



Parliamentary Joint Committee on Intelligence and Security - Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill

Home Affairs Portfolio responses to Questions on Notice.

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QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/001) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment (Police Powers at Airports) Bill
2018 - Use of current laws.**

Asked:

Use of current laws

1. In the Department's supplementary submission, you note that providing for expedited judicial review may have 'significant resourcing implications for Australian courts' [supplementary submission p. 5]. Does this mean you envisage these powers will be used frequently? How many times per year do state and territory police use their existing powers to 'direct individuals to leave and not return to a place for a specified period of time' in relation to airports?
2. How will you capture and report on the number of individuals who will be subject of the new powers? Will this information be made publically available?

Answer:

1. At the major airports, AFP Members have access to applied State laws, including move-on powers by way of Commonwealth Places (Application of Laws) Act 1970. Since the State-based move on powers are not airport specific, and are not consistent across the jurisdictions they have varied utility at Airports. For example, in the last year:

- Section 175 of the Crimes Act 1900 (ACT) has been used twice at Canberra Airport in the last year.
- Section 17A(1) of the Summary Offences Act 1953 (SA), which relies on trespass, has been used six times at Adelaide Airport in the last year.
- Sections 6 and 9 of the Summary Offences Act 1966 (Vic) are used a number of times a week at Melbourne Airport.

We do not have access to data on how many times per year state and territory police may have used move on powers at Australian airports, but note that state and territory police do not have permanent uniformed presence at airports. They may attend at an airport upon request of airport management or individuals.

2. Records on the use of the powers will be captured in the AFP's Police Real-time Online Management Information System (PROMIS). This information will not be made publically available.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/002) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Role of Protective Services Officers v constables**

Asked:

Role of Protective Services Officers v constables

3. Please explain the difference between a constable and a Protective Services Officer (PSO). In particular, please note differences in:
 - Powers
 - Training, including duration and ongoing training
 - Entry level requirements
 - Salary.
4. What measures will be put in place to ensure PSOs issue directions in a proportionate manner, using clear and appropriate thresholds, and exercising judgment on what constitutes 'reasonable grounds'?
5. The Police Federation of Australia submitted that it does not 'generally support the expansion of police style powers' beyond fully sworn police officers (i.e. not to PSOs), but does so on this occasion.
 - a. Should more accountability/approval mechanisms be put in place for PSO's to use these powers?

Answer:

3.

Powers

Protective Service Officers (PSOs) are law enforcement officials employed under the Australian Federal Police Act 1979 (the AFP Act). The main difference between constables and PSOs is that constables may exercise powers in relation to criminal offences generally, while PSOs may exercise powers in the course of their protection duties only.

Training

During recruit training, AFP Members receive additional training modules in accordance with their expanded powers and range of functions. Consequently the PSO recruit course is approximately 14 weeks duration and the AFP Member recruit course with added modules is approximately 24 weeks duration. Where AFP Members and PSOs are performing the same duties or operating under the same

legislation they will receive the same ongoing training. For example the same Behavioural Assessment and Security Questioning (BASQ) training package is delivered to AFP Members (i.e. constables) and PSOs. The AFP has planned a training package in relation to this Bill which will be undertaken by both AFP Members and PSOs working at Airports.

Entry-level requirements

The AFP Commissioner is responsible for conferring the status of PSO and AFP Member (i.e. constable). The competency and qualification requirements for PSOs and AFP Members are declared by the AFP Commissioner under sections 40EB and 40C of the AFP Act respectively. The requirements for PSOs are:

- a) has been certified by a medical practitioner, approved by the Commissioner, to be in good health;
- b) is of good character and reputation;
- c) possesses the experience, qualifications and training required for the effective performance of the duties of a protective service officer;
- d) having regard to any other factors that are relevant to the discharge of the duties of a protective service officer, is a suitable person to have the powers and duties of a protective service officer; and
- e) has satisfied such requirements as the Commissioner determines to be necessary, from time to time, for the purpose of ascertaining whether the level of physical fitness of the person is sufficient to enable the person to perform duties of the kind performed by a protective service officer.

The requirements for AFP Members are:

- a) is of good character and reputation;
- b) has been certified by an approved medical practitioner to be in good health;
- c) has been assessed to possess the skills, knowledge, experience, qualifications and training required for the effective performance of the duties of a member; and
- d) has been assessed to possess particular competencies or qualifications that are required for the performance of the duties of specific roles.

Salary

PSOs range in rank from AFP band 2 (with a base salary of \$53,969) to AFP Superintendent (with a base salary of \$190,674). AFP Members range in rank from AFP Band 2.4 (with a base salary of \$60,274) to AFP Superintendent (with a maximum base salary of \$190,674).

Subject to their role and working patterns, both PSOs and AFP Members may also be entitled to a number of other financial entitlements including a night shift allowance, over-time payments, on-call allowance etc. Details of these entitlements are outlined in the AFP Enterprise Agreement 2017-2020 and the AFP Executive Level Enterprise Agreement 2016-20191.

¹ <https://www.afp.gov.au/careers/benefits-conditions>

4. All AFP Members and PSOs are trained in the use of their powers including the legal concept 'reasonable grounds'.

All AFP Members and PSOs are trained in the use of their powers including the legal concept 'reasonable grounds'.

All AFP Members and PSOs are subject to the AFP Code of Conduct in The AFP Commissioner's Order on Professional Standards. The Code of Conduct requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. A breach of this Code may lead to disciplinary action, including termination.

AFP Members and PSOs are also subject to reporting requirements and complaint mechanisms (as outlined below). The AFP, as an organisation, is subject to extensive independent oversight from the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, this Committee, the Parliamentary Joint Committee on Law Enforcement, the Senate Standing Committee on Legal and Constitutional Affairs, as well as our own internal Professional Standards Unit. Use of powers is also tested whenever evidence derived from those powers is led in court.

5. PSOs are able to exercise many of the same police powers as AFP members, including use of force powers (which are limited in their application to particular protective service functions and offences). As such, PSOs are subject to the same practice, reporting, training, assessment, qualification and administration requirements as AFP Members in all instances where their powers overlap. On this basis it is not appropriate to introduce additional accountability or approval mechanisms for PSOs.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/003) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Safeguards/Accountability**

Asked:

Safeguards/Accountability

6. Could you please outline what avenues an individual will have to both appeal a direction, and request compensation for a missed flight, including all associated costs such as accommodation/hire car/entry fees/tour fees?
7. According to your submission, the subject of an identity check or 'move-on' direction is 'entitled to lodge a complaint with AFP Professional Standards where they are concerned that an officer has clearly [acted] outside their authority'.
 - a. Will this complaint mechanism also exist for directions given by constables of state/territory police?
 - b. What other complaint processes do individuals have open to them to challenge a direction?
 - c. What other avenues of appeal do they have?
 - d. How and when will individuals be informed of their rights to lodge a complaint? How will this be communicated to those with English as a second language?
8. In your submission, you note that records of the use of the proposed identity checking and move-on powers will be kept in accordance with the AFP's policies on records management.
 - a. Are these policies made available to the public?
 - b. What do they require?
 - c. What oversight/scrutiny applies?

Answer:

6. An individual will be able to appeal a direction, and seek compensation for a missed flight (including associated costs) through the judicial review process, outlined in the *Administrative Decisions (Judicial Review) Act 1977*. A person would also be able to initiate civil proceedings to seek damages or compensation incurred as a result of improper use of the proposed identity check, move-on or ancillary

powers. These mechanisms apply consistently across other police powers used by the Australian Federal Police.

7a. All State and Territory police have equivalent complaint mechanisms in place in relation to improper conduct by their respective police officers.

7b. The AFP as an organisation is subject to extensive independent oversight from the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, this Committee, the Parliamentary Joint Committee on Law Enforcement, the Senate Standing Committee on Legal and Constitutional Affairs, as well as our own internal Professional Standards Unit. Use of powers is also tested whenever evidence derived from those powers is led in court.

7c. Judicial review enables a person subjected to an administrative decision (such as an identity or move-on direction) to apply to a court for review of the lawfulness of that decision.

7d. Information about how to lodge a complaint is readily available on the AFP website, in a number of different languages.

8. The 'AFP National Guideline on information management' is the AFP's primary policy on record management. This document is publically available on the AFP's website and is included for reference at Attachment A. The National Guideline requires all AFP personnel to maintain appropriate records of their business activities and decisions. Inappropriate departures from the National guideline may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/004) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Approval level to issue ‘move-on’ directions**

Asked:

Approval level to issue ‘move-on’ directions

9. A move-on direction that results in a person missing a flight has the potential to cause significant financial loss regardless of the duration of a notice. With this in mind, can you please explain why senior officer authorisation is only required for a ‘move-on’ direction with a duration of 12 hours or more?

What ramifications would there be if the Bill was amended to require senior level authorisation for all ‘move-on’ directions?

Authorisation may be given orally. Are written records subsequently made of all decisions to orally authorise a ‘move-on’ notice?

Answer:

9. The Bill makes the powers available to all Constables and AFP PSOs in order to ensure that officers responsible for day to day policing at the airports are able to quickly remove threats to the airport and flights from the airport premises.

A requirement to obtain senior level authorisation before exercising move-on powers in the first instance would delay steps being taken to remove a person from the airport in situations where the person is considered to be a risk to aviation security.

Only identity directions may be given orally. Move-on directions must be issued in writing. This is to ensure the recipient has a clear understanding of what the direction prohibits them from doing. Use of the powers will also be recorded in the individual officer’s notebook, and communicated to the AFP Operations Coordination Centre (AOCC) where a log of activities undertaken at the airports is kept.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/005) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - BASQ training**

Asked:

BASQ training

10. The committee has received concerns from Australian Lawyers for Human Rights and the Queensland Council for Civil Liberties about the 'Behavioural Assessment and Security Questioning' (BASQ) model, which according to the Explanatory Memorandum, will be used by police to identify a person displaying known behavioural traits and direct them to provide proof of identity.

Australian Lawyers for Human Rights contend that 'While BASQ can be of great assistance when used by experts, there is evidence that it can often be abused, whether intentionally or not, to target minorities and reinforce stereotyping'.

- a. For what period of time are officers trained in this? Is this the same for constables and PSOs?
- b. What data or studies do you have to counter arguments that tools such as BASQ may inadvertently be used to target 'minority communities ... based on race, ethnicity, national origin and religion'? [quoted from the American Civil Liberties Union in ALHR submission. para 4.2]
- c. How can the Committee be assured that BASQ won't be inadvertently used to target minority communities?

Answer:

10a. The initial level one BASQ training course includes three days of formal training in theory and practice. Ongoing practical on the job training is also delivered. The course itself is continually refined in accordance with identified best practice. There is no difference between BASQ training for Constables or PSOs.

10b. The AFP's BASQ course was developed in 2011, from training material provided to the AFP by the Centre for Protection of National Infrastructure (CPNI) United Kingdom, and is based upon 31 identifiable behaviours, which all have been extensively tested to be culturally neutral by CPNI, Portsmouth University and Essex Police Force.

10c. As outlined above the AFP is subject to a comprehensive complaints and oversight regime, with reporting requirements and complaint mechanisms (with both internal and external oversight). Officers that use the powers in this Bill to target minority communities will be acting unlawfully and subject to the AFP's professional standards regime.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/006) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Training in general**

Asked:

11. The Australian Police Federation notes that the AFP has given an undertaking that both constables and PSO's will be appropriately trained in the exercise of the new powers proposed by the Bill.

a. What training will be provided, for what duration, and what ongoing or follow-up training will be given?

Answer:

11a. In accordance with standard practices for new police powers, a training package will be provided to officers affected by the amendments covering the new legislation. As part of that training package, AFP Members and PSOs will be given examples and scenarios that may be anticipated with a recommended course of action in response. The governance surrounding the application of the powers, recording and accountability mechanisms administering the legislation will form part of this package.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/007) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Inconsistencies between state and territory legislation**

Asked:

Inconsistencies between state and territory legislation

12. In your submission you note that the Bill addresses inconsistencies in powers available to police under state and territory legislation. Can you please explain what these inconsistencies are?

13. Your supplementary submission notes that

State and Territory move-on powers are only available to AFP officers at airports in limited circumstances, and the threshold for use differs from jurisdiction to jurisdiction. The Bill will ensure that police at airports have access to appropriate and consistent powers to address security and criminal threats that are unique to the aviation environment.

With this in mind:

- a. How does the Bill interact with existing state and territory legislation?
- b. How will inconsistencies between jurisdictions be resolved through the Bill?

Answer:

12. There are differences in the identity checking and move-on powers available to police under State and Territory legislation, both in terms of the circumstances in which a police officer may require a person to identify themselves or direct a person to move-on, and the threshold that a police officer is required to meet prior to exercising such powers.

In Queensland, for example, one of the prescribed circumstances in which a police officer may require a person to provide their name and address is where the officer reasonably suspects that the person is likely to consort with one or more recognised offenders.¹ In contrast, one of the circumstances where a police officer in the Northern Territory may require a person to provide their name and address is if the officer believes on reasonable grounds that the person may be able to assist with inquiries in connection with an offence that may be committed.²

¹ *Police Powers and Responsibilities Act 2000* (Qld) sections 40, 41(p).

² *Police Administration Act 1978* (NT) subsection 134(1).

The state of mind that a police officer is required to hold at the time of exercising a power varies across State and Territory legislation, from the threshold of ‘reasonably suspects’ to ‘believes on reasonable grounds’, with the latter requiring the police officer to have more than a suspicion. This means that police officers in some jurisdictions are required to adhere to a higher standard of proof to exercise their powers than what would otherwise be required in the same circumstances in another jurisdiction.

The period of time for which a person may be directed to move-on also differs between State and Territory legislation. In Tasmania, for example, a police officer may direct a person to leave a public place for not less than four hours if the officer believes on reasonable grounds that the person is likely to commit a breach of the peace.³ Comparatively, in the Northern Territory, a police officer is permitted to issue a move-on direction in relation to a place or area for up to 72 hours, if the officer reasonably suspects that the person subject to the direction is about to commit an offence at the place or area.⁴

13a. The Bill does not interact with existing State and Territory legislation. It provides a Commonwealth framework that removes the need for police officers to rely upon identity checking and move-on powers available under State and Territory legislation. Members of the police force or police service of a State or Territory will be authorised to exercise the powers, in accordance with the specific criteria prescribed by the Bill.

13b. The Bill creates a nationally consistent framework of powers that can be exercised by federal, State and Territory police officers, in appropriate circumstances. In doing this, the Bill will ensure that police officers at major Australian airports have access to identical powers, irrespective of the jurisdiction in which the police officer is performing their duties.

³ *Police Offences Act* (Tas) paragraph 15B(1)(d).

⁴ *Summary Offences Act* (NT) section 47B.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/008) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Other matters**

Asked:

Other matters

14. A submitter has raised concerns with absolute liability applying to proposed section 3US(1)(d) of the Act. Could you please provide the Department's position?

Answer:

As outlined at pages 14-15 of the Explanatory Memorandum to the Bill, a constable or officer's compliance with his or her duties in subsection 3UR(2) is a precondition that must be met before a direction is given. The state of mind of the defendant as to the officer's compliance should not be a relevant consideration in their criminal liability for failing to abide by a direction (see page 24 of the Guide to Framing Commonwealth Offences (the Guide)).

In addition, it is a precondition that the defendant be informed that a failure to comply with the direction, or the provision of false or misleading information or documentation, may constitute an offence before they can be subject to criminal liability under subsection 3US(1). The fact that the person must be put on notice to guard against the possibility of any contravention of subsection 3US(1) also reinforces that there are legitimate grounds for penalising persons lacking fault (see page 23 of the Guide).

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

**(PPA/009) – Parliamentary Joint Committee on Intelligence and Security -
Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill
2018 - Expanding the provisions of the Bill**

Asked:

At page 5 of your supplementary submission, under the heading 'good order' you say:

The measures in the Bill are not intended to interfere with the right to peaceful assembly and do not give police the ability to use the powers to disrupt or quell a protest that is peaceful and does not disrupt the safe operation of the airport.

Again, the Law Council helpfully referred us to the saving provision that appears at section 10(2) of the Aviation Transport Security Act:

However, unlawful interference with aviation does not include lawful advocacy, protest, dissent or industrial action that does not result in, or contribute to, an action of a kind mentioned in paragraphs (1)(a) to (h).

Is there any problem about expanding the provisions of the bill as introduced to the parliament by including some saving provision which makes clear the intent that the department in its supplementary submission has said is the intent—that is, the bill is not intended interfere with peaceful assembly et cetera?

Answer:

The Department notes that the reference to a 'saving provision' made at the public hearing was in relation to the meaning of 'unlawful interference with aviation' in subsection 10(2) of the *Aviation Transport Security Act (2004)*. This provision excludes peaceful protest from the definition, except where it interferes with the very actions the Act is designed to prevent. As this Bill stands now, a constable or officer could not direct a person participating in peaceful protest to move on unless they thought it necessary (on reasonable grounds) to do so based on the criteria in 3UO(1)(b). Therefore the savings provision is not necessarily warranted, but would require an exception for specified conduct if it were to be recommended.

3UO Move-on directions at airports

When may a direction be given?

- (1) A constable or a protective service officer may give a person a direction under this section if:
 - (a) the direction is given on the premises of a major airport; and

- (b) one or more of the following applies:
 - (i) the constable or officer considers on reasonable grounds that the person has contravened a direction given at that airport under section 3UN (identity information at airports) or 3UQ (stop and directions powers at airports), and the constable or officer is not reasonably satisfied of the person's identity;
 - (ii) the constable or officer suspects on reasonable grounds that it is necessary to give the direction to prevent or disrupt relevant criminal activity occurring on the premises of any major airport, or in relation to a flight to or from any major airport;
 - (iii) the constable or officer considers on reasonable grounds that it is necessary to give the direction to safeguard aviation security.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 17 October 2018

HOME AFFAIRS PORTFOLIO

(PPA/010) – Parliamentary Joint Committee on Intelligence and Security - Review of the Crimes Legislation Amendment - (Police Powers at Airports) Bill 2018 - Is it envisaged the powers will be used frequently? -

Asked:

1. Is it possible to expand the provisions in the Bill to incorporate a 'saving provision' that makes clear that the Bill is not intended to interfere with peaceful assembly/lawful protest? 2. Expedited judicial review: Do you envisage these powers being used frequently 3. Can you clearly articulate the sort of conduct preparatory to terrorist offences in airports (with clear examples i.e. photographing areas, loitering)? This is to inform how the laws are to be used.

Answer:

Peaceful protest

1. The Department notes that the reference to a 'saving provision' made at the public hearing was in relation to the meaning of 'unlawful interference with aviation' in subsection 10(2) of the Aviation Transport Security Act (2004). This provision, excludes peaceful protest from the definition, except where it interferes with the very actions the Act is designed to prevent. By the same token, the only way a similar provision could be included in the Bill would be to exclude peaceful assembly/lawful protest except where this conduct interferes with aviation security or involves criminal activity. If such an exemption were in place, organisations or individuals could use the cover of 'peaceful protest' to carry out acts against aviation security. As this Bill stands now, a constable or officer could not issue a move-on direction to a person participating in a peaceful protest unless the officer considers it necessary on reasonable grounds (see subparagraphs 3UO(1)(b)(ii) and (iii)) or the officer considers on reasonable grounds that the person has contravened an identity check direction or an ancillary direction and the officer is not reasonably satisfied of the person's identity (see subparagraph 3UO(1)(b)(i)).

2. It is not possible to accurately estimate how frequently the proposed powers will be used as their use will be dependent on the operational need and the behaviour of people at airports. Use of existing identity checking power and applied State/Territory move on powers at airports do not necessarily provide an accurate indication of how frequently the new powers will be used.

The identity checking power at section 3UM of the Crimes Act 1914 is generally used less than ten times a year at each of the major airports. However this figure is

impacted by the restrictiveness of the current legislative threshold and the availability of applied State powers in some jurisdictions.

Use of applied State move-on powers varies considerably from airport to airport due to differences in State laws. For example:

- Section 175 of the Crimes Act 1900 (ACT) has been used twice at Canberra Airport in the last year.
- Section 17A(1) of the Summary Offences Act 1953 (SA), which relies on trespass, has been used six times at Adelaide Airport in the last year.
- Sections 6 and 9 of the Summary Offences Act 1966 (Vic) are used a number of times a week at Melbourne Airport.

Scope of powers

3. Where police observe conduct that gives rise to suspicion of a terrorism offence the priority is always to arrest the person. This includes acts done in preparation for, or planning, terrorist acts. However, police may observe other behaviour that is unusual in the context of the airports and may be an indicator of a risk to aviation security, including in the context of terrorism. For example:

Example One

Police observe a person spending a significant period of time in an elevated section of a major airport. The person is not near a boarding gate and police confirm there are no flights experiencing major delays at the time. The person appears to be on constant alert, watching the security screening process and taking notes.

Example Two

Police detect a person entering and exiting a major airport on several occasions over the course of a week. CCTV shows the person does not arrive by taxi or public transport, nor do they drive and park their vehicle. Police observe the person leaving the airport on foot towards the direction of nearby hotels. The person is not employed at the airport and is not displaying an Aviation Security Identity Card.

Example Three

Police receive a tip-off from a taxi driver who recently drove two men to a major airport. The taxi driver is concerned about a conversation overheard referring to “targets” and advises police that when he tried to help the pair with their luggage they became agitated and ordered him away. Police use CCTV to locate the pair matching the taxi driver’s description. While they entered the airport together, they moved towards check in desks at opposite ends of the departures hall.