiry into Australia's Foreign Incursions Act, as reported in Chapter III.

After all, a person must make a public pledge of commitment to become an Australian citizen.¹⁷⁸ The pledge of commitment as an Australian citizen must be made in the following terms "I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey".¹⁷⁹

The preamble to the Citizenship Act describes Australian citizenship as "a common bond, involving reciprocal rights and responsibilities". As Gleeson CJ explained in *Roach v Electoral Commissioner*¹⁸⁰:-

The preamble to the *Australian Citizenship Act 2007* (Cth) declares that Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations. The reference to the reciprocity of rights and obligations is important in the context of membership of the community. Serious offending may warrant temporary suspension of one of the rights of membership, that is, the right to vote. Emphasis upon civic responsibilities as the corollary of political rights and freedoms, and upon society's legitimate interest in promoting recognition of responsibilities as well as acknowledgment of rights, has been influential in contemporary legal explanation of exclusions from the franchise as consistent with the idea of universal adult suffrage.¹⁸¹

Australian citizens are legally obliged to defend Australia if required during a war through compulsory conscription. During a time of war any person between the ages of 18 and 60 years who has resided in Australia for six months or more (a resident alien being exempt from this requirement¹⁸²), may, upon proclamation of the Governor-General, be obliged to serve with the ADF for the duration of the war.¹⁸³

The INSLM is concerned with the implications dual, or multiple, citizenship has for Australia's counter-terrorism effort. The INSLM is concerned that the concept of dual citizenship raises issues of divided loyalties and does not see why, as a matter of policy, an Australian citizen should also be able to be a citizen of another country. With great respect, the INSLM agrees with

¹⁷⁸ Only in certain prescribed circumstances is it permissible for a person not to make a pledge before becoming an Australian citizen – see secs 26-28 of the Citizenship Act and Regs 7 and 8 of the *Australian Citizenship Regulations 2007* (Cth)

¹⁷⁹ Schedule 1 to the Citizenship Act

¹⁸⁰ (2007) 233 CLR 162

¹⁸¹ (2007) 233 CLR 162, 177 [12] (Upholding provisions disqualifying as voters at federal elections persons who were serving sentences of imprisonment).

¹⁸² See *Polites v R* (1945) 70 CLR 60 which upheld a constitutional challenge to the law conscripting resident aliens to perform military service in the defence forces of Australia.

¹⁸³ *Defence Act 1903* (Cth) secs 59-60

the views of a former Chief of the Army, now Prof Peter Leahy AC, Director of the National Security Institute at the University of Canberra:-

As a retired soldier I have a view that citizenship brings rights and responsibilities. One of these is that, in the extreme, a citizen may be called upon to fight to defend his nation. I do not see that this responsibility is divisible. Thus dual citizenship, while it may be convenient for the individual, should not be allowed. I offer the potential that an Australian military or police force if it were to be deployed on a mission to Syria may find itself directly opposed by an Australian citizen with dual Australian-Syrian passports on the field of battle. This is an intolerable situation, which requires strong preventive and retrospective action.¹⁸⁴

As discussed at length in Chapter III, the INSLM does not see why Australian law should not regulate the service of an Australian citizen with any armed force not at war with Australia. And sec 35 of the Citizenship Act provides that an Australian dual national ceases to be an Australian citizen if the person serves in the armed forces of a country at war with Australia (which apparently has been understood, perhaps incorrectly, to require a declaration of a formal state of war). That is, their citizenship is revoked and they can be removed from Australia. This provision does not apply to Australian citizens who do not hold any other citizenship or nationality, in light of Australia's international obligations under the Statelessness Convention.¹⁸⁵

As well as the position contemplated by the retired General Leahy, noted above, Australia may be called upon by the UN Security Council, in the exercise of its use of force powers under Chapter VII of the UN Charter, to use force in a particular situation. As Australia would not necessarily be at war with the country or countries it is obliged to take action against under UN Security Council mandate, the ADF may be involved in conflict against an individual who is not serving in the armed force of a country declared as being at war with Australia.

DFAT advises dual nationals that their dual nationality "may have implications for you if you travel to the country of your other nationality. For example: you might be liable for military service".¹⁸⁶ DFAT advises dual nationals that:-

Dual nationals may be liable for military service in the country of their other nationality. Countries where this is more likely include Egypt, Greece, Iran, Lebanon, Syria and most countries in central and eastern Europe.

If you plan to visit a country where you may be considered a national, you should check your military service obligations before leaving Australia with that country's embassy or consulate in Australia. Seek this advice in writing before leaving Australia and take a copy with you.

Some countries allow nationals who have been living abroad to enter and stay for a limited time before incurring obligations for military service. In others, there is no such

¹⁸⁴ *Submission to the INSLM 3r^d* January 2014

¹⁸⁵ para 35(1)(a) of the Citizenship Act

¹⁸⁶ *Dual nationals*, Department of Foreign Affairs and Trade, www.smartraveller.gov.au

period and the obligation is imposed immediately upon arrival.

In these countries, dual nationals may be ‘called up’ and, if they don’t report for duty, may be regarded as defaulters whether they were aware of the call-up or not. They could then either be imprisoned, or inducted into the military forces when they next arrive in the country or attempt to leave the country. Even dual nationals who have passed the age for military service may be considered defaulters for failing to report at the required time.¹⁸⁷

As can be seen from the DFAT advice, countries where compulsory military service of Australian dual nationals is more likely include Egypt, Iran, Lebanon and Syria – all of which are relevant from a counter-terrorism perspective.

Dual citizenship is not a human right. Its permission in Australia since 2002 does not render it anything like traditional. Migrants from non-British origins became citizens for generations before it became available. Its invidious legal qualities in relation to Australia’s CT Laws and the associated Foreign Incursions Act have been discussed above. Obviously, the withdrawal of this boon (from the perspective of individuals presently enjoying it) will be as difficult as any governmental reduction of what people have come to regard as an entitlement. However, in its nature dual citizenship is deeply problematic, unlike a pension.

Recommendation V/7: The 2002 legislated policy in favour of dual citizenship should be reconsidered.

V.7 Other bases for non-approval of citizenship applications and revocation

The Citizenship Act also prohibits approval of a citizenship applicant who is assessed by ASIO as a risk to the security of Australia, or who has been convicted of certain serious criminal offences. Generally speaking, the Immigration Minister must not approve a person becoming an Australian citizen if an ASIO adverse or qualified security assessment is in force in respect of that person, assessing that the person is directly or indirectly a risk to security (within the meaning of sec 4 of the ASIO Act).¹⁸⁸ However, if the person is not a national or citizen of another country and at the time of the person’s birth, the person had a parent who was an Australian citizen then this provision doesn’t apply and instead, the Minister must not approve the person becoming an Australian citizen if the person has been convicted of a national security offence.¹⁸⁹

The definition of “national security offence” under sec 3 of the Citizenship Act includes offences against Part 5.3 of the Criminal Code (Terrorism) but does not include certain other offences which should, in the opinion of the INSLM, properly be within the definition of “national security offence” which applies for the purposes of the Citizenship Act. The definition of “national security offence” under sec 3 of the Citizenship Act should include an offence against

¹⁸⁷ *Dual nationals*, Department of Foreign Affairs and Trade, www.smartraveller.gov.au

¹⁸⁸ subsecs 17(4) and (4A) of the Citizenship Act – this applies to the acquisition of citizenship by descent, similar provisions apply for citizenship for persons adopted through inter-country adoption, see subsecs 19D(5)-(7A).

¹⁸⁹ subsec 17(4B) of the Citizenship Act – this applies to the acquisition of citizenship by descent, similar provisions apply for citizenship for persons adopted through inter-country adoption, see subsecs 19D(5)-(7A).

the Foreign Incursions Act, Part 3 of the UN Charter Act in so far as it relates to terrorism and Part 4 of the UN Charter Act.

Recommendation V/8: The definition of “national security offence” under sec 3 of the Citizenship Act¹⁹⁰ should be amended to include offences against Foreign Incursions Act, Part 3 of the UN Charter Act in so far as it relates to terrorism and Part 4 of the UN Charter Act.

Citizenship may also be revoked where a person has been convicted of certain serious criminal offences before becoming a citizen and it would be “contrary to the public interest for the person to remain an Australian citizen”.¹⁹¹

It is worth noting also that the right of Australian citizens to reside in Australia is not absolute. In *Vasiljkovic v R*¹⁹² the High Court rejected an argument that Australian citizens are immune from removal by extradition from Australia. Gleeson C J stated:-

There is nothing in the Act or Regulations that seeks to attach any legal significance to the fact that the plaintiff was at the relevant time a citizen of Australia as well as of Serbia and Montenegro. This represents a legislative choice in keeping with past Australian practice, and with the practice of many, but not all, other nations.¹⁹³

V.8 A new basis for citizenship revocation?

The INSLM has considered whether the revocation powers of the Immigration Minister should be strengthened to facilitate the use of revocation of citizenship where it is in Australia’s national security or counter-terrorism interests.

The INSLM has considered the position in the United States, where a person who is a national of the United States whether by birth or naturalization will lose their US nationality if they perform certain specified acts voluntarily and with the intention to relinquish their US nationality. These acts include entering or serving in the armed forces of a foreign state engaged in hostilities against the United States *or* serving as a commissioned or noncommissioned officer in the armed forces of a foreign state.¹⁹⁴

The INSLM has also considered the position in the UK, where the Secretary of State may by order deprive a dual national of their citizenship status “if the Secretary of State is satisfied that deprivation is conducive to the public good”.¹⁹⁵ The order can be made with immediate effect and can be made when the individual is outside of the UK, although it can be judicially appealed.

¹⁹⁰ The Citizenship Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁹¹ subpara 34(2)(b)(ii), para 34(2)(c) and subsec 34(5) of the Citizenship Act

¹⁹² (2006) 227 CLR 614

¹⁹³ (2006) 227 CLR 614 at [8]

¹⁹⁴ 8 U.S. Code § 1481. Other expatriating acts include: obtaining naturalization in a foreign state upon his or her own application (that is, becoming a dual national); making a formal declaration of allegiance to a foreign state; committing acts of treason, or attempting by force to overthrow, or bearing arms against, the United States. All these acts must be done voluntarily and with the intention to relinquish US nationality. The US Supreme Court has ruled that a person cannot lose their US nationality unless he or she voluntarily relinquishes that status: *Afroyim v Rusk*, 387 US 253 (1967) and *Vanace v Terrazas*, 444 US 252 (1980).

¹⁹⁵ sec 40 of the *British Nationality Act 1981(UK)* The only restriction is that such action cannot render the person stateless.

The *Immigration Bill 2013-14* (UK), currently before the UK Parliament would, if enacted, introduce a new basis for deprivation of citizenship for “conduct seriously prejudicial to vital interests of the UK”. The proposed provision would enable the Secretary of State to deprive a person of their citizenship if their citizenship was acquired by naturalization and not birth, “if the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory”.¹⁹⁶

The Explanatory Notes to the *Immigration Bill 2013-14* (UK) explain the proposed amendment as:-

The purpose of this provision is to qualify the existing provisions on deprivation so that in the most serious cases - such as those involving national security, terrorism, espionage or taking up arms against British or allied forces – individuals can still be deprived of their citizenship, where this has been acquired by means of naturalisation, without regard to whether or not it will render them stateless.

This provision is intended to be consistent with the 1961 UN Convention on the Reduction of Statelessness, which allowed states to declare on ratifying the Convention that they retain the right to deprive a person and render them stateless in specific circumstances. The UK ratified the Convention on 29th March 1966 and explicitly retained the right to deprive where the person had either “ i) has, in regard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty”.¹⁹⁷

The *Convention on the Reduction of Statelessness* (New York, 30 August 1961) entered into force for Australia on 13th December 1975 [1975] ATS 46. The Statelessness Convention contains an express prohibition against depriving a person of his or her nationality if such deprivation would render him or her stateless. However, the person may be deprived of nationality if it is permissible under the Convention eg because of residence requirements (Art 7 (4) and (5)) or where the nationality has been obtained by misrepresentation or fraud (Art 8(2)(b)). Article 8(3) also provides that notwithstanding the general prohibition against statelessness:-

Contracting States may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

(i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from,

¹⁹⁶ Clause 60 of the *Immigration Bill 2013-14* (UK)

¹⁹⁷ *Explanatory Notes, Immigration Bill 2013-14* (UK), paras 381-382

another State, or

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State:

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

The UK and other countries retained the right to deprive a person and render them stateless in specific circumstances in accordance with Art 8(3) of the Statelessness Convention. For example, Austria declared in accordance with Art 8(3)(a)(i) and (ii) that it retains “the right to deprive a person of his nationality, if such person enters, on his own free will, the military service of a foreign State” or “if such person being in the service of a foreign State, conducts himself in a manner seriously prejudicial to the interests or to the prestige of [Austria]”. New Zealand declared in accordance with Art 8(3) that it retains “the right to deprive a person of his New Zealand citizenship on the following grounds, being grounds existing in New Zealand law at the present time: the person has, while a New Zealand citizen and while of or over the age of 18 years and of full capacity, (a) Acquired the nationality or citizenship of another country by any voluntary and formal act, and acted in a manner that is contrary to the interests of New Zealand; or (b) Voluntarily exercised any of the privileges or performed any of the duties of another nationality or citizenship possessed by him in a manner that is contrary to the interests of New Zealand”.

Australia on the other hand, did not make any reservations or declarations in regards to the Statelessness Convention. DFAT, AGD and DIBP jointly advised the INSLM that:-

[T]o comply with constitutional requirements and to be consistent with Australia’s international obligations regarding the prevention of statelessness, the deprivation of citizenship for terrorism or security-related activity would need to be limited to those who have more than one citizenship.¹⁹⁸

Taking into account Australia’s international obligations, and the national security and counter-terrorism risks posed by Australians engaging in acts prejudicial to Australia’s security, the INSLM supports the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia’s security and it is not in Australia’s interests for the person to remain in Australia.

Recommendation V/9: Consideration should be given to the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia’s security and it is not in Australia’s interests for the person to remain in Australia.

¹⁹⁸ AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

CHAPTER VI MISCELLANEOUS IMPROVEMENTS

VI.1 Introduction

During the course of this review, the INSLM has discussed with agencies problems with Australia's existing legislation which are either having, or have the potential to have, adverse consequences for the investigation and prosecution of terrorism offences and to the identification and investigation of threats to Australia's security more broadly.

This Chapter deals with matters considered by the INSLM to be the more pressing of these issues, and where appropriate for the INSLM to do so, to make recommendations to remedy problems with the legislation, including gaps in legislative coverage of counter-terrorism matters.

VI.2 Proscription of terrorist organizations

For the proscription by regulation of terrorist organizations under the Criminal Code,¹⁹⁹ it is standard practice to specify the primary name of the terrorist organization along with its known aliases. For example, the regulation proscribing Syrian based group Jabhat al-Nusra states:-

5 Terrorist organisation—Jabhat al-Nusra

(1) For paragraph (b) of the definition of *terrorist organisation* in subsection 102.1(1) of the Code, the organisation known as Jabhat al-Nusra is specified.

(2) For subsection (1), Jabhat al-Nusra is also known by the following names:

(a) Al-Nusra Front;

(b) Al-Nusrah Front;

(c) Al-Nusrah Front for the People of the Levant;

(d) Jabhat al-Nusra li-Ahl al-Sham Min Mujahideen al-Sham fi Sahat al-Jihad;

(e) Jabhat al-Nusrah;

(f) Jabhet al-Nusra;

(g) Support Front for the People of Syria from the Mujahideen of Syria in the Places of Jihad;

(h) The Victory Front.²⁰⁰

The proscription by regulation of terrorist organizations under the Criminal Code should include

¹⁹⁹ under Division 102 of Part 5.3 of the Criminal Code

²⁰⁰ reg 5, *Criminal Code (Terrorist Organisation—Jabhat al-Nusra) Regulation 2013* (Cth)

known aliases. It is the INSLM's view that as new aliases become known, the proscribing regulation should be capable of being amended without the need for the proscription process to be re-done. The AFP submitted to the INSLM that:-

Under the current regime, when an organisation is proscribed as a terrorist organisation, the relevant regulation names the group and lists its known aliases. However, there is no mechanism to amend the regulation to include new aliases the organisation has adopted after the regulation is made. For example, the *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2013* (the ASG Regulation) lists eight names that the Abu Sayyaf Group is known as. However, if Abu Sayyaf were to operate (i.e. recruit, fight or receive resources) under a different name, this name would not be covered by the ASG Regulation. Rather, the ASG Regulation would have to be revoked and the listing criteria revisited for Abu Sayyaf reconsidered, and then the additional alias could be included in the new regulation.

If the alias is not included in the regulations, should a prosecution be commenced in relation to the new alias of the organisation (e.g., a Division 102 offence), the court would need to be satisfied that the organisation met the criteria in section 102.1(a). Further, certain offences are not available where the organisation is not a proscribed terrorist organisation.²⁰¹

The INSLM agrees that the law should be altered so that proscription by regulation means the body with that name and any other names (aliases) as originally listed, as well as any other aliases that the authorities discover from time to time and list in subsequent regulations. The process for listing such new aliases should be a far more streamlined process than currently exists for initial proscription. A regulation proscribing a terrorist organization for the purposes of para (b) of the definition of "terrorist organisation" in subsection 102.1(1) of the Criminal Code, should be capable of being amended to add a new alias or aliases where the Attorney-General is satisfied that the alias or aliases are those of the listed terrorist organization (that is, they are in fact aliases of the listed terrorist organization and not separate organizations).

The Governor-General should be permitted to make the regulation without the need for the Attorney-General to be satisfied that the organization meets the statutory criteria for proscription under the Criminal Code. A decision to include a new alias or aliases should be made without consultation of the States or Territories unless there is a demonstrated need to do so. Where there is consultation, this should not unduly delay the making of the regulation.²⁰²

Recommendation VI/1: A regulation proscribing a terrorist organization for the purposes of para (b) of the definition of "terrorist organisation" in subsection 102.1(1) of the Criminal Code, should be capable of being amended to add a new alias or aliases where the Attorney-General is satisfied that the alias or aliases are those of the listed terrorist organization (that is, they are in fact aliases of the listed terrorist organization and not separate organizations). The Governor-General should be permitted to make the regulation without the need for the Attorney-General to be satisfied that the organization meets the statutory criteria for proscription under the Criminal Code. A decision to include a new alias or aliases should be made without consultation of the

²⁰¹ AFP submission to the INSLM, 21st March 2014

²⁰² see IV.3 of the INSLM's Third Annual Report, esp Recommendation IV/1

States or Territories unless there is a demonstrated need to do so. Where there is consultation, this should not unduly delay the making of the regulation.²⁰³

VI.3 Police powers to investigate terrorism offences

The INSLM has discussed with the AFP how the investigatory tools available to police for the investigation of terrorism offences could be made more effective. The INSLM considers the following amendments would be appropriate and would enhance the counter-terrorism capabilities of police. Recommendations on the use of surveillance devices are found in Chapter IV.

Delayed notification search warrants

The AFP expressed its concern to the INSLM that “the lack of covert search warrant powers at the Commonwealth level represents an impediment to serious criminal investigations, including counter terrorism operation”. Delayed notification warrants are similar in their powers to traditional search warrants, with the exception that they do not require the occupier to be served with notice of the search for a certain period after the warrant was executed. This enables police to “enter and re-enter premises, conduct searches, and examine, test, record, substitute or seize contents during that period, without the knowledge of the occupier”.²⁰⁴ Importantly, when notice of the warrant is eventually given to the occupier, a copy of the warrant will be attached and will give the occupier information regarding what was authorised.²⁰⁵

The AFP noted that:-

During the execution of an ordinary search warrant, the occupier of the premises being searched must be given a copy of the warrant. The execution of ordinary search warrants immediately notifies suspects of police interest in their activities, and provides an opportunity for persons to:

- destroy or relocate evidence
- change planned criminal activities
- relocate criminal operations, and/or
- adopt counter surveillance measures.

Notification of the search may also alert associates who are not known yet to police allowing them to take active measures to avoid detection.

Covert search warrant schemes are used not only as an evidentiary gathering tool, but also as an element of threat mitigation and management. Delayed notification searches

²⁰³ see IV.3 of the INSLM’s Third Annual Report, esp Recommendation IV/1

²⁰⁴ Report of the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (February 2007) para 2.30

²⁰⁵ Report of the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (February 2007) para 2.42

allow police to gain an understanding of a suspect's operational readiness to carry out a terrorist act and whether the threat should be considered imminent. This information would obviously then inform the use of other tools available to police, including increased surveillance, electronic monitoring or arrest and charge. For counter terrorism investigations in particular, there is a real need for police to balance the risks of moving to resolution too early (and having a lack of evidence to prosecute) compared to moving too late and creating a high chance of a successful terrorist act.

Enabling the AFP to have access to delayed notification search warrants would enable a greater range of covert police activity against suspects, particularly those suspected of preparing to travel to Syria. The power would also allow for searches of electronic material related to travel and objectives to be undertaken in a potentially decrypted format without alerting the suspect to police interest in their activities.²⁰⁶

The INSLM sees no reason why the AFP should not be able to access a delayed notification search warrant scheme for the investigation of terrorism offences. Such a scheme would increase the capability of the AFP to investigate and prosecute terrorism offences and would improve the effectiveness of Australia's counter-terrorism laws. The INSLM is advised that the introduction of such a scheme would reflect existing State and Territory powers with the use of covert style search warrants available in New South Wales, Victoria, Queensland, Northern Territory and Western Australia having enacted covert or delayed notification search warrant legislation.²⁰⁷ Under some State schemes, notification of the search is delayed for a period of up to six months (which can be extended under particular circumstances). Delayed notification search warrant schemes also operate in Canada, the USA, and the UK.

A delayed notification search warrant regime was previously introduced into the Commonwealth Parliament in 2006 (the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (Cth)). The Bill was introduced in the Senate on 29th November 2006 and was subsequently referred to the Senate Standing Committee on Legal and Constitutional Affairs which reported on 7th February 2007. While the Committee recommended passage of the Bill, the Bill lapsed when Parliament was prorogued in 2007. The Committee recommended the offences in relation to which delayed notification search warrants may be issued to offences involving terrorism or organised crime; or death or serious injury with a maximum penalty of life imprisonment.²⁰⁸ The then Minister for Justice and Customs, Senator the Hon Chris Ellison stated in the Second Reading Speech:-

[T]he bill will introduce a delayed notification search warrants scheme. This will enable police officers to get search warrants that will allow the covert entry and search of premises to prevent or investigate Commonwealth terrorism offences and a limited range of other serious Commonwealth offences, in cases where keeping the existence of an

²⁰⁶ AFP Submission to the INSLM, 21st March 2014

²⁰⁷ Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW)(terrorism), Part 5 of *Division 4 of the Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)(other crime types); Chapter 9 of the *Police Powers and Responsibilities Act 2000* (QLD); Division 4 of the *Terrorism (Emergency Powers) Act (NT)*; sec 6 of the *Terrorism (Community Protection) Act 2003* (VIC); Part 3 of the *Terrorism (Extraordinary Powers) Act 2005* (WA)

²⁰⁸ Report of the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (February 2007) Recommendation 6

investigation confidential could be critical to its success. The scheme will add a covert investigative tool to the suite of tools police can use to investigate terrorism and other serious criminal offences. The warrants will allow the examination of physical evidence, such as a suspect's computer, diaries and correspondence, so that police can identify associates and obtain evidence. It will be a feature of the new scheme that police will have to give notice of the search without tipping off the suspected offenders that their activities are under investigation to the occupier of premises when operational sensitivities allow.²⁰⁹

The 2006 Bill proposed a three-part test which must be satisfied before the warrant could be issued. The Bill required that the applicant, and then the issuing authority, must be satisfied that:-

- there are reasonable grounds to suspect that one or more relevant offences have been, are being, are about to be or are likely to be committed;
- entry to and search of the premises will substantially assist in the prevention of, or investigation into, those relevant offences; and
- there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.²¹⁰

The INSLM considers this to be an appropriate test for delayed notification search warrants to be issued for the investigation of terrorism and foreign incursions offences.

Recommendation VI/2: A delayed notification search warrant scheme for the investigation of terrorism offences should be enacted.

Arrest threshold for terrorism offences

The general provision in sec 3W of the *Crimes Act 1914* (Cth) for the ground justifying arrest is reasonable grounds to believe in the commission of an offence by the relevant person.

There is, obviously, very powerful justification to apply that general rule to cases of terrorism offences. However, the AFP has raised the particular quality of efforts to counter terrorism, described as “proactive and prevention focused”.²¹¹

It may be doubted whether a special rule, evidently intended to facilitate arrest, should be promulgated for terrorism, compared to (ordinary) conspiracy to murder. But the thoughtful proposal advanced by the AFP for consideration by the INSLM draws to attention that the general rule for justifying arrest is by no means universally expressed. NSW stipulates reasonable grounds to suspect rather than to believe.²¹² QLD, WA, SA and the ACT provide in similar terms to NSW; Vic, Tas and NT are similar to the Commonwealth test.

This comparison within Australian jurisdictions produces, so the AFP submits, the incongruity of

²⁰⁹ Senate Hansard, 29th November 2006 1

²¹⁰ proposed sec 3SD

²¹¹ *AFP Submission to the INSLM*, 21st March 2014 para 107

²¹² sec 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

NSW police being entitled to arrest on reasonable grounds to suspect a mere assault, and the AFP needing reasonable grounds to believe a terrorist offence has been committed in order to arrest for it.

Further, the AFP has drawn to attention the position in the UK, which involves both generally and for terrorism reasonable grounds to suspect the commission of an offence.²¹³ The AFP draws to attention Art 5 of the ECHR, which also requires reasonable grounds to suspect as the test for arrest. These comparative instances suffice to dispel concern that liberalizing the test for arrest would disturb appropriate social balances. Indeed, in the INSLM's view, it may be that the semantic distinction between "suspect" and "believe" has escaped substantive attention.

Be that as it may, the INSLM regards the AFP's suggestions as well founded, sensible and of some practical utility. This does not mean that the INSLM supports a special rule for terrorism offences in relation to arrest: that would be hard to justify.

Recommendation VI/3: Consideration should be given to examining the merits of the "reasonable grounds to believe" grounds for the power of arrest, with a view to generally amending it to "reasonable grounds to suspect", in sec 3W of the Crimes Act 1914.

Crimes Act information gathering powers for terrorism offences

If an authorized AFP officer considers on reasonable grounds that a person has documents that are relevant to, and will assist, the investigation of a 'serious terrorism offence' then the officer may give the person a written notice requiring the person to produce the documents.²¹⁴ The notice must "state that the person must comply with the notice as soon as practicable".²¹⁵

For serious non-terrorism offences an authorized AFP officer may apply to a Federal Magistrate for a notice to produce documents if the AFP officer considers on reasonable grounds that a person has documents that are relevant to, and will assist, the investigation of a serious offence.²¹⁶ If satisfied of the prescribed matters, the Magistrate may give the person a written notice requiring production of the documents. The notice must "state that the person must comply with the notice within 14 days after the day on which the notice is given".²¹⁷

The power to obtain documents relating to serious terrorism offences in sec 3ZQN of the Crimes Act 1914 should provide for compliance with the notice within 14 days in order to operate as an effective investigatory power. There is no reason why documents would need to be obtained within 14 days for the investigation of a serious offence but not for the investigation of a serious terrorism offence.

Recommendation VI/4: The power to obtain documents relating to serious terrorism offences in sec 3ZQN of the Crimes Act 1914 should provide for compliance with the notice as soon as practicable and no later than 14 days.

²¹³ sec 24 of the *Police and Criminal Evidence Act 1984* (UK) and sec 41 of the *Terrorism Act 2000* (UK)

²¹⁴ sec 3ZQN of the Crimes Act 1914

²¹⁵ para 3ZQN(3)(e) of the Crimes Act 1914

²¹⁶ sec 3ZQO of the Crimes Act 1914

²¹⁷ para 3ZQO(4)(e) of the Crimes Act 1914

AFP submitted that “banks only have an obligation to assist law enforcement when a specific link between a bank and a person is known, generally through the identification of an account number. The proposal would allow a more targeted approach to the exercise of other powers” such as the notice power discussed above. The AFP also submitted that “the AFP does not have a clear basis on which to actively monitor bank accounts suspected of being linked to terrorist groups or activities. Requests for financial information are usually made across the major banks and financial institutions at set intervals. This can lead to gaps in information, and reduce the AFP’s ability to gather evidence in a timely manner”.

The AFP has drawn the INSLM’s attention to UK and European comparative provisions to enable monitoring of bank accounts, subject to safeguards.²¹⁸ There is a respectable view²¹⁹ that this approach “is probably the most effective investigatory instrument for this aspect of counter terrorism”.

Recommendation VI/5: Consideration should be given to enacting authorization for the AFP to obtain information concerning the existence of specified accounts, and to permit continuous monitoring of activities in relation to them, subject to warrant-style safeguards.

VI.4 Definition of terrorism offence under the Crimes Act 1914 and ASIO Act

The definition of “serious terrorism offence” in subsec 3C(1) of the Crimes Act 1914 applies for the purposes of Part 1AA of the Crimes Act 1914 (search, information gathering, arrest and related powers). Serious terrorism offence means a “terrorism offence” except the offence of associating with a terrorist organization under sec 102.8 or offences against the control order and preventative detention order regimes in Divisions 104 and 105 of Part 5.3, or an offence against a law of a State or Territory which has the characteristics of a terrorism offence (and in the case of a State, also has a federal aspect).²²⁰ Subsection 3(1) of the Crimes Act 1914 defines “terrorism offence” to be an offence against Subdivision A of Division 72 of the Criminal Code [International terrorist activities using explosives and lethal devices], or Part 5.3 of the Criminal Code [Terrorism].

The consistency of approach in the definition of terrorism offence, and the offences which should be included in any such definition, was the subject of report and recommendation in the INSLM’s Third Annual Report.²²¹ The INSLM reiterates that there is no reason in principle or policy to distinguish UN Charter Act terrorism financing offences which implement Australia’s international counter-terrorism obligations under 1373 and relate to potentially very serious terrorism financing activity, from terrorism offences under the Criminal Code.

The Foreign Incursions Act criminalizes politically motivated violence, including conduct that would fit within the meaning of “terrorist act” under the Criminal Code. The definition of “politically motivated violence” under sec 4 of the ASIO Act includes “acts that are offences

²¹⁸ *AFP Submission to the INSLM*, 21st March 2014 para 104

²¹⁹ Council of Europe, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Countering of Terrorism, April 2013

²²⁰ see paras (a)-(c) of the definition of “serious terrorism offence” in subsec 3C(1) of the Crimes Act

²²¹ III.21-22 and Recommendations III/15-19 of the INSLM’s Third Annual Report. The INSLM’s position regarding these Recommendations remains the same.

punishable under the [Foreign Incursions Act]”.²²² The Foreign Incursions Act also criminalizes engaging in hostile activity with an organization which is a proscribed terrorist organization under the Criminal Code. There is no reason in principle or policy to distinguish between the offences under the Foreign Incursions Act, which cover potentially very serious terrorist activity, from terrorism offences under the Criminal Code.

The INSLM is strongly of the view that offences against the Foreign Incursions Act, Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act should be included in the definition of “terrorism offence” under subsec 3(1) of the Crimes Act 1914.

It is appropriate that these offences be defined as “terrorism offences” for the purposes of all provisions in the Crimes Act 1914 which deal with terrorism offences. The proposed amendment to subsec 3(1) of the Crimes Act 1914 will achieve this. In particular, it will apply the provisions regulating access to bail before conviction and the imposition of non-parole periods in sentencing for persons charged with or convicted of terrorism offences; the search, information gathering and arrest powers affecting persons suspected of terrorism offences; and the provisions for the investigation of terrorism offences and questioning and detention of persons arrested for terrorism offences, to terrorism related offences under the UN Charter Act and Foreign Incursions Act offences.

Recommendation VI/6: The definition of “terrorism offence” in subsec 3(1) of the Crimes Act 1914 should be amended to include an offence against the Foreign Incursions Act, an offence against Part 3 of the UN Charter Act insofar as it relates to terrorism, and an offence against Part 4 of the UN Charter Act.

For the same reasons, there should be consistency of approach in the definition of “terrorism offence” under sec 4 of the ASIO Act which defines “terrorism offence” to mean an offence against Subdivision A of Division 72 (International terrorist activities using explosive or lethal devices) or Part 5.3 (Terrorism) of the Criminal Code. This is the same as the definition of “terrorism offence” under subsec 3(1) of the Crimes Act 1914.

The definition in sec 4 of the ASIO Act applies to ASIO’s power to compel answers to questioning under Division 3 of Part III of the ASIO Act where “there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence”.²²³ As discussed above, there is no policy basis to exclude from the definition of “terrorism offence” in sec 4 of the ASIO Act, an offence against Part 3 of the UN Charter Act insofar as it relates to terrorism, or Part 4 of the UN Charter Act.²²⁴ This was the subject of recommendation in the INSLM’s Third Annual Report.²²⁵ Nor is there a policy basis to exclude from the definition of “terrorism offence” in sec 4 of the ASIO Act, an offence against the Foreign Incursions Act.

²²² para (c) of the definition of “politically motivated violence” under sec 4 of the ASIO Act

²²³ paras 34D(4)(a) and 34E(1)(b) (QWs) and paras 34F(4)(a) and 34G(1)(b) (QDWs) of the ASIO Act. In addition to this criterion, there are other mandatory criteria that must be met before such powers can be exercised. The INSLM’s previous review of these powers, and recommendations in relation to them, are in Chapters IV and V, and Recommendations IV/1-IV/8 and V/1-V/2, of the INSLM’s Second Annual Report.

²²⁴ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²²⁵ see III. 21 and Recommendation III/15 of the INSLM’s Third Annual Report

Recommendation VI/7: The definition of “terrorism offence” in sec 4 of the ASIO Act should be amended to include an offence against the Foreign Incursions Act.

VI.5 Post-conviction conditions and monitoring of terrorist convicts

Recommendation II/4 of the INSLM’s Second Annual Report was for consideration of authorizing control orders against persons convicted of terrorism, after their release from any imprisonment to which they have been sentenced, if they are shown to have been unsatisfactory with respect to their rehabilitation and continued dangerousness. The intention was to make available a form of protection against the threat posed by such proven offenders, upon their release into the community. The proposal was for a much more simply obtained form of control order than is presently the case, including for such proven offenders. It drew on established analogues with respect to recalcitrant sexual offenders. When the recommendation was made, there were about ten terrorist convicts already released, and about thirteen still imprisoned, of whom about three are quite likely to be released in the next five years.

As outlined in the INSLM’s Third Annual report, indirect support for such an approach can be seen in the following UK experience.²²⁶ The Court of Appeal of England and Wales has considered notification requirements (imposed for 10 years from the date of release from imprisonment) on convicted terrorists. The Court held the notification requirements²²⁷ to be appropriate and not disproportionate, and upheld them as compliant with the European Convention on Human Rights.²²⁸ The Court held that the scheme is not disproportionate when set against the legitimate aim of the prevention of terrorism and considering “the relatively moderate intrusion caused by the interference with the private lives of convicted terrorists”.²²⁹

The Court held that terrorism offences fall into a special category and that “even if it is the case that there may be exceptional cases [where a terrorist offender can be said to pose] “no significant future risk”, their possible existence does not preclude a general requirement of relatively moderate interference in a context such as this”.²³⁰ The Court held it was “important to keep in mind the gravity of the disorder or crime which is being sought to be prevented” finding that terrorism offences have unique features which compound concern (acts committed by someone motivated by extreme political or religious fanaticism) and if anything calls for a precautionary approach it is counter-terrorism.²³¹

The High Court of England and Wales has recently dismissed a challenge to two parole conditions imposed on a convicted terrorist on his release from prison.²³² The Court held the conditions were imposed for the statutory purpose of protecting the public, and preventing reoffending. The court held that any interference with the claimant’s rights under the *European*

²²⁶ see Ch I.4 of the INSLM’s Third Annual Report

²²⁷ The notification requirements are extensive and include notification to police of a range of personal information including home address, travel plans etc and the person must make the notification in person at a police station and must allow the police to take his or her fingerprints or photographs when attending the police station. See secs 47-52 of the *Counter-Terrorism Act 2008* (UK)

²²⁸ *R(Mohamed Irfan) v Secretary of State for the Home Department* [2012] EWCA Civ 1471

²²⁹ [2012] EWCA Civ 1471 per Maurice Kay LJ at [14] (Munby and Tomlinson LLJ agreeing)

²³⁰ Ibid

²³¹ [2012] EWCA Civ 1471 at [12]-[13]

²³² *R (Mohammed Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin)

Convention on Human Rights (“**ECHR**”) was not disproportionate and would be justified as necessary in a democratic society and proportionate given that the claimant had been convicted of a terrorism offence. In particular, the court was satisfied that the conditions were imposed to facilitate the effective management of risk in respect of an extremist offender and were in accordance with the Probation Instruction which sets out mandatory guidelines for probation decisions.

Prior to his release from prison, the claimant was assessed as posing a “high risk of causing serious harm”. The court stated the following regarding the Probation Instruction²³³ which guides the decision making for licence [parole] decisions:-

13. The section of the Policy on conditions for extremist offenders makes it clear (in paragraph 2.25) that additional conditions must only be used “where they are necessary and proportionate”...Paragraph 2.15 states that “necessary means that the condition is necessary to enable the Offender Manager to manage the risks identified within the risk management plan, and no other less onerous risk will suffice”. The condition “must be needed to allow for effective management of the offender”. “Proportionate means that any restriction or loss of liberty arising from the imposition of the condition is proportionate to the level of risk presented by the offender” and “no other less intrusive means of addressing the risk is available or appropriate”.

...

15. The additional licence conditions...“may be used...providing proportionality is met”. It also states that extremist offenders may pose specific risks which cannot be sufficiently managed by the application of conditions designed for other offending groups and the [additional conditions were] prepared to address the risks that had been identified...”. It is also made clear that a case must be made for the application of the additional conditions to each individual offender, and the Offender Manager must have clear evidence that they are necessary and proportionate, and should review all conditions on a regular basis and evidence that this has been done.²³⁴

The two additional conditions imposed on the claimant were not standard parole conditions, but were the pro forma additional licence conditions set out in the policy for extremist offenders. They were imposed because of the nature of the offending conduct (terrorism). The first condition was a “non-association requirement” that the claimant not attend meetings or gathering other than those convened solely for worship without prior approval. The second was a “restricted activity requirement” that the claimant not have any printed, handwritten or electronically recorded material which a) promotes religious or ethnic hatred, b) celebrates, justifies or promotes acts of violence, or c) contains information about military or paramilitary technology, weapons, techniques or tactics, without prior approval.

²³³ Which provides that “[T]he aims of the licence [parole] period are to protect the public, to prevent re-offending and to secure the successful re-integration of the offender into the community. Licence conditions should be preventative as opposed to punitive and must be proportionate, reasonable and necessary”. *Probation Instruction 07/2011*, issued 21st April 2011, para 1.2

²³⁴ [2014] EWHC 373 (Admin) Per Beatson LJ at [13] and [15]

The court held that the nature of the offending and evidence from the circumstances of the offence justified the need for the two additional conditions. The conditions were necessary and proportionate to manage the risk posed by the claimant’s offending history. The court held that, assuming that Arts 8, 10 and 11 of the ECHR²³⁵ are engaged, the question was whether the restrictions are justified. The court then turned to “the question of justification and the requirements that the restrictions are necessary in a democratic society and that a fair balance has been struck between the interests of society and those of the claimant”.²³⁶ The court held that:-

[71] Giving the impugned conditions a purposive interpretation, and subject to two qualifications, I am satisfied that the defendant has demonstrated that requiring this claimant, who has been convicted of a terrorist-related offence, to comply with these conditions is necessary and strikes a fair balance.

[72] It is important to recall the nature of release on licence...the submissions on behalf of the claimant made no distinction between the position of an offender in whom the state has a legitimate interest in rehabilitation, and the position of a citizen without a blemish on his record exercising one of the fundamental freedoms of all citizens which are protected by the ECHR. There was also little recognition of the extensive experience built up by the defendants in managing extremist offenders following their release on licence...²³⁷

The court gave particular attention to the offence for which the claimant was convicted – being the dissemination of terrorist publications.²³⁸ In order to be convicted of this offence, a defendant is required to intend the effect of his conduct to be a “direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism”, “the provision of assistance in the commission or preparation such acts”, or to be reckless as to whether his conduct has one of these effects. The court held that:-

...It is in the light of [that] offence that the claimant was assessed as posing a “High Risk of Causing Serious Harm”. Conditions designed to prevent him possessing such material and controlling the meetings he can attend are manifestly for the purposes of protecting the public and preventing re-offending, the first two of the three purposes which section 250(8) states the Secretary of State must have regard to in exercising her powers to prescribe conditions. The conditions themselves also relate to these purposes...²³⁹

The UK experience demonstrates how parole conditions and reporting requirements for terrorist

²³⁵ Art 8: Right to respect for private and family life, Art 10: Freedom of expression and Art 11: Freedom of assembly and association.

²³⁶ [2014] EWHC 373 (Admin) Per Beatson LJ at [71]

²³⁷ [2014] EWHC 373 (Admin) Per Beatson LJ at [71] and [72]

²³⁸ Those publications are defined by section 2(3) of the *Terrorism Act 2006* (UK) as publications containing matter which is likely to be understood as a direct or indirect encouragement or inducement to the commission, preparation or instigation of acts of terrorism, or to be useful in the commission or preparation of such acts, and made available wholly or mainly for the purpose of being so useful. Section 2(4) provides that material that is likely to be understood as indirectly encouraging the commission or preparation of acts of terrorism includes material which “glorifies” such acts or from which a person could reasonably be expected to infer that such acts are being glorified and should be emulated.

²³⁹ [2014] EWHC 373 (Admin) Per Beatson LJ at [73]

convicts can be applied as a proportionate counter-terrorism measure.

The INSLM's position found in Recommendation II/4 of the INSLM's Second Annual Report remains the same. That is, consideration should be given to authorizing control orders against persons convicted of terrorism, after their release from any imprisonment to which they have been sentenced, if they are shown to have been unsatisfactory with respect to their rehabilitation and continued dangerousness.

In addition, the INSLM considers there should be a scheme for the registration and management of terrorist convicts across Australia following their release from prison. The scheme for convicted terrorists should provide for reporting obligations to be imposed on terrorist convicts for a significant period after their release and for the sharing of intelligence and information about terrorist convicts between all Australian jurisdictions.

This could be modelled on the Australian National Child Offender Register ("ANCOR"). The ANCOR scheme "requires convicted offenders to provide and maintain basic information about their living, travel and working arrangements. ANCOR provides a tool for police to register, case manage and share information about registered persons, both with domestic police and to overseas jurisdictions".²⁴⁰ The AFP submitted to the INSLM that:-

There are benefits to establishing an ANCOR-like scheme for convicted terrorist offenders. The motivation of terrorist offenders often remains after finishing any custodial sentence. Being a political/religiously motivated crime type, removing the impetus for further illegal involvement is harder than for 'normal' crime types.

The AFP is aware of convicted terrorist offenders re-engaging in terrorist activity following their release from prison. This behaviour is often short of direct engagement in criminal behaviour where police can interdict, but still represents a risk to community safety. In addition, those convicted of terrorist offences can be viewed by their peers as having credibility due to their perceived 'skills and knowledge', and act as role models to persons at risk of radicalisation.²⁴¹

Recommendation VI/8: There should be a scheme for the registration and management of terrorist convicts across Australia following their release from prison. The scheme for convicted terrorists should provide for reporting obligations to be imposed on terrorist convicts for a significant period after their release and for the sharing of intelligence and information about terrorist convicts between all Australian jurisdictions.

Part IB of the Crimes Act 1914 governs the release and parole of federal offenders (persons who are convicted of a Commonwealth offence, including terrorism offences). To improve the effectiveness of the current system for parole of terrorist convicts, the INSLM supports a review of the current system for parole of federal offenders to improve the provisions dealing with the revocation of parole for terrorist convicts and to ensure police officers have appropriate powers to arrest a terrorist convict who has breached their parole conditions.

²⁴⁰ AFP Submission to the INSLM, 21st March 2014

²⁴¹ AFP Submission to the INSLM, 21st March 2014

Outside of emergency circumstances, before a terrorist convict who has breached their parole conditions can be arrested, the convict must be provided with a notification of an intention to revoke parole by the Attorney-General. The convict then has fourteen days to respond and provide advice as to why parole shouldn't be revoked. The INSLM has been made aware that this is at odds with the State and Territory procedures for dealing with parole violations and the revocation of parole. The INSLM agrees that, given the nature of terrorist offending and the potential seriousness of parole violations, the AFP should have the ability to revoke the parole of a terrorist convict without notice, with or without a warrant. The ability to revoke parole without notice should not be conditional on the emergency circumstances set out in subsec 19AU(2) of the Crimes Act, and should be available for any breach of parole.

It may be that the revocation is a temporary one awaiting approval from the Attorney-General. The AFP could be given the power to detain a person suspected of breaching their parole for a certain maximum period pending a decision by the Attorney-General whether to revoke parole. Minor parole violations could be dealt with by providing that a parole violation must represent a threat to public safety before the AFP can detain "on the spot".

VI.6 ASIO authorized intelligence operations scheme

The INSLM supports a legislative scheme (authorized intelligence operations scheme) for intelligence operations carried out by ASIO officers and their agents. The introduction of such a scheme into the ASIO Act was considered by the Government and the proposal was reviewed by the Joint Parliamentary Committee on Intelligence And Security ("PJCIS"). Following its review of the proposed scheme, the PJCIS recommended amending the ASIO Act to create an authorized intelligence operations scheme.²⁴² Such a scheme would provide ASIO officers and its human sources with protection from criminal and civil liability for certain conduct in the course of authorized intelligence operations.

Such a scheme is already available for use by law enforcement agencies,²⁴³ for example, the controlled operations scheme under Part 1AB of the Crimes Act 1914.²⁴⁴ The proposed scheme

²⁴² Recommendation 28, *Parliamentary Joint Committee on Intelligence and Security Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, June 2013 "The Committee recommends that the *Australian Security Intelligence Organisation Act 1979* be amended to create an authorised intelligence operations scheme, subject to similar safeguards and accountability arrangements as apply to the Australian Federal Police controlled operations regime under the *Crimes Act 1914*".

²⁴³ Commonwealth, State and Territory controlled operations schemes provide statutory immunity from prosecution and indemnity from civil liability for law enforcement officers and civilian participants for what would otherwise be unlawful activity.

²⁴⁴ The *Crimes Amendment (Controlled Operations) Act 1996* (Cth) introduced Part 1AB into the Crimes Act 1914, which provided a statutory basis for controlled operations. This was in response to the decision of the High Court in *Ridgeway v R* (1995) 184 CLR 19. In that case, Ridgeway had contacted a Malaysian man named Lee to discuss the purchase of heroin in Malaysia. Unknown to Ridgeway, Lee was a police informer. Lee passed on the information and the AFP and the Royal Malaysian Police Force arranged for the heroin to be purchased and brought into Australia, to clear Customs and then be passed to Ridgeway who was arrested. As a result of the controlled operation, Ridgeway was convicted of having a prohibited import (traffickable quantity of heroin) in his possession without reasonable excuse. Ridgeway appealed against his conviction to the High Court. By a majority (6-1), the Court found that the evidence of Ridgeway's offence was so tainted by the illegal police operation, that it should be excluded. The Court quashed the conviction and ordered a permanent stay of the proceedings against him. The Court found that the *Customs Act 1901* (Cth) provided no exemption for the conduct engaged in by the police and stated

for ASIO would be modelled on the Commonwealth controlled operations scheme “with appropriate modifications and safeguards that recognise the scheme would operate in the context of covert intelligence gathering investigations or operations”.²⁴⁵

The INSLM considers it to be not only entirely appropriate for ASIO to be able to access such a scheme for its officers and human sources but also necessary for ASIO to perform its statutory functions, including its counter-terrorism rôle. The need for ASIO to be able to access such a scheme for the protection of their officers and human sources is particularly acute given the introduction of inchoate or precursor terrorism offences under the Criminal Code, which criminalize conduct at a much earlier point than has traditionally been the case. In *Lodhi v R*, Spigelman CJ described the criminal responsibility in these offences thus:-

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge.²⁴⁶

Law enforcement officers have successfully used controlled operations schemes in the investigation and prosecution of serious crimes, including serious organized criminal activity such as the smuggling of people, drugs and firearms, and to disrupt organized criminal groups. The INSLM considers that the introduction of such a scheme for ASIO investigations would provide an effective counter-terrorism investigatory tool and agrees with AGD that a scheme would “significantly assist covert intelligence operations that require undercover ASIO officers or human sources to gain and maintain access to highly sensitive information concerning serious threats to Australia and its citizens”.²⁴⁷

Not only would the introduction of a scheme improve the counter-terrorism capabilities of ASIO, it would also provide legitimate protection to ASIO officers for activities undertaken in the course of the performance of their official duties, and for human sources acting under the direction of those officers. The INSLM is satisfied that reliance on prosecutorial discretion for ASIO officers and human sources is neither an appropriate nor viable course to take in resolving the problem of criminal liability for activities done by ASIO officers and human sources in furtherance of the performance of ASIO’s functions. As AGD explained:-

While a general prosecutorial discretion is available, decisions on whether to pursue a prosecution are determined on a case-by-case basis by the relevant Director of Public Prosecutions. It is not normal practice for the Director of Public Prosecutions to give

that exemptions for controlled operations were a matter for Parliament. See further: Australian Parliamentary Library, *Bills Digest 92 1995-96 Crimes Amendment (Controlled Operations) Bill 1996*

²⁴⁵ Attorney-General’s Department, *Equipping Australia against emerging and evolving threats*, Discussion Paper, July 2012, p46

²⁴⁶ *Lodhi v R* [2006] NSWCCA 121 per Spigelman CJ at [66]

²⁴⁷ Attorney-General’s Department, *Equipping Australia against emerging and evolving threats*, Discussion Paper, July 2012, p46.

advance indemnities or immunities from future prosecution. In addition, there is no equivalent mechanism to provide indemnity from civil proceedings.²⁴⁸

It is worth noting that ASIO's statutory functions relate to intelligence and security and are very different to the functions of law enforcement agencies. Accordingly, the scheme for ASIO officers and human sources will need to reflect ASIO's operating environment and the nature of security investigations and intelligence operations.

Recommendation VI/9: Consideration should be given, as a matter of priority to the introduction of a legislative scheme to provide ASIO officers and ASIO human sources with protection from criminal and civil liability for certain conduct in the course of authorized intelligence operations.

VI.7 Collection of intelligence for counter-terrorism investigations

The INSLM has been made aware that existing legislative requirements under the *Intelligence Services Act 2001* (Cth) ("**Intelligence Services Act**") prevents those intelligence agencies governed by the Intelligence Services Act from collecting or producing intelligence on an Australian person where the agency is cooperating with ASIO in the performance of an ASIO function unless a ministerial authorization under sec 9 of the Intelligence Services Act has been given for the collection and production of that intelligence.

The Intelligence Services Act sets out the functions of the Australian Secret Intelligence Service ("**ASIS**"), the Defence Imagery and Geospatial Organisation ("**DIGO**") and the Australian Signals Directorate ("**ASD**") (ASD was formerly Defence Signals Directorate ("**DSD**") and is referred to in the Act under its former name).²⁴⁹ The functions of all these agencies include obtaining intelligence "about the capabilities, intentions or activities of people or organisations...in accordance with the Government's requirements" and to communicate that intelligence "in accordance with the Government's requirements".²⁵⁰ A further function of each of the agencies is to "cooperate with and assist bodies referred to in section 13A in accordance with that section".²⁵¹ Section 13A is headed "Co-operation with intelligence agencies etc. in connection with performance of their functions" and provides that an Intelligence Services Act agency (ASIS, DIGO or ASD) "may co-operate with and assist" another agency, ASIO, or a Commonwealth or State authority prescribed by regulation.²⁵²

However, the agency may only do so subject to any arrangements made or directions given by the responsible Minister and on the request of the head of the body with whom the agency is co-operating.²⁵³

It seems odd that an agency should have a legislative function to co-operate with and assist other agencies yet have discretion as to whether or not to fulfil this function (an agency "may co-

²⁴⁸ Attorney-General's Department, *Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into Potential Reforms of Australia's National Security Legislation*, Submission No 36, p6

²⁴⁹ secs 6, 6B and 7 of the Intelligence Services Act

²⁵⁰ paras 6(1)(a) and (b), 6B(1)(a) and (d), and 7(1)(a) and (b), of the Intelligence Services Act

²⁵¹ paras 6(1)(da), 6B(1)(f), and 7(1)(f) of the Intelligence Services Act

²⁵² subsec 13A(1) of the Intelligence Services Act

²⁵³ subsec 13A(2) of the Intelligence Services Act

operate with and assist...”²⁵⁴). ASIS, DIGO or ASD must obtain a ministerial authorization before undertaking an activity for the purpose of producing intelligence on an Australian person.²⁵⁵ Section 9 of the Intelligence Services Act sets out the statutory requirements for the giving of a ministerial authorization.

While the Intelligence Services Act enables the Minister responsible for ASIS, DIGO or ASD to authorize specified activities which may involve producing intelligence on an Australian person where the agency is cooperating with ASIO, the statutory requirements for the giving of a ministerial authorization under sec 9 will apply. This legislative régime which applies to ASIS, DIGO and ASD under the Intelligence Services Act is different to the régime which applies to ASIO under the ASIO Act when the agency produces intelligence on Australians. Generally speaking, ASIO can collect intelligence about an Australian of security interest, in the performance of its functions, without the need for ministerial or other external approval unless there is a legislative requirement that such intelligence collection can only be undertaken under warrant. This requirement may be under the ASIO Act or other legislation, such as the *Telecommunications (Interception and Access) Act 1979* (Cth) (“TIA”). For example, ASIO can collect intelligence about an Australian of security interest, whether that person is in Australia or overseas, based on internal approvals, whereas ASIS would in all cases require the approval of the Minister for Foreign Affairs and the agreement of the Attorney-General to do the same thing.

The *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth) made amendments to the ASIO Act and the Intelligence Services Act to enable Australia’s intelligence agencies to more closely cooperate and assist one another in the performance of each other’s functions. Section 13A of the Intelligence Services Act was “introduced to facilitate greater cooperation in multi-agency teams, such as under the Counter Terrorism Control Centre, which is hosted by ASIO, and enable agencies to harness resources in support of key national security priorities”.²⁵⁶ AGD explained that notwithstanding that intention:-

However, there are differences in the legislative regimes which apply to ASIS, [ASD] and DIGO under the [Intelligence Services] Act and to ASIO under the ASIO Act when they produce intelligence on Australian persons. In part these differences reflect the different nature and functions of the IS Act agencies and ASIO. When the agencies are cooperating and assisting ASIO in the performance of ASIO’s functions, these differences have led to situations being identified where ASIO is able to undertake an activity for the purposes of its functions but an agency subject to the [Intelligence Services] Act may not be able to fully cooperate with and assist it.

To better meet the intention of enabling Australia’s intelligence agencies to cooperate and assist each other in the performance of each other’s functions to protect Australia and Australians, section 13A of the [Intelligence Services] Act could be amended. For example, section 13A could be amended to enable the Minister responsible for an [Intelligence Services] Act agency to authorise specified activities where the agency is

²⁵⁴ subsec 13(1) of the Intelligence Services Act

²⁵⁵ subpara 8(1)(a)(i) of the Intelligence Services Act

²⁵⁶ Attorney-General’s Department, *Equipping Australia against emerging and evolving threats*, Discussion Paper, July 2012, p53

cooperating with ASIO in the performance of an ASIO function. A Ministerial Authorisation will not replace the need to obtain a warrant where one is currently required. This change would create greater consistency between the ministerial approval regime that applies to the [Intelligence Services] Act agencies and the approval regime which applies to ASIO.²⁵⁷

It is the Government's intention that ASIO access the resources of ASIS, ASD and DIGO in the performance of its functions, including its counter-terrorism function. The INSLM considers it appropriate that where ASIS, ASD or DIGO are performing a discrete activity for a specified purpose in cooperating with ASIO in connection with the performance of its functions, a ministerial authorisation under the Intelligence Services Act should not be required. Where ASIO would require a warrant to undertake the activities in question, ASIO should still be required to obtain a warrant. The INSLM considers an amendment to facilitate intelligence collection and production by ASIS, ASD and DIGO to assist ASIO in the performance of its functions is necessary to ensure ASIO can effectively carry out its counter-terrorism function.

Amendments to the Intelligence Services Act were considered by the Government and the proposal was reviewed by the PJCIS. Following its review of the proposed amendments, the PJCIS recommended amending the Intelligence Services Act to apply ASIO Act standards to the collection of intelligence on Australians.²⁵⁸

Recommendation VI/10: Consideration should be given, as a matter of priority, to amending the Intelligence Services Act to facilitate intelligence collection and production by ASIS, ASD and DIGO without ministerial authorisation where the intelligence collection and production is at the request of the Director-General of ASIO and is for the purpose of assisting ASIO in the performance of its counter-terrorism function.²⁵⁹

²⁵⁷ Attorney-General's Department, *Equipping Australia against emerging and evolving threats*, Discussion Paper, July 2012, p53

²⁵⁸ Recommendation 39, *Parliamentary Joint Committee on Intelligence and Security Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, June 2013 "The Committee recommends that where ASIO and an *Intelligence Services Act 2001* agency are engaged in a cooperative intelligence operation a common standard based on the standards prescribed in the *Australian Security Intelligence Organisation Act 1979* should apply for the authorisation of intrusive activities involving the collection of intelligence on an Australian person".

²⁵⁹ The Intelligence Services Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

APPENDIX A

LIST OF RECOMMENDATIONS

CHAPTER II

Recommendation II/1: The provisions of Division 3B of Part IIIAAA of the Defence Act should be amended so as to exclude from the range of permissible measures against aircraft any action calculated to kill innocent passengers and crew.

CHAPTER III

Recommendation III/1: The wording of the provisions of subsec 100.1(1) of the Criminal Code concerning intimidation of the public or a section of the public, and of para 6(3)(b) of the Foreign Incursions Act concerning causing the public in a foreign State to be in fear, should be exactly consistent. The Foreign Incursions Act²⁶⁰ version should explicitly include the fear of a section of the public.

Recommendation III/2: Paragraph 6(1)(a) and the provisions of subsec 6(3) of the Foreign Incursions Act²⁶¹ should be redrawn to replace the definite article “the” before the phrase “foreign State” in paras 6(1)(a) and 6(3)(a), (c) and (d) with the indefinite article “a”.

Recommendation III/3: The Criminal Code should be amended to require the Attorney-General’s consent for all prosecutions for an offence against Part 5.3 of the Criminal Code.

Recommendation III/4: Subsection 7(1B) of the Foreign Incursions Act²⁶² should be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC, the UN or its agencies, and agencies contracted or mandated to work with the UN or its agencies, (as well as entities with the status of deductible gift recipients in the category overseas aid funds under applicable income tax legislation).²⁶³

Recommendation III/5: The definitions of “recruit” under subsec 102.1(1) of the Criminal Code and subsec 3(1) of the Foreign Incursions Act²⁶⁴ should be consistent.

Recommendation III/6: The penalty provisions in secs 102.4 of the Criminal Code and 8 of the Foreign Incursions Act²⁶⁵ should be equivalent.

Recommendation III/7: The penalty provisions in secs 101.1 and 101.6 of the Criminal Code and 6 and 7 of the Foreign Incursions Act²⁶⁶ should be equivalent.

Recommendation III/8: The provisions of subsections 11(3) and (3A) of the Foreign Incursions

²⁶⁰ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶¹ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶² The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶³ Recommendation V/2 in the INSLM’s Third Annual Report should be understood as varied accordingly in relation to the statutes and regulations recommended to be amended in it.

²⁶⁴ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶⁵ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶⁶ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

Act²⁶⁷ should be amended so as to substitute the word “conclusive” for the phrase “prima facie”, in relation to the evidentiary effect of executive certificates concerning effective governmental control in a specified foreign State or part thereof, and concerning the non-governmental armed force character of a specified organization.

Recommendation III/9: The provisions of the Foreign Incursions Act²⁶⁸, and particularly secs 6 and 9, should be amended so as to provide for an exception to offences under the Act for service in foreign military forces or participation in foreign armed conflicts only if and when by express determination given statutory force the Australian Executive has determined to provide that exception in that case.

CHAPTER IV

Recommendation IV/1: Consideration should be given to amending the Surveillance Devices Act²⁶⁹ to enable the Attorney-General to waive the requirement for the consent of an “appropriate consenting official” in the authorization and use of surveillance devices. The Attorney-General would need to be satisfied that it would be reasonably unlikely that the consent of an “appropriate consenting official” could be obtained as a matter of practicability. Appropriate amendments would need to be made to sec 43 of the Surveillance Devices Act to enable the admission of the evidence into an Australian court proceeding where the court is satisfied that an Attorney-General’s certificate was in place.

Recommendation IV/2: Consideration should be given to examining the merits of amendments to the Evidence Act 1995 and the Foreign Evidence Act 1994²⁷⁰ so as to permit the collection of information and its admission into evidence, from foreign countries, where political circumstances or states of conflict render impracticable the making of a request of the government of that country, for assistance in gathering evidence.

CHAPTER V

Recommendation V/1: Part 1 of Schedule 1 to the Australian Passports Determination 2005²⁷¹ should be amended to include offences against Division 103 of the Criminal Code (financing terrorism).

Recommendation V/2: Part 2 of Schedule 1 to the Australian Passports Determination 2005²⁷² should be amended to include offences against the Foreign Incursions Act, Part 3 of the UN Charter Act in so far as it relates to terrorism and Part 4 of the UN Charter Act.

²⁶⁷ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶⁸ The Foreign Incursions Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁶⁹ The Surveillance Devices Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷⁰ The Evidence Act 1995 and the Foreign Evidence Act 1994 being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷¹ The Australian Passports Determination 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷² The Australian Passports Determination 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

Recommendation V/3: The ASIO Act, Passports Act and the Foreign Passports (Law Enforcement and Security) Act 2005²⁷³ should be amended to enable the Attorney-General to issue a certificate that he or she is satisfied that notification of the grounds in support of a request for a passport cancellation (or part of the statement), or notification of the fact of cancellation, would be prejudicial to an ongoing law enforcement investigation into an offence listed in Schedule 1 to the Passports Determination or would be prejudicial to security. The Minister for Foreign Affairs should not be required to disclose to the person the statement of grounds in support of the passport cancellation request in respect of the person, or of a particular part of that statement, or to give notice of a passport cancellation, where a certificate applies.

Recommendation V/4: The ASIO Act and Passports Act²⁷⁴ should be amended to enable ASIO, by its Director-General to make a request for an interim passport suspension where ASIO is considering issuing an adverse security assessment.

Recommendation V/5: The Foreign Passports (Law Enforcement and Security) Act 2005²⁷⁵ should be amended so as to include a power to suspend the capacity to use a foreign passport for the purposes of departing Australia in circumstances similar to those that would permit the interim suspension of an Australian passport.

Recommendation V/6: The meaning of “would be likely” in para 14(1)(a) of the Passports Act²⁷⁶ should be clarified to ensure the officers of ASIO and other competent authorities apply the correct legislative test. The appropriate meaning should be determined by reference to the aim of sec 14 itself, to cancel passports for reasons relating to *potential* for harmful conduct. An amendment should expressly adopt the “real and not remote possibility” contained in the original Explanatory Memorandum.

Recommendation V/7: The 2002 legislated policy in favour of dual citizenship should be reconsidered.

Recommendation V/8: The definition of “national security offence” under sec 3 of the Citizenship Act²⁷⁷ should be amended to include offences against Foreign Incursions Act, Part 3 of the UN Charter Act in so far as it relates to terrorism and Part 4 of the UN Charter Act.

Recommendation V/9: Consideration should be given to the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia’s security and it is not in Australia’s interests for the person to remain in Australia.

CHAPTER VI

²⁷³ The ASIO Act, Passports Act and the Foreign Passports (Law Enforcement and Security) Act 2005 being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷⁴ The ASIO Act and the Passports Act being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷⁵ The Foreign Passports (Law Enforcement and Security) Act 2005 being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷⁶ The Passports Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁷⁷ The Citizenship Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

Recommendation VI/1: A regulation proscribing a terrorist organization for the purposes of para (b) of the definition of “terrorist organisation” in subsection 102.1(1) of the Criminal Code, should be capable of being amended to add a new alias or aliases where the Attorney-General is satisfied that the alias or aliases are those of the listed terrorist organization (that is, they are in fact aliases of the listed terrorist organization and not separate organizations). The Governor-General should be permitted to make the regulation without the need for the Attorney-General to be satisfied that the organization meets the statutory criteria for proscription under the Criminal Code. A decision to include a new alias or aliases should be made without consultation of the States or Territories unless there is a demonstrated need to do so. Where there is consultation, this should not unduly delay the making of the regulation.²⁷⁸

Recommendation VI/2: A delayed notification search warrant scheme for the investigation of terrorism offences should be enacted.

Recommendation VI/3: Consideration should be given to examining the merits of the “reasonable grounds to believe” grounds for the power of arrest, with a view to generally amending it to “reasonable grounds to suspect”, in sec 3W of the Crimes Act 1914.

Recommendation VI/4: The power to obtain documents relating to serious terrorism offences in sec 3ZQN of the Crimes Act 1914 should provide for compliance with the notice as soon as practicable and no later than 14 days.

Recommendation VI/5: Consideration should be given to enacting authorization for the AFP to obtain information concerning the existence of specified accounts, and to permit continuous monitoring of activities in relation to them, subject to warrant-style safeguards.

Recommendation VI/6: The definition of “terrorism offence” in subsec 3(1) of the Crimes Act 1914 should be amended to include an offence against the Foreign Incursions Act, an offence against Part 3 of the UN Charter Act insofar as it relates to terrorism, and an offence against Part 4 of the UN Charter Act.

Recommendation VI/7: The definition of “terrorism offence” in sec 4 of the ASIO Act should be amended to include an offence against the Foreign Incursions Act.

Recommendation VI/8: There should be a scheme for the registration and management of terrorist convicts across Australia following their release from prison. The scheme for convicted terrorists should provide for reporting obligations to be imposed on terrorist convicts for a significant period after their release and for the sharing of intelligence and information about terrorist convicts between all Australian jurisdictions.

Recommendation VI/9: Consideration should be given, as a matter of priority, to the introduction of a legislative scheme to provide ASIO officers and ASIO human sources with protection from criminal and civil liability for certain conduct in the course of authorized intelligence operations.

²⁷⁸ see IV.3 of the INSLM’s Third Annual Report, esp Recommendation IV/1

Recommendation VI/10: Consideration should be given, as a matter of priority, to amending the Intelligence Services Act to facilitate intelligence collection and production by ASIS, ASD and DIGO without ministerial authorisation where the intelligence collection and production is at the request of the Director-General of ASIO and is for the purpose of assisting ASIO in the performance of its counter-terrorism function.²⁷⁹

²⁷⁹ The Intelligence Services Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

APPENDIX B

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APPENDIX C

CONSULTATIONS AND SUBMISSIONS

This year, the INSLM held hearings under subsec 21(1) of the INSLM Act for the purposes of reviewing the provisions of the Foreign Incursions Act, the terrorism offences under Part 5.3 of the Criminal Code, Part IIIAAA of the Defence Act, and the powers to refuse to issue or to cancel Australian passports under the Passports Act. The Foreign Incursions Act and Passports Act are related laws for the purpose of subpara 6(1)(a)(ii) of the INSLM Act (being “any other law of the Commonwealth to the extent that it relates to Australia’s counter-terrorism and national security legislation”).

The INSLM may direct that any hearings under subsec 21(1) are to be held in private and must give such a direction for any time during which a person is giving evidence that discloses operationally sensitive information. All hearings held this year with Australian Government officials were conducted in private. Witnesses were summoned under subsec 22(1) of the INSLM Act to attend and give evidence at the hearings. In accordance with subsec 21(4) of the INSLM Act, a record was made of each hearing.

The INSLM issued written notices under subsec 24(2) of the INSLM Act for the production of documents and information from Australian Government agencies. A number of agencies also made written submissions to the INSLM.

The INSLM advertised for public submissions and placed information about the review on the INSLM’s website. The INSLM wrote to Federal, State and Territory Governments, academics, civil society, solicitors and counsel inviting their views as part of the review process. The INSLM received 9 written submissions from civil society and academia.

Agencies and persons consulted

Australian Government

Attorney-General’s Department
Australian Defence Force
Australian Federal Police
Australian Security Intelligence Organisation
Commonwealth Director of Public Prosecutions
Department of Foreign Affairs and Trade
Department of Immigration and Border Protection
Department of Defence

Non-Government

Australian Council for International Development

Events attended by the INSLM

Attendee, *Secrecy, Law and Society Workshop*, Sydney University Law School, 6-7th February 2014

Public submissions received

1. Professor Peter Leahy AC, University of Canberra
2. Professor Clive Walker, University of Leeds
3. Professor Ben Saul, University of Sydney
4. Dr James Renwick SC, NSW Bar
5. Humanist Society of Victoria
6. Gilbert + Tobin Centre of Public Law
7. Law Council of Australia
8. Law Council of Australia - Supplementary submission
9. Lip Yi Chong, Australian National University

None of these dealings could have proceeded without the diligent work of my Adviser, Teneille Elliott. All of my researches have been enabled or improved by her own learning and intelligence. I am, again, most grateful for her assistance.

APPENDIX D

DISCUSSION OF ISSUES FOR CONSIDERATION IN THE INSLM'S ANNUAL REPORTS

- 1** Was the CT Laws' criminalization of terrorism necessary given Australia's pre-existing criminal laws against murder etc?
5 of the INSLM's First Annual Report²⁸⁰
II.12, III.9 and IV.2 of the INSLM's Second Annual Report
II, IV and V, VI.1 and VII.16 of the INSLM's Third Annual Report
- 2** Are there features special to terrorism that justify extraordinary treatment of terrorist offences concerning investigation, proof and punishment?
9-11 of the INSLM's First Annual Report
II.12, III.9 and IV.2 of the INSLM's Second Annual Report
IV and VI of the INSLM's Fourth Annual Report
- 3** Is the UN Security Council Resolution 1373 a secure foundation for Australia's international counter-terrorism obligations?
15-17 of the INSLM's First Annual Report
VI.4 and VI.6 of the INSLM's Second Annual Report
II.1-II.3, III.3 and III.8 of the INSLM's Third Annual Report
- 4** Is there practical consensus internationally on the definition of terrorism?
16, 24-25, 49-54 of the INSLM's First Annual Report
VI of the INSLM's Second Annual Report
II.1-II.3, III.3 and III.8 of the INSLM's Third Annual Report
- 5** Should hostage-taking be explicitly within Australia's definition of terrorism?
21, 53 of the INSLM's First Annual Report
VI.8 of the INSLM's Second Annual Report
- 6** Does the use of religious motivation in the definition of terrorism inappropriately risk enlisting anti-Muslim prejudice?
22-25, 52-54 of the INSLM's First Annual Report
VI.1, VI.4-7 of the INSLM's Second Annual Report
- 7** Is the last resort requirement for a questioning warrant under the ASIO Act too demanding?
29-30 of the INSLM's First Annual Report
IV.3 of the INSLM's Second Annual Report
- 8** Are the time limits (eg 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right?
30-32 of the INSLM's First Annual Report
IV.4, V.2-3, V.5 of the INSLM's Second Annual Report

²⁸⁰ Page references are to the PDF version of the Report

- 9** Are the time limits for questioning warrants where interpreters have been used commensurate with the limits applying otherwise?
31-32 of the INSLM's First Annual Report
IV.4 of the INSLM's Second Annual Report
- 10** Are there sufficient safeguards including judicial review in relation to the surrender or cancellation of passports, in connexion with questioning warrants?
32 of the INSLM's First Annual Report
IV.2 of the INSLM's Second Annual Report
- 11** Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences?
32 of the INSLM's First Annual Report
IV.6-7 of the INSLM's Second Annual Report
- 12** Is the abrogation of privilege against self-incrimination under a questioning warrant sufficiently balanced by the use immunity?
32-33 of the INSLM's First Annual Report
IV.9 of the INSLM's Second Annual Report
- 13** Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb?
33 of the INSLM's First Annual Report
IV.5 of the INSLM's Second Annual Report
- 14** Are the three several conditions for issuing a questioning and detention warrant stringent enough?
34-35 of the INSLM's First Annual Report
V.2-5 of the INSLM's Second Annual Report
- 15** Should the risk of non-appearance as a condition for issuing a questioning and detention warrant require assessment by a judicial officer?
34 of the INSLM's First Annual Report
V.2-5 of the INSLM's Second Annual Report
- 16** Does the possible resort either to a questioning and detention warrant or to arrest for the same person for the same circumstances give an inappropriate discretion to officers of the executive?
35 of the INSLM's First Annual Report
V.2-5 of the INSLM's Second Annual Report
- 17** Should the issuing authority, being a judicial officer, rather than the Attorney-General, or as well as the Attorney-General, determine the existence of a condition for the issue of a questioning and detention warrant?
35 of the INSLM's First Annual Report
IV.3, V.2-5 of the INSLM's Second Annual Report

- 18** Should the offence of failing to produce records or things under a warrant explicitly extend to deliberate destruction?
35 of the INSLM's First Annual Report
IV.8 of the INSLM's Second Annual Report
- 19** Is the disparity between length of imprisonment for offences against security obligations in relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants appropriate?
35 of the INSLM's First Annual Report
IV.6 of the INSLM's Second Annual Report
- 20** Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient?
35-36 of the INSLM's First Annual Report
IV.2 of the INSLM's Second Annual Report
- 21** Should questioning and detention warrants remain available at all?
11-12, 34-35 of the INSLM's First Annual Report
V.1, V.5 of the INSLM's Second Annual Report
- 22** Is the requirement that regulations under the UN Charter Act for listing decisions in relation to freezing assets etc merely relate to terrorism too loose?
38 of the INSLM's First Annual Report
III.8 of the INSLM's Third Annual Report
- 23** Should the Minister be required rather than empowered to revoke a listing when satisfied it is no longer necessary?
38-39 of the INSLM's First Annual Report
III.10-11, III.20 of the INSLM's Third Annual Report
- 24** Does the once yearly obligation for the Minister to consider a listing revocation application give too much discretion or create undesirable inflexibility?
39 of the INSLM's First Annual Report
III.10-11, III.20 of the INSLM's Third Annual Report
- 25** Should there be wider judicial review of listing decisions including revocation applications?
39-40 of the INSLM's First Annual Report
III.10-11, III.20 of the INSLM's Third Annual Report
- 26** Are the provisions for compensation for loss caused by mistaken listing generous enough?
39-40 of the INSLM's First Annual Report
III.18 of the INSLM's Third Annual Report
- 27** Is the injunction power in aid of asset-freezing etc too easily available?
40 of the INSLM's First Annual Report
III.18 of the INSLM's Third Annual Report

- 28** Do secrecy provisions hamstring judicial review of listing decisions?
40 of the INSLM's First Annual Report
III.10-11, III.20 of the INSLM's Third Annual Report
- 29** Is the offence of making an asset available to a listed person broader than culpability justifies?
40-41 of the INSLM's First Annual Report
III.12, III.14-17 of the INSLM's Third Annual Report
- 30** Is the defence of mistake reasonably available in relation to listing offences?
40-41 of the INSLM's First Annual Report
III.12, III.14-17 of the INSLM's Third Annual Report
- 31** Is bail justifiably more difficult for terrorism offences than for others?
42 of the INSLM's First Annual Report
III.22 of the INSLM's Third Annual Report
- 32** Should non-parole provisions be stricter for terrorism offences than for others?
42 of the INSLM's First Annual Report
III.22 of the INSLM's Third Annual Report
- 33** Does the *Crimes Act* inappropriately confine judicial discretion as to bail and non-parole for terrorism offences?
42 of the INSLM's First Annual Report
III.22 of the INSLM's Third Annual Report
- 34** Is the test that a police officer suspects a person might commit a terrorist act strict enough to empower search and arrest under the *Crimes Act*?
43-44 of the INSLM's First Annual Report
III.4 and III.7-13 of the INSLM's Second Annual Report
III.22 of the INSLM's Third Annual Report
VI.3 of the INSLM's Fourth Annual Report
- 35** Should senior police officers or other officials be included in the test for empowering search and arrest?
44 of the INSLM's First Annual Report
III.4 and III.7-13 of the INSLM's Second Annual Report
III.22 of the INSLM's Third Annual Report
- 36** Does the Minister require reasonable grounds for declaring a prescribed security zone, and should they be required?
44 of the INSLM's First Annual Report
III.10 of the INSLM's Second Annual Report
- 37** Should it be mandatory for the Minister to consider revocation, and to revoke when satisfied a prescribed security zone is no longer required?
44-45 of the INSLM's First Annual Report
III.10 of the INSLM's Second Annual Report

- 38** Are these emergency powers appropriate for indefinite or permanent availability, without a sunset clause?
44-45 of the INSLM’s First Annual Report
- 39** Are the stipulations governing investigation of terrorism offences under the *Crimes Act* accessible to those trying to observe them?
45 of the INSLM’s First Annual Report
III.4 and III.7-13 of the INSLM’s Second Annual Report
- 40** Is the longer time limit (20 hours rather than 8 hours) for questioning in relation to terrorism offences justified?
45 of the INSLM’s First Annual Report
III.4 and III.7-13 of the INSLM’s Second Annual Report
- 41** Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the *Criminal Code*?
47-49 of the INSLM’s First Annual Report
II.6.1, II.14-15 of the INSLM’s Second Annual Report
- 42** Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders?
48-49 of the INSLM’s First Annual Report
II.3, II.7-II.9, II.11, II.13, II.15, III.1-2, III.7-9, III.11-12 of the INSLM’s Second Annual Report
- 43** Does non-use of control orders and preventative detention orders suggest they are not necessary?
48-49 of the INSLM’s First Annual Report
11.5, 11.6, 11.15, III.1-2, III.7, III.10, III.13 of the INSLM’s Second Annual Report
- 44** Should control orders and preventative detention orders be more readily available?
49 of the INSLM’s First Annual Report
II.12, II.15, III.13 of the INSLM’s Second Annual Report
I.4 of the INSLM’s Third Annual Report
- 45** Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation?
48-49 of the INSLM’s First Annual Report
II.12, II.15, III.13 of the INSLM’s Second Annual Report
I.4 of the INSLM’s Third Annual Report
- 46** In light of 1373 and international usage, international comparisons and scholarship, is the definition of “terrorist act” in the Code able to be improved?
50-54 of the INSLM’s First Annual Report
VI of the INSLM’s Second Annual Report
III.8 of the INSLM’s Third Annual Report
III.1, 9, 11, 12 and 14 of the INSLM’s Fourth Annual Report

- 47** Are there criticisms by the Special Rapporteurs of Australia's definition of terrorism of which further account should be taken?
52-53 of the INSLM's First Annual Report
VI.10 of the INSLM's Second Annual Report
- 48** Should hostage-taking be explicitly included as a terrorist act?
21, 53 of the INSLM's First Annual Report
VI.8 of the INSLM's Second Annual Report
- 49** Does the separate requirement for a motive (including the intention of advancing a religious cause) produce avoidable disadvantages including prejudicial trial evidence?
22-25, 52-54 of the INSLM's First Annual Report
VI.1, VI.4-7 of the INSLM's Second Annual Report
- 50** Should terrorist acts or threats of them be defined always to involve dangers to life and limb as opposed only to property or infrastructure damage?
54 of the INSLM's First Annual Report
VI.10 of the INSLM's Second Annual Report
- 51** Are the offences of preparation for or planning a terrorist act, including by a sole person, too early in a course of wrongdoing to justify the prescribed punishment?
54-56 of the INSLM's First Annual Report
- 52** Does the offence of preparing for or planning terrorism comprehend too broad a range of conduct for one offence?
55-56 of the INSLM's First Annual Report
- 53** Are the penalties provided for training and possession offences, knowingly or recklessly committed, appropriately weighted?
55-56 of the INSLM's First Annual Report
- 54** Should the only possible alternative verdict of reckless rather than knowing terrorist training be explicit?
55-56 of the INSLM's First Annual Report
- 55** Is the requisite connexion of a possessed thing with terrorism too vague?
56-57 of the INSLM's First Annual Report
- 56** Is the evidential burden as to a lack of intention to facilitate terrorism for the possession offences fair and appropriate?
57 of the INSLM's First Annual Report
- 57** Are there any remaining issues concerning conspiracies and acts in preparation for terrorism, such as being too inchoate?
57-58 of the INSLM's First Annual Report
- 58** Does the definition of membership of a terrorist organization extend too broadly?
58 of the INSLM's First Annual Report

- 59** Does the definition of advocacy of terrorism in relation to praise of conduct permit too loose or slight a connexion?
58-59 of the INSLM's First Annual Report
- 60** Has the operation of the NSI Act excessively impeded terrorism trials?
61-63 of the INSLM's First Annual Report
VII.5 of the INSLM's Third Annual Report
- 61** Has the resort to agreements under the NSI Act been a healthy development?
61-62 of the INSLM's First Annual Report
VII.3, 5, 11-12 of the INSLM's Third Annual Report
- 62** What, if any, resort would be appropriate to security clearance for defence counsel and to special defence counsel?
62 of the INSLM's First Annual Report
VII.13, VII.15 of the INSLM's Third Annual Report
- 63** Are Attorney-General's certificates appropriate in place of judicial determination of national security matters?
63 of the INSLM's First Annual Report
VII.6-8 of the INSLM's Third Annual Report

APPENDIX E

RELEVANT PROVISIONS OF THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (GRUNDGESETZ) AND ICCPR

RELEVANT PROVISIONS OF THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (GRUNDGESETZ)

Article 1

[Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2

[Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

...

Article 19

[Restriction of basic rights – Legal remedies]

...

(2) In no case may the essence of a basic right be affected.

...

RELEVANT PROVISIONS OF ICCPR

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

...

Article 9

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.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
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.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

APPENDIX F

DEFENCE ACT PART IIIAAA CALL OUT PROVISIONS RELATING TO AIRCRAFT

Division 3B-Powers relating to aircraft

51SR Application of this Division and Division 4

If an order states in accordance with paragraph 51A(4)(c), 51AB(4)(c), 51B(3)(c) or 51C(3)(c) that this Division and Division 4 apply in relation to the order, the following provisions of this Division, and the provisions of Division 4, apply.

51SS Geographical application

This Division and Division 4 (in its operation in relation to this Division) extend to the Australian offshore area.

51ST Special powers of members of the Defence Force

Taking measures against aircraft

- (1) A member of the Defence Force who is being utilised in accordance with section 51D may, under the command of the Chief of the Defence Force:
 - (a) take measures (including the use of force) against an aircraft, up to and including destroying the aircraft; or
 - (b) give an order relating to the taking of such measures; whether or not the aircraft is airborne.
- (2) Paragraph (1)(a) does not apply to the taking of measures unless:
 - (a) the member of the Defence Force takes the measures under, or under the authority of, an order of a superior; and
 - (b) the member was under a legal obligation to obey the order; and
 - (c) the order was not manifestly unlawful; and
 - (d) the member has no reason to believe that circumstances have changed in a material way since the order was given; and
 - (e) the member has no reason to believe that the order was based on a mistake as to a material fact; and
 - (f) taking the measures was reasonable and necessary to give effect to the order.

(3) Paragraph (1)(b) does not apply to giving an order unless:

- (a) the member of the Defence Force gives the order under, or under the authority of, an order (a *superior order*) of a superior; and
- (b) the member was under a legal obligation to obey the superior order; and
- (c) the superior order was not manifestly unlawful; and
- (d) the member has no reason to believe that circumstances have changed in a material way since the superior order was given; and
- (e) the member has no reason to believe that the superior order was based on a mistake as to a material fact; and
- (f) giving the order was reasonable and necessary to give effect to the superior order.

Ministerial authorisation

(4) However, the member must not take measures against an aircraft, or give an order of a kind mentioned in paragraph (1)(b) in connection with an aircraft, unless an authorising Minister has in writing authorised the taking of measures against the aircraft.

Exception

(5) Subsection (4) does not apply if:

- (a) the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists; or
- (b) the measures are taken in specified circumstances that an authorising Minister has authorised under subsection (6).

(6) An authorising Minister may in writing authorise the taking of measures against an aircraft in specified circumstances if this Division applies because an order states in accordance with paragraph 51AB(4)(c) that this Division and Division 4 apply in relation to the order.

Authorising Minister must be satisfied of reasonableness and necessity

(7) An authorising Minister must not authorise the taking of measures against an aircraft unless the Minister is satisfied that:

- (a) in the case of an authorisation under subsection (4)—taking action against the aircraft is reasonable and necessary; or
- (b) in the case of an authorisation under subsection (6)—taking action against the aircraft would be reasonable and necessary if the specified circumstances in question were to arise.

International obligations

- (8) An authorising Minister must, in giving an authorisation under this section, have regard to Australia's international obligations.

APPENDIX G

DECISION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT (BUNDESVERFASSUNGSGERICHT)²⁸¹

Background to the German Federal Constitutional Court decision

A constitutional complaint to the German Federal Constitutional Court (Bundesverfassungsgericht) challenged the German armed forces' authorization by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons in crimes against human lives. The court held that subsec 14(3) of the Act (reproduced below) is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime.

Relevant German law (call out provisions) considered by the court, §§ 13 to 15 of the Aviation Security Act:-

§13 Decision of the Federal Government

(1) Where on account of a major aerial incident, facts exist that, in the context of the exercise of police power, give rise to the assumption that an “especially grave accident” within the meaning of Article 35.2 sentence 2 or 3 of the Basic Law is imminent, the armed forces can be employed to support the police forces of the *Länder* in the air space to prevent such accident.

(2) The decision about a mission pursuant to Article 35.2 sentence 2 of the Basic Law shall be taken by the Federal Minister of Defence upon request of the *Land* affected, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister, in consultation with the Federal Minister of the Interior. Where immediate action is required, the Federal Ministry of the Interior is to be informed without delay.

(3) The decision about a mission pursuant to Article 35.3 of the Basic Law shall be taken by the Federal Government in consultation with the *Länder* affected. If a decision of the Federal Government is not possible in time, the Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister, shall take the decision in consultation with the Federal Minister of the Interior. The decision of the Federal Government is to be brought about without delay. Where immediate action is required, the *Länder* affected and the Federal Ministry of the Interior are to be informed without delay.

²⁸¹ Judgment of the First Senate of 15 February 2006 on the basis of the oral hearing of 9 November 2005 – 1 BvR 357/05. The full decision of the court is available at:
http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html

(4) Further details shall be regulated between the Federation and the *Länder*. The support by the armed forces shall be rendered in accordance with the provisions of this Act.

§14 Operations, authority to give instructions

(1) To prevent the occurrence of an especially grave accident, the armed forces may force the aircraft off its course in the air space, force it to land, threaten to use armed force, or fire warning shots.

(2) From several possible measures, the one which will probably least impair the individual and the general public is to be chosen. The measure may only be carried out as long as and to the extent that its purpose requires. It may not result in a detriment that is recognisably out of proportion to the aspired success.

(3) The direct use of armed force is permissible only where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger.

(4) The measure pursuant to subsection 3 can only be ordered by the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister. ...

§15 Other measures

(1) The measures pursuant to § 14.1 and 14.3 may only be taken after a check [of the aircraft] and unsuccessful attempts at warning and diverting [the aircraft]. For this purpose, the armed forces can, upon request of the authority responsible for air traffic control, check, divert or warn aircraft in the air space ...

(2) The ... Chief of Staff of the Federal Air Force is to inform the Federal Minister of Defence without delay about situations that could lead to measures pursuant to § 14.1 and 14.3.

(3) The other regulations and principles of administrative assistance shall remain unaffected.

The court on the role of armed forces' under the German Aviation Security Act:-

[13] Under the title “Support and Administrative Assistance by the Armed Forces” („*Unterstützung und Amtshilfe durch die Streitkräfte*“), §§ 13 to 15 of the Aviation Security Act constitute a separate Part 3 of the Act. Where on account of a major aerial incident, facts exist that, in the context of the exercise of police power, give rise to the assumption that an “especially grave accident” within the meaning of Article 35.2 sentence 2 or 35.3 of the Basic Law is imminent, the armed forces can, pursuant to § 13.1 of the Aviation Security Act, be employed to support the police forces of the *Länder* in the air space to prevent such accident to the extent that this is required for effectively

counteracting it. In the case of a so-called regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law, the decision about such deployment shall be taken by the Federal Minister of Defence upon request of the *Land* affected, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister (§ 13.2 of the Aviation Security Act); in the case of an interregional emergency situation pursuant to Article 35.3 of the Basic Law, the decision shall be taken by the Federal Government in consultation with the *Länder* affected (§ 13.3 sentence 1 of the Aviation Security Act). If a decision of the Federal Government is not possible in time, the Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister shall take the decision in consultation with the Federal Minister of the Interior (§ 13.3 sentence 2 of the Aviation Security Act). Pursuant to § 13.4 sentence 2 of the Aviation Security Act, the support by the armed forces in the context of the mission shall be rendered in accordance with the provisions of the Aviation Security Act.

[14] The operations that are permissible in accordance with the Aviation Security Act and the principles that apply as regards their choice are specified in §§ 14 and 15 of the Aviation Security Act. Pursuant to § 15.1 of the Aviation Security Act, operations intended to prevent the occurrence of an especially grave accident within the meaning of § 14.1 and 14.3 of the Aviation Security Act may be taken only if the aircraft from which the danger of such accident emanates has previously been checked by the armed forces in the air space and if it has then been unsuccessfully tried to warn and to divert it. If this prerequisite has been met, the armed forces may, pursuant to § 14.1 of the Aviation Security Act, force the aircraft off its course in the air space, force it to land, threaten to use armed force, or fire warning shots. The principle of proportionality applies to the choice among these measures (§ 14.2 of the Aviation Security Act). Pursuant to § 14.3 of the Aviation Security Act, the direct use of armed force against the aircraft is permissible only if the occurrence of an especially grave accident cannot be prevented even by such measures. This, however, only applies where it must be assumed under the circumstances that the aircraft is intended to be used as a weapon against human lives, and where the direct use of armed force is the only means to avert this imminent danger. Pursuant to § 14.4 sentence 1 of the Aviation Security Act, the exclusive competence for ordering this measure rests with the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, with the member of the Federal Government who is authorised to represent the Minister.

Federal Government submissions on the necessity and constitutionality of the provisions:-

[42] The Federal Government (Bundestag) submitted that the provisions of the Aviation Security Act were both necessary and constitutional:-

[44] There is no infringement of Article 1 of the Basic Law. When proceeding pursuant to §§ 13 to 15 of the Aviation Security Act, it is not the state – which only reacts – which deprives the people on board the plane of their dignity and makes them objects but the one who takes command of a plane with the intention to not only kill the people on board but to even use them while they are dying as instruments to annihilate more people. The

state comes close to an infringement of Article 1 of the Basic Law only if it negates the quality as subjects that the people affected have, expressing thereby that it despises the value which is due to a human being by virtue of his or her being a person. This, however, is not the Air Security Act's objective. The Air Security Act constitutes the legislature's effort to provide a legislative framework also for desperate situations.

[45] Article 2.2 sentence 1 of the Basic Law is also not violated. Admittedly, the fundamental right to life of the crew of a hijacked plane, of its passengers and of the hijackers is encroached upon in the most serious manner possible. But this is constitutional. Article 2.2 sentence 3 of the Basic Law expressly permits the killing of a human being. If, in view of a danger which will hopefully never occur but is nevertheless realistic, the legislature issues a regulation that comes down to having a relatively smaller number of people killed by the armed forces in order to avoid an even higher number of deaths, the decisive question regarding Article 2.2 sentence 1 of the Basic Law is in reality whether the Act ensures that this will only happen in an extreme emergency. This question can be answered in the affirmative here. In the densely populated and relatively small Federal Republic of Germany, it factually is almost inconceivable that the option provided in § 14.3 of the Aviation Security Act will occur.

[46] The guarantee of the essence of the fundamental rights, which is enshrined in Article 19.2 of the Basic Law, is also not infringed. The Aviation Security Act establishes high obstacles to the most serious encroachment conceivable. Thus, it is said to be guaranteed that ultimately, a passenger plane will probably only be shot down if it is possible to limit the number of victims at least with a certain probability to the people on board the plane.

[47] The only choice that the legislature had was between remaining inactive and issuing a regulation that must reach into the borderline area of what can be regulated at all. Terrorism along the lines of 11 September 2001 is fundamentally different from cases of justifiable defence and of necessity as defined by criminal law. In such cases, the law may only legitimise the action of the persons in charge, with the consequence that by their lawful action, they cause wrong in order to prevent an even greater wrong. Consequently, § 14.3 of the Aviation Security Act establishes a personal reason for justification, which is derived from their functions, for the Federal Minister of Defence and the executing soldiers.

...

[52] Neither the essence of Article 2.2 sentence 1 of the Basic Law nor the principle of proportionality is violated. The strict prerequisites of § 14 of the Aviation Security Act in particular rule out the direct use of armed force against an aircraft with people on board who are not participants in the crime, with all conceivable courses of events being taken into account. This follows from the fact that the provision requires maximum normative certainty about the imminence of an especially grave accident. What is called for apart from this is to prevent worse damage in the densely populated Federal Republic of Germany.

[53] What must be taken into account apart from this is that the people on board the plane in the case provided for in § 14.3 of the Aviation Security Act are, so to speak, part of the weapon as which the aircraft is used. In view of the present threat to air traffic, the people on board a plane must be aware of the danger to which they expose themselves when they take part in air traffic. Only if the state acts in accordance with § 14.3 of the Aviation Security Act, at least some of the threatened lives can be saved. In such an extraordinary situation, this can also be done to the detriment of those who cannot be saved anyway because they are inseparably linked with the weapon.

[54] The Aviation Security Act also respects human dignity. The dignity of the people on board an aircraft that will be shot down is respected. They are, albeit against their will, part of a weapon that threatens the lives of others. Only for this reason, and for lack of other possibilities of averting the attack, the state measures are also directed against them. The human dignity of third parties who are possibly also endangered is not violated either. The Act also serves their protection with all its provisions.

Opinions of non-governmental groups taken into account by the court:-

[49] ...The targeted intentional killing of persons who are not participants in the crime is said to be prohibited by Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law. According to the parliamentary group of ALLIANCE 90/THE GREENS, also an obligation of the individual to sacrifice his or her life in situations in which the existence of the state and the common good are endangered in order to preserve them is to be rejected. If a passenger plane is used as a weapon, the rights of the passengers and of the crew to forbearance of an encroachment by the state upon their right to life may not come second to the duty of protection that is derived from this right in favour of the persons on the ground endangered by the targeted shooting down of the plane.

[63]-[64] The German Armed Forces Association expresses doubts as regards the constitutionality of the challenged regulation. It submits the following...objections exist against § 14.3 of the Aviation Security Act with a view to the principle of clarity and definiteness of the wording of statutes. The provision does not mention precise criteria for the weighing up of lives against lives that is assumed therein. For the soldier who is forced to act, this results in a serious conflict between the duty to obey and the strictly personal moral decision that is to be taken by him or her. What is lacking is a regulation which reliably exempts soldiers also before foreign courts from preliminary investigation proceedings and from civil liability actions.

[65] The Cockpit Association considers the constitutional complaint well-founded. It submits the following: The suitability and necessity of § 14.3 of the Aviation Security Act, which permits the use of deadly force also against people who are not participants in the crime is doubtful. The terrorist success of a renegade attack depends on numerous imponderabilities. In view of the factual sequence of events in air traffic, it is extremely difficult, and only rarely is it possible with certainty, to even establish the occurrence of a major aerial incident within the meaning of § 13.1 of the Aviation Security Act. Even with ideal weather conditions, the findings gained through the check of aircraft pursuant to § 15.1 of the Aviation Security Act are vague at best. The possible motivation of a

hijacker and the objectives of a hijacking remain speculative to the very end. In view of the narrow time slot available, a decision on a mission pursuant to § 14.3 of the Aviation Security Act which is based on established facts will in all probability be too late. Therefore the concept of §§ 13 to 15 of the Aviation Security Act will work out only where the reaction is excessive from the outset.

[67] The Independent Flight Attendant Organisation UFO shares the objections raised in the constitutional complaint. It submits the following... There is the additional danger of the situation on board being misjudged from the ground. It is virtually impossible to assess from there whether the prerequisites of § 14.3 of the Aviation Security Act are met. The information which the Federal Minister of Defence needs for his decision to order the shooting down of a plane do not come from the direct danger zone on board the plane. They are only indirect information which the pilot has received from the cabin crew, who is possibly under the command of terrorists. Apart from this, the situation on board can change within seconds, something of which ground control probably cannot be informed fast enough due to the long channels of communication.

The decision of the court on the compatibility of the provisions with constitutional human rights guarantees:-

[32] With their constitutional complaint, the complainants directly challenge the Aviation Security Act because, as they argue, it permits the state to intentionally kill persons who have not become perpetrators but victims of a crime. The complainants put forward that § 14.3 of the Aviation Security Act, which under the conditions specified in the law authorises to shoot down aircraft, violates their rights under Article 1.1, Article 2.2 sentence 1 in conjunction with Article 19.2 of the Basic Law. They argue as follows:

...

[34] The constitutional complaint is also well-founded. The Aviation Security Act infringes the complainants' fundamental rights to human dignity and to life pursuant to Article 1.1 and Article 2.2 sentence 1 of the Basic Law. The Act makes them mere objects of state action. The value and the preservation of their lives are left to the discretion of the Federal Minister of Defence according to quantitative aspects and to the life span presumably remaining to them "under the circumstances". In the case of an emergency, they are intended to be sacrificed and to be intentionally killed if the Minister presumes, on the basis of the information available to him or her, that their lives will only last a short time and that, in comparison with the losses which are imminent otherwise, they therefore are no longer of any value at all or are, at any rate, of reduced value.

[35] The state may not protect a majority of its citizens by intentionally killing a minority – in this case, the crew and the passengers of a plane. A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible. The state may not kill people because they are fewer in number than the ones whom the state hopes to save by their being killed.

[36] A qualification of the passengers' right to life also cannot be substantiated by arguing that they are regarded as part of the weapon that the plane has become. Whoever argues in this manner makes them mere objects of state action and deprives them of their human quality and dignity.

[37] The constitutional requirement of the specific enactment of a statute in Article 2.2 sentence 3 of the Basic Law [if fundamental rights are to be restricted] does not lead to a different result. The guarantee of the essence of fundamental rights enshrined in Article 19.2 of the Basic Law rules out an encroachment upon the right to life by intentional physical destruction.

[38] The complainants argue that their fundamental rights to life and human dignity are violated also because the Aviation Security Act and the deployment of the armed forces within the domestic territory provided therein are unconstitutional because they violate Article 87a of the Basic Law. They put forward that the requirements set forth in subsection 2 of Article 87a are not met. They further argue that §§ 13 to 15 of the Aviation Security Act cannot be justified by invoking Article 35.2 and 35.3 of the Basic Law. These provisions are said to intend the partial introduction of martial law in order to deal with a desperate borderline situation. A war-like operational mission of the Federal Armed Forces within the domestic territory with military means, however, is said not to be covered by Article 35 of the Basic Law.

[39]...Pursuant to the police laws of all *Länder*, the intentional killing of persons who are deemed innocent bystanders under police law is ruled out. ...

[82] The constitutional complaint is also well-founded. § 14.3 of the Aviation Security Act is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law, and is void.

[83] Article 2.2 sentence 1 of the Basic Law guarantees the right to life as a liberty right (see BVerfGE 89, 120 (130)). With this right, the biological and physical existence of every human being is protected against encroachments by the state from the point in time of its coming into being until the human being's death, independently of the individual's circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value (see BVerfGE 39, 1 (59)). Although it constitutes an ultimate value within the order of the Basic Law (see BVerfGE 39, 1 (42); 46, 160 (164); 49, 24 (53)), also this right is nevertheless subject to the constitutional requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law. Also the fundamental right to life can therefore be encroached upon on the basis of a formal Act of Parliament (see BVerfGE 22, 180 (219)). The precondition for this is, however, that the Act in question meets the requirements of the Basic Law in every respect. It must be adopted in accordance with the legislative competences, it must leave the essence of the fundamental right unaffected pursuant to Article 19.2 of the Basic Law, and it may also not contradict the fundamental decisions of the constitution in any other respect.

[84] The challenged provision of § 14.3 of the Aviation Security Act does not live up to these standards.

[85] It encroaches upon the scope of protection of the fundamental right to life, which is guaranteed by Article 2.2 sentence 1 of the Basic Law, of the crew and of the passengers of an aircraft affected by an operation pursuant to § 14.3 of the Aviation Security Act and also of those who want to use the plane against the lives of people in the sense of this provision. Recourse to the authorisation to use direct armed force against an aircraft pursuant to § 14.3 of the Aviation Security Act will virtually always result in its crash. The consequence of the crash, in turn, will with near certainty be the death, and consequently the destruction of the lives, of all people on board the aircraft.

...

[116] Regarding the guarantee of human dignity enshrined in Article 1.1. of the Basic Law (aa), over and above this, § 14.3 of the Aviation Security Act is not in harmony with Article 2.2 sentence 1 of the Basic Law also as regards substance to the extent that it permits the armed forces to shoot down aircraft with human beings on board who have become victims of an attack on the security of air traffic pursuant to § 1 of the Aviation Security Act (bb)...

[117] The fundamental right to life guaranteed by Article 2.2 sentence 1 of the Basic Law is subject to the requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law (see also above under C I). The Act, however, that restricts the fundamental right must in its turn be regarded in the light of the fundamental right and of the guarantee of human dignity under Article 1.1 of the Basic Law, which is closely linked with it. Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution (see BVerfGE 39, 1 (42); 72, 105 (115); 109, 279 (311)). All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status (see BVerfGE 87, 209 (228); 96, 375 (399)). It cannot be taken away from any human being. ...

[118] In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties (see BVerfGE 39, 1 (42); 46, 160 (164); 56, 54 (73)). ...

[119] What this obligation means in concrete terms for state action cannot be definitely determined once and for all (see BVerfGE 45, 187 (229); 96, 375 (399-400)). Article 1.1 of the Basic Law protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself (see BVerfGE 1, 97 (104); 107, 275 (284); 109, 279 (312)). Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to

exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own (see BVerfGE 45, 187 (227-228)), the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state (see BVerfGE 27, 1 (6)); 45, 187 (228); 96, 375 (399)). What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity (see BVerfGE 30, 1 (26); 87, 209 (228); 96, 375 (399)) by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person (see BVerfGE 30, 1 (26); 109, 279 (312-313)). When it is that such a treatment occurs must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise (see BVerfGE 30, 1 (25); 109, 279 (311)).

[120] According to these standards, § 14.3 of the Aviation Security Act is also incompatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the shooting down of an aircraft affects people who, as its crew and passengers, have not exerted any influence on the occurrence of the non-warlike aerial incident assumed under § 14.3 of the Aviation Security Act.

[121] In the situation in which these persons are at the moment in which the order to use direct armed force against the aircraft involved in the aerial incident pursuant to § 14.4 sentence 1 of the Aviation Security Act is made, it must be possible, pursuant to § 14.3 of the Aviation Security Act, to assume with certainty that the aircraft is intended to be used against human lives. As has been stated in the reasoning for the Act, the aircraft must have been converted into an assault weapon by those who have brought it under their command (see *Bundestag* document 15/2361, p. 20 on § 13.1); the aircraft itself must be used by the perpetrators in a targeted manner as a weapon for the crime, not merely as an auxiliary means for committing the crime, against the lives of people who stay in the area in which the aircraft is intended to crash (see *Bundestag* document 15/2361, p. 21 on § 14.3), In such an extreme situation, which is, moreover, characterised by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner.

[122] ...Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

[123] In addition, this happens under circumstances in which it cannot be expected that at the moment in which pursuant to § 14.4 sentence 1 of the Aviation Security Act a decision concerning an operation under § 14.3 of the Aviation Security Act is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly. One also cannot rule out the possibility that the course of events will be such that it is no longer required to carry out the operation. According to the findings that the Senate has gained from the written opinions submitted in the proceedings and from the statements made in the oral hearing, it cannot be assumed that the factual prerequisites for ordering and carrying out such an operation can always be established with the certainty required for this.

[124] In particular the Cockpit Association has pointed out that depending on the circumstances, establishing that a major aerial incident within the meaning of § 13.1 of the Aviation Security Act has occurred and that such incident constitutes the danger of an especially grave accident is already fraught with great uncertainties. According to the Cockpit Association, such establishment can only rarely be made with certainty. The critical point in the assessment of the situation was said to be to what extent the possibly affected crew of the plane was still able to communicate the attempt at, or the success of, hijacking an aircraft to the decision-makers on the ground. If this was not possible, the factual basis was said to be tainted with the stigma of a misinterpretation from the very beginning.

[125] Also the findings that are supposed to be gained from reconnaissance measures and checks pursuant to § 15.1 of the Aviation Security Act are, in the opinion of the Cockpit Association, vague at best, even with ideal weather conditions. In the opinion of the Cockpit Association, there are limits to the approach of interceptors to an aircraft that has become conspicuous in view of the dangers involved. For this reason, the possibility of making out the situation and the events on board of such an aircraft is, according to the Cockpit Association, limited even if there is visual contact, which, moreover, is often difficult to establish. Under these circumstances, the assessment of the motivation and the objectives of the hijackers of an aircraft that is made on the basis of the facts ascertained were said to probably remain, as a general rule, speculative to the very end. Consequently, the danger concerning the application of § 14.3 of the Aviation Security Act was said to be that the order to shoot down the aircraft was made too early on an uncertain factual basis if, within the time slot available, which as a general rule is extremely narrow, armed force was at all supposed to be used in a timely manner with prospects of success and without disproportionately endangering people who are not participants in the crime. For such a mission to be effective, it was said to have to be accepted from the very beginning that the operation was possibly not required at all. In other words, reactions would probably often have to be excessive.

[126] In the proceedings, no indications have arisen for assuming that this assessment could be based on unrealistic, and thus unfounded, assumptions. On the contrary, also the Independent Flight Attendant Organisation UFO has plausibly stated that the decision to be taken by the Federal Minister of Defence or by the Minister's deputy pursuant to § 14.4 sentence 1 in conjunction with § 14.3 of the Aviation Security Act must be made on the basis of information most of which is uncertain. Due to the complicated and error-

prone channels of communication between the cabin crew and the cockpit on board an aircraft that is involved in an aerial incident on the one hand and between the cockpit and the decision-makers on the ground on the other hand, and with a view to the fact that the situation on board the aircraft can change within minutes or even seconds, it was said to be virtually impossible for those on the ground who must decide under extreme time pressure to reliably assess whether the requirements of § 14.3 of the Aviation Security Act are met. It was put forward that as a general rule, the decision would have to be taken on the basis of a suspicion only and not on the basis of established facts.

[127] This appraisal appears convincing to the Senate not least because the complicated, multiple-tiered decision-making system, which depends on a large number of decisionmakers and persons concerned, that must have been gone through pursuant to §§ 13 to 15 of the Aviation Security Act until an operation pursuant to § 14.3 of the Aviation Security Act can be carried out, will require considerable time in the case of an emergency. In view of the fact that the overflight area of the Federal Republic of Germany is relatively small, this means that there is not only enormous time pressure on decisionmaking but also the danger of premature decisions.

[128] Even if in the area of police power, insecurities concerning forecasts often cannot be completely avoided, it is absolutely inconceivable under the applicability of Article 1.1 of the Basic Law to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorisation which even accepts such imponderabilities if necessary. It need not be decided here how a shooting down that is performed all the same, and an order relating to it, would have to be assessed under criminal law (on this, and on cases with comparable combinations of circumstances see, for instance, ... What is solely decisive for the constitutional appraisal is that the legislature may not, by establishing a statutory authorisation for intervention, give authority to perform operations of the nature regulated in § 14.3 of the Aviation Security Act vis-à-vis people who are not participants in the crime and may not in this manner qualify such operations as legal and thus permit them. As missions of the armed forces of a non-warlike nature, they are incompatible with the right to life and the obligation of the state to respect and protect human dignity.

[129] Therefore it cannot be assumed – differently from arguments that are advanced sometimes – that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus to his or her own killing, in the case of the aircraft becoming involved in an aerial incident within the meaning of § 13.1 of the Aviation Security Act which results in a measure averting the danger pursuant to § 14.3 of the Aviation Security Act. Such an assumption lacks any realistic grounds and is no more than an unrealistic fiction.

[130] Also the assessment that the persons who are on board a plane that is intended to be used against other people's lives within the meaning of § 14.3 of the Aviation Security Act are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of

the physical existence of the individual human being (see above under C I, II 2 b aa). Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity (see above under C II 2 b aa, bb aaa).

[131] In addition, uncertainties as regards the factual situation exist here as well. These uncertainties, which characterise the assessment of the situation in the area of application of §§ 13 to 15 of the Aviation Security Act in general (see above under C II 2 b bb bbb), necessarily also influence a prediction of how long people who are on board a plane which has been converted into an assault weapon will live and whether there is still a chance of rescuing them. As a general rule, it will therefore not be possible to make a reliable statement about these people's lives being "lost anyway already".

[132] The assumption that anyone who is held on board an aircraft under the command of persons who intend to use the aircraft as a weapon of a crime against other people's lives within the meaning of § 14.3 of the Aviation Security Act has become part of a weapon and must bear being treated as such also does not justify a different assessment. This opinion expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects. This cannot be reconciled with the Basic Law's concept of the human being and with the idea of the human being as a creature whose nature it is to exercise self-determination in freedom (see BVerfGE 45, 187 (227)), and who therefore may not be made a mere object of state action.

[133] The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction (for instance Enders, in: *Berliner Kommentar zum Grundgesetz*, vol. 1, *Artikel 1*, marginal no. 93 (as of July 2005)) also does not lead to a different result. In this context, the Senate need not decide whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution can be derived from the Basic Law. For in the area of application of § 14.3 of the Aviation Security Act the issue is not averting attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system.

...

[135] Finally, § 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft that is abused as a weapon for a crime within the meaning of § 14.3 of the Aviation Security Act is intended to be used.

[136] In complying with such duties of protection, the state and its bodies have a broad margin of assessment, valuation and organisation (see BVerfGE 77, 170 (214); 79, 174 (202); 92, 26 (46)). Unlike the fundamental rights in their function as subjective rights of defence [against the state], the state's duties to protect which result from the objective

contents of the fundamental rights are, in principle, not defined (see BVerfGE 96, 56 (64)). How the state bodies comply with such duties of protection is to be decided, as a matter of principle, by themselves on their own responsibility (see BVerfGE 46, 160 (164); 96, 56 (64)). This also applies to their duty to protect human life. It is true that especially as regards this protected interest, in cases with a particular combination of circumstances, if effective protection of life cannot be achieved otherwise, the possibilities of choosing the means of complying with the duty of protection can be restricted to the choice of one particular means (see BVerfGE 46, 160 (164-165)). The choice, however, can only be between means the use of which is in harmony with the constitution.

[137] This is not the case with § 14.3 of the Aviation Security Act. What the ordering and the carrying out of the direct use of force against an aircraft pursuant to this provision leaves out of account is that also the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state. Not only are they denied this protection by the state, the state itself even encroaches on the lives of these defenceless people. Thus any procedure pursuant to § 14.3 of the Aviation Security Act disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Article 1.1 of the Basic Law and disregards the ban on killing that results from it for the state. The fact that this procedure is intended to serve to protect and preserve other people's lives does not alter this.

[138] § 14.3 of the Aviation Security Act is, however, compatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground.

...

[140] ...If those who have the aircraft under their command do not intend to use it as a weapon, if therefore the corresponding suspicion is unfounded, they can, on the occasion of the early measures carried out pursuant to § 15.1 and § 14.1 of the Aviation Security Act, for instance on account of the threat to use armed force or on account of a warning shot, easily show by cooperating, for instance by changing course or by landing the aircraft, that no danger emanates from them. The specific difficulties that can arise as regards communication between the cabin crew, which is possibly threatened by offenders, and the cockpit, and between the cockpit and the decisionmakers on the ground, do not exist here. In such cases, it is therefore easier to ascertain with sufficient reliability and also in a timely manner that an aircraft is intended to be abused as a weapon for a targeted crash.

[148] However, the encroachment upon fundamental rights carries much weight because the execution of the operation pursuant to § 14.3 of the Aviation Security Act will with near certainty result in the death of the people on board the plane.

...

[150] What must also be kept in mind, however, is that the application of § 14.3 of the Aviation Security Act will possibly affect not only extremely dangerous installations on the ground but will possibly also kill people who are staying in areas in which, in all probability, the wreckage of the aircraft that is shot down by the use of armed force will come down. The state is constitutionally obliged to protect also the lives – and the health– of these people. In a decision pursuant to § 14.4 sentence 1 of the Aviation Security Act, this cannot be left out of account.

APPENDIX H

DECLARATIONS UNDER SUBSEC 9(2) OF THE FOREIGN INCURSIONS ACT

The Attorney-General's Department advised the INSLM that there have been only two declarations made under subsec 9(2) of the Foreign Incursions Act. The first declaration was signed by the Attorney-General on 18th February 1988 and published in the Gazette on 23rd March 1988. The declaration permitted the recruitment in Australia of qualified flying instructors to serve with the Republic of Singapore Air Force subject to the conditions that the Republic of Singapore Air Force not advertise in Australia for the purpose of such recruiting and not recruit in Australia a currently serving member of the Australian Defence Force.

The second declaration was signed by the Attorney-General on 20th July 1989 and published in the Gazette on 24th July 1989. The declaration permitted the recruitment in Australia by the Government of the Independent State of Papua New Guinea or its contractors or agents, of persons "to serve in or with the Papua New Guinea Defence Force in any capacity for the purpose of facilitating the use of 4 Iroquois helicopters supplied to that Government by the Australian Government" on the condition that it not recruit in Australia a currently serving member of the Australian Defence Force.

APPENDIX I

EXECUTIVE CERTIFICATES AND RECOGNITION OF GOVERNMENTS

Section 11 of the Foreign Incursions Act provides for the use of four types of Executive certificates as evidence in a prosecution for an offence against the Foreign Incursions Act.

Subsection 11(1) provides that in a proceeding against a person for an offence against the Foreign Incursions Act in relation to a foreign State, a certificate by a Minister stating that a place or an area specified in the certificate is or is in, or on a specified day or during a specified period was or was in, an independent sovereign state is conclusive evidence of the matters stated in the certificate. This statutory provision applies the common law effect of Executive certificates on matters of foreign affairs and international relations, providing that the certificate is conclusive evidence of the matters stated.²⁸²

Subsection 11(2) provides that in a proceeding against a person for an offence against the Foreign Incursions Act, a certificate by a Minister stating that, if the person had done an act specified in the certificate, being an act alleged to constitute the offence, the person would not have been acting in the course of the person's duty to the Commonwealth in relation to the defence of Australia is prima facie evidence of the matters stated in the certificate.

Subsection 11(3) provides that in a proceeding against a person for an offence against the Foreign Incursions Act in relation to the government of a foreign State or a part of a foreign State, a certificate by a Minister stating that an authority described in the certificate is, or was on a specified day or during a specified period was, in effective governmental control in a specified foreign State, or in a specified part of a foreign State, is prima facie evidence of the matters stated in the certificate. This statutory provision modifies the common law conclusive effect of Executive certificates on matters of foreign affairs and international relations, providing that the certificate is not be treated as conclusive evidence of the matters stated but rather has the status of prima facie evidence capable of being rebutted.

Subsection 11(3A) provides that in a proceeding against a person for an offence against the Foreign Incursions Act, a certificate by a Minister stating that an organisation specified in the certificate was not, on a specified day or during a specified period, an armed force, or part of an armed force of a foreign State specified in the certificate is prima facie evidence of the matters stated in the certificate. This statutory provision modifies the common law conclusive effect of Executive certificates on matters of foreign affairs and international relations, providing that the certificate is not be treated as conclusive evidence of the matters stated but rather has the status of prima facie evidence capable of being rebutted.

Key definitions under the Foreign Incursions Act: “foreign State” and “government”

A certificate under subsec 11(3) relates to a proceeding against a person for an offence against the Foreign Incursions Act in relation to the government of a foreign State or a part of a foreign

²⁸² But see *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at [54] citing *Re James* [1977] Ch 41 at 72, cf *Bonser v La Macchia* (1969) 122 CLR 177 at 193, 217; cited in W.R. Edeson “Conclusive Executive Certificates in Australian Law” (1976-7) 7 *AYBIL* 1, and see also that astute article *passim*.

State. A subsec 11(3) certificate is prima facie evidence that an authority described in the certificate is, or was on a specified day or during a specified period was, in effective governmental control in a specified foreign State, or in a specified part of a foreign State, is prima facie evidence of the matters stated in the certificate. Subsection 3(1) of the Foreign Incursions Act defines “foreign State” and “government” as follows:-

foreign State means a place outside Australia that is:

- (a) an independent sovereign state; or
- (b) an area of land (whether or not it is self-governing) that is not part of an independent sovereign state.

government, in relation to a foreign State or a part of a foreign State, means the authority exercising effective governmental control in that foreign State or that part of that foreign State.

Subsection 3(2) provides that a reference in the Foreign Incursions Act to a part of a foreign State “shall read as a reference to a political subdivision of a foreign State”.

1987 Amendments to key definitions under the Foreign Incursions Act

The Foreign Incursions Act as originally enacted did not refer to a “foreign State” but instead referred to a “foreign country” defined under sec 3 to mean “any country outside Australia”. Section 3 as originally enacted defined “government” in relation a foreign country to mean “the government recognized by the government of Australia as the lawful government of that foreign country”. The *Crimes Legislation Amendment Act 1987* (Cth) replaced these definitions with the current definitions under sec 3.

The Second Reading speech for the *Crimes Legislation Amendment Bill 1987* (Cth) described these changes to the Foreign Incursions Act as follows:-

The purpose of the amendments is to remedy a number of deficiencies in the Act...The scope of the Act is further limited in that the definition of government is limited to those governments recognised by Australia. The term ‘government’ has been redefined to refer to governments which are in effective control of a country. The definition of foreign country is being omitted and a new definition of foreign State is being substituted to overcome possible limits as to the application of the Act to incursions into particular geographical areas outside Australia.²⁸³

The change to the definition of “government” under the Foreign Incursions Act reflected a change in diplomatic practice at the time which saw Australia introduce a policy of diplomatic recognition of States and not government. This followed the UK change of practice. In 1980, the UK Government announced that it would no longer issue certificates indicating formal recognition of governments of foreign States and the question of whether a régime qualified as a

²⁸³ The Hon Senator Tate (then Minister for Justice), Second Reading speech, *Crimes Legislation Amendment Bill 1987* (Cth), Senate Hansard 5th November 1987

government for the purposes of UK domestic legal proceedings would be “left to be inferred from the nature of the dealings, if any, which the [UK Government] may have with it, and in particular on whether [the UK Government] are dealing with it on a normal Government to Government basis”.²⁸⁴

The Foreign Secretary described the UK policy of not recognizing governments as:-

...we have decided that we shall no longer accord recognition to Governments...Where an unconstitutional change of regime takes place in a recognized State, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime and whether and to what extent it qualified to be treated as the Government of the State concerned...

We shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.²⁸⁵

This change might be seen to have been a kind of adoption of the so-called Estrada Doctrine²⁸⁶ on diplomatic relations, the purpose of which is to avoid diplomatic embarrassment by governments not recognizing other governments but instead recognizing only states.²⁸⁷

DFAT and AGD advised the INSLM of the following:-

As a matter of general policy, Australia recognises States not governments. This is intended to facilitate Australia’s political and diplomatic activities.

Notwithstanding this general policy, there are specific contexts in which the Australian Government is or may be required to form a view on whether an authority is properly defined as the government of a foreign State...one such context is the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* (the Act).²⁸⁸

DFAT and AGD elaborated further on this position:-

A determination under subsection 11(3) of the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* (the Act) that an authority was in ‘effective governmental control’ in a foreign State or part thereof is a factual determination that is necessary for

²⁸⁴ Statement by the Secretary of State for Foreign and Commonwealth Affairs, 28th April 1980 Parl. Deb. HL (5th ser) 1121-22 quoted in MJ Dixon, “Recent Development in United Kingdom Practice Concerning the Recognition of States and Governments” (1988) 22 *The International Lawyer* 555 at 556

²⁸⁵ Statement by the Secretary of State for Foreign and Commonwealth Affairs, 28th April 1980 Parl. Deb. HL (5th ser) 1121-22 quoted in Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 250

²⁸⁶ Hilary Charlesworth “The New Australian Recognition Policy in Comparative Perspective” (1991)18 *MULR* 1 at 8-14. Mexico, of which Genaro Estrada was Foreign Minister in 1930, did not recognize the Franco Government of Spain until 1977.

²⁸⁷ See further discussion in M.J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* at 179-181.

²⁸⁸ *Joint DFAT and AGD Response to INSLM’s Question on Notice*, 23rd August 2013

the proper administration of the Act. Any determination is limited in its effect to the criminal proceedings against a person under the Act. We note in this context that a determination may be limited under the Act to a particular time-bound period. A determination under the Act does not necessarily constitute the recognition of a government under international law.

The question of ‘effective control’ is drawn from the customary international law pertaining to the recognition of governments (which is a question related to, but separate from, the recognition of States). An assessment as to whether an entity is properly considered to be the government of a State, or whether an entity acts validly in a State’s name, is traditionally based on the effective control doctrine. The issue primarily arises in the context of the emergence of new States and the assumption of authority by military, as distinct from constitutional, means. The issue is also relevant to determinations such as whether an armed conflict is properly classified as international or non-international (which determines what rules of international humanitarian law apply).

...

Consistent with the foregoing, Australia’s policy of recognising States not governments was intended to facilitate Australia’s political and diplomatic activities. The policy is quite separate from assessments of whether an entity is properly defined as a government for the purpose of domestic legislation.²⁸⁹

Background to the change in diplomatic recognition of foreign State and not governments

AGD advised the INSLM that the former practice of formally recognizing or withholding recognition of foreign governments was abandoned in January 1988:-

In announcing the change of policy, the then Foreign Minister Hayden said:

“...From now on the Australian Government will not extend formal recognition, whether de facto or de jure, to new governments taking power in other countries. Instead, Australian authorities will conduct relations with new regimes to the extent and in the manner which may be required by the circumstances of each case. Successive Australian Governments had been concerned for a number of years about the public presentation of Australia’s practice of extending formal recognition to foreign governments which come to power otherwise than by normal constitutional processes. The decision whether to recognise or not recognise such a regime had at times led to misunderstandings and complications in any dealings Australia might need to have had with the new regime for consular or other purposes.

In voicing the Opposition’s support for the change in policy, then Opposition Spokesman for Foreign Affairs, John Spender QC, said:

“The Opposition supports the change to recognition of states in place of recognition of

²⁸⁹ *AGD Response to Question on Notice* (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

governments for the purpose of foreign relations. However it does so on the basis of certain specific statements of principle.” He went on to say that one of the statements of principle should be that “the Australian Government should retain the right, in exceptional circumstances, to designate the Government accepted by Australia as representing any state recognised by Australia, or to specify that a particular Government is not, or is no longer, recognised by the Australian Government as being entitled to represent a State”.²⁹⁰

In March 1988, an article on the policy shift was published in the DFAT publication *Backgrounder* (No 611). This article included the following:-

In future Australia will no longer announce that it recognises, or does not recognise, a new regime in an existing State. Australia’s attitude to a new regime will be ascertained by the nature of our policies towards and relations with the new regime. Important indicators of Australia’s attitude to a new regime will be: public statements; establishment of and/or the conduct of diplomatic relations with it; ministerial contact; other contacts, such as entering into aid, economic or defence arrangements, technical and cultural exchanges. Abandoning the device of recognition of Governments will enable us to react more flexibly and quickly to developments and to avoid giving rise to speculation about recognition and, consequently, assumptions of approval.

Recognition for the purposes of foreign relations versus recognition for the purposes of domestic judicial proceedings: Common law position of the conclusiveness of Executive certificates on matters of foreign relations

This change in diplomatic practice to the recognition of foreign governments is, to quote DFAT and AGD, intended “for the purpose of foreign relations...to facilitate Australia’s political and diplomatic activities...[a] policy quite separate from assessments of whether an entity is properly defined as a government for the purpose of domestic legislation”.²⁹¹

The practice of recognizing (or not recognizing) governments is a diplomatic tool that takes into account a variety of foreign policy considerations beyond the “effective control” principle and can lead to a government not being recognized even where they are in effective control. This happens where foreign policy reasons are such that the government of one State are not willing to recognize the government of another State: for example, where the government came to power through acts of aggression²⁹² or where the government came to power through non-constitutional

²⁹⁰ *AGD Response to Question on Notice* (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

²⁹¹ *AGD Response to Question on Notice* (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

²⁹² The way in which effective control was achieved may raise questions about international legality. See eg UN Security Council Resolutions 660, 661 and 662 (1990), which called upon States not to recognize any régime established by Iraq following its invasion of Kuwait. Iraq had established de facto control of Kuwait from August 1990 to January 1991. Acting under Chapter VII of the UN Charter, the Security Council decided to take measures to “restore the authority of the legitimate Government of Kuwait” and called upon States “not to recognize any régime set up by the occupying Power” and to “take appropriate measures to protect assets of the legitimate Government of Kuwait” (UNSC Res 661 (1990), paras 2 and 9). The Security Council decided that “annexation of Kuwait by Iraq... has no legal validity” and called upon “all States, international organizations and specialized

means or is non-democratic. Such non-recognition has occurred even where the government which is not recognized is exercising “extensive, and sometimes complete, control over the population” of the State.²⁹³ The foreign policy reasons for non-recognition may arise precisely because of the way in which effective control is being exercised – where excessive (but effective) control is being exercised, this may be the cause for non-recognition.²⁹⁴

The diplomatic practice of recognition or non-recognition departs from the traditional means of identifying a government of a foreign State for the purposes of international law. In relation to the diplomatic practice of recognizing governments, Murphy describes how the traditional criteria under international law for recognising States and governments “have often been mixed with other factors... rather than resorting to a read-made legal framework on recognition, policy-makers are left weighing various amorphous policy elements that provide little concrete guidance. While the central and determinative issue whether to recognize a government may still be the traditional “effective control” test, decisions by States to recognize a government go beyond this traditional test and may in some cases ignore it completely, as the UK Government did in relation to Libya where it abandoned the practice of not recognizing States and recognized the National Transitional Council of Libya as the government of Libya before it has effective governmental control over the State of Libya.”²⁹⁵

The INSLM has considered whether this diplomatic change of practice has actually changed the approach to recognising governments under domestic law. In this regard, the INSLM has considered the experiences of Australian and UK courts in determining the existence of a government both before and after the change in diplomatic practice. Reflecting on those experiences, the INSLM has reached the view that this diplomatic change of practice has not had any effect on the practice of the Executive Government providing certificates to the courts which, by their very nature, state whether the Government recognises a government, or does not recognise a government, for the purposes of domestic legislation.

It has long been accepted by Australian and British courts that as a principle of common law, Executive certificates on matters of foreign affairs and international relation will be conclusive of the matters stated therein.²⁹⁶ Executive certificates stating matters as to the sovereignty of a foreign State or the government of a foreign State (including whether a government is exercising

agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as indirect recognition of the annexation” (UNSC Res 662 (1990) paras 1 and 2).

²⁹³ Sean D Murphy, “Democratic Legitimacy and the Recognition of States and Governments” (1999) 48 *ICLQ* 545 at 570

²⁹⁴ See further Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 258; and MJ Peterson “Recognition of governments should not be abolished” (1983) 77 *AJIL* 31 at 49

²⁹⁵ See statement by Foreign Secretary 27th July 2011 quoted in Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 253. In recognizing the National Transitional Council as the government of Libya, the Foreign Secretary stated “the momentum has shifted against [Qadhafi] and those around him. There is steady progress across the board... where the opposition is driving Qadhafi’s forces back. Reports suggest that moral amongst the regime’s forces is low... I am making this announcement today to reflect the facts on the ground and increase our support for those fighting... for a better future in Libya. We will sustain our actions for as long as is necessary. Our recent decision to deploy an additional four Tornados to Libya is a concrete illustration of this end”. It is clear from this statement that the National Transitional Council was not in effective governmental control of Libya.

²⁹⁶ The leading case establishing the law on Executive certificates and their conclusive evidentiary effect is *Duff Development Corporation v Government of Kelantan* [1924] AC 797.

de facto control of a foreign State) have consistently been held to be conclusive of those matters. As Lord Atkin stated in the case of *The Arantzazu Mendi* (which required a determination by the court as to the identity of the government of Spain during the Spanish civil war):-

Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of States ...”²⁹⁷

In this case, the court accepted that the statements by the Foreign Secretary as to the status of the National Government were conclusive that that Government was the Government of the foreign State of Spain.

Lord Atkin described the Foreign Secretary’s statement to the court as stating that “His Majesty’s Government recognize Spain as a foreign sovereign State, and recognizes the Government of the Spanish Republic as the only de jure Government of Spain or any part of it” but then proceeded to say “His Majesty’s Government recognizes the Nationalist Government as a Government which at present exercises de facto administrative control over the larger portion of Spain...”.

While the Foreign Secretary expressly stated that “His Majesty’s government have not accorded any other recognition to the Nationalist Government”²⁹⁸ their Lordships held that “exercising effective de facto administrative control” and “exercising effective administrative control” should be understood as exercising all the functions of a sovereign government.²⁹⁹ Lord Wright described the Foreign Secretary’s statement as follows: “[the statement] appears to me to have stated sufficiently, and in the substance, that the Nationalist Government of Spain had been recognized by His Majesty’s Government as a de facto Government ...not subordinate to any other Government ...ruling over the larger portion of Spain”.³⁰⁰

Lord Russell of Killowen noted that the Statement also posed a different question, namely whether the Nationalist Government should be so regarded but that the statement overall “can lead to only one conclusion of fact - namely, that His Majesty’s Government does recognize the Nationalist Government as the Government of a sovereign State which has the larger portion of Spain ...under its exclusive authority and control”.³⁰¹

Lord Atkin described “exercising effective administrative control” as “exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control

²⁹⁷ [1939] AC 256 at 264. For recent applications of this principle see *British Arab Commercial Bank v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) per Blair J at [25] and *R on the Application of HRH Sultan of Pahang v Secretary of State* [2011] EWCA Civ 616 per Maurice Kay LJ at [14] et seq, and Moore-Bick LJ at [30].

²⁹⁸ at [1939] AC 258

²⁹⁹ at [1939] AC 264-265

³⁰⁰ at [1939] AC 268

³⁰¹ at [1939] AC 267

of property whether for military or civil purposes...”³⁰²

The advice received from DFAT and AGD confirms the INSLM’s view that the current definition of “government” under the Foreign Incursions Act has been purposely used to pick up the international law concepts of “effective control” and de facto recognition of a government, without needing to declare whether the government should be recognized as the government from a foreign policy or ethical perspective.

The reasons of their Lordships suggest the tenuous nature of the distinction sought to be advanced between an “authority exercising effective governmental control in that foreign State or that part of that foreign State” for the purposes of the Foreign Incursions Act and a government recognized by the Australian Government as the government of a foreign State. An Executive certificate under subsec 11(3) that an authority is or was exercising effective governmental control in a specified foreign State or specified part of that foreign State does as a matter of fact involve something very like, or amounting to, recognition of that government as the government of the foreign State irrespective of the policy question as to whether that government should be the government of the foreign State, in the eyes of the Executive.³⁰³

The High Court of Justice of England and Wales recently applied the principles espoused in *The Arantzazu Mendi* in a case which required the court to be satisfied that the National Transitional Council of the State of Libya was the Government of Libya (and the Qadhafi régime was not). The UK Foreign Secretary produced a certificate to the court for the purposes of the proceedings which stated 1) “Her Majesty’s Government recognise the National Transitional Council as the Government of Libya” and 2) “Her Majesty’s Government do not recognise any other Government in Libya. In particular, they no longer recognise the former Qadhafi régime as the Government of any part of Libya”.³⁰⁴

The court held that the Foreign Secretary’s certificate was conclusive of the matter of whether the National Transitional Council of the State of Libya was the Government of Libya and the Qadhafi régime was not and due to the conclusiveness of that evidence “there can only be an affirmative answer to this question”.³⁰⁵ The court noted that “the important point is that the government of the United Kingdom recognises it as the legitimate government of Libya”.³⁰⁶ The court further noted that had it been required to investigate the factual position for itself (in the absence of such a certificate) it “might be a difficult exercise given the conditions that prevail in Libya at the time of this judgment”³⁰⁷ and would have involved:-

consideration of issues such as whether the NTC [National Transitional Council] is the constitutional government of Libya, the degree, nature and stability of administrative control that it of itself exercises over the territory of the state, whether HMG [Her Majesty’s Government] has any dealings with it and, if so, what is the nature of those

³⁰² at [1939] AC 264-265

³⁰³ The possibility under subsec 11(3) of confining the certified status to a specified day or period is probably quite different from the general understanding of international practice.

³⁰⁴ *British Arab Commercial Bank v The National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm) at [23]

³⁰⁵ at [2011] EWHC 2274 (Comm) [25]

³⁰⁶ at [2011] EWHC 2274 (Comm) [24]

³⁰⁷ at [2011] EWHC 2274 (Comm) [22]

dealings, and the extent of international recognition that it has as the government of the state.³⁰⁸

Had the court been required to establish the factual situation for itself, rather than take as conclusive the certificate of the Foreign Secretary, it is not clear that the court would have reached the same conclusion as to who the government of Libya exercising effective control was. Prof Warbrick states:-

At the time the Foreign Secretary certified that the National Transitional Council was the government of Libya it was by no means clear that it had the reach of effective territorial control which would have entitled it to be so regarded. It was its democratic aspirations which motivated the British Government, not the totality of its military successes.

On the other hand, the British Government might have had an effective response to this claim, even if it were otherwise made out. It is this. The power to recognize governments is an aspect of the prerogative to conduct foreign affairs.³⁰⁹

Approach of the Australian courts to the conclusiveness of Executive certificates on foreign relations matters: application of the common law principle

Australian courts have applied the common law principle that generally in matters involving foreign relations the Court may rely upon a certificate from the Executive and that certificate would be conclusive. The circumstances in which this is so are described in the judgement of Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 368:-

While the courts are entitled to take judicial notice of the course of open and notorious international events of a public nature, in some cases of doubt they accept as conclusive statements provided to the courts by the Executive Government... statements so received have dealt with such questions as the extent of foreign territory, the existence of a state of war, belligerency or neutrality, the existence of foreign States and the identity of persons constituting the governments of recognised States.

The statements provided by the executive certify that the Australian Government “recognises” a particular state of affairs: see the terms of the certificate in *Corporate Affairs Commission v Bradley* (supra) at 390. The terms of such certificates are subject to interpretation by the courts but, once so construed, the certificates are “conclusive”.

The expression “conclusive” is used not only in the sense that evidence is not admissible to contradict the certificates (*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853 at 901) but also, it seems, in the sense that the certificates cannot be questioned in proceedings for judicial review under s 75(v) of the Constitution or s 39B of the *Judiciary Act*.

³⁰⁸ at [2011] EWHC 2274 (Comm) [22]

³⁰⁹ Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 263

In *Savill and Albion Co Ltd v R*,³¹⁰ Dixon J applied the common law principle to explain when the court should treat an Executive certificate as conclusive, finding that there are certain facts which the Executive is authorized to decide such as “the existence of a state of war, the recognition of a foreign state, the extent of the realm or other territory claimed by the Crown, or the status of a foreign sovereign”.³¹¹ This case involved a negligence claim for acts done in the course of warlike operations. His Honour noted that “the Court is not in a position to know or to inquire what measures are necessary for the proper conduct of a warlike operation and must depend upon those upon whom finally rests the responsibility of action”.³¹²

*Attorney-General (Cth) v Tse Chu-Fai*³¹³ involved the question of whether the Hong Kong special administrative region was an extradition country for the purposes of the *Extradition Act 1988* (Cth). An Executive certificate was tendered as evidence stating the political status of Hong Kong, namely, that it was a territory for which the People’s Republic of China had responsibility for the international relations. The High Court held that the obligation to construe a statutory provision (in this case, the meaning of “extradition country”) remains with the court but where the statutory provision takes as “factum for its operation a matter pertaining to the conduct of foreign affairs, the communication of information by the Executive may be both helpful and relevant”.³¹⁴ The Court held that the certificate was admissible into evidence as a statement that Australia dealt with China on the footing that it was responsible for the international relations of Hong Kong but that it remained for the court to construe and apply the definition of “extradition country” under the Act.

In *Anglo-Czechoslovakia & Prague Credit Bank v Janssen*³¹⁵ the Full Court of the Victorian Supreme Court held that, following the authorities, the court’s decision of who is administering a foreign State at a particular time – that is, exercising de facto control of a foreign State, should be made by reference to who the Australian Executive recognizes as being in effective control at the material time (and as such, it is recognition and not actual control which matters). The court held that the statements in the Executive certificate provided to the court in this case were “conclusive on the matters which I have to determine”.³¹⁶

The court went on to state:-

Where doubts exist as to what Government has or had the administration of a particular territory at a given time the question may be best resolved by obtaining a statement on the point from one of His Majesty’s Ministers of State. The question is one of fact...the cases in which it becomes necessary or desirable to seek an answer to such a question from the Minister of State are substantially illustrated in the authorities. They are cases where a country has been or is being invaded by an enemy and war has been waged or is still being waged in some degree in the whole or part of the invaded territory. Similar

³¹⁰ (1940) 66 CLR 344

³¹¹ at 66 CLR 364

³¹² at 66 CLR 363. His Honour decided that the Court must accept the statement of the First Naval Member of the Naval Board as decisive of the relevant matters.

³¹³ (1998) 193 CLR 128

³¹⁴ at 193 CLR 128 [54] citing *Re James* [1977] Ch 41 at 72

³¹⁵ [1943] VLR 185

³¹⁶ at [1943] VLR 191-192

questions may arise for the same reasons during the progress of civil wars. In such cases it will often be extremely difficult to determine what portion of the territory in question is under the effective administrative control of either of the contestants.³¹⁷

Terrorism prosecutions under the Criminal Code: the application of the common law principles for Executive certificates, including their conclusive effect

The meaning of “government” for the purposes of Part 5.3 of the Criminal Code (Terrorism) is not defined and there is no statutory provision for Executive certificates to be issued for the purposes of a prosecution for an offence against Part 5.3. In the absence of a statutory scheme for Executive certificates, the common law principles for the admission of Executive certificates (including their conclusive effect) will apply for the purposes of a Criminal Code terrorism prosecution. Section 145 of the *Evidence Act 1995* (Cth) preserves the common law principles relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international relations.

Australian statutory scheme preserving the conclusive effect of certificates on foreign relations matters

There is precedent for replicating the common law conclusive effect of certificates on foreign relations matters in statutory schemes. It is worth noting the approach taken to Executive certificates under the *Foreign States Immunities Act 1985* (Cth). Under subsec 40(1) of that Act, the Minister for Foreign Affairs may issue a certificate certifying for the purposes of the Act that a) a specified country is or was a foreign State,³¹⁸ b) a specified territory is or was, or is not or was not, a part of a foreign State, c) a specified person is, or was, the head of, or the government or part of the government of, a foreign State or a former foreign State. A certificate issued under sec 40 is “admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters”.³¹⁹

Legitimate representative of the people but not the government

Further complicating the statutory scheme of evidentiary certificates under the Foreign Incursions Act is the diplomatic practice of recognizing the “legitimate representatives” of a foreign State. Prior to the decision by the UK Government to recognize the National Transitional Council as the government of Libya, it had described the Council’s status as being regarded by the UK as the “legitimate political interlocutor” for the Libyan people.³²⁰ The UK Government also stated “it is unclear that Gaddafi no longer has legitimacy and so he should heed the calls of the Libyan people and the international community to leave immediately. We recognise the

³¹⁷ at [1943] VLR 197. The court noted the *Arantzazu Mendi* and other United Kingdom authorities as illustrating these difficulties.

³¹⁸ Foreign State is defined in subsec 3(1) of the *Foreign States Immunities Act 1985* (Cth) to mean “a country the territory of which is outside Australia, being a country that is: (a) an independent sovereign state; or (b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state”. The meaning of ‘government’ is not defined for the purposes of the Act.

³¹⁹ subsec 40(5) of the *Foreign States Immunities Act 1985*

³²⁰ Statement by the Foreign Secretary, 19th April 2011, quoted in Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 248

National Transitional Council as the legitimate representative of the Libyan people...”³²¹

Prof Warbrick describes this notion of ‘legitimate representation’ as:-

belonging to discourse from the field of colonial self-determination rather than effective administration...less than full usurpation of a government’s authority by rebels might be enough to allow acceptance or even recognition of degrees of status up to-and as it was to turn out [in relation to Libya]-including-recognition as a government...as a matter of British policy.³²²

The use of the word “recognition” is intended to mean something less than being a government. This policy of recognizing the legitimate representatives of a people of a foreign State “carries the risk of challenge against standards of international law by an incumbent government”.³²³ This same problem arises in relation to the definition of “government” under the Foreign Incursions Act as the Australian Government practice has also expressly recognized groups as the “legitimate representative” of the people of a foreign State.

Where the Australian Government expressly recognizes a group as the “legitimate representative” of the people of a foreign State while refusing to recognize a government of that State, it raises problems where a certificate is given under subsec 11(3) or (3A) under the Foreign Incursions Act for a prosecution under that Act. Not only does it raise problems of proof regarding who the “government” of the foreign State is, and who the armed force of that government is (especially given the prima facie nature of such certificates), it also raises an important policy question. Given it is not an offence under the Foreign Incursions Act to fight on the government side of a conflict, there are important questions raised where the Australian Government recognizes an authority as the legitimate representatives of a foreign State but it is nonetheless an offence to fight on behalf of that authority but not an offence to fight on behalf of the government which is not the legitimate representative of the people of that foreign State.

For an example of how oddly this policy works, governments including Israel, have recognized the Palestinian Liberation Organization (“**PLO**”) as the legitimate representative of the Palestinian people.³²⁴ Australia on the other hand, has not recognized the PLO as the legitimate representative of the Palestinian people, with DFAT advising Australian diplomats that “[t]here are no restrictions on courtesy calls, invitations to and correspondence with the PLO, however, no endorsement should be given to the claim that it represents ‘Palestine’ or the ‘State of Palestine’, ”.³²⁵

³²¹ HC Parl Deb 27th June 2011, Vol 530 c566W quoted in Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 252

³²² Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 252

³²³ Colin Warbrick “British Policy and the National Transitional Council of Libya” (2012) 61 *ICLQ* 247 at 252

³²⁴ See Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press (1997) at 17 and 80

³²⁵ Guidelines on Official Australian Contact with Representatives of Foreign States, Political Entities or Organisations where Special Considerations are Involved, Department of Foreign Affairs and Trade (August 2013). As Australia does not formally recognize Taiwan or accept its claim to be “the Republic of China”, the same document advises that:- “While the ‘Taiwanese authorities’ is preferable, mention may be made of the ‘Taiwanese government’ provided the ‘g’ is in lower case,”.

This is not a hypothetical issue as it has already arisen in relation to Syria. The Australian Government has recognized the National Coalition of Syrian Revolution and Opposition Forces as the legitimate representative of the Syrian people. DFAT and AGD jointly advised the INSLM that:-

In contexts other than the [Foreign Incursions] Act, Australia has on occasion publicly described entities as the legitimate interlocutor or representative of a country's people.

The National Coalition for Syrian Revolutionary and Opposition Forces has been described by the Australian Government as the legitimate representative of the Syrian people in order to achieve the policy objective of publicly supporting the Syrian National Coalition's struggle against the Assad regime, placing international pressure on the Assad regime and encouraging the acceptance of the Syrian National Coalition as a legitimate interlocutor in international meetings in relation to the future of Syria.

Consistent with Australia's general policy of recognising States not governments, the term 'legitimate representative of the Syrian people' was deliberately designed to make it clear that the description does not signify recognition of the Syrian National Coalition as the Government of Syria.³²⁶

In the press release announcing the listing of Jabhat al-Nusra as a terrorist organisation under the Criminal Code, the Hon Mark Dreyfus QC MP, the then Attorney-General, described the organisation as:-

Jabhat Al-Nusra is an extremist group fighting against Bashar al Assad's regime In Syria, with direct links with Al-Qa'ida in Iraq, which supplies it with weapons, recruits and equipment. The Australian Government deplores the violence and suffering that is occurring in Syria

Jabhat al-Nusra has a history of suicide attacks and indiscriminate bombings in Syria and is not part of the National Coalition for Syrian Revolutionary and Opposition Forces, which Australia acknowledges as the legitimate representative of the Syrian people.³²⁷

A press release titled *UN Security Council meets with Syrian Opposition*, stated:-

Foreign Minister Bob Carr welcomed the first meeting on 26 July between UN Security Council members and the National Coalition of Syrian Revolution and Opposition Forces, led by its newly elected President Ahmad al-Jarba.

Senator Carr said the meeting reflected sustained efforts by Australia and other Council members to maintain the Security Council's focus on Syria.

"The situation in Syria is getting worse every day," Senator Carr said.

"Over 100,000 people have now been killed in the conflict and millions of people are

³²⁶ *Joint DFAT and AGD Response to INSLM's Question on Notice*, 23rd August 2013

³²⁷ Press release of then Attorney-General, Mark Dreyfus QC MP, *LISTING OF JABHAT AL-NUSRA AS TERRORIST ORGANISATION*, 28th June 2013

homeless and without proper food or medical care. About 2 million are now refugees in neighbouring countries.

“Australia’s strong view is that the only solution to this conflict is a political settlement, and we welcome the National Coalition’s confirmation at the meeting that it is committed to such a settlement.

“It is vital that the proposed Geneva II conference is held as soon as possible, so agreement can be reached on a political transition.”

Senator Carr said Australia acknowledged the National Coalition as the legitimate representative of the Syrian people in December 2012.

“Australia welcomes the new leadership of the National Coalition and its expanded political body as an indication of its commitment to broad representation,” Senator Carr said.

“We commend the commitment of the National Coalition’s leadership to a democratic and pluralistic Syria where all minorities have a place and for rejecting terrorism and extremism.

“These are fundamental principles on which a new Syria needs to be built.”³²⁸

The Australian Government has released factsheets containing information and advice for Australians on the current situation in Syria, including the ongoing violence. The Australian Government’s factsheet *Ongoing Violence in Syria* advises:-

The Australian Government deplores the violence and suffering that is occurring in Syria. Australians condemn all acts of violence against civilians, whoever is responsible.

The Government remains committed to a unified international response on Syria. Australia is continuing to work with like-minded countries to maintain pressure on the Syrian Government to end the violence and commit to an inclusive process of political transition.

Australia implemented new sanctions against Syria on 21 August 2012 restricting trade in precious metals and diamonds, luxury goods, and newly minted currency and with the oil, gas and petrochemical sectors. These new measures are in addition to existing asset freezes and travel bans on 106 individuals and 28 entities and an embargo on the provision of military equipment and assistance.

Australia’s sanctions specifically target the regime, not the Syrian people. They include sanctions against senior government figures, including President Assad, who are connected with the violence and abuses of human rights.

The Australian Government has released 2 factsheets with information on the 2 Syria based

³²⁸ Press release of Senator the Hon Bob Carr, then Foreign Minister, 27th July 2013

Islamic terrorist organisations listed under the Criminal Code. The factsheet *Ongoing Violence in Syria – additional information for the Australian communities* advises the following in relation to Jabhat AlNusrah which was listed as a terrorist organisation under the Criminal Code in June 2013:-

Al-Nusrah is an extremist group fighting against Bashar al Assad’s regime in Syria. The group has a history of suicide attacks and indiscriminate bombings in Syria. It has direct links with AlQa’ida in Iraq, which supplies it with weapons, recruits and equipment.

Al-Nusrah follows an extremist terrorist ideology and does not respect the democratic aspirations of the Syrian people. Violent extremism and terrorist ideology have no place in Syria, or anywhere else.

Al-Nusrah is not part of the National Coalition for Syrian Revolutionary and Opposition Forces (SOC), which Australia acknowledges as the legitimate representative of the Syrian people.

The factsheet *Ongoing Violence in Syria – Listing of terrorist organisation – the Islamic State of Iraq and the Levant* advises the following in relation to the Islamic State of Iraq and the Levant (ISIL) which was listed as a terrorist organisation under the Criminal Code in December 2013:-

ISIL is an extremist organisation and one of many groups involved in the ongoing violence in Syria and Iraq. ISIL is one of the world’s most active terrorist organisations and it conducts daily and often indiscriminate attacks that target public gatherings to maximise casualties.

ISIL is not part of the National Coalition for Syrian Revolutionary and Opposition Forces, which Australia acknowledges as the legitimate representative of the Syrian people.

The AFP submitted to the INSLM:-

Certain (inter-State) conflicts may occur where it is not possible for the Australian Government to clearly identify which of the involved parties should be considered the legitimate representative of the people of the State. This can result from a lack of identifiable ‘Government’ and opposition forces, particularly in situations of entrenched civil war and the involvement of 3rd party State actors. The Syrian conflict is an example; the Assad Government is not recognised as the legitimate government, certain elements of the opposition forces have been recognised as the legitimate representatives of the people, but these opposition forces are not a unified body and have limited governmental power in certain sections of the country.

...

Those who are involved in the Syrian conflict (and similar situations) present a risk to the Australian community, both from returnee fighters and the possibility of increased ethnic/racial tensions within the community. Those who are involved in conflict could have increased military skills and training, be further radicalised and be willing to commit acts of terrorism in Australia.³²⁹

Determining effective governmental control?

The AFP submitted to the INSLM that:-

While the Australian Government does not recognise the Assad regime as the legitimate representative of the Syrian people, the Assad regime would nonetheless likely be regarded as the “government” of Syria for the purposes of the Act in so far as it may be said to be ‘the authority exercising effective governmental control’ in Syria (section 3). This may cause difficulties in prosecuting those who travel to Syria for the purpose of fighting against the Assad Government.

The AFP also notes that there is a defence to the offence in section 6 of the Act where the person is serving with the armed forces of the government of the foreign State. This again raises issues in the Syrian context, where a person fighting with the Assad forces may not be committing an offence under the Foreign Incursions Act (although they may be committing offences under other Commonwealth Acts).³³⁰

³²⁹ *AFP Submission to the INSLM*, 21st March 2014

³³⁰ *AFP Submission to the INSLM*, 21st March 2014

APPENDIX J

AUSTRALIAN GOVERNMENT VIEWS ON THE SYRIAN CONFLICT

Australian Government factsheets

The Australian Government has released factsheets containing information and advice for Australians on the current situation in Syria, including the ongoing violence. The Australian Government's factsheet *Ongoing Violence in Syria* advises:-

The Australian Government deplores the violence and suffering that is occurring in Syria. Australians condemn all acts of violence against civilians, whoever is responsible.

The Government remains committed to a unified international response on Syria. Australia is continuing to work with like-minded countries to maintain pressure on the Syrian Government to end the violence and commit to an inclusive process of political transition.

Australia implemented new sanctions against Syria on 21 August 2012 restricting trade in precious metals and diamonds, luxury goods, and newly minted currency and with the oil, gas and petrochemical sectors. These new measures are in addition to existing asset freezes and travel bans on 106 individuals and 28 entities and an embargo on the provision of military equipment and assistance.

Australia's sanctions specifically target the regime, not the Syrian people. They include sanctions against senior government figures, including President Assad, who are connected with the violence and abuses of human rights.

The Australian Government has released 2 factsheets with information on the 2 Syria based Islamic terrorist organisations listed under the Criminal Code. The factsheet *Ongoing Violence in Syria – additional information for the Australian communities* advises the following in relation to Jabhat AlNusrah which was listed as a terrorist organisation under the Criminal Code in June 2013:-

Al-Nusrah is an extremist group fighting against Bashar al Assad's regime in Syria. The group has a history of suicide attacks and indiscriminate bombings in Syria. It has direct links with AlQa'ida in Iraq, which supplies it with weapons, recruits and equipment.

Al-Nusrah follows an extremist terrorist ideology and does not respect the democratic aspirations of the Syrian people. Violent extremism and terrorist ideology have no place in Syria, or anywhere else.

Al-Nusrah is not part of the National Coalition for Syrian Revolutionary and Opposition Forces (SOC), which Australia acknowledges as the legitimate representative of the Syrian people.

The factsheet *Ongoing Violence in Syria – Listing of terrorist organisation – the Islamic State of Iraq and the Levant* advises the following in relation to the Islamic State of Iraq and the Levant

(ISIL) which was listed as a terrorist organisation under the Criminal Code in December 2013:-

ISIL is an extremist organisation and one of many groups involved in the ongoing violence in Syria and Iraq. ISIL is one of the world's most active terrorist organisations and it conducts daily and often indiscriminate attacks that target public gatherings to maximise casualties.

ISIL is not part of the National Coalition for Syrian Revolutionary and Opposition Forces, which Australia acknowledges as the legitimate representative of the Syrian people.

Attorney-General, Senator the Hon George Brandis QC

The threat posed by Australian travellers to Syria and other conflict zones is significant and will likely have long-term implications for our security.

I am concerned about the radicalisation of Australians as a result of the Syrian conflict, particularly those who return to Australia with the capabilities acquired through fighting or training with extremist groups.

In addition, Australians travelling to Syria to engage in, or support terrorist activities are not only committing criminal offences, but may face personal risks such as being kidnapped, seriously injured or killed.³³¹

[p]er capita Australia is one of the largest sources of war fighters from other countries outside the region to the Syrian civil war.³³²

Increased access to foreign travel and ability to connect and communicate with people around the world has enriched individuals, business and society. However, the global access and connectivity we now take for granted also present opportunities and tools for terror groups to expand their reach.

This is all exemplified with the current situation in Syria. The conflict has claimed more than 100,000 lives, forced 2.3 million Syrians to flee for neighbouring countries, and left half the population in need of humanitarian aid. We hope the Geneva II conference can result in agreeable solutions that address the root cause of the conflict and the human suffering. We strongly support what UN Secretary General Ban Ki-Moon and his Special Envoy Lakhdar Brahimi tried to achieve in difficult circumstances.

But while the fighting is limited to Syria and its immediate region, the ramifications from the conflict extend beyond the region and present a complex set of global security challenges.

³³¹ *Arrests highlight threats to Australia's national security*, Media Release, 3rd December 2013
<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/3December2013-ArrestshighlighthreatstoAustraliasnationalsecurity.aspx>

³³² Attorney-General, the Hon Senator George Brandis QC, quoted in Paul Maley, "Aussie fighters leading Syrian terror groups", *The Australian*, 18 Feb 2014 p2

Here in Australia, as recently as last December, two men were arrested in Sydney and charged with foreign incursion offences and there have been several reported deaths of Australian citizens. Such events remind us of the risks to Australian citizens and our national security from individuals who support or engage in far-away conflicts.

In Australia, like many other countries, we are witnessing a growing trend of citizens travelling offshore to engage in, or support terrorist activities or conflict. These individuals not only potentially breach Australian laws and commit offences offshore, but upon their return to Australia they pose a significant national security risk.

Those who actively participate in combat or assist in the planning and facilitation of such activity can become radicalised and obtain new skills– including the ability to conduct an attack on Australian soil, radicalise others and impart knowledge and skills gained offshore.

It is important for the international law enforcement community to work together in the effort to counter the threat from the region...

The ongoing violence in Syria is giving rise to increasing tensions between the Sunni,

Shia and Alawi communities in Australia. This has manifested in localised violence and criminal activity.³³³

Minister for Foreign Affairs, the Hon Julie Bishop MP

[W]e are deeply concerned for the safety of Australians in Syria. The security situation is extremely dangerous. There's ongoing military conflict. We are aware of reports of kidnappings and terrorist attacks. And I have to point out that it is illegal under Australian law for any Australian including dual citizens to fight, or provide funding, or provide training, or supply weapons to either side of the conflict in Syria.

So we're deeply concerned about the potential radicalisation of Australians as a result of the Syrian conflict, particularly those who are travelling to Syria and then returning to Australia with capabilities acquired through fighting or training with extremist groups.

And in particular we have learned that some Australians are fighting in Syria with Jabhat al-Nusra and the Islamic State of Iraq and the Levant which are listed terrorist organisations under our criminal code.

...our advice of the Government to Australians who are intending to travel to Syria to participate in the Syrian conflict is don't do it, it's against the law and if you choose to illegally participate in a foreign conflict then you're not only breaking the law but you're placing yourself in immense danger. So we are considering a number of measures that

³³³ Attorney-General, the Hon Senator George Brandis QC, *Address at the opening of the INTERPOL Global Security and Counter Terrorism Convention*, 28th January 2014
<http://www.attorneygeneral.gov.au/Speeches/Pages/2014/28January2014-InterpolGlobalSecurityAndCounterTerrorismConvention.aspx>

might have to be put in place to discourage or deter Australians from travelling to Syria to participate in the conflict.

...

Now what we can do is we can point out that anyone including dual Australian Syrian nationals who participate in what I'll call military activities with the Syrian armed forces, if they don't have any authorisation to do so, they are in breach of our laws and the offence under the relevant law; that's the Autonomous Sanctions Act is punishable by up to ten years imprisonment or a fine or both. So it's also — there's another act about foreign incursions — it's an offence to join or recruit someone to join organisations that are engaged in hostile activities against foreign governments. So we're trying to stop people doing this.

Now, we can cancel passports, we can cancel passports if we have belief that Australians are travelling overseas to engage in these illegal activities and we've certainly done that but I don't want to go into too much detail. And if they have gone overseas and we have information that leads us to believe that people have been engaged in fighting for either side in the Syrian conflict, we can cancel their passport while they're overseas to stop them travelling to other countries, but then provide consular assistance and limited documentation to get them back to Australia.³³⁴

ASIO

In 2014, ASIO advised the INSLM that:-

ASIO is concerned about young Australians placing themselves in harms way and the very real prospect of these people returning home with social connections to networks of extremists and equipped with the intent and knowhow to conduct an attack in Australia.

ASIO is investigating between 120 to 150 people in Australia and offshore who are involved substantively with extremist groups in Syria. It is important to remember that precise figures are constantly changing due to the fluid nature of the conflict.

Australians who have travelled to the region have done so for various reasons. Not all of these individuals are joining terrorist groups in Syria; there is a spectrum of activities connected with the conflict, ranging from medical or humanitarian aid through to active engagement in fighting.³³⁵

Approximately ten Australians are believed to have been killed in Syria as a result of the conflict. Due to the security situation it is difficult to say precisely how many.³³⁶

³³⁴ Transcript of interview, 11th February 2014
http://www.foreignminister.gov.au/transcripts/2014/jb_tr_140211.html

³³⁵ *Information provided by ASIO to the INSLM*, 18th February 2014

³³⁶ *Information provided by ASIO to the INSLM*, 18th February 2014

In 2013, ASIO reported to Parliament that:-

There has been an increase in Australians travelling overseas to participate in terrorist training or engage in foreign disputes—Syria is the primary destination. The concern is not only for Australians who risk their lives overseas, but also the likelihood of radicalised Australians returning home with an increased commitment and capability to pursue violent acts on our shores.³³⁷

...

Ongoing conflicts overseas present a range of security challenges for Australia.

The Syrian conflict has resonated strongly in Australia, partly because of deep familial ties to Lebanon that exist here. Many Australians—a significantly greater number than we have seen for any comparable conflict—have travelled to the region, including several to participate directly in combat or to provide support to those involved. As at 30 June 2013, four Australians were known to have been killed in Syria.

ASIO is concerned about the potential for Australians in Syria to be exposed further to extremist groups and their ideology. Such groups include the recently proscribed terrorist organisation Jabhat al-Nusra. An individual who becomes involved in the conflict and who holds, or develops, an extremist ideology could return to Australia not only with the intent to facilitate attacks onshore but also with experience and skills in facilitating attacks. In addition, the individual's social connections with international fighters could make such attacks easier to carry out. Alternatively, such an individual could become involved in terrorist activity elsewhere, exploiting the relative travel advantages Australian citizenship brings.

We expect these challenges to play out over several years and have a medium-to long-term influence on the extremist environment in Australia, beyond any immediate resolution to the Syrian civil war.³³⁸

In late 2013, the ASIO Director-General of Security, David Irvine, stated:-

We continue to see young Australian Muslims travelling to fight in Syria – mostly with the Sunni opposition and with al-Qa'ida affiliates, but also some with Hizballah. A significant number of Australians have been actively involved in the Syrian conflict and as many as six Australians may already have died in the fighting.

Our concern is not simply for their safety as Australian citizens in Syria but also for their support of the violent doctrines of al-Qa'ida and its associates, and what they might do, or inspire, when they return to Australia. It is relevant that, of the score or so of Australians who trained with al-Qa'ida or its affiliates in Afghanistan or Pakistan in the 1990s, almost all returned to Australia and were subsequently convicted of offences

³³⁷ *ASIO's Report to Parliament 2012-2013*, pviii

³³⁸ *ASIO's Report to Parliament 2012-2013*, p3

relating the planning of terrorist attacks in Australia.³³⁹

In 2013, ASIO submitted to the INSLM that:-

Within Australia, numerous individuals are supporting the conflict in Syria. The type of support varies from fundraising to facilitation for individuals seeking to travel to Syria, as well as involvement in violence and harassment related to the conflict. Fundraising in support of the conflict has been particularly notable.³⁴⁰

AFP

In 2014, AFP submitted to the INSLM:-

Those who are involved in the Syrian conflict (and similar situations) present a risk to the Australian community, both from returnee fighters and the possibility of increased ethnic/racial tensions within the community. Those who are involved in conflict could have increased military skills and training, be further radicalised and be willing to commit acts of terrorism in Australia.³⁴¹

In 2013, the AFP submitted to the INSLM:-

There has never been an international civil conflict that has prompted as many Australians to travel to a warzone as the Syria crisis has, other than perhaps the Balkans war. The vast majority of Australians in Syria are there doing humanitarian work. There are however some who are there fighting with the Free Syrian Army or other groups that aim to overthrow government forces, and there's also a handful that is fighting with al-Qaeda affiliated groups. It is this group that is causing us real concern, most of whom are still in Syria.

Of significant security threat to Australia is the growing trend of Australians travelling offshore to engage in, or support terrorist activities or conflict. These individuals not only potentially commit criminal offences, but upon their return to Australia they potentially pose a significant national security risk in terms of their ability to conduct an attack on Australian soil, radicalise others and impart knowledge and skills gained offshore.

...

While authorities from bordering countries to Syria are assisting the AFP in regards to Australians travelling there, it is difficult to keep tabs on every person who travels to Syria as some have dual passports and others enter the country away from designated border crossings.³⁴²

³³⁹ David Irvine, Director-General of Security, "*Protecting Secrets, Protecting People*", The 2013 Sir Zelman Cowen Oration, Australian Institute of International Affairs, 1st October 2013

³⁴⁰ *ASIO Submission to the INSLM's Review of Terrorism Financing Legislation*. The AFP expressed similar concerns to the INSLM.

³⁴¹ *AFP Submission to the INSLM*, 21st March 2014

³⁴² *AFP Submission to the INSLM*, 14th October 2013

APPENDIX K

FOREIGN GOVERNMENT VIEWS ON THE SYRIAN CONFLICT

Austria

Director of the Federal Office for the Protection of the Constitution and the fight against terrorism in Austria Peter Greddleng confirmed the presence of a group of Austrian terrorists who have been fighting in Syria, without specifying numbers.

Syria has become the most attractive place and a pastureland for jihadists and terrorists in the world, Austrian news agency quoted Greddleng as saying in a small conference about the dangers of Islamic terrorism and its risks on Austria.

He added that a number of Austrian terrorists were killed in armed battles in Syria, stressing that their return to the country poses a dangerous challenge.

The Vienna-based anti-terrorism bureau warned from the return of terrorists to Austria and Europe, describing controlling them as a difficult task since they will be under constant surveillance, especially regarding the attempts to rehabilitate them to be reintegrated in Austrian and European society.³⁴³

Belgium

For the last several months, the Belgian government has been trying to weaken recruitment of jihadists in Belgium. As part of that effort, the interior ministry has set up a “task force” meant to monitor the situations of Belgians who have left for Syria to join the rebels.

In April, the federal prosecutor’s office confirmed that it was aware of 33 presumed jihadists in Syria who were originally from Antwerp and Vilvoorde, nearly all of them linked to Sharia4Belgium.³⁴⁴

Canada

“CSIS continues to investigate hundreds of persons involved in terrorism-related activity that threatens Canada and our allies... Any aid Bill S-7 [An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act] can provide to alleviate and prevent some of this activity would be welcome. It should be pointed out that criminal sanctions are not generally a deterrent to terrorists who are motivated by

³⁴³ “Austria confirms involvement of Austrians in fighting in Syria, warns of their return to country”, *Syrian Free Press* 25th June 2013 <http://syrianfreepress.wordpress.com/2013/06/25/austria-confirms-involvement-of-austrians-in-fighting-in-syria-warns-of-their-return-to-country/>

³⁴⁴ “Belgian jihadists in Syria stripped of welfare benefits” *France 24* 19th August 2013 http://www.france24.com/en/20130819-belgian-jihadists-syria-stripped-welfare-payments-assad-antwerp/#/?&_suid=139502842892002373582_584650638

extremist ideology, but as Bill S-7 would provide another tool to law enforcement”. (Michel Coulombe, Deputy Director of Operations, Canadian Security Intelligence Service)³⁴⁵

It is estimated that at least 100 Canadians — mainly in their 20s and coming from Ontario and Alberta — have left for Syria in the past year, joining a steady march of foreigners drawn to the conflict, security sources say.

“Our government is acutely aware of this issue,” said Frederik Boisvert, spokesman for Public Safety Minister Steven Blaney, noting Ottawa passed the Combating Terrorism Act in April, which makes it a crime to leave the country — or even attempt to — to engage in terrorist activities.

Last November, the interim director of Canada’s Security Intelligence Service told a parliamentary committee that Syria provided Al Qaeda an ideal recruiting ground.

“The situation in Syria will remain chaotic for the foreseeable future, and this will continue to offer a permissive environment for terrorist activities,” Michel Coulombe stated.

“The spectre of these young people returning to Canada — with combat experience and thoroughly radicalized views — is a serious national security concern.”³⁴⁶

Europe

EU counterterrorism chief sees Al-Qa’idah as continuing threat: European Union counterterrorism coordinator Gilles de Kerchove has said that Al-Qa’idah remains the main terrorist threat to Europe. Interviewed by German external broadcaster Deutsche Welle on the 10th anniversary of the bombing of Madrid railway station, he said this was manifested in Al-Qa’idah’s regional franchises, “lone wolves”, and radicalised European citizens returning from fighting in Syria.

De Kerchove said failed states provide armed outfits with the chance to regroup, train and reinforce themselves, noting that such groups were “highly mobile”.

He said Arab Spring countries have often had to dismantle their security services, thereby providing another opening for terrorists.

³⁴⁵ *Evidence to the Standing Committee on Public Safety and National Security*, House of Commons, Canada, 21st November 2012

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&DocId=5853331&Language=E>

³⁴⁶ Michelle Shepard “Canadians hurrying to Syria in record numbers to join rebels” *The Star* 23rd August 2013
http://www.thestar.com/news/world/2013/08/23/canadians_hurrying_to_syria_in_record_numbers_to_join_rebels.html

De Kerchove said the EU was providing specific financing programmes to help third countries beef up their counterterror capability, but domestic security remained a matter for individual EU states.³⁴⁷

France

With Europe's largest Muslim population, France has become a major centre for recruitment and judicial authorities are grappling with a fresh wave of adolescent volunteers, some of whom are as young as 15 years old.

“Major events like the use of chemical gases have inspired many people” to join Islamist groups in Syria, said Marc Trevidic, an investigating judge specialised in counter-terrorism and Islamist radicalisation.

“But there has also been a very obvious accelerator, which is that the first generation of recruits have come back home to fetch their buddies,” he told Reuters.

President Francois Hollande warned about the issue in January when he said that some 700 people had left France for Syria. The number appeared to contradict an earlier estimate from his interior minister of around 250.

Trevidic said the discrepancy was between the number of French citizens known to be fighting in Syria and the larger number of people passing through France on their way to Turkey, which shares a border with Syria.

A French court last month placed two youths, one of them just 15, under formal investigation on suspicion of planning terror acts after they were arrested in Turkey on their way to Syria...

Trevidic said he was in favour of stopping recruits who plan to join Islamist groups in Syria from leaving France. Those who have returned are questioned by anti-terror security agents and kept under surveillance if they had joined hardline groups or had combat experience, he said.³⁴⁸

France's interior minister revealed on Thursday that hundreds of home-grown Islamist militants were signing up to fight in Syria, and warned they could pose a security threat when they return to France.

More than 300 French nationals or residents are either currently fighting in Syria's civil war, are known to have plans to go and fight, or have recently returned from Syria, Interior Minister Manuel Valls told France's Inter radio.

Citing intelligence reports, Valls said that more than 130 French citizens or residents are currently fighting in Syria.

³⁴⁷ “EU counterterrorism chief sees Al-Qa'idah as continuing threat” *Deutsche Welle* 11th March 2014

³⁴⁸ Nicholas Vinocur “Exodus of French volunteers for Syria jihad growing – judge” *Reuters* 12th February 2014
<http://in.reuters.com/article/2014/02/12/france-syria-idINDEEA1B0BS20140212>

Most of them were young men with a delinquent past who had become radicalised, he said.

“This is a phenomenon which worries me because they represent a potential danger when they return to our soil,” Valls said. “We have to be extremely attentive.”³⁴⁹

Germany

German security services are monitoring about a dozen Islamic extremists who have returned from fighting in Syria and are considered potential terror threats.

Germany’s domestic intelligence service said Wednesday that about 300 people — 280 men and 20 women — have left Germany for Syria since the start of unrest there more than two years ago.

“There’s a growing problem from radicalized and battle-hardened returnees from Syria,” Hans-Georg Maassen, the head of the intelligence service, said in a statement. “We have information on about a dozen people who have actively engaged in fighting in Syria. This has increased the risk of terrorist acts in Germany.”

Intelligence officials have noted that German law makes it difficult to arrest jihadis returning from Syria unless there is concrete proof that they have committed a crime. But security agencies, wary of letting extremists just slip back into the country, have stepped up their observation of those people considered to be the greatest potential threats.³⁵⁰

Indonesia

Jihadists coming home from Afghanistan formed radical and terrorist groups, according to National Counterterrorism Agency (BNPT) head Ansyad Mbai, and history could repeat itself.

“We fear they also may have been trained in Syria. We need to anticipate that upon their return. We should learn from our own bitter experiences of the past,” he told Khabar Southeast Asia, adding that his agency would monitor the movements of newly returned Syrian war veterans.

According to the Ministry of Foreign Affairs, some 50 Indonesian militants are in Syria. “We [got] the information from the Syrian intelligence, but we still can’t confirm their whereabouts as they may have taken a non-procedural way to enter the country,” Tatang Budi Utama Razak, the ministry’s director of legal aid and protection for Indonesians abroad, told Khabar.³⁵¹

³⁴⁹ “Number of French jihadis fighting in Syria ‘worrying’” *France24* 19th September 2013
http://www.france24.com/en/20130919-france-130-citizens-residents-fighting-syria-valls-assad/#./?&_suid=139536669504509083218642997055

³⁵⁰ “Germany monitoring jihadists returning from Syria” *Haaretz* 26th February 2014
<http://www.haaretz.com/news/middle-east/1.576543>

³⁵¹ Ismira Lutfia Tisnadibrata and Aditya Surya “Indonesia on alert for jihadis returning from Syria” *Central Asia*

Norway

Norway's intelligence agency has revealed it is concerned the country could face a higher terrorist threat because of the large number of Norwegians fighting in Syria.

Up to 50 people with links to the Scandinavian country have fought, or are still fighting, with opposition forces trying to oust President Bashar al-Assad and could potentially, according to the Norwegian Intelligence Service (NIS), return as radical fighters.

The NIS wrote its 2014 threat assessment report that they believe the threat level has increased and is likely to continue increasing throughout the year. General Kjell Grandhagen went on to note that jihadists are often aligned to the most radical Islamic organisations like the al-Nusra Front and the Islamic State of Iraq and Greater Syria (ISIS).

The NIS estimated that around 2,000 rebel fighters from Europe have joined the conflict in Syria to fight the current regime, although it did not say how it came up with that figure. Norwegian publication *Verdens Gang* also reported on Monday that more than 10 women had travelled to Syria from Norway to join the rebels.³⁵²

Russia

“It is known that there are at least 600 people from Russia and Europe are fighting along with opposition forces in Syria” (Russian President Vladimir Putin)³⁵³

Sweden

Jonathan Peste, the chief analyst at Säpo, the Swedish intelligence agency, “We can rarely stop Swedish jihadists from traveling to Syria. Once in Syria, he said, they acquire more training and experience, and are “dangerous” and have even attacked civilians.”³⁵⁴

United Kingdom

Richard Walton, the head of Scotland Yard's counter-terrorism command, said that children as young as 16 were travelling to Syria to fight.

The prospect of hundreds of battle-hardened extremists returning to Britain with sophisticated training and practical experience of bomb-making and weaponry has become a grave cause of concern in recent months.

Online 13th February 2014 http://centralasiaonline.com/en_GB/articles/caii/features/main/2014/02/13/feature-02

³⁵² “Norway faces Syria jihadist threat” *Ice News* 3rd March 2014 <http://www.icenews.is/2014/03/03/norway-faces-syria-jihadist-threat/>

³⁵³ “At least 600 Russians and Europeans fighting alongside Syrian opposition – Putin” *RT News* 21st June 2013 <http://rt.com/news/russians-europeans-putin-syria-063/>

³⁵⁴ Lisa Lundquist, “Swedish intelligence concerned about Syrian jihadists” *Threat Matrix* 17th June 2013 http://www.longwarjournal.org/threat-matrix/archives/2013/06/swedish_intelligence_concerned.php

A senior Whitehall source said: “The large number of British Muslims travelling to Syria to wage jihad against the Assad regime is developing into a major security issue for the UK. They are openly associating with Islamist terror groups like al-Qaeda, and the concern is that, once they have finished fighting in Syria, they will try to return home and wage jihad on the streets of Britain.

“Not only will they be battle-hardened as a result of their experience in Syria, they will also have been trained in all the latest terrorist techniques.”

Mr Walton, speaking at a conference organised by the business group London First, said there were already indications that Britons were returning from Syria with orders to carry out attacks, with the Metropolitan Police carrying out a “huge number of operations” to protect the public.

He said: “I don’t think the public realises the seriousness of the problem. The penny hasn’t dropped. But Syria is a game-changer. We are seeing it every day. You have hundreds of people going to Syria, and if they don’t get killed they get radicalised. So it’s the impact when they come back.

“I think the implications over the next three to five years are very profound. We have got probably around 200 Britons who have gone to Syria and some have returned.”³⁵⁵

The vast majority of people opposing the Assad regime are Syrians, fighting for the future of their country. But Syria is now the number one destination for jihadists anywhere in the world today. This includes a number of individuals connected with the United Kingdom and other European countries. They may not pose a threat to us when they first go to Syria, but if they survive some may return ideologically hardened and with experience of weapons and explosives. The longer the conflict continues, the greater this danger will become, a point that should not be lost on policy makers in Russia and elsewhere. More innocent lives will be lost, extremists will be emboldened, sectarianism will increase and the risk of the use of Chemical or Biological Weapons will grow.³⁵⁶

There are a few hundred people going out there [Syria]. They may be injured or killed, but our biggest worry is when they return they are radicalized, they may be militarized, they may have a network of people that train them to use weapons,” London police chief Sir Bernard Hogan-Howe told the paper.

When RT contacted the British Home Office, it responded with a pre-prepared statement from Immigration and Security Minister James Brokenshire.

In the statement, Brokenshire said there “up to 200 UK nationals” fighting in Syria “who may come in to contact with extremist groups that aspire to attack Western countries.”

³⁵⁵ Con Coughlin and Gordon Rayner, “Hundreds of British jihadists in Syria” *The Telegraph* 3rd December 2013 <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10492997/Hundreds-of-British-jihadists-in-Syria.html>

³⁵⁶ First Secretary of State and Secretary of State for Foreign and Commonwealth Affairs, The Rt Hon William Hague MP “*Countering terrorism overseas*”, Transcript of Speech, 14th February 2013 <https://www.gov.uk/government/speeches/countering-terrorism-overseas>

He did not comment on Sunday's report, however, only saying that the British government "is determined to detect, disrupt and where possible prosecute all terrorist threats, whether international or home-grown."

"We know there is a risk of individuals returning to the UK after being radicalized, but they should be in no doubt that the police and intelligence agencies are working to identify and disrupt potential threats and protect national security. The police have the power to examine and detain individuals at the UK border to investigate any concerns of terrorism involvement."³⁵⁷

United States

More than 50 U.S. citizens have joined extremist groups that are fighting to overthrow Syrian President Bashar Assad, and some have returned to America and are under FBI surveillance, U.S. intelligence officials said Tuesday.

Counter-terrorism officials are increasingly concerned that Americans who have been trained by Al Qaeda-linked groups and gained battlefield experience in Syria ultimately will try to mount terrorist attacks back home.

"It's probably one of the most significant threats we're dealing with," said a senior intelligence official who requested anonymity because he was not authorized to speak publicly.

At a House Intelligence Committee hearing Tuesday, CIA Director John Brennan said Al Qaeda-linked fighters are training Americans and Europeans at camps in Syria and Iraq.

"We are concerned about the use of Syrian territory by the Al Qaeda organization to recruit individuals ... to use Syria as a launching pad" for attacks on the West, Brennan said in a hearing called to discuss global threats to national security.

James R. Clapper, the U.S. director of national intelligence, said "7,500 or so" fighters from 50 countries are in Syria. Clapper last week cited a figure of 7,000 at a Senate hearing. He did not say how many Americans were involved or how many have returned.

Clapper said he was particularly worried about a small cadre of Al Qaeda operatives who have fought in Afghanistan and Pakistan and aspire to attack the United States.

"Not only are fighters being drawn to Syria, but so are technologies and techniques that pose particular problems to our defenses," he said.

Not all of the Americans in the war are Syrian Americans or are Muslims, the senior intelligence official said.

³⁵⁷ "Extremist tourists: 250 jihadists reportedly return to UK" *RT News* 17th February 2014 <http://rt.com/news/terror-tourists-uk-syria-355/>

“There is no single profile,” the official said. “Some are defending their family, some fighting perceived Shiite [Muslim] aggression, some are seeking the fall of Assad. Some are going for humanitarian reasons and they get sucked into the extremism.”

Some want to participate in global jihad, the official added, and “some are just adventure seekers.”

The FBI has scrutinized more than a dozen people who have returned from Syria, according to two senior U.S. intelligence officials who also declined to be named. Some of the returnees were ruled out as a threat, but some remain under surveillance, one senior official said.

Tracking Americans who fought in Syria has become an FBI priority, bureau Director James B. Comey has said.³⁵⁸

The FBI is concerned that Americans may be fighting in Syria and could bring terrorist tactics back to the United States, but U.S. officials say there is a small number of U.S. citizens fighting with Syrian rebels.

FBI Director Robert Mueller told ABC News in an interview aired on Friday that the terrorism threat that began in Afghanistan and Pakistan has now “migrated” to places including Syria, Libya, Egypt and Yemen.

“you have individuals traveling to those venues, you are concerned about the associations they will make, and secondly about the expertise they will develop and whether or not they will utilize those associations, utilize that expertise, to undertake an attack upon the homeland,” Mueller said in the interview.

“So, yes, we are concerned about that, and, yes, we are monitoring it,” he said.

Places like Syria may end up harboring “radical extremists who want to do harm” to the United States, according to Mueller,³⁵⁹

³⁵⁸ Ken Dilanian “Syria-trained US. Militants pose threat, officials say” *LA Times* 4th February 2014
<http://www.latimes.com/world/la-fg-americans-syria-20140205,0,193314,print.story>

³⁵⁹ “FBI director worried Americans fighting in Syria could bring tactics home” *Reuters* 23rd August 2013
<http://www.reuters.com/article/2013/08/23/us-syria-crisis-americans-idUSBRE97M0S220130823>

APPENDIX L

UN UTTERANCES ON THE CURRENT SITUATION IN SYRIA

The UN General Assembly has stated the following on the situation in Syria:-

Reaffirming the purposes and principles of the Charter, the Universal Declaration of Human Rights and relevant international human rights law,

including the International Covenant on Civil and Political Rights, and recalling the obligation of the Syrian Arab Republic to protect human rights and fundamental freedoms,

Expressing grave concern at the continuing escalation of violence in the Syrian Arab Republic, in particular the continued widespread and systematic gross violations and abuses of human rights and violations of international humanitarian law, including those involving the continued use of heavy weapons and aerial bombardments, such as the indiscriminate use of ballistic missiles and cluster munitions, by the Syrian authorities against the Syrian population, and the failure of the Government of the Syrian Arab Republic to protect its population,

Expressing outrage at the rapidly increasing death toll of at least 70,000 casualties in the Syrian Arab Republic, as reported by the United Nations High Commissioner for Human Rights on 12 February 2013,

Recalling the statements made by the United Nations High Commissioner for Human Rights before the Human Rights Council and the Security Council that crimes against humanity are likely to have been committed in the Syrian Arab Republic, stressing that the Syrian authorities have failed to prosecute such serious violations, and noting the repeated encouragement by the High Commissioner for Human Rights to the Security Council to refer the situation to the International Criminal Court,

...

Expressing concern at the occurrence of grave violations against children in the Syrian Arab Republic, that children were among the victims of military operations carried out by Government forces, including the Syrian armed forces, intelligence forces and *shabbiha* militias, and that children were victims of killing and maiming, arbitrary arrest, detention, torture, ill-treatment and sexual violence, and were used as human shields and recruited and used in the conduct of hostilities in violation of international law...

Deploring also the further deterioration of the humanitarian situation and the failure to ensure the safe and timely provision of humanitarian assistance to all areas affected by the fighting,

Expressing deep concern at the more than one million refugees and millions of internally displaced persons who have fled as a result of the extreme violence,

...

Expressing grave concern at the threat by the Syrian authorities to use chemical or biological weapons and at allegations of reported use of such weapons,³⁶⁰

The UN General Assembly further stated:-

International humanitarian law and human rights

1. *Strongly condemns* the continued escalation in the use by the Syrian authorities of heavy weapons, including indiscriminate shelling from tanks and aircraft, and the use of ballistic missiles and other indiscriminate weapons against population centres, as well as the use of cluster munitions;

2. *Strongly condemns also* all violations of international humanitarian law

and the continued widespread and systematic gross violations of human rights and fundamental freedoms by the Syrian authorities and the Government-affiliated *shabbiha* militias, such as those involving the use of heavy weapons, aerial bombardments and other force against civilians, attacks on schools, hospitals and places of worship, massacres, arbitrary executions, extrajudicial killings, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, violations of the rights of the child, including the recruitment and use of children in the conduct of hostilities in violation of international law, unlawful interference with access to medical treatment, failure to respect and protect medical personnel, torture, systematic sexual violence, including rape in detention, and ill-treatment, including against children, as well as any human rights abuses or violations of international humanitarian law by anti-Government armed groups;

3. *Condemns* all violence, irrespective of where it comes from, and calls upon all parties to immediately put an end to all forms of violence, including terrorist acts and acts of violence or intimidation that may foment sectarian tensions, and to comply strictly with their obligations under international law, including international humanitarian law;

4. *Demands* that all parties immediately put an end to all violations of international humanitarian law, including those involving attacks against civilians, also demands that the Syrian authorities immediately end all violations of international human rights law and meet their responsibility to protect the population and comply fully with their obligations under applicable international law...

...

6. *Strongly condemns* the shelling as well as the shooting by the Syrian armed forces into neighbouring countries, which led to casualties and injuries of the civilians of those countries as well as of Syrian refugees, underlines that such incidents violated international law, stresses the grave threat of the crisis in the Syrian Arab Republic on the

³⁶⁰ A/RES/67/262 (4 June 2013) preamble

security of its neighbours and on regional peace and stability, as well as its grave implications for international peace and security, and calls upon the Government of the Syrian Arab Republic to respect the sovereignty of neighbouring States and meet its international obligations in this regard;³⁶¹

The UN Security Council has called for an immediate cessation of violence in Syria and stated the following in relation to the conflict:-

Condemning the widespread violations of human rights by the Syrian authorities, as well as any human rights abuses by armed groups, *recalling* that those responsible shall be held accountable, and *expressing* its profound regret at the death of many thousands of people in Syria,

2. *Calls upon* the Syrian government to implement visibly its commitments in their entirety, as it agreed to do in its communication to the Envoy of 1 April 2012, to (a) cease troop movements towards population centres, (b) cease all use of heavy weapons in such centres, and (c) begin pullback of military concentrations in and around population centres;

3. *Underlines* the importance attached by the Envoy to the withdrawal of all Syrian government troops and heavy weapons from population centres to their barracks to facilitate a sustained cessation of violence;

4. *Calls upon* all parties in Syria, including the opposition, immediately to cease all armed violence in all its forms;

...

10. *Reiterates* its call for the Syrian authorities to allow immediate, full and unimpeded access of humanitarian personnel to all populations in need of assistance, in accordance with international law and guiding principles of humanitarian assistance and calls upon all parties in Syria, in particular the Syrian authorities, to cooperate fully with the United Nations and relevant humanitarian organizations to facilitate the provision of humanitarian assistance;³⁶²

In regards to the humanitarian situation, the UN Security Council has expressed its appreciation of the efforts of States in assisting with the consequences of the violence:-

Expressing its appreciation of the significant efforts that have been made by the States bordering Syria to assist Syrians who have fled across Syria's borders as a consequence of the violence, and requesting UNHCR to provide assistance as requested by member states receiving these displaced persons.³⁶³

³⁶¹ A/RES/67/262 (4 June 2013)

³⁶² UNSC Res 2042 (2012) preamble and paras 2-4, 10. Reiterated in UNSC Res 2043 (2012).

³⁶³ UNSC Res 2043 (2012) preamble

The UN Security Council has not yet used any putative Chapter VII powers directly and generally to address the violence involved in the Syrian conflict, reportedly because of Russia's veto as a permanent member. However, the Security Council placed binding obligations on Syrian President Bashar al-Assad's régime which required the expeditious destruction of the Syrian government's chemical weapons programme and agreed that in the event of non-compliance, it would impose Chapter VII measures. The Security Council has stated it is:-

Deeply outraged by the use of chemical weapons on 21 August in Rif Damascus, as concluded [by a United Nations investigation team], *condemning* the killing of civilians that resulted from it, *affirming* that the use of chemical weapons constitutes a serious violation of international law, and stressing that those responsible for any use of chemical weapons must be held accountable.

...

Stressing that the only solution to the current crisis in the Syrian Arab Republic is through an inclusive and Syrian-led political process based on the Geneva Communiqué of 30 June 2012, and *emphasising* the need to convene the international conference on Syria as soon as possible,

Determining that the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security.³⁶⁴

³⁶⁴ S/RES/2118 (2013) preamble

APPENDIX M

OFFICIAL AUSTRALIAN VIEWS ON THE MERCENARIES CONVENTION

Engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving certain objectives, as defined in subsec 6(3) of the Foreign Incursions Act. Each of these objectives has a link to the government of the foreign State, or to causing fear in the public of the foreign State except for para 6(3)(aa) which provides that “engaging in armed hostilities in the foreign State” constitutes “hostile activity” for the purposes of the offences under subsec 6(1) of the Foreign Incursions Act. Paragraph 6(3)(aa) was inserted into the Foreign Incursions Act by the *Crimes Legislation Amendment Act 1987* (Cth) and was intended to capture the conduct of mercenaries.

The Hon Senator Tate, then Minister for Justice, stated the purpose of the amendment was to “remedy a number of deficiencies in the Act. One such deficiency is that mercenary acts as such are not proscribed unless they involve acts done for specific purposes, those purposes generally relating to acts directed against the government of a foreign country”.³⁶⁵ The explanatory memorandum to the *Crimes Legislation Amendment Bill 1987* (Cth) described the insertion of para 6(3)(aa) as being “to fill the present gap in the Act by reason of which it is not an offence for an Australian to become involved in mercenary activities per se in a foreign State”.³⁶⁶ However, the amendment did not extend coverage of the Foreign Incursions Act to mercenaries engaged in armed hostilities serving in or with the armed forces of a foreign State as this continues to be excluded from the subsec 6(1) offence by virtue of para 6(4)(a).

The use of mercenaries by the government in an internal armed conflict has been “deplored” by the Security Council³⁶⁷ and is the subject of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (4th December 1989).³⁶⁸ Australia has not yet acceded to the Convention. In 1997, the then Minister for Foreign Affairs, the Hon Alexander Downer MP, stated in Parliament that the Australian Government “was taking steps to accede to the Mercenaries Convention...the Government is looking at ways to develop and encourage international and regional support for the Mercenaries Convention so that it may soon gain effect under international law and enable the international community to cooperate to prevent the activities of mercenaries”.³⁶⁹

The issue was again raised in 2001, with the Minister representing the Minister for Foreign

³⁶⁵ The Hon Senator Tate (then Minister for Justice), Second Reading speech, *Crimes Legislation Amendment Bill 1987* (Cth), *Senate Hansard* 5th November 1987

³⁶⁶ Explanatory Memorandum, *Crimes Legislation Amendment Bill 1987* (Cth), p23

³⁶⁷ see below discussion of the use of mercenaries by the Libyan authorities in 2011

³⁶⁸ The preamble to the Convention states:-

“Reaffirming the purposes and principles enshrined in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples... Also convinced that the adoption of a convention against the recruitment, use, financing and training of mercenaries would contribute to the eradication of these nefarious activities and thereby to the observance of the purposes and principles enshrined in the Charter. ...

³⁶⁹ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (Question on Notice No. 1684), Tuesday 2nd September 1997, *House of Representatives Official Hansard* 7606

Affairs advising that the Convention had been listed on the Commonwealth State-Territory Standing Committee on Treaties' Schedule of Treaty Action since December 1995, consultation had revealed no objection to Australia acceding to the Convention and that "the Government intends to include the legislative action necessary to implement the Convention in a package of amendments to *the Criminal Code 1995* transferring into the Code all elements of the *Crimes (Foreign Incursions and Recruitment) Act 1978* and inserting any other necessary provisions". There has been no consideration of the Convention in Parliament since.³⁷⁰

³⁷⁰ *Senate Official Hansard* No. 10 2001, Tuesday 7th August 2001, 25807

APPENDIX N

IHL APPLICATION AS THE BOUNDARY OF TERRORIST AND FOREIGN INCURSION OFFENCES

The INSLM has already reported on the importance of maintaining the distinction between the legal framework governing terrorism committed during peace-time or outside of armed conflict and the legal framework governing terrorist type acts committed in armed conflict. For this reason, violence committed in the context of an armed conflict should be excluded from the offences under the Foreign Incursions Act, leaving it to be dealt with by the international humanitarian law (“IHL”) and international criminal law frameworks, and Australia’s domestic war crimes and crimes against humanity legislation.

In armed conflicts those who commit foreign incursions (or terrorist) type acts may be prosecuted for war crimes and crimes against humanity either in national courts or international tribunals. Most terrorist type acts are already covered by IHL which prohibits direct and deliberate attacks against civilians, including a war crime of spreading terror among a civilian population.³⁷¹ IHL also prohibits indiscriminate and disproportionate attacks that may be expected to cause incidental loss of civilian life or damage to civilian objects and has additional rules protecting dams, electricity stations etc.³⁷²

It is appropriate that the Foreign Incursions Act exclude lawful conduct engaged in under the rules of IHL and this approach is supported by common Art 3 of the Geneva Conventions which applies IHL rules to all parties in non-international armed conflicts. Australians would not be immune from criminal laws – war crimes and crimes against humanity would apply. For such offences, the application of common Art 3 should be the subject of a conclusive executive certificate certifying the existence of a non-international armed conflict, and the application of common Art 3, to the armed conflict a person is alleged to have been involved in.

It is also supported by the existing IHL carve out under the Terrorism Financing Convention. Under Art 2(1)(b) of the Terrorism Financing Convention, an offence against that Convention includes:- “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.

Australia should not criminalize acts that are lawful under IHL as offences against the Foreign Incursions Act. Lawful violent acts committed by State or Non-State actors should be excluded from the scope of the Foreign Incursions Act to prevent it from interfering with the “carefully constructed parameters of permissible violence in IHL”.³⁷³ The Foreign Incursions Act should exclude unlawful acts of violence already regulated as unlawful under IHL. This would allow the

³⁷¹ *Prosecutor v Galic* ICTY-98-29-T (5 December 2003)

³⁷² See Jelena Pejic “Armed Conflict and Terrorism : There is a (Big) Difference” in *Counter-Terrorism International Law and Practice* De Frias et al (eds) 2012 and Ben Saul “Civilising the Exception: Universally Defining Terrorism” in *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* Aniceto Masferrer (ed) 2012

³⁷³ Ben Saul “Civilising the Exception: Universally Defining Terrorism” in *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* Aniceto Masferrer (ed) 2012 at 95

unlawful conduct to be punished in accordance with the already existing international law framework.

APPENDIX O

AGD AND DFAT SUBMISSIONS ON THE FOREIGN INCURSIONS ACT

While it is true the Foreign Incursions Act was originally intended not to criminalize Australians fighting in the armed forces of foreign States, the INSLM does not consider the offences as currently drafted can be justified as either an effective counter-terrorism measure not can it been seen as being in compliance with Australia's international obligations. AGD advised the INSLM that:-

The Government added subsection 6(4) [of the Foreign Incursions Act] in response to the [Senate Standing Committee on Constitutional and Legal Affairs] Committee's recommendation that persons serving with the armed forces of a government or a force approved by the Minister pursuant to subsection 9(2) should not be liable to penalty for acts done during the course of their services with those forces.³⁷⁴

The Foreign Incursions Act should be amended to prohibit the engagement by Australians in hostile activities in a foreign State regardless of whether the individual is engaged in hostile activities in or with the armed forces of a foreign State or with any other group. The one-sided offences under secs 6 and 7 of the Foreign Incursions Act should be amended such that it is an offence to fight for any side in an armed conflict in a foreign State.

The Minister for Defence or the Attorney-General should be authorized under the Foreign Incursions Act to declare that is in the interests of the defence or international relations of Australia to permit persons to serve in or with an armed force in a foreign State. This could be a general permission to serve or could detail the specific circumstances or conditions of such service. As discussed above, there is already provision under subsec 9(2) of the Foreign Incursions Act to allow the recruitment of persons to serve in or with an armed force in a foreign State where a ministerial declaration has been made.

It is not envisaged that such a declaration would be needed for members of the ADF to serve in or with a foreign armed force under military exchanges, secondments etc. Such service, being as it is authorized by (and ordered by) the ADF itself should be seen as something very different than a civilian or a serving member of the ADF taking it upon himself (it is always a him) to engage in hostile activities with a foreign armed force. It is the role of the Australian Government to decide which, if any, foreign armed forces it will allow its citizens to serve in or with.

There is no policy reason why mercenaries fighting with a foreign armed force should be exempt from liability for offences under the Foreign Incursions Act. An Australian should be prohibited from acting as a mercenary for the government or opposition groups in a foreign armed conflict. As discussed above, such an exemption weakens the counter-terrorism effect of the Foreign Incursions Act.

³⁷⁴ AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence), 18th February 2014

The INSLM asked AGD and DFAT for the policy rationale for permitting Australians to serve in or with the armed forces of the government of a foreign State. DFAT and AGD submitted to the INSLM that:-

Prohibiting Australian citizens (including dual citizens) from serving in the armed forces of any foreign state, except where a ministerial determination has been made to permit such service, would raise a number of potential foreign policy implications. First, whether or not a ministerial determination has been made could have significant impacts on bilateral relationships; many countries would likely interpret the absence of such a determination as a criticism of its armed forces or the country itself. Second, such an approach could raise particular difficulties for dual citizens of countries for which a determination has not been made where this conflicts with a legal requirement in that country to undertake military service. This may result in dual citizens feeling compelled to renounce their Australian citizenship or that of the foreign country to avoid violating the law of Australia or the foreign country. Third, such an approach could have significant resource implications for consular and other officials at Australian missions overseas, who would be required to report that an Australian was undertaking military service in an unauthorised country.

The risks outlined above could be mitigated by maintaining an extensive list of countries for which it is permitted for Australians to fight; however, such an approach would require a significant dedication of resources and may not result in a different outcome from Australia's current approach of prohibiting the provision of military services through sanctions regimes.³⁷⁵

The INSLM does not accept these are legitimate policy reasons for permitting Australians to serve in or with foreign armed forces without the approval of the Australian Government. In particular, the DFAT and AGD submission fails to take into account Australia's responsibilities as a Member of the United Nations to act in accordance with the purposes and principles of the UN Charter, and ignores the detrimental impact of this policy on the effectiveness of the Foreign Incursions Act as a counter-terrorism tool. It is entirely appropriate to deter Australians from being party to armed conflicts – this both accords with Australia's international obligations and addresses the terrorism risks and risks to Australia's national security associated with Australians engaging in armed conflicts.

³⁷⁵ *AGD Response to Question on Notice (prepared in consultation with DFAT, DIBP and the Department of Defence)*, 18th February 2014

APPENDIX P

UN CHARTER AND INTRA-STATE BREACHES OF PEACE

The prevention of threats to the peace is the primary purpose of the UN. The UN Charter established a system of collective security aimed at deterring, preventing and correcting violations of the values of the international community and preventing the escalation of ongoing conflicts.³⁷⁶ Art 1(1) sets out the purposes and principles of the UN-

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 4 of the UN Charter provides:-

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

The UN Charter obliges States not to endanger international peace and security (Art 2(3)) and to settle disputes peacefully (Arts 2(4) and 33(1)). The UN Charter regulates the use of force by States. The right to take action for self-defence purposes under Article 51 (the right to self-defence) and the Security Council's powers under Chapter VII to take action (including authorizing the use of force) to protect collective security³⁷⁷ specify the only circumstances where force may legitimately be used. Article 39 encompasses the twin concepts of a breach of peace and threat to peace. These concepts have now grown (through practice and incorporation into customary international law) to include violence within states eg Libya - contrary to the notion of state sovereignty in its traditional Westphalian sense. Acting under Chapter VII of the UN Charter in 1373, the UN Security Council has made clear that matters which are essentially within the domestic jurisdiction of a state can amount to a breach of peace and threat to peace and that the UN Security Council can take action under Chapter VII without breaching Art 7 of the UN Charter.³⁷⁸

The UN system of collective security has a clear preventive role because of the threat of collective action against a State for the purposes of maintaining international peace and security. The changed nature and source of conflicts has evolved since the UN Charter was drafted and the meaning of what is a threat to international peace and security has shifted.³⁷⁹ The UN Charter

³⁷⁶ see K Manusama 'Conflict prevention' in N White and C Henderson (eds) *Research Handbook on International Conflict and Security Law* (2013)

³⁷⁷ see esp Arts 39-42

³⁷⁸ Art 7 provides that nothing in the UN Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..."

³⁷⁹ As the UN has described: "In the first 30 years of the United Nations, dozens of new States emerged from colonial systems that, until recent times, tied half of mankind to a handful of capitals. ...By the 1980s, many of these new States faced crises of State capacity and legitimacy, reflected in the rise of internal wars as the dominant form

was originally designed to prevent and respond to armed conflicts between States (inter-state armed conflict or in the language of IHL “international armed conflict”). However, since the 1990s the predominance of intra-state armed conflicts (“non-international armed conflict” under IHL) involving an internal armed conflict between the government of a State and internal opposition groups, has led to a re-evaluation of what constitutes a threat to the peace and how the UN (in particular the Security Council) can and should respond to such conflicts within States.³⁸⁰

The UN has recognized that modern internal conflicts have implications for international peace and security and that the threats to collective security “are from non-State actors as well as States, and to human security as well as State security”.³⁸¹ The UN stated in 2004:-

The case for collective security today rests on three basic pillars. Today’s threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours.

...

Since the end of the cold war, peacemaking, peacekeeping and post-conflict peacebuilding in civil wars have become the operational face of the United Nations in international peace and security.

...

The large loss of life in such wars and outbreaks of mass violence obliges the international community to be more vigilant in preventing them. When prevention fails, there is urgent need to stop the killing and prevent any further return to war.³⁸²

Geneva Conventions

In regulating the conduct of parties during an armed conflict under international law, the Geneva Conventions have a focus on the prevention of violence against civilians.

Common Art 3 of the Geneva Conventions regulates the actions of parties to a non-international armed conflict. Article 3(1) obliges parties to protect civilians not taking part in active hostilities (not to maim or murder), while Art 3(2) sets out the important role of the ICRC as the only body with a mandate from the international community to provide humanitarian support during such a

of warfare in the second half of the twentieth century”. *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change*, United Nations (2004) A/59/565, paras 2-5

³⁸⁰ There are numerous examples of Security Council involvement in intrastate conflicts. Eg the Security Council broadened the interpretation of threats to international peace and security to authorize an intervention for humanitarian purposes in Somalia (see UNSC Res 794 (1992) para 10).

³⁸¹ *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change*, United Nations (2004) A/59/565, Synopsis

³⁸² *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change*, United Nations (2004) A/59/565, Synopsis, paras 84 and 88

conflict (other than the UN and its agencies). Like the UN Charter, the Geneva Conventions aim to limit the harm caused by armed conflict by setting the perimeters for lawful engagement in armed hostilities, in particular, providing protection for civilians.

UN Security Council actions in relation to the 2011 Libyan conflict

The concern of the international community to prevent armed hostilities in an internal conflict is shown by the recent conflict in Libya. In 2011, the UN Security Council determined that the intra-state conflict in Libya constituted a threat to international peace and security and acted under Chapter VII of the UN Charter.³⁸³ The UN Security Council authorized Member States to “take all necessary measures... to protect civilians and civilian populated areas under threat of attack in [Libya]”.³⁸⁴ The UN Security Council also decided to establish a no-fly zone,³⁸⁵ called upon all Member States to ensure strict compliance with an arms embargo (including an embargo on the provision of armed mercenary personnel)³⁸⁶ and decided to extend an asset freeze against Libyan authorities.³⁸⁷ The Security Council also commented adversely on the use of mercenaries by the Libyan authorities³⁸⁸ and decided to refer the situation in Libya to the International Criminal Court.³⁸⁹

The Libyan example shows how the international community is concerned with preventing armed conflict and addressing violations of international law, including fundamental human rights, in intra-state conflicts. As the Libyan armed forces were not a prescribed organisation for the purposes of para 6(7)(a) or (b) of the Foreign Incursions Act, an Australian engaging in “hostile activity” (including armed hostilities) in the course of the person’s service with the Libyan armed forces would have been automatically exempt from the offences under the Foreign Incursions Act.³⁹⁰ While there may be other crimes (crimes against humanity, war crimes) that could have been applied to a person’s conduct serving with the Libyan armed forces, there is no policy rationale for exempting from the Foreign Incursions Act *any* action taken in service with *any* foreign armed forces that would otherwise constitute an offence of engaging in armed hostilities.

The matter is further complicated by the definition of “government” under the Foreign Incursions Act which leaves open the possibility that a person charged under the Foreign Incursions Act for their engagement in hostile activity can lead evidence to rebut the statements in a prima facie certificate issued under subsec 11(3) or 11(3A) as to the identity of the “government” of a foreign State and the armed forces of that government. As the definition of government under subsec 3(1) of the Foreign Incursions Act applies a test of “effective governmental control” it would be open to argue that an opposition group was in fact the government as defined for the purposes of the Foreign Incursions Act. Using the example of

³⁸³ UNSC Res 1973 (2011)

³⁸⁴ UNSC Res 1973 (2011) para 4

³⁸⁵ UNSC Res 1973 (2011) paras 6-12

³⁸⁶ UNSC Res 1973 (2011) paras 13-16

³⁸⁷ The Security Council decided that the asset freeze would apply to “all funds, other financial assets and economic resources owned or controlled, directly or indirectly, by the Libyan authorities or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them”. UNSC Res 1973 (2011) para 19

³⁸⁸ “*Deploring the continuing use of mercenaries by the Libyan authorities*” UNSC Res 1973 (2011) preamble

³⁸⁹ UNSC Res 1970 (2011) paras 4-9

³⁹⁰ see subsecs 6(3) and (4) of the Foreign Incursions Act

Libya, it could have been argued that the Libyan authorities led by Qadhafi were not in fact the government for the purposes of the Foreign Incursions Act.

In 2011, the UN Security Council determined that the intra-state conflict in Libya constituted a threat to international peace and security and acted under Chapter VII of the UN Charter as follows:-

Acting under Chapter VII of the Charter of the United Nations,

1. *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;
2. *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution;
3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance.³⁹¹

The UN Security Council stated the following in regards to the conflict in Libya and the actions of the Libyan government:-

Expressing grave concern at the situation in [Libya] and condemning the violence and use of force against civilians,

Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.

Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in [Libya],
Considering that the widespread and systematic attacks currently taking place in [Libya] against the civilian population may amount to crimes against humanity,

...

³⁹¹ UNSC Res 1973 (2011)

Recalling the Libyan authorities' responsibility to protect its population,

...

Stressing the need to hold to account those responsible for attacks, including by forces under their control, on civilians,³⁹²

The Libyan example shows how the international community is concerned with preventing armed conflict and addressing violations of international law, including fundamental human rights, in intra-state conflicts.

³⁹² UNSC Res 1970 (2011) preamble

APPENDIX Q

PRIVY COUNCIL REPORT ON MERCENARIES

The issue of mercenaries was considered by the Privy Council.³⁹³ In its Report, the Privy Council stated:-

(On why there should not be laws that cannot be enforced, and proof difficulties)

Exclusion of enlistment from offences under fresh legislation

42. In considering whether or not to recommend the retention of a statutory offence of illegal enlistment which can be committed by United Kingdom citizens when they are abroad we have been influenced by three considerations. First, for reasons we have given, we do not think it practicable or just to try to define an offence of enlisting as a mercenary in such a way that guilt would depend upon proof by the prosecution of a particular motive as actuating the accused to do so. Secondly, a penal prohibition sought to be imposed by the State upon what an individual does abroad involves a restriction on the liberty of the individual which we think can only be justified on compelling grounds of public interest. Thirdly, the practical difficulties of proving such an offence would mean that there could be very few successful prosecutions; and the chances of convicting the accused would depend not so much on his actual guilt as on his exceptional bad luck in there being available to the prosecution in his case sufficient evidence to convict him on his trial in this country.

43. The mere presence on the statute book of an Act of Parliament creating an offence for which it was hardly ever practicable to bring a successful prosecution would not, we think, be likely to mollify any foreign state or group of states that had resented the activities of British mercenaries in a particular country and observed that no prosecutions were in fact brought against returning mercenaries. Nor do we think that it can be justified in principle to enact a penal statute *in terrorem* only, knowing full well that it can only result in the punishment of a small minority of offenders distinguishable from the others for an arbitrary reason not connected with their actual guilt. This only serves to bring the criminal law into disrepute.

The evidential difficulties of proof of offences

37. Independently of the difficulties of determining the status of the various armed forces that may be operating in an internal struggle for power in a foreign state, in any trial of a person after his return for an offence under the Act the prosecution would be confronted by evidential difficulties in proving what the accused had in fact done in the foreign country, with sufficient particularity to justify a conviction for having enlisted in a particular armed force. This would require oral evidence from eye-witnesses of his conduct as they had observed it in the confusion likely to be prevalent in the kind of conflict in which the services of mercenaries are sought. The only persons in this country

³⁹³ *Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries*, August 1976

likely to be able to give first-hand evidence of this kind after the return of the accused to the United Kingdom are his former comrades; but even if they could be identified and brought to the court they would be unlikely to be voluntary witnesses for the prosecution and if forced to give evidence could rely upon the privilege against self-incrimination. The task of assembling sufficient evidence to support a conviction from other witnesses in the foreign country where the mercenary served and persuading them to come here for the trial presents practical problems that would, in our view, be insurmountable.

(On recognition of governments and conclusive executive certificates)

34. The expanded definition of “foreign state” prevents its being confined to a government that is recognised by HM Government as the *de jure* sovereign government over a particular area. It is, and was no doubt intended by the draftsmen to be, broad enough to make it an offence to enlist in armed forces raised by rival governments in a civil war such as that which had been waged in the United States of America, or forces such as those which had been raised by insurgents in the Spanish American colonies in their recent struggles for independence. But the questions whether, and if so, when the Act becomes applicable to particular cases of internal struggles for power between rival factions within a state in the varied circumstances in which such struggles may arise today, are capable of raising so many doubts as to make this part of the Act unsuitable, in our opinion, to continue to be used as a penal statute.

50. If this method of legislation were adopted the application of the Act would not depend upon whether the operations in which the proscribed force was engaged were taking place in a foreign as distinct from a Commonwealth country or colony, or upon whether Her Majesty’s Government had formally recognised one or other faction involved in an internal struggle for power as the *de facto* or *de jure* government. The power could be exercised in the light of the effect upon good international relations with other states of preventing (or permitting) steps being taken in the United Kingdom to recruit mercenaries for service in a particular armed force at a particular time.