



National Health Security Amendment (Background Checking) Bill 2009

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National Health Security Amendment (Background Checking) Bill 2009

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House: House of Representatives

Portfolio: Health and Ageing

Commencement: On royal assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The National Health Security Amendment (Background Checking) Bill 2009 (the NHS Bill) seeks to amend the *National Health Security Act 2007* (the NHS Act) to enable the Minister to require that the Australian Background Checking Service of the Attorney-General's Department (AusCheck) conducts background checking of people who handle or dispose of security sensitive biological agents (SSBAs).¹

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1. N Roxon, 'Second reading speech: National Health Security Amendment (Background Checking) Bill 2009', House of Representatives, *Debates*, 19 November 2009, p. 1. For further information about AusCheck and background checking, see Attorney-General's Department, 'AusCheck-background checking service', viewed 24 November 2009, http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_AusCheckBackgroundCheckingService; Attorney-General's Department, 'Background checking', viewed 24 November 2009, http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_BackgroundChecking_BackgroundChecking

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Background

National health security regime

As to information about the establishment of the national health security regime in Australia and the basis of the policy commitment behind such a regime, please refer to the Bills Digest for the National Health Security Amendment Bill 2009.²

Briefly, the NHS Act was designed to ‘enhance Australia’s capability to protect the health of the nation and to respond to naturally occurring epidemics or to terrorist attacks involving chemical, biological and radiological agents.’³ The NHS Bill amends the NHS Act to enable background checks of individuals to determine their suitability to handle or dispose of security-sensitive biological agents, which may include bacteria, viruses or toxins from biological sources such as animals, plants and microbes.

AusCheck scheme

As to general information about the establishment of the Auscheck scheme in Australia and the basis of the policy commitment behind that scheme, please refer to the Bills Digest for the AusCheck Amendment Bill 2009 (the AusCheck Bill).⁴

The AusCheck Bill, which has passed both Houses, had been referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report.⁵

During its inquiry, the Committee noted that the AusCheck Bill, as introduced, would have expanded the operation of the *AusCheck Act 2007* (the AusCheck Act) to the effect that, via regulations, background checks would be expanded to include checks for many and broadly-defined national security purposes; as well as for defence, national emergencies and matters relating to the executive power of the Commonwealth and matters incidental to the legislative powers of the Parliament. Currently, the AusCheck Act is limited to background checks for the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Act 2003*.

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2. R de Boer and S Scully, *National Health Amendment Bill 2009*, Bills digest, no 15, 2009–10, Parliamentary Library, Canberra, 2009, pp. 2-4, viewed 24 November 2009, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd015.pdf>
 3. A. Abbott, ‘Second reading speech: National Health Security Bill 2007’, House of Representatives, *Debates*, 13 September 2007, p. 3.
 4. Mary Anne Neilsen, *AusCheck Amendment Bill 2009*, Bills digest, no 116, 2008–09, Parliamentary Library, Canberra, 2009, pp. 2-4, viewed 24 November 2009, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd116.pdf>
 5. The Committee’s report was tabled on 18 June 2009: see Senate Standing Committee on Legal and Constitutional Affairs, *AusCheck Amendment Bill 2009*, June 2009, Commonwealth of Australia, Canberra, 4 December 2009.

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One of the Committee's recommendations was that:

a clause be inserted into the Bill clarifying that no background checking scheme may be established under either the AusCheck Act nor regulations promulgated under the Act in the absence of another Act of Parliament providing for the establishment of such a scheme.⁶

The AusCheck Bill was subsequently amended and it is stated in the supplementary Explanatory Memorandum to the amended version of the AusCheck Bill that:

The purpose of these amendments to the AusCheck Amendment Bill 2009 is to respond to a report of the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee).

In its report completed on 18 June 2009, the Senate Committee made a number of recommendations for amending the AusCheck Amendment Bill. The Senate Committee expressed concerns about ambiguity in the scope of the regulation-making power in the AusCheck Amendment Bill, the breadth of the definition for 'national security' and the handling of personal information by AusCheck collected for the purpose of the AusCheck Scheme.

These amendments have been framed to address the Committee's concerns.⁷

That was confirmed in the Explanatory Memorandum to the NHS Bill:

... There is currently no requirement for background checking of persons who handle or dispose of SSBA's.

The legislative framework for AusCheck to provide background checks under the SSBA Standards was included in the AusCheck Amendment Bill 2009 which was introduced into Parliament during the 2009 Autumn sittings. The AusCheck Amendment Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs in May 2009. The Senate Committee recommended that no background checking scheme could be established under the AusCheck legislation in the absence of another Act of Parliament providing for the establishment of such a scheme.

The change proposed by this Bill has arisen because of the Senate Committee's recommendation and is simply to enable a principal Act, the NHS Act, to establish a background checking scheme to be conducted by AusCheck.⁸

6. *ibid.*, p. 16.

7. Supplementary Explanatory Memorandum, 'AusCheck Amendment Bill 2009', p. 1.

8. Explanatory Memorandum, 'National Health Security Amendment (Background Checking) Bill 2009', p. 1.

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Committee consideration

On 26 November 2009, the Senate Selection of Bills Committee recommended that the NHS Bill not be referred to any parliamentary committee for inquiry and report.⁹

It is also noted that the Senate Standing Committee for the Scrutiny of Bills chose to make no comment on the NHS Bill.¹⁰

Position of significant interest groups

The Minister states that the proposed change has been subject to extensive consultation.¹¹

However, as at 24 November 2009, no stakeholder comment on the proposed amendment has been made accessible.

Financial implications

According to the Government, there would be no financial impact from the NHS Bill as the proposed measures could be implemented within existing resources.¹²

Main provision

There is only one amendment proposed in the NHS Bill.

Item 1 proposes to **insert new subsection 35(2A)** into the NHS Act.

Subsections 35(1) and (2) of the NHS Act gives the Minister discretionary power to determine standards relating to security sensitive biological agents (SSBAs). These standards may set out requirements relating to matters including the security status of people who may handle or dispose of SSBAs. **Proposed new subsection 35(2A)** explicitly provides that background checks of people by AusCheck, in determining whether they should be authorised to handle or dispose of SSBAs, is an example of such a requirement.

It is noted that the NHS Bill itself does not refer to any review or appeal process and that the NHS Act also does not provide for review of decisions relating to background

9. Senate Selection of Bills Committee, *Report*, no. 18 of 2009, Senate, 26 November 2009, p. 93.

10. See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 15, 25 November 2009, p. 22.

11. N Roxon, *op. cit.*, p. 1. See also Explanatory Memorandum, *op. cit.*, p. 2.

12. *ibid.*

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checks.¹³ However, it is noted that under subregulations 8(2) and (3) of the *AusCheck Regulations 2007* (the *AusCheck Regulations*), where the Secretary of the Attorney-General's Department makes a preliminary assessment that the outcome of a background check should include information about the person's unfavourable criminal history:

(2) The Secretary must give the individual written notice:

(a) about the substance of the unfavourable criminal history advice; and

(b) giving the individual an opportunity to make representations to the Secretary on or before the day mentioned in the notice, or a later day nominated under subregulation (4), about whether the individual's criminal history discloses any of the matters mentioned in paragraph 9 (1) (a).

(3) The day mentioned in the notice must be at least 28 days after the day on which the notice is given.

Subregulations 8(5) and (6) of the *AusCheck Regulations* also provide that:

(5) The Secretary must not give any advice about the outcome of the background check until after any representations made by the individual before the end of the day mentioned in the notice or any later day nominated under subregulation (4) have been considered.

(6) If the Secretary decides that advice of the outcome of background check should include unfavourable criminal history advice about the individual, the Secretary must tell the individual of the decision.

Lastly, under regulations 12 of the *AusCheck Regulations*:

An individual about whom advice of the outcome of a background check contains unfavourable criminal history advice may apply to the Administrative Appeals Tribunal for review of the decision to give the unfavourable criminal history advice.

Concluding comment

The proposed amendment is consistent with the Committee's recommendation, as discussed above.

13. See *National Health Security Act 2007* Part 3 Division 8 (Review of decisions).

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