
AusCheck Amendment Bill 2009

Senate Committee on Legal and Constitutional Affairs

June 2009

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Acknowledgment

The Law Council acknowledges the assistance of the Privacy Law Committee of the Business Law Section in the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to provide the following submission in response to the Senate Committee on Legal and Constitutional Affairs ('the Senate Committee') Inquiry into the *AusCheck Amendment Bill 2009* ('the 2009 Bill').
2. The Law Council has closely monitored the establishment of the AusCheck scheme and made detailed written and oral submissions to the Senate Committee when the scheme was first introduced via the *AusCheck Bill 2006* ('the 2006 Bill').
3. The Law Council has no objection in principle to legislation which enables a centralised background checking service to operate within the Attorney-General's Department, particularly if it is able to deliver a more efficient, uniform and secure service.
4. The Law Council's primary concern with the 2006 Bill was that it failed to establish clear parameters on the purposes for which background checking could be undertaken, the types of information which could be gathered, the uses that could be made of that information and the procedures which must be observed in the process.
5. These concerns were reflected in the observations and recommendations of the Senate Committee following its 2007 Inquiry into the 2006 Bill, and were ultimately reflected in the provisions of the *AusCheck Act 2007* ('the Act') which is limited to providing a background checking scheme for the purpose of the *Aviation Transport Security Act 2004* ('the ATSA') and the *Maritime Transport and Offshore Facilities Security Act 2003* ('the MTOFSA').
6. The Law Council is now concerned that the amendments sought to be introduced by the 2009 Bill would expand the AusCheck scheme in a similar way as that originally intended by the 2006 Bill. The Law Council has serious concerns with a regime that permits background checking schemes to be established for a very broad range of purposes without requiring the details of such schemes to be outlined in primary legislation.
7. In addition, the 2009 Bill seeks to establish a system of identity verification involving the use of biometric data. The Law Council believes that such a scheme should only be implemented following careful consideration as to its potentially grave implications for the privacy rights of individuals concerned.
8. In light of these concerns, the Law Council makes two key recommendations:
 - (a) that clause 8(1)(c) of the 2009 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; and
 - (b) that before a system of identity verification based on the use of biometric data is introduced, Parliament should be satisfied that such a system is necessary and effective to overcome existing difficulties in identity verification. It should provide adequate protection against the potential for grave intrusions into personal privacy. The principles enunciated by the Council of Europe and referred to by the Australian Law Reform Commission (ALRC) may provide a useful framework for evaluating the system proposed by the 2009 Bill.

Background

AusCheck Bill 2006

9. The purpose of the 2006 Bill was to provide the regulatory framework for the AusCheck scheme. It established AusCheck as the centralised background criminal and security checking service for persons requiring access to security zones in the aviation and maritime industries.¹
10. The Bill provided authority for AusCheck to coordinate background checks for applicants of the Aviation Security Identity Card (ASIC) and the Maritime Security Identity Card (MSIC), and any subsequent schemes. It also provided authority for AusCheck to maintain a database of applicants and cardholders; to collect, use and disclose information; and to recover costs for conducting background checks.²
11. In addition, the original 2006 Bill would have allowed the Government to implement by way of regulations alone, a wide range of background checking schemes without the authorisation of any other primary legislation.
12. Clause 8 of the 2006 Bill provided that regulations could be made for the establishment of a background checking scheme relating to the conduct and co-ordination of background checks of individuals:
 - for the purposes of the ATSA or the regulations under that Act;
 - for the proposes of the MTOFSA or the regulations under that Act; or
 - for such other purposes as prescribed by the regulations.
13. Subclause 8(2) provided that the purposes prescribed by the regulations could be any of the legislative heads of power available to the Commonwealth under the Constitution, such as purposes relating to external affairs or purposes relating to national defence, and purposes related to any other matter in respect of which the Parliament had the power to make laws.

Law Council's Concerns

14. On 23 February 2007 the Law Council made a submission to the Senate Committee's Inquiry into the 2006 Bill.³ On 1 March 2007 the Law Council gave evidence on the Bill before the Committee.
15. The Law Council had three primary concerns with the 2006 Bill, which were echoed in a number of other submissions received by the Committee.
16. First, the Law Council was concerned that the regulation making power granted under the 2006 Bill was too broad. While the Law Council appreciated that the Bill was intended to provide a framework only for the operation of AusCheck, it submitted that the Bill should at least set some substantive limits on the purposes

¹ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 1.

² Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 1.

³ Law Council of Australia, *Submission to Inquiring into AusCheck Bill 2006* (23 February 2007) available at <http://www.lawcouncil.asn.au/library/submissions.cfm>.

for which a background check may be required and conducted and the type of information which may be gathered as part of that scheme.

17. Clauses 5, 8 and 10 read together clearly envisaged that a wide range of background-checking schemes might be devised and implemented by way of AusCheck regulations alone. Given the sensitive nature and function of background checks, which can both be intrusive and adversely impact on people's livelihoods, the Law Council submitted that Parliament should retain closer control over determining the purposes for which background checks are necessary. The Office of the Privacy Commissioner (OPC) shared this concern.⁴
18. Secondly, the Law Council was concerned that the 2006 Bill failed to properly take advantage of the opportunities that centralisation of background checking might present by failing to set minimum standards for transparency, fairness and accountability. The Law Council expressed the view that the 2006 Bill should have included guaranteed review rights and/or reporting obligations.
19. Thirdly, the Law Council was concerned that the provisions of the 2006 Bill which dealt with the use and disclosure of personal information stored by AusCheck were vague and broad. In particular, the Law Council was concerned with the provisions which allowed for personal information collected and stored by AusCheck to be disclosed for the purposes of "criminal intelligence" or "security intelligence", which were not defined in the Bill.
20. In general, the Law Council was concerned that the 2006 Bill appeared to favour flexibility over safeguards. This was of particular concern given that the 2006 Bill was designed to accommodate future background checking schemes beyond the maritime and aviation security card schemes.
21. As will be discussed later in this submission, these concerns remain pertinent, and in some cases are heightened, in the context of the 2009 Bill.

Senate Committee's Recommendations

22. The Senate Committee shared many of the concerns raised by the Law Council and other organisations with respect to the breadth of the Bill's regulation-making power, privacy issues, and the lack of accountability mechanisms.⁵ In particular, the Committee:
 - Expressed concern at the use of delegated legislation to extend the scope and operation of primary legislation, particularly given the sensitive nature and function of background checking.⁶
 - Expressed the view that it is imperative that Parliament be afforded the opportunity to consider fully the particulars of any future screening regimes in order to ensure that the background checks they introduce are appropriate and proportionate to the purpose that is sought to be achieved.⁷

⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 16-17.

⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 36.

⁶ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 36.

⁷ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 36.

- Agreed with the concerns of the Law Council that the ambit of the Bill's regulation-making power was too broad. The Committee did not consider it appropriate that clause 8 allowed the Australian Government to implement, by way of regulations alone, a wide range of background checking schemes – related to any activities within a constitutional head of power – without the authorisation of any other primary legislation.⁸
- Expressed the view that the particulars of any schemes beyond the ASIC and MSIC schemes should ideally be set out in primary legislation.⁹
- Considered that several of the 2006 Bill's provisions dealing with the collection of information, information to be assessed, retention of information, and use and disclosure of personal information were too broad and had the potential to impact adversely on an individual's right to privacy¹⁰

23. The Senate Committee's report adopted a number of the Law Council's recommended amendments to the 2006 Bill. These included:

- the deletion of a sub-clause allowing for regulations to expand the types of information that might be collected as part of a background check;
- the deletion of clauses allowing for new background checking schemes to be devised and implemented by way of AusCheck regulations alone;
- the amendment of the Bill to limit the agencies to which personal information about an individual may be used or disclosed "for the purposes of criminal intelligence or security intelligence" to:
 - the Australian Federal Police;
 - the Australian Crime Commission; and
 - the Australian Security Intelligence Organisation.
- the amendment of the Bill to impose appropriate conditions and limitations on the use and disclosure of personal information by a third party agency to which AusCheck has lawfully disclosed information.
- the amendment of the Bill to include a specific requirement that AusCheck provide periodic reports to Parliament about matters including:
 - the number and type of background checks that it conducts;
 - the average time taken to conduct background checks;
 - the legislative scheme under which background checks have been conducted;
 - the number of individuals who have received adverse background checks and the basis for that assessment; and

⁸ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 37.

⁹ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 37.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the AusCheck Bill*, (March 2007) p. 37.

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- the agencies to which information obtained by AusCheck has been shared and for what purposes.
24. Many of these recommendations were reflected in the Act, which was assented to on 12 April 2007.

AusCheck Act 2007

25. The Act as passed confines AusCheck to conducting background checking for the purposes of the existing ASIC and MSIC schemes. The Act does not allow for regulations to be made which expand the type of information which may be gathered as part of a background check.
26. The recommendations regarding periodic parliamentary reporting were not reflected in the Act as passed, however, the Attorney General gave an undertaking to Parliament to include this information in the Attorney-General's Department Annual Report. As will be discussed later in this submission, reporting requirements have now been included in the AusCheck Guidelines.

Privacy Impact Assessment

27. During the Senate Inquiry a number of organisations, including the Law Council, raised concerns that the 2006 Bill had been introduced, and was likely to be passed, prior to the completion and release of a Privacy Impact Assessment (PIA).
28. On 12 March 2007 a PIA for AusCheck was completed.¹¹ The PIA found that while the AusCheck scheme included some privacy-enhancing features, a number of improvements to privacy protection could be achieved without compromising the proposal's objectives.¹²
29. The improvements to privacy protection recommended by the PIA included:
- Limiting the potential for function creep, by limiting AusCheck's purpose, functions and scope of data collection to only what is necessary to administer the MSIC and ASIC schemes.¹³
 - In particular, it was recommended that any expansion into new checking function, or changes to the scope of the MSIC and ASIC schemes, should require further Parliamentary debate and approval. It was noted that delegation to subordinate legislation although subject to disallowance by Parliament, does not afford the same level of public scrutiny or Government transparency.
 - Limiting the potential for irrelevant disclosures.¹⁴

¹¹ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ResponseToTheRecommendationsOfThePrivacyImpactAssessment-May2007.

¹² Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 74.

¹³ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 75-76.

¹⁴ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 76-77.

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- It was observed that people are comfortable with the use or disclosure of their personal information for law enforcement purposes, so long as such disclosures are targeted, measured, and conducted with appropriate transparency and accountability safeguards. The PIA suggested some appropriate parameters for disclosing personal information about card holders and recommended against widespread data-matching exercises.
 - Improving transparency and access.¹⁵
 - It was observed that notifying people about the personal information being collected about them, and in particular about how it will be used or disclosed, is an important privacy principle. Suggestions were made as to the use of short form privacy notices on application forms to be used by individuals and issuing bodies. Suggestions were also made to ensure that individuals can access their personal information from AusCheck, issuing bodies and partner checking agencies to seek correction of that information if it is found to be incorrect, incomplete, out of date, irrelevant or misleading.
 - Controlling irrelevant data collection and use by issuing bodies.¹⁶
 - It was noted that the current scheme allows issuing bodies to design their own application form, which provides an opportunity for issuing bodies to seek irrelevant or intrusive personal information.
 - Enhancing the security of personal information held.¹⁷
 - The PIA included suggestions as to how personal information can be stored, and how long it should be retained, in order to enhance data security.
30. A number of these findings and recommendations correlate closely to the recommendations made by the Law Council and shared by the Senate Committee.
31. Some of these recommendations have been addressed in the Act. For example, the Act currently limits the purpose, scope and function of the AusCheck background checking scheme to MSICs and ASICs.
32. Other recommendations and suggestions contained in the PIA have been subsequently addressed by AusCheck. For example, AusCheck has issued a Privacy Notice explaining what personal information is collected about a person when he or she applies for an ASIC or MSIC and how that personal information will be used.¹⁸

¹⁵ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 77.

¹⁶ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 77.

¹⁷ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 78/

¹⁸ See Attorney-General's Website "AusCheck Privacy Policy"

http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_NationalSecurityandCriminalJustice_AusCheck_AusCheckPrivacyPolicy (accessed 29 May 2009)>

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33. The Secretary of the Attorney-General's Department has also issued *Guidelines for Accessing Information on the AusCheck Database*.¹⁹ These Guidelines establish a compulsory framework for decision making by AusCheck staff in determining the legality of requests for personal information from the AusCheck database under subparagraph 14(2)(b)(iii) of the Act. For example, the Guidelines require that:
- Any Commonwealth agency, other than that authorised under the Act, wishing to access personal information from the AusCheck database must be accredited by AusCheck as an appropriate agency for the purposes of subparagraph 14(2)(b)(iii).
 - Before seeking access to information held on the AusCheck database, the requesting officer must give a written undertaking on behalf of the agency that information held on the AusCheck database will only be accessed and used for purposes relating to law enforcement or national security.
 - As part of the Attorney-General's Department Annual Report, AusCheck will report:
 - the names of all agencies granted access to the AusCheck database during the reporting period
 - the purposes for which access to the AusCheck database was sought, and
 - the number of occasions on which access was sought during the reporting period by an agency and provided by AusCheck.
34. Despite these privacy and accountability protections, it is of concern that the 2009 Bill seeks to introduce provisions which would again enliven some features of the 2006 Bill identified by the PIA as posing possible privacy risks and requiring reform.

Operation of AusCheck scheme

35. AusCheck commenced operation in September 2007 as a separate division within the Attorney-Generals Department. It maintains a comprehensive database of all applicants and cardholders for the aviation and maritime industries and operates on a cost recovery basis.²⁰
36. Under the AusCheck scheme, background checking involves gathering information, including identity information, work information and immigration information, about a person from a variety of sources. The sources can include:
- criminal history certificates from CrimTrac and the AFP
 - a security assessment from ASIO, and
 - a right to work check from DIAC.

¹⁹ These Guidelines were established under regulation 15 of the *AusCheck Regulations 2007*. See Attorney-General's Website "AusCheck Guidelines for Accessing Information on the AusCheck Database" http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_NationalSecurityandCriminalJustice_AusCheck_GuidelinesforaccesstotheAusCheckdatabase (accessed 29 May 2009)

²⁰ Attorney General's Department Website http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Backgroundchecking (accessed 29 May 2009).

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37. In the case of maritime and aviation security identification cards, information about an individual is checked against established criteria to determine their suitability to access secure areas of air and sea ports. The individual's eligibility to hold a card is then reported to the agency that requested the background check. It is then up to the agency to decide whether to issue a card to an eligible individual. A card cannot be granted to a person who is assessed as ineligible.²¹
38. AusCheck has developed an *AusCheck Service Charter* which aims to describe to the public and to the aviation and maritime communities, the service provided by AusCheck.²² The Charter sets out a feedback process and a complaints handling procedure and states that a report on performance against the Charter is to be included in the Attorney-General's Annual Report.
39. The Charter informs individuals who interact with AusCheck that they have the right to :
- provide comment before an adverse finding is made;
 - ask for additional time to provide comments before an adverse finding is made;
 - lodge an appeal against an adverse decision;
 - lodge a complaint about AusCheck;
 - privacy and confidentiality of personal information; and
 - access documents under the *Freedom of Information Act 1982*.
40. The Charter also provides that complaints against an AusCheck officer should be referred to the Executive Director in the first instance. The Executive Director may then refer the complaint to the Director, Corporate Governance & Coordination, Attorney-General's Department for investigation.
41. It further states that decisions AusCheck makes may be subject to review or appeal under the *Administrative Decisions (Judicial Review) Act 1997*, or by the Administrative Appeals Tribunal, and that individuals with complaints about AusCheck may also contact the Commonwealth Ombudsman.

Features of the 2009 Bill

42. As noted above, the current Act only allows background checks for purposes of the ATSA and the MTOFSA.
43. The Explanatory Memorandum states that the main purpose of the 2009 Bill is to provide a capacity for background checks under the Act to be carried out for national security purposes:

... [T]he amendments will provide a bare capacity for the Attorney-General's Department, carrying out its responsibility for conducting background checks, to

²¹ Attorney General's Department Website

http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_Backgroundchecking (accessed 29 May 2009).

²² See Attorney-General's Website 'AusCheck Service Charter' at

http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_NationalSecurityandCriminalJustice_AusCheck_AusCheckServiceCharter (accessed 29 May 2009).

*conduct background checks that are required under authority of some other law. A background check under the Act could then be identified as a requirement for access to places, things, substances or employment positions as specified by a regulatory scheme.*²³

44. The second purpose of the 2009 Bill is to establish a regime for the use and disclosure of biometric data for the purposes of identity verification.

National Security Background Checks

45. Item 7 of the 2009 Bill would amend section 8 of the Act to broaden the range of background checking schemes to include 'national security background checking schemes'²⁴ and to include schemes relating to a broad range of other purposes as provided by regulation. Under proposed paragraph 8(c), regulations could provide for the establishment of background checking schemes for purposes related to:

- Australia's national security;
- the defence of Australia;
- a national emergency;
- the prevention of conduct to which Part 5.3 of the *Criminal Code* applies (i.e. terrorism offences)
- the executive power of the Commonwealth; or
- matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

Meaning of Consent

46. The Bill also seeks to 'clarify' the meaning of 'consent' in the context of background checks.²⁵ Currently paragraph 9(1)(b) of the Act provides that the AusCheck scheme may make provision for 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.
47. Under the current scheme, all applications to AusCheck must be made by an issuing body, and not by the individual themselves, unless the individual has an operational need to access a secure area.²⁶ This would suggest that most applications for background checking are made pursuant to paragraph 9(1)(b) of the AusCheck Act.
48. Proposed subsection 9(4) provides that for the purposes of paragraph 9(1)(b), a person is taken to have given consent to another person making an application for a background check in relation to the person if:

²³ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 2.

²⁴ A new definition of 'national security background check' is proposed in the Bill as 'a background check performed in relation to the individual for a purpose referred to in subparagraph 8(c)(i)-(vi).

²⁵ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 2.

²⁶ Attorney-General's Website, "AusCheck- Frequently Asked Questions" available at http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_NationalSecurityandCriminalJustice_AusCheck_AusCheckFrequentlyAskedQuestions (accessed 2 June 2009). See also *AusCheck Regulations 2007*(Cth) Reg 5.

- the person has applied for an aviation security identification card, or a maritime security identification card or any other card, licence, permit or authorisation; and
- before making the application for such a card, licence, permit or authorisation, the individual was advised by the other person, in accordance with the requirements (if any) specified in the regulations, that a background check was a precondition to the issuing of the card, licence, permit or authorisation.

Use and Disclosure of Biometric Information

49. The 2009 Bill sets up a new regime for the use and disclosure of biometric data, referred to in the Bill as 'identity verification data'. 'Identity verification data' is defined to mean:

*... AusCheck scheme personal information consisting of the individual's fingerprints or other biometric data about the individual, but does not include a photograph of the individual.*²⁷

50. Photographs are excluded from this definition because they may be necessary for the operation of the online verification service.²⁸
51. 'Biometric data' is not defined in the Bill, however the Bill's Digest gives a number of examples of what this term might include, such as finger scanning, facial recognition, iris and retinal scanning, voice recognition and dynamic signature verification.²⁹
52. The Bill seeks clearly to distinguish between the use and disclosure of AusCheck personal information, and the use and disclosure of identity verification information.
53. It attempts to achieve this by amending the existing provisions relating to the collection, use and disclosure of 'personal information' specifically to *exclude* personal information that constitutes 'identity verification information'. It then introduces specific provisions dealing with the collection, use and disclosure of 'identity verification information'.
54. For example, section 14 of the Act allows the Secretary to establish and maintain the AusCheck database of information, including personal information. Subsection 14(2) currently provides that AusCheck scheme personal information³⁰ in the database may be use or disclosed for the following purposes:
- carrying out a subsequent background check in relation to the individual under the AusCheck scheme;
 - responding to an incident that poses a threat to national security; or
 - the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence by the Commonwealth or a relevant Commonwealth authority, for purposes relating to law enforcement or national security.

²⁷ *AusCheck Amendment Bill 2009* Item 1.

²⁸ Explanatory Memorandum to the AusCheck Amendment Bill 20089 at p. 3.

²⁹ Department of Parliamentary Services, *Bills Digest: AusCheck Amendment Bill 2009*, (18 March 2009) No 116, 2008-09, ISSN 1328-8091 at p. 5.

³⁰ 'AusCheck scheme personal information' is defined in section 4 of the *AusCheck Act* as personal information (a) that is obtained under the AusCheck scheme; or (b) that relates to the administration of the AusCheck scheme.

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55. Subsection 14(2A) of the Act currently allows AusCheck scheme personal information about an individual to be disclosed for the purpose of *verifying* the personal details contained on an aviation security identification card or a maritime security identification card.
56. The Bill would repeal subsection 14(2) and replace it with a subsection which concerns the use and disclosure of AusCheck scheme personal information about an individual *other than identity verification information*.³¹ The new subsection would provide that use and disclosure of this type of personal information can occur for the same purposes as currently contained in section 14(2) of the Act.
57. The Bill would also amend subsection 14(2A) specifically to exclude identity verification information from this subsection. The Bill would, however, add two new purposes for which AusCheck scheme personal information (other than identity verification information), could be disclosed, including for the purpose of verifying whether:
- a national security background check has been conducted in relation to the individual; and
 - an individual who is in the possession of a card, licence, permit or other authorisation in relation to which a national security background check has been conducted is the individual to whom the card, licence, permit or authorisation was issued.
58. The Bill would also insert a new subsection 14(2AB) into the Bill which would permit identification verification information about an individual being disclosed for the purpose of verifying the individual if a subsequent background check is being conducted under the AusCheck scheme.

Law Council's Concerns

Breadth of Background Checking Regime

59. Currently, the AusCheck scheme is tied to two pieces of primary legislation concerning aviation and maritime security and their respective regulations.³² The detail and purpose of these schemes have already been approved by Parliament. These are the only purposes for which background checks can be conducted under the AusCheck scheme.
60. In contrast the 2009 Bill allows for AusCheck regulations to be promulgated which, in themselves, create new screening regimes independent of any other legislation. There is no explicit limit to the purposes for which these regimes can be developed, outside of the legislative and executive powers of the Commonwealth.
61. Item 7 of the Bill would amend section 8 to broaden the range of background checking schemes not just for the purpose of Australia's national security, but also for the purpose of any matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

³¹ "Identity verification information" is defined in item 1 of the Bill as AusCheck scheme personal information consisting of the individual's fingerprints or other biometric data about the individual, but does not include photograph of the individual.

³² *AusCheck Act 2007* (Cth) s8.

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62. In other words, the 2009 Bill effectively seeks to re-introduce the power to add to the AusCheck scheme by way of regulation for any purpose related to the legislative or executive powers of the Commonwealth.
63. While expressed in different terms from the 2006 Bill, this provision appears to have the same broad effect. As result, the 2009 Bill raises the same concerns that were ventilated before the Senate Committee during the 2007 Inquiry, and that formed the basis for the Committee's recommendation that then proposed subsection 8(1)(c) be removed from the 2006 Bill.
64. The Law Council wishes to briefly reiterate a number of its key concerns in the context of the 2009 Bill.

Impact on Right to Privacy

65. The AusCheck scheme 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. Given the sensitive nature of background checking, the Law Council is concerned that the 2009 Bill offers little more than a vague authorisation to the Executive to conduct background checks whenever and however the Executive decides it is necessary. There is a risk that the narrow interests of the Executive could predominate over the public interest that includes the interest of persons the subject of the intrusive powers of the Act.
66. The Law Council believes that the 2009 Bill should only enable AusCheck to administer background checking regimes already authorised by Parliament in the context of other legislative schemes, in line with the approach adopted in respect of aviation and maritime security cards.³³ The Law Council is concerned that without such an approach, there is a risk that the privacy rights of individuals will not receive adequate protection.
67. The potential for a broad-based AusCheck regime to impact adversely on the privacy rights of individuals was recognised in the Privacy Impact Assessment (PIA) of the 2006 Bill. The PIA recommended that any expansion into new checking functions, or changes to the scope of the MSIC and ASIC schemes, should require further Parliamentary debate and approval.³⁴ It was noted that delegation to subordinate legislation does not afford the same level of public scrutiny or Government transparency. Limiting AusCheck's purposes, functions and scope of data collection was said to be critical to ensuring public trust in the scheme.

Lack of Demonstrated Necessity

68. The 2009 Bill seeks to introduce amendments that were described as unduly broad and unnecessary by the Senate Committee two years ago and were subsequently

³³ 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.

³⁴ Salinger & Co, *A Privacy Impact Assessment for AusCheck – a unit of the Australian Government Attorney-General's Department* (12 March 2007) p. 75-76.

removed from the AusCheck Act. Despite this, little justification has been provided by the Government as to why such a significant expansion of the AusCheck scheme is now warranted.

69. The only specific example of the type of background check that could be established under the 2009 Bill provided in the Explanatory Memorandum relates to the Council of Australian Government's Review of Hazardous Materials. This review identified access to security sensitive biological material as an area where activities need to be regulated to address national security risks.³⁵ The Law Council notes that there currently exists Commonwealth, State and Territory legislation implementing this review which could potentially provide a legislative basis for the establishment of a background checking regime.³⁶ This suggests that a hazardous materials background checking scheme could be established by primary legislation, rather than regulation, as was the approach taken in respect of the existing aviation and maritime security card regimes.
70. No explanation is provided in the Explanatory Memorandum as to why it is necessary to include an open-ended power to expand the AusCheck regime by way of regulation in the area of national security, let alone expanding the AusCheck regime to any matter incidental to the execution of any of the legislative or executive powers of the Commonwealth.
71. Given the concern about the 2006 Bill and its broad regulation making power, shared not only by the Law Council and the Office of the Privacy Commissioner, but also by the Senate Committee and the PIA, the Law Council questions why this provision needs to be drafted so broadly.³⁷

Recommendation:

72. The 2009 Bill should not allow for the creation of new background checking regimes which, except for the broad, relatively unfettered regulation making power granted under the Bill, have not received parliamentary authorisation.
73. The Law Council recommends that proposed clause 8(1)(c) of the 2009 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.
74. The Law Council believes that these amendments to the 2009 Bill are required to ensure that:
- (a) Parliament retains greater and therefore appropriate control over when and why Australians might be subjected to background checks; and
 - (b) the AusCheck scheme, which has been established to facilitate the centralised performance of an administrative function, is not utilised to implement intrusive policies which are not otherwise supported by legislative authorisation.

³⁵ Explanatory Memorandum, *AusCheck Amendment Bill 2009*, p. 2.

³⁶ See for example, *National Health Security Act 1997* (Cth) Part 3 'Regulation of Security Sensitive Biological Agents'. For further discussion see Department of Prime Minister and Cabinet Website, "COAG Review of Hazardous Materials" available at http://www.pmc.gov.au/consultation/haz_materials/index.cfm (accessed 2 June 2009).

³⁷ Department of Parliamentary Services, *Bills Digest: AusCheck Amendment Bill 2009*, (18 March 2009) No 116, 2008-09, ISSN 1328-8091 at p. 6. See also Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72, September 2007, pp. 330-332.

Changes to consent

75. Currently paragraph 9(1)(b) of the *AusCheck Act* provides that the AusCheck scheme can undertake a background check of a particular individual on the application of another person provided the individual to whom the background check relates has given his or her consent.
76. Proposed subsection 9(4) of the Bill provides that for the purposes of paragraph 9(1)(b), a person is taken to have given consent if:
- the person has applied for an aviation security identification card, or a maritime security identification card or any other card, licence, permit or authorisation; and
 - before making the application for such a card, licence, permit or authorisation, the individual was advised by the other person, in accordance with the requirements (if any) specified in the regulations, that a background check was a precondition to the issuing of the card, licence, permit or authorisation.
77. The Explanatory Memorandum states that the purpose of the proposed amendment is to:
- recognise and clarify that where an individual has applied for a particular card, licence, permit or authorisation then they are background checked as a result of proceeding with that application. In this situation, the background check is a condition of that application rather than something to which the individual has separately consented.*³⁸
78. The Law Council is concerned that this change weakens the protection currently provided by paragraph 9(1)(b). Instead of requiring a separate, positive act of consent to the particular application for a background check, proposed subsection 9(4) *assumes* that consent has been obtained if the person has applied for an aviation security identification card, or a maritime security identification card or any other card, licence, permit or authorisation, and was advised that a background check was a precondition of obtaining that card.
79. The 2009 Bill clearly contemplates the establishment of background checking regimes for a wide range of purposes. The change of consent proposed in the 2009 Bill could result in an individual making an application for a security card, licence or permit, and then being subject to a background check without fully understanding what he or she has consented to. The Law Council notes that the proposed subsection anticipates certain requirements being specified in the regulations regarding the type of advice that an individual should receive upon making an application for a security card, licence, permit or authorisation. However, without seeing the content of the proposed regulations, it is difficult to assess whether such advice will be sufficient for someone to understand exactly what it is that they are assumed to be consenting to.³⁹

³⁸ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 5.

³⁹ The Law Council notes that AusCheck's Frequently Asked Questions currently provide individuals with some information as to the application process for a security card and the background check that will follow, as do the current *AusCheck Regulations 2007* (Cth). However, these documents do not set out the content of the advice an individual should receive before making an application for a security card, licence, permit or other authorisation that a background check was a precondition to the issuing of that card, licence, permit or authorisation.

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80. Given the intrusive nature of background checking, the Law Council believes that it is important to preserve safeguards within the AusCheck Act designed to protect against third parties initiating background checks without the explicit and informed consent of the person concerned.

Use of biometric data

81. As noted above, one of the purposes of the 2009 Bill is to introduce the use of biometric data to verify personal information in the AusCheck regime. This information is referred to in the Bill as 'identity verification data'.

82. The purpose of including 'identity verification data' in the AusCheck regime is explained as follows:

*In conducting criminal history background checks it is sometimes necessary to confirm the identity of an individual so that police services can distinguish between people with the same or similar name and date of birth. In these circumstances, it may not be possible to complete the background check unless the identity of the individual can be confirmed through the provision of further identification such as fingerprints.*⁴⁰

83. The 2009 Bill seeks to authorise and protect this data by providing additional protections for this type of identity verification information to that provided to other AusCheck personal information and by limiting the use of such information.⁴¹

*The amendments do this through separating out identity verification information so this information is restricted to use or disclosure for the purpose of subsequent background checks only. The intention of the amendments is that biometric information is only used for background checking purposes – that is, to make sure of the identity of the person – and not for other purposes associated with the AusCheck scheme.*⁴²

84. This is achieved by splitting the current subsection 14(2) into two parts – the amended subsection 14(2) and the new subsection 14(2AA).

85. The amendments also allow AusCheck to provide an online verification service, which extends beyond verification with respect to aviation and maritime security cards, to verify other types of cards or licences that may be issued indicating that a person has undergone a national security background check.⁴³

86. The introduction of a system of identity verification through the use of biometric data is a significant addition to the AusCheck scheme and requires careful consideration by Parliament.

87. The development of biometric technology has been described as 'in its infancy' and its accuracy as a tool for identification and verification of identity remains subject to scientific debate.⁴⁴ Further, the use of biometric data has a range of serious privacy implications. It involves the collection and use of bodily features and may reveal

⁴⁰ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 2.

⁴¹ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 2.

⁴² Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 6.

⁴³ Explanatory Memorandum to the *AusCheck Amendment Bill 2009* p. 3.

⁴⁴ Council of Europe, *Progress Report on the Application of the Principles of Convention 108 to the collection and processing of biometric data* (2005) at [10]

unnecessary but sometimes unavoidable sensitive information, such as information about certain illnesses or physical disabilities.⁴⁵

88. The serious privacy implications of the use of biometric data for verifying identity have been acknowledged by the ALRC. In its recent review on privacy law in Australia, the ALRC observed that the use of biometric technologies raises a number of privacy concerns, including that:⁴⁶
- widespread use of biometric systems will enable extensive monitoring of the activities of individuals, particularly if the same form of biometric information is used to identify individuals in a number of different contexts – that is, if a type of biometric information is used as a unique multi-purpose identifier;
 - biometric technologies, such as facial recognition technologies, may be used to identify individuals without their knowledge or consent;
 - biometric information could reveal sensitive personal information, such as information about a person's held or religious beliefs;
 - the security of biometric systems could be compromised and biometric information stored in a central or local database, or as an object in the possession of an individual, could be acquired by those wishing to use it for some kind of gain;
 - the accuracy and reliability of many biometric systems is still unknown, causing some to express concern about the potentially serious consequences for an individual who is falsely accepted or rejected by a biometric system.
89. In the course of its observations on the privacy implications of biometric data, the ALRC quoted the work of the Council of Europe.
90. The Council of Europe has recognised the significant privacy implications of the use of biometric material for identification or verification purposes and has developed a set of principles outlining how such material can be collected, used, stored and disclosed in compliance with other European law, including the European Convention on Human Rights.⁴⁷
91. In a progress report on the application of the principles in the Convention, the Council of Europe recommended that when considering whether to adopt a system of identification or verification of identity based on biometric data, the body establishing such a system should:

*... balance the advantages of biometrics against the possible drawbacks. The balancing should take place before a choice is made. Simple convenience is insufficient justification for choosing biometrics. The purpose for which this instrument is called upon should justify its use. The use of biometric data should not be disproportionate to that purpose, taking into account all the relevant interests and values at stake.*⁴⁸

⁴⁵ Council of Europe, *Progress Report on the Application of the Principles of Convention 108 to the collection and processing of biometric data* (2005) at [10]

⁴⁶ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72, September 2007, pp. 408- 409.

⁴⁷ Council of Europe, *Convention 108 to the collection and processing of biometric data* (2005).

⁴⁸ Council of Europe, *Progress Report on the Application of the Principles of Convention 108 to the collection and processing of biometric data* (2005) at [27]

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92. The Council of Europe further recommended that the following considerations be taken into account before adopting a system of verification or identification based on biometric data:⁴⁹
- The biometric data and any associated data generated by the system must be processed for specific, explicit and legitimate purposes.
 - The data should be adequate, relevant and not excessive in relation to these purposes. A technical system using biometric data should be configured to exclude the possibility of the collection of more biometric or associated data than is necessary for the purposes of the processing.
 - In choosing the system architecture, the advantages and disadvantages for the data subject's private life should be balanced against the envisaged purposes. A reasoned choice should be made between storage solely on an individual storage medium, a decentralised database or a central database, bearing in mind the aspects relating to data security.
 - The architecture of a biometric system should not be disproportionate in relation to the purpose of the processing. For example, if identification is possible through non-biometric means, such as through the use of identification documents, this method should be considered before introducing a biometric based system.
 - The data subject should be informed about the purposes of the system and the personal data that will be processed and the persons or the categories of persons to whom they will be disclosed.
 - The data subject should have a right of access, rectification, blocking and erasure of the data relating to him or her. These rights should extend to the biometric data attached to his or her identity, possibly associated data (such as date and place of use of the system) and data relating to whom these matters have been communicated.
93. The Law Council recognises that the 2009 Bill attempts to limit the collection, use and disclosure of identity verification information to those purposes directly necessary for verifying the identity of an individual in respect of whom a background check is being or has been conducted under the AusCheck scheme, or for the purpose of verifying the identity of an individual if a subsequent background check is being conducted.⁵⁰ The 2009 Bill also seeks to exclude identity verification information from the provisions relating to the collection, use and disclosure of other AusCheck scheme personal information.
94. These provisions provide an important measure of protection for biometric identity verification information, however the Law Council queries whether they provide sufficient protection, given the highly personal nature of the biometric material and the grave consequences that could flow from its misuse or mishandling.
95. These concerns are heightened by the fact that the 2009 Bill would allow background checks to be conducted under the AusCheck scheme for a broad range of purposes prescribed by regulation, without the details of these purposes being enshrined in primary legislation. Further, the AusCheck Act currently fails to provide

⁴⁹ Council of Europe, *Progress Report on the Application of the Principles of Convention 108 to the collection and processing of biometric data* (2005) at [107]

⁵⁰ *AusCheck Amendment Bill 2009* Item 13, Time 17.

robust review or reporting requirements or other mechanisms to ensure the purposes for which background checks are being conducted fall within the ambit of the AusCheck Act.

96. The 2009 Bill also does not contain any specific provisions relating to the destruction or storage of identity verification information, or the individual's right to challenge the accuracy of such information. The Law Council recognises that storage and security of personal information and a person's right to access personal information are covered in the Information Privacy Principles under the *Privacy Act 1988*, which apply to the AusCheck scheme. The AusCheck Privacy Policy also deals with destruction and storage of personal information. However, in light of the significance of the introduction of an identity verification scheme based on biometric data,⁵¹ the Law Council believes that consideration should be given to including a specific provision in the Act that makes it clear that the Information Privacy Principles apply.
97. Given the level of scientific uncertainty surrounding the use of biometric data and the serious privacy implications the collection, use and disclosure of such data poses, the Law Council queries whether, in the absence of compelling evidence demonstrating the ineffectiveness of the current system, it is necessary to introduce such an identity verification system into the AusCheck regime. The Explanatory Memorandum does not provide any evidence of problems encountered with current methods of verification of personal information, such as through documentary or electronic verification, other than pointing to difficulties associated with criminal history checks on persons with the same name and birthdate. In these cases, it may be possible to verify identity by AusCheck examining other personal information such as the address of the individual at the time that any convictions occurred. Such an approach appears to be employed by the Australian Security and Intelligence Organisation when it undertakes security assessments.

Recommendation

98. The Law Council does not claim any expertise in the area of biometric data and anticipates that there is a range of individuals and organisations with appropriate expertise who are better placed to assist the Committee on this issue. However, the Law Council recommends that before a system of identity verification based on the use of biometric data is introduced, Parliament should be satisfied that such a system is necessary and effective to overcome existing difficulties in identity verification. It should provide adequate protections against the potential for grave intrusions into personal privacy. The principles enunciated by the Council of Europe and referred to by the ALRC provide a useful and appropriate framework for evaluating the system proposed by the 2009 Bill.

⁵¹ The use of biometric identity verification data raises a number of specific storage and handling concerns. For example, in light of the well known international cooperation undertaken by intelligence agencies around the world, issues relating to satisfactory storage of data offshore are a particular concern.

Summary of Recommendations:

99. The Law Council recommends that:

- (a) Clause 8(1)(c) of the 2009 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.
- (b) Before a system of identity verification based on the use of biometric data is introduced, Parliament should be satisfied that such a system is necessary and effective to overcome existing difficulties in identity verification. It should provide adequate protection against the potential for grave intrusions into personal privacy. The principles enunciated by the Council of Europe and referred to by the ALRC may provide a useful and appropriate framework for evaluating the system proposed by the 2009 Bill.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.