

17 October 2018

Public Hearing: The Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Opening Statement: Parliamentary Joint Committee on Intelligence and Security

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1. My name is Gabrielle Bashir SC and I am Co-Chair of the Law Council of Australia's National Criminal Law Committee. As the Committee would be aware, the Law Council is the peak national body representing the legal profession in Australia.
2. I would like to thank the Committee for the opportunity to provide evidence to its inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018.
3. The Bill seeks to amend the *Crimes Act 1914* (Cth) and the *Australian Federal Police Act 1979* (Cth) to allow constables and protective service officers (PSOs) to direct a person to:
 - a. produce evidence of their identity;
 - b. leave airport premises and/or not take a specified flight or any flight, for up to 24 hours; and
 - c. direct a person to stop or do anything else necessary to facilitate an identity check or move-on direction.
4. The Law Council recognises and accepts that security at airports and on flights is a matter of significant concern to not only the government but also the community. Accordingly, we accept that there must be laws in place to provide police with powers to deal with issues relating to safety and criminal activity at airports and on planes. However, these laws need to be proportionate and directed to matters relating to safety and criminal activity. Providing powers at large to police which are not tempered by these factors could lead to innocent citizens having their rights interfered with given the broad nature of the discretion given to police.
5. Accordingly, the Law Council has proposed amendments to not only ensure the rights of citizens are not inadvertently impacted upon, but also to ensure that such laws are proportionate to the risks identified as to the reasons for this legislation.
6. The central point of the Law Council's submission is that these powers, to be exercised for the good order of an airport, premises and flights should only be exercised in circumstances to ensure safety or disrupting or preventing criminal activity. This will ensure that those police officers that are exercising such powers will only do so in limited circumstances and not have a discretion at large which may interfere with a citizen's right of movement. It would also ensure that police exercising these powers may be held accountable if they act outside of these powers by issuing an order in bad faith where there was no threat to safety or need to do so in order to disrupt or prevent criminal activity.

7. Proposed section 3UN would allow a constable or a PSO to direct a person to produce evidence of their identity if the constable or PSO suspects on reasonable grounds that the person has committed, is committing, or will commit an offence, or considers on reasonable grounds that it is necessary to give the direction to safeguard 'aviation security'. Similar requirements apply under proposed sections 3UO and 3UQ.
8. 'Aviation security' is broadly defined in Item 2 of the Bill to include the 'good order and safe operation of: a major airport and its premises; and flights to and from a major airport'. However, the term 'good order' is not defined in the Bill or Explanatory Memorandum to the Bill. This creates uncertainty and the potential for the powers to be exercised in a broad range of circumstances and at the discretion of constables or PSOs in an arbitrary and potentially ad hoc manner. A key principle of the rule of law, is that the law must be both readily known and available, and certain and clear. The intended scope of the exercise of the powers should be unambiguous and key terms should be defined so that they do not inadvertently capture a wide range of benign conduct and overtly depend on police discretion to determine their scope.
9. The Law Council notes that the powers proposed by the Bill, in particular the power to order a person not to take a flight, may have significant economic implications for the person subject to the order. Such an order may also cause the person considerable inconvenience as it may prevent them from reaching their destination by their desired time. For this reason, the power should be subject to a very specific power of urgent or expedited review, with an authority to the reviewing officer, presumably a judicial officer, to order compensation.
10. These powers have the potential to significantly impact on individual rights and freedoms. Allowing for judicial review of these orders does not compromise the objectives of the Bill, but rather provides a safeguard to ensure the proposed powers are being exercised in an appropriate manner. It should also enable those who have been impacted unduly by the proposed new powers to seek compensation. As such, the Law Council considers that judicial review of these powers is an appropriate measure.
11. For these reasons, the Law Council recommends that the powers be limited to ensuring safety or disrupting or preventing criminal activity, and there be a capacity for urgent or expedited judicial review.
12. My colleague and I are happy to answer any questions the Committee may have. Thank you.

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