

Customs and AusCheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Home Affairs

Summary of committee view

1.91 The committee seeks further clarification as to:

- the type of personal information to be collected under the revised scheme and how such information will be used and stored;
- whether persons adversely affected by a decision to refuse, suspend or cancel an identity card will have, in all circumstances, the right to know the details of any material adverse to them;
- whether the provisions relating to the conduct of background checks on persons who have been acquitted of an offence or against whom criminal proceedings do not proceed to trial, is consistent with the right to be presumed innocent.
- what reporting arrangements will apply in relation to the issue, suspension and cancellation of aviation and maritime identity cards and recommends that if such reporting arrangements are not already in place, that consideration be given to providing for regular transparent reporting on the use made of these powers.

Overview

1.92 This Bill seeks to amend the *Customs Act 1901*, *AusCheck Act 2007* and *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). It contains measures intended to strengthen the cargo supply chain against criminal infiltration by:

- imposing new obligations on cargo terminal operators and cargo handlers;
- creating new offences for using information from the Integrated Cargo System (ICS) to aid a criminal organisation; and
- adjusting existing controls and sanctions under the Customs Act.

1.93 The bill seeks to enable follow up background checks to be carried out on those holding an aviation and maritime identity cards without the consent of the card holder where the individual is reasonably known or suspected to have been convicted of a relevant offence. It will also confer on the Secretary of the Attorney-General's Department the power to suspend Aviation and Maritime Security

Identification Cards (ASICs and MSICs), or processing of applications for ASICs or MSICs, if the cardholder or applicant has been charged with a serious offence.

Compatibility with human rights

1.94 The bill is accompanied by a detailed self-contained statement of compatibility which addresses at considerable length the human rights issues to which the bill gives rise. The statement identifies the following rights as engaged by the bill: the right to privacy under article 17 of the International Covenant on Civil and Political Rights (ICCPR); the rights to equality and non-discrimination under article 26 of the ICCPR and article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); the right to work under article 6 of the ICESCR; and the right to be presumed innocent under article 14 of the ICCPR.

Purpose of the bill

1.95 The explanatory memorandum and statement of compatibility note that the purpose of the bill is to address ‘vulnerabilities in Australia’s aviation and maritime sectors that can be exploited by organised crime’. The bill is stated to form part of the government’s response to the 2012 report of Joint Agency Task Force Polaris, which is investigating serious and organised crime on the Sydney waterfront, and the Parliamentary Joint Committee on Law Enforcement 2011 *Inquiry into the adequacy of aviation and maritime security measures to combat serious and organised crime*.

1.96 The goal of ensuring security in the movement of cargo by sea and air and ensuring that those engaged in organised criminal activity do not infiltrate these sectors and subvert legitimate operations are important public goals. The amendments proposed by the bill involve wide-ranging and intrusive measures into the operations of those engaged in those sectors (which are already highly regulated) and may have serious adverse consequences for those employed or intending to become employed in the industry.

1.97 The committee accordingly considers that, if the process of assessing human rights compatibility is to take place effectively, persuasive evidence must be produced of both the threats that are reasonably considered to exist, and the extent to which the measures proposed might reasonably be expected to play a role in reducing or eliminating those threats. In order to determine whether particular measures are proportionate it is generally necessary to review specific information about whether other less intrusive measures are available or were considered. Generalised and conclusory assertions of the existence of a problem that can only be addressed by the measures proposed in a bill will not, as a general rule, provide sufficient material on which to base an informed scrutiny of provisions for compatibility with human rights.

1.98 In the present case the committee notes the various statements in the explanatory memorandum and the statement of compatibility about the problems the government considers exist and need to be addressed. The committee also notes that the issue has been considered in some detail by the Joint Parliamentary Committee on Law Enforcement in 2011, although not all the proposed amendments are directly taken from the recommendations of that committee and that committee did not engage in an extended or detailed analysis in human rights terms. The committee also notes the reference to the findings and recommendations contained in a 2012 report of the Joint Task Force Polaris; however, this report does not appear to be publicly available and the committee has not had access to it.

Right to privacy

1.99 The statement of compatibility notes that the bill will engage the right to privacy as it requires container terminal operators (CTOs) to collect and provide to Customs officers personal information about persons entering a cargo terminal. The detail about what information is required to be recorded is to be set out in regulations. Customs officials are also authorised to access electronic equipment and make copies or take extracts from any document at a terminal.

1.100 The statement of compatibility states that these provisions are consistent with the right to privacy as they are consistent with current obligations and most CTOs would be covered by the obligations contained in the *Privacy Act 1988* and the Privacy Principles. However, it states that not all CTOs would be covered, for example, some CTOs that are small businesses. It concludes:

Further, the general powers of authorised officers are restricted by the purpose of the powers, that being to determine whether the provisions of any Customs-related law has been, or is being, complied with. This ensures that the powers will be executed on a targeted basis rather than on a random or arbitrary basis.⁴³

1.101 The committee intends to write to the Minister for Home Affairs to seek further information as to the type of personal information to be collected and how such information will be used and stored. In particular, the committee seeks information as to what steps are proposed to ensure that the right to privacy of a person who provides personal information to container terminal operators not covered by the *Privacy Act 1988*.

1.102 In addition, new section 102E gives officers broad powers to enter and search cargo terminals: to inspect and copy any documents at the terminal and take in any equipment or materials to the terminal to exercise their customs powers. The statement of compatibility does not explain why a general search power is necessary

43 Statement of compatibility, p. 7.

– focusing instead on the need to have greater visibility of persons entering and operating in cargo terminals. It does not explain what safeguards exist in relation to the exercise of these powers and whether the use of these powers will be reported on.

1.103 The committee intends to write to the Minister for Home Affairs to seek further information as to why the broad search power in proposed new section 102E is necessary and what safeguards are in place to ensure this power is consistent with the right to privacy under article 17 of the ICCPR.

Right to work

1.104 The bill includes provisions that engage the right to work. The statement of compatibility notes that proposed new measures⁴⁴ enable the CEO of Customs to direct a cargo terminal operator or cargo handler not to permit a person, who fails to meet the fit and proper person test, to be involved in the loading, unloading, handling or storage of goods subject to Customs control. Such a direction restricts the enjoyment of the right to work. Persons subject to such a direction may seek review of the decision before the Administrative Appeals Tribunal.

1.105 The statement of compatibility identifies the purpose of this measure:

The measure seeks to disrupt the ability of organised criminal groups to use trusted insiders to engage in or facilitate criminal activity by limiting a person who the CEO of Customs has determined is no longer a fit and proper person, having regard to legislatively prescribed matters, from working in and accessing information in relation to the movement of cargo.⁴⁵

1.106 Such an objective is clearly a permissible one; the issue is whether the ‘fit and proper person’ criteria, the procedures for their application and review, and their link to achieving the legitimate objective are reasonable and proportionate. The ‘fit and proper person’ criteria under the *Customs Act 1901* applies to a number of situations. The criteria to which the CEO of Customs must have regard in making a ‘fit and proper person’ determination includes ‘whether the person or company has committed certain offences, is insolvent, under administration, or has been wound up or has supplied misleading or false information.’⁴⁶

1.107 The bill proposes to add additional criteria to which the CEO must have regard in making such a determination. These are whether the person has had an ASIC or MSIC refused, suspended or cancelled. At present a card may only be

44 See proposed new section 102F of the *Customs Act 1901*, in Schedule 1, Part 2 of the bill.

45 Statement of compatibility, p. 8.

46 Statement of compatibility, p 7.

cancelled or refused when a person has been convicted of and sentenced to imprisonment for an aviation- or maritime-security relevant offence.⁴⁷ The bill provides for suspension of an ASIC or MSIC where the holder is *charged* with a 'serious offence'. A proposed new definition of this term is to be inserted in section 4(1) of the *AusCheck Act 2007* as being an offence 'of a kind specified in the regulations for the purposes of this paragraph'. Further details are not provided. However, the statement of compatibility notes that:

The regulations to be made following this bill will only prescribe as serious offences those offences demonstrating that the person charge[d] poses a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity. The suspension on charge measure is therefore a proportionate method of addressing the organised crime risks identified by operational law enforcement and a reasonable limitation on the right to equality and non-discrimination.⁴⁸

1.108 Where a person's ASIC/MSIC is suspended, unless the employer can reassign the person to work that does not require an identity card, the person's employment may be suspended or terminated pending resolution of the case.⁴⁹ The statement of compatibility notes that this limits a person's enjoyment of the right to work under article 6 of the ICESCR. However, it notes that under article 4 of the ICESCR, such limitations are permissible where they are 'determined by law' and 'only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

1.109 The statement of compatibility states that suspension of the identity card of a person charged with a serious offence is a permissible limitation:

The suspension on charge measure is part of the Government's response to operational law enforcement advice that organised criminals are successfully targeting and exploiting airports, seaports and the cargo supply chain to facilitate their criminal activities. The PJCLE also found that criminal networks have infiltrated Australia's aviation and maritime sectors and supply chain in its June 2011 report on its *Inquiry into the Adequacy of Aviation and Maritime Security Measures to Combat Serious and Organised Crime*.

Temporarily suspending the access to secure areas of airports and seaports of persons charged with serious offences is designed to enhance the existing aviation and maritime security schemes' capacity to mitigate national security threats, including serious and organised crime.⁵⁰

47 Statement of compatibility, p 11.

48 Statement of compatibility, p 14.

49 Statement of compatibility, p 10.

50 Statement of compatibility, p 10.

1.110 The committee accepts that the suspension of the identity card of a person charged with a serious aviation-security or maritime-security offence may be a permissible limitation on the enjoyment of the right to work, if the offences in question can be shown to satisfy the criteria foreshadowed by the statement of compatibility, namely that they are 'offences demonstrating that the person charge[d] poses a national security threat or may use their access to a secure area to engage in or facilitate serious and organised criminal activity.'⁵¹

1.111 However, the committee does not consider it appropriate to express a final view on the human rights compatibility of these provisions until the regulations in question have been laid before the Parliament. The committee notes in the case of a category of offences that is integral to the significant changes proposed by the bill, it would be preferable to include details of those offences in the primary legislation.

Right to equality and non-discrimination

1.112 The statement of compatibility also notes that treating people whose ASICs or MSICs have been refused, cancelled or suspended differently from others may limit the right to equality and non-discrimination.⁵² It notes that differential treatment will not constitute discrimination where it is aimed at achieving a legitimate objective and is based on reasonable and objective criteria and is proportionate to the objective to be achieved. The statement of compatibility then refers to a number of factors that are relied on to show that the measures satisfy this test for permissible differential treatment. These include the fact that a person's history in relation to ASIC/MSIC is a matter to be taken into account and not determinative for a decision in relation to an identity card, the duty to act fairly in taking a decision in relation to an identity card, the availability of procedures for the review of any adverse decision, and that relevant offence are limited to serious offences relevant to aviation or maritime security and relate only to the preceding ten years.⁵³

1.113 The committee considers that the assessment of whether the differential treatment is justifiable is a substantially similar inquiry to assessing whether limitations on the right to privacy and the right to work are justifiable. The committee accepts that in principle the differential treatment would be justifiable, but it is not able to express a final view until the details of what constitutes a 'serious offence' are laid before the Parliament.

51 Statement of compatibility, p 14.

52 Contained in article 26 of the ICCPR and article 2(2) of the ICECSR in conjunction with article 6 of the ICECSR.

53 Statement of compatibility, pp 7-87.

Right to a fair hearing and the right to work

1.114 An important aspect of assessing whether a measure which limits the right to privacy or restricts enjoyment of the right to work is permissible, is whether there are adequate procedural safeguards and the availability of review. The statement of compatibility states:

Further, the processes undertaken by the Attorney-General's Department and the Department of Infrastructure and Transport in determining whether a person's ASIC or MSIC should be refused, suspended or cancelled are rigorous and incorporate the rules of natural justice.⁵⁴

1.115 The statement of compatibility also notes that merits review of adverse decisions may be sought before the Administrative Appeals Review.

1.116 The committee notes that the material that may be taken into account in making a decision on the refusal, suspension or cancellation of an identity card may include material collected as a result of conducting a background check. This material may include material relating to security matters, as set out in section 8 of the *Auscheck Act 2007*. It is unclear whether the person whose identity card is refused, suspended or cancelled will know why this decision was taken.

1.117 The committee considers that the general law and applicable human rights standards, including the duty to act fairly in administrative decision-making, require that a person adversely affected by a decision is informed of the details or the gist of the case against them. The right to a fair hearing in the determination of rights and obligations in a suit at law guaranteed by article 14(1) of the ICCPR would apply to administrative decisions of this sort which have a direct impact on a person's right to work. Equally, the right to a remedy in relation to alleged violations of the right to work guaranteed by article 2(2) and 6 of the ICESCR would also require a fair procedure in which a person was made aware of adverse material taken into account in any decision to refuse, suspend or cancel an identity card.

1.118 The committee intends to write to the Minister for Home Affairs to seek clarification as to whether persons adversely affected by a decision to refuse, suspend or cancel an identity card will have, in all circumstances, the right to know the details of any material adverse to them.

Right to be presumed innocent and the right to work

1.119 The bill proposes amendments to the *Auscheck Act 2007* relating to the carrying out of background checks. The existing *Auscheck Act 2007* provides that regulations may be made requiring or permitting background checks to be carried out in relation to:

54 Statement of compatibility, p 8.

- an individual's criminal history;
- matters relevant to a security assessment of the individual;⁵⁵
- the individual's citizenship status or residency status or the individual's entitlement to work in Australia, including but not limited to, whether the person is an Australian citizen, a permanent resident or an unlawful non-citizen;
- the identity of the individual.⁵⁶

1.120 The bill seeks to add background checks in relation to whether the individual has been charged with a serious offence or whether a charge for a serious offence has been resolved.

1.121 The bill seeks to establish a new system for background checking where:

- an individual is the holder of an identity card or has applied for an identity card or various other procedures relating to the person's possession of an identity card are underway; and
- the Secretary considers on reasonable grounds that the individual has been charged with a 'serious offence' or 'a charge for a serious offence has been resolved in relation to an individual.'⁵⁷

1.122 The bill introduces a definition of when a charge has been 'resolved' in relation to an individual stating that this applies where:

- the charge is withdrawn;
- the charge is dismissed by a court;
- the individual is discharged by a court following a committal hearing;
- the individual is acquitted of the offence by a court;
- the individual is found guilty of the offence and is sentenced.⁵⁸

1.123 The combined effect of the proposed new provisions would appear to be that a person who has been acquitted of an offence (or against whom a charge has not proceeded to trial) may be treated in the same way as a person who has been convicted of an offence, so far as the power to conduct a background check is concerned. This appears to raise issues in relation to the enjoyment of the right to be presumed innocent.

55 As defined in subsection 35(1) of the *Australian Security Intelligence Organisation Act 1979*.

56 *Auscheck Act 2007*, sections 5 and 8.

57 Proposed new paragraph 8(3) of the *Auscheck Act 2007*, Schedule 2, Part 1 of the bill.

58 See proposed new subsection 4(3) of the *Auscheck Act 2007*, Schedule 2, Part 1 of the bill.

1.124 The committee intends to write to the Minister for Home Affairs to seek clarification as to whether the provision relating to the conduct of background checks on persons who have been acquitted of an offence or against whom criminal proceedings do not proceed to trial, is consistent with the right to be presumed innocent as guaranteed by article 11(1) of the ICCPR.

Right to be presumed innocent

1.125 As the statement of compatibility notes, the bill contains a number of strict liability offences, including new ones introduced by the bill and by the introduction of strict liability for some existing offences.⁵⁹ The statement of compatibility acknowledges that the committee has recognised that strict liability offences may be justified as consistent with the right to be presumed innocent under certain circumstances. Such a limitation on the right may be permissible if it is for a legitimate objective and is a reasonable and proportionate measure.⁶⁰

1.126 The statement of compatibility states:

These amendments will standardise the penalties for many Customs Act strict liability penalties and significantly enhance the effectiveness of the enforcement regime in deterring conduct that undermines the integrity of the Australian border and the collection of revenue.

The new and existing strict liability offences are regulatory in nature, often occur in high volume and attract relatively minor penalties, the majority of which provide for a maximum of 60 penalty units or less, as recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Further, defences contained in the *Criminal Code* such as mistake of fact are available to persons alleged to have committed a strict liability offence.⁶¹

1.127 The stated objective is, in the committee's view, a legitimate one. The statement of compatibility also notes that the offences are regulatory in nature, often occur in high volume and attract relatively minor penalties, the majority of which provide for a maximum of 60 penalty units or less'.⁶² For those that provide for higher penalties (up to 100 penalty units) the statement of compatibility explains why this is so and notes that an additional defence balances the higher penalty.

1.128 In light of the detailed explanation in the statement of compatibility the committee considers that the strict liability offences in the bill are consistent with the right to be presumed innocent contained in article 14(2) of the ICCPR.

59 Statement of compatibility, p 9.

60 Statement of compatibility, p 9.

61 Statement of compatibility, p 9.

62 Statement of compatibility, p 9.

Mandatory self-reporting and right to privacy and reputation

1.129 The bill empowers regulations to be made which may make provision requiring an individual or issuing body to notify AusCheck of certain matters, including if the individual has been charged with a serious offence or where the charge has been resolved.⁶³ The statement of compatibility notes:

The measure would require mandatory self-notification of relevant charges for applicants and card holders, consistent with the existing requirement for card holders to self-report convictions for relevant offences. Offences for a card holder or applicant failing to self-report charge with a serious offence will be contained in the regulations. It is proposed that these offences will attract a monetary penalty.⁶⁴

1.130 Requiring a person to notify an organisation when they are charged with an offence engages the right of a person to privacy and the right to reputation. The statement of compatibility states that this limitation is 'proportionate to the end of preventing and disrupting serious and organised crime'. It also goes on to state:

The personal information AusCheck is to collect and share is either already on the public record (as information about whether or not a person has been charged with an offence is a matter of public record at the time of the charge) or forms part of a Government licensing scheme (in the case of information about whether or not a person holds a card). This information will continue to be protected through existing privacy protections in the AusCheck scheme. These protections include criminal offences for the unlawful disclosure of AusCheck scheme personal information (existing section 15 of the AusCheck Act) and a range of secrecy provisions in Commonwealth, State and Territory legislation that prohibit a person from unlawfully disclosing personal and other information obtained during the course of their duties.⁶⁵

1.131 In light of the detailed explanation in the statement of compatibility the committee considers that the mandatory self-reporting requirements in the bill are consistent with the right to privacy and reputation.

Safeguards against abuse – the desirability of transparent reporting

1.132 It is well-accepted in international human rights law that the existence of safeguards against the abuse of powers that potentially infringe rights are relevant to assessing whether a measure is reasonable and proportionate method of pursuing a legitimate objective. In addition to merits review and judicial review of actions that may infringe on rights in individual cases, reporting on the extent and nature of the

63 See new section 10(3)(b) of the Auscheck Act 2007, in Schedule 2, Part 1, item 21 of the bill.

64 Statement of compatibility, p 12.

65 Statement of compatibility, p. 12.

use of powers conferred by legislation can provide helpful information for assessing whether the overall use and impact of powers that may infringe rights are proportionate and justified. This is particularly so in relation to powers which are exercised in order to ensure 'security interests' in different sectors and which may depend for their effectiveness on the use of intelligence of different types.

1.133 The committee recognises that there are provisions for the merits review of the exercise of a number of powers that may adversely affect a person's rights. However, it considers that it may also be appropriate to ensure ongoing and broader scrutiny of the exercise of the powers, in particular those related to the refusal to issue, suspend or cancel identity cards, through regular reporting to Parliament. The committee has noted in this report the proposed new statutory reporting obligations in relation to the use of compulsory information-gathering powers of the *Australian Securities and Investments Commission Act 2001*.⁶⁶

1.134 The committee intends to write to the Minister for Home Affairs to clarify what reporting arrangements will apply in relation to the exercise of the powers conferred by the bill in relation to the issue, suspension and cancellation of aviation and maritime identity cards and to recommend that if such reporting arrangements are not already in place, that consideration be given to amending the legislation to provide for regular transparent reporting on the use made of these powers.

66 In the form of a new 136(2A) of the *Australian Securities and Investments Commission Act 2001*, proposed to be inserted by the Corporations and Financial Sector Legislation Amendment Bill 2013.