

EXPLANATORY STATEMENT

Comptroller-General of Customs (Operational Safety) Directions 2021

Customs Act 1901

Customs Act 1901 (NI)

Subsection 189A(2) of the *Customs Act 1901* (the Customs Act) and subsection 189A(2) of the *Customs Act 1901 (NI)* provide that the Comptroller-General of Customs may give directions relating to:

- (a) the circumstances in which approved firearms and other approved items of personal defence equipment may be issued; and
- (b) the circumstances in which such firearms and other items of equipment are to be recalled; and
- (c) the circumstances in which such firearms and other items of equipment can be used and the manner of their use; and
- (d) the nature of the secure storage of such firearms and other items of equipment when recalled; and
- (e) any other matters relating to the deployment of such firearms and other items of equipment the Comptroller-General of the Customs thinks appropriate.

Background

Section 189A of the Customs Act provides authority for officers of Customs to carry firearms and other items of approved personal defence equipment for the purpose of enabling the safe exercise of powers conferred on them under that Act or any other Act.

The *Norfolk Island Customs Ordinance 2016*, made under section 19A of the *Norfolk Island Act 1979*, applies a modified version of the Customs Act 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 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 is cited as the *Customs Act 1901 (NI)* (the NI Customs Act).

Section 189A of the NI Customs Act provides authority for officers of Customs to carry firearms and other items of approved personal defence equipment for the purpose of enabling the safe exercise of powers conferred on them under that Act or any other Act.

Directions

The *Comptroller-General of Customs (Operational Safety) Directions 2021* (the Directions) contain directions made in accordance with subsection 189A(2) of the Customs Act and subsection 189A(2) of the NI Customs Act, and incorporate the Operational Safety Order (2021) (the Order) that is in force on the date the Directions commence. The Order contains the Department of Home Affairs' policy on operational safety. The Directions supersede the *Comptroller-General of Customs (Operational Safety) Directions 2020* and the *Comptroller-General of Customs Directions (Use of Force – Norfolk Island) 2016* and the Order supersedes the Operational Safety Order (2020) (the 2020 Order).

The Order, a redacted version of which is publically available on the Australian Border Force website, does not differ substantially from the 2020 Order, and includes minor amendments to provide greater clarity in relation to the Department's policy on operational safety.

The Directions revoke the *Comptroller-General of Customs (Operational Safety) Directions 2020* and *Comptroller- General of Customs Directions (Use of Force – Norfolk Island) 2016*.

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 the day after they are registered.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Comptroller-General of Customs (Operational Safety) Directions 2021

The *Comptroller-General of Customs (Operational Safety) Directions 2021* (the Directions) 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

In accordance with section 189A of *Customs Act 1901* and section 189A of the *Customs Act 1901* (NI), 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 are set out by reference to complying with requirements of Operational Safety Order (2021) (the Order).

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 Home Affairs (the Department). It also includes the requirement for managing firearms and other items of PDE. The ABF Operational Safety Principles and Use of Force Model are detailed in the Order and guide officers of Customs 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.

The Directions supersede the *Comptroller-General of Customs (Use of Force) Directions 2020* and *Comptroller-General of Customs Directions (Use of Force – Norfolk Island) 2016*, and the Order supersedes the Operational Safety Order (2020). The Directions and the Order are substantively similar to the superseded 2020 Directions and Order, and include minor amendments to provide greater clarity in relation to the Department's policy on operational safety.

The Directions commence on the day after they are registered.

Human Rights Implications

The Directions engage the following human rights:

- The right to safe and healthy working conditions in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The right to life in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

- The prohibition on torture and other cruel, inhuman or degrading treatment or punishment in Articles 2 and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 of the ICCPR.
- The right to humane treatment in detention in Article 10 of the ICCPR.
- The right to protection of a child's status as a minor in Article 24(1) of the ICCPR.
- The best interests of the child in Article 3(1) of the Convention on the Rights of the Child (CRC).
- The right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth in Article 40 of the CRC.

Right to safe and health working conditions

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

- (a) 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;
- (b) 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 ABF considers the safety of officers of Customs and members of the public to be of paramount importance); and
- (c) Ensuring that persons injured or affected by use of force situations receive appropriate medical attention as soon as practicable.

Right to life

Article 6(1) of the ICCPR accords every human being the inherent right to life and prohibits the arbitrary deprivation of life. The Directions and the Order are consistent with this right because any use of force authorised by the Directions will be lawful and there are parameters and limitations placed on the use of force including the use of lethal force, which mean it will only be used where necessary, reasonable and proportionate.

The Order, to which the use of force under the Directions is subject, directs officers of Customs to use lethal force only when necessary and reasonable and in proportion to the seriousness of the circumstances. The Order further requires that the use of lethal force is only to be used 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 also specifically states that lethal force is an option that must only be used when less extreme measures are insufficient to prevent the serious injury on themselves or another, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life. Principles of negotiation and conflict de-escalation are emphasised as the first consideration prior to using physical force. Where 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.

Accordingly, the use of force in these circumstances would be justified and any death that may result from lethal use of force would not be arbitrary in contravention of Article 6 of the ICCPR.

Prohibition on torture and other cruel, inhuman or degrading treatment or punishment

Articles 2 and 16 of the CAT and Article 7 of the ICCPR require Australia not to engage in torture, cruel, inhuman or degrading treatment or punishment. The Directions may engage these rights to the extent that the Directions authorise the use of force and the issue of firearms and items of PDE.

The Directions are consistent with these rights because there are parameters and limitations on the use of force and the carrying of firearms and PDE set out in the Order, and the Directions incorporate the Order. These measures are directed towards ensuring that use of force deployed by the ABF do not amount to torture or cruel, inhuman or degrading treatment or punishment.

In addition to the parameters and limitations on the use of force discussed above, further safeguards in the Order include:

- (a) Directing officers of Customs to use the minimum amount of force reasonable and appropriate for the effective exercise of statutory powers and only in the exercise of those powers;
- (b) Requiring that only those officers who hold a valid and current qualification in accordance with the Order may be issued items of PDE and firearms;
- (c) Requiring that only those officers who have completed operational safety training are approved to use and are issued with a valid and current qualification to hold items of PDE and firearms;
- (d) Prior to discharging a firearm against a person, an officer of Customs must give a clear oral warning of their intention to use a firearm and ensure there is sufficient time for the warning to be complied with. The only exception to this is where the officer believes on reasonable grounds that this would unduly place him or herself at risk of serious injury or death, create a risk of serious injury or death to other people or be clearly inappropriate or ineffective given the circumstances of the incident;
- (e) Requiring officers of Customs to report any incidences where use of force has been carried out, which may be subject to further investigation within the Department and externally; and
- (f) Providing additional controls to restrict, suspend and / or revoke an officer's qualification to carry firearms and PDE if:
 - (i) 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;
 - (ii) in relation to the circumstances described in paragraph (i) above, the case is still pending but an order has not been served;
 - (iii) the officer is subject to any court order relating to use of violence or assault;
 - (iv) the officer is suspended from duty;
 - (v) the decision maker reasonably considers that the officer is unfit to carry, access or use approved firearms and approved items of PDE;
 - (vi) there is a medical recommendation to do so (physical or psychological);

- (vii) the officer has an inability to demonstrate competence in the operational safety assessment;
- (viii) the officer is absent from duty for a period of more than 16 weeks;
- (ix) the officer separates or resigns from the ABF; or
- (x) the officer has discharged an approved firearm without authorisation.

The Directions are therefore consistent with Australia's international obligations under Articles 2 and 16 of the CAT and Article 7 of the ICCPR as there are specified limits on the use of force and it is only to be employed in the exercise of statutory powers.

Right to humane treatment in detention

Article 10(1) of the ICCPR provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. It is envisaged that Article 10(1) may be engaged by the Directions to the extent that force is employed.

As discussed above, the Order, with which use of force authorised under the Directions is to comply, specifies that where use of force is required, only the minimum amount that is reasonable and appropriate for the effective exercise of statutory powers should be used. With regard to lethal force, it is only to be used when necessary and reasonable and in proportion to the seriousness of the circumstances, and only for the purposes of self-defence or the defence of others in the face of immediate threat of death or serious injury. As such, to the extent that these Directions may limit Article 10(1), the limitations are both reasonable and proportionate to achieving the legitimate objective to protect the safety of the officers of Customs, public safety and the rights and freedoms of others.

Children's rights

The Directions also engage:

- (a) Article 24(1) of the ICCPR which provides for the right of a child to be afforded protection required by his status as a minor;
- (b) Article 3(1) of the CRC which sets out that in all actions concerning children, the best interests of the child shall be a primary consideration; and
- (c) Article 40 of the CRC which provides for 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.

This is because the Directions authorise officers of Customs to use force in the exercise of statutory powers, which may include the use of force with regard to children. In addition to the limitations and parameters set around the use of force discussed above, the Order, with which the use of force authorised by the Directions must comply, contains specific directions on situations where children and young people may be handcuffed. In particular, the Order specifies that handcuffs must not be used unless the officer of Customs believes on reasonable grounds, that it is essential to safely transport the child to protect the welfare and/or security of the child or any other person. Factors relevant to this consideration are:

- whether it is essential in order to safely transport the minor; and
- whether the restraints are necessary to protect the welfare and/or security of the minor or any other person.

Further, the Order specifies, consistently with the use of handcuffs on adults, that an officer of Customs may consider the following before deciding whether or not to handcuff a child or young person:

- (a) whether the person in custody is violent, or believed to be violent, or his or her demeanour gives rise to the apprehension of violence;
- (b) whether the person in custody has attempted, or is likely to attempt to escape;
- (c) whether the person in custody is required to be escorted with other detainees;
- (d) the necessity to prevent the person in custody from injuring him or herself, or any other person;
- (e) the necessity to restrain the person in custody to prevent the loss, concealment or destruction of evidence; or
- (f) whether the person threatens to expel a bodily fluid or has done so.

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 (i.e. the carrying out of statutory powers), and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

As such, consistently with Article 24(1) of the ICCPR and Articles 3(1) and 40 of the CRC, particular protections are set out with regard to the use of handcuffs on children, namely that child-centred considerations, including the child's best interests, are to be made prior to any decision to handcuff a child. These are in addition to overarching limitations placed on the use of force by officers of Customs. Accordingly, the Directions and the Order are consistent with these rights.

Conclusion

The Directions are compatible with human rights as it is consistent with the rights discussed above and to the extent that they may also limit human rights, those limitations are reasonable, necessary and proportionate.

Comptroller-General of Customs