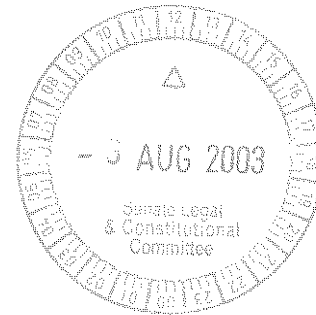


Criminal Justice Division

03/6421

4 August 2003

The Secretariat
Senate Legal and Constitutional Committee
Room S1.61
Parliament House
Canberra ACT 2600
AUSTRALIA



Dear Senator Payne

Australian Protective Service Amendment Bill 2003

On 23 July 2003 representatives of the Department and the Australian Federal Police (the AFP) attended a Senate Committee hearing in relation to the Australian Protective Service Amendment Bill 2003 (APS Bill). During the hearing, the Department and the AFP agreed to respond to a number of questions in relation to the Bill. In this letter, the Department addresses the Committee's queries about clause 18B and each of the issues raised in the Community and Public Sector Union (CPSU) submission. We understand that the remaining issues, which deal with operational aspects of the Bill, will be addressed by the AFP.

Response to Committee Concerns

Clause 18B – Stop and Search Power

The Committee noted there is no requirement for a protective security officer to advise a person of their lawful authority to exercise the power under clause 18B to stop and search a person, and there is no offence for failing to cooperate with a protective security officer exercising that power. In contrast, clause 18A requires a protective security officer to advise a person of the authority to exercise the power and includes an offence for failure to comply, punishable by a pecuniary penalty of 20 penalty units.

We do not consider it is necessary to include an offence for failure to comply with clause 18B, as the general Commonwealth offence for obstruction of a Commonwealth public official (in section 149.1 of the *Criminal Code Act 1995*) would cover situations where the person sought to prevent the search, either actively or by failing to cooperate. The penalty for that offence is imprisonment for two years.

There is no requirement in clause 18B for a protective security officer exercising the search power to advise a person of the APS officer's authority to exercise the power. However, there are legal and practical reasons for this. For a prosecution under section 149.1 of the *Criminal Code* for

failing to cooperate, it would be necessary to prove the person was aware of the APS officer's authority to exercise the power and that the person knew he or she was required to cooperate. Alternatively, it would be sufficient to show the person did not give the APS officer the opportunity to convey this information because, for example, the person decamped the area.

A failure to cooperate with a request for name and address information is considered less serious than hindering or obstructing a lawful search. In addition, there is no general offence provision in the *Criminal Code* for failing to provide name and address details when requested by a Commonwealth official. Therefore, clause 18A includes an offence with an appropriate penalty, which is comparable to penalties for similar offences in other Commonwealth legislation.

Response to CPSU Submission

The CPSU submission makes 11 "recommendations". We address each of those recommendations using the subject headings from the CPSU submission to the Committee.

Time Frame (Clause 18A(1)(a))

The CPSU expresses concern that the inclusion of the word "just" in paragraph 18A(1)(a) unreasonably imposes a time constraint on the exercise of the power. The CPSU suggests the inclusion of "just" means the delay of ten minutes between the APS officer forming the relevant suspicion and being in a position to exercise the power would render the APS officer ineligible to exercise the power. The CPSU recommends amending the provisions so the power can be exercised where the APS officer suspects the person "might have committed" rather than "might have just committed" an offence.

We do not consider the word "just" limits the capacity of the APS officer to exercise the power to the extent suggested. However, we consider the inclusion of "just" is necessary to ensure the power is not exercised inappropriately (for example, in relation to a person who might have committed an offence some days or even years previously). Removal of the word "just" could result in protective security officers becoming involved in investigations, rather than protection. The provision has been drafted to ensure the APS officer can exercise the power within a reasonable period of forming the relevant suspicion in order to act in a preventative manner, consistent with the preventative objects of the provision and the functions of the APS. What will constitute a reasonable time will depend on the circumstances of the particular situation.

Search of vessels (Clause 18B)

The CPSU indicates that the APS has frequently been required to respond to reports of suspicious activity from persons occupying vessels. Accordingly, the CPSU has recommended the power to search vehicles in subparagraph 18B(1)(a)(iii) should be expanded to include the power to search a vehicle "or vessel".

We believe clause 18B already covers the search of a vessel. In the context of a search under clause 18B, a vessel would be either a thing under the person's immediate control (subparagraph 18B(1)(a)(i)) or a thing a person is occupying (subparagraph 18B(1)(a)(ii)).

Premises (Clause 18B(1)(a)(iv))

The CPSU suggests there is a need to insert a detailed definition for the word “premises”. In particular, they recommend premises should be defined to mean land, a building or structure, a road-way, and a carpark.

The suggested definition is not consistent with the generally understood meaning of premises. For instance, in the context of the issue and conduct of search warrants by police, section 3C of the *Crimes Act 1914* (Cth) defines premises to include “a place and a conveyance”.

The search power in subparagraph 18B(1)(a)(iv) would not operate to prevent a protective security officer from inspecting or searching an item in a public place. For example, if a protective security officer observed an item in a roadway or other public place adjacent to, or in the vicinity of a place where he or she was performing protective services, the APS officer would be entitled to examine that item, just like any other member of the public could. No statutory authority would be necessary for such an action.

Immediate Control (Clause 18B(2)(b)(ii))

The CPSU queries whether “immediate control” in subparagraph 18B(2)(b)(ii) has the same meaning as “possession”, and whether it is necessary to establish that a person is carrying or handling an item for that item to be under the person’s immediate control. In addition, the CPSU query whether an item left unattended would be under a person’s immediate control and therefore subject to search by a protective security officer.

The expression “immediate control” is used in other legislative provisions authorising protective security officers to conduct personal searches (for example, section 252 of the *Migration Act 1958*). “Immediate control” includes property that is either on the individual’s person or nearby at the time of the search. Therefore, it would not be necessary to show that a thing was being carried or handled for that thing to be under a person’s immediate control. An item under a person’s immediate control would include, for example, an item locked in luggage that has been left in the public area of an airport, but for which the person was carrying the key.

Protective security officers are also authorised to search items left unattended. Subclause 18B(6) of the Bill expressly authorises a protective security officer to search “items brought on to premises” which are left unattended (see subparagraph 18B(1)(a)(iv)).

Vehicle Searches (Clause 18B(2)(b)(iii))

The CPSU raise a number of specific issues with respect to the search of vehicles authorised by subparagraph 18B(2)(b)(iii):

1. the provision does not specifically permit entry to a vehicle for the purposes of search;
2. the provision does not authorise a protective security officer to give directions to facilitate the search;
3. the provision does not expressly authorise the search of compartments within the vehicle;
4. the provision does not expressly authorise a protective security officer to search or otherwise deal with abandoned vehicles;

5. the provision does not define “vehicle” and does not expressly refer to a motor carriage or motor cycle, or a trailer attached to a vehicle..

We consider the provision is adequate in its current form and provide the following brief responses to those concerns.

1. entry for the purposes of a lawful search is implicitly authorised;
2. the general Commonwealth offence for obstruction of a Commonwealth public official (in section 149.1 of the *Criminal Code*) would cover situations where the person sought to prevent the search, either actively or by failing to cooperate (see our comments above under Clause 18B – Stop and Search Power);
3. compartments in a vehicles are part of the vehicle being searched;
4. vehicle is interpreted broadly to include motor cycles, and other means of conveyance (other than conveyances used on a railway or tramway). In any case, a trailer will be a “thing” that a protective security officer has authority to search under either subparagraph 18B(1)(a)(i) or (iv);
5. an abandoned vehicle will be a “thing” that has been brought onto premises that a protective security officer has authority to search under subparagraph 18B(1)(a)(iv).

Ordinary Searches (Clause 18B(8)(b))

The CPSU recommends the definition of “ordinary search” in paragraph 18B(8)(b) be amended to permit Bomb Appraisal and Explosive Detection K-9 examination.

The definitions of ordinary search and frisk search have been taken directly from the *Crimes Act 1914*, which is the benchmark for such matters. We consider the definition is appropriate.

In any case, the definitions provided for ordinary and frisk searches relate to searches of persons. In contrast, the types of examination the CPSU seeks to have incorporated into the ordinary search definition are generally not relevant to searches of persons, but examinations of things and vehicles.

Degree of Certainty (Clause 18B(1)(b))

The CPSU is concerned that the word “likely” in paragraph 18B(1)(b) implies a particular action or event is destined to occur or there is certainty it will occur. They recommend the insertion of the words “or may” in the provision.

We do not believe the word “likely” connotes the certainty of a particular outcome. A significant amount of thought was given to the appropriate word to be used in this provision during the drafting process. “Likely” was chosen as we consider this word appropriately limits the circumstance in which a protective security officer is authorised to exercise the power. It is not appropriate the power could be exercised in circumstances where it is highly unlikely that an event will occur, but where there is a slim possibility that the event “may” occur. The power is only exercisable if the APS officer has reasonable grounds to suspect that there is a likelihood of the event occurring.

Personal Safety (Clause 18B, new clause)

The CPSU recommends the insertion of a new provision following subparagraph 18B(1)(b)(ii) authorising a protective security officer to conduct a search where a person has a thing which is likely to cause a person to “fear for their safety, or the security of, the premises...”. The CPSU consider this new provision would authorise protective security officers to exercise their stop and search powers under clause 18B in circumstances where, for example, premises have been evacuated or where a person makes a statement to a protective security officer as a “practical joke” that they have a bomb in their bag.

We do not consider an additional provision of the type outlined is necessary. In situations in which an evacuation or similar incident has occurred, the events which resulted in the evacuation would normally be sufficient for a protective security officer to form the relevant suspicion and exercise his or her search powers. Those powers would be exercisable in relation to a number of things at the premises or in the vicinity of those premises. A protective security officer would also be justified in exercising the search power in circumstances where a person makes a statement to the effect that they have a bomb in their bag. There would need to be more for the officer to conclude it was a practical joke (eg the person is known to him or her as a joker).

Searching and seizure

The CPSU is concerned about the seizure of things located during a lawful clause 18B search which the Bill does not expressly permit protective security officers to seize. They query what actions a protective security officer could take in that situation and whether the location of illicit drugs or stolen items during a search would render that search unlawful. They also query whether a protective security officer in such circumstances would be required to make a citizens arrest of the person. The CPSU recommends including an explanatory note or enabling provision in the Bill in relation to these matters.

The new powers are not designed to create a new police force. Consistent with the functions of the APS, the seizure power in clause 18C is preventative – not investigative. In the event that items such as illicit drugs are located and the arrest power under section 13 of the APS Act is not available, the APS officer can contact Police and report the matter. If the APS officer considers the matter is serious and that it necessary to act immediately, the APS officer can exercise the citizens arrest power and hand the arrested person and the seized items into the custody of the Police at that time.

In response to the CPSU’s suggestion that the Bill include an explanatory note or enabling provision, we draw the CPSU’s attention to the following extract from the Explanatory Memorandum to the Bill, which clearly expresses the limits on the seizure power in clause 18C:

... the protective service officer can only seize a thing under this subsection (18C(1)) if that thing is likely to cause, or is likely to be used by the person or another person to cause, damage or harm in circumstances that would be likely to involve the commission of an offence under section 13.

Proposed subsection 18C(2) provides a protective service officer with the power to also seize any other weapon or other thing found during the course of a search where the protective service officer has reasonable grounds to suspect that the weapon or thing is likely to be used to cause death or serious harm to a person ... This will enable the protective service officer to act immediately to prevent possible threats to relevant persons.

After stop and search?

The CPSU recommends protective security officers should be empowered to detain persons for the purpose of handing those persons over to the Police in circumstances where the APS officer "has reasonable suspicion of the person's motives".

We do not consider a power to detain persons is necessary or appropriate in this Bill. APS Officers have existing arrest powers for offences relevant to their protective service functions. A power to detain persons on a mere suspicion of that person's motives is well outside the scope of the protective functions of the APS. Such a power would also constitute an encroachment on individual rights to freedom and liberty.

Certification, Training and Remuneration (new clause required)

The CPSU expresses concern that the Bill does not place onus on the AFP Commissioner to ensure protective security officers are trained, and they recommend the inclusion of a provision which effectively prevents protective security officers from exercising the powers in the Bill unless they have been trained. The CPSU also recommends that the Bill should authorise the AFP Commissioner to "provide additional remuneration to any officer who has been certified as suitable to exercise the enhanced powers contained within the Bill".

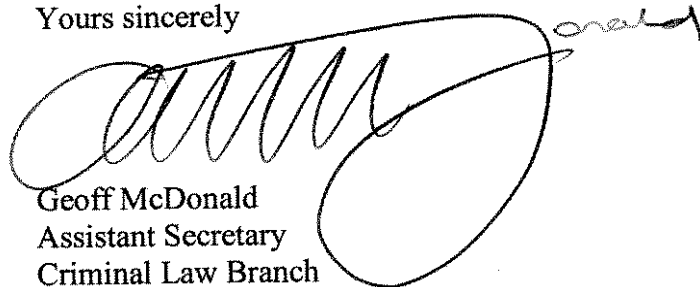
APS Officers currently receive job-specific training relating to their local work environment and ongoing refresher training and testing to ensure they are familiar with changes to legislation and are competent in all aspects of their work. The Bill proposes new powers which are less coercive than existing powers. Following the conferral of the new powers, training programs will be adapted to ensure protective security officers understand and can exercise those powers effectively. This will involve training protective security officers about the circumstances in which they can exercise the powers.

We consider issues about remuneration are outside the scope of the Bill.

General

We hope these comments have been of assistance to the Committee. If you have any further queries about the matters outlined above, or about any other issue, please do not hesitate to contact myself or Karen Bishop on 02 6250 5604.

Yours sincerely



Geoff McDonald
Assistant Secretary
Criminal Law Branch

Telephone: 02 6250 6395
Facsimile: 02 6250 5918