

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Justice

AusCheck Act 2007

AusCheck Regulations 2017

Introduction

The *AusCheck Regulations 2017* are made under section 18 of the *AusCheck Act 2007*.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Outline

The *AusCheck Act 2007* (the Act) establishes a background checking function within the Attorney-General's Department (the department). The purpose of the Act is to enhance national security by providing a consistent approach to background checking for individuals who require access to secure areas of airports, seaports and facilities that handle security sensitive biological agents. The Act also aims to assist law enforcement and national security agencies respond to security incidents and perform their functions.

The background checking function is performed by a branch within the department called AusCheck. Section 8 of the Act states that the regulations may provide for the establishment of the AusCheck scheme which relates to the conduct and coordination of background checks for the purposes of the *Aviation Transport Security Act 2004* (ATS Act), *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFS Act), *National Health Security Act 2007* (NHS Act), and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme.

Section 18 of the Act provides that the Governor-General may make regulations required or permitted by the Act, or necessary or convenient to carry out or give effect to the Act. The *AusCheck Regulations 2017* (the Regulations) outline a range of administrative matters for the operation of the AusCheck scheme (as it applies to the Act, ATS Act, MTOFS Act and NHS Act) including:

- how to apply for a background check
- information required for an application
- decisions that can be made
- advice that may be given
- fees that may be charged
- review rights
- information required following a background check, and
- guidelines for the use and disclosure of information.

This instrument has been introduced to replace the *AusCheck Regulations 2007*, which will automatically repeal (sunset) on 1 October 2017, and to ensure that the AusCheck scheme continues to operate. This instrument has been remade with substantially the same effect as the *AusCheck Regulations 2007* with amendments to provide greater clarity and consistency.

The structure of the Regulations appears significantly different in order to increase clarity between the purposes of the Aviation Security Identification Card (ASIC), Maritime Security

Identification Card (MSIC) and the National Health Security (NHS) schemes. Use and disclosure of information provisions have been removed as the *Privacy Act 1988* and Australian Privacy Principles effectively address these provisions.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation on the content of this instrument occurred between the department, Australian Criminal Intelligence Commission (ACIC), Australian Federal Police (AFP), Australian Security Intelligence Organisation (ASIO), Department of Health (Health), Department of Immigration and Border Protection (DIBP), Department of Infrastructure and Regional Development (DIRD) and issuing bodies responsible for Aviation Security Identification Cards (ASICs) and Maritime Security Identification Cards (MSICs).

The department has received departmental-level approval from DIRD for consequential amendments made to the *Aviation Transport Security Regulations 2005* (ATS Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFS Regulations).

Regulatory Impact Statement

The Office of Best Practice Regulation (OBPR) was consulted about the Regulations and advised that a Regulatory Impact Statement (RIS) would usually be required as the Regulations are being introduced as a new legislative instrument. However the department has assessed the current regulations as fit for purpose, and given the changes are not substantial, a letter from the department's Deputy-Secretary to OBPR was sent in lieu of a RIS (**Attachment A**).

Commencement

The instrument commences on 1 August 2017.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

AusCheck Regulations 2017

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *AusCheck Act 2007* (the Act) establishes a background checking function within the Attorney-General's Department (the department). The purpose of the Act is to enhance national security by providing a consistent approach to background checking for individuals who require access to secure areas of airports, seaports and facilities that handle security sensitive biological agents. The Act also aims to assist law enforcement and national security agencies respond to security incidents and perform their functions.

The background checking function is performed by a branch within the department called AusCheck. Section 8 of the Act states that the regulations may provide for the establishment of the AusCheck scheme which relates to the conduct and coordination of background checks for the purposes of the *Aviation Transport Security Act 2004*, *Maritime Transport and Offshore Facilities Security Act 2003*, *National Health Security Act 2007* and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme.

Section 18 of the Act provides that the Governor-General may make regulations required or permitted by the Act, or necessary or convenient to carry out or give effect to the Act. The *AusCheck Regulations 2017* (the Regulations) outline a range of administrative matters for the operation of the AusCheck scheme including:

- how to apply for a background check
- information required for an application
- decisions that can be made
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- information required following a background check, and
- guidelines for the use and disclosure of information.

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The structure of the Regulations appears significantly different in order to increase clarity between the purposes of the Aviation Security Identification Card (ASIC), Maritime Security Identification Card (MSIC) and the National Health Security (NHS) schemes. Use and disclosure of information provisions have been removed as the *Privacy Act 1988* and Australian Privacy Principles effectively address these provisions.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- right to equality and non-discrimination – Article 2(1) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- right to an effective remedy – Article 2(3) of the ICCPR
- right to privacy – Article 17(1) of the ICCPR, and
- right to work – Article 6(1) of the ICESCR.

Rights to equality and non-discrimination

Article 2(1) of the ICCPR and Article 2(2) of the ICESCR ensure that the rights in both covenants are exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Article 26 of the ICCPR provides that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UN Human Rights Committee has not defined the ground of ‘other status’. However in the matter of *Thlimmenos v Greece* (application no. 34369/97), the European Court of Human Rights interpreted ‘other status’ to include non-discrimination on the basis of criminal record. Australia is not bound by the European Court’s jurisprudence, but the case law from the Court is useful in considering how the UN Human Rights Committee may interpret similar provisions in the ICCPR.

The differential treatment by AusCheck of individuals on the basis of criminal history is a limit on the rights of equality and non-discrimination. Division 5 of the instrument allows AusCheck to give advice about background checks of individuals including an assessment of an individual’s criminal history information. This assessment informs the eligibility of an individual to access secure areas of airports, seaports and facilities that handle security sensitive biological agents. The objective of the assessment is to protect national security by ensuring that individuals considered to be a threat to national security are not given that access.

Division 5 is a reasonable, necessary and proportionate limitation on the rights to equality and non-discrimination as it does not capture all individuals with a criminal history. Distinctions made on the basis of criminal history are only necessary for individuals who have security-relevant offences that appear on their criminal history. This is the least restrictive means, in the context of background checks, of identifying individuals who may threaten national security. The criterion for security-relevant offences is explicitly stated in legislation and therefore is lawful and non-arbitrary.

Right to an effective remedy

Article 2(3) of the ICCPR provides that an individual should have an effective remedy for any violation of rights or freedoms recognised in the ICCPR. The article also provides that the remedy shall be determined and enforced by a competent judicial, administrative or legislative authority.

Section 26 of the instrument provides a right of appeal to the AAT for an applicant who receives an unfavourable criminal history decision. The AAT is a competent administrative authority which has the power to review a decision made by AusCheck, and to set aside, remit or affirm that decision. To the extent that any rights in the ICCPR are limited by the instrument, section 26 promotes the right to an effective remedy.

Right to privacy

Article 17(1) of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Parts 2 and 3 of the instrument engage the right to privacy by providing for the collection, use, storage and disclosure of personal information including criminal history information.

The instrument's limit on the right to privacy is legitimately authorised by section 13 of the *AusCheck Act 2007*. The purpose of the authorisation in relation to the AusCheck scheme is to:

- determine whether a background check is required or permitted
- conduct or advise on the outcome of a background check
- update information on an individual who has undertaken a background check
- verify the identity of an individual, and
- provide an online card verification service.

The purpose of collecting, using, storing and disclosing information is reasonable and necessary to pursue the objective of national security. This is achieved by using an individual's personal information, such as their criminal record, to identify and disclose whether they would constitute a threat to particular national facilities. The collection and storage of personal information also assists law enforcement agencies respond to security incidents by providing an up-to-date database of individuals with access to areas such as secure zones in airports and seaports.

Appropriate safeguards exist to ensure that use of an individual's personal information is reasonable and proportionate. Section 29 allows the Secretary of the department to issue guidelines about the use and disclosure of information on the AusCheck database. The guidelines were established under the *AusCheck Regulations 2007* and are currently publically available on the department's website. All AusCheck staff members are required to comply with the guidelines. Section 15 of the *AusCheck Act 2007* also provides an offence provision for AusCheck staff members who unlawfully disclose AusCheck scheme personal information.

Right to work

Article 6(1) of the ICESCR provides the right of everyone to work and have the opportunity to gain a living by work. The assessment by AusCheck of an individual's criminal history may lead to a recommendation that an individual is ineligible to hold certain security cards such as Aviation Security Identification Cards (ASICs) and Maritime Security Identification Cards (MSICs). Holding an ASIC or MSIC is an essential requirement for people who work in secure zones in airports and seaports, for example, baggage handlers, air stewards and dockworkers. Therefore AusCheck's assessment could limit the right to work of some individuals.

Article 4 of the ICESCR provides that countries may limit economic, social and cultural rights if those limits are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The outcome of an unfavourable criminal history is based on the threat of the individual to national security and therefore the limitation is considered to be reasonable and necessary to promote general welfare in a democratic society.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the instrument

Section 1

This clause provides that the title of the instrument is the *AusCheck Regulations 2017*.

Section 2

This clause provides that the whole instrument commences on 1 August 2017.

Section 3

This clause outlines the authority to make the regulations. Section 8 of the *AusCheck Act 2007* (the Act) provides for the establishment of the AusCheck scheme. Section 18 of the Act provides that the Governor-General may make regulations required or permitted by the Act, or necessary or convenient to carry out or give effect to the Act.

Section 4

The note to the clause lists expressions that are used in the instrument but are defined in the Act. The clause then lists definitions that are not clear on their face value.

Adverse / qualified security assessments

The terms ‘adverse security assessment’ and ‘qualified security assessment’ have the same meanings as Part IV of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

Entity

The term ‘entity’ has the same meaning as in the NHS Act . It can mean an individual, a body corporate, or an agency or instrumentality of the Commonwealth, a State or a Territory.

NHS entity

The term ‘NHS entity’ means an entity to which Division 5 of Part 3 of the NHS Act applies.

Notification period

The term ‘notification period’ refers to subsection 22(5) of the regulations which is the amount of time that an issuing body has to provide required information under subsection 22(3) to the Secretary about a holder, or proposed holder, of an Aviation Security Identification Card (ASIC) or Maritime Security Identification Card (MSIC).

Operational need

The term ‘operational need’ references the definition in subregulation 6.01(1) of the *Aviation Transport Security Regulations 2005* (ATS Regulations) and subregulation 6.07F of the *Maritime Transport and Offshore Facilities Security Regulations 2003* (MTOFS Regulations).

Required information

The term ‘required information’ refers to the list of information in section 5 of the regulations. The list contains mandatory information required for all background check applications, plus additional information for applications under the ATS Regulations, MTOFS Regulations or the Security Sensitive Biological Agents (SSBA) Standards.

Transferred ASIC and MSIC applications / ASIC and MSICs

The terms ‘transferred ASIC applications’ and ‘transferred ASICs’ reference the definitions in subregulation 6.22(2) of the ATS Regulations. The terms ‘transferred MSIC applications’ and ‘transferred MSICs’ reference the definitions in subregulation 6.07ZA(2) of the MTOFS Regulations.

Section 5

This clause lists the required information for an application for a background check to be undertaken by AusCheck. If an individual has been known by another name, their previous name must also be included in the application. If an individual has multiple mailing addresses, telephone contact numbers or email addresses, they only need to provide their preferred mailing address, contact number and email.

If an individual is applying for an ASIC or MSIC, and is employed with an operational need (as defined in the ATS Regulations and MTOFS Regulations) at the time of making the application, the name and business address of the employer must be provided. This may apply in circumstances where an individual is currently working in a secure area of a port, and they are required to apply for a background check to ensure their continued validity to hold an MSIC and therefore their job.

If an individual is applying for an ASIC or MSIC, and is a student with an operational need at the time of making the application, the name and business address of the study institution must be provided. This may apply in circumstances where an individual is a recreational pilot and may be required to enter secure areas of an airport for the purposes of their training.

If an individual is employed or a student at the time of making an application for the purposes of being authorised under the SSBA Standards, the name and business address of the employer or study institution must be provided.

If a background check is to include an assessment of whether the individual is an unlawful non-citizen or holds a right to work visa in Australia, the individual’s passport and visa details must be provided.

Section 6

This clause provides that an individual will have an unfavourable criminal history if any of the following apply; they have an adverse criminal record, a qualified criminal record or have been convicted of a disqualifying offence. An adverse criminal record is relevant to an ASIC, MSIC or National Health Security (NHS) application. A qualified criminal record is relevant to an ASIC or NHS application. A disqualifying offence is only relevant to an MSIC application.

For an ASIC application, a qualified criminal record means an individual has been convicted at least twice of an aviation-security-relevant offence and did not receive a sentence of imprisonment for any of those convictions, and did not receive any of those convictions within the 12 months ending on the date the relevant background check was conducted.

For an NHS application, a qualified criminal record means that an individual has been convicted of a health-security-relevant offence on three or more separate occasions in the previous 10 years from the date of AusCheck providing the results of the background check to the NHS entity, and did not received a sentence of imprisonment for any of those convictions.

Section 7

This clause provides for the establishment of the AusCheck scheme. The AusCheck scheme relates to the conduct and coordination of background checks for the purposes of the ATS Act, MTOFS Act, NHS Act, and any other Act that expressly requires or permits a background check to be conducted under the AusCheck scheme.

Section 8

This clause provides that AusCheck may undertake a background check on an applicant for an ASIC or MSIC when that application is made by an issuing body. An application must be made electronically by the issuing body and include the required information in section 5 of the regulations. In practice, electronically means making the application through the AusCheck database.

This clause also provides that AusCheck may undertake a background check on a certain applicant for, or holder of, an ASIC or MSIC when that application is made by the Transport Secretary. For an ASIC, this is an individual who the Transport Secretary reasonably considers has been convicted of an aviation-security-relevant offence, or, constitutes a threat to aviation security. For an MSIC, this is an individual who the Transport Secretary reasonably considers has been convicted of a disqualifying offence or other maritime-security-relevant offence, and, constitutes a threat to maritime transport or offshore facility security.

An application made by the Transport Secretary for an ASIC or MSIC must be made in writing and include the individual's name, date of birth and residential address. This information is required for AusCheck to identify the relevant individual on the AusCheck database.

This clause also provides that AusCheck must undertake a background check on a holder of an ASIC or MSIC, who has been convicted of a certain offence, if an application is made by an issuing body. For an ASIC holder, the offence must be an aviation-security-relevant offence. For an MSIC holder, the offence must be a disqualifying offence or other maritime-security-relevant offence. An application of this type must be made electronically and include information specified in either the ATS Regulations or the MTOFS Regulations.

Section 9

This clause provides that AusCheck must undertake a background check on an applicant or holder of an ASIC or MSIC if they have notified the Secretary that they have been convicted of a certain offence. For an ASIC holder, the offence must be an aviation-security-relevant offence. For an MSIC holder, the offence must be a disqualifying offence or other maritime-security-relevant offence. Under this clause, the individual is deemed to apply for a background check.

Section 10

This clause applies to an individual who holds an MSIC that is in force for four years, or an individual who has held an MSIC that was to be in force for four years and the card was cancelled under certain provisions in the MTOFS Regulations (for example due to lack of operational need). This clause provides that AusCheck must undertake a background check for that individual two years after the advice of the individual's initial background check is recorded in the AusCheck database.

For AusCheck to undertake this background check the individual must not have withdrawn consent for the second background check. Under this clause, the issuing body is deemed to apply for the background check.

Section 11

This clause provides that AusCheck may undertake a background check on an individual if an application is made by an NHS entity. The application must be made electronically and include the required information in section 5 of the regulations. In practice, electronically means making the application through the AusCheck database.

This clause further provides that AusCheck must undertake a background check on an individual authorised under the SSBA Standards, who has been convicted of a certain offence, if an application is made by an NHS entity. The offence must be a health-security-relevant offence.

Section 12

This clause provides that where a preliminary assessment of an individual's background check suggests the final outcome of the check will include unfavourable criminal history advice, the Secretary must give written notice to the individual of that assessment and its reasons including the security relevant offences under ATS Regulations, MTOFS Regulations and SSBA Standards.

An individual must be given a period of time to make representations to the Secretary about the preliminary assessment. This period of time is intended to afford the individual natural justice as an unfavourable criminal history advice may have a significant impact on their interests. Most applications for a background check made by an issuing body or an NHS entity will require the time period to be at least 28 days. Applications made by the Transport Secretary, an individual self-reporting a security-relevant offence, or issuing body on the second anniversary background check for a four-year MSIC holder, will require the time period to be at least 14 days.

If necessary, the individual can ask the Secretary to grant an extension of time to make representations. If representations have been made, the Secretary must not give advice until all representations made within the specified time period, or extended time period, have been considered.

Section 13

This clause provides for the advice that the Secretary can give following a background check that has been applied for, or taken to be applied for, by an issuing body. The Secretary can provide advice on the following.

Criminal history

The Secretary must advise the issuing body whether or not the individual has an unfavourable criminal history. If the unfavourable criminal history is based on a qualified criminal record, the issuing body retains the ability to issue a conditional ASIC to the individual. A conditional ASIC can only be issued for a period of 12 months. To assist the issuing body exercise its discretion to issue a conditional ASIC, the Secretary is required to provide the issuing body with a document setting out the individual's relevant aviation-security-relevant offences.

If the individual has an unfavourable criminal history, the Secretary must also advise the individual of that advice and its reasons. The reasons for an unfavourable criminal history advice could include a copy of the aviation and maritime security-relevant offences that relate to either an adverse or qualified criminal record.

Security assessment

If a background check includes a security assessment, the Secretary must advise the issuing body whether or not the outcome of that security assessment is adverse or qualified. If a security assessment is qualified, the Secretary must provide a copy of the qualified security assessment to the Transport Secretary.

Providing a copy of the qualified security assessment assists the Transport Secretary determine, under the ATS Regulations or MTOFS Regulations, whether the holding of an ASIC or MSIC by that person would constitute a threat to aviation security, or maritime transport or offshore facility security. If the applicant does not constitute a threat, the Transport Secretary will provide a written notice to the issuing body stating that an ASIC or MSIC may be issued to the individual.

If an adverse or qualified security assessment in respect of an individual is furnished to the department, the department must provide a notice to which a copy of that security assessment is attached (excluding any matter that is subject to a certificate issued by the Attorney-General) to the individual within 14 days in accordance with Part IV of the ASIO Act.

Citizenship / Residency status / Entitlement to work

If a background check includes an assessment of an individual's citizenship status, residency status or entitlement to work in Australia, the Secretary must advise the issuing body of the result of that assessment.

Section 14

This clause provides for the advice that the Secretary can provide following a background check that has been applied for by the Transport Secretary. The Secretary must advise the Transport Secretary whether or not the individual has an unfavourable criminal history. If the unfavourable criminal history is based on a qualified criminal record, the Secretary is required to provide the Transport Secretary with a document setting out the individual's relevant aviation-security-relevant offences.

If the individual has an unfavourable criminal history, the Secretary must inform the issuing body of that advice and if it is based on a qualified criminal record, provide a document setting out the individual's relevant aviation-security-relevant offences.

If the individual has an unfavourable criminal history, the Secretary must also advise the individual of that advice and its reasons. The reasons for an unfavourable criminal history advice could include a copy of the aviation and maritime security-relevant offences that relate to either an adverse or qualified criminal record.

Section 15

This clause provides for the advice that the Secretary can provide following a background check that has been deemed to be made by an applicant or holder of an ASIC or MSIC when they self-report a conviction for a security-relevant offence to the Secretary. The Secretary must advise the individual whether or not the individual has an unfavourable criminal history. If the individual has an unfavourable criminal history, the Secretary must also provide reasons for that advice. The reasons for an unfavourable criminal history advice could include a copy of the aviation and maritime security-relevant offences that relate to either an adverse or qualified criminal record.

If the individual has an unfavourable criminal history, the Secretary must inform the issuing body of that advice and if it is based on a qualified criminal record, provide a document setting out the individual's relevant aviation-security-relevant offences. The intent behind this requirement is to assist the issuing body exercise its discretion whether to issue a conditional ASIC to the individual.

Section 16

This clause provides for the advice that the Secretary must give the Transport Secretary in certain circumstances. The circumstances for an ASIC are when an application has been made to the Transport Secretary under the ATS Regulations to:

- approve the issue of an ASIC notwithstanding that a person has an adverse criminal history (a 'discretionary' card)
- set aside a cancelled card on the basis of a qualified security assessment, and
- set aside a cancelled card on the basis of an adverse criminal record.

The circumstances for an MSIC are when an application has been made to the Transport Secretary under the MTOFS regulations to:

- approve the issue of an MSIC notwithstanding that a person has an adverse criminal history (a 'discretionary' card)

- set aside a cancelled card on the basis of a qualified security assessment, and
- set aside a cancelled card on the basis of the issuing body finding out that an individual has been convicted of a maritime-security-relevant offence that is not a disqualifying offence.

In these circumstances, the Secretary must provide to the Transport Secretary the individual's background check advice and criminal history information, and any other information relating to the background check of the individual. This information could include previous applications of the individual.

AusCheck provide a copy of the full criminal history received by the Australian Criminal Intelligence Commission. Convictions which have spent between the time of the background check and the time the Transport Secretary receives an application under the above circumstances will be redacted from that criminal history.

Section 17

This clause allows the Secretary to provide further advice to an individual, issuing body, or the Transport Secretary where it becomes known to the Secretary that the initial advice was inaccurate or incomplete. Such initial advice may have been given when the criminal history of an individual did not disclose all their convictions.

Section 18

This clause allows the Secretary to provide advice to a new issuing body that becomes responsible, under the ATS Regulations and MTOFS Regulations, for a security identification card which has been issued by another issuing body, or becomes responsible for an application for a security card which was made by another issuing body.

Section 19

This clause provides for the advice that the Secretary can provide following a background check that has been applied for by an NHS entity. The Secretary can provide advice on the following.

Criminal History

The Secretary must advise the NHS entity whether or not the individual has an unfavourable criminal history. If the unfavourable criminal history is based on a qualified criminal record, the Secretary is required to provide the NHS entity with a document setting out the individual's relevant health-security-relevant offences.

If the individual has an unfavourable criminal history, the Secretary must also advise the individual of that advice and its reasons. The reasons for an unfavourable criminal history advice could include a copy of the health-security-relevant offences that relate to either an adverse or qualified criminal record.

Security Assessment

The Secretary must advise the NHS entity whether or not the outcome of a security assessment is adverse or qualified. If an adverse or qualified security assessment in respect of an individual is furnished to the department, the department must provide a notice to which a

copy of that security assessment is attached (excluding any matter that is subject to a certificate issued by the Attorney-General) to the individual within 14 days in accordance with Part IV of the ASIO Act.

Citizenship / Residency Status / Entitlement to Work

If a background check includes an assessment of an individual's citizenship status, residency status or entitlement to work in Australia, the Secretary must advise the NHS entity of the result of that assessment.

Section 20

This clause outlines the advice that the Secretary can provide following an application for a background check that has been made by an NHS entity for an individual who has notified that NHS entity that they have been convicted of a health-security-relevant offence.

The Secretary must advise the NHS entity whether or not the individual has an unfavourable criminal history. If the unfavourable criminal history is based on a qualified criminal record, the Secretary is required to provide the NHS entity with a document setting out the individual's relevant health-security-relevant offences.

If the individual has an unfavourable criminal history, the Secretary must also advise the individual of that advice and its reasons. The reasons for an unfavourable criminal history advice could include a copy of the health-security-relevant offences that relate to either an adverse or qualified criminal record.

Section 21

This clause allows the Secretary to provide further advice to an individual or NHS entity where it becomes known to the Secretary that the initial advice was inaccurate or incomplete. Such initial advice may have been given when the criminal history of an individual did not disclose all their convictions.

Section 22

This clause requires an issuing body who proposes to issue, or has issued an ASIC or MSIC, to provide certain information to the Secretary after the background check of an individual has been conducted. AusCheck use the following information to maintain an up-to-date database of cardholders which also assists law enforcement and national security agencies respond to security incidents and perform their functions.

Information about individual with operational need

If the issuing body proposes to issue an ASIC or MSIC to the individual; and the application for the background check did not include the individual's employment details or study institution details, the issuing body must provide this information to the Secretary before issuing the ASIC or MSIC.

Information about holder or propose holder of ASIC or MSIC

If the issuing body proposes to issue, or has issued an ASIC or MSIC, to an individual, the issuing body must give the Secretary the individual's name, the number and expiry date of the

card, and a photograph of the individual. The Secretary may grant an issuing body an exemption from the requirement to provide a photograph of the individual. For an ASIC, the location for which the card is or will be valid is also required.

If the issuing body proposes to issue, or has issued, a replacement ASIC or MSIC to the individual because the individual's name has changed, the issuing body must provide the individual's former and current names, the replacement card's number and expiry, a photograph of the individual, and if it is a replacement ASIC, the locations for which the replacement card is valid.

This information must be provided within the notification period. If a card is issued within 30 days of the background check advice been provided, the notification period is the period ending at the end of those 30 days. If a card is not issued within 30 days of the background check advice been provided, the notification period is the period ending 30 days after the card is issued to the individual.

Information about the cancellation or suspension of ASIC or MSIC

If an ASIC or MSIC has been cancelled or suspended before its expiry date, the issuing body must inform the Secretary within 48 hours after the cancellation or suspension occurs.

Information about lost, stolen or destroyed ASIC or MSIC

If an issued ASIC or MSIC has been lost, stolen or destroyed, the issuing body must inform the Secretary within 48 hours of becoming aware of the loss, theft or destruction.

Section 23

This clause provides that an issuing body must inform the Secretary as soon as practicable of a decision not to issue an ASIC or MSIC to the individual that the Secretary has advised:

- does not have an unfavourable criminal history or,
- does not have an adverse or qualified security assessment or,
- is not an unlawful non-citizen or,
- holds a visa entitling the individual to work in Australia.

Section 24

This clause provides that an NHS entity must inform the Secretary of the cancellation or suspension of an authorisation under the SSBA standards within 48 hours after that cancellation or suspension occurs.

Section 25

This clause provides that an individual's criminal history information can include information from a country other than Australia only if the law that requires or authorises a background check to be undertaken specifies the circumstances to assess that information.

Section 26

This clause provides that applications may be made to the Administrative Appeals Tribunal for review of decisions made by the Secretary advising that an individual has an unfavourable criminal history. The appeal right does not include review of an adverse or qualified security assessment as that appeal right is provided in the *Australian Security Intelligence Organisation Act 1979*.

Section 27

This clause provides that the Secretary must keep a website about the AusCheck scheme. The AusCheck website is currently part of the department's website and includes information about the scheme, privacy policy and guidelines.

Section 28

This clause provides that a new issuing body, responsible for an application made or security identification card issued by another issuing body, is treated as having always been the issuing body for the purposes of the AusCheck database. This would allow the new issuing body access to AusCheck scheme personal information recorded on the AusCheck database.

Section 29

This clause provides that the Secretary may issue written guidelines about the use and disclosure of information included in the AusCheck database. Section 18(2)(d) of the Act provides the power for making guidelines about matters relating to background checking. The guidelines are administrative and reiterate the existing framework in the Act rather than create a new regime for the disclosure of AusCheck scheme personal information.

The current guidelines include the process for making information requests and how and in what circumstances AusCheck scheme personal information will be released. They also highlight AusCheck's reporting obligations as part of the department's annual report. The current guidelines are published on the department's website.

Section 30

This clause provides the Secretary with the power to charge a fee for an application for a background check in relation to an individual. A 'background check' is defined in section 5 of the Act and includes an assessment of one or more of the following in relation to an individual:

- criminal history
- whether the individual has been charged with a serious offence or such a charge has been resolved in relation to the individual
- security assessment
- citizenship status, residency status or entitlement to work, or
- identity.

The intention is that the Secretary is able to charge a fee in relation to any of these types of assessments conducted under the Act and the Regulations. In setting the fee, regard must be had to the types of assessment to which the fee relates. Details relating to how these fees are

determined are included in the AusCheck Cost Recovery Implementation Statement which is published on the department's website.

Section 31

This clause provides that all applications for background checks that have been made or taken to have been made under the *AusCheck Regulations 2007* (the old regulations), and are yet to be finalised by AusCheck, will be dealt with under the *AusCheck Regulations 2017*. An application will not be finalised until all required acts to complete the application under the Act have concluded. This ensures that the old regulations will not continue to apply for up to two years following the commencement of the new regulations.

Section 32

This clause applies to individuals who receive a preliminary assessment of an unfavourable criminal history under regulation 8 of the old regulations before that instrument is repealed.

Individual has not made representations

If the day mentioned in the notice, or the later date nominated by the Secretary, is after the day on which the old regulations are repealed, the notice continues to have effect as if it was issued under section 12 of this instrument.

Individual has made representations

If the Secretary has not considered representations made by the individual immediately before the repeal of the old regulations, subsection 12(6) of the new regulations applies to the representations.

Section 33

This clause applies if before the repeal of the old regulations, the Transport Secretary told the Secretary that an application has been made for the setting aside of an ASIC/MSIC for certain reasons or for the issue of a discretionary card.

If the Secretary has not provided the Transport Secretary with a copy of the individual's criminal history, the criminal history assessment that was made and any other information relevant to the background check before the repeal of the old regulations, the Secretary must comply with subsection 16(2) of this instrument which requires providing advice that the individual has an unfavourable criminal record; a copy of the criminal history and any other information relevant to the background check.

Section 34

This clause applies if before the repeal of the old regulations, an issuing body or NHS entity was required to provide personal information about a relevant individual or the employment details and study institution details under regulation 14 or 14A of the old regulations and immediately before the repeal of the old regulations the time for complying with regulation 14 or 14A which is 30 days has not ended. On or after 1 August 2017, the issuing body or NHS entity is required to comply with the applicable sections 22, 23 and 24 of this instrument.

Section 35

This clause applies to the guidelines if they were issued under regulation 15 of the old regulations and were in force immediately before the repeal of the old regulations. Under this clause, the guidelines will be taken to have been issued under section 29 of this instrument.

Attachment A



Australian Government
Attorney-General's Department

17/3039-01

1 May 2017

Ms Tanja Cvijanovic
First Assistant Secretary
Office of Best Practice Regulation
Regulatory Reform Division
Department of Prime Minister and Cabinet

Email: helpdesk@obpr.gov.au

Dear Ms Cvijanovic

AusCheck Regulations 2007

I am writing to the Office of Best Practice Regulation (OBPR) regarding the *AusCheck Regulations 2007*, which, as per the *Legislative Instruments Act 2003*, are scheduled to sunset on 1 October 2017. It has been decided that the instrument is to be remade without significant amendment.

The Attorney-General's Department certifies that the *AusCheck Regulations 2007* are operating effectively and efficiently, and therefore a Regulation Impact Statement is not required for this regulation to be remade.

The assessment that the regulation is operating effectively and efficiently has been informed by a consultation process which involved AusCheck, Australia's intelligence community agencies, the Australian Federal Police, the Department of Health, the Department of Immigration and Border Protection, the Department of Infrastructure and Regional Development and all issuing bodies responsible for issuing Aviation Security Identification Cards and Maritime Security Identification Cards. Consultation occurred between January and March 2017.

I acknowledge that OBPR will publish this letter for transparency purposes.

If you have any queries about this advice, please contact Michael Pahlow on 02 6141 2042 or michael.pahlow@ag.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nicole Rose', written over a horizontal line.

Nicole Rose
Deputy Secretary
Criminal Justice Group
Attorney-General's Department