



Australian Government
**Australian Customs and
Border Protection Service**

Customs House
5 Constitution Avenue
Canberra ACT 2600

Dr Roger Clarke
Chair
Australian Privacy Foundation
78 Sidaway St
Chapman ACT 2611

Dear Dr Clarke

I refer to the letter of 8 July 2012 from Professor Zifcak, Dr Klugman, Mr Cope, Mr Murphy and yourself to the Minister for Home Affairs, the Honourable Jason Claire MP, regarding the Australian Customs and Border Protection Service's (Customs and Border Protection) pilot of internal body scanning to assist in the detection of internally concealed drugs. I have been asked by the office of the Minister for Home Affairs to reply directly to you and would like to address some of the concerns that you have raised in your letter.

From the outset I would like to distinguish Customs and Border Protection's pilot of internal body scanning technology from the deployment of external body scanners for aviation security purposes.

The use of an internal body scanner by Customs and Border Protection is separate to the Government's plans to strengthen aviation security by implementing external body scanning technology to screen departing passengers at international airports. These external body scanners will check for dangerous items concealed on departing passengers – to ensure the safety of all onboard departing aircraft.

You also refer to the previous Privacy Impact Assessment in your letter. I believe you are referring to the Privacy Impact Assessment on external body scanners for aviation security that was produced by the Department of Infrastructure and Transport, through the Office of Transport Security. This document has no relation to the use of an internal body scanner by Customs and Border Protection.

Customs and Border Protection pilot of an Internal Body Scanner

The Customs and Border Protection pilot of internal body scanning technology will assist Customs and Border Protection officers to more quickly confirm or allay suspicions regarding travellers who are suspected of concealing drugs within their bodies.

Existing legislation enabled Customs and Border Protection officers to detain a person for an internal personal search where there was a reasonable suspicion that drugs may be concealed within the person's body. The legislation required that the internal personal search be conducted by a medical practitioner at a medical facility.

Customs and Border Protection made changes to the *Customs Act 1901* (Customs Act) to extend the definition of internal search to include an 'internal non-medical scan' which is conducted by Customs and Border Protection staff at a Customs place.

Travellers will only be asked to undertake an internal non-medical scan where there is reasonable suspicion that they may be carrying drugs internally. The identification and formation of reasonable grounds to suspect internal concealment remains central to the detention of travellers for personal search.

Participation in an internal non-medical scan is by consent only. There is no coercive power available to Customs and Border Protection officers to compel a person to participate in an internal non-medical scan. A person who does not consent or is not invited to consent to an internal non-medical scan may be asked to consent to an internal medical search by a medical practitioner at a medical facility. The person may refuse that consent at which point a Federal Judge must order the further detention or internal medical search of the person.

The Customs and Border Protection internal body scanner is not a mass screening tool. Customs and Border Protection officers will identify suspected internal drug couriers through a layered intelligence driven risk based assessment process.

The use of an internal body scanner at airports will provide significant time and costs savings to Customs and Border Protection, AFP, public hospitals and the traveller. One of the major benefits from the use of an internal body scanner at airports is the reduction of referrals to hospital. Travellers suspected of being internal drug couriers, who consent to a body scan and are found not to be concealing drugs, will be released from detention and allowed to depart the airport on completion of their Customs, Immigration and Quarantine requirements.

Amendments to the *Customs Act 1901*

As outlined above amendments were made to the *Customs Act* and *Customs Regulations 1926* to permit the deployment and use of the internal body scanner for an internal non-medical scan.

The *Customs Amendment (Serious Drugs Detection) Bill 2011* (the Bill) was introduced into the House of Representatives on 23 February 2011 by the then Minister for Home Affairs, the Hon Brendan O'Connor MP. The Minister also announced the legislation in a media release on 23 February 2011.

The Bill was passed by Parliament on 4 July 2011 and received Royal Assent on 25 July 2011. The Minister announced the passage of the Bill in a media release on 4 July 2011 and a copy of this can be found at:

<http://www.alp.org.au/federal-government/news/using-technology-to-stop-drug-couriers-at-our-airp/>.

The *Customs Amendment (Serious Drugs Detection) Act 2011* (Amendment Act) came into effect on 26 January 2012. The Bill and Amendment Act can be found at: <http://www.comlaw.gov.au>.

This legislative amendment ensures that the *Customs Act* contains legislative provisions regarding the internal non-medical scan process and travellers' rights and obligations in consenting to an internal non-medical scan.

There are also a number of privacy protection measures stipulated in the Amendment Act which cover the recording, reproduction, storage and disposal of records and electronic images of personal searches and scans.

The legislative change is operationalised in a Customs and Border Protection Instruction and Guideline specific to the use of the internal body scanner. Instructions and Guidelines are security classified operational documents that provide policy and enforceable operational direction to our operational staff. As such they are not publicly available documents.

Information and Consent Forms

For travellers offered an internal non-medical scan, legislation requires that the process of securing their written consent includes a full explanation of their rights.

An information and rights card is available in English and multiple foreign languages (33) as an aid to this process. A card in the appropriate language is handed to the traveller to read and the traveller asked if he/she understands it and whether they have any questions.

If Customs and Border Protection officers are not able to communicate satisfactorily with the traveller because of language difficulties, or if the traveller specifically requests it, then a person competent to act as an interpreter will be called in.

Who is precluded from or will not be invited to consent to a scan?

Persons in Need of Protection (PINOPs) as defined in Section 4 of the Customs Act as persons under 18 years, and those identified as being physically or mentally incapable of managing their own affairs, are precluded from undergoing an internal non-medical scan.

Customs and Border Protection policy also precludes a Customs and Border Protection officer from inviting a pregnant woman to consent to an internal non-medical scan.

The Customs and Border Protection officer must also consider the person's physical capacity and health to undergo an internal non-medical scan. Where the Customs and Border Protection officer considers that asking the person to undertake an internal non-medical scan would expose that person to risk or injury, the person will not be invited to consent to an internal non-medical scan.

Body Scan Operators

Only trained and authorised Customs and Border Protection officers operate the internal body scanner.

It is a requirement of the Customs Act that the CEO of Customs and Border Protection approve the training in the operation of the body scanner and authorise individual Customs and Border Protection officers to use the body scanner after they have completed this training.

Engagement with the Office of the Australian Information Commissioner

Customs and Border Protection engaged with the Office of the Australian Information Commissioner (OAIC) prior to the drafting of the relevant legislative changes. Since this time the OAIC has provided feedback on a Privacy Impact Assessment (PIA) Customs and Border Protection produced to assist in identifying the privacy implications of using an internal body scanner. The OAIC has also provided input into the legislative changes to the Customs Act and policy and operational directions on use of the internal body scanner.

The OAIC continues to provide policy advice on the measures and processes used by Customs and Border Protection to protect the personal information of those travellers subjected to internal body scanning.

Customs and Border Protection is also subject to scrutiny from the Commonwealth Ombudsman's office in relation to the use of our powers in conducting an internal non-medical scan and the Department of Health and ARPANSA in relation to the operation of the internal body scanner.

With regard to your question on which public interest advocacy organisations participated in the PIA process I can confirm that there was no public consultation during the drafting of the PIA document and that it is also a security classified document.

As previously outlined Customs and Border Protection introduced amending legislation in February 2011 to enable the use of an internal body scanner. The Minister for Home Affairs made relevant media releases in February and July 2011 and there was no feedback or complaints received from public interest advocacy organisations.

I have also noted above that the internal body scanner is not a mass screening tool and can only be used in cases where a Customs and Border Protection officer has reasonable grounds to suspect a traveller is internally concealing illicit drugs and they provide their consent. In 2011/12, less than 200 people out of 29 million international travellers were referred for an internal search. As such the introduction of an internal body scanner has no impact on the majority of the travelling public.

Provision of Information

I note that you have requested copies or the location of information (including the PIA) on the use of the internal body scanner. These are classified operational documents and I consider that public release of this information would unnecessarily expose our law enforcement methods and procedures and impact the integrity of our border protection responsibilities.

The body scan technology being used by Customs and Border Protection is produced by Smiths Detection (model – Smiths B-SCAN 16HR-DV) and information is available on their internet site.

I hope that I have been able to provide you with some background on Customs and Border Protection's pilot of an internal body scanner and address your specific concerns. If you require further information I would be pleased to provide you with a verbal briefing on the project and can be contacted on (03) 9339 1310.

Yours sincerely

Tonie Differding
National Manager
Airport Operations South
18 July 2012