

2011

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

SECURITY INDUSTRY AMENDMENT BILL 2011

EXPLANATORY STATEMENT

**Circulated by authority of the
Attorney-General
Mr Simon Corbell MLA**

Security Industry Amendment Bill 2011

Overview of bill

The Security Amendment Bill amends the *Security Industry Act 2003* (the Act) to implement the remaining requirements of phase 1 of the COAG agreed private security industry reforms. These reforms seek to improve the probity, competence and skills of security personnel and the mobility of security industry licences across jurisdictions.

The reforms included in this bill relate to:

- use of criminal intelligence in licensing decisions;
- mandatory fingerprinting;
- the inclusion of unverifiable backgrounds as a consideration by the regulator;
- exclusionary offences;
- suspension and cancellation powers for the Commissioner for Fair Trading.

Human Rights Issues

A number of human rights are engaged through these reforms, including the right to privacy and reputation; right to recognition and equality before the law without discrimination of any kind; and right to a fair trial. These issues are considered in more detail below. Given security licensees are often involved with vulnerable people and employed in positions of trust with the duty of ensuring the security of public places, any limitations on human rights are considered reasonable.

Criminal intelligence

The provisions in clause 4 of the bill authorising the disclosure of criminal intelligence from ACT Policing to the Office of Regulatory Services and the subsequent use of that information in licensing decisions engage the right to privacy and reputation. The provisions authorise the Chief Police Officer to provide the Commissioner for Fair Trading with criminal intelligence only if it is of a particular nature and is relevant to the licensing decision. These provisions will ensure that the Commissioner is able to consider all relevant information to determine a person's suitability as a security licensee. The ACT Civil and Administrative Tribunal will retain the ability to review all information used for a decision to refuse a licence, providing a safeguard against use of irrelevant information in decision-making. The provision of this information is considered necessary to ensure the probity of individuals working in the security industry. By limiting the scope of information able to be provided and including judicial safeguards, these provisions reflect the least restrictive means of achieving the purpose.

The use of criminal intelligence without disclosure to the applicant raises issues in relation to procedural fairness and may also engage the right to a fair trial as the non-disclosure of this information may disadvantage an applicant in any appeal against an adverse decision. The limitation on releasing information only relates to information about suspected or actual criminal activity that could prejudice an investigation, disclose a confidential source or endanger a person's safety. The narrow definition means that only information within these parameters will be unavailable to the applicant on review. The amendments also set out a clear procedure for review of

this information, giving an independent judicial body the power to decide whether or not the information is criminal intelligence and therefore should remain confidential or, if the information is not withdrawn from the proceedings, whether it can be provided to the applicant.

Mandatory fingerprinting

The provision in clause 5 requiring applicants to provide the Commissioner with police checks that are verified using fingerprints engages the right to privacy and reputation by requiring applicants to provide an image of their fingerprints to ACT Policing. The purpose of this provision is to verify the identity of an applicant. To protect the individual's right to privacy, fingerprints must not be retained by either ORS or ACT Policing and any image held by ACT Policing or ORS must be destroyed with a written notice to the applicant stating that the image has been destroyed.

Request for extra information

Clause 6 inserts a new provision giving the Commissioner the power to request a copy of an applicant's criminal history from a foreign country in circumstances where, in the previous 5 years, the applicant lived outside of Australia for 1 year or more. This provision engages the right to privacy and reputation. This power is required to allow the Commissioner to examine an applicant's suitability to hold a licence. A decision to refuse a licence on the basis that the Commissioner is not satisfied with an applicant's suitability is reviewable by ACAT.

Exclusionary offences

Clause 10 inserts provisions requiring the Commissioner to refuse a licence where the applicant has been convicted or found guilty of certain offences. These provisions may engage the right to recognition and equality before the law without discrimination of any kind, particularly in relation to consideration of spent convictions, as the *Spent Convictions Act 2000* does not apply (except in relation to pardoned or quashed convictions). However, the range of offences covered by clause 10 is limited to offences that are relevant to the suitability of a person to work in the private security industry, such as assault or theft. In determining if an applicant is suitable for a licence, the Commissioner must only consider those offences listed in the Act or other relevant matters. Offences irrelevant to the suitability to hold a security licence must not be considered. As the decision to refuse a licence is a reviewable decision, an independent judicial body will be the final arbiter on relevance of the information used by the Commissioner to inform the licensing decision.

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Outline of Provisions

PART 1 Preliminary

Clause 1 - Name of Act

This clause names the Act as the *Security Industry Amendment Act 2011*.

Clause 2 - Commencement

This clause notes that the Act will commence on the date decided by the Minister and notified in the Legislation Register and provides for 12 months delayed commencement rather than the default 6 months. This is to allow processes to be put into place to operate the new scheme.

Clause 3 - Legislation Amended

This clause sets out the Acts and Regulation amended.

PART 2 Security Industry Act 2003

Clause 4 - New Part 2A

This clause inserts a new part into the *Security Industry Act 2003* authorising the Chief Police Officer to disclose criminal intelligence to the Commissioner for Fair Trading. Nothing in this part requires the Chief Police Officer to disclose this information. The clause also sets out when this information must be kept confidential and the powers of the tribunal and courts to determine whether the information is criminal intelligence and therefore must be kept confidential.

New section 9A defines criminal intelligence as information relating to actual or suspected criminal activity that would prejudice a criminal investigation, expose a confidential source of information or endanger a person's safety. If the information would not meet any of the 3 risks, then the information may be disclosed and the confidentiality provisions do not apply.

New section 9B provides that information classified as criminal intelligence can only be disclosed to the licensing authority if the information is relevant to a licensing decision.

New section 9C provides that the Commissioner may not disclose any reason for a decision involving criminal intelligence other than a reason specified in the section. For example, if the Commissioner refuses a licence based on criminal intelligence, the only reason the Commissioner can give is that the granting of the licence would not be in the public interest.

New section 9D requires that, if an applicant is refused a licence using criminal intelligence and the applicant seeks a review of the licensing decision or the Commissioner seeks occupational discipline based on criminal intelligence, the Commissioner or Chief Police Officer must apply to ACAT for a determination about whether the information is criminal intelligence.

New section 9E allows the Commissioner or Chief Police Officer to withdraw the sensitive information from the proceedings if it is decided that it does not fit the definition of criminal intelligence. This will mean the licensing decision will be reviewed on the other grounds for the decision and the criminal intelligence can no longer be a basis for the decision.

New sections 9F and 9G set out when and how the information must remain confidential.

New section 9H allows the Chief Police Officer to delegate functions under part 2A to a senior police officer.

The inclusion of independent judicial determination of all aspects of the decision and the narrow definition of criminal intelligence minimises the adverse impacts of the use of information about which the applicant is not aware.

Clause 5 - Application for licence
Section 17 (3) (a) and (b)

This clause inserts the requirement that an application must be accompanied by a police certificate that is verified by the provision of fingerprints if one has not already been provided to the Commissioner for Fair Trading and requires the applicant to provide information sufficient for a 100 point check.

Clause 6 - Request for further information
New section 18 (1A)

This clause inserts a new provision that enables the Commissioner for Fair Trading to request a copy of the applicant's criminal history from another country if that person has lived outside Australia 1 year or more in the last 5 years.

Clause 7 - New Section 18 (3)

This clause inserts a new definition to be used in conjunction with the new provision inserted by clause 6.

New provisions inserted by clauses 6 and 7 enable the Commissioner to refuse a licence to any applicant who is ordinarily a resident in Australia but has been absent from Australia for 12 months or more within the previous five years and is unable to satisfy the licensing authority of their probity during that absence.

Clause 8 - Request for fingerprints
Section 19

This clause removes the section giving the power of the Commissioner to require a person to have their fingerprints taken as it is no longer necessary.

Clause 9 - General suitability criteria
Section 21 (1) (a)

This clause inserts a new criterion into the suitability criteria regarding the Commissioner being satisfied as to the applicant's identify and also includes criteria for temporary licences.

Clause 10 - New section 21 (1A) and (1B)

This section inserts a list of offences that prevent a person from holding a licence if there is a conviction recorded against them in the last 10 years or a finding of guilt has been recorded in the last 5 years. Spent convictions will be able to be considered, see clause 34.

Clause 11 - Section 21 (3), new definition of *stated circumstances*

This clause inserts a new definition which puts a minimum penalty level on when convictions are considered for the new suitability criteria set out in new section 21(1B)

**Clause 12 - Review of workplace information criterion
Section 21A (1)**

This clause renumbers section 21A (1).

Clause 13 - Section 23

This clause amends the definition of public interest to reflect these amendments.

**Clause 14 - Temporary licences
Section 26 (1) (b) (ii)**

This clause renumbers section 26 (1) (b).

Clause 15 - Term of licence Section 29

This clause enables the Commissioner to issue licences for up to 3 years. This amendment will minimise the burden of the extra requirements on applicants and the regulator.

Clause 16 - New division 3.7A

This clause inserts a provision which requires the Commissioner to cancel a licence if a licensee is convicted or found guilty of an offence that excludes them from holding a licence. This decision is subject to review by ACAT.

This clause inserts new clause 29A which links the cancellation of a licence to those criteria that would exclude a person from obtaining a licence in the first place. If a person has been convicted of certain offences within the last 10 years or has been found guilty without a conviction being recorded in the last 5 years, they are unable to obtain a licence. If a person commits one of these exclusionary offences, then the Commissioner must cancel the licence.

Under existing section 36A, the Commissioner must notify the licensee that their licence has been cancelled, informing the person of their right of review and requiring that the licence be returned to the Commissioner within 5 working days.

An automatic statutory cancellation was considered for this provision instead of requiring the Commissioner to cancel the licence, however, the positive obligation on the Commissioner to notify the licensee of the cancellation, the obligation to return their licence and their review rights protects the individual from inadvertently committing an offence under the Act by not returning their licence within the prescribed timeframes and ensures that they are fully informed in writing of their rights of review.

This clause also inserts a new section 29B that allows the Commissioner to suspend a licence if the Commissioner applies, or intends to apply, to ACAT for occupational discipline and there is a threat to public safety that means it is warranted to suspend the licence immediately. This suspension lasts for 30 days or until an occupational

discipline order is made, whichever is earlier. The suspension of a licence is also a reviewable decision and, under new section 29B (3) the licensee must be given the notice for the suspension to take effect.

These amendments will enable the Commissioner to be able to respond promptly to any adverse event that comes to his attention through the power to cancel or suspend a licence.

Clause 17 - New section 49A

This clause inserts a new provision that requires the destruction of any image of the fingerprints not given to the applicant.

Clause 18 - New Part 8

This clause inserts new section 80 that clarifies that the requirement for the Commissioner to cancel a licence applies to existing licensee only if the conviction or finding of guilt occurs after the commencement of this section. This means the Commissioner will not have to suddenly cancel a licence for something that was already disclosed and was taken into account in the granting of the licence.

This clause also inserts provisions allowing the Executive to make transitional regulations for these amendments.

Clause 19 - Schedule 1, new items 5A and 5B

This clause inserts a provision that creates the automatic cancellation and immediate suspension as reviewable decisions.

Clause 20 - Dictionary, note 2

This clause inserts the terms foreign country and public servant into note 2 of the dictionary to make it clear that the *Legislation Act 2001* defines these terms.

Clause 21 - Dictionary, new definitions of *criminal intelligence* and *maintain*

This clause inserts the new definitions from the amendments into the dictionary.

Clause 22 - Dictionary, definition of *police certificate* and note

This clause inserts a definition of police certificate.

Clause 23 - Dictionary, definition of *relevant offence*

This clause updates the definition of relevant offence to reflect the other changes in the act.

Clause 24 - Dictionary, definition of *workplace information*

This clause renumbers the definition of workplace information.

PART 3 Security Industry Regulation 2003

**Clause 25 - Exempt people-Act, s9
Section 6 (2) (a)**

This clause renumbers section 6 (2) (a).

Clause 26 - Section 7A heading

This section replaces the heading of section 7A so that it reflects the correct numbering in the Act.

Clause 27 - Section 8 heading

This section replaces the heading of section 8 so that it reflects the correct numbering in the Act.

Clause 28 - Table 8, item 1, column 3

This clause inserts the requirement for a current first aid certificate into the training requirements for this licence.

Clause 29 - Table 8, item 5, column 3

This clause inserts the requirement for a current first aid certificate into the training requirements for this licence.

Clause 30 - Table 8, items 6 to 10, column 3

This clause inserts the requirement for a current first aid certificate into the training requirements for these licences.

Clause 31 - Section 9 heading

This section replaces the heading of section 9 so that it reflects the correct numbering in the Act.

Clause 32 - Section 9A heading

This section replaces the heading of section 9A so that it reflects the correct numbering in the Act.

Clause 33 - Section 9B heading

This section replaces the heading of section 9B so that it reflects the correct numbering in the Act.

PART 4 Spent Convictions Act 2000

Clause 34 - Exclusions

New section 19 (8A)

This clause amends the *Spent Convictions Act 2000* to ensure the Commissioner can consider spent convictions in a licensing decision. The Commissioner cannot consider quashed or pardoned convictions.