

To: "DIFFERDING Tonie" <tonie.differding@customs.gov.au>  
From: Roger Clarke <Roger.Clarke@xamax.com.au>  
Subject: Re: Body Scanning for Internal Drugs

Ms Tonie Differding  
National Manager  
Airport Operations South  
Passengers Division  
Australian Customs and Border Protection Service

Dear Tonie

At 14:02 +1000 3/8/12, DIFFERDING Tonie wrote:

>Please come into Customs House on Tuesday afternoon at 2pm.

>There is a reception desk where the security guards sign in visitors and I, or one of my staff, will meet you in the foyer.

Apologies for cancelling late, but I'm under time-pressure on multiple fronts, and I really can't afford the time out.

There were a couple of matters arising from your letter of 18 July.

For example, it would have been helpful if the drafter had provided specific references in the legislation, rather than leaving readers to hunt down Division 1B and scan to find the various sections relevant to the matter.

I note in passing that the wording of the letter is misleading in respect of the point on p.2 about further detention needing to be ordered by "a Federal Judge". In fact, s.219T(1)(b) says "a Division 1B Judge or a Division 1B Magistrate ... who is remunerated by salary or otherwise", i.e. a pair of JPs would seem to be enough, e.g. at Coober Pedy, or Kununurra.

I'm hamstrung by the very limited information available. Within those constraints, however, the provisions appear to be drafted in a manner much less cavalier with human rights than we've seen in a lot of other statutes. It's particularly significant that there is no coercive power, and a couple of at-risk categories are precluded from the scanning program.

The major concerns felt by APF are procedural, but nonetheless very important issues. From informal discussions with the co-signatories to the original letter, I'm aware that APF is far from alone in having these concerns.

Your organisation's approach was procedurally seriously deficient in relation to:

- the failure to undertake consultation with the affected public and with advocacy organisations for their interests
- the failure to make any meaningful documentation available
- the use of the OAIC as a shield, as though the organisation not only represented the privacy interest (which it does not), but also was a sufficient representative of the privacy interest
- the failure to publish the PIA Report
- the failure to restrict security-sensitive details to closed appendices, with the result that nothing is publicly available

These problems have been subsequently compounded by aspects not entirely under your control:

- the failure of the OAIC to prevail upon you to conduct consultation with relevant advocacy organisations
- the failure of the Parliamentary Committee to ensure that consultation had been undertaken prior to the matter reaching the table of the Parliament
- the failure of the Parliamentary Committee to draw the Inquiry to the attention of relevant advocacy organisations
- the Minister washing his hands of the matter by passing our letter to you without maintaining control of the correspondence
- the lack of a copy to the Minister of your (lengthy, and - within the, to us, excessive security constraints) very helpful response

The OAIC's PIA Guidelines were prepared back in the days of an earlier Commissioner who perceived his role as including the protection of privacy. While in many respects a quite workable document, the Guidelines are significantly deficient in not promoting public consultation. The previous and current Commissioners have refused to correct that deficiency. In addition, they have been consistently unfriendly to the privacy interest, and distant from privacy advocacy organisations, resulting in them being held in very low regard by the advocacy community.

The Victorian PIA Guidelines are much better. See the reference below.

Based on the content and tenor of our conversation, my feeling is that a consultation process between yourselves and a small selection of privacy advocacy organisations, at a stage early enough to influence the design of the process and the legislation, would have been conducted in a constructive and entirely civil manner. (In my consultancy role, I have organised a number of such events, always carefully, and always with positive outcomes).

That is in distinct contrast to a number of highly unsatisfactory processes, not least the farcical procedures involving the Office of Transport Security and the OAIC in relation to the outbound body scanning project.

Thank you for your consideration.

And again, my apologies for the late cancellation of our meeting.

Regards

Roger Clarke  
Chair, Australian Privacy Foundation (APF)

Clarke R. (2011) 'An Evaluation of Privacy Impact Assessment Guidance Documents' International Data Privacy Law 1, 2 (March 2011) 111-120, PrePrint at <http://www.rogerclarke.com/DV/PIAG-Eval.html>

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Customs Act 1901  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/)  
as amended by:  
Customs Amendment (Serious Drugs Detection) Bill 2011

Division 1B--Detention and search of suspects

Initial Detention, s.219S  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219s.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219s.html)

Internal Non-Medical Scan, s.219SA  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219sa.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219sa.html)  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219sb.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219sb.html)

48(+48)-Hour Detention Order by Judge, Magistrate (or JP?), s.219T, 219U  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219t.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219t.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219u.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219u.html)

Provisions Relating to Detention

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219v.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219v.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219w.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219w.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219x.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219x.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219y.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219y.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zaa.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zaa.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zab.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zab.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zac.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zac.html)

Records Destroyed (after 12 months!)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zad.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zad.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zae.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zae.html)

Internal Medical Search by medical practitioner

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219z.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219z.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zf.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zf.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zg.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zg.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zh.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zh.html)

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s219zj.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s219zj.html)

"internal search" of a person:

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/s4.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/s4.html)

(a) means an examination (including an internal examination) of the person's body to determine whether the person is internally concealing a substance or thing; and

(b) in the case of an internal medical search--includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed.

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