



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

By Email: PJCIS@APH.GOV.AU

Dear Madam/Sir

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Thank you for providing us with an opportunity to make a late submission in relation to this Bill.

The QCCL is an organisation of volunteers, which, amongst other things, seeks the implementation in Queensland and Australia of the Universal Declaration of Human Rights.

The *Crimes Act* already allows police to request suspects at airports to identify themselves. However the amendments greatly expand the reasons for which identification can be requested. The amendments add to the existing grounds 'reasonably suspecting that the person has committed, is committing or intends to commit an offence' punishable by imprisonment for 12 months or more the alternate grounds of considering on reasonable grounds that it is necessary that the person identify themselves to "safeguard aviation security".

Additional police powers granted under the Bill include the ability to order a person at an airport to stop what they are doing or to do anything else the constable or officer considers on reasonable grounds to be necessary such as not taking a specified flight or not taking any flight for a specified period (of up to 24 hours) and to leave the airport and not re- enter any airport for a specified period (of up to 24 hours) (known as 'move on' directions). The justification for such orders again rests either on reasonable suspicion of a serious offence, or the broader 'aviation security' basis.

The following fundamental rights are engaged by these proposed laws:

- The right not to be deprived of your liberty. This means that everyone has the right to walk down the street or in an airport free from police interference, and that police shall not deprive a person of their liberty without the non-arbitrary legal authority to do so.
- Another right is the right to silence. The right to silence is founded on a "principle of fundamental justice" that a person who may be deprived of their liberty by the state should not be compelled to provide the state with information that may incriminate them.
- The third is the right to be secure against unreasonable search or seizure.
- The fourth is that no one shall be arbitrarily detained or imprisoned.

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- Finally, everyone has the right to be presumed Innocent. Another way of stating this key principle is that the state should presume each person to be harmless and therefore it is in principle wrong to take measures against people for preventative reasons unless there are very strong justifications for doing so.

It might be argued that stopping a person to ask questions does not result in a deprivation of liberty, given the presumably short period of time involved. However in this case hanging over the situation is the compulsion that follows from the threat of a fine of over \$4000. Moreover, randomly searching will result in such a large number of incursions on liberty that it requires a serious normative justification.

The submission by the Department of Home Affairs rejects the submission that this legislation authorises random searches. We beg to differ. The right to search when a person “considers on reasonable grounds that it is necessary to give the direction to safeguard aviation security” is so vague as to be beyond effective scrutiny and thus random.

The Ex-memo justifies the expansion of the grounds upon which persons can be asked for identification by reference to the desirability of that power in the context of Behavioural Assessment and Security Questioning (BASQ). However these assessment tools have been shown to have no basis in science.

In its report *BAD TRIP - Debunking the TSA's 'Behavior Detection' Program* February 2017 the ACLU found that the TSA's own records didn't support the program:

“The TSA has repeatedly claimed that the behavior detection program is grounded in valid science, but the records that the ACLU obtained show that the TSA has in its possession a significant body of research that contradicts those claims. The records include numerous academic studies and articles that directly undermine the premise of the program: the notion that TSA officers can identify threats to aviation security with some reliability based on specific behaviors in an airport setting. In fact, the scientific literature in the TSA's own files reinforces that deception detection is inherently unreliable, and that many of the behaviors the TSA is apparently relying on are actually useless in detecting deception. The documents further show that the TSA either overstated the scientific validity of behavior detection techniques in communications with members of Congress and government auditors, or did not disclose information that discredited the program's scientific validity.” (page 1)

“The TSA's list of behavioral indicators—long held secret but leaked to the press in March 2015—deepens our concerns about the program and calls into question whether it could ever be implemented neutrally and objectively. The list includes conduct as commonplace as being late for a flight, yawning, whistling, or rubbing one's hands together. Other “indicators” are unavoidably subjective: appearing confused, “wearing improper attire,” “appearing not to understand questions,” or displaying “exaggerated emotions.” (page 2)

That these programs have no scientific validity was the conclusion of the US Government Audit Office:

“Available evidence does not support whether behavioral indicators, which are used in the Transportation Security Administration's (TSA) Screening of Passengers by Observation Techniques (SPOT) program, can be used to identify persons who may pose a risk to aviation security. GAO reviewed four meta-analyses (reviews that analyze other studies and synthesize their findings) that included over 400 studies from the past 60 years and found that the human

ability to accurately identify deceptive behavior based on behavioral indicators is the same as or slightly better than chance.¹

Given there is no scientific basis to the searching tool and the decision making criteria is opaque it follows in our submission that searches conducted under this legislation are likely to be affectively random or more likely default to stereotypes and racial profiling.

Random searching is likely to be inefficient (in terms of results) and socially divisive insofar as stereotypes are used to select people to search so is unlikely to be the most productive law enforcement policy.

In our view an airport, despite its current ownership, is a public facility to which members of the public have a legitimate expectation of access which cannot be defeated without complying with the rules of natural justice. We rely by analogy on the decisions of the High Court in *Forbes v New South Wales Trotting Club* 143 CLR 242 at 264 per Gibbs J and Murphy J 274-5. Or alternatively having entered on the premises has a right to remain subject to procedural fairness *Heatley v Tasmanian Racing and Gaming Commission* 137 CLR at 507-10 per Aickin J (Mason J agreeing).

Finally we come back to a point about anti-terror laws that we have made consistently- they are a threat to basic tenets of our legal system. On what legitimate basis can the situation at an airport be legitimately distinguished from any other public place in our community? More particularly how can it be distinguished from Lang Park? Flemington? The area around the Opera House? Once this power is granted here inevitably it will be used to justify its extension elsewhere and finally to the whole community.

This is also our answer, to the oft heard refrain, that there is no great issue because the legislation only applies in major airports.

In relation to the direction powers we make the following comments.

The QCCL has consistently opposed move on powers because inevitably they will be used disproportionately against the marginalized and disadvantaged in our community. The use of the behavioural assessment tool, only reinforces our concerns in this regard for the reasons set out previously.

In relation to the use of this power where “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” - we would have thought the person could be arrested. At least then they could be afforded some basic rights.

Given our opposition to the power to ask questions we oppose any power to remove people from the airport or from a flight on the basis of the failure to comply with it. No doubt such decisions will be infected with the same prejudices and errors that the decision to ask questions will be.

Our criticisms of the power to ask for identity apply with even greater stringency to a power to remove a person from a flight or airport where “the constable or officer considers on reasonable grounds that it is necessary to give the direction to safeguard aviation security”.

¹ AVIATION SECURITY: TSA Should Limit Future Funding for Behavior Detection Activities - Report to Congressional Requesters November 2013 GAO-14-159

Conclusion and Recommendation

For the umpteenth time since 11/9/01 we ask - where does this stop? At what point do we decide that we have given up the very liberty we are supposed to be fighting for? Long after the frog has boiled would seem to be the answer.

In short we recommend the legislation be rejected as excessive and likely to be counter-productive.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
12 October 2018