



Law Council
OF AUSTRALIA

Office of the President

12 October 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

By email: PJCIS@aph.gov.au

Dear Mr Hastie

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

1. The Law Council welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**PJCIS**) inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 (**the Bill**).
2. The Law Council is grateful for the assistance of its National Criminal Law Committee and the Law Society of South Australia in the preparation of this submission.
3. The Bill seeks to amend the *Crimes Act 1914* (Cth) (**Crimes Act**) to broaden existing identity check provisions and create offences and powers in relation to identity check, move-on and ancillary directions by constables and protective services officers at Australia's major airports; and the *Australian Federal Police Act 1979* (Cth) to provide that the offence of contravening an identity check or move-on direction is a protective service offence for the purposes of the Act. The amendments would allow constables and protective service officers to direct a person to:
 - produce evidence of their identity;
 - leave airport premises and/or not take a specified flight or any flight, for up to 24 hours; and
 - direct a person to stop or do anything else necessary to facilitate an identity check or move-on direction.
4. The Law Council notes the Second Reading Speech of the Minister for Home Affairs, in which he states that the Bill will enable police officers to appropriately engage with people at Australia's major airports in specified circumstances, to assess and disrupt potential security and criminal threats.¹ The Minister noted the new proposed power is based on advice from the Australian Federal Police that the current requirement to suspect that a person is about to commit, or has committed, a criminal offence before conducting an airport ID check is no longer fit for purpose.²
5. The Minister noted that the new move-on power in the Bill will ensure police can respond to serious threats that arise in the aviation environment in a more tailored and

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2018, 7-8 (Peter Dutton, Minister for Home Affairs), 7.

² Ibid.

proportionate way.³ In addition, the Minister noted that a patchwork of Commonwealth, State and Territory laws currently apply across Australian airports and the Bill will address some of this complexity by giving state and territory police and Australian Federal Police officers, including protective service officers, consistent and appropriate powers to manage risks that are unique to the aviation environment.⁴

Exercise of powers for aviation security

6. The Law Council considers that the powers in proposed sections 3UN, 3UO and 3UQ (identification, stop and move on directions powers) which may be exercised to ensure the 'good order' of an airport, its premises, and flights must be demonstrated to be necessary and proportionate.
7. Currently, these powers appear to leave a broad discretion to a constable or a protective services officer (**PSO**) to exercise the powers in a broad range of circumstances, including for example to intervene or prevent a peaceful protest. That is, where the powers are exercised to ensure 'good order' they may unnecessarily and disproportionately interfere with an individual's right to privacy, free speech and free movement.
8. The Law Council recommends that the power would be proportionate if it were limited to ensuring safety or disrupting or preventing criminal activity, and there was a capacity for urgent judicial review (as noted below).
9. Proposed section 3UN would allow a constable or a PSO to direct a person to produce evidence of their identity if the constable or PSO suspects on reasonable grounds that the person has committed, is committing, or will commit an offence, or considers on reasonable grounds that it is necessary to give the direction to safeguard 'aviation security'. Similar requirements apply under proposed sections 3UO and 3UQ.
10. 'Aviation security' is broadly defined in Item 2 to include the 'good order and safe operation of: a major airport and its premises; and flights to and from a major airport'.
11. The Explanatory Memorandum states that:

*The intent is to ensure the term aviation security is interpreted in accordance with its ordinary meaning, but also captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct).*⁵
12. However, the term 'good order' is not defined in the Bill or Explanatory Memorandum to the Bill. This creates uncertainty and the potential for the powers to be exercised in a broad range of circumstances and at the discretion of constables or PSOs in an arbitrary and potentially ad hoc manner. A concern may arise, for example, that powers which are overly broad and dependant on police discretion may, in practice, result in over-policing which may be perceived to be discriminatory or unfair and may undermine community goodwill towards police.
13. A key principle of the rule of law, is that the law must be both readily known and available, and certain and clear.⁶ The intended scope of the exercise of the powers

³ Ibid, 8.

⁴ Ibid.

⁵ Explanatory Memorandum, Crimes Legislation Amendment (Police Powers at Airports) Bill 2018, 5.

⁶ Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011) Principle 1, 2.

should be unambiguous and key terms should be defined so that they do not inadvertently capture a wide range of benign conduct and overtly depend on police discretion to determine their scope. This is particularly so where, in the absence of suspicion of criminal behavior or a threat to security and safety, an individual's liberty may be interfered with to, for example, produce identity documents, vacate airports and related premises, and abstain from taking flights.

14. For these reasons, the Law Council recommends that the powers be limited to ensuring safety or disrupting or preventing criminal activity, and there be a capacity for urgent or expedited judicial review.

Judicial review

15. The Law Council notes that the powers proposed by the Bill, in particular the power to order a person not to take a flight, may have significant economic implications for the person subject to the order. Such an order may also cause the person considerable inconvenience as it may prevent them from reaching their destination by their desired time. For this reason, the power should be subject to a very specific power of urgent or expedited review, with an authority to the reviewing officer, presumably a judicial officer, to order compensation.
16. Some consideration could be given to also providing for the judicial review of a move-on order, as well as the ancillary powers used to do anything necessary to facilitate the proposed powers.
17. Judicial review will ensure that these powers are being used appropriately. It should also enable those who have been impacted unduly by the proposed new powers to seek compensation.
18. The Explanatory Memorandum to the Bill notes that recent events overseas, and the disrupted terrorist plot at Sydney International Airport, have shown that airports are a high-profile and high-impact target for terrorists. The Law Council understands the Bill seeks to manage risks that are unique to the aviation environment.
19. Allowing for judicial review of these orders does not compromise the objectives of the Bill, but provides a safeguard to ensure the proposed powers are being exercised in an appropriate manner. These powers have the potential to significantly impact on individual rights and freedoms. As such, the Law Council considers that judicial review of these powers is an appropriate measure.

The Law Council is grateful for the opportunity to make this submission.

Please contact Dr Natasha Molt, Director of Policy, Policy Division
in the first instance should you require further
information or clarification.

Yours sincerely

Morry Bailes
President