

AusCheck Bill 2006

Legal and Constitutional Affairs Committee

23 February 2007

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Overview

1. The AusCheck Bill (“the Bill”) sets out a rudimentary framework for the establishment of a background checking service within the Attorney-General’s Department.
2. To the extent that the basic aim of the Bill is to establish a centralised and uniform regime for background checking, the Law Council has no in principle objections.
3. However, the Law Council believes that too much important detail about the scheme has been deferred to the regulations, including the purposes for which a background check may be conducted and the information which may be gathered as part of such a check.
4. This is a Bill which establishes the administrative machinery for gathering sensitive personal information and for making assessments which will impact directly on people’s livelihoods. Background checking often involves an invasion of privacy and, depending on the nature of the information gathered, may increase the potential for discrimination on improper grounds. For that reason, the Law Council believes that the Bill should be more than a vague authorisation to the Executive to conduct background checks whenever and however the Executive decides it is necessary.
5. On the contrary, the Law Council believes that the Bill should establish clear parameters on the purposes for which background checking may be undertaken, the types of information which may be gathered, the uses that may be made of that information and the procedures which must be observed in the process.
6. By failing to address these matters, for example by failing to set out clear review and appeal procedures or periodic reporting obligations, the proposed legislation fails to secure the types of benefits that a centralised system has the potential to offer. If the Bill is passed in its current form, the opportunity will be missed for Parliament to establish the minimum standards of fairness, transparency and accountability which must be observed when a person is subject to a background check and assessment. The opportunity will also be missed for Parliament to dictate the type of information it will require from AusCheck in order to monitor and scrutinize its performance.
7. An AusCheck Implementation Project Team was formed within the Attorney-General’s Department in January 2006 to manage all aspects of the establishment of this new scheme. One of the key deliverables for the implementation team was to develop and publish a Privacy Impact Assessment. The Law Council has been advised that the AusCheck scheme is still in the process of compiling this assessment and that it remains a couple of months away from completion. The purpose of doing a PIA is “to identify and recommend options for managing, minimising or eradicating privacy impacts”.¹ The Law Council believes that the Parliament should have the benefit of reviewing the finalised PIA before approving this enabling legislation. Parliament may decide that some of the recommendations contained in the finalised PIA are most appropriately translated into legislative safeguards.

¹ Office of the Privacy Commissioner, Privacy Impact Assessment Guide August 2006, p.4

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8. In any case, the Law Council hopes and assumes that specialist statutory bodies such as the Office of the Privacy Commissioner and the Human Rights and Equal Opportunities Commission will have the opportunity to address the Legal and Constitutional Affairs Committee on the Bill. In particular, the Law Council hopes that the Committee will have the benefit of expert on advice on the extent to which the Bill complies with the content and spirit of the Information Privacy Principles contained in the *Privacy Act 1988* and the Guidelines on Data-Matching in Commonwealth Administration issued by the Office of the Privacy Commissioner.

Regulation making power is too broad

9. According to the Attorney-General, the AusCheck Bill “contains a series of generic background coordination and checking powers to be exercised in accordance with parameters to be defined by regulation for each scheme.”²
10. Law Council believes that some of these parameters should be defined by the Bill itself and not left to subordinate legislation which is unlikely to be scrutinised by the Parliament or the general public in the same way.

Purposes for which background check may be conducted

11. In particular, the Law Council believes that the Bill should identify more precisely the purposes for which AusCheck is authorised to conduct and coordinate background checks of individuals.
12. Currently, Clause 8 of the Bill provides as follows:

“8 Establishment of AusCheck scheme

(1) The regulations may provide for the establishment of a background checking scheme (the AusCheck scheme) relating to the conduct and coordination of background checks of individuals:

(a) for the purposes of the Aviation Transport Security Act 2004 or regulations under that Act; and

(b) for the purposes of the Maritime Transport and Offshore Facilities Security Act 2003 or regulations under that Act; and

(c) for such other purposes as are prescribed by the regulations.”

The only limitation on paragraph (c) is that the “other purposes” must fall within the scope of the Commonwealth’s powers and functions as established by the Constitution.³

13. As is apparent from Clause 8, the reason for the establishment of AusCheck and the impetus for the Bill is the need for a centralised agency to coordinate background checks on applicants for aviation security identification cards (ASICs) or maritime security identification cards (MSICs). These cards facilitate access to

² Second Reading Speech, House of Representatives Hansard 7 December 2006.

³ AusCheck Bill 2006, Clause 8(2)

secure areas of airports and seaports. Hence in commending the Bill to the Parliament the Attorney-General twice made reference to the September 11 tragedy and made frequent mention of national security.

14. The ASIC and MSIC schemes are already established by existing legislation. The effect of the AusCheck Bill will be to transfer responsibility for the background checking aspects of those schemes to AusCheck, which will also be responsible for maintaining a database of all applicants and actual ASIC and MSIC card holders.
15. However, as is also apparent from Clause 8, the Bill does not limit AusCheck to this role in the ASIC and MSIC schemes or even to national security related schemes generally. Sub-clause 8(1)(c) leaves open the possibility that AusCheck will be able to perform background checks on individual for a much broader range of purposes.
16. Before Parliament, the Attorney-General has indicated that these other purposes may include screening people for employment with children or in aged-care facilities. Although he noted that there was “no current consideration of AusCheck being involved in either of these examples”⁴ Instead, the Attorney-General emphasised that the provisions would allow AusCheck the flexibility to take on responsibility for other background checking regimes as the expertise and capacity of the agency grows.
17. The Law Council's concern is that the regulation making power granted under the Bill is not merely designed to facilitate AusCheck:
 - (a) assuming responsibility for background checking under existing screening regimes already approved by Parliament; or
 - (b) assuming responsibility for background checking under screening regimes which may be approved by Parliament in the future.

The Bill goes further and in fact allows for AusCheck regulations to be promulgated which, in themselves, create new screening regimes independent of any other legislation.

18. This is further emphasised by clause 10 which provides that:

“The AusCheck scheme may require an individual to apply for a background check under the AusCheck scheme, and for a specified decision to be made in relation to that application, as a condition precedent to:

(a) the individual being granted access to specified information or a specified place or other specified thing that is controlled or limited; or

(b) a specified power or function under a law of the Commonwealth being exercised in relation to the individual (including a power or function relating to whether a licence, permit or other authorisation should be issued to the individual); or

(c) the individual being permitted to occupy a specified office or to engage in particular employment.

⁴ House of Representatives Hansard 8 February 2007

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19. The Law Council believes that the Executive should not be given such broad regulation making power, particular in this sensitive area. The Bill should only enable AusCheck to administer background checking regimes already authorised by Parliament in the context of other legislative schemes. This is what has occurred with the ASIC and MSIC schemes.⁵
 20. The Bill should not allow for the creation of new background checking regimes which, except for the broad, unfettered regulation making power granted under the Bill, have not received parliamentary authorisation.
 21. For that reason, the current clause 8(1)(c) of the Bill should be deleted or at least amended to confine AusCheck to conducting and coordinating background checking **for the purposes of other Commonwealth Acts which directly authorise the screening of persons for a specified reason.**
 22. The Law Council believes that these amendments to the Bill are required to:
 - a. ensure that Parliament retains greater control over when and why Australians might be subjected to background checks; and
 - b. ensure that the AusCheck scheme, which has been established to facilitate the centralised performance of an administrative function, is not utilised to implement policies which are not otherwise supported by legislative authorisation.

Information which can be sought as part of a background check

23. The Law Council also believes that the Bill should identify more precisely the type of information which may be gathered about an individual as part of a background check.
24. Clause 5 currently defines a background check as follows:

“5 Definition of background check

A background check, in relation to an individual, is an assessment of information relating to one or more of the following:

- (a) the individual’s criminal history;*
- (b) matters relevant to a security assessment of the individual;*
- (c) the individual’s citizenship status, 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;*
- (d) such other matters as are prescribed by the regulations.*

⁵ Sections 35 and 37 of the *Aviation Transport Security Act 2004* authorise regulations to be made in relation to access to certain parts of a security controlled airport, this includes regulations which deal with the conditions of entry to secure areas, the issue and use of security passes and the background checking of persons who have access to secure areas. Sections 105, 109, 113 and 113D of *Maritime Transport and Offshore Facilities Security Act 2003* authorise regulations to be made in relation to maritime security zones, this includes regulations which deal with the conditions of access to such zones and the issue and use of security passes.

The Regulations subsequently promulgated under both Acts set out in more detail the ASIC and MSIC schemes.

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25. The Law Council accepts that privacy is not absolute. Nonetheless, any authorised interference with a person's private life should be limited to what is necessary and proportionate to achieve a clearly defined purpose.
 26. In the context of this Bill it is not possible to assess necessity and proportionality. Clause 5, read together with sub-clause 8(1)(c), allows regulations to be made which authorise inquiry into any area of a person's private life for any purpose. The emphasis is entirely on affording AusCheck maximum flexibility.
 27. The Law Council believes that flexibility should not be achieved at the expense of appropriate safeguards against rights infringements. In that regard, the Law Council suggests that the Bill should clearly state that the AusCheck scheme must comply with existing rights based legislation and international human rights treaties ratified by Australia.
 28. In particular, the Law Council recommends that clause 18, which sets out a general regulation making power, could be amended to include an additional subclause which provides that regulations made pursuant to the AusCheck Act must not:
 - (a) Authorise the collection or retention of personal information in a manner or for a purpose which is inconsistent with the Information Privacy Principles as set out in section 14 of the Privacy Act 1988; or
 - (b) Authorise the conduct of background checks on individuals for purposes which contravene the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004* or which are otherwise inconsistent with Australia's obligations under international law, including under the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.
 29. While such a sub-clause is, *in some respects*, redundant, it would nonetheless provide an important statement of principle and place appropriate limits on when and why background checks may be conducted and how information obtained may be used.

Advantages of a centralized approach not realized

30. In his second reading speech, the Attorney-General commended the AusCheck Bill to the parliament in the following terms:

*“Under this approach the basic elements of Commonwealth background checking provisions will be centralised in the Act. This flexible approach facilitates applying best practice background checking across Commonwealth administration.”*⁶
31. The Law Council agrees with the Attorney General that by centralising the performance of certain functions within AusCheck there is the potential to deliver

⁶ Second Reading Speech, House of Representatives Hansard 7 December 2006, p12.

more consistent, higher quality background checking. However, the Law Council believes that, because so little of the detail of how AusCheck will operate has been addressed in the Bill, the opportunity to entrench best practice has not been realised. For example, the Bill establishes no minimum standards with respect to transparency, natural justice, appeal processes or with respect to periodic reporting.

Transparency, natural justice and independent review

32. The consequences of an unfavourable background check can have a very detrimental impact on a person's employment opportunities. For example, Mr Kevin Johnson lost a job which he had held for five years when the area he was working in at Brisbane airport was reclassified as a secure area and he was refused an ASIC.⁷ Mr Justin Cowdrey's offer of employment at the Broome Airport was withdrawn when he was refused an ASIC because of a six year old assault conviction for which he had received a suspended sentence.⁸ He had resigned from his position at the Broome office of the Department of Immigration and Multi-Cultural and Indigenous Affairs to take up the offer.
33. For that reason, it is important that background checking processes are transparent, afford natural justice to affected persons, and provide opportunities for appropriate review.
34. Currently the Bill states only that:

"9(1) The AusCheck scheme may make provision for and in relation to the following:

(a) the making of applications for a background check by the individual to whom the background check relates;

(b) the making of applications for a background check by a person other than the individual to whom the background check relates, with the consent of the individual to whom the background check relates;

(c) the information that is to be contained in an application for a background check;

(d) the criteria against which an application for a background check is to be assessed;

(e) the decision or decisions that may be made as a result of an application for a background check;

(f) the form of advice to be given to the applicant for a background check;

(g) the form of advice to be given to an individual in respect of whom a background check is conducted;

(h) the form of advice to be given to other persons about the outcome of a background check."

⁷ [2006] AATA 573 – Mr Johnson's appeal to the AAT was unsuccessful.

⁸ [2005] AATA 1100 – Mr Cowdrey's appeal to the AAT was successful

The Bill also provides that the “regulations may provide for ... review of decisions under the regulations”.⁹

35. Proponents of the Bill may argue that there is no need for the AusCheck scheme to include detailed provisions about matters such as the notification of results to applicants or review rights because those types of provisions are likely to have been included in the legislative scheme which established the screening regime itself.
36. For example, the *Aviation Transport Security Act 2004* and regulations already provide for full merits review before the Administrative Appeals Tribunal (AAT) of decisions relating to the issue and cancellation of ASICs.¹⁰ The MSIC regulatory regime also provides for full merits review before the AAT.¹¹
37. Nonetheless, the Law Council believes that if Parliament authorises the establishment of a centralised agency to coordinate and conduct background checking, it should also establish the minimum standards of fairness which must be observed in the process. The benefit of legislation like the current Bill, is that the rights of a person whose livelihood is threatened by an unfavourable background check are not left to myriad regulations or indeed are not left to subordinate legislation at all.
38. Looking just at review rights, the Law Council acknowledges that there are number of possible scenarios under the Bill. For example:
 - a. The results of a background check conducted on an individual by AusCheck may be unfavourable because ASIO has provided an adverse security assessment.¹²
 - b. AusCheck may conduct a background check on an individual according to established criteria (eg does the person have a criminal history, is s/he entitled to work in Australia) and provide the information gathered to the requesting agency without assessment or direction as to the decision which must be taken.
 - c. AusCheck may conduct a background check on an individual according to established criteria and based on the results of that background check recommend that the requesting agency make a decision which is unfavourable to that individual.
 - d. AusCheck may conduct a background check on an individual according to established criteria and based on the results of that background check give a binding direction to the requesting agency to make a decision which is unfavourable to that individual.

⁹ Clause 18(2)(b)

¹⁰ *Aviation Transport Security Regulations 2005* Reg 8.02 and 8.03

¹¹ *Maritime Transport and Offshore Facilities Security Regulations 2003* Reg 6.08z

¹² In these circumstances if review is sought, it is likely to be review of the security assessment itself, rather than review of any subsequent decision. Part IV Division 4 of the *Australian Security Intelligence Organisation Act 1979* allows for AAT review of an adverse or qualified security assessment provided by ASIO to another Commonwealth agency. The AAT Act sets out the procedures to be followed by the Security Appeals Division if an application is made for review of an ASIO security assessment.

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- e. AusCheck may conduct a background check on an individual according to established criteria and based on the results of that background check directly make a decision which is unfavourable to that individual.
39. There are clearly differences between these scenarios as to which “decision” made under which legislative scheme needs to be appealed in order to obtain effective review. However, the Law Council does not accept that an affected individual’s rights should therefore be determined on a scheme by scheme basis. It is still possible and desirable to establish consistent minimum standards with respect to:
- a. the degree of information which must be provided to an individual who is subject to a background check about the results of that check;
 - b. the statement of reasons which must be provided to an individual explaining the basis of any discretionary evaluation made about him or her as a result of a background check,
 - c. the available avenues for challenging the accuracy of the information gathered in the course of a background check; and
 - d. the available avenues for challenging the merits of any discretionary decision made on the basis of a background check.

Reporting Obligations

40. A further advantage of a centralised agency to conduct background checks should be that Parliament is better placed to monitor the Executive’s performance of this sensitive function.
41. For that reasons, the Law Council believes that the Bill should make specific provision for periodic reporting to Parliament about the operation of AusCheck. At present the Bill provides only that “*the regulations may provide for ... the establishment and conduct of a review of the AusCheck scheme.*”
42. The Law Council recommends that the Bill should require AusCheck to provide periodic reports to Parliament about matters such as:
- a. the number and type of background checks conducted,
 - b. the average time taken to conduct them,
 - c. the scheme under which they have been conducted,
 - d. the number of individuals who have received adverse background checks and the basis for that assessment,
 - e. the number of individuals about whom information is retained by AusCheck and under which scheme,
 - f. the agencies with whom information obtained by AusCheck has been shared and for what purposes.

Data matching and data sharing

43. The Law Council is also concerned that the Bill allows for increased opportunities for data matching and data sharing.
44. The Bill provides for the retention, protection and subsequent use of information obtained under the AusCheck Scheme. Specifically, it allows for the creation and maintenance of a database of information, including personal information obtained under the AusCheck Scheme.
45. According to the Attorney-General: "*the database can only be used for a limited purpose. Its purpose will be responding to a national security incident.*"¹³
46. However, the Bill in fact allows for the information stored on the database to be used for a number of purposes including:
 - a. carrying out a subsequent background check in relation to the individual under the AusCheck scheme;
 - b. responding to an incident that poses a threat to national security;
 - c. the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence.
47. Neither the terms "criminal intelligence" or "security intelligence" are defined in the Bill. The Law Council is concerned that these terms are very broad and may allow for the provision of information to a wide range of both national and international agencies.
48. Meanwhile, there is nothing in the Bill to require AusCheck to provide advance notice to a person who applies for a background check about the uses which may be made of the information gathered. Neither are there any provisions which specifically allow an individual to access the information about him or her on the database and to challenge its accuracy.
49. Further, while the Bill creates an offence with respect to AusCheck staff who disclose information for an unlawful purpose, once information is lawfully disclosed to another agency, for example for the purposes of "the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence", the Bill does not impose any limitations on how that agency may use or disclose the information.

¹³ Second Reading Speech, House of Representatives Hansard 8 February 2007