Crimes Legislation Amendment (Police Powers at Airports) Bill 2019

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This Bills Digest replaces an earlier version dated 29 November 2018 that was prepared for an earlier version of the Bill (the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018) that lapsed on prorogation of the 45th Parliament.

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House: House of Representatives
Portfolio: Home Affairs
Commencement: On proclamation or six months after Royal Assent, whichever occurs first.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at July 2019.
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The Bills Digest at a glance

The Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 (the 2019 Bill) will amend the Crimes Act 1914 to:

• expand existing police powers to require identity information from a person at a major airport

• introduce new move-on powers for police under which they may give a written direction to a person at a major airport that the person not take a flight, or leave the airport as soon as possible

• introduce new powers for police to give a direction to a person at a major airport that the person stop or do anything else considered necessary to facilitate the exercise of the identity information request or move-on powers and

• allow the Minister to determine by legislative instrument that certain airports are major airports for the purposes of the exercise of powers outlined above.

While the existing identity-checking power may only be exercised by a constable, the expanded and new powers in the Bill will be available to constables and Australian Federal Police (AFP) protective service officers (PSOs). Contravening a direction will be an offence.

Background

An earlier version of the 2019 Bill (the 2018 Bill) was introduced into the 45th Parliament on 12 September 2018. The 2018 Bill lapsed on prorogation of Parliament before being debated. Introduction of the 2018 Bill followed an airport security review that was ordered in August 2017, shortly after the disruption in July 2017 of an alleged plot to bring down a plane leaving from Sydney airport. The report of the review has not been made public. The 2019 Bill implements or responds to most of the recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its report on the 2018 Bill.

Thresholds for exercise of powers

Contrary to reporting at the time the expanded identity-checking power was announced, it will not permit random identity checks. Thresholds will apply to each of the proposed powers, and a person not carrying identification can instead provide personal information.

The new threshold for the use of identity checking and move-on powers will be that the exercise of the power is considered necessary to safeguard the ‘public order and safe operation’ of a major airport, instead of the more broadly defined ‘aviation security’ used in the 2018 Bill (with greater clarity provided about the status of lawful advocacy, protest, dissent and industrial action).

Accountability and oversight

Move-on directions must be given in writing. A direction covering a period of more than 12 hours must be given or authorised by a senior police officer. No more than two move-on directions may be given within a seven day period, and if a second direction is given, it must be given or authorised by a senior police officer, and must not end more than seven days after the first direction was given. Enhanced and additional safeguards that could be considered include requiring all move-on directions to be authorised by a senior police officer, including record-keeping requirements in legislation instead of in AFP procedures, and requiring records of the use of directions powers to be inspected and reported on by the Commonwealth Ombudsman.
History of the Bill
An earlier version of the 2019 Bill (the 2018 Bill) was introduced into the 45th Parliament on 12 September 2018. The 2018 Bill lapsed on prorogation of Parliament before being debated in either House of Parliament.¹

The 2019 Bill has been revised to implement or respond to most of the recommendations made by the PJCIS in its report on the 2018 Bill. The most fundamental change is that the new threshold for the exercise of identity checking and move-on powers will be based on the exercise of the power being considered necessary to safeguard the ‘public order and safe operation’ of a major airport, instead of the more broadly defined ‘aviation security’ (in particular, greater clarity is provided about the status of lawful advocacy, protest, dissent and industrial action).

Purpose of the Bill
The purpose of the Crimes Legislation Amendment (Police Powers at Airports) Bill 2019 (the Bill) is to amend the Crimes Act to:

• expand existing police powers to require identity information from a person at a major airport
• introduce new move-on powers for police under which they may give a written direction to a person at a major airport that the person not take a flight, or leave the airport as soon as possible
• introduce new powers for police to give a direction to a person at a major airport that the person stop or do anything else considered necessary to facilitate the exercise of the identity information request or move-on powers
• allow the Minister to determine by legislative instrument that certain airports are major airports for the purposes of the exercise of powers outlined above and
• replace the existing offence of failing to comply with an identification request with an offence of contravening an identification or move-on direction, or a direction to stop or do anything else considered necessary to facilitate the exercise of the identity information request or move-on powers.

While the existing identity-checking power may only be exercised by a constable, the expanded and new powers in the Bill will be available to constables and AFP PSOs.² The Bill will also amend the Australian Federal Police Act 1979 to enable PSOs to exercise powers in relation to the new offence of contravening a direction.

Background
The 2018–19 Budget included a $293.6 million package designed to improve aviation, air cargo and international mail security to protect Australia against ‘persistent and evolving terrorist, national security and criminal threats’.³ Included as part of the Budget package was $121.9 million to ‘increase the presence and specialist capabilities of the Australian Federal Police and the Australian Border Force at nine major domestic and international airports’ (including an additional 140 AFP Counter Terrorist First Response officers and 50 officers to provide tactical intelligence

2. Constable is defined in section 3 of the Crimes Act 1914 to mean ‘a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory’. Protective service officer will mean such an officer within the meaning of the Australian Federal Police Act 1979 (proposed section 3UL of the Crimes Act).
and other support) and $50.1 million for security enhancements at 64 regional airports.\(^4\) The Government stated that to complement this package, it would introduce legislation to provide the AFP with ‘broader powers to conduct identity checks at airports and to order a person to “move on” from airport premises where needed’.\(^5\)

The funding package and the legislative measures in the 2019 Bill (and the earlier 2018 Bill) follow on from an airport security review that was ordered shortly after the disruption in July 2017 of an alleged plot to bring down a plane leaving from Sydney airport. Mahmoud and Khaled Khayat were arrested on 29 July 2017 and charged with preparing for or planning a terrorist act, specifically planning to detonate an improvised explosive device on an Etihad flight.\(^6\) Both men pleaded not guilty.\(^7\) In May 2019, a jury found Khaled Khayat guilty but failed to reach a verdict on Mahmoud, who may face a re-trial at a later date.\(^8\)

Additional security measures, including additional screening of luggage, were put in place at Sydney airport on 27 July 2017, and extended to all major Australian airports shortly afterwards.\(^9\)

On 8 August 2017, the Government directed the Inspector of Transport Security to conduct a review of security at Australia’s security regulated airports. The Inspector sought submissions from airports, major airlines, aviation peak bodies and several Government departments, and reported to the Government in late November 2017.\(^10\) The report has not been made public, but the Department of Home Affairs (DoHA) states that the review informed the measures in the 2018–19 Budget package.\(^11\) While the review was still underway, some media outlets reported that plans to give police greater powers to require identification documents and question people at airports, and to order them to leave, or alternatively to require photo identification for domestic flights, were under consideration by the Government.\(^12\)

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7. The AFP has said that Mahmoud and Khaled’s brother Amer, in whose luggage the bomb was initially placed, had no knowledge of the plot. Lebanese authorities claim otherwise, and as at 11 May 2019, Amer had been released on bail in Lebanon while a military tribunal continues to consider the matter: A Harvey, *‘Tarek Khayat: Islamic State commander and suspected Etihad plane bomb plot leader sentenced to death’*, *ABC News* (online), updated 10 October 2018; Al Jazeera and news agencies, *‘Australian-Lebanese ordered released in Sydney bomb plot’*, *Al Jazeera* (online), 11 May 2019.
8. Another of their brothers, Tarek, is alleged to have put Mahmoud and Khaled in touch with an Islamic State ‘controller’ who helped the brothers prepare for the planned attack. Tarek is a Lebanese citizen. In October 2018, he was sentenced to death by an Iraqi court for being a financial officer for Islamic State (the charges did not relate to the alleged Australian plot, in which he denied involvement): Harvey, *‘Tarek Khayat: Islamic State commander and suspected Etihad plane bomb plot leader sentenced to death’*, op. cit.; E Whimett, *‘Death sentence for doll bomb accused’*, *The Daily Telegraph*, 10 October 2018, p. 3, ProQuest database.
11. Ibid.
After announcing the intent to broaden police powers at airports earlier the same month, on 15 May 2018 the Minister for Home Affairs stated:

> There's certain conditions that need to be met at the moment before police can ask for that identification. Which is an absurdity and it's an issue that the police have raised with us. So we're addressing an anomaly and a deficiency in the law at the moment. There are two elements in it. One is in relation to requests for identification, if somebody is within the airport precinct, and the ability to move somebody on from an airport precinct, if it's believed they're involved in certain criminal activities. So that's essentially the two elements of it.¹³

Based on that description and an interview that the then Prime Minister gave in which he stated that police would conduct random identity checks,¹⁴ the proposal was interpreted to mean that police would be able to require anyone in an airport to provide proof of identity at any time, and was criticised by some on that basis.¹⁵ However, that will not be the case under the changes included in the 2019 Bill (nor was it the case for the 2018 Bill). There will still be a threshold that must be met before police can request evidence of a person’s identity, but it will be broadened to include circumstances where an officer considers on reasonable grounds that it is necessary to safeguard the ‘public order and safe operation’ of a major airport (a term defined in the Bill), in addition to those where an officer reasonably suspects the commission of an offence. Thresholds will also apply to the proposed move-on powers. As is currently the case, a person not carrying any form of identification will be able to provide personal details instead.

**Committee consideration**

At the time of publication of this Bills Digest, the 2019 Bill had not been considered by any parliamentary committees. Information on consideration of the 2018 Bill and the Government’s response is set out below.

**Parliamentary Joint Committee on Intelligence and Security**

The PJCIS reported on the 2018 Bill on 13 February 2019.¹⁶ The report included nine recommendations, six of which were for amendments to the Bill, two of which were that the AFP be required to keep and report on certain records, and the last that, subject to the implementation of the other recommendations, the Bill be passed by the Parliament.¹⁷ The 2019 Bill includes amendments to:

- remove the definition of *aviation security* from the Bill and instead set out a more detailed definition of the *public order and safe operation* of a major airport (responding to recommendation 1 of the PJCIS, with which the Government agreed)
- state as part of that definition that ‘the exercise of a person’s right to engage lawfully in advocacy, protest, dissent or industrial action is not, by itself, to be regarded as prejudicial to the public order and safe operation of a major airport’ (responding to recommendation 2, with which the Government agreed)

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¹³ P Dutton in M Turnbull (Prime Minister), Doorstop with the Minister for Home Affairs, the Hon. Peter Dutton MP and the Minister for Law Enforcement and Cyber Security, the Hon. Angus Taylor MP, media release, 15 May 2018.

¹⁴ M Turnbull (Prime Minister), Transcript of interview with Neil Mitchell, media release, 15 May 2018.

¹⁵ See for example R Sarre, ‘Why random identification checks at airports are a bad idea’, The Conversation, 22 May 2018; P Hatch and F Hunter, ‘Police airport ID laws branded “authoritarian”’, The Sydney Morning Herald, 16 May 2018, p. 7; Australian Lawyers for Human Rights (ALHR), Human rights lawyers raise alarms about new powers given to border police, media release, 17 May 2018.


¹⁷ Ibid., pp. xiii–xiv; see further pp. 10–36.
• require move-on directions (which must be given in writing) to include certain information to assist the person given the direction in making an application for judicial review or interlocutory orders if they wish to do so (responding to recommendation 4, with which the Government agreed in principle)

• clarify the definition of senior police officer for the purpose of the move-on powers (implementing recommendation 5)

• require a senior police officer to make a written record as soon as practicable after giving oral authorisation for an initial move-on direction (partially implementing recommendation 7, with which the Government agreed) and

• requiring both uniformed and plain clothes officers to provide certain information, such as their name and identification number, on request (implementing recommendation 8).\(^{18}\)

The Government stated that the AFP will update its policies and procedures to require certain records be kept ‘to enable annual reporting’, but did not commit to keeping all of the records that were recommended, and did not explicitly commit to publishing that information annually.\(^{19}\)

Further information on the extent to which different elements of the Bill implement recommendations of the PJCIS is noted in the ‘Key issues and provisions’ section of this Digest.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) was concerned about the availability of the expanded and new powers in the 2018 Bill for the purpose of safeguarding aviation security, given the broad definition of aviation security proposed in that Bill.\(^ {20}\) The Committee noted that the proposed definition included the ‘good order’ as well as the safe operation of a major airport and its premises and flights to and from the airport, and that there was nothing on the face of the Bill to limit the powers to situations where criminal activity or a threat to safety had been identified.\(^ {21}\)

The Committee sought the Minister’s advice on the circumstances in which it is anticipated the powers would be exercised to ensure ‘good order’ and the need for such powers, and on whether those circumstances would extend beyond ensuring safety and preventing or disrupting criminal activity to include disrupting or quelling a peaceful protest.\(^ {22}\)

The Minister for Home Affairs provided that information, and stated:

> Police will not be able to use the proposed powers to disrupt or quell a peaceful protest, as a peaceful protest would not pose a threat to aviation security, including the good order and safe operation of the airport, or involve the commission of a serious criminal offence.\(^ {23}\)

The Committee welcomed the Minister’s advice but considered that this should be made clear on the face of the provisions, and recommended that the Bill be amended accordingly.\(^ {24}\)

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19. Ibid. (see responses to recommendations 3 and 6).
21. Ibid.
22. Ibid., p. 15.
24. Ibid., pp. 82–83.
The amendments included in the 2019 Bill to respond to recommendations 1 and 2 of the PJCIS’s report on the 2018 Bill should go at least some of the way to addressing the Scrutiny of Bills Committee’s concerns.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (PJCHR) reported on the 2018 Bill in October 2018. The Committee was concerned about the breadth of the provisions, including the definition of *aviation security* and the power to direct a person ‘to do anything else’ considered necessary to facilitate the exercise of the identity-checking or move-on powers.25

In relation to the **right to privacy**, the Committee sought the Minister’s advice on:

- whether the identity-checking powers are proportionate to the stated objective of the Bill and
- whether the power to direct a person ‘to do anything else’ considered on reasonable grounds to be necessary to facilitate the exercise of the identity-checking or move-on powers is rationally connected to achieving, and proportionate to, the stated objective of the Bill.26

In relation to the **right to freedom of movement**, the Committee sought the Minister’s advice on:

- whether there is ‘reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective’ and
- whether the limitation on the right to freedom of movement is proportionate, including whether the move-on and ancillary directions powers are sufficiently circumscribed and accompanied by adequate safeguards.27

The Committee noted that the Statement of Compatibility did not address whether the power to direct a person to stop or do anything else considered on reasonable grounds to be necessary to facilitate the exercise of the identity-checking or move-on powers may engage and limit the **right to liberty**. It sought the Minister’s advice on whether the power is compatible with that right.28

In relation to the **right to equality and non-discrimination**, the Committee asked the Minister for:

- advice on whether the proposed powers are sufficiently circumscribed and accompanied by adequate safeguards to ensure that they are exercised in a non-discriminatory manner and
- a copy of the AFP Code of Conduct, additional information on Behaviour Assessment and Security Questioning, and ‘any other relevant information as to the professional standards and training that applies to AFP members and protective services officers to ensure that the powers in the bill will be exercised in a non-discriminatory manner’.29

The Committee noted that the Statement of Compatibility did not address whether the measures in the Bill may engage and limit the **rights to freedom of expression** and **freedom of assembly**. It considered that the Bill may do so, due to the broad definition of aviation security and the inclusion in that definition of the ‘good order’ of major airports and flights to and from those airports. It sought the Minister’s advice on the compatibility of the Bill with those rights, including:

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27. Ibid., pp. 15–19 (quote taken from p. 19).
28. Ibid., pp. 18–19.
29. Ibid., pp. 19–22 (quote taken from p. 22).
• whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;

• whether there is a rational connection between the limitation and that objective; and

• whether the limitation is a reasonable and proportionate measure for the achievement of that objective.\(^{30}\)

Following consideration of the Minister’s response, the PJCHR was of the view that:

• ‘there is a significant risk that the powers may operate in a way that may not be proportionate’ with respect to the limitations on the rights to privacy and freedom of movement. This was due to ‘the risk that “good order” could capture a broader range of conduct than is strictly necessary to achieve the legitimate objectives of the bill’\(^{31}\)

• the powers appear to be compatible with the right to liberty\(^{32}\)

• the powers are likely to be compatible with the right to equality and non-discrimination, but that their use should be monitored to ensure that this was the case in practice and\(^{33}\)

• the powers ‘may operate in a way that may not be a proportionate limitation on the right to freedom of expression and assembly’ [emphasis added] (again, due to the breadth of the term ‘good order’).\(^{34}\)

The amendments included in the 2019 Bill to respond to recommendations of the PJCIS’s report on the 2018 Bill may help to address some of the PJCHR’s concerns.

**Policy position of non-government parties/independents**

When the 2018 Bill was introduced, Shadow Attorney-General, Mark Dreyfus, indicated that the Australian Labor Party (ALP) would reach a position on the Bill once it had been examined by the PJCIS.\(^{35}\) The PJCIS’s report on the 2018 Bill was unanimous, indicating that the ALP is likely to support the 2019 Bill if it assesses that it implements the PJCIS’s recommendations.

The Australian Greens opposed the 2018 Bill. When the Government first announced it would be giving the AFP broader powers to request proof of identity at airports, justice spokesperson, Senator Nick McKim, called for the proposal to be resisted, and stated: ‘Demanding people produce documents on the spot is a hallmark of police states’.\(^{36}\) This position was restated when the 2018 Bill was introduced.\(^{37}\)

Senator Rex Patrick of the Centre Alliance considered the proposed measures to be problematic, pointing to the possibility of their use being focused on particular ethnic and religious groups and

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30. Ibid., pp. 22–23 (quote taken from p. 23).
32. Ibid., pp. 67–69.
33. Ibid., pp. 70–72.
34. Ibid., pp. 73–76.
36. N McKim (Greens justice spokesperson), *Dutton’s “papers please” plans must be resisted*, media release, 15 May 2018.
a lack of redress available to people prevented from catching a flight, as well as the incremental impact of successive tranches of national security legislation.\footnote{38}

At the time of publication of this Bills Digest, there was no public indication of the policy position of any other non-government parties and independents on the 2018 or 2019 Bills.

**Position of major interest groups**

**Civil society**

Like the Scrutiny of Bills Committee and the PJCHR, the Law Council of Australia (LCA) and Australian Lawyers for Human Rights (ALHR) were concerned about the inclusion of ‘good order’ in the definition of *aviation security* in the 2018 Bill and recommended that the definition be amended to exclude that term.\footnote{39} The LCA considered that where the proposed powers are exercised to ensure good order, they ‘may unnecessarily and disproportionately interfere with an individual’s right to privacy, free speech and free movement’.\footnote{40} As noted above, this term has not been included in the 2019 Bill, which relies instead on a more detailed definition of the *public order and safe operation* of a major airport.

ALHR opposed the move-on powers (now in *proposed section 3UQ* of the *Crimes Act*) and the power (now in *proposed section 3US*) to give a direction that a person stop or do anything else considered necessary to facilitate the exercise of the identity-checking or move-on powers, and recommended that they be removed from the 2018 Bill. It pointed to existing legislative powers to prevent suspicious people from boarding flights, and the ability for airlines to prevent a person from taking a flight, and raised concerns about racial, ethnic or religious profiling.\footnote{41}

The LCA noted the significant inconvenience and financial impact that people subject to move-on directions, including directions not to take a particular flight, may face. It recommended that directions not to take flights 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’.\footnote{42} It also recommended that consideration be given to providing for judicial review of all move-on directions and directions to stop or do anything else considered necessary to facilitate the exercise of the identity-checking or move-on powers.\footnote{43}

The Queensland Council for Civil Liberties (QCCL) opposed the proposed expansion of the identity-checking powers to include the purpose of safeguarding aviation security, arguing that the provision will now be ‘so vague as to be beyond effective scrutiny and thus random’.\footnote{44} It also opposed the move-on powers, and recommended that the 2018 Bill be ‘rejected as excessive and likely to be counter-productive’.\footnote{45}

\footnotesize
\begin{itemize}
\item \footnote{38}{R Patrick, ‘Dutton’s airport ID checks are ripe for abuse and take us closer to a police state’, *The Guardian*, 9 October 2018.}
\item \footnote{39}{Law Council of Australia (LCA), *Submission* to Parliamentary Joint Committee on Intelligence and Security (PJCHR), *Inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018*, [Submission no. 4], 12 October 2018, pp. 2–3; Australian Lawyers for Human Rights (ALHR), *Submission* to PJCHR, *Inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018*, [Submission no. 2], 5 October 2018, pp. 2–3, 5; PJCHR, *Official committee Hansard*, 17 October 2018, pp. 1–4}
\item \footnote{40}{LCA, *Submission* to PJCHR, op. cit., p. 2.}
\item \footnote{41}{ALHR, *Submission* to PJCHR, op. cit., pp. 3–5.}
\item \footnote{42}{LCA, *Submission* to PJCHR, op. cit., p. 3.}
\item \footnote{43}{Ibid.}
\item \footnote{44}{Queensland Council for Civil Liberties, *Submission* to PJCHR, *Inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018*, [Submission no. 5], 12 October 2018.}
\item \footnote{45}{Ibid.}
\end{itemize}
The Australian Council for Civil Liberties and the Australian Lawyers Alliance raised concerns when the expanded powers were announced in May 2018 (and interpreted to allow the exercise of powers without a threshold), but do not appear to have commented on the 2018 or 2019 Bills as introduced.46

The LCA welcomed the PJCIS’s recommendations on the 2018 Bill, stating that their implementation ‘would temper potential misuse of police powers and enhance transparency and accountability’.47

**Police Federation**

The Police Federation of Australia stated that it does not normally support the extension of police-style powers beyond fully sworn officers, but that it supported the powers in the 2018 Bill being available to PSOs because they ‘play a vital role in Australia’s aviation network’.48

AFP PSOs provide protective services for Australian Commonwealth interests in Australia (including at Parliament House, Defence sites and major airports) and overseas (including at Australian diplomatic posts).49 PSOs have certain powers, including those of arrest and search, in relation to particular offences where those offences relate to a person, place or thing in respect of which the AFP is performing protective service functions (referred to as protective service offences).50 However, they do not have the full range of investigative powers available to sworn AFP officers under legislation such as the Crimes Act. The only power PSOs currently have under the Crimes Act is that of requiring a person found upon prohibited Commonwealth land to provide his or her name and address.51

**Financial implications**

The Explanatory Memorandum states that the Bill will have no impact on Government revenue.52

**Statement of Compatibility with Human Rights**

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the 2019 Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government acknowledges that the Bill will engage the right to freedom of movement and the prohibition on arbitrary or unlawful interference with privacy, and considers that the Bill is compatible with those and other applicable human rights and freedoms.53

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46. Hatch and Hunter, ‘Police airport ID laws branded “authoritarian”’, op. cit; ‘Civil liberty groups worried airport laws will cause racial profiling’, *RN Breakfast*, ABC, 16 May 2018 (Hamish McDonald interview with Terry O’Gorman, President of the Australian Council for Civil Liberties, audio only).
50. *Australian Federal Police Act 1979*, subsection 4(1), section 8A and Divisions 3 and 4 of Part II.
51. *Crimes Act*, section 89.
53. The Statement of Compatibility with Human Rights can be found at page 17 of the *Explanatory Memorandum* to the 2019 Bill.
As noted above under ‘Committee consideration’, the PJCHR has not reported on the 2019 Bill, but considered that the limitations on some of those rights in the 2018 Bill may not have been proportionate.

Key issues and provisions

Major airports

In 2012, the Crimes Act was amended to insert new Division 3B into Part IAA, which gave police powers to require identity information at a constitutional airport, where a constable reasonably suspects that the person has committed, is committing or intends to commit a Commonwealth, state or territory offence punishable by imprisonment of 12 months or more. At the time of the introduction of those offences, no concerns were raised to the Senate Standing Committee on Legal and Constitutional Affairs, which inquired into the Bill.

The amendments in the 2019 Bill will repeal the term constitutional airport and replace it with major airport. This will broaden the scope of the airports that can be captured by the legislation. Other than the terminology change, the Minister will be able to determine, by legislative instrument, that an airport is a major airport.

The following airports are included within the new definition of major airport:

- Adelaide Airport
- Alice Springs Airport
- Brisbane Airport
- Canberra Airport
- Darwin International Airport
- Gold Coast Airport
- Hobart International Airport
- Launceston Airport
- Melbourne (Tullamarine) Airport
- Perth Airport
- Sydney (Kingsford-Smith) Airport and
- Townsville Airport.

The Bill will allow the Minister to add any other airport, including a regional airport, to this list, under proposed section 3UO. The section will apply only if the airport is ordinarily used for:

- flights that start or end in a territory

54. Division 3B was inserted by the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012.
56. Proposed sections 3UL and 3UM of the Crimes Act.
57. The determination power is introduced by proposed section 3UO.
58. Proposed section 3UM. The Explanatory Memorandum states that these airports have been ‘selected on the basis of operational advice from the AFP, taking into account the risk profile of these airports and the prevailing threat environment’ (p. 6).
59. Determinations under proposed section 3UO will be legislative instruments.
• passenger flights between Australia and a foreign country and
• interstate passenger flights (proposed subsection 3UO(3)).

**Directions to provide evidence of identity**

As noted above, section 3UM of the *Crimes Act* currently allows a constable to request evidence of a person’s identity if the request is made at a *constitutional airport* and the constable reasonably suspects that the person has committed, is committing or intends to commit an offence against a Commonwealth, state or territory law that is punishable by imprisonment for 12 months or more.60

Section 3UM will be replaced with *proposed section 3UP*, which will expand the identification powers by also allowing directions to be given:

• by PSOs (as well as constables)
• at airports determined by the Minister to be *major airports* and
• if a constable or PSO considers on reasonable grounds that the direction is necessary to safeguard the *public order and safe operation* of a major airport.

*Proposed section 3UP* will also allow officers to request more evidence of identity than is currently the case.

**Safeguarding the public order and safe operation of major airports**

Under *proposed subparagraph 3UP(1)(b)(ii)* a constable or PSO will be able to direct a person at a major airport to provide evidence of his or her identity if the officer considers on reasonable grounds that giving the direction is necessary to safeguard the public order and safe operation of that airport or another major airport. The *public order and safe operation* of a major airport will be defined in *proposed subsection 3UN(1)* to mean (subject to *proposed subsection 3UN(2)*):

1. the public order of the airport, or flights to and from the airport; or
2. the safety of persons at the airport, or on flights to and from the airport; or
3. the safe operation of the airport, or flights to and from the airport.

*Proposed subsection 3UN(2)* will clarify that ‘the exercise of a person’s right to engage lawfully in advocacy, protest, dissent or industrial action is not, by itself, to be regarded as prejudicial to the public order and safe operation of a major airport’.

The term ‘aviation security’, the definition of which in the 2018 Bill concerned stakeholders and the PJCIS, Scrutiny of Bills Committee and the PJCHR, has been replaced in the 2019 Bill with the term *public order and safe operation*, with the proposed definition providing greater clarity about the circumstances in which powers may be exercised. The change responds to the PJCIS’s recommendations to specify the scope of activities to which the term (then aviation security) applies.

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60. A constable may also currently request evidence of a person’s identity at an airport other than a constitutional airport if he or she reasonably suspects that the person has committed, is committing or intends to commit a *Commonwealth offence* that is punishable by imprisonment for 12 months or more. Under the Bill, evidence of a person’s identity may be required from a person at a major airport in relation to an offence against a law of the Commonwealth or a territory, or a state offence with a federal aspect, that is punishable by imprisonment for 12 months or more: *proposed subparagraph 3UP(1)(b)(i).*
applies, and to ‘include a savings provision to ensure the move-on powers do not interfere with the right to peaceful assembly, or give the ability to use the powers to disrupt or quell a protest that is peaceful and does not disrupt the safe operation of the airport’. 61

Threshold for issuing direction

Proposed subparagraph 3UP(1)(b)(i) allows a constable or PSO to direct a person to give evidence of the person’s identity if the constable or officer *suspects on reasonable grounds* that the person has committed, is committing or intends to commit an offence against a law of the Commonwealth or a territory, or a state offence with a federal aspect, that is punishable by imprisonment for 12 months or more. In contrast, proposed subparagraph 3UP(1)(b)(ii) allows the constable or PSO to direct a person to give evidence of their identity if the constable or officer *considers on reasonable grounds* that the direction is necessary to safeguard the *public order and safe operation* of a major airport.

When legislation prescribes that there must be ‘reasonable grounds’ for a state of mind, it ‘requires the existence of facts which are sufficient to induce that state of mind in a reasonable person’. 62 As set out above, the state of mind required differs between proposed subparagraphs 3UP(1)(b)(i) and (ii), the former requiring a suspicion and the latter requiring the officer to consider that the relevant requirement exists.

In *George v Rockett*, the Full Bench of the High Court stated:

> Suspicion, as Lord Devlin said in *Hussien v. Chong Fook Kam* (1970) AC 942, at p 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. 63
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In contrast, a requirement to ‘consider on reasonable grounds’ has been held to be analogous to ‘believes on reasonable grounds’ 64 and to require:

> ... first, that the relevant belief or opinion be actually held by the responsible entity; and, second, that facts exist that are sufficient to induce the belief or opinion in a reasonable person. 65

Evidence of identity

A person directed to provide evidence of his or her identity may satisfy that requirement by producing a *government photographic identity document* issued to them, or otherwise another *identity document* (or, if so directed, two different identity documents). 66 If the person does not produce an identity document or documents, he or she must give the constable or officer his or her

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65. Ibid.
66. Proposed paragraphs 3UP(2)(a) and (b). *Government photographic identity document* and *identity document* will be defined in proposed section 3UL of the *Crimes Act*. The Bill will replicate the current definitions.
her name, address and date of birth. 67 This mirrors existing requirements, except that constables may not currently require two different identity documents and people not providing documents are not currently required to provide a date of birth. 68

Given that the identity documents people would be likely to most commonly use (passports and drivers licences) include a person’s date of birth, this inclusion seems reasonable. The ability to request two identity documents if the person does not provide a government photographic identity document is broadly consistent with the 100 point identification system used by banks and for some government purposes, under which documents such as passports and drivers licences are worth more points than those such as Medicare and credit cards. 69

**Move-on directions**

The *Crimes Act* does not currently contain move-on powers. The Explanatory Memorandum notes that AFP officers can use move-on powers under state and territory laws, but that the thresholds for those powers differ across jurisdictions. It also notes that police may direct a person to move on from certain airports under section 86 of the *Aviation Transport Security Act 2004*, but that this power may only be exercised if an officer reasonably suspects that a person is committing or has committed an offence against that Act. 70 The Bill will provide move-on powers for constables and PSOs at major airports that are broader than those under the *Aviation Transport Security Act* and are consistent across all jurisdictions.

**Threshold for directions**

Proposed subsection 3UQ(1) of the *Crimes Act* will allow a constable or PSO to give a person a direction at a major airport if the constable or PSO:

- considers on reasonable grounds that the person has contravened a direction given under:
  - proposed section 3UP (to provide evidence of his or her identity) or
  - proposed section 3US (to stop or do anything else considered necessary to facilitate the exercise of the identity information request or move-on powers)

  and the constable or PSO is not reasonably satisfied of the person’s identity

- suspects on reasonable grounds that giving the direction is necessary to prevent or disrupt relevant criminal activity occurring at a major airport or in relation to a flight to or from a major airport and/or

- considers on reasonable grounds that giving the direction is necessary to safeguard the public order and safe operation of a major airport. 71

**Relevant criminal activity** will mean activity involving the commission of an offence against a law of the Commonwealth or a territory, or a state offence that has a federal aspect, that is punishable by imprisonment for 12 months or more. 72

67. *Proposed paragraph 3UP(2)(c).*
68. The current identity information requirements are contained in section 3UM of the *Crimes Act 1914*.
69. See for example: Commonwealth Bank of Australia (CBA), ‘What documents do you need for an in-branch id check?’, CBA website; South Australia Police (SAPOL), ‘100 point identification’, SAPOL website.
70. Explanatory Memorandum, 2019 Bill, p. 10.
71. The requirements relating to ‘suspects on reasonable grounds’ and ‘considers on reasonable grounds’ are discussed above.
72. *Proposed subsection 3UQ(2). Federal aspect*, in relation to state offences, is defined in subsection 3AA(1) of the *Crimes Act*.  

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Types of directions
Under proposed subsection 3UQ(3), directions will be able to require a person to:

• not take a specified flight, or any flight, to or from the airport at which it is given or another specified major airport, for a specified period of up to 24 hours from when the direction is given and/or

• leave the airport as soon as practicable and not enter that airport, or any other specified major airport, for a specified period of up to 24 hours from when the direction is given.

Conditions and limitations on giving directions
Directions given under proposed section 3UQ must be in writing, and given in a form approved in writing by the Minister. The form must include certain information to assist the person given the direction in making an application for judicial review or interlocutory orders if they wish to do so.

This requirement responds to a recommendation of the PJCIS that the Government accepted in principle (see further below under ‘Access to remedies’).

A direction covering a period of more than 12 hours must be given or authorised by a senior police officer (a constable who has a rank of sergeant (or equivalent) or higher, or with formal authorisation to act as a constable with such a rank).

No more than two directions may be given under proposed section 3UQ within a seven-day period. If a second direction is given, it must be given or authorised by a senior police officer, and must not end more than seven days after the first direction was given.

The PJCIS recommended that where a senior officer provides oral authorisation for a move-on direction, that the authorisation be required to be documented in writing as soon as practicable. The 2019 Bill will implement that recommendation for authorisation of directions covering more than 12 hours (proposed subsection 3UQ(5)), but not for authorisation of directions that are the second in relation to the same person within a seven-day period.

Should additional limitations and safeguards apply to the proposed move-on powers?
Authorisations by senior police officers
As noted above, move-on directions covering a period of more than 12 hours or which are the second within a seven day period must be given or authorised by a senior police officer. DoHA submitted that this will mean that ‘two officers have turned their mind to the identified threat and whether the proposed exclusion is a proportionate response in the circumstances’. However, this will not always be the case. If such directions are originally given by a senior police officer,
they will require no additional authorisation, even if the same officer gives both of the move-on directions within a seven day period. Consideration could be given to amendments that would require move-on directions given by a senior officer that cover a period of more than 12 hours or which are the second within a seven day period to be authorised by another senior officer. Given the potential inconvenience and expense that may be associated with complying with move-on directions covering less than 12 hours, consideration could also be given to requiring all move-on directions to be issued or authorised by a senior police officer.

**Record keeping and reporting**

Move-on directions will be required to be given in writing, and DoHA stated:

> Records of the use of the proposed identity checking and move-on powers will be kept in accordance with the AFP’s policies on records management. This will be supported by a standard operating procedure, which stipulates the process for constables and PSOs to adhere to when issuing an identity check or move-on direction.\(^81\)

The PJCIS recommended that the AFP be required to record:

> ... the number of occasions on which an identity information direction is issued under proposed section 3UN of the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018. Such records—detailing the number of identity check directions issued at each major airport—should be made public on an annual basis.

> [and]

> ... the number of occasions on which a move-on direction is issued under proposed section 3UO of the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018. Such records—detailing the number of move-on directions issued at each major airport, and the number of move-on directions at each major airport that resulted in an individual missing a flight—should be made public on an annual basis.\(^82\)

In its response to the PJCIS, the Government stated that it agreed to these recommendations and that the AFP will update its policies and procedures to capture the number of occasions on which each type of direction is issued ‘to enable annual reporting’. However, it did not commit to capturing the number of each type of direction issued at each major airport or the number of move-on directions that result in individuals missing flights, or to publicly reporting on the records kept.\(^83\)

The Government has not proposed any legislative amendments to respond to the above recommendations. It may be preferable to make provision for the keeping and reporting of records about the use of the directions powers in the *Crimes Act*, with the detail dealt with in a standard operating procedure. Consideration could also be given to requiring regular inspections of and reporting on those records by the Ombudsman, as occurs with several other law enforcement powers.\(^84\)

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81. Ibid., p. 6.
84. For details, see Commonwealth Ombudsman, ‘Our inspections role’, Commonwealth Ombudsman website.
Access to remedies

It is possible that a person subject to a move-on direction could be significantly inconvenienced and/or impacted financially (for example, by being prevented from taking a particular flight or any flight within a certain period). DoHA’s submission to the inquiry into the 2018 Bill stated that a person given a move-on (or identity check) direction will be entitled to complain to AFP Professional Standards if he or she is concerned that an officer has acted outside authority, and that where a complaint is substantiated the officer could face disciplinary action, including termination. Its supplementary submission further noted that it would be open to a person to initiate civil proceedings ‘to seek damages or compensation for losses incurred as a result of improper use’ of the proposed powers. It is not apparent how an airline might deal with such situations. An airline may provide a person with an alternative flight at no cost or reduced cost if the person can provide evidence that he or she was unable to take a scheduled flight in order to comply with a move-on direction.

The LCA recommended that provision be made for judicial review (on application) of move-on directions and directions to stop or do anything else considered necessary to facilitate the exercise of the identity-checking or move-on powers, with an expedited review process for directions not to take flights. It recommended that the reviewer be given the power to order compensation. In response, DoHA stated that judicial review will be available, but that providing for an expedited process for the powers in the Bill would be ‘difficult, if not impossible, to practically implement and may have significant resourcing implications for Australian courts’. The PJCIS recommended that the 2018 Bill be amended ‘to include, in certain restricted circumstances [such as ‘an urgent personal or commercial situation’], the right to seek urgent or expedited review’ of a move-on direction. In its response to the PJCIS, the Government accepted this recommendation in principle. Instead of making specific provision for such review, the 2019 Bill will require move-on directions to be given in writing in a form that must include certain information to assist the person given the direction in making an application for judicial review or interlocutory orders in relation to the direction, specifically:

(a) details to enable the person to contact a Federal Court registry in the State or Territory in which the direction is given, or a requirement for the constable or officer giving the direction to include such details;

(b) any other information the Minister considers appropriate to assist the person to make such applications, for example information relating to the procedure for urgent or expedited applications.

85. DoHA, Submission to PJCIS, op. cit., p. 6. AFP Professional Standards deals with complaints in accordance with Part V of the Australian Federal Police Act 1979, which also gives the Commonwealth Ombudsman a role in determining the kinds of conduct to be included in different categories of conduct and requires the Ombudsman to conduct annual and ad hoc reviews of AFP’s administration of Part V of the Act.

86. DoHA, Supplementary submission to PJCIS, op. cit., p. 5.

87. LCA, Submission to PJCIS, op. cit., p. 3. PJCIS, Official committee Hansard, 17 October 2018, pp. 2–3.

88. DoHA, Supplementary submission to PJCIS, op. cit., p. 5. Mark Dreyfus noted in a PJCIS hearing that Australian courts ‘have out-of-hours arrangements and duty judges for the very purpose of dealing with urgent interim injunction applications’: PJCIS, Official committee Hansard, 17 October 2018, p. 3.


91. Proposed subsection 3UQ(8).
Directions to stop or do other things necessary for exercise of other powers

Under proposed section 3US, a constable or PSO will be able to direct a person to stop or to do anything else that the officer considers on reasonable grounds to be necessary to facilitate the exercise of the identity-checking or move-on powers in proposed sections 3UP and 3UQ. A direction may be given at a major airport if the officer considers on reasonable grounds that it is necessary to facilitate the exercise of one of those powers.

Obligations of constables and PSOs

As is currently the case for existing powers to require evidence of identity, under proposed section 3UT, a constable or PSO will be required to fulfil certain requirements before giving a direction under proposed section 3UP or 3UQ (but not under proposed section 3US). The officer will be required to inform the person that failure to comply, or the provision of false or misleading information or documents, may be an offence. If the officer is not in uniform, the officer must also show the person evidence that he or she is a constable or PSO before giving a direction.

A constable or PSO must also provide certain information (including the officer’s name or identification number) if the person so requests, before or after a direction is given. Under the 2018 Bill, a constable or PSO was only required to provide such information if not in uniform. The 2019 Bill implements a recommendation of the PJCIS by imposing the same obligation to provide identifying information regardless of whether a constable or PSO is in uniform or plain clothes.

Offences

Under proposed section 3UU, offences will apply to:

- persons, for contravening a direction given under proposed section 3UP, 3UQ, or 3US (for which the maximum penalty for an individual will be 20 penalty units (currently $4,200) and
- constables and PSOs, for breaching the requirements of proposed section 3UT (for which the maximum penalty will be five penalty units (currently $1,050).

These offences are both comparable to those that currently apply in existing section 3UN of the Crimes Act (which will be repealed by the Bill), and carry the same maximum penalties.

PSO powers

As noted above, under the Australian Federal Police Act, PSOs have certain powers, including those of arrest and search, in relation to particular offences, referred to as protective service offences.

Item 2 of Schedule 1 will amend the definition of protective service offence in subsection 4(1) of the Australian Federal Police Act to include an offence against proposed subsection 3UU(1) (contravening a direction given under proposed section 3UP, 3UQ, or 3US).

92. Proposed subsections 3UT(1) and (2).
93. Proposed section 3UT.
95. The first offence will apply if the person engages in conduct and the conduct contravenes a direction; the second will apply where the constable or PSO engages in conduct and the conduct breaches a requirement. A prosecutor will need to prove that the person, constable or PSO intentionally engaged in conduct due to the application of default fault elements under section 5.6 of the Criminal Code Act 1995. For further detail about all of the physical and fault elements that will need to be proven for each offence, see pages 15–16 of the Explanatory Memorandum, 2019 Bill.
96. Australian Federal Police Act, subsection 4(1) and Divisions 3 and 4 of Part II.
Concluding comments

Thresholds will apply to each of the new and expanded powers proposed in the 2019 Bill. The replacement of the broadly defined ‘aviation security’ with the more detailed definition of the public order and safe operation of a major airport, particularly the greater clarity provided about the status of lawful advocacy, protest, dissent and industrial action, will help to address concerns that the powers in the 2018 Bill could be used in a broader range of circumstances than would be appropriate.

The 2019 Bill includes amendments to respond to most of the PJCIS’s recommendations. However, given the potential financial implications and inconvenience associated with complying with move-on directions, consideration could be given to enhanced and additional safeguards. These could include requiring all move-on directions to be authorised by a senior police officer, including record-keeping requirements in legislation instead of AFP procedures, and requiring records of the use of move-on (and identity-checking) powers to be inspected and reported on by the Commonwealth Ombudsman.