



Australian Government
Department of Home Affairs

Submission to the inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Parliamentary Joint Committee on Intelligence and
Security

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Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Introduction

The Department of Home Affairs (the Department) thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make a submission on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018 (the Bill).

This submission provides an overview of:

- operational advice indicating that the current framework for issuing identity checking and move-on directions at airports is no longer fit-for-purpose
- the new powers introduced by the Bill, and
- appropriate limitations on the exercise of these powers and safeguards against misuse.

The Australian Federal Police (AFP) was consulted in the preparation of this submission.

Inadequacy of the current framework

Recent international and domestic incidents, including the failed terrorist plot at Sydney International Airport in July 2017, highlight the high-profile and high-impact nature of evolving security threats to Australia's aviation network. Airports also provide a platform for serious and organised crime activities, such as illicit drug trafficking, and a pathway for these groups to expand their operations domestically and transnationally.

Existing identity checking powers

Under the current framework, police are reliant on powers that only permit identity checking at airports in circumstances where officers hold a reasonable suspicion that an offence punishable by twelve months imprisonment or more has been, is being, or will be committed. Consequently, police are unable to adequately interact with people who may be engaging in suspicious conduct in an airport precinct, such as scoping the vulnerabilities of aviation security apparatus, as this conduct may not necessarily lead to a suspicion of involvement in the commission of a specific offence. The AFP has reported that the weaknesses identified in the current framework impact on its ability to assess and manage potential threats within airports.

Existing move-on powers

There is currently a limited power under the *Aviation Transport Security Act 2004* for police to direct a person to move on from the premises of certain airports if they reasonably suspect the person is committing or has committed an offence against the Act. This power may only be exercised for the purpose of safeguarding against unlawful interference with aviation, and does not extend to the commission of other offences or disruptive behaviour more generally.

In the absence of a Commonwealth power to address security or criminal risks, AFP officers at airports may rely upon move-on directions available in limited circumstances under State or Territory legislation.

Updating the framework

The Bill closes a gap in existing Commonwealth law that currently limits the capacity of police to respond appropriately and proactively to potential threats at airports. Further, the Bill implements a Commonwealth framework that overcomes inconsistencies in powers available to police under State and Territory legislation, and addresses security and criminal risks that are unique to the aviation environment.

The measures in the Bill enhance police powers at major Australian airports by enabling constables and protective services officers (PSOs)¹, in appropriate circumstances, to:

- direct a person to produce evidence of their identity (**identity check direction**)
- direct a person to leave the airport premises or the premises of any specified airport, and/or not to take any specified flight to or from the specified airports, for up to 24 hours (**move-on direction**), and
- direct a person to stop or do anything else necessary to facilitate an identity check direction or move-on direction (**ancillary direction**).

The new powers require a constable or PSO to suspect or consider that it is reasonably necessary to issue a direction to achieve the objective of disrupting a criminal or security threat, ensuring that these directions will be used in a manner proportionate to the threat.

These powers will be available at capital city airports, as well as Gold Coast, Launceston, Alice Springs and Townsville airports, or at airports otherwise determined by the Minister.

The Bill contains criminal offences for failing to comply with an identity check, move-on or ancillary direction, punishable by a maximum penalty of 20 penalty units (a fine of up to \$4,200). The Bill will also contain criminal offences that apply if a constable or PSO fails to comply with their duties in issuing an identity check or move-on direction – for example, the duty to appropriately identify themselves if not in uniform, and inform the subject of a direction that it may be an offence not to comply with the direction.

Identity check direction

Under the Bill, to issue an identity check direction, a constable or PSO must:

- suspect on reasonable grounds that the person has committed, is committing, or intends to commit an offence under a Commonwealth law or State law with a federal aspect that is punishable by 12 months imprisonment or more, or
- consider on reasonable grounds that it is necessary to conduct the identity check to safeguard aviation security.

Appropriate limitations

The new power does not authorise police to undertake random identity checks or to check the identification of every person present in an airport environment. Rather, police will exercise the identity checking power based on clear criteria in the legislation, and relying on their specialist expertise and training.

It also does not operate as a de facto requirement for a person to carry proof of identification at major airports. A person can satisfy the identification requirements in a range of ways, including by:

- producing a government photographic identity document (such as a passport or driver's licence)
- producing one or more other identity documents (such as a student card, bank card and/or Medicare card), or
- giving the officer their name, date of birth and address.

Move-on direction

Under the Bill, to issue a move-on direction, a constable or PSO must:

- consider on reasonable grounds that the person has contravened an identity check or ancillary direction, and the constable or PSO is not reasonably satisfied of the person's identity

¹ *Constable* means a member or special member of the AFP or a member of the police force or police service of a State or Territory (subsection 3(1) of the *Crimes Act 1914*). *protective service officer* means an AFP employee declared as such by the AFP Commissioner (sections 4 and 40EA of the *Australian Federal Police Act 1979*).

- suspect on reasonable grounds that the direction is necessary to prevent or disrupt relevant criminal activity, being the commission of an offence under a Commonwealth law or State law with a federal aspect that is punishable by twelve months imprisonment or more, at the premises of a major airport or in relation to a flight arriving at or departing from a major airport, or
- consider on reasonable grounds that the direction is necessary to safeguard aviation security.

Appropriate limitations

The proposed move-on power has been formulated to ensure that a constable or PSO can tailor their direction so that it is most appropriate in the circumstances and proportionate to the threat situation identified.

Allowing a move-on direction to extend to specified airports or flights ensures that, should a threat only arise in relation to a particular flight or airport, the scope of the direction can be confined to the particular area where the threat may arise. Permitting a constable or PSO to issue the direction for up to 24 hours also allows the direction to be catered to only the necessary time period in which a threat may arise.

The Bill provides that all move-on directions must be in writing, and any decision to exclude a person from a specified airport or flight for more than twelve hours must be authorised by a senior police officer. A senior police officer must also authorise a subsequent move-on direction in relation to the same person within seven days, with a maximum of two move-on directions permissible within this time period.

These limitations on the use of the move-on power ensure that, where the exclusion period is greater than twelve hours or a subsequent move-on order is issued within seven days, two officers have turned their mind to the identified threat and whether the proposed exclusion is a proportionate response in the circumstances. Further, the restriction on the number of directions that can be given within a specified time period ensures that the move-on power cannot be used as a mechanism to indefinitely exclude a person from the aviation environment.

Ancillary direction

Under the Bill, a constable or PSO may also direct a person to stop or do anything else that is reasonably necessary to facilitate the exercise of the identity checking or move-on power.

Appropriate limitations

As a constable or PSO is required to have reasonable grounds to exercise this power, this threshold ensures that the officer must choose the least intrusive means to facilitate an identity check or move-on direction, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

This power does not permit a constable or PSO to detain a person for the purpose of exercising their power, or undertake any search and seizure of the person's property. The intention of an ancillary direction is purely to enable an officer to direct a person to undertake reasonable and necessary steps to facilitate the exercise of an identity check or move-on direction – for example, an officer could direct a person to step to the side of a public walkway while conducting an identity check to ensure they are not disrupting others' use of the airport.

International comparisons

A number of international jurisdictions have comparable arrangements in place to address security and criminal risks in the aviation environment.

For example, in the United Kingdom, the *Terrorism Act 2000* enables a police officer to stop, question and detain a person at an airport for the purposes of determining whether he or she appears to be a person who is, or has been, concerned in the commission, preparation or instigation of acts of terrorism. Under this Act, a person who is questioned must, on request, give the police officer a valid passport which includes a

photograph, or another document which establishes his or her identity. The exercise of these powers is not contingent upon reasonable suspicion that a person has committed an offence.

In the United States, Canada and the United Kingdom, adult passengers are required to provide proof of identification before boarding domestic flights. The laws in these jurisdictions go beyond what is proposed in the Bill, which will not require people to carry proof of identification at major Australian airports.²

Safeguards against misuse of powers

In addition to the limitations prescribed in the Bill, there are various safeguards against the misuse of the proposed powers, including protections against discrimination and record keeping requirements, within Commonwealth, State and Territory legislation, as well as the policies, procedures and specialist training of the AFP.

Protections against discrimination

The proposed identity checking, move-on and ancillary powers will apply equally to all persons within a major airport regardless of age, gender, ethnicity, religious background or other status.

The Bill does not permit police to exercise these powers in a discriminatory fashion. In issuing a direction, a constable or PSO must have reasonable grounds for doing so which are linked to criminal activity or aviation security. This 'reasonable grounds' requirement ensures that directions are based on actionable observations or intelligence relevant to aviation security or criminal conduct, preventing police from exercising these powers solely on the basis of a person's age, ethnicity or religious background.

Further, Commonwealth officers exercising these powers are bound by Commonwealth anti-discrimination legislation including the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. State and Territory officers are also bound by similar legislation within their own jurisdictions.

Constables and PSOs are also bound by professional standards that preclude them from exercising their powers in a discriminatory fashion. For example, the AFP Code of Conduct, requires all appointees of the AFP to act without discrimination or harassment in the course of their duties.

Constables and PSOs also receive specialist training to identify potential threats in a non-discriminatory manner. Members of the AFP, for example, are appropriately trained in Behavioural Assessment and Security Questioning to identify known behavioural traits displayed by people who are about to commit a criminal act, and to ask targeted questions of persons of interest, without prejudice or discrimination.

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. This could potentially expose the officer to disciplinary action, including termination, if the complaint is substantiated.

Record keeping

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. This will be supported by a standard operating procedure, which stipulates the process for constables and PSOs to adhere to when issuing an identity check or move-on direction. As prescribed by the Bill, all move-on directions must be issued in writing. In issuing a move-on direction, constables and PSOs will communicate details of the direction to the AFP Operations Coordination Centre, where the direction will also be recorded in the written log of activities at the airport. All AFP appointees coming onto duty at an airport whilst a move-on direction is in place will be made aware that a direction has been issued, including any background information.

² Passengers may be contractually required to carry identification by airlines.

Stakeholder consultation

The Department consulted with the AFP, Attorney-General's Department, Australian Government Solicitor, Department of the Prime Minister and Cabinet (including the Office of Best Practice Regulation), State and Territory police and justice officials, and management of major airports, in relation to the Bill.