

## **EXPLANATORY STATEMENT**

### **Comptroller-General of Customs (Places of Detention) Directions 2015**

#### ***Customs Act 1901***

Subsection 219ZJE(1) of the *Customs Act 1901* (Customs Act) provides that the Comptroller-General of Customs must, by legislative instrument, give directions in writing under that subsection:

- a) identifying places at which an officer is permitted to detain a person under this Division (whether by their character under this Act, the amenities available at the places or any other matters); and
- b) specifying such other matters relating to the detention of persons under this Division as the Comptroller-General of Customs considers appropriate.

#### ***Background***

Division 1BA of the Customs Act allows an officer of Customs to detain a person if:

- 1) the person is in a designated place; and the officer has reasonable grounds to suspect that the person has committed, or is committing, or intends to commit a serious Commonwealth offence or a prescribed State or Territory offence; or
- 2) the person is in a designated place; the officer has reasonable grounds to suspect that the person intends to leave the designated place; and either:
  - a) there is a warrant for the arrest of the person in relation to a Commonwealth offence or a prescribed State or Territory offence; or
  - b) the person is on bail subject to a condition that the person not leave Australia and the bail relates to a Commonwealth offence or a prescribed State or Territory offence (new subsection 219ZJC(1) of the Customs Act refers);
- 3) the person is in a designated place and the officer is satisfied on reasonable grounds that the person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country.

“Designated place” is defined in subsection 4(1) of the Customs Act to mean:

- a) appointed ports, airports, wharves or boarding stations; or
- b) places that are subject to certain permissions given under the Customs Act; or
- c) a section 234AA place that is not a place, or a part of a place, covered by paragraph (a) or (b).

Section 219ZJD provides that an officer may, in relation to a person detained under Division 1BA:

- a) conduct a frisk search or an ordinary search of the person; and
- b) search the clothing that the person is wearing and any property under the person's immediate control, if the officer believes on reasonable grounds that it is necessary to do so;

for the purposes of:

- a) determining whether there is concealed on the person, or in the person's clothing or property, a weapon or other thing capable of being used to inflict bodily injury or to assist the person to escape from detention; or
- b) in the case of a person detained under section 219ZJB—preventing the concealment, loss or destruction of evidence of, or relating to, the offence concerned; or
- c) in the case of a person detained under section 219ZJCA—preventing the concealment, loss or destruction of material of interest for national security or the security of a foreign country.

Item 1 of the Comptroller-General of Customs (Places of Detention) Directions 2015 (the Directions) provide that a person must be detained in a room that meets certain standards or if no such room is convenient and suitable, an Australian Border Force vehicle.

Since there may be some distance between the initial place of detention and the room or vehicle, it may be necessary to search the person under section 219ZJD of the Customs Act before they are taken to the room or vehicle. Item 2 of the Direction provides that for the purposes of paragraph 219ZJE(1)(b) of the Customs Act, if an officer of Customs conducts a search under section 219ZJD before taking a person to place mentioned in item 1 of the Direction, the officer conducting the search must afford the detainee as much personal privacy as the circumstances of the search allow.

From 1 July 2015, the functions of the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service (ACBPS) will be integrated, and a new frontline operational agency, the Australian Border Force, will be established within the new Department.

The Direction does not differ substantially from the Directions that applied in the ACBPS in relation to the same subject matter.

### **Consultation**

No consultation was undertaken under section 17 of the *Legislative Instruments Act 2003* before the Directions were made as they are of a minor or machinery nature and do not substantially alter existing arrangements.

### **Commencement**

The Directions commence on 1 July 2015.

## **Statement of Compatibility with Human Rights**

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

### **Comptroller-General of Customs (Places of Detention) Directions 2015 made pursuant to section 183UC of the *Customs Act 1901***

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

#### *Overview of the legislative instrument*

The Comptroller-General of Customs (Places of Detention) Directions 2015 (the Directions) are made for the purpose of subsection 219ZJE(1) of the *Customs Act 1901* (Customs Act). This subsection provides that the Comptroller-General of Customs must, by legislative instrument, give directions in writing under that subsection:

- a) identifying places at which an officer is permitted to detain a person under this Division 1BA (whether by their character under this Act, the amenities available at the places or any other matters); and
- b) specifying such other matters relating to the detention of persons under this Division as the Comptroller-General of Customs considers appropriate.

Item 1 of the Directions provides that, for the purposes of paragraph 219ZJE(1)(a) of the Customs Act, a person must be detained in a room that meets certain standards or if no such room is convenient and suitable, an Australian Border Force vehicle.

Since there may be some distance between the initial place of detention and the room or vehicle, it may be necessary to search the person under section 219ZJD of the Customs Act before they are taken to the room or vehicle. Item 2 of the Direction provides that for the purposes of paragraph 219ZJE(1)(b) of the Customs Act, if an officer of Customs conducts a search under section 219ZJD before taking a person to place mentioned in item 1 of the Direction, the officer conducting the search must afford the detainee as much personal privacy as the circumstances of the search allow.

The Direction commences on 1 April 2015.

#### *Human Rights implications*

The Regulation engages the human rights which are identified below:

#### *Right to Humane Treatment in Detention*

Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

#### *Right to Privacy*

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. It also prohibits unlawful attacks on a person's honour and reputation. It provides that persons have the right to protection of the law against such interference or attacks. An interference with privacy will not be arbitrary if it is authorised by law or consistent with the provisions, aims and objectives of the ICCPR and reasonable in the circumstances. Reasonableness in this context incorporates notions of proportionality, appropriateness and necessity.

The Directions engage both Article 10 and 17 of the ICCPR and promote both rights.

Item 1 of the Directions prescribes standards with respect to detention places. These places and standards promote the right to humane treatment in detention as they ensure that a detention place is a separate room and that persons inside a detention place are concealed from the view of persons outside, the place is secured against unauthorised access and the place has reasonably comfortable ventilation and illumination.

Item 1 of the Directions also promotes the detainee's right to privacy as they ensure that the detainee is concealed from the view of other persons. Item 2 also promotes the detainee's right to privacy as it requires the officer conducting the search to afford the detainee as much personal privacy as the circumstances of the search allow.

#### *Conclusion*

This Regulation is compatible with human rights because it is consistent with Australia's human rights obligations and promotes human rights.

### **Comptroller-General of Customs**