

Appendix 3

Extract from Senate Standing Committee for the Scrutiny of Bills *Alert Digest No. 2 of 2012*

Trespass on personal rights and liberties

Item 4, repeal existing section 95A

Item 4 seeks to repeal existing section 95A, which provision currently allows a person to choose a frisk search over another screening procedure. The explanatory memorandum at page 3 states that this amendment will enable the introduction of a policy whereby a person selected to pass through a body scanner may not choose an alternative screening method and that this ‘will ensure that the strongest security outcome is achieved from the technology’.

This encroachment on the right to freedom of movement, to the extent an option of a frisk search is removed, is justified in the SOC on the basis that (1) body scanners offer the greatest chance of detection of security threats, those threats being asserted to be serious and continuing, and (2) a full body frisk, which may be thought to achieve a similar outcome to a body scanner, would ‘involve a frisk of the entire body, including sensitive areas, as well as the possible loosening and/or removing of some clothing’ (see the explanatory memorandum at page 3). Further in relation to (2) above, it is stated that ‘it is unlikely that any passenger who fully understands the procedures and the technology would opt for an enhanced full body frisk in preference to a body scan’, for which a person has been randomly selected.

In the circumstances, the Committee leaves the question of whether the right to freedom of movement has been limited in an appropriate, reasonable and proportionate manner is left to the consideration of the Senate as a whole.

The Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Insufficiently defined legislative powers

Item 4, repeal existing section 95A

As suggested above, the question of whether the overall policy approach underlying this amendment is appropriate is left to the Senate as a whole. However, the explanatory memorandum, at page 6, notes that in applying the requirement that all persons who have been selected to pass through a body scanner may not choose an alternative screening procedure, allowances ‘will be made where there is a physical or medical reason that would prevent a person being screened by a body scanner’. In the SOC it is

stated that the rights of persons with disability are not inappropriately affected as ‘the Government is making appropriate modifications to ensure that individuals who cannot undergo a certain screening procedure due to a physical or medical condition will be screened by alternative methods that are more suitable to their circumstances’ (see page 4 of the explanatory memorandum). The SOC also notes, at page 5, that preparations for the introduction of body scanners has led to an ‘increased focus on the training of aviation security screening officers to ensure that people with a disability are treated in a compassionate manner’.

Although the Committee accepts these assurances, based on the proposed amendments it is unclear exactly how alternative screening procedures and compassionate treatment for persons with disabilities or medical conditions will be guaranteed in appropriate circumstances. It is not clear to the Committee whether the appropriateness of alternative procedures will be left to the discretion of security screening officers or whether the legislation can provide for guidelines to be developed. **The Committee therefore seeks a further explanation of how the application of alternative screening procedures in appropriate circumstances will be administered and regulated, and whether consideration has been given to providing in the legislation for the development of appropriate guidelines.**

Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Trespass on personal rights and liberties

Schedule 1, item 1, proposed section 41A

Schedule 1, item 3, proposed paragraph 4(3)(3B)

Item 1 of Schedule 1 proposes a new section 41A. This provision deems consent to have been given to conduct screening procedures, including body scans but excluding frisk searches, unless a person expressly refuses to undergo a procedure. It is noted that the Statement of Compatibility acknowledges that screening procedures are of concern from the perspective of the protection of an individual's privacy, and the Committee adds that this concern is heightened when consent to procedures is deemed. However, the SOC, at page 3 of the explanatory memorandum, states that the Office of the Australian Information Commissioner (OAIC) has been closely involved with the development of a comprehensive privacy impact assessment to protect a passenger's right to privacy.

Particularly in relation to the introduction of body scanners, it is stated that this technology is less intrusive than the only realistic alternative that could provide similar outcomes (full frisk searches) and that the implementation of ‘automatic threat recognition technology’ will mean that areas of concern

are only displayed on a 'generic human representation that is the same for all passengers'. This technology removes the need for a 'human operator to look at raw or detailed images, and therefore maintains the privacy and modesty of all individuals'. Finally, it is stated that the 'body scanners that are introduced in Australia will not be capable of storing or transmitting any information or data' (also at page 3 of the explanatory memorandum).

In support of this approach, item 3 proposes a new paragraph 4(3)(3B) which provides that if body scanning equipment is used for screening a person, then any image 'must only be a generic body image that is gender-neutral and from which the person cannot be identified'. In light of the detailed explanation in the explanatory memorandum, the Committee leaves to the consideration of the Senate as a whole the general question of whether the overall approach is reasonable and proportionate.

However, the Committee is concerned that the important safeguard mentioned in the explanatory memorandum that the machines introduced into Australia won't be able to store or transmit data is not a legislative requirement. It is unclear why the legislation (properly) prohibits the use of images that are not generic, but does not take a similar approach to the use of equipment that may store or transmit data. **The Committee therefore seeks the Minister's advice as to whether the legislation can be amended to require that scanners not be capable of storing or transmitting data or that these functions are disabled or removed.**

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

