



Australian Government
Department of Home Affairs

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

Parliamentary Joint Committee on Intelligence and
Security

Table of Contents

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018	3
Introduction	3
Key feedback on the Bill	3
<i>Human rights and freedoms</i>	3
<i>Protections against discrimination</i>	4
<i>Identification requirements for constables and PSOs</i>	4
<i>Good order</i>	5
<i>Expedited judicial review</i>	5
The current threat environment	6
Operational circumstances in which the powers may be exercised	6
<i>Identity check direction</i>	6
<i>Move-on direction</i>	6
<i>Ancillary direction</i>	7
<i>Case studies</i>	7

Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Introduction

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

This submission provides:

- a response to the key feedback provided in other submissions to the inquiry
- an overview of the current threat environment, and
- a discussion of the operational circumstances in which the powers may be exercised, including case study examples.

This submission was prepared by the Department and the AFP.

Key feedback on the Bill

A submission raised concerns as to whether the proposed powers in the Bill:

- impinge upon human rights and freedoms by unreasonably requiring people to identify themselves on request
- encourage discriminatory policing practices, in particular racial profiling, and
- should require uniformed police officers to identify themselves to a person subject to a direction.

Another submission to the inquiry raised concerns about the meaning of the term *good order* in relation to the definition of 'aviation security', and recommended that the Bill include a mechanism to enable persons subject to an identity check, move-on or ancillary direction to seek expedited judicial review.

Human rights and freedoms

Some international jurisdictions require persons to produce identification on the request of a police officer without a reasonable basis for doing so, but Australians do not expect to be arbitrarily asked for identification. This is why the Bill is limited to the airport environment, and does not authorise police to undertake arbitrary identity checks or to check the identification of every person present.

The Bill enables an identity check direction to be issued by a constable or AFP protective service officer (PSO) where they consider on reasonable grounds that it is necessary to give the direction to safeguard aviation security. In these instances, the terms 'reasonable' and 'necessary' will ensure that the direction will be appropriate and proportionate to the objective of preventing or disrupting activities that risk aviation security. Directions will be implemented based on information available to police or an objective fact.

The Bill also enables identity check directions to be issued where a constable or PSO suspects on reasonable grounds that a person has committed, is committing or intends to commit an offence against the law of the Commonwealth, or a law of a State having a federal aspect, punishable by twelve months imprisonment or more. This provision is based on current paragraph 3UM(1)(b) of the *Crimes Act 1914* (Crimes Act) and is designed to ensure that a person who can be linked to current, future or previous serious criminal conduct can be identified to ensure that law enforcement is aware of their presence and any threat they may pose in the airport environment.

The Bill does not mandate that people carry identification at an airport. A person can satisfy the identification requirements by simply providing their name, date of birth and address to a constable or PSO conducting an identity check.

To the extent that the powers to issue identity check, move-on and ancillary directions engage Australia's human rights obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, any interference is not unlawful or arbitrary, and is reasonable, necessary and proportionate to achieving the legitimate objectives of preserving national security, public order, and the rights and freedoms of others.

Protections against discrimination

The proposed identity check, move-on and ancillary directions will apply equally to all persons within a major airport regardless of age, gender, ethnicity, religious background or other status. A constable or PSO issuing these directions is required to do so in a non-discriminatory fashion. The AFP Code of Conduct, for example, requires AFP appointees (including constables and PSOs) to act without discrimination and harassment in the course of their duties.

To issue an identity check or move-on direction, a constable or PSO must have reasonable grounds for doing so which are linked to criminal activity or aviation security. By requiring a constable or PSO to have 'reasonable grounds' to issue a direction, this ensures that the powers are only exercised on the basis of observations or intelligence relevant to aviation security or criminal conduct. A direction cannot be issued in the absence of such grounds, preventing a constable or PSO from issuing a direction solely on the basis of a person's age, ethnicity or religious background.

Police receive specialist training to identify potential threats in a non-discriminatory manner. For example, members of the AFP are appropriately trained in Behavioural Assessment and Security Questioning (BASQ) 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.

Commonwealth officers exercising these powers must comply with 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.

If a person believes that a constable or PSO has acted outside the scope of their authority, the person is entitled to lodge a complaint that, if substantiated, could potentially expose the officer to disciplinary action.

The measures in the Bill do not impact upon a person's right to equality and non-discrimination, complying with Australia's obligations under the International Covenant on Civil and Political Rights.

Identification requirements for constables and PSOs

The Bill requires constables or PSOs exercising the powers to provide sufficient information to identify themselves as a constable or PSO if they are not in uniform. The Department and the AFP note that the combination of provisions in the Bill and existing legislation will ensure that police officers and PSOs exercising these powers are easily identifiable.

Most officers exercising these powers will be in uniform, which is a visible signifier of the person's role as a police officer or PSO, readily understood by the Australian public. Under existing sections 64A and 64AAA of the *Australian Federal Police Act 1979* (AFP Act), AFP members and PSOs must wear their identification number clearly visible on their uniform, which will ensure they can be individually identified by members of the public.

Further, under section 40YC of the AFP Act, all AFP appointees are required to give a person their name, place of duty and identification number if the person is complaining or proposes to complain about an action of the AFP appointee. This requirement also applies if the person is giving information or proposing to give information about a conduct issue pertaining to conduct engaged in by the AFP appointee. It is an offence if

an AFP appointee fails to comply with these requirements. This would apply to all AFP constables and PSOs who would be able to exercise the proposed powers in the Bill.

Section 3UR of the Bill will ensure that plain clothes officers are also clearly identifiable when using the new powers.

Good order

For the purposes of the Bill, *aviation security* is defined as including *the good order and safe operation of a major airport and its premises, and flights to and from a major airport*.

The inclusion of the term *good order* is designed to ensure that aviation security is interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct). The term *good order* is analogous with the concept of *public order* under the International Covenant on Civil and Political Rights and the Convention, which has been interpreted broadly as including 'not only the absence of disorder but also... public safety and the prevention of crime'.¹

By including the term *good order*, the intention of the Bill is to empower constables and PSOs to issue a direction where it is reasonably necessary to address risks to the peace, safety and security of all persons within the airport premises – for example, to deter or manage a public order disturbance. 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.

The proposed use of a police direction to ensure *good order* and public safety is not unique to the aviation environment. All Australian States and Territories have laws that enable police officers to direct individuals to leave and not return to a place for a specified period of time to address a range of public order issues.²

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.

Expedited judicial review

Judicial review will be available in relation to the powers under the Bill, and there is no intention to exclude the application of judicial review. However, providing for an expedited judicial review process in the Bill would be difficult, if not impossible, to practically implement and may have significant resourcing implications for Australian courts.

For example, if an expedited judicial review mechanism was introduced, a court would need to consider the legal merits of a move-on direction before the subject of the direction incurred a loss, or before the period of his or her exclusion from the airport lapsed – in many cases, particularly if the subject was attending the airport for the purposes of taking a flight, this could be a matter of a few hours (and a maximum of 24 hours in any case).

The Bill does not preclude a person from initiating civil proceedings to seek damages or compensation for losses incurred as a result of improper use of the proposed identity check, move-on or ancillary powers. Further, where an officer has clearly acted outside their authority, the subject of a direction could make a complaint to AFP Professional Standards, potentially exposing the officer to disciplinary action, including termination.

¹ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st ed, 1993), p.212.

² Sections 197 and 198, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); section 6, *Summary Offences Act 1966* (Vic); sections 48 and 791, *Police Powers and Responsibilities Act 2000* (Qld); sections 27 and 153, *Criminal Investigation Act 2006* (WA); section 18, *Summary Offences Act 1953* (SA); section 15B *Police Offences Act 1935* (Tas); section 47B, *Summary Offences Act* (NT); sections 175 and 179, *Crimes Act 1900* (ACT).

The current threat environment

Public commentary on the Bill has highlighted issues about the circumstances in which the powers may be used and the current threat environment. On this basis, further information on the threat environment and case studies are provided below.

The National Terrorism Threat Level has remained at 'Probable' since September 2014, based on credible intelligence assessed by Australia's security agencies that individuals or groups continue to have the intent and capability to conduct a terrorist attack in Australia. Since this time, there have been six attacks and fourteen major counter-terrorism disruption operations in response to potential attack planning in Australia.

Within this threat environment, airports and the aviation sector are an attractive high-profile and high-impact target for criminals and terrorists. A number of attacks on airports and planes have occurred overseas and, in 2017, plans to carry out a potentially catastrophic attack on a plane departing from Sydney International Airport were discovered.

Airports are also key locations for gang-related activity, such as illicit drug trafficking, and provide pathways for serious and organised crime groups to expand their operations at a domestic and international level.

Operational circumstances in which the powers may be exercised

Identity check direction

The Bill enhances existing police powers to direct a person to produce evidence of their identity at a major airport.

Constables and PSOs may now engage with persons by giving a direction that a person provide evidence of their identity where the constable or officer considers on reasonable grounds that such action is necessary to safeguard aviation security. This assessment may be based on a range of information, including, for example, police observations about the unusual behaviour of a person, or a tip off from another passenger or airport employee.

The identity checking power may be used in circumstances where, for example:

- a known terrorism suspect drops off an unknown person at the airport
- a person is seen photographing security screening points, or
- a person is loitering beside a baggage collection area for an extended period, with no apparent reason for being there.

In the above situations, confirmation of a person's identity will enable police to conduct further enquiries. Those enquiries may result in information to satisfy the legislative threshold for an arrest, or may confirm the person is not a risk to aviation security.

Importantly, the Bill does not give the constables and PSOs unfettered powers to check identity and officers will not be empowered to conduct random identity checks. While the amendments broaden the circumstances in which the powers may be exercised, the Bill still maintains a clear and appropriate threshold which police must meet before directing a person to provide evidence of their identity.

Move-on direction

The Bill provides constables and PSOs with a specific power to issue move-on directions in a proportionate manner, based on the unique circumstances of the relevant threat. The powers are intended to be exercised where the constable or officer is not satisfied the threshold is met to arrest a person, but nevertheless considers on reasonable grounds that the person needs to leave the premises to safeguard aviation security, disrupt or prevent serious criminal activity, or due to failure to comply with an identity check or ancillary direction. While a move-on direction may limit a person's liberty of movement, such a direction is likely to be less intrusive than taking a person into detention or arresting them.

The move-on powers in the Bill enable constables and PSOs to take the least rights restrictive approach as it allows an officer to determine the scope of the move-on direction and the duration of the exclusion period depending on what is reasonable and necessary in the circumstances. Such powers will alleviate immediate risks to public safety and provide valuable time for police to conduct further enquiries regarding the extent to which a person may pose a continued risk to aviation security.

Ancillary direction

The Bill also provides scope for police to issue ancillary directions to ensure that police are able to exercise their powers. For example, police may need to ask a passenger to step to the side while undertaking the identity check so that a queue for passing through airport security is not obstructed.

The Bill does not enable an officer to detain a person for the purpose of exercising their powers to request identity information or direct a person to move-on, or to undertake any search and seizure of the person's property. Rather, the Bill sets out a threshold that a constable or PSO must consider on 'reasonable grounds' that the direction to stop or do anything else is necessary to facilitate the exercise of the identity check or move-on direction. This threshold means the direction must be a proportionate and appropriate response to the circumstances.

Case studies

The below case studies illustrate the types of operational circumstances in which the powers in the Bill may be used.

Case study 1

Flight crew on a plane travelling from the Gold Coast to Sydney contact police to advise there are Outlaw Motor Cycle Gangs (OMCG) members on board. Police intelligence indicates the individuals are known rivals of a New South Wales (NSW) OMCG. Prior to the plane's arrival, police identify two NSW OMCG members walking up and down the arrivals hall at Sydney Airport.

Police approach the two NSW OMCG members and question them about their presence at the airport. The two NSW OMCG members are identified as belonging to a particular group by virtue of the insignia on their clothing, but their identities are unknown. The two OMCG members initially refuse to engage with police until directed to provide identification. The direction is given on the basis that officers are now concerned the OMCG members may pose a risk to aviation security, which includes the good order of the airport. The NSW OMCG members satisfy the officers as to their identity, but refuse to disclose their purpose for being at the airport.

The NSW OMCG members have a history of violence and police consider on reasonable grounds that if they remain at the airport it will result in a violent altercation with the incoming Queensland OMCG members. On this basis, using the proposed powers, police issue a move-on direction for two hours to the two NSW OMCG members to safeguard the security of the airport premises and ensure the safety of the travelling public.

In this situation, the new powers contained in the Bill enable officers to identify the OMCG members. Knowledge of the identity of the OMCG members informs the officers' decision to safeguard aviation security by issuing a move-on direction. Without the new powers, the officers would not be able to rely on the existing identity checking powers in the Crimes Act, as there is no reasonable suspicion of a criminal offence. Nor would there be grounds for arrest in this situation.

Case study 2

In response to a heightened threat environment, an increased number of officers is assigned to patrol and observe security screening areas at major airports. Police observe a person taking photos and video of the screening point during and after passing through security. CCTV footage further indicates the person has

been in the airport for several hours, taking photos and making notes. Police consider this conduct highly unusual and in contrast with day-to-day observations at the airport.

Under the existing laws, the person's behaviour may not be sufficient for officers to reach the threshold for identity checking powers – reasonable suspicion of a criminal offence punishable by twelve months or more imprisonment. A still image of the person is circulated among officers and airport staff. However, without a name and date of birth, police are unable to search intelligence holdings to confirm whether the person is a known person of interest.

Using the proposed laws, police are able to issue a direction to provide identification because it is necessary to safeguard aviation security. The person refuses to comply and police issue a move-on direction, providing police time to conduct checks of intelligence holdings, as well as with various other national and state agencies to determine whether the person may pose a continuing threat to aviation security.