

2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN PROTECTIVE SERVICE AMENDMENT BILL 2003

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs,
Senator the Honourable Chris Ellison)

AUSTRALIAN PROTECTIVE SERVICE AMENDMENT BILL 2003

GENERAL OUTLINE

The purpose of the Australian Protective Service Amendment Bill is to ensure that the Australian Protective Service has adequate powers and capabilities to support its functions of providing protective security services.

The Bill proposes new powers for protective service officers undertaking protective security functions to request a person's name, evidence of identification, address and reason for being in a place, or in the vicinity of a place, person or thing they are protecting. The Bill also proposes powers to stop, detain and search a person who is in the place, or in the vicinity of the place, person or thing, and a new power to seize things found on persons who are searched, if those things are likely to be used to cause death or serious harm to a person, or a person in a place, or in the vicinity of a person, place or thing that the Australian Protective Service is protecting.

The Australian Protective Service was established by the *Australian Protective Service Act 1987* (the APS Act) and is the pre-eminent provider of protective security services for and on behalf of the Commonwealth. It provides a uniformed, disciplined and accountable force to protect the Commonwealth's interests. One of the most important areas in which the Australian Protective Service performs its functions is the aviation environment. As the events of 11 September 2001, Bali 2002, and recent incidents on Australian domestic flights demonstrate, the aviation industry is particularly vulnerable to attacks by not only organised groups but also persons acting alone who are not connected to such groups. The Australian Protective Service also provides protective security functions at a number of diplomatic and consular premises, Defence establishments and other Commonwealth buildings around Australia.

Australia has an obligation under international law to take all appropriate steps to protect the premises of foreign diplomatic and consular missions against any intrusion or damage, to prevent any disturbance of the peace of foreign missions or the impairment of dignity, and to prevent any attack on the person, freedom or dignity of a diplomatic or consular official.

The APS Act sets out the functions of the Australian Protective Service, and the powers and duties of protective service officers. Protective service officers have the power to arrest without warrant in relation to certain Commonwealth offences. An example would be an offence against the terrorism provisions in Divisions 72 and 102 of the *Criminal Code*. Following a lawful arrest, powers of search and seizure are also available to protective service officers under the Act.

The new powers represent a proactive approach in the current security environment, providing another tool in the armoury of the Australian Protective Service. They will provide protective service officers with greater flexibility in suspicious circumstances where the exercise of the arrest power is not immediately necessary, but where it is necessary to act quickly to ensure the security of a person or place that is being protected is not compromised.

The expanded powers preserve the clear delineation between the protective security functions of the Australian Protective Service and the policing functions of the Australian Federal Police and State and Territory police services. They are less intrusive than the existing arrest and search powers and will provide for a graduated response to circumstances that may arise when protective service officers are performing protective security services.

FINANCIAL IMPACT

The amendments in this Bill have no financial impact on Government revenue.

NOTES ON CLAUSES

Clause 1 Short Title

This is a formal clause which provides for the Act, when it is enacted, to be cited as the *Australian Protective Service Amendment Act 2003*.

Clause 2 Commencement

This clause provides for the commencement of the Act.

Subclause 2(1) provides that each provision of this Act specified in column 1 of the table in that subclause commences or is taken to have commenced on the day or at the time specified in column 2 of the table.

Item 1 of the table provides that sections 1 to 3 and anything in this Act not elsewhere covered by this table commence on the day on which this Act receives the Royal Assent.

Item 2 of the table provides that Schedule 1 commences on the twenty eighth day after the day on which this Act receives the Royal Assent.

Subclause 2(2) provides that column 3 of the table in the subclause is for additional information that is not part of this Act, and that such additional information may be included in any published version of this Act.

Clause 3 Schedule(s)

This clause is the formal enabling provision for the Bill. It provides that each Act specified in a Schedule is amended in accordance with the applicable items of the Schedule. In this Bill, the *Australian Protective Service Act 1987* is being amended.

The clause also provides that any other item in a Schedule has effect according to its terms. This is a standard enabling clause for transitional, savings and application items in amending legislation.

SCHEDULE 1 – AMENDMENTS

Item 1

This item inserts new sections after section 18 of the *Australian Protective Service Act 1987* (the APS Act). The purpose of these new sections is to include new powers for protective service officers when they are carrying out their protective security service functions under the APS Act. Proposed section 18A contains a power to ask for a person's name, evidence of identification, address and reason for being in a particular place. Proposed section 18B contains a power to stop, detain and search in certain circumstances. Proposed section 18C contains a power to seize things found during a search conducted under section 18B. Proposed sections 18D and 18E provide

for how things must be dealt with after seizure action has been taken under section 18C.

Proposed section 18A

Proposed subsection 18A(1) provides for a power to ask a person for their name and evidence of their identity, their residential address and reason for being in a place or in the vicinity of a place, person or thing in respect of which the Australian Protective Service is performing its functions. This power can be used at locations where a protective service officer is providing protective security services. Currently that would include airports, diplomatic and consular missions, and Commonwealth government buildings.

The circumstances in which a protective service officer can request this information are limited to when a protective service officer suspects on reasonable grounds that a person might have just committed, might be committing or might be about to commit an offence to which section 13 of the APS Act applies. Section 13 of the APS Act gives a protective service officer the power to arrest a person without warrant if the protective service officer believes on reasonable grounds that the person has committed or is committing certain Commonwealth offences, including offences against various sections of the *Crimes Act 1914*, *Crimes (Internationally Protected Persons) Act 1976*, *Crimes (Aviation) Act 1991* and the terrorism offences covered by the *Criminal Code*.

The power is comparable to powers in other Commonwealth legislation which enable authorised officers to request information. It will enable a protective service officer to intervene in a possible security threat to the Commonwealth's interests at the earliest point in time.

Proposed subsection 18A(2) provides that, if a protective service officer makes a request under subsection 18A(1), the protective service officer must inform the person of the officer's authority to make such a request and that it may be an offence not to comply with the request. A protective service officer must either be in uniform or produce his or her identification card when making a request under subsection 18A(1) (that is, they must comply with subsections 19(3) or 20(2) of the APS Act). The proposed subsection also provides that it is an offence to fail to comply with the request of a protective service officer or to give a false name or address, and provides for a penalty of 20 penalty units (\$2,200).

A safeguard is provided in proposed subsection 18A(3), which provides for a reasonable excuse defence. What is a reasonable excuse will depend not only on the circumstances of the individual case but also on the purpose of the provision to which the defence is an exception. In the circumstances of this provision, a reasonable excuse may be that a person could not comply with a request because they were rushing through a secure area to catch their child who had broken away and was heading towards an open doorway.

In addition to the offence provision in proposed subsection 18A(2), existing offences in Commonwealth legislation may be relevant in circumstances where a person about whom a protective service officer is exercising a power under section 18A, section

18B or section 18C, uses force against the protective service officer. An example would be section 149.1 of the *Criminal Code* which creates an offence of obstruction, hindering or intimidating an official, including a protective service officer in the execution of his or her functions (maximum penalty of imprisonment for 2 years).

Proposed section 18B

Proposed subsection 18B(1) provides the criteria necessary for exercising the stop and search power in subsection 18B(2). Before the power can be exercised, the protective service officer must have reasonable grounds to suspect that the person has a thing that is likely to cause or is likely to be used by the person or another person to cause substantial damage to a place or thing, or death or serious harm to a person, where the Australian Protective Service is performing its functions. The power can only be exercised where the damage or serious harm is likely to involve the commission of an offence listed in section 13 of the APS Act.

Proposed subsection 18B(2) provides for a power to stop and detain a person for the purpose of searching that person, or a thing that person has in his or her possession or control (including a vehicle operated or occupied by that person), or a thing that person has brought onto premises at which the Australian Protective Service is performing its functions under the Act.

This power provides another level of response for protective service officers. Once a search has been conducted the person must be allowed to leave or, if the protective service officer conducting the search reasonably believes an offence under section 13 of the Act has been committed or is being committed, the person may be arrested. If during the search the protective service officer identifies evidence relating to a possible offence which does not come within section 13 the protective service officer has no authority under the new provisions to seize the item or arrest the person as this would be outside the protective security functions of the Australian Protective Service.

Proposed subsection 18B(2) provides for a protective service officer to search the person for the thing, search any thing that is under the person's immediate control, and to search a vehicle operated or occupied by the person. The protective service officer may conduct an ordinary search or a frisk search. A search must be carried out by a protective service officer of the same sex as the person being searched.

Where the protective service officer is not the same sex as the person to be searched, the protective service officer has three options. He or she may request another protective service officer, or a police officer or a Customs officer, or another person (who is the same sex as the person being searched) to conduct the search (proposed subsection 18B(3)).

Proposed subsection 18B(5) provides that protective service officers and others conducting a personal search must act in good faith and must not use more force or subject the person to greater indignity than is reasonable and necessary.

Proposed subsection 18B(4) provides that persons conducting a search at the request of a protective service officer are protected from civil and criminal proceedings

relating to the conduct of the search provided they comply with proposed subsection 18B(5). This is consistent with comparable provisions in other legislation.

The terms ordinary search and frisk search have the same meaning as those used in section 3C of the *Crimes Act 1914* (proposed subsection 18B(8)). The proposed search provisions and the safeguards included are consistent with similar provisions in other Commonwealth legislation. The provisions have been drafted to balance the need for appropriate security arrangements with personal rights and freedoms.

Proposed subsection 18B(6) provides that a protective service officer can search in items that have been brought onto premises at which the Australian Protective Service is performing its functions. The provision authorises protective service officers to search in items that have been left unattended for a thing that the officer suspects on reasonable grounds is likely to be used to cause serious harm to a person, or damage to a place or thing, in respect of which the Australian Protective Service is performing its functions.

Proposed subsection 18B(7) provides that a protective service officer may use necessary and reasonable force in the conduct of a search of an item under subsections 18B(2) and (6). It does not permit the thing being searched to be damaged by forcing it open unless the person has been given an opportunity to open the thing or it is not possible to give that opportunity.

Proposed section 18C

Proposed subsection 18C(1) provides for a protective service officer to seize the thing that either the protective service officer, or a person conducting a search at the request of the protective service officer pursuant to subsection 18B(3), was searching for. As the search power only enables an officer to search for a thing that could be connected to an offence under section 13 of the APS Act, it follows that the protective service officer can only seize a thing under this subsection if that thing is likely to cause, or is likely to be used by the person or another person to cause, damage or harm in circumstances that would be likely to involve the commission of an offence under section 13.

Proposed subsection 18C(2) provides a protective service officer with the power to also seize any other weapon or other thing found during the course of a search where the protective service officer has reasonable grounds to suspect that the weapon or thing is likely to be used to cause death or serious harm to a person in respect of whom the Australian Protective Service is performing its functions, or a person in a place, or in the vicinity of a person, place or thing in respect of which the Australian Protective Service is performing its functions (proposed subparagraphs 18C(2)(a) and (b)). This will enable the protective service officer to act immediately to prevent possible threats to relevant persons.

Proposed new subsection 18C(3) provides that seized things must be delivered into the custody of a police officer as soon as practicable. This is consistent with the existing seizure provision in the APS Act.

Proposed section 18D

Proposed section 18D establishes how, and the time frames in which, seized things are to be dealt with. Proposed subsection 18D(1) requires a police officer to serve a seizure notice on either the owner of the thing or, if the owner of the thing cannot be identified after reasonable enquiries, the person from whom it was seized. The seizure notice is required to be served within 7 days after the day on which the thing was delivered into the custody of a police officer.

The seizure notice must also identify the thing seized, the date on which it was seized, the ground or grounds on which it was seized and also state that if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth (see proposed subsection 18D(3)).

The period of 90 days will allow sufficient time for an owner to make his or her existence known to the police and make a request for the return of the thing under proposed subsection 18D(4).

Proposed subsection 18D(2) provides that where the thing was not seized from a person and, after making reasonable enquiries, a police officer cannot identify the owner of the seized thing, there is no obligation to serve a seizure notice. This will cover situations where the thing seized was found in a bag that had been abandoned at or in the vicinity of a place or person in relation to which the Australian Protective Service is performing its functions. It will also cover situations where a protective service officer has lawfully requested a person's name and address, conducted a search and seized a thing, but it is later discovered that the person gave a false name and address.

If the owner requests the return of the seized thing under subsection 18D(4), a police officer must return the thing unless there are reasonable grounds to suspect that, if the thing is returned to the owner, it is likely to cause or be used to cause substantial damage to a place or thing in respect of which the Australian Protective Service is performing its functions, or death or serious harm to a person in respect of whom the Australian Protective Service is performing its functions, or a person in a place, or in the vicinity of a person, place or thing in respect of which the Australian Protective Service is performing its functions (see proposed subsection 18D(5)). This provision makes it clear that a police officer can only return seized weapons and things to a person if the officer is satisfied that the person is in fact the owner and the reason for the seizure no longer exists.

If the owner of a seized thing does not request its return within 90 days of the date of the seizure notice, the thing will be forfeited to the Commonwealth (proposed subsection 18D(6)). Where no seizure notice was served under subsection 18D(2) because the owner could not be identified or found, the thing will be forfeited to the Commonwealth if the owner has not requested the return of the thing within 90 days of the thing being delivered into the custody of a police officer.

Where a police officer does not return a thing in response to a request under subsection 18D(5), and a period of 90 days has elapsed since the date of the seizure notice or, where applicable, the date on which the thing was delivered into the

custody of a police officer, proposed subsection 18D(7) requires a police officer to either return the thing to its owner or make an application to a magistrate for an order in relation to the thing under proposed section 18E. The application must be made within 95 days of the relevant date.

These safeguards are consistent with general Commonwealth standards for the protection of a citizen's property, and at the same time do not unduly burden the police with the responsibility for storing and maintaining such property.

Proposed section 18E

Proposed subsection 18E(1) provides for an application to be made to a magistrate for an order in relation to the thing where the conditions in subsection 18D(7) are met. The application must be made by the police officer who is responsible for the thing at the time of making the application.

The owner of the thing must be allowed to appear before the magistrate and be heard (proposed subsection 18E(2)).

If the magistrate is satisfied there are reasonable grounds to suspect the seized thing is likely to cause or be used to cause substantial damage to a place or thing in respect of which the Australian Protective Service is performing its functions, or death or serious harm to a person in respect of whom the Australian Protective Service is performing its functions, or a person in a place, or in the vicinity of a person, place or thing, in respect of which the Australian Protective Service is performing its functions, a magistrate may make any of the orders in proposed paragraphs 18E(3)(c), (d), (e) or (f). The magistrate may order the police officer retain the thing for a specified period, the thing must be forfeited to the Commonwealth, the thing must be sold and the proceeds given to the owner, or the thing is to be otherwise sold or disposed of.

Proposed subsection 18E(4) requires the magistrate to order the return of the thing to the owner if the magistrate is not satisfied of the matters in paragraphs 18E(3)(a) and (b).