

Aviation Crimes and Policing Legislation Amendment Bill 2010

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Law and Bills Digest Section

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Aviation Crimes and Policing Legislation Amendment Bill 2010

Date introduced: 29 September 2010

House: Senate

Portfolio: Home Affairs

Commencement: Section 1 to 3 commence on the day of Royal Assent. The operative provisions – Schedules 1 and 2 – commence 28 days after Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

This Bill was originally introduced on 23 June 2010 but lapsed on the proroguing of Parliament in July 2010. It has been re-introduced without changes.

Purpose

The Aviation Crimes and Policing Legislation Amendment Bill 2010 (the Bill) amends various pieces of Commonwealth legislation to:

- Create new aviation-related criminal offences
- Increase the penalties applying to certain existing aviation-related criminal offences
- Increase Australian Federal Police investigatory and arrest powers for state and territory-based criminal offences occurring at major Australian airports

Background

New offences and increased penalties

The *Crimes (Aviation) Act 1991* implements Australia's international obligations to ensure the protection against violence and other acts that could endanger civilian aircraft and airports.¹ These offences carry existing maximum penalties ranging from life imprisonment for the most serious offences (such as hijacking) down to 2 years (making threats or false statements). These penalties

1. Aviation-related offences are also found in other Commonwealth legislation, notably the *Aviation Transport Security Act 2004*.

have remained unchanged from the passing of this Act in 1991. According to the Minister's second reading speech for this Bill, an internal review by the Attorney-General's department indicated that:

It became clear that there are a number of penalties in the Act that do not reflect the seriousness of these offences.

For example, under the Criminal Code, a maximum penalty of 10 years imprisonment could apply to a person who is found guilty of making threats to contaminate goods. In comparison, under the existing provisions in the Crimes (Aviation) Act, a person who makes a bomb threat could only be imprisoned for a maximum of two years.

This is a very low penalty, given the very serious disruption, and potential danger that such hoaxes can create, for example, if a flight is redirected as a result or if an airport has to be evacuated.²

In some cases, the increase in penalties proposed in the Bill is only fairly modest – for example, the penalty for unlawfully taking control of an aircraft would be raised from 7 to 10 years imprisonment. However, some penalty increases are much steeper – the penalty for making threats or false statements would be raised from 2 to 10 years, and for certain acts done outside Australia by Australian citizens that endanger an aircraft in flight, the penalty would increase from 7 to 20 years imprisonment.

Certain new offences are also created. For example, **item 7 of Schedule 1** creates the offence of assaulting, threatening with violence, or intimidating a crew member on board an aircraft. There is an existing related offence, but this requires that the assault, threat or intimidation must impact on the crew member's ability to perform his or her duties. The Explanatory Memorandum comments that 'the assault of a crew member is a serious matter and liability for such an assault should not depend on the impact the assault has on the crew member's ability to perform his or her duties, particularly as this additional requirement has been difficult to prove in some cases.'³ Whilst this is true, the offence also covers the broader concept of intimidation. This matter is discussed in more detail later in the Key Provisions section of this Digest.

Australian Federal Police (AFP) powers at major airports

During the 1990s, the Commonwealth sold the leasehold to major airports around Australia. The Commonwealth retains ownership of the freehold title and consequently as a matter of law, these airports remain Commonwealth land.

Since the terrorist attacks in the United States on September 11 2001, aviation security, including at airports, has been a significant issue in Australia's anti-terrorism and law enforcement efforts.

2. J Ludwig, Second reading speech: Aviation Crimes and Policing Legislation Amendment Bill 2010, Senate, *Debates*, 29 September 2010 p. 260.

3. Explanatory Memorandum, Aviation Crimes and Policing Legislation Amendment Bill 2010, p. 8.

Following reports of a range of events at Sydney (Kingsford-Smith) airport during 2004 and 2005, heightened concerns about 'criminality and security weaknesses at major airports' led the Commonwealth to commission the Wheeler Review.⁴ At that time, the major day-to-day policing role at the major airports was the responsibility of State / Territory police.

Following the Wheeler report, COAG agreed in 2005 that all police functions at each major airport be unified under the command of an AFP Commander. Both AFP and State/Territory police specifically stationed at each airport would be subject to the control of the AFP Airport Police commander. This was the airport 'unified policing model', sometimes also termed the 'hybrid policing model'.

However, a 2009 audit of AFP capabilities, which the Commonwealth commissioned in early 2009, recommended that the unified policing model be replaced with a Commonwealth 'all in' model, which would also require some legislative changes:

Recommendation 7.5:

The Commonwealth should vigorously pursue the replacement of the existing Unified Policing Model with an 'All In' model under which the Commonwealth accepts the responsibility of funding and staffing nationally coordinated airport security and policing services, noting that this will likely take several years before being fully operational.

Recommendation 7.6:

Under the 'All In' model, the AFP should seek agreement from all State Police Commissioners to swear in AFP Airport Uniform Police members as special members of the State police forces and/or make any necessary legislative amendments to ensure that the powers of AFP members policing airports are clear and adequate to the task.⁵

In December 2009, the Minister for Home Affairs, Brendan O'Connor announced that the Government would move to implement these recommendations.⁶

4. *An independent Review of Airport Security and Policing for the Government of Australia*, September 2005, viewed 8 November 2010, <http://www.customs.gov.au/webdata/resources/files/SecurityPolicingReview.pdf>

5. *New Realities: National Policing for the 21st Century Review of Federal Capabilities* (The Beale Review), viewed 10 November 2010, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~Federal+Audit+of+Police+Capabilities-dec09.pdf/\\$file/Federal+Audit+of+Police+Capabilities-dec09.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~Federal+Audit+of+Police+Capabilities-dec09.pdf/$file/Federal+Audit+of+Police+Capabilities-dec09.pdf), p. 30.

6. B O'Connor, Minister for Home Affairs, *Reforms to Enhance Police Capability*, media release, 18 December 2010, viewed 10 November 2010, http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2009_FourthQuarter_18December2009-ReformstoenhancePolicecapability

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 16 November 2010. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/legcon_ctte/aviation_crimes_policing_amendment_43rdparl/index.htm

Policy position of non-government parties/independents

There appears to have been no comment on the Bill since its introduction into Parliament.

Position of major interest groups

The submission from the Police Federation of Australia to the Senate committee inquiry was supportive of the Bill.⁷ A submission from Qantas was also supportive, but added that it considered that 'aviation security could be further enhanced with the deployment of a permanent law enforcement presence at the passenger screening points at airports'.

A submission from the NSW Department of Premier and Cabinet noted that the 'operational interests' of NSW Police Force at Sydney Airport would need to be 'maintained during, and after the transition to the 'all in' model of aviation policing.

The submission of the NSW Council for Civil Liberties criticised the 'intimidation' offence in item 7 of Schedule 1 and also questioned whether the increase in penalties necessarily reflected the seriousness of the relevant offence in all cases.

Financial implications

The Explanatory Memorandum states the Bill will have no financial impact. Implementation of the 'all in' airport policing model will however have financial implications, but these are beyond the scope of this Digest.

7. All submissions are brief and no more than 2-3 pages. They are available at http://www.aph.gov.au/Senate/committee/legcon_ctte/aviation_crimes_policing_amendment_43rdparl/submissions.htm, No public hearings were held as part of the committee inquiry.

Key provisions

Schedule 1 – Aviation Crimes – *Amendments to the Crimes (Aviation) Act 1991*

Item 5 increases the maximum penalty for the existing offence in subsection 16(1) of unlawfully taking or exercising control of an aircraft covered by Division 3⁸ from 7 to 10 years imprisonment.

Item 6 increases the maximum penalty for the existing offence in subsection 19(1) of doing something capable of prejudicing the safe operation of a Division 3 aircraft, where it was done with the intention of prejudicing the safe operation of the aircraft. The increase is from 14 to 20 years imprisonment.

There are similar increases in the maximum terms of imprisonment for various existing offences in other parts of the Bill, notably **items 8, 10, 12, 16, 18-20** where the increases are in the range of 30-50 per cent of the existing penalties. However, **items 14-15** and **21-22** increase the penalties from a maximum of 2 years imprisonment to 10 years, and **item 17** from 7 years to 20 years. The increases from 2 to 10 years relate to existing offences of making threats or making false statements in certain circumstances, and the increase of 7 years to 20 years relates to an existing offence covering a variety of acts in certain circumstances that endanger the safety of an aircraft in flight.

Existing section 21(1) contains the offence of assaulting, threatening with violence, or intimidating a crew member of an aircraft where it interferes with the member's performance of functions or duties connected with the operation of the aircraft, or lessens the member's ability to perform those functions or duties. **Item 7** inserts **new section 20A** which creates a similar offence, but without the need for the prosecution to prove that the assault, threat or intimidation interferes with the crew member's performance of, or ability to perform their functions or duties. As mentioned previously, the Explanatory Memorandum states that the rationale for the new offence is that 'the assault of a crew member is a serious matter and liability for such an assault should not depend on the impact the assault has on the crew member's ability to perform his or her duties, particularly as this additional requirement has been difficult to prove in some cases.'⁹

The submission of the NSW Council of Civil Liberties was critical of this proposed new offence in respect to the intimidation element:

In case of *Lustig v Regina*, Peter Lustig was convicted of interfering with the performance by a cabin attendant of his duties because of a simple dispute over the opening of a coat locker. Lustig argued with the attendant, and later objected to being told to leave the plane, since he had children to pick up when he reached his destination. He used the address system to tell the other passengers about it. The court held that using the address system made it more difficult for the attendant to use it, and that was interfering with his performance of his duties.

8. A Division 3 aircraft is defined in existing section 3 of the *Aviation Transport Security Act 2004*.

9. Explanatory Memorandum, Aviation Crimes and Policing Legislation Amendment Bill 2010, p. 8.

Though interference per se is no longer a crime, the case is instructive. The term was neither defined nor limited; and as a result, Lustig has a criminal offence on his record, for what was at worst a mild piece of misbehaviour.

The bill introduces a new offence of assaulting or intimidating a crew member, without there being any requirement that safety is at risk. The maximum penalty for the new offence is set at 10 years imprisonment. CCL is concerned that without a significant qualification being left on the offence of intimidation, a passenger may be subject to conviction for behaving with justified annoyance by, for example, shouting or threatening to inform the crew member's employer.

While assault is properly a crime whether or not it endangers the aeroplane, no reason has been given for the introduction of an unqualified crime of intimidation, nor for the penalty—other than architectural neatness and that it would be easier to provide a conviction. These are never good reasons for legislation. The Committee should express its disgust.¹⁰

Item 9 provides for the situation if a person is being tried for an offence under subsection 21(1), but the trier of fact (which would normally be a jury) considers them not guilty of that offence, but in fact guilty of a **new subsection 20A(1)** offence.¹¹ Under item 9, the person may be found guilty of subsection 20A(1), providing they have 'been accorded procedural fairness in relation to that finding of guilt'. Such 'alternative verdict' provisions are found in some other Commonwealths laws, notably the *Criminal Code 1995*. Although the Explanatory Memorandum for the current Bill does not elaborate on the concept of procedural fairness in relation to item 9, Explanatory Memorandums for some previous Bills have contained more information. For example, the Explanatory Memorandum for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 comments:

To find the person guilty of the other offence, the trier of fact must be satisfied that the defendant has been accorded 'procedural fairness' in relation to that finding of guilt. While the term 'procedural fairness' is not defined in this context, it is common to other existing alternative verdict provisions in the Criminal Code (for example, see sections 101.2 or 132.1(10)) and is necessary for the proper exercise of federal judicial power under Chapter III of the Constitution. According a defendant 'procedural fairness' may involve, for example, ensuring that the case against the other offence is put to the defendant, and/or ensuring that all defences applicable to the other offence are made available to the defendant. However, it is likely that what will satisfy the 'procedural fairness' requirement will differ in each case and is a matter about which the trier of fact must be satisfied.¹²

Item 11 inserts **new section 22A**, creating a new offence of recklessly endangering the safety of an aircraft likely to endanger life or cause serious harm to an individual. It carries a maximum penalty of 14 years imprisonment. Under this section, an alternative verdict is also possible in that the trier of

10. See: viewed 10 November 2010, http://www.apf.gov.au/Senate/committee/legcon_ctte/aviation_crimes_policing_amendment_43rdparl/submissions.htm

11. The difference between the two offences is discussed above.

12. Explanatory Memorandum, Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005, p. 101.

fact may find a person guilty of the related, but slightly less serious, existing offence in subsection 22(1).

Item 13 inserts **new section 23A**, creating a new offence of possession or placing of dangerous goods onboard an aircraft likely to endanger a person's life or cause serious harm to a person. It carries a maximum penalty of 14 years imprisonment. Again, an alternative verdict is also possible in that the trier of fact may find a person guilty of the related but slightly less serious existing offence in subsection 23(1).

Schedule 2 – Policing at Airports – Amendments to the *Australian Federal Police Act 1979* (AFPA Act) and *Commonwealth Places (Application of Laws) Act 1970* (COPAL ACT)

Item 1 inserts **new section 10** into the AFP Act which enables AFP officers to be appointed as members or special constables to State or Territory police forces. They may also be appointed as a member of a foreign police force or law enforcement agency. The Explanatory Memorandum comments:

While this is an existing practice for the AFP especially for the purpose of joint operations, there were no provisions in the Act that provided any formal legal basis for doing so. The addition of this section removes any doubt as to the legal basis for this to occur.

The amendments will not compel state and territory police forces to appoint AFP members and special members as members or special constables and it will remain within the discretion of the states and territories as to whether they make these appointments.¹³

Items 2-7 collectively amend the COPAL Act to enable existing AFP investigatory, arrest and legal proceedings powers under the *Crimes Act 1914* to apply to State offences at designated major airports where these offences are applied as Commonwealth law by virtue of the COPAL Act. Under **item 3**, the relevant airports will be prescribed by regulation but the Explanatory Memorandum state these will be Adelaide Airport, Brisbane Airport, Coolangatta (Gold Coast) Airport, Hobart Airport, Melbourne (Tullamarine) Airport, Perth Airport and Sydney (Kingsford-Smith) Airport.¹⁴

13. Op cit. p. 13

14. ibid.

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