

SCREENING AND ‘FRISK SEARCHES’ AS PART OF AIRPORT SECURITY: MATTERS OF CHOICE?

THE NEED FOR ‘CHECKS AND BALANCES’ IN AVIATION SECURITY LEGISLATION

GARY N HEILBRONN*

I INTRODUCTION

Airport security is achieved by controlling access to the secure areas at airports and aerodromes through various policing and pseudo-policing operations ranging from the humble ‘hands-on’ ‘frisk search’,¹ to optical surveillance and portrait recognition systems as well as technologies that can analyse voice patterns to identify suspect emotions. Whether ‘high-tech’ or ‘low-tech’, such processes are fundamentally differing manifestations of police powers to stop, search and detain. However, it is private enterprise in the security industry, which not only develops most of the technologies applied at airports, but also, takes most responsibility for implementing airport security procedures and powers at an operational level. Each day in any major city with an airport, hundreds of people are subjected to these policing powers as they are screened by security personnel at the airport, whereas on the city streets just a few dozen go through similar processes at the hands of police officers. The airport security context is perhaps unusual and potentially very hazardous, but when masses of people are subjected to policing powers in such a context, it is important that the legislative and

* BA LLB (Qld) LLM (Mon) Dip Crim (Melb) Dip Comm L (Mon) PhD (Qld), Aviation Law Consultant, Honorary Associate, Law Faculty, Monash University; Aviation Legislation Consultant, Technical Co-operation Programme, ICAO (Montreal); Consultant, Johnson Stokes & Master, Solicitors and Notaries (Hong Kong).

¹ By the *Aviation Transport Security Act 2004* (Cth) s 9, a ‘frisk search’ has the same meaning as in the *Crimes Act 1914* (Cth), where s 3C defines it as ‘(a) a search of a person conducted by quickly running the hands over the person’s outer garments; and (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by a person.’ Also, a ‘frisk search’ is defined in the *Criminal Code 1995* (Cth) s 101.1(1) in the same manner.

regulatory environment in which this occurs be appropriate and properly adapted to the relevant circumstances. For various reasons, this does not appear to be the case with airport screening and related procedures.

Legal authority and the procedures for the implementation of most airport security measures do not come from enactments dealing with police powers (except as regards the highly specialised Australian Protective Service officers), but are to be found in provisions somewhere in the complex and voluminous matrix of legislation and regulation applying to airports and airlines, aviation security and counter-terrorism.² Both the threat posed by terrorism and the actual counter-measures: including the development, operation and even the effectiveness of existing and emerging technologies and procedures now being applied to airport security, inevitably pose new problems for lawmakers and give rise to a broader question as to the nature and extent of regulation required in this area.³ Though the broader question is an important one, the focus here is on the narrower issue of the implementation of airport security processes. A simple, but telling illustration of the kinds of issues raised in this context, as well as the considerable practical difficulties experienced when imposing physical controls on access to secure areas at airports, is clearly presented by the all too common practice of running a hand-held metal detector around the body or the somewhat more intrusive 'frisk search' and 'clothing removal request' both used as part of the passenger screening process. Even these well-tried and 'low-tech' procedures still raise concerns, partly because of the somewhat impenetrable nature of the applicable legislative scheme and the vagueness of the concepts described in some of the relevant provisions, but also because of the continuing difficulty experienced when trying to balance conflicting rights and powers⁴ in a context where costs (of both success and failure) are significant and benefits are nearly impossible to estimate.⁵

² There are many laws that affect airport security, not the least the range of legislation relating to airports and aerodromes in the connect of civil aviation: *Civil Aviation Act 1988* (Cth); *Civil Aviation Regulations 1988* (Cth); and *Civil Aviation Safety Regulations 1998* (Cth), pts 93, 139, 143, 171, 172; *Crimes (Aviation) Act 1991* (Cth) and *Crimes (Aviation) Regulations 1992* (Cth); airports generally: *Airports Act 1996* (Cth) pt 12 – Protection of Airspace; and *Airports (Protection of Airspace) Regulations 1996* (Cth); and terrorism: *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act 2005* (Cth); and *Anti-Terrorism Act (No.2) 2005* (Cth) which enactments primarily make amendments to the *Criminal Code 1995* (Cth); the *Crimes Act 1914* (Cth); and several other relevant enactments including the most relevant, the *Aviation Transport Security Act 2004* (Cth); the *Aviation Transport Security Regulations 2005* (Cth); and the *Air Navigation Regulations 1947* (Cth) pt 7. The last-mentioned is given less attention here, because, although it complements the other two enactments, it may need revision as it partially duplicates and further complicates the regulatory regime which those enactments set up.

³ Additionally, significant government funds are being invested in airport counter-terrorism. However, there has so far been little focus on the operational efficacy and legal implications of airport and aerodrome security measures. The adequacy of existing combination of aviation and corporate regulatory systems to deal with this rapidly expanding area is the subject of further research by the present author.

⁴ The issue of human rights and counter-terrorism initiatives has been already explored in studies: L Lasry, and K Eastman, 'Memorandum of Advice: Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act 2004 (Cth) Act' (2005) 9 *University of Western Sydney Law Review* 111; A Garwood-Gowers, 'Self-Defence Against Terrorism in the Post-9/11 World' (2004) 4 *Queensland University of Technology Law and Justice Journal* 167; and P Emerton, 'Paving the Way for Conviction Without Evidence – A Disturbing Trend in Australia's Anti-Terrorism Laws' (2004) 4 *Queensland University of Technology Law and Justice Journal* 129.

⁵ While enhanced policing and security controls and their impact on the individual are all too visible and obvious, any assessment of their dissuasive effect on would-be terrorists is almost impossible to make.

It should be noted - although it does not detract from the illustrative and other significance of this particular aspect of airport security operations - that technological advances are beginning to reduce reliance on physical restraint and intrusive searches at certain major airports. Of course, such technologies are expensive and also have their limits, so human intervention will always be needed in some cases. For example, throughout much of 2007, 'backscatter' X-ray machines and millimetre wave technology are being used on an experimental basis at several major United States international airports, to carry out a one minute full-body scan which allows screeners to see through a person's clothes and detect potentially threatening objects by picking up x-rays scattered by materials which may be present under the garments. Edge-detection x-ray machines can clearly see, for example, a vest being worn by a potential suicide bomber or some other hidden object. These machines differ from traditional x-ray machines which pick up signals that pass through or are absorbed by the body.⁶ This is just one of many new and developing technologies that are being applied to airport security,⁷ and that, aside from helping to streamline the security screening process, may impact positively on the present regulatory system by, for example, replacing some of the potentially intrusive, humiliating and controversial⁸ 'clothing removal request' and 'frisk search' powers now regularly exercised by airport screening officers; or indeed, may also impact negatively, in ways not yet understood.⁹

Whether screening at airports involves 'clothing removal requests' and 'frisk searches' or other technological alternatives, or a mix of them all, increased emphasis is being accorded to the passenger and airport personnel screening process in Australia: the Australian Government Review of Airport Security and Policing: 2005 (The Wheeler Review) stated:

[i]n the next few years ... the responsibility of screeners will grow, because they will become an even more important line of defence against those who might cause danger on and to planes. In the same time period, rapid technological change in detection devices will demand extra efforts from screeners if they are to keep up to date.¹⁰

The Review went on to support increased and more vigilant screening, including 'frisk searches' of all aviation staff having access to secure areas at security controlled airports.¹¹ Naturally, it is not just passengers who are subject to security controls, though these controls differ in nature and intensity for different groups of airport users

⁶ D Biello, *The Naked Truth: Is New Passenger Scanner a Terrorist Trap or a Virtual Strip Search?* (2007) Scientific American <<http://www.sciam.com/article.cfm?id=terrorist-trap-or-virtual-strip-search>> at 2 December 2007.

⁷ Others include CCTV surveillance, fingerprint and voice recognition, biometric readers, facial recognition, metal detectors etc.

⁸ While there may be no doubt that the power to perform frisk searches and request clothing removal should exist, even aside from privacy issues, the imposition of such searches seems arbitrary and there is little evidence as to how effective they are in preventing terrorist activities or even avoiding the carriage into sterile areas, of any of a wide range of weapons or potentially dangerous items now prohibited in aviation.

⁹ For example, if the increased use of advanced technology in airport security gives rise to other, different legal issues yet to be explored, or if, for example, it has negative health and safety or other implications for persons subjected to it.

¹⁰ Rt Hon Sir John Wheeler, *The Australian Government Review of Airport Security and Policing* (Wheeler Review) (2005) The Australian Government [77] <<http://www.aspr.gov.au/>> at 2 December 2007.

¹¹ See *ibid* [78].

and, of course, security control exemptions do exist for some airport staff and other persons (see below).

At the same time, it should not be overlooked that there is an important 'safety' as well as 'security' element to the screening of passengers and their baggage, though these two imperatives do overlap. Indeed, aviation safety regulations define a wide range of personal items to be 'prohibited items' (see below) and restrict their carriage through screening points, into secure areas in airports and on board aircraft,¹² for safety reasons and irrespective of security considerations.

Completely apart from the normal search, detention and arrest powers of police and other law enforcement officers such as the Australian Customs Service,¹³ the specific powers of airport screening officers to impose screening procedures (including 'clothing removal requests') and to effect 'frisk searches' are provided for in ss 94-96 of the *Aviation Transport Security Act 2004* (Cth) and the latest amendment to the Act, which commenced on 31 March 2007,¹⁴ purporting to extend and clarify the powers of airport screening officers to conduct a 'frisk search' of a person wishing to pass a screening point.¹⁵ The Act also requires the *Aviation Transport Security Regulations 2005* (Cth) to elaborate on the methods and procedures for screening and to specify the training, qualifications and procedures to be followed by screening officers.¹⁶ Parts 4 and 5 of those regulations do deal with screening and clearing of persons, baggage and cargo in some descriptive detail, though perhaps with inadequate precision, and relevant provisions are discussed below. Because it illustrates the kinds of problems which the present regulatory system is unable to deal with, the emphasis here is on the screening of persons in the ordinary process of airport security. It is this process which (even aside from its uncertain efficacy), can have potentially objectionable social, cultural and psychological effects; and questionable legality, partly because of vagueness and conceptual issues in the legislation, and partly because it is performed by persons other than law enforcement officers, acting without the benefit of clear guidelines.

II SCREENING

All access to aircraft, as well as to designated areas and zones at an airport is to be restricted to persons who have received clearance. The same applies to goods, vehicles and cargo. Where access is restricted in this way, the aircraft, area or zone is said to be 'cleared' and to obtain access clearance generally requires going through a screening process.¹⁷ The *Aviation Transport Security Act 2004* (Cth) ss 41-43, expressly require persons, goods and vehicles to be screened and receive clearance before going or being taken on board an aircraft, and also before entering an 'area' or 'zone' within a security controlled airport (security controlled airports and zones etc are discussed below). Although for persons (and to some extent for goods and vehicles), this process is usually performed by a screening officer exercising his or her functions in accordance

¹² For the latest list, see the Department of Transport and Regional Services (DoTARS) website <<http://www.dotars.gov.au/transport/security/aviation/index.aspx>> at 2 December 2007. Otherwise issues as to the carriage of dangerous goods by air are not within the ambit of this article.

¹³ Indeed, almost all of the case law related to frisk searches involves the Australian Customs Service and the illegal import or export of drugs or other prohibited items.

¹⁴ *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007* (Cth) s 2.

¹⁵ Though greater internal consistency has been achieved, little has been done to increase clarity.

¹⁶ *Aviation Transport Security Act 2004* (Cth) s 94.

¹⁷ *Aviation Transport Security Act 2004* (Cth) s 40.

with ss 94-96 of the Act, regulated air cargo agents – themselves private companies engaged in the freight forwarding business - provide for the screening of cargo (which can include goods and some vehicles). Goods, vehicles and cargo screening are not discussed here as, although from a management perspective, related screening responsibilities are an adjunct to the agents' business activities, resembling the situation of airports and airlines, the screening of goods and cargo does not raise the same kinds of legal and social issues as the security screening of persons.

A *Security Controlled Airports*

Screening is only required at 'security controlled airports'. Most, but not all commercial airports in Australia are 'security controlled airports'. They need to have been so declared by the Secretary by notice published in the Gazette.¹⁸ Of course, potential terrorist action could occur at or originate from an airport which is not in this category. Doubtless, a small plane laden with aviation fuel or explosives, taking off from such an uncontrolled airport could still cause significant damage there or elsewhere. However, the extent of such a risk is unknown.

Security controlled airports have a 'landside area' and an 'airside area'. The latter, established by the notice, is designated and delineated on the map accompanying the notice: the aim being to control access to the operational parts of the airport,¹⁹ which are generally assumed to be more 'at risk' from terrorist and the like activity than non-operational areas, though this may no longer be a correct perception, as a less protected 'landside area' makes an easier target.²⁰ The part of the airport not designated as airside is known as landside,²¹ but there are no substantive criteria for either of these designations in the definitions; only the un-stated assumption that landside areas are less hazardous. Both these designated areas are further subdivided into zones of various types and are subject to slightly varying levels of security and access control.

1 *Secure areas*

At airports, it is 'secure areas' that are most at risk and require screening and other access controls. Such 'secure areas' are created under the legislation. First, airside security zones may be established by the Secretary under the *Aviation Transport Security Act 2004* (Cth) s 30. This is done by written notice to the airport operator. The various types of airside security zones, including airside event zones (though special event zones may be temporary), are prescribed in ss 31, 31A and 31B of the Act.²² The

¹⁸ The declaration is made by the Secretary by notice in the Gazette and includes a map of the airport and specified zones: *Aviation Transport Security Act 2004* (Cth) ss 9 and 28(2). Section 41 declared such airports were notified in Gazette No's S 40, 3 March 2005. Subsequent declarations of amendments have been made eg for Canberra airport: Gazette No's S 39, 16 March 2006 and S 124, 4 July 2006. Of security controlled airports in Australia, there are: one in ACT; 39 in NSW; 21 in NT; 66 in QLD; 10 in SA; 8 in TAS; 10 in VIC; and 29 in WA: see Civil Aviation Safety Authority (CASA) website <<http://www.casa.gov.au/fcl/>> at 2 December 2007 and DoTARS website <<http://www.dotars.gov.au/>> at 2 December 2007. Four of these airports do not have regular public transport (RPT) operations and do not require an Aviation Security Identity Card (ASIC).

¹⁹ *Aviation Transport Security Act 2004* (Cth) s 29(1), (2).

²⁰ Witness the various well publicised 'car bomb' attacks on airport entrances in recent years eg at Edinburgh airport in August 2007.

²¹ *Aviation Transport Security Act 2004* (Cth) s 29(3).

²² By the *Aviation Transport Security Act 2004* (Cth) s 31(1), the regulations may prescribe different types of airside security zones and by the *Aviation Transport Security Regulations 2005* (Cth) reg

zone types are established for different purposes and include zones for controlling the movement of people, vehicles and goods; for preventing interference with aircraft; for ensuring the security of air traffic control facilities; for cargo and baggage handling facilities, for fuel storage; for navigational aids; for fire-fighting and emergency facilities etc as well as for what are known as ‘critical facilities’ and ‘critical structures’, damage to which could put the safe operation of airports or aircraft at risk.²³

Though potentially less hazardous and ‘at-risk’ of terrorist action, landside security zones and landside event zones (and temporary special event zones) may also be established by the Secretary by notice given to the operator of a security controlled airport; and these are, in theory, the same types of zones as those that may be established as airside security zones.²⁴ Other different landside security zones may, under s 33(1) of the Act, be prescribed by the regulations and, in fact, four are listed in reg 3.02 of the *Aviation Security Regulations 2005* (Cth). These prescribed landside security zones are: the sterile area (which is important as it is the post-screening area for passengers); the fuel storage zone; the air traffic control facilities zone; and the navigational aids zone. The sterile area is more susceptible to unauthorised passenger access than other areas, as passengers are rarely in a position to approach fuel storage zones and air traffic control facilities which are more likely to be targeted by ‘bogus’ staff or a commando raid. The distinction is underlined by the nature of and the potential for harm that may result from uncontrolled passenger access to a sterile zone, and, uncontrolled staff access to, for example, a fuel storage area. The difference between these two scenarios, in potential for harm and the manner in which it could be caused, may well indicate that a difference should exist in the nature and extent of screening and other security procedures that need to be applied in each scenario.

At a security controlled airport, all of airside (including airside security zones) and also the landside security zones are referred to as ‘secure areas’ under reg 1.03. Such airside and landside security and event zones are specifically designated as secure areas in order to impose stricter or more specialised kinds of controls, notably access controls, over certain areas on a security controlled airport. The primary kinds of access controls are a requirement for the display of identification cards and physical measures such as security barriers and screening, including ‘frisk searches’. The extent to which stricter or different kinds of access controls are imposed, and whether such controls are, or even should be, proportionate to the potential hazard, is not specified in the regulations, nor are these matters the subject of any stated mechanism for verification or surveillance.²⁵

3.01, ‘the security restricted area’ is prescribed. To complicate matters further, the *Air Navigation Regulations 1947* (Cth) reg 57 also creates the category of ‘security sensitive areas’.

²³ Some of these can be notified as ‘airside event zones’ under the *Aviation Transport Security Act 2004* (Cth) s 31A and s 31B in order for the Secretary to subject those zones to different controls to those generally applicable. *Aviation Transport Security Regulations 2005* (Cth) reg 3.02A prescribes these to be ‘airside special event zones’. Airport operators may apply to the Secretary to establish special event zones under Div. 3A.2 of the *Aviation Transport Security Regulations 2005* (Cth).

²⁴ *Aviation Transport Security Act 2004* (Cth) ss 32-33 and ss 33A-33B.

²⁵ There is in fact increasing emphasis upon auditing and surveillance of security measures, notably the International Civil Aviation Organization (ICAO) has an on-going audit system: Universal Security Audit Programme (USAP) evaluating the implementation of Annex 17 ‘Security’ and Annex 9 ‘Facilitation’: see International Civil Aviation Organization (2007) <<http://www.icao.int/>> at 2 December 2007.

2 *Display of Aviation Security Identity Cards*

Under the legislation, a significant feature of secure areas at security controlled airports is that they are said to be ‘cleared’ (subject to restricted access: see above) and also, with certain exceptions (notably screened passengers), it is an offence for a person to be there unless they display a valid red Aviation Security Identity Card (ASIC).²⁶ Incidentally, ASIC display requirements do not apply to any security controlled airport from which no regular public transport (RPT) traffic operates, though at present there are only four of these in Australia.²⁷ More relevant here, are two important passenger-related exceptions to the ASIC display requirement, and they are: (i) for persons who are in sterile areas (discussed below) in airports that are accessible to passengers or the public generally; and (ii) for passengers who are boarding or disembarking an aircraft by means of an aerobridge or in a secure area and moving reasonably directly between the aircraft and the terminal building.²⁸ It is not expressly stated, though would normally be the situation in practice, that such passengers would have to be under the continuous control of an authorised person or member of airport or airline staff. Another narrow exception to the obligation to display ASICs exists for uniformed members of the Australian Defence Force on duty guarding an aircraft; as well as for uniformed crew members of foreign aircraft and state aircraft; and, for foreign defence forces personnel displaying appropriate identification.²⁹ It is perhaps arguable that all but the first-mentioned category, should also be under the continuous control or supervision of an authorised person or member of airport or airline staff.³⁰

Apart from having to display a valid ASIC within secure areas at security controlled airports, all persons seeking access to restricted and secure areas by passing through a screening point, (except for those specified persons and classes of persons who are exempted), are required to be screened.³¹ It is significant, however, that not all secure areas at airports need to be entered through screening points, and in this way, a person who may represent a risk to aviation security may avoid the screening process (see below at Part B.2 ‘Screening passengers and others: some aberrations’ of this article). So for access to those areas, the possession and display of an ASIC or a Visitor Identification Card (VIC) (as required) is particularly important.

²⁶ In secure areas other than an airside security zone, either a valid red or a valid grey ASIC must be displayed: *Aviation Transport Security Regulations 2005* (Cth) reg 3.03(1). See also *Air Navigation Regulations 1947* (Cth) regs 102-103. For issue and other aspects of ASICs, see *Air Navigation Regulations 1947* (Cth) regs 76-101.

²⁷ See above n 18.

²⁸ *Aviation Transport Security Regulations 2005* (Cth) reg 3.03(5).

²⁹ *Aviation Transport Security Regulations 2005* (Cth) regs 3.05, 3.06. There are a few other minor exceptions: see regs 3.07 and 3.08. Likewise, in places where a valid VIC may be displayed: see reg 3.09. See also *Air Navigation Regulations 1947* (Cth) regs 104-107; reg 104 excludes a police officer from carrying an ASIC.

³⁰ There appear to be no reciprocal or other international obligations requiring this exemption. Note that all operation and safety regulation, and much security regulation in aviation derives from international obligations under the *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) (Chicago Convention) and the Annexes to that convention, notably Annex 17 ‘Security – Safeguarding International Civil Aviation Against Acts of Unlawful Interference’ (8 ed April 2006).

³¹ *Aviation Transport Security Regulations 2005* (Cth) regs 4.09-4.12. Discussed below.

3 *Physical access controls*

All aspects of access to, and use of, secure areas are subject to comprehensive regulatory measures, including physical access controls. The *Aviation Transport Security Act 2004* (Cth) ss 35, 36 and 36A, respectively, authorise the making of regulations, including the creation of offences, for the purposes of safeguarding **the airside area** of a security controlled airport, airside security zones and airside event zones against any unlawful interference with aviation. In particular, the regulations are required to govern access, patrolling, fencing, marking, screening of persons, security checking, maintenance of integrity, access to aircraft, management of person etc. From time to time, relatively benign breaches of physical access controls at major airports have occurred, when, for example, persons have gained access to runways at Sydney Airport by cutting through fences.³²

Almost identical provisions exist as regards regulation of **the landside area** of a security controlled airport, landside security zones and landside event zones, under ss 37, 38 and 38A of the Act.

More specifically, and understandably, given the increased hazards associated with the airside area, the manner of controlling physical access to airside secure areas at an airport is subject to quite detailed regulation,³³ under which the ‘responsible aviation industry participant for the airside area (who may be the airport operator or, in other cases, another entity in aviation, such as an airline: under the *Aviation Security Regulations 2005* (Cth) reg 3.13) must ensure that access is only allowed to:

- authorised persons or vehicles driven by authorised persons displaying the appropriate ASIC or VIC (in other words, mainly airport or airline staff and contractors); or
- exempt persons; or
- persons holding valid tickets for air carriage and who are moving reasonably directly from the terminal exit or entry to or from the aircraft under the supervision of the aircraft or airport operator for the purpose of boarding or after disembarking (reg 3.15(3), though confusion may occur, as supervision is expressly required under this provision, unlike under reg 3.03(5)).

In addition to the above general access restrictions, the regulations prescribe slightly more strenuous physical controls such as security barriers and signs, as regards access to airside special zones,³⁴ notably for:

- (a) an ‘airside security zone that is a security restricted area’ (reg 3.16), (and also, specific offences are created for unauthorised entry to, remaining in, entry with a vehicle into and leaving a vehicle in such secure areas (reg 3.17)); and

³² Five recent cases in 2006-2007 were cited, though none apparently for terrorist purposes, in Joseph Sumegi, ‘Airport Security Flaws Exposed’, *Inner West Courier* (Sydney), 13 March 2007.

³³ Detailed requirements are set out as regards fencing, lighting etc for airside generally in the *Aviation Transport Security Regulations 2005* (Cth) reg 3.15.

³⁴ Apart from landside sterile areas, landside secure areas and zones and airside secure areas and zones are, in most respects, similar in nature and as regards the controls imposed: *Air Transport Security Regulations 2005* (Cth) reg 3.20.

- (b) landside security zones other than sterile areas³⁵ (reg 3.21(2)), (and again, specific offences are created for unauthorised entry to, remaining in, entry with a vehicle into and leaving a vehicle in such secure areas (reg 3.25)). However, the various landside zones differ considerably from each other in nature and purpose, for example some are used for navigational aids, others house air traffic control facilities or are used for fuel storage, and there are additional and differing physical access controls which can be affected for each of those areas.³⁶

Thus, in respect of the obligations of the aviation industry participants responsible for such airside secure areas, notably airlines and airport operators, the regulations have gone into considerable detail so that such entities can be keenly aware of the nature and limits of their responsibilities. This approach of controlling delegated responsibilities is consistent with the whole tenor of the developments in civil aviation legislation over the last several years.³⁷ However, the same levels of detailed insight and precision do not seem to be reflected in other parts of the regulatory system, for example, as regards matters such as the screening process, including 'frisk searches' and 'clothing removal requests' (see below: at Part II.C 'Screening Officers and Their Powers' of this article).

Significantly, from the perspective of ordinary air travellers, to access a landside secure area that is a sterile area (that is, where passengers may go after screening), there are certain different and stricter physical security access requirements imposed by the *Aviation Security Regulations 2005* (Cth) reg. 3.20 on the responsible aviation industry participant. To control access to such sterile areas, in particular, there must be at least one screening point. Notably, this is not required for access to other security zones where normally, just the display of an ASIC is required. However, although landside sterile areas may well present less of a hazard than other landside security zones, not only are stricter controls in place there, but the efficacy of the ASIC system which alone guarantees that inappropriate persons do not have access to other landside secure areas, is yet to be fully tested and proved to be an adequate counter-terrorist measure. The nature of screening points and the screening process are discussed below at Part II.B 'Screening and Clearance: Methods and Procedures' of this article.

Finally, emergency response personnel belonging to ambulance, fire and rescue and defence force services benefit from exemptions to these physical controls on access to airside and to airside secure areas. Similar exemptions apply in respect of access by such personnel to landside secure areas (including sterile areas).³⁸

³⁵ Sterile areas are those areas that passengers and other persons move to after passing through the screening process. See also below: at Part II.B.2 'Screening passengers and others: some aberrations' of this article.

³⁶ *Aviation Transport Security Regulations 2005* (Cth) regs 3.21-3.24.

³⁷ Under the *Civil Aviation Safety Regulations 1998* (Cth), which are gradually replacing the *Civil Aviation Regulations 1988* (Cth), there has been vast expansion of and increased precision as regards the regulatory obligations of airlines and other operators of aviation facilities: see G N Heilbronn, *Aviation - Laws of Australia, Vol 34* (Law Book Co, 2nd ed, 2007) Ch 3 generally and R I C Bartsch, *Aviation Law in Australia* (Law Book Co, 2nd ed, 2004) 15-44. Note also that the *Air Navigation Regulations 1947* (Cth) regs 63-68 divide airports into five categories for the purposes of regulating aviation security generally.

³⁸ *Aviation Transport Security Regulations 2005* (Cth) regs 3.18 (airside), 3.2 (landside). The extent to which this exemption represents a potential security risk is unknown, but ambulance, fire and rescue personnel may be infiltrated by potential terrorists in a similar manner to airport staff and contractors.

B *Screening and Clearance: Methods and Procedures*

Having identified the role that screening plays in the context of airport security measures, it remains to define the nature of the screening process and also the powers of screening officers who carry out screening (discussed in Part II.C ‘Screening Officers and Their Powers’ of this article). Screening and clearance, as well as related matters such as controls over weapons and prohibited items are specifically provided for in Part 4 of the *Aviation Transport Safety Act 2004* (Cth). Although ss 40-44 in Part 4, ‘Division 2 – Screening and Clearing’ are the most relevant provisions here, ss 45-60 provide for and create offences in relation to the carriage through screening points of authorised and unauthorised weapons as well as prohibited items. These sections also provide for an unauthorised person’s possession of weapons or prohibited items in secure areas and on cleared aircraft.

1 *Screened air services and cleared aircraft*

An aircraft operating an international air service that is a RPT or an open charter operation, or a jet aircraft operating a domestic air service that is a RPT operation – which together account for almost all commercial public transport aircraft operations in Australia – must be ‘cleared’ before departure, and such aircraft are described as operating a ‘screened air service’.³⁹ If a person is a passenger, or a member of the crew, on an aircraft operating a screened air service, then that person must also be screened and cleared before boarding the aircraft.⁴⁰ Exceptionally, a member of the crew is taken to have been screened if he or she has, since being last screened, continuously been either on the airside or in a sterile area of an airport, or on board an aircraft that operates a screened air service.⁴¹ However, as discussed immediately below, there are other classes of person, including airport and airline contracted staff, who may legitimately enter a screened aircraft without being themselves screened. Thus, these excepted classes of persons are not subject to the standard screening process, including the possibility of ‘frisk searches’ and ‘clothing removal requests’.

2 *Screening passengers and others: some aberrations*

In principle, every person must be cleared through a screening point before entering a sterile area (whether as a precursor to boarding an aircraft or otherwise), unless either that person:

- enters from airside after disembarking from a screened air service; or
- belongs to the classes of persons which the regulations specify as being ‘taken to be cleared’.⁴²

³⁹ *Air Transport Security Regulations 2005* (Cth) reg 4.02. Also included are other aircraft departing from the same airport apron within the ‘operational period’ as such screened air services: reg 4.02(2). The operational period, for most specified major airports, is two hours before and 30 minutes after the actual departure time of the cleared aircraft. For departures from other security controlled airports and all arrivals from all airports it is 30 minutes either side of the departure time: reg 4.01.

⁴⁰ *Aviation Transport Security Regulations 2005* (Cth) reg 4.08(2).

⁴¹ *Aviation Transport Security Regulations 2005* (Cth) reg 4.08(3).

⁴² *Aviation Transport Security Regulations 2005* (Cth) reg 4.09. These are a law enforcement officer who produced an ID; a screening office engaged in the management of the screening point; an ambulance or fire rescue service officer responding to an emergency on the landside of the airport; or

It is of note, however, that even other classes of authorised persons are entitled to enter sterile areas other than through screening points. These are: aviation security inspectors, Australian Customs Service officers and even authorised contractors and employees of contractors to the airport operator or screened air service operator.⁴³ It would seem that it is this final class of airport personnel, in particular contractors and their employees, that the Wheeler Review⁴⁴ had in mind when it proposed the increased use of 'frisk searches' (and thus screening) for airport employees,⁴⁵ even though all such persons must display a valid ASIC or valid VIC and be supervised by a person 'taken to be cleared' and displaying a valid ASIC.⁴⁶

It would seem reasonable that these classes of persons employed to work in such secure areas, carrying tools and equipment etc into sterile areas and on board aircraft, or working with screened luggage and cargo, should fully expect screening procedures, clothing removal requests and 'frisk searches'; and be prepared to accept them more willingly than ordinary air passengers. Yet this class of contracted airport or airline personnel can legitimately enter secure areas without screening, despite the fact that they and their activities may well represent a clearer risk to aviation security than the average passenger.⁴⁷ The regulations do not expressly require any form of screening or frisk searching of such persons and it is noteworthy that the Wheeler Review found, in 2005, that for an ASIC:

[t]he checking process can take weeks to complete, causing unacceptable reliance on procedures for visitor cards which do not require background checks. There are 188 ASIC databases and authorising bodies around Australia and these are neither consistent nor linked. Some casual or contract workers, such as security screeners and cleaners do not initially hold ASICs and may not always be accompanied on-the-job by an ASIC holder as required under current legislation.⁴⁸

As the recommendations of the Wheeler Review are gradually being implemented, it remains to be seen if this perhaps anomalous situation whereby airport contract workers are subject to less stringent controls than ordinary air travellers, is satisfactorily remedied. Though at the moment, the regulations only require screening points for access to a landside sterile area,⁴⁹ there would seem to be no reason why airport operators may not choose, or be otherwise encouraged, to install such points for access to other secure areas or zones as needed, given that the operator does not seem to be precluded from doing this by any legislative provision, and there is flexibility as to some of the security measures that the operator may choose to impose. In the meantime, this remains a flaw in the effectiveness of the screening process as a whole and undermines its credibility as a counter-terrorist measure.

a member of the Defence Force responding to an event or threat of unlawful interference with aviation: see *Aviation Transport Security Regulations 2005* (Cth) reg 4.10.

⁴³ See *Aviation Transport Security Regulations 2005* (Cth) reg 4.11.

⁴⁴ See Wheeler, above n 10.

⁴⁵ *Ibid* 78.

⁴⁶ See *Aviation Transport Security Regulations 2005* (Cth) reg 4.11(1).

⁴⁷ There is only anecdotal evidence for this commonly held view, as there is an absence of empirical evidence on such matters.

⁴⁸ Wheeler, above n 10, xiii. Note however, that reforms are pending as regards the more centralised provision and delivery of ASICs.

⁴⁹ See *Aviation Transport Security Regulations 2005* (Cth) reg 3.20(3)(a).

3 *Screening and clearance requirements*

The method and procedure for screening and obtaining clearance at security controlled airports are prescribed in detail in Part 4.1 of the *Aviation Transport Security Regulations 2005* (Cth). The regulations governing the screening of persons, goods and vehicles (though goods, vehicles and cargo are irrelevant for present purposes), are made pursuant to the *Aviation Transport Safety Act 2004* (Cth) s 44 which provides that:

- (1) The regulations may, for the purposes of safeguarding against unlawful interference with aviation, prescribe requirements in relation to one or more of the following:
- (a) screening;
 - (b) receiving clearance;
 - (c) the circumstances in which persons, goods or vehicles are required to be cleared;
 - (d)
- (2) Without limiting the matters that may be dealt with by regulations made under subsection (1), the regulations may deal with the following:
- (a) the persons who are authorised or required to conduct screening;
 - (b) the things to be detected by screening;
 - (c) the procedures for dealing with things detected by screening;
 - (d) the circumstances in which persons must be cleared in order to:
 - (i) board an aircraft; or
 - (ii) enter a landside security zone, a landside event zone, an airside area, an airside security zone or an airside event zone;
 - (e) the circumstances in which goods, other than baggage and cargo, must be cleared in order to be taken:
 - (i) onto an aircraft; or
 - (ii) into a landside security zone, a landside event zone, an airside area, an airside security zone or an airside event zone;
 - (f) the circumstances in which baggage must be cleared in order to be taken:
 - (i) onto an aircraft; or
 - (ii) into a landside security zone, a landside event zone, an airside area, an airside security zone or an airside event zone;
 - (g) ... [cargo]... :
 - (h) ... [vehicles]...
 - (i) the places where screening is to be conducted;
 - (j) the methods, techniques and equipment to be used for screening;
 - (k) the notices that are to be displayed in places where screening is to be conducted;
 - (l) the supervision and control measures for ensuring that persons, goods and vehicles that have received clearance remain cleared in areas or zones that are not cleared areas or cleared zones;
 - (m) ... [cargo].

While these provisions allow scope for, and indeed authorise, comprehensive regulatory control, there are many exceptions and exemptions (some of which have been discussed above), as well as several instances of vagueness and uncertainty as regards, in particular, the powers exercisable by airport screening officers as part of their screening procedures, thus requiring such officers to accept and carry out various responsibilities, as well as to make too many choices and to exercise significant discretions without adequate and appropriate guidance (see below: Part II.C '*Screening Officers and Their Powers*' of this article).

(a) Exempt passengers

Persons are 'screened' when they undergo screening in accordance with the regulations made pursuant to s 44 of the Act and receive 'clearance' when they are allowed to pass a screening point after having been screened. Alternatively, persons may receive 'clearance' when the Secretary has provided by written notice that those persons may pass through without being screened, or that they may otherwise enter a cleared zone, cleared area or cleared aircraft.⁵⁰ Certain persons who are passengers (but who are not airport or airline employees etc and security personnel: discussed above) are exempt from screening, in various circumstances in accordance with Tables in the *Aviation Transport Security Regulations 2005* (Cth) reg 4.2. Two factors which diminish the need for screening are (i) if the aircraft they are boarding is not a RTP aircraft, and (ii) if they are entering the aircraft directly from a vehicle. The most notable passengers exempt from screening are the Queen of Australia, members of the royal family and Heads of State and their protection officers, especially if they are entering a state aircraft.⁵¹ These exemptions are quite rare.

(b) Absence of guidelines in the regulations

Otherwise, the legislation provides few clear and publicly-stated guidelines as to the manner in which screening is to be carried out, though naturally there are internal procedures recommended. Additionally the Secretary may specify by written notice that is to be given to the person responsible for carrying out the screening, the methods, techniques and equipment to be used for screening, but the notice is only binding if served upon the person.⁵² Failure to comply with such directions may expose the person to disciplinary action, but even if such directions were available to the public, their legal significance is far from clear.

4 *Screening offences*

Screening is designed to detect specified classes of things being carried on or by any person entering a sterile area. These are: (i) if on a person, their belongings or aircraft stores - weapons and prohibited items; and (ii) if in checked baggage - explosives.⁵³ Weapons and prohibited items detected during the screening must be stored and handled in accordance with any applicable Commonwealth, State or Territory law.⁵⁴ Screening officers are to be specifically trained for this purpose (see below: Part II.C.1 '*Screening officers and Others*' of this article).

It is an offence carrying a maximum penalty of seven years imprisonment (but 100 penalty units for a strict liability offence i.e. where fault is immaterial),⁵⁵ if a person

⁵⁰ *Aviation Transport Security Act 2004* (Cth) s 41(1), (2) and (3).

⁵¹ By *Aviation Transport Security Regulations 2005* (Cth) reg 4.12(5), a '*state aircraft*' means: (a) aircraft of any part of the Defence Force (including any aircraft that is commanded by a member of that Force in the course of his or her duties as such a member); and (b) aircraft used in the military, customs or police services of a country other than Australia.'

⁵² *Aviation Transport Security Regulations 2005* (Cth) reg 4.17. The Secretary is the Secretary, DoTARS.

⁵³ *Aviation Transport Security Regulations 2005* (Cth) reg 4.04(2).

⁵⁴ *Aviation Transport Security Regulations 2005* (Cth) regs 4.05 (weapons) and 4.06 (prohibited items).

⁵⁵ By the *Criminal Code 1995* (Cth) s 6.1, if a law that creates an offence provides that the offence is an offence of strict liability: (a) there are no fault elements for any of the physical elements of the

passes through a screening point and has a weapon in his or her possession, unless of course, the person is a law enforcement officer or otherwise authorised to do so by the regulations or permitted in writing to do so by the Secretary.⁵⁶ A wide range of things are included as ‘weapons’.⁵⁷ Incidentally, a thing that is both a prohibited item and a weapon is taken to be a weapon.⁵⁸ Otherwise, it is an offence carrying a maximum penalty of two years imprisonment (but 20 penalty units for a strict liability offence i.e. where fault is immaterial),⁵⁹ if a person passes through a screening point and has a prohibited item in his or her possession, unless they are a law enforcement officer or otherwise authorised to do so by the regulations or permitted in writing to do so by the Secretary.⁶⁰ As there appear to be no reported cases dealing with these offences, it must be assumed that there are few such offences that are charged or prosecuted, or perhaps more likely, few that are defended. On the other hand, large numbers of prohibited items are actually confiscated at airports in Australia.

Airport security guards and airport screening officers are both authorised to restrain physically a person who they reasonably suspect is committing or has committed an offence against the *Aviation Transport Security Act 2004* (Cth) (discussed below). Thus, persons carrying prohibited items or weapons through a screening point may be legitimately detained by screening officers.

C *Screening Officers and Their Powers*

It is in respect of the actual policing powers accorded to airport screening officers that most anomalies, uncertainties, arbitrary choices and discretions arise and best illustrate the weaknesses in this aspect of the existing regulatory system in its application to airport security. When policing powers, in whatever form, are given to persons other

offence; and (b) the defence of mistake of fact under s 9.2 is available; s 6.1(1): (that is, the person has considered if certain facts existed and is under a mistaken but reasonable belief about those facts, and had the mistaken facts existed, they would not have constituted an offence: s 9.2(1)). The existence of strict liability does not make any other defence unavailable: s 6.1(3).

⁵⁶ *Aviation Transport Security Act 2004* (Cth) s 47(1)-(2) (strict liability) and s 47(3). Of course it is also similarly offences to be in possession of a weapon on board and aircraft: *Aviation Transport Security Act 2004* (Cth) ss 48-9; and in an airside area, landside security zones and landside event zones: *Aviation Transport Security Act 2004* (Cth) s 46.

⁵⁷ By *Aviation Transport Security Act 2004* (Cth) s 9, a weapon is defined as: (a) a firearm of any kind; or (b) a thing prescribed by the regulations to be a weapon; or (c) a device that, except for the absence of, or a defect in, a part of the device, would be a weapon of a kind mentioned in paragraph (a) or (b); or (d) a device that is reasonably capable of being converted into a weapon of a kind mentioned in paragraph (a) or (b).

⁵⁸ Prohibited items and weapons specified in Tables 1.07 and 1.09 are weapons: *Aviation Transport Security Regulations 2005* (Cth) reg 1.09(5), although there are certain specified exceptions. See also <<http://www.dotars.gov.au/transport/security/aviation/LAG/index.aspx>> at 2 December 2007.

⁵⁹ By the *Criminal Code 1995* (Cth) s 6.1, if a law that creates an offence provides that the offence is an offence of strict liability: (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under s 9.2 is available; s 6.1(1): (that is, the person has considered if certain facts existed and is under a mistaken but reasonable belief about those facts, and had the mistaken facts existed, they would not have constituted an offence: s 9.2(1)). The existence of strict liability does not make any other defence unavailable: s 6.1(3).

⁶⁰ *Aviation Transport Security Act 2004* (Cth) s 55(1)-(2) (strict liability) and s 47(3). Of course it is also similarly offences to be in possession of a weapon on board and aircraft: *Aviation Transport Security Act 2004* (Cth) ss 48-9; and in an airside area, landside security zones and landside event zones: *Aviation Transport Security Act 2004* (Cth) s 46.

than recognized law enforcement officers,⁶¹ questions will inevitably be posed as to the suitability of such persons, the precise nature of their powers and the circumstances in which those persons are entitled to exercise such powers. This is especially the case in the context of airport security and counter-terrorism where concerns have already been expressed over the erosion of individual rights in the face of such legislation.⁶²

1 *Screening officers and others*

It may first be of some concern that airport screening officers are not police officers,⁶³ though police and other law enforcement officers are also on duty at airports.⁶⁴ Screening officers are essentially specialised security guards, and usually privately employed.⁶⁵ However, they must wear a distinctive and recognizable uniform,⁶⁶ carry an ASIC,⁶⁷ and, where that State's or Territory's legislation so requires (which is only in a few States),⁶⁸ they must be licensed as a security guard in the State or Territory where the airport is situated.⁶⁹ The character of airport screening officers as essentially private security guards has inescapable implications for the nature and legitimacy of the

⁶¹ There can be confusion, as various persons, including police officers, are described as being a 'security officer' for the purposes of aviation security regulation, see *Air Navigation Regulations 1947* (Cth) reg 27. By the *Criminal Code 1995* (Cth) s 146.1, **Commonwealth law enforcement officer** means a person who is:

- (a) a member or special member of the Australian Federal Police; or
- (aa) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*); or
- (ab) a staff member of ACLEI (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*); or
- (b) a member of the Board of the Australian Crime Commission established under section 7B of the *Australian Crime Commission Act 2002*; or
- (ba) an examiner (within the meaning of that Act); or
- (c) a member of the staff of the ACC (within the meaning of that Act); or
- (d) the Chief Executive Officer of Customs; or
- (e) a person employed in the Australian Customs Service.

⁶² See above n 4.

⁶³ Police officers have, in relation to terrorist acts, substantial search, questioning and detention powers in airports pursuant to the *Crimes Act 1914* (Cth) Div 3A.

⁶⁴ Police are concerned at what is perceived as a reduction in police presence at airports: see M Carroll, 'Airport Policing' (2006) April *Police Journal* 16. Airport policing responsibilities are shared amongst Federal (AFP and APS) and State and Territorial police services. The Australian Protective Service (APS) became fully integrated into the Australian Federal Police (AFP) from 1 July 2004 following two years of partial integration; see 'An Independent Review of Airport Security and Policing for the Government of Australia' Commonwealth of Australia (September 2005) (Australian Government Review of Airport Security and Policing 2005) 41. The AFP, under s 9 of the *Australian Police Force Act 1979* (Cth), have the power to enforce state laws in commonwealth places such as airports, just as State police have the duty to enforce the State law at airports under the *Commonwealth Places (Application of Laws) Act 1970* (Cth).

⁶⁵ See eg *Pawson v Sydney Night Patrol and Enquiry Company t/as SNPSecurity* [2005] NSWCMC 45 (a salary dispute between a Passenger Screening Officer and his employer).

⁶⁶ *Aviation Transport Security Regulations 2005* (Cth) reg 5.07.

⁶⁷ *Aviation Transport Security Regulations 2005* (Cth) 5.08. Discussed above.

⁶⁸ The Australian Government Review of Airport Security and Policing 2005 (Wheeler Review), (see above n 10, 77) recently stated: 'Because of the importance of these screening personnel, and of the private security guards employed at larger airports, it is necessary that realistic but rigorous standards be set for employment in this field....Some States and Territories (NSW, the ACT and most recently Victoria) have already instituted licensing standards; the work done in preparing those could help in establishing a national licensing regime'.

⁶⁹ *Aviation Transport Security Regulations 2005* (Cth) reg 5.06(1)(b).

authority they exercise as well as their credibility in the eyes of the public. This is another reason why the regulations should go further towards including the provisions necessary to ensure that the powers and discretions exercised by such officers are justifiable and based on clear principles.

To somewhat offset any possible doubts as to the authority they exercise, there are substantial training requirements prescribed for screening officers: namely, that they hold at least Certificate II or its equivalent in security operations; or alternatively, that they have undergone training and acquired experience while working as a security guard for the purpose of obtaining such a certificate.⁷⁰ However, an issue as to credibility again arises, as having appropriate 'work experience' (whatever that may be) can alone be an adequate precondition to appointment. More precision in this area is needed and clear standards should be set.

Further, it is required that while on duty as a screening officer, such persons must be supervised by a qualified screening officer and not take independent screening decisions until the supervisor is satisfied they are competent. Such a requirement does however open itself to varying interpretations and subjective implementation by supervisors: the degree and closeness of supervision is unspecified and no prescribed assessment or standards are required to establish competence. At least, some minimal standards can be independently assured, as screening officers must also complete training which has been approved by the Secretary of the Department of Transport and Regional Services (DoTARS) to ensure familiarity with the *Aviation Transport Security Act 2004* (Cth) and, in particular, with the powers of screening officers. Unfortunately, as the following analysis reveals, there is some uncertainty as to the true nature and scope of these powers. Also, they need to have completed training approved by the Secretary designed to ensure competency in maintaining the integrity of a sterile area, the operation of screening equipment, screening methods and techniques as well as dealing with weapons and prohibited items⁷¹ that have been detected or surrendered.⁷²

2 Powers of screening officers and airport security guards

There is a clear distinction made between 'airport security guards' and 'screening officers' in the *Aviation Transport Security Act 2004* (Cth) ss 91-7, though screening officers may also exercise powers given to security guards. Airport security guards are persons who satisfy the training, qualification and other requirements prescribed in the regulations for airport security guards⁷³ and who are on duty at a security controlled airport, but who are not law enforcement officers.⁷⁴ They have the authority to restrain physically a person who they reasonably suspect is committing or has committed an

⁷⁰ See Australian Government, Attorney-General's Department, *PSCC Training Centre* (2007) <http://www.ag.gov.au/www/agd/agd.nsf/page/Security_training> at 4 December 2007 for security guard training programmes.

⁷¹ There is now a lengthy list of such items: see Australian Government, Department of Infrastructure, Transport, Regional Development and Local Government, *Aviation* (2007) <www.dotars.gov.au/aviation> at 4 December 2007.

⁷² *Aviation Transport Security Regulations 2005* (Cth) reg 5.06(1)((a),(c),(d) and (e).

⁷³ *Aviation Transport Security Regulations 2005* (Cth) reg 5.03. Instead of receiving training in the use of screening equipment and related matters, the security guard undertakes training in the use of metal detectors and the powers of airport security guards under the *Aviation Transport Security Act 2004* (Cth) s 92.

⁷⁴ *Aviation Transport Security Act 2004* (Cth) s 91(1).

offence against the *Aviation Transport Security Act 2004* (Cth), provided they reasonably believe that it is necessary to ensure that a person who has not been cleared does not enter or remain in a cleared area or cleared zone, or, to maintain the integrity of a landside security zone, a landside event zone, an airside area, an airside security zone or an airside event zone,⁷⁵ This power of restraint is limited. A person so restrained may only be detained until they can be dealt with by a law enforcement officer.⁷⁶ Furthermore, and this is where a discretion arises, in restraining such persons, airport security guards must not use more force or subject a person to greater indignity than is both 'necessary and reasonable' (discussed below). Otherwise, such powers of airport security guards would seem to be not inappropriate and relatively unexceptional.

(a) *Powers to restrain and request or require clothing removal*

Screening officers are equipped with similar powers to airport security guards, but have additional powers which are in some ways quite specific and in other respects quite vague. They do have the same powers of physical restraint as airport security guards,⁷⁷ – an important power when people are often in a hurry to catch a plane – and there seems no reason why these restraint powers may not be exercised in appropriate circumstances in conjunction with their screening powers. In exercising any of their powers, screening officers (like security guards) must not use more force or subject a person to greater indignity than is both 'necessary and reasonable'.⁷⁸ There is therefore the assumption that in the exercise of any of the screening officer's powers, persons being screened will necessarily endure some level of indignity: just how much indignity is acceptable can only depend on the circumstances.⁷⁹ This wording appears to set quite a strict standard as to how much indignity is acceptable and it is equivalent to the standards to be followed by a police officer under s 3UD(2) of the *Crimes Act 1914* (Cth) and by protective services officers, members and special members of the Australian Federal Police Force under, ss 14B, 14D, 14J (for example) of the *Australian Federal Police Force Act 1979* (Cth).⁸⁰ However, is it appropriate that private security guards and screening officers be authorised to exercise the same level of discretion in carrying out their statutory powers as fully trained police or law enforcement officers, when such members of the security staff have not had the same training, and are not subject to the same duties and responsibilities as police or law enforcement officers,⁸¹ and do not have the benefit of any clear and recognized guidelines?

⁷⁵ *Aviation Transport Security Act 2004* (Cth) s 91(1)(a) and (b).

⁷⁶ *Aviation Transport Security Act 2004* (Cth) s 92(2).

⁷⁷ *Aviation Transport Security Act 2004* (Cth) s 96.

⁷⁸ *Aviation Transport Security Act 2004* (Cth) s 97.

⁷⁹ There is surprisingly little judicial clarification of what 'necessary and reasonable' means in this context. Unlike cases where legislation makes it clear that what counts is the subjective perceptions of the person required to act in a manner which is 'necessary and reasonable', eg *R v Clotheir* [2002] SASC 9, it would seem that in the present circumstances it is a matter of fact for the arbiter of factual questions to decide according to objective rather than subjective standards, though the matter is as yet undecided.

⁸⁰ Under s 3UA of the *Crimes Act 1914* (Cth), a 'police officer' means: (a) a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or (b) a special member (within the meaning of that Act); or (c) a member, however described, of a police force of a State or Territory.

⁸¹ Even apart from statutory powers and duties imposed on police officers, there can be no comparison between the level of training, discipline, psychological evaluation of permanent Federal and State police officers, and that of security guards and airport screening officers.

As mentioned above, screening officers have additional powers. Notably, a screening officer may, if he or she ‘considers it necessary’ in order to screen a person properly, request the person to ‘remove any item’ of his or her clothing.⁸² Note, the text of the Act, s 95(1) does not use the words: ‘reasonably consider’ nor ‘consider on reasonable grounds’, so apparently the screening officer’s decision to request clothing removal is based on purely subjective criteria. That is, it only matters that the particular screening officer ‘considers it necessary’ to make the clothing removal request, even if a reasonable screening officer would not have done so. There is nothing in the legislation to say that the request needs to be based on some legislatively imposed objective criterion, such as a reasonable suspicion of the commission of the offence of carrying a prohibited item or weapon through a screening point, which criterion an officer can comprehend and a court can easily investigate and verify. Instead the test is whether the individual screening officer ‘considers it necessary’. The word ‘considers’ would appear to be satisfied if, first, the particular officer says he or she applied his or her mind to the issue, and second, that it would be possible, in all the circumstances, for this screening officer, given the purpose of the powers he or she was exercising, to conclude that the request was necessary. It would appear to be enough, perhaps, that the screening officer’s decision to make the request was based on the prospective passenger’s demeanour, dress, racial or ethnic origin or general scruffiness or even conformity to a given profile.⁸³

However, the subsection also uses the word ‘necessary’ which imposes, or seems to impose, quite a high standard and requires much more certainty than would, for example, the word: ‘desirable’. ‘Necessary’ means simply that it is something that has to be done, once the officer has considered the case.

The legislation assumes that persons passing through a screening point will ordinarily comply with such a clothing removal request and thus, involuntary or enforced removal of clothing is not expressly provided for. However, screening officers commit a strict liability offence,⁸⁴ if they require removal, or remove, or cause to be removed, any such item of clothing,⁸⁵ unless they have, and can provide evidence that they have, ‘reasonable excuse’.⁸⁶ Unfortunately, this defence is based on a concept which is somewhat vague,⁸⁷ and seemingly, leaves open the possibility of legitimate involuntary or enforced removal of clothing in appropriate circumstances.⁸⁸ The circumstances may also justify the screening officer exercising other powers, such as the power of restraint under s 96 of the *Aviation Transport Security Act 2004* (Cth). To establish ‘reasonable

⁸² *Aviation Transport Security Act 2004* (Cth) s 95(1).

⁸³ There is little in the legislation to require it, other than the legislative context, but it may be arguable that a court should impose the requirements that the decision to make the request be one that would be made by a properly or fully trained screening officer, as the legislation requires training and competence. It might also be argued that as a form of administrative decision, principles of natural justice should apply, so that the decision must not be biased and made not with an improper purpose or illegally; and made only with reference to relevant considerations and after giving the person concerned a chance to be heard.

⁸⁴ *Aviation Transport Security Act 2004* (Cth) s 95(4).

⁸⁵ *Aviation Transport Security Act 2004* (Cth) s 95(2).

⁸⁶ *Aviation Transport Security Act 2004* (Cth) s 95(3).

⁸⁷ There is no further elaboration as to what may constitute ‘reasonable excuse’.

⁸⁸ If clothing has been removed without the passenger’s consent, could it be said that there is tacit authorisation from the legislation when there is ‘reasonable excuse’. Could it even be said that it is a necessary implication of the reading together of s 95(2) and (3) that there is an implicit authority of an enforced removal of the clothing requested when there is ‘reasonable excuse’?

excuse', it is not enough that the particular screening officer believed he or she had an excuse or even a reasonable excuse. It must be an excuse which is reasonable by objective standards: the question is, what would a reasonable person consider to be a reasonable excuse (see below). There is, however, no guidance in the legislation on what may amount to a 'reasonable excuse' in this context. The screening officer has to make this choice unaided and presumably, under pressure.

(b) When will the 'consent' be freely given

There can be no certainty that consent to clothing removal is given freely. Even accepting that there is no express or implicit authority for the screening officer to require the removal of clothing, whether there is a reasonable excuse or not, it would seem, as a matter of practical reality, that the consent required implicitly by the wording of s 95 of the *Aviation Transport Security Act 2004* (Cth), would be easily obtained. It is indeed arguable that there would be, at the least, considerable external pressure experienced by the person concerned, to comply with a clothing removal request made under s 95(1) of the *Aviation Transport Security Act 2004* (Cth). It is not as if air passengers being screened on their way to catch a flight have much real choice when deciding whether or not to comply with the screening officer's clothing removal request. This is because the legislation requires that such passengers be refused passage through the screening point and risk missing their flights, with considerable economic and other consequences) if they refuse to remove the item of clothing on the request of the screening officer.⁸⁹ However, before finally being denied passage by the screening officer, a person initially refusing the clothing removal request must be given the option of a private screening. That option may be refused, or if it is accepted, the person may still refuse to comply with the clothing removal request. Then passage may be again denied, if the refusal in question has meant that it has not been possible to screen the person properly,⁹⁰ because he or she has either: refused the option to be screened in a private room by an officer of the same sex; or, if having accepted the private screening option, refused to remove the item of clothing requested during that screening.⁹¹

There is a further issue here. It is that the legislation does **not** specifically state that it is the screening officer concerned, who is to consider, believe or come to the conclusion that it has not been possible to screen the person properly. Nor does it state that the matter should, or should not, be referred to a supervisor. It is left open and the screening officer has no publicly recognized guidance on the matter. At best it could be said that there is no reason to assume that the decision to deny passage should be made according to anything other than purely objective criteria. If this is the case, the test is: what a reasonable person or reasonable screening officer would have concluded as to the impossibility of being able to screen the person properly without the removal of clothing. So a screening officer, after having **subjectively** considered it necessary to request the removal of clothing, must decide **objectively** if without the clothing removal, it is possible to screen the person properly. If this is what the provisions mean, on a proper construction of the Act's, s 95, the legislation would seem to put the screening officer in an invidious position, especially considering that the screening officer is not a recognised and duly authorised law enforcement officer. Even a properly

⁸⁹ *Aviation Transport Security Act 2004* (Cth) s 95(4).

⁹⁰ *Aviation Transport Security Act 2004* (Cth) s 95(5)(d).

⁹¹ *Aviation Transport Security Act 2004* (Cth) s 95(a)–(c).

directed jury would find it difficult to perform the mental acrobatics involved in making such decisions.

Leaving aside the difficult conceptual legal issues mentioned above, it may seem reasonable for innocent prospective air travellers to accept willingly to remove items of clothing as requested, or, to undergo the private screening option, especially if this can occur immediately with little or no inconvenience to the air traveller. Nonetheless, in the circumstances in which passengers find themselves when making either or both decisions, they must inevitably feel a compulsion to comply. Then, the genuineness and volition of the consent or otherwise may well become an issue and may even render the screening and search process unlawful. What if on the screening officer's request, the person answers 'well, if I really have to!' Is this consent? How can a screening officer make this judgement? Where does 'grudging consent' end and 'unwilling compliance' begin? In such cases, do screening officers also lay themselves open to being charged with committing the offence under s 95(2) and (3) of the *Aviation Transport Security Act 2004* (Cth)?

(c) Passengers choosing to be 'frisk searched' rather than remove clothing

Airport screening officers also have specific 'frisk search' powers, and the circumstances in which a frisk search can be made are significant and are discussed below. However, the legislation also states that a person may actually choose to undergo a frisk search as an alternative to any other screening procedure.⁹² It is highly unlikely that a person will know that such a choice exists unless specifically informed that this alternative to a clothing removal request (or any other screening procedure) is actually open to them under the legislation. It can only be assumed that the screening officer should inform them that they may make this choice, especially if the person has already refused a request to remove clothing and is being denied passage through a screening point. However, there is no requirement in the legislation that the screening officer or anyone else makes information available as to screening choices. Is it even practical and convenient for this to be done? Is all this also another difficult matter of choice for the screening officer? Clarification of respective rights and duties in these cases is needed.

3 *Power to 'frisk search' and limitations*

A frisk search⁹³ may be performed by a screening officer in various circumstances. First, it can be requested by the officer, if a person undergoes a screening procedure and the results indicate that additional screening procedures are necessary in order to screen the person properly.⁹⁴ This is a decision to be made by the screening officer concerned. As anyone who has taken an international flight will know, there are, in practice, several stages of the screening process, beginning with queuing and placing most cabin baggage items as well as emptying pocket contents etc on to the conveyor belt to pass through the x-ray machine; followed by passing through a walk-through door-frame-like metal

⁹² *Aviation Transport Security Act 2004* (Cth) s 95A.

⁹³ By the *Aviation Transport Security Act 2004* (Cth) s 9, a 'frisk search' has the same meaning as in the *Crimes Act 1914* (Cth), where s 3C defines it as '(a) a search of a person conducted by quickly running the hands over the person's outer garments; and (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by a person.' Also, a 'frisk search' is defined in the *Criminal Code 1995* (Cth) s 101.1(1) in the same manner.

⁹⁴ *Aviation Transport Security Act 2004* (Cth) s 95(B)(1).

detector, before sometimes being subjected to an additional body scan by a hand-held metal detector⁹⁵ and an explosives scent detector or a dog performing a similar task. Then, there may even be a frisk search and we will assume that there is always a request made (though perhaps unspoken) before a frisk search is performed. Most of that whole process goes without mention in the legislation. Is it appropriate that such procedures be ignored, especially in view of the new technologies being employed in passenger screening at airports?

If there is a frisk search request, it is not required in the legislation that there first be a clothing removal request, but if 'considered necessary', there may well be such a request (see above). It is only if there has been a refusal to comply with the clothing removal request that a difficulty arises. This is because s 95(5) of the *Aviation Transport Security Act 2004* (Cth) mandates that the screening officer then refuse the person passage through the screening point. It would appear that the screening officer has no choice. But how definitive is this? Is it that all that is required is merely a refusal to pass through the screening point at this stage, or, until some other screening procedures are performed? If so, this is not stated in the legislation. On the other hand, is it then too late to perform a frisk search? Does the screening officer have a choice here? Does the legislature really intend that the refusal of a clothing removal request be the end of the matter and that a frisk search only be possible where there has not already been a refusal to comply with a clothing removal request? Or are these two procedures intended to be complementary as well as alternatives? A literal interpretation of the provisions would suggest that the two procedures are potentially mutually exclusive once a clothing removal request has been made to, and refused by, the person concerned. This would not necessarily appear to be consistent with the purpose of the legislation nor its provisions, which purpose, at some secondary level, must be also to facilitate the smooth and proper passenger departure process.

On the other hand, there would appear to be nothing in the wording of the provisions to say that a 'frisk search' cannot be performed **before** a clothing removal request is made. Thus, it appears from the legislation that if there has been a 'clothing removal request', a 'frisk search' can certainly be requested before the person refuses, either to remove clothing or to undergo screening in a private room. It may also be that after such refusals, a frisk search request can still be made provided the officer has not yet concluded that the person should be denied passage through the screening point. This may be a 'common sense' approach but it is not clear from the legislation that it is correct. Whichever is the correct interpretation of these provisions, it must be exceedingly difficult for screening officers to understand properly and fully the powers they have been given and to exercise them lawfully.

(a) Consent and 'reasonable excuse' in its absence

As regards frisk searches, screening officers are given very similar powers to those existing in respect of removal of clothing requests under s 95 of the *Aviation Transport Security Act 2004* (Cth) (discussed above). Either upon the choice of the person being screened, or, where the results of a screening indicate that additional screening procedures are necessary, (and if the screening officer's request to perform a frisk

⁹⁵ Hand held metal detectors must only be operated in accordance with written notice or special directions given by the Secretary under the *Aviation Transport Security Act 2004* (Cth) s 44(3) or s 67 respectively.

search is consented to by the person being screened), the screening officer may perform a frisk search which may be carried out ‘to the extent necessary’ in order to screen the person properly or complete the proper screening (see below Part II.C.3.(b) ‘searching to the extent necessary’ of this article).⁹⁶ Further, under s 95C of the *Aviation Transport Security Act 2004* (Cth) (inserted in 2007)⁹⁷ a screening officer may ‘if [he or she] considers it necessary’ request a frisk search.⁹⁸ In the last two situations (but not the first, where it is the person’s choice to be frisk searched), the person must be given the option for the frisk search to be carried out in a private room by someone of the same sex. Then, if the person refuses to submit to the frisk search in public or in private, the screening officer must refuse passage past the screening point.⁹⁹ It was, however, mentioned above that giving consent either to a clothing removal request (and likewise to a frisk search), or to a private screening procedure is really, in practice, open to criticism as not being a consent freely given, as persons on their way to catch flights may already feel a strong compulsion, if not an obligation to submit.

As with the removal of clothing, the carrying out of a frisk search cannot be required or conducted by screening officers without the person’s consent, unless the screening officer has, and can prove he or she has, ‘reasonable excuse’.¹⁰⁰ To do so is an offence. Inclusion of this notion of ‘reasonable excuse’ as a defence, could, as with a clothing removal request, imply that the frisk search can be forcibly performed if there is a ‘reasonable excuse’. Again, there are no legislative guidelines as to what would amount to a ‘reasonable excuse’ in such cases and although there has been varied judicial comment in diverse facts situations, it appears that what applies is the rather imprecise common law rule that its meaning depends on the circumstances of the individual case, and, on the purpose of the provision to which the defence of ‘reasonable excuse’ is an exception.¹⁰¹ The main purpose of the present legislation, including the frisk search and clothing removal request provisions, is to safeguard against unlawful interference with aviation by establishing minimum security obligations.¹⁰² In such a context of combating terrorist activity, it may be acceptable to be able to establish a ‘reasonable excuse’ for an enforced frisk search, based on quite minimal indices, especially given the uncertainty as to the meaning of this expression.¹⁰³ However, the matter is far from unequivocal and to ask screening officers to exercise such a power without publicly recognized guidelines is to require them to make an invidious choice between letting go a potential terrorist and committing an offence themselves.

⁹⁶ This is authorised under the *Aviation Transport Security Act 2004* (Cth) ss 95A and 95B.

⁹⁷ *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007* (Cth) s 5.

⁹⁸ *Aviation Transport Security Act 2004* (Cth) s 95C(1), (2).

⁹⁹ *Aviation Transport Security Act 2004* (Cth) s 95B(5).

¹⁰⁰ *Aviation Transport Security Act 2004* (Cth) s 95B(4) and s 95C(4). The wording of these provisions seems to be inordinately long-winded and repetitive and arguably does not sufficiently emphasise procedures to be followed or elucidate principles or guidelines upon which screening officers are to make decisions as to when clothing removal and frisking should be requested.

¹⁰¹ See *Taikato v Regina* (1996) 186 CLR 454, 464 followed in *The Council of the New South Wales Bar Association v Davison* [2006] NSWSC 699; *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470. See *Weeks v Nominal Defendant* [2005] QCA 118; and *Callanan v B* [2005] 1 Qd R 348. But see also *Nicholls v The Queen* [2005] HCA 1 where the High Court refused the admission of evidence of admissions which had not been videotaped on the grounds of ‘reasonable excuse’ where the legislation gave three sets of circumstances that amounted to ‘reasonable excuse’.

¹⁰² *Aviation Transport Security Act 2004* (Cth) s 3(1)-(2).

¹⁰³ See also the *Acts Interpretation Act 1901* (Cth) s 15AA and eg *Newcastle City Council v GIO Limited* [1997] HCA 53.

(b) Searching 'to the extent necessary'

Another troubling and uncertain phrase in the applicable legislation, which would likely be subject to the same kind of interpretative analysis as has been carried out above in respect of the phrase 'reasonable cause', is the significant qualification that the search may be performed 'to the extent necessary', though these words do not appear to have been the subject of judicial pronouncement. Under s 9 of the *Aviation Transport Security Act 2004* (Cth), a 'frisk search' has the same meaning as in the *Crimes Act 1914* (Cth), where s 3C defines it as:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by a person.

Do these qualifying words mean that the frisk search, as defined, is the maximum that can be requested by the screening officer, and if consented to, carried out by that officer. Does it mean that there is a discretion or choice to carry it out less fully or emphatically: perhaps quicker and using less hand pressure, or overlooking certain parts of the body; or, perhaps over-emphasising certain parts and under-emphasising others. Whatever it means, the interaction of the definition of a frisk search (which seems to require that any removal of clothing as part of a frisk search be voluntary), and the notion that it should be carried out 'to the extent necessary' is likely to cause confusion, especially for the screening officer, further obfuscating that delicate dividing line between the right not to be arbitrarily detained and searched, and the power of screening officers (who are after all not law enforcement officers with their concomitant duties and responsibilities), to stop, request removal of clothing, detain and frisk search with some form of consent or with reasonable cause, and in the absence of any articulated reasonable suspicion of the commission of an offence.

III CONCLUSION: TOO MANY CHOICES?

As the relevant provisions in the legislation stand, there are various issues raised relating to who is screened at airports, by whom and how this is carried out. Many, if not all of these involve what could be described as 'uninformed' choices being made by the entity responsible for the particular secure area, by security guards and screening officers, or by the persons undergoing screening.

As far as airport screening of passengers and other persons, including airport and airline staff and contractors is concerned, the practical reality is that any person turning up at an airport and wishing to enter a sterile area or to transit such an area to take a flight, must, if he or she wishes to pass through the screening point for either purpose, and, if a screening officer so requests or requires, undergo either in public or in private, a screening process which may include, aside from being scanned by X-ray and metal detection devices, removal of any item of clothing and/or a frisk search, where the screening officer 'considers it necessary'. Further, if a frisk search is performed, it may be effected 'to the extent necessary'. The passenger or other person has, in many cases, no real practical choice. Submit to the requests or miss the flight. On the other hand, the legislation permits the screening officer the choice of which procedures, if any, to follow (though even this is not always clear), but with very few useful guidelines as to

how to go about making such choices. In other words, the screening officer, who has had considerably less training than, and has not the same duties and responsibilities as, a law enforcement officer, makes decisions and exercises discretion which effectively impose upon persons passing through screening points, the obligation to submit to clothing removal and/or frisk searches, based almost exclusively on subjective criteria and without legislative or other certain guidance as to standards to apply or procedures to follow. Yet, every day, there are thousands of persons potentially affected by these choices.

Should a review of any such screening officer's decisions ever occur, the screening officer would need to show that rather than following standard procedure, consideration was given to, or, that his or her mind had been turned to, the relevant question: should a particular procedure be invoked in any particular case. Otherwise, it would likely mean that there was no actual consideration of the question at all, effectively rendering the procedure unlawful. Further, if the screening officer did consider the question, but could not articulate or identify any grounds at all for making the decision, then it could be said that he or she has acted arbitrarily or unlawfully. On the other hand, it is not necessary that any such grounds for the officer's decision that do exist, actually justify it on purely 'objective criteria', as the legislation does not always require or specify that the screening officer must act reasonably in this respect. Screening officers are therefore left to exercise their powers with little guidance or concern for the consequences. But if they do make a mistake, then they are likely to have committed an offence.

The *Aviation Transport Security Act 2004* (Cth) and *Aviation Transport Security Regulations 2005* (Cth) alone run to some five hundred pages in length and there are several other lengthy legislative and regulatory enactments which deal in different ways, and more or less directly, with matters pertaining to airport security. Of course, only specific divisions and a limited number of provisions in these enactments govern airport security, and in particular the airport screening procedures, though a substantial part of the legislation elaborates on the various secure areas of airports, the control of access to such areas, duties of airport operators and others, as well as the creation of relevant offences. Yet there is little that can assist the screening officer looking for guidance on how to exercise the powers given by legislation.

Even aside from the difficulty of ascertaining precisely what rights and duties exist in respect of airport security screening under these rather prolix and repetitive legislative provisions, there is a further significant tension between society's need for adequate counter-terrorism measures to be implemented at airports and the desirability of reasonably free and efficient functioning of the air transport industry and the persons who participate in it. The legislature has not included or applied, in its provisions, any 'checks and balances' that would appear to be needed to deal with the uncertainties and questions that may arise: for example, objective guidelines for screening procedures, clothing removal requests and for the performance of frisk searches; the possibility of immediate review of screening and searching decisions by a supervisor; or examples of what amounts to a 'reasonable excuse' for imposing a clothing removal request or frisk search without the person's genuine and willingly-given consent, or guidance as to how one goes about deciding if there is 'reasonable excuse'.

Further, despite the reality that all sorts of technologies are being used in the airport security context, and that advances are occurring in the nature and efficiency of devices

used especially in the screening process, there is, at this stage, very little in the legislation that betrays any recognition that highly technical scientific equipment is increasingly being used in the screening process.¹⁰⁴ It may be that the suppliers of such equipment, and operators such as screening officers, are to be left to perform their functions with even less guidance, certainty and perhaps protection, than screening officers have at present.

The implementation of airport security procedures, whether they be high or 'low-tech', must be founded in legislative or regulatory provisions. Most of these provisions have been enacted in the aviation context, where, subject to prescribed surveillance procedures and guidelines, industry participants are often required to establish and implement their own regulatory measures in respect of many of their own operational activities. This kind of independent regulatory responsibility cannot be asked of security guards and screening officers. So, arguably, this is perhaps an inappropriate context for legislative provisions governing the exercise of policing powers over large sections of the general public. The frisk search and clothing removal request powers of airport screening officers are indicative of the kinds of questions and uncertainties that can arise in these circumstances. However, whether such powers are legislated in the aviation context or elsewhere, it is highly desirable that the powers be clear and unambiguous, that difficult concepts be explained or clarified, that as much guidance as possible be provided as to how discretions are to be exercised and that there be a clear statement of the factors to be taken into account when choices, if any, are to be made.

¹⁰⁴ Aside from general principles relating to optical surveillance devices in the *Aviation Transport Security Act 2004* (Cth) ss 74J and 74K.