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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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Dear Committee Secretary

Inquiry into the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into the proposed *Crimes Legislation Amendment (Police Powers at Airports) Bill 2018* ('the Bill').

1. Summary

- 1.1 ALHR is concerned that the proposed amendments are too broad and have the potential to breach Australians' human rights to privacy, to be treated with dignity, to be presumed innocent, to be treated without discrimination and to be policed in accordance with the rule of law.
- 1.2 It appears that the proposed amendments are not a practical response to the type of police concerns cited, and indeed could have a counterproductive effect.

2. ALHR's Concerns

- 2.1 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.

- 2.2 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014¹ as to the nature of Australia’s human, civil and political rights obligations, and agree that the inclusion of human rights ‘safeguards’ in Commonwealth legislation is directly relevant to Australia’s compliance with those obligations.
- 2.3 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR.
- 2.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 2.5 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.
- 2.6 Legislation should represent an **appropriate and proportionate response** to the problems and harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.²

3. What the Bill would permit

- 3.1 Police and Australian Border Force (ABF) officers are already taking measures at Australian airports which seriously invade the privacy of apparently innocent travellers, as reported in *The Guardian* in the context of the search of Nathan Hague’s phone and computer in August this year.³ In the context of that search, a Department of Home Affairs spokeswoman was quoted as saying that Border Force officers “routinely copied data from travellers at airports if they suspected they were engaging in suspicious activity.”⁴
- 3.2 *The Crimes Act* already allows constables to request suspects at airports to identify themselves. The proposed amendments give this ability also to protective service officers, which is not in itself objectionable. However the amendments greatly expand the reasons for which identification can be requested. The amendments add to the existing grounds under section 3UM (to be renumbered as 3UN) of ‘reasonably suspecting that the person has committed, is committing or intends to commit an offence’ punishable by imprisonment for 12 months or more the alternate grounds of considering ‘on reasonable grounds that it is necessary to give the direction [that the person identify themselves] to safeguard aviation security.’
- 3.3 ‘Aviation security’ is defined very widely in section 3UL as including ‘the good order and safe operation’ of the airport, its premises, and flights to and from the airport. It is submitted that

¹ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>.

² See generally Law Council of Australia, “*Anti-Terrorism Reform Project*” October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> .

³ Elise Thomas, “Sydney airport seizure of phone and laptop ‘alarming’ say privacy groups”, *The Guardian* online, 25 August 2018, <https://www.theguardian.com/world/2018/aug/25/sydney-airport-seizure-of-phone-and-laptop-alarming-say-privacy-groups>

⁴ Stephen Johnson, “The police state has arrived: British man claims Australian customs agents bugged his phone after taking his mobile and laptop into a private room”, *Daily Mail* online, 17 August 2018, <https://www.dailymail.co.uk/news/article-6070001/British-man-Nathan-Hague-claims-Australian-customs-Border-Force-bugged-Android-phone.html>

‘good order’ is an insufficient basis for granting powers to police which infringe both traditional common law rights and freedoms and human rights.

- 3.4 Additional police powers granted under the Bill relate to the ability to order a person at an airport to stop what they are doing or to do anything else the constable or officer considers on reasonable grounds to be necessary (section 3UQ) such as not taking a specified flight or not taking any flight for a specified period (of up to 24 hours) and to leave the airport and not re-enter any airport for a specified period (of up to 24 hours) (known as ‘move on’ directions) (Section 3UO(3)). The justification for such orders again rests either on reasonable suspicion of a serious offence, or the broader ‘aviation security’ basis.

4. Will the Bill discourage ‘flying while brown?’

4.1 *The proposed amendments breach our common law rights and freedoms and our human rights*

Under Australia’s common law legal system, police are not meant to stop people and ask for identification or search them unless the police believe there to be some wrongdoing. This is a hard-won protection, developed over hundreds of years in the interplay between judicial decisions and parliamentary drafting.

While it may be normal in Europe to show one’s identity papers at any time for any reason or no reason, there are two differences between the Australian and the European experiences.

The first distinction is that Australians have long resisted the concept of a compulsory identity card on the basis that they do not believe that it is right for them to have to prove their identities on request when they have not been involved in any wrongdoing. In this Australians demonstrate their support of anonymity as a common law right and freedom and as an aspect of the human right to privacy. Most Australians are likely to agree with Professor Sarre that to be asked by police to produce identification documents (especially for no apparent reason) “is a practice more aligned with authoritarian regimes than with parliamentary democracies”.⁵

The second difference is that most European countries have constitutionally-entrenched human rights protections. Police requests for identity must be carried out so as to protect your human rights to privacy, to be treated with dignity, and to be treated in accordance with the rule of law. Australians have no such underlying protection.

4.2 *The proposed amendments are likely to encourage racial profiling*

The Explanatory Memorandum justifies the expansion of the grounds upon which persons can be asked for identification by reference to the desirability of that power in the context of Behavioural Assessment and Security Questioning (BASQ).⁶ While BASQ can be of great assistance when used by experts, there is evidence that it can often be abused, whether intentionally or not, to target minorities and reinforce stereotyping.⁷ The American Civil Liberties Union (ACLU) has recorded such results from similar US legislation. In its words (emphasis added):

Using expanded authorities that permit investigations **without actual evidence of wrongdoing**, the FBI has also targeted minority communities for interviews based on race, ethnicity, national origin, and religion. It has used informants to conduct surveillance in community centers, mosques, and

⁵ Rick Sarre, “Why random identification checks at airports are a bad idea,” *The Conversation*, 22 May 2018, <<https://theconversation.com/why-random-identification-checks-at-airports-are-a-bad-idea-96784> >

⁶ Par 41, page 9.

⁷ Hina Shamsi, Director, ACLU National Security Project & Laura W. Murphy, Director, ACLU Washington Legislative Office, “The Perversity of Profiling”, 12 April 2014, *ACLU website*, <<https://www.aclu.org/blog/national-security/discriminatory-profiling/perversity-profiling>>

other public gathering places and against people exercising their First Amendment right to worship or to engage in political advocacy. And among America's minority communities, "flying while brown" soon joined "driving while black" as a truism of government-sanctioned discrimination and stigma. It's hard to overstate the damage done to the FBI's relationship with minorities, particularly American Muslims.⁸

It is also argued that the apparent successes in BASQ (when used in airports) in practice relate to non-terrorist related offences that people who happen to be in the airport may have committed such as parole violation, drug possession, illegal immigration and the like.⁹

4.3 *The proposed amendments are likely to reduce trust in police*

Professor Sarre argues that the proposed amendments are likely to lead to loss of trust in police, thus in practice assisting rather than countering terrorism for two related reasons: because loss of trust in the police leads to people being less likely to obey the law and because it results in less information-sharing with police.¹⁰ In his view, "(r)andom stopping, questioning and demanding identification carries with it the risk of racial and social profiling, which brings with it public disquiet if not anger.... If that type of profiling occurs over and over, police quickly lose their 'legitimacy.' If [the community providing information to police] loses confidence in the police, then the well-spring of potentially significant information quickly dries up."¹¹

4.4 *The proposed amendments are likely to have a flow-on effect at State and Territory level*

In the words of the ACLU, noting extensive racial profiling carried out by the New York Police Department following its use by the FBI, "when federal law enforcement leads in discriminatory profiling, state and local law enforcement will follow."¹²

4.5 *The proposed amendments only make sense if they are to be used in a discriminatory way*

As Professor Sarre notes,¹³ it is difficult to imagine what the 'move on' directions (to not take flights and to stay out of airports) would be used for in practice. If police had real concerns about a person in an airport being likely to endanger anyone's safety, surely they would arrest them under existing powers?

There are already clear legislative powers to prevent suspicious persons from boarding planes and indeed everyone is familiar with the ultimate practical power of airlines to simply state that they have overbooked and that certain people will not be able to take a specific flight.

It is not clear what benefit to public safety there would be from police exercising the proposed 'move on' powers - while failing to arrest a person about whom they apparently harbour reasonable suspicions. On the other hand, the potential for severe inconvenience (and no doubt loss of prepaid air fares) to anyone who might be the subject of such police directions is clear. It is hard to envisage how the 'move on' powers could be used other than in a discriminatory manner.

⁸ Ibid.

⁹ Bart Elias, "Risk-Based Approaches to Airline Passenger Screening", *Congressional Research Service*, 31 March 2014, p 12, [Homeland Security Digital Library, <https://www.hsdl.org/?view&did=752251>](https://www.hsdl.org/?view&did=752251)

¹⁰ Sarre, op cit and see also Kurt Iveson, "To create safer cities for everyone, we need to avoid security that threatens", 1 May 2018, *The Conversation*, < <https://theconversation.com/to-create-safer-cities-for-everyone-we-need-to-avoid-security-that-threatens-93421>>

¹¹ Sarre, op cit.

¹² ACLU, op cit.

¹³ Sarre, op cit.

4.6 *The proposed amendments reinforce an existing inconsistency in the legislation*

It is reasonable to provide that a constable or officer not in uniform must show evidence that they are who they say they are and provide their personal information on request. However it is unreasonable not to apply this requirement also to a constable or officer who is in uniform. While there may be other legislation that requires a constable or officer in uniform to give their name, rank etc as required in section 3UR(3) (some of which information might also be apparent from name tags etc), it is recommended that this point also be clarified in this part of the *Crimes Act*, to avoid any implication to the contrary. We have suggested some specific wording in the following section, which would involve only minor changes to the Bill.

5. Recommendations

We make the following recommendations which in our view will assist in the Bill being a more proportionate response to the concerns expressed by police, while maximising citizens' human rights:

- (1) delete the words 'good order and' from the definition of 'aviation security' in Section 3UL. Good order of itself is an insufficient justification for the proposed breach of fundamental common law freedoms and rights.
- (2) Delete proposed sections 3UO, 3UP and 3UQ.
- (3) Amend section 3UR(2) to read as follows:

3UR Constables' and protective service officers' duties at airports

Scope of section

- (1) A constable or protective service officer must comply with this section before giving a person a direction under:
 - (a) section 3UN (identity information at airports); or
 - (b) section 3UO (move-on directions at airports).

Evidence of constable's status and identity, etc.

- (2) The constable or officer must:
 - ~~(a)~~—if not in uniform:
 - ~~(i)~~—show the person evidence that the constable is a constable, or that the officer is an officer; ~~and~~
 - ~~(ii)~~—if the person requests—comply with subsection ~~(3)~~; and
 - (b) in any case—inform the person that it may be an offence not to comply with the direction, or to give the constable or officer a false or misleading document, or false or misleading information, in response to the direction.
- (3) ~~If~~ Whether or not the constable or officer is ~~not~~ in uniform, the constable or officer must give the person any of the following information if requested by the person:
 - (a) the constable's or officer's name;
 - (b) the address of the constable's or officer's place of duty;
 - (c) the constable's or officer's identification number (if any);
 - (d) if the constable or officer has no identification number—the constable's or officer's rank.

6. Conclusion

- 6.1 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights. The drafting of this Bill exceeds its stated aims and has the

potential to be used in a discriminatory manner which could, contrary to the intention of the Bill, undermine trust in the Australian police.

- 6.2 Given that Australians are alone amongst Western democracies in not having a federal Human Rights Act to expressly legally protect their rights, the aspects of the proposed Bill referred to above are all the more troubling.
- 6.3 ALHR is happy to appear before the Committee or to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully

Kerry Weste
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice to be a comprehensive review of all developments in the law and practice or to cover all aspects of the matters referred to. Readers should obtain their own legal advice before applying any information provided in this document to specific issues or situations.