

Chapter 1

1.1 On 20 September 2018, the Senate referred the provisions of the Aviation Transport Security Amendment Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 16 October 2018.¹

1.2 The Selection of Bills Committee recommended that the bill be referred to the committee and provided the following issues for consideration:

Impact on Airport operations and whether it meets the objective of the legislation.²

Conduct of the inquiry

1.3 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 3 October 2018. The committee also wrote directly to a number of relevant organisations inviting them to make a submission. The committee received five submissions, which are listed at Appendix 1 of this report. All submissions are available in full on the committee's website.³ The committee thanks all organisations that made submissions to this inquiry.

1.4 The committee did not conduct any public hearings for this inquiry.

Purpose of the bill

1.5 The Minister for Home Affairs, the Hon. Peter Dutton MP, introduced the bill into the House of Representatives on 19 September 2018.⁴ He stated that the bill will:

...ensure that Australia's aviation security framework remains responsive to changes in the security environment, while reducing the regulatory burden on smaller aviation industry participants.⁵

1.6 Under the *Aviation Transport Security Act 2004* (the Act), certain aviation industry participants are required to maintain a Transport Security Program (Program). Each Program is developed by the industry participant and approved by the Secretary of Home Affairs. According to the Explanatory Memorandum, a Program:

...sets out the measures and procedures that industry participants have in place to meet their legislative and regulatory obligations. A [Program]

1 *Journals of the Senate [Proof]*, No. 121, 20 September 2018, pp. 3842–43.

2 Senate Standing Committee for Selection of Bills, *Report No. 11 of 2018*, 20 September 2018, p. 3 and Appendix 1.

3 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AviationSecurity/Submissions (accessed 5 October 2018).

4 *House of Representatives Votes and Proceedings [Proof]*, No. 139, 19 September 2018, p. 1843.

5 The Hon. Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard [Proof]*, 19 September 2018, p. 6.

demonstrates the participant is aware of, and has the capacity to meet, their obligations. It must also set out how that industry participant coordinates and manages aviation security, taking into account their local security risk context.⁶

1.7 The Explanatory Memorandum highlights that industry participants are required to maintain a Program regardless of their size or the complexity of their operations. It states that this approach 'places a higher administrative burden on smaller industry participants that often operate in regional Australia'. It posited:

The costs to both industry and Government are not proportionate to the security benefits associated with smaller industry participants maintaining a bespoke [Program], particularly given their lower risk.⁷

1.8 To address this, the bill would enable the Secretary of Home Affairs, or their delegate, to give a model Program to an aviation industry participant.⁸ The Explanatory Memorandum states that this would occur for lower risk participants 'where the administrative burden of preparing a bespoke [Program] is not proportionate to the security outcomes'.⁹

1.9 The minister stated that the bill 'will uphold security outcomes while ensuring security measures and costs are commensurate with risk'.¹⁰

Key provisions

1.10 The bill amends only the Act. The Act requires the following aviation industry participants to have a Program:

- (a) an operator of a security controlled airport;
- (b) an operator of a prescribed air service;
- (c) a participant of a kind prescribed in the regulations.¹¹

1.11 Schedule 1 of the bill would amend the Act to provide for Programs to be given to industry participants by the Secretary. Items 1 to 6 of Schedule 1 are minor, technical, or consequential amendments. Item 7 contains the bulk of the amendments; it inserts seven new sections as follows:

- Proposed section 26B provides that the Secretary may give a Program to a relevant industry participant only if the Secretary is satisfied that it is

6 Explanatory Memorandum, Aviation Transport Security Amendment Bill 2018 (Explanatory Memorandum), p. 2.

7 Explanatory Memorandum, p. 2.

8 The Hon. Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard [Proof]*, 19 September 2018, p. 7.

9 Explanatory Memorandum, p. 2.

10 The Hon. Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard [Proof]*, 19 September 2018, p. 7.

11 Subsection 12(1) of the *Aviation Transport Security Act 2004* (the Act).

appropriate to do so, 'taking into account existing circumstances as they relate to aviation security'.¹²

- Proposed section 26C sets out requirements for a Secretary-issued Program, including that the Program 'be appropriate for the operations or locations covered by the program'.¹³ The proposed section also sets out various matters that a Secretary-issued Program may require of the industry participant.¹⁴
- Proposed section 26D provides for the time period in which a Secretary-issued Program would be in force.
- Proposed section 26E specifies that if the Secretary has given a Program to an industry participant, the participant may not give another Program to the Secretary (under the existing provisions in Division 5) without the Secretary's written permission.
- Proposed section 26F provides that the Secretary may cancel a Secretary-issued Program, or give an industry participant a new one, if the Secretary is no longer satisfied that the existing Program is appropriate.
- Proposed section 26G provides that if an industry participant has failed to comply with a Secretary-issued Program, then the Secretary may cancel the Program. Compliance is considered via a system of demerit points prescribed by the regulations.¹⁵
- Proposed section 26H provides that an industry participant may request the cancellation of a Secretary-issued Program. The Secretary may then cancel the Program if satisfied that it is appropriate to do so. Alternatively, the Secretary may, in writing, refuse to cancel the Program. If the Secretary does not cancel the program within 60 days of the participant's request, the Secretary is taken to have refused to cancel the program.¹⁶

1.12 Item 8 of Schedule 1 replaces existing subsection 125(1) to provide for a demerit points system, as referred by proposed section 26G.

1.13 Item 9 of Schedule 1 amends existing subsection 126(1) to provide that any of the following decisions taken by the Secretary may be reviewed by the AAT:

- A decision to give a Program to an industry participant under proposed section 26B (including a revised program under proposed section 26F).
- A decision to cancel a Program under proposed section 26F or 26G.
- A decision to refuse to cancel a Program under proposed section 26H.

12 See proposed subsection 26B(3) of Schedule 1 of the Aviation Transport Security Amendment Bill 2018 (the bill).

13 See proposed paragraph 26C(1)(c) of Schedule 1 of the bill.

14 See proposed subsection 26C(3) of Schedule 1 of the bill.

15 Explanatory Memorandum, p. 7.

16 See proposed subsection 26H(5).

Financial implications

1.14 The Explanatory Memorandum states that there 'will be no financial impact as a result of this bill'.¹⁷

Compatibility with human rights

1.15 According to the statement of compatibility with human rights, the bill 'does not engage any of the applicable rights or freedoms'. The statement concludes that the bill is compatible with human rights.¹⁸

1.16 At the time of writing, neither the Parliamentary Joint Committee for Human Rights nor the Senate Standing Committee for the Scrutiny of Bills had published any comments about the bill.¹⁹

Key issues raised in submissions

Maintaining appropriate levels of security in the aviation industry

1.17 The Transport Workers' Union submitted that there are a number of serious vulnerabilities in the security of the aviation industry, many of which are linked to industrial relations in the industry.²⁰ The Union presented this as a more pressing issue than the bill:

At a time when the Federal Government should be urgently addressing dangerously declining industrial standards across the industry that directly impact safety and security, and requiring airports to take action, amending the *Aviation Transport Security Act* with the intention of easing an administrative burden would appear to be a secondary concern.²¹

1.18 The Transport Workers' Union also argued that 'abundant caution' should be exercised when considering the bill and that 'the potential winding back of any security measures must be heavily scrutinised'.²² It raised doubts about the policy rationale for the bill:

The assertion that the costs of preparing [Programs] are not proportionate [to] the security benefits for smaller industry participants given their 'lower

17 Explanatory Memorandum, p. 3.

18 Explanatory Memorandum, p. 4.

19 Standing Committee for the Scrutiny of Bills, *Index of bills considered by the committee: As at 19 September 2018*, available online at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Index_of_Bills (accessed 3 October 2018); Parliamentary Joint Committee on Human Rights, *Index of bills and instruments considered by the committee: As at 18 September 2018*, available online at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments (accessed 3 October 2018).

20 Transport Workers' Union, *Submission 4*, p. 2; see a March 2017 report by the Rural and Regional Affairs and Transport References Committee titled *Airport and Aviation Security*.

21 Transport Workers' Union, *Submission 4*, p. 2.

22 Transport Workers' Union, *Submission 4*, p. 5.

risk' is dangerous and must [be] carefully examined, as any unlawful interference with civil aviation is an extremely serious matter. Smaller and regional airports are by no means immune from serious security threats, particularly those relating to staffing, with the potential for catastrophic consequences. Smaller airports are also part of the same network that includes our major airports.²³

1.19 The Department of Home Affairs (the department) submitted that the introduction of Secretary-issued Programs would maintain security outcomes. Programs would only be given to industry participants with lower risk profiles, such as a smaller regional airport. This would be based on risk assessments that are:

...informed by intelligence and the characteristics of industry participants, such as: location; proximity to iconic or critical infrastructure; regular passenger numbers; and the types of services provided.²⁴

1.20 The department submitted that it will continue to 'maintain a program of compliance activities' to ensure that industry participants meet the security requirements of Secretary-issued Programs.²⁵ It also stated that the bill is consistent with the Inspector of Transport Security's *Review into Security at Australian Security Regulated Airports 2017*.²⁶

Issues relating to implementation

1.21 The Northern Territory Department of Infrastructure, Planning and Logistics (NT Department of Infrastructure) submitted that security requirements should not be 'one size fits all'; rather, they should be tailored to consider risk levels and varying operational environments. It noted that provisions of the bill support this approach.²⁷

1.22 However, the NT Department of Infrastructure also raised some questions about the implementation of Programs by certain industry participants. It highlighted that there are over 400 aerodromes in the Northern Territory, most of which are not commercially sustainable and rely heavily on external funding. An ongoing challenge for these aerodromes is having an entity in place to undertake the function of aerodrome operator.²⁸ In this light, the NT Department of Infrastructure expressed concern that:

...the availability and / or capacity of an aerodrome operator entity to be responsible for implementing the [Program] requirements for remote aerodromes may still be an ongoing issue in some areas of the Northern Territory.²⁹

23 Transport Workers' Union, *Submission 4*, p. 4.

24 Department of Home Affairs, *Submission 5*, p. 2.

25 Department of Home Affairs, *Submission 5*, p. 2.

26 Department of Home Affairs, *Submission 5*, p. 2.

27 Northern Territory Department of Infrastructure, Planning and Logistics, *Submission 2*, p. 1.

28 Northern Territory Department of Infrastructure, Planning and Logistics, *Submission 2*, p. 1.

29 Northern Territory Department of Infrastructure, Planning and Logistics, *Submission 2*, p. 2.

1.23 Both Regional Express Holdings (Rex) and the Regional Aviation Association of Australia (Regional Aviation Association) welcomed any move to reduce the administrative burden on regional aviation operators that are low risk and have limited resources.³⁰ However, they also expressed concern that costs for a lower risk industry participant may increase if it is given a Program that does not take into account local resource limitations or consider alternative security measures.³¹

1.24 Noting this, Rex and the Regional Aviation Association submitted that the department should develop 'robust and transparent procedures' to ensure that any Program given to an industry participant is appropriate (as required by proposed paragraph 26C(1)(c)). They also stated that, prior to a program being given to an industry participant, there should be a 'full consultation' between the department and the participant. This consultation would ensure that the Program sets out viable and affordable measures that achieve the desired outcomes.³²

1.25 The department assured the committee that it will work closely with industry to develop the content of the Program. It also stated that it engages regularly with industry, including through certain established fora.³³

1.26 The department also stated that it consulted all security-controlled airports about the introduction of Secretary-issued Programs. Regional airports likely to be affected by the bill have supported the proposal, and industry 'has been supportive of the approach which sees a reduced regulatory burden, yet still ensures security outcomes are delivered'.³⁴

1.27 Furthermore, the department highlighted various benefits of the bill:

- Lower risk industry participants would be able to direct their resources towards maintaining security measures rather than preparing documents and their Program.
- The department would be able to direct its resources towards compliance activities for higher risk participants, rather than assessing lower risk participants' bespoke Programs.
- Secretary-issued Programs would provide a more consistent approach to aviation security across smaller operators.³⁵

30 Regional Express Holdings (Rex), *Submission 1*, p. 1; Regional Aviation Association of Australia (Regional Aviation Association), *Submission 3*, p. 1.

31 Rex, *Submission 1*, p. 1; Regional Aviation Association, *Submission 3*, p. 1.

32 Rex, *Submission 1*, p. 1; Regional Aviation Association, *Submission 3*, p. 2.

33 Department of Home Affairs, *Submission 5*, p. 2.

34 Department of Home Affairs, *Submission 5*, p. 2.

35 Department of Home Affairs, *Submission 5*, p. 2.

Committee view

1.28 The committee considers security in aviation to be critically important in ensuring the safety of all Australians. However, security requirements should be commensurate with the level of risk, as should the administrative burden imposed by such requirements.

1.29 The committee considers that the bill provides this kind of risk-based approach to security requirements in the aviation industry. The measures in the bill would benefit government and industry, as well as the general public, by reducing the regulatory burden on certain industry participants while maintaining security outcomes.

1.30 Some evidence to the committee raised concerns about the general level of security in the aviation industry. The committee notes that if the bill were passed, industry participants would still be required to have a Program, but it would be possible for these Programs to be given to them by the Secretary. Industry participants would be required to comply with a Secretary-issued Program, and the department would continue to conduct compliance activities.

1.31 Other concerns related to elements of the bill's implementation. The committee is pleased to hear that the department has consulted industry about the bill, and that industry was generally supportive. The committee further welcomes the department's advice that the government will continue to work with industry to develop the content of the Program. The committee also notes that certain decisions can be reviewed by the AAT.

1.32 This bill recognises the administrative burden that certain security requirements can place on industry, and takes steps to ameliorate that burden while ensuring that security outcomes are maintained. The committee supports the bill.

Recommendation 1

1.33 The committee recommends that the bill be passed.

Senator Jim Molan AO, DSC

Chair