# EXPLANATORY STATEMENT

## Comptroller‑General of Customs Directions (Use of Force ‑ Norfolk Island) 2016

### Customs Act 1901 (NI)

Subsection 189A(2) of the *Customs Act 1901* (NI) (the NI Customs Act) provides that the Comptroller‑General of Customs may give directions relating to:

1. the circumstances in which approved firearms and other approved items of personal defence equipment may be issued; and
2. the circumstances in which such firearms and other items of equipment are to be recalled; and
3. the circumstances in which such firearms and other items of equipment can be used and the manner of their use; and
4. the nature of the secure storage of such firearms and other items of equipment when recalled; and
5. any other matters relating to the deployment of such firearms and other items of equipment the Comptroller‑General of Customs thinks appropriate.

### Background

From 1 July 2016, the Australian Government will integrate Norfolk Island with mainland tax and social security systems, and will commence delivering essential national functions such as immigration, biosecurity and customs.

The *Norfolk Island Customs Ordinance 2016*, made under section 19A of the *Norfolk Island Act 1979,* applies a modified version of the *Customs Act 1901* to Norfolk Island except to the extent that they purport to deal with duties of customs. This is consistent with the operation of customs laws in the Indian Ocean Territories of Christmas Island and the Cocos (Keeling) Islands. Application of the *Customs Act 1901* and associated regulations maintains a customs border that is required to give effect to the Australian Government reforms outlined above. The modified version of the *Customs Act 1901* is cited as the *Customs Act 1901* (NI) (the NI Customs Act).

### Directions

The *Comptroller‑General of Customs Directions (Use of Force ‑ Norfolk Island) 2016* (the Directions) contain directions made in accordance with subsection 189A(2) of the NI Customs Acts and provide for the operation of the *Operational Safety Order (2015)* (the 2015 Order) on Norfolk Island.

The 2015 Order, which may be obtained from the Department of Immigration and Border Protection, is the Order that applies to mainland officers of Customs in the integrated Department of Immigration and Border Protection.

### Consultation

No consultation was undertaken under section 17 of the *Legislation 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 2016.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

**Comptroller‑General of Customs Directions (Use of Force ‑ Norfolk Island) 2016 (incorporating the Operational Safety Order (2015))**

The *Comptroller‑General of Customs Directions (Use of Force ‑ Norfolk Island) 2016* (the Directions) and the *Operational Safety Order (2015)* (the Order) are 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**

In accordance with section 189A of *Customs Act 1901* (NI) (the NI Customs Act), the Comptroller‑General of Customs may give directions relating to the deployment of approved firearms and other approved items of personal defence equipment (PDE).

The Directions set out such directions by reference to complying with requirements set out in the Order. They impose the same obligations on officers of Customs deployed on Norfolk Island in relation to the deployment and use of firearms and items of personal defence equipment, and the use of force in the performance of duties, that apply to officers of Customs exercising powers on the mainland.

The Order provides a policy framework for the issue and use of approved firearms and other items of PDE to authorised officers of Customs in the exercise of their statutory powers. It covers competency standards, the accreditation of trainers, the qualification and re‑qualification of officers of Customs in operational safety, reporting mechanisms, and management structures for the training and monitoring of operational safety in the Australian Border Force (the ABF) within the Department of Immigration and Border Protection (the Department). It also includes the requirement for the safe handling of firearms and other items of PDE.

The ABF Operational Safety Principles and Use of Force Model are detailed in the Order and guide s in the use of appropriate force in the exercise of statutory powers. It provides that ABF policy is for the minimum amount of force to be used that is reasonable and appropriate for the effective exercise of statutory powers. It also emphasises the use of negotiation and conflict de‑escalation in any interaction between officers of Customs and members of the public. Any use of force against another person by an officer of Customs in the course of their duties, must be in accordance with the Order.

**Human Rights Implications**

The Order engages the following human rights:

**Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)**

The Order promotes the right to safe and healthy working conditions in Article 7(b) of the ICESCR by:

1. Ensuring that appropriate technical and vocational guidance and training programmes are provided to officers of Customs to enable them to safely use firearms and other items of PDE in the exercise of their statutory powers;
2. Promoting safe and healthy working conditions for the use of force by officers of Customs (for example, providing officers who patrol remote areas with appropriate PDE for protection from assault by other persons and emphasising that the Department considers the safety of officers of Customs and members of the public to be of paramount importance); and
3. Ensuring that persons injured or affected by use of force situations receive appropriate medical attention as soon as practicable.

**Article 6 of the International Covenant on Civil and Political Rights (ICCPR)**

Article 6 of the ICCPR accords every human being the inherent right to life. Under the Order principles of negotiation and conflict de‑escalation are always emphasised as the first consideration prior to using physical force. The Directions and Order promote the inherent right to life as they only direct officers of Customs to use lethal force when reasonably necessary (noting that they must act appropriately and in proportion to the seriousness of the circumstances), when other options are insufficient and only in self‑defence from the immediate threat of death or serious injury or in defence of others against who there is an immediate threat of death or serious injury. The Order specifically states that lethal force is an option of last resort, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life.

The Order also directs that if an officer of Customs uses force against another person, they must ensure that any person injured or affected by the use of force receives appropriate medical attention. This further promotes the inherent right to life.

**Articles 7 and 10 of the ICCPR**

These two articles provide the right for individuals to be free of cruel, inhuman or degrading treatment, as well as the right to be treated with humanity and respect when deprived of liberty.

The Order promotes these rights by:

1. Directing that it is Departmental policy for officers of Customs to use the minimum amount of force reasonable and appropriate for the effective exercise of statutory powers;
2. Ensuring that only those officers who have completed operational safety training are approved to use items of PDE and firearms; and
3. Providing additional controls to suspend and / or revoke an officer’s permit to carry firearms and PDE if:
   1. the officer is served with an interim domestic violence protection order, a domestic violence protection order, a restraining order, or any court order relating to the possession of an official or private firearm or PDE (note that where an officer of Customs is served with any of these orders, they are required to immediately report the fact and supply a copy of the order to his or her Manager or Director);
   2. the decision maker has reasonable concern that the officer is unfit or unsuitable to carry, access or use approved firearms and approved items of PDE;
   3. the officer is suspended from duty; or
   4. the decision maker reasonably considers that the officer is unfit to hold the authority.

The current approved operational safety training package contains a module on human rights which links the conditions of the Order with, inter alia, international human rights conventions. The Operational Safety Principles and Use of Force Model specifically refer to the expectation that officers of Customs will utilise negotiation and conflict de‑escalation as a first option before considering the use of force.

The Order also promotes:

**Article 24 of the ICCPR** ‑ the right of a child to be afforded protection required by his status as a minor; and

**Article 40 of the Convention on the Rights of the Child (CRC)** ‑ the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, because an officers of Customs may only use necessary and reasonable force in the exercise of statutory powers.

The Order also contains specific directions on situations where children and young people may be handcuffed, in particular, that handcuffs may not be used on children or young people unless an officer of Customs believes on reasonable grounds it is essential to safely transport the child to protect the welfare and/or security of the child or any other person. Any situation that would necessitate the handcuffing of a child or young person, would only ever be done so in order to achieve a legitimate objective, and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

Restraints would only ever be considered in accordance with the Operational Safety Principles and Use of Force Model that states officers will only use the minimum amount of force reasonable and appropriate for the effective exercise of their statutory powers. At its core, the Model requires the use of communications (including negotiation and conflict de‑escalation) as the primary consideration in interactions between officers and members of the public.

In promoting Article 24 of the ICCPR and Article 40 of the CRC, an officer of Customs must consider the following before deciding whether or not to handcuff a child or young person:

1. whether the person in custody is violent, or believed to be violent, or his or her demeanour gives rise to the apprehension of violence;
2. whether the person in custody has attempted, or is likely to attempt to escape;
3. whether the person in custody is required to be escorted with other detainees;
4. the necessity to prevent the person in custody from injuring him or herself, or any other person;
5. the necessity to restrain the person in custody to prevent the loss, concealment or destruction of evidence; or
6. whether the person threatens to expel a bodily fluid or has done so.

**Conclusion**

The Directions are compatible with human rights as it applies and seeks to promote a number of human rights in the ICESCR, ICCPR and CRC.

**Comptroller‑General of Customs**