

EXPLANATORY STATEMENT

Minute No. _____ of 2017 – Attorney-General

Subject - *Foreign Evidence Act 1994*
Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014
Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015

The *Foreign Evidence Act 1994* (FEA) enables evidence collected in overseas countries to be adduced in proceedings in an Australian court. It also provides for the collection of evidence in Australia for use in an overseas court. Part 3 of the Act provides a means of bringing forward or presenting foreign material, obtained in response to a request made by the Attorney-General under the *Mutual Assistance in Criminal Matters Act 1987* to a foreign country, as evidence in proceedings in Australian courts.

In the context of terrorism-related matters, obtaining foreign evidence through a formal request by the Attorney-General may not always be possible or practicable because there may be no effective Government to which a request can practicably be made. Further, there are circumstances where, although it is possible for Australia to make a mutual assistance request to another country, experience has demonstrated that some countries are not willing or able to provide the requested evidence in response to a mutual assistance request, or not willing or able to provide it in a form that meets the existing requirements in the FEA.

In response to these difficulties and in recognition of the seriousness of offences to which these proceedings relate and the need to protect the safety of the community, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Foreign Fighters Act) amended the FEA to insert a new Part 3A which provides Australian judicial officers with greater discretion in deciding whether to admit foreign material in terrorism-related proceedings, while still providing appropriate judicial protection of the rights of the defendant. Under Part 3A, in addition to foreign material obtained as a result of a mutual assistance request to a foreign country, material received on a police-to-police or agency-to-agency basis (foreign government material) will be able to be adduced in terrorism-related proceedings, as long as certain requirements are met, and subject to the exercise of a broad judicial discretion. Foreign government material is defined within the FEA as material provided by a foreign authority to an authority of the Commonwealth.

In recognition of the fact that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings and to safeguard the rights of the defendant, there are a range of requirements that must be met before foreign government material is able to be adduced, including subsection 27B(1) which provides that foreign government material can only be adduced in terrorism-related proceedings if accompanied by a certificate of the Attorney-General. Subsection 27B(3) will enable the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain the foreign government

material or the information in the foreign government material as foreign material. That is, that it was not practicable to obtain the material in response to a formal request through mutual assistance channels. This may be because there is no functioning government to which a request may be made (for example when the requested country is in a severe state of conflict) or where the requested country is unwilling or unable to provide the requested evidence in response to a mutual assistance request.

Subsection 27B(3) requires the Attorney-General's certificate to be in a form prescribed under subsection (4). Subsection 27B(4) provides the Attorney-General with the power to prescribe a form for the certificate by legislative instrument.

Details of the proposed instrument are set out in the Attachment.

The FEA does not specify any condition that needs to be satisfied before the power to prescribe the form may be exercised.

Consultation outside of the Australian Government was not undertaken for this legislative instrument, as this instrument does not have direct, or substantial indirect, effects on business, nor does it restrict competition.

The proposed instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Subsection 27B(5) of the FEA provides that a certificate given under subsection (3) is not a legislative instrument.

The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

The proposed instrument would commence the day after it is registered.

Authority: Section 27B(4) of the *Foreign Evidence Act 1994*

ATTACHMENT

Details of the proposed *Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015*

Paragraph 1 – Name of Regulation

This paragraph provides that the form in Schedule 1 is the form for the certificate to be given under subsection 27B(3) of the *Foreign Evidence Act 1994*.

Paragraph 2 – Commencement

This paragraph provides for the instrument to commence the day after its registration.

Schedule 1 – Certificate under section 27B

The schedule contains the prescribed form.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) Regulation 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Foreign Evidence Act 1994* (FEA) enables evidence collected in overseas countries to be adduced in proceedings in an Australian court. Part 3 of the Act provides a means of bringing forward or presenting foreign material, obtained in response to a request made by the Attorney-General under the *Mutual Assistance in Criminal Matters Act 1987* to a foreign country, as evidence in proceedings in Australian courts.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Foreign Fighters Act) amended the FEA to insert a new Part 3A which provides Australian judicial officers with greater discretion in deciding whether to admit foreign material in terrorism-related proceedings, while still providing appropriate judicial protection of the rights of the defendant. Under Part 3A foreign material received on a police-to-police or agency-to-agency basis (foreign government material) will be able to be adduced in terrorism-related proceedings, as long as certain requirements are met, and subject to the exercise of a broad judicial discretion. Foreign government material is defined within the FEA as material provided by a foreign authority to an authority of the Commonwealth.

In recognition of the fact that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings and to safeguard the rights of the defendant, there are a range of requirements that must be met before foreign government material is able to be adduced, including subsection 27B(1) which provides that foreign government material can only be adduced in terrorism-related proceedings if accompanied by a certificate of the Attorney-General. Subsection 27B(3) will enable the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain the foreign government material or the information in the foreign government material as foreign material. That is, that it was not practicable to obtain the material in response to a formal request through mutual assistance channels. This may be because there is no functioning government to which a request may be made (for example when the requested country is in a severe state of conflict) or where the requested country is unwilling or unable to provide the requested evidence in response to a mutual assistance request.

Subsection 27B(3) requires the Attorney-General's certificate to be in a form prescribed under subsection (4). Subsection 27B(4) provides the Attorney-General with the power to prescribe a form for the certificate by legislative instrument. This Legislative Instrument prescribes the form for the certificate.

Human Rights Implications

Paragraphs 246 to 255 of the Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill) set out the human rights implications of the amendments contained within the Bill including those engaged by the new Part 3A of the FEA and conclude that the proposed amendments are reasonable, necessary and proportionate in respect of crimes that constitute the gravest threat to the lives of Australians and Australia's national security interests.

Conclusion

This Legislative Instrument merely prescribes the form for the Attorney-General's certificate and does not engage any human rights.

[Senator The Hon George Brandis QC, Attorney-General]