



## Customs Amendment (Serious Drugs Detection) Bill 2011

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## Customs Amendment (Serious Drugs Detection) Bill 2011

**Date introduced:** 23 February 2011

**House:** House of Representatives

**Portfolio:** Home Affairs

**Commencement:** Sections 1 to 3 on Royal Assent. Schedule 1 on the earlier of a day fixed by proclamation or the day after a period of six months has elapsed from the date of Royal Assent.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Customs Amendment (Serious Drugs Detection) Bill 2011 is to amend the *Customs Act 1901* to allow for the use and control of prescribed equipment for the conduct of external searches and internal non-medical scans. It also concerns amendments associated with issues of privacy particularly in relation to search records produced by the prescribed equipment and the manner in which they are dealt with.

### Background

The Bill was introduced into Parliament on 23 February 2011 to implement the use of body scanning technology to detect persons carrying concealed prohibited goods or suspicious substances.

These changes were foreshadowed in the Budget of May 2010.

The Government will provide \$199.2 million over five years to enhance and strengthen the aviation security regime in Australia, in response to current threat assessments and the recommendations of the review of Australia's aviation security conducted by the National Security Adviser following the attempted terrorist attack in the United States on 25 December 2009.<sup>1</sup>

One of the funded measures includes:

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1. Australian Government, *Budget measures: budget paper no. 2: 2010-11 – Border security—strengthening passenger and air cargo security*, May 2010, p. 99.

New technologies for passenger and air cargo screening at international gateway airports (including an immediate increase in the number of passengers subjected to explosive trace detection; and the use of body scanners and multi-view x-ray machines.<sup>2</sup>

## Basis of policy commitment

The proposed changes in the Bill will enable Customs and Border Protection staff to conduct a 12 month trial of the X-ray scan technology. Under the legislation<sup>3</sup> currently an X-ray of a detainee suspected of concealing suspicious substances internally is carried out by a medical practitioner. The Bill will allow an initial non-medical scan conducted by Customs officers trained in the use of the technology if the person consents to the scan being done. The Bill states that before the Governor-General makes regulations prescribing the equipment to be used for the purpose of conducting external searches and internal non-medical scans, the Minister must obtain a statement from the Customs CEO as to the safety of the equipment to be used and that it poses little or no risk to the health of the person being searched and the person does not require professional qualifications to operate the equipment. The CEO must consult with Commonwealth authorities with the requisite expertise in these areas to determine that what is said in the statement is correct in relation to the equipment being used.

The body scan technology produces a “computer image of a person’s internal cavities within the skeletal structure. Where the body scan image supports a suspicion of internal concealment, the existing regime governing an internal search by a medical practitioner will then apply”.<sup>4</sup>

The aim of the legislation is to reduce the impact of having to refer people to hospital for X-rays. It will reduce the impact “on the resources of the AFP, hospital emergency units and Customs and Border Protection”.<sup>5</sup>

Most importantly, body scanning technology will not be used on all travellers or used randomly— it will only be used where there is a reasonable suspicion that a person is carrying drugs internally. In addition a suspect must consent to the use of body scanning technology.

Measures to ensure privacy and individual rights are respected include:

- law enforcement agencies form a reasonable suspicion that a person may be carrying illicit drugs internally before the technology can be used

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2. M Donaldson, Budget Review 2010-11, *Border security—passenger and air cargo security*, Parliamentary Library, Canberra, viewed 22 March 2011, <http://www.aph.gov.au/library/pubs/RP/BudgetReview2010-11/BorderSecurity.htm>

3. Section 219Z, *Customs Act 1901*.

4. B O'Connor, ‘Second reading speech: Customs Amendment (Serious Drugs Detection) Bill 2011’, House of Representatives, *Debates*, 23 February 2011, p. 4, viewed 22 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-02-23%2F0021%22>

5. Ibid.

- a suspect must give written consent to being subject to body scanning technology. If they don't, a hospital examination will be conducted, as is the current practice
- the operation of the body scanning technology will be conducted by a specially trained Customs officer
- the images taken are subject to storage, access and destruction controls
- children, pregnant women and the mentally impaired will not be offered a body scan.<sup>6</sup>

The *Customs Act 1901* section 4(20) defines 'in need of protection'

(20) For the purposes of Division 1B of Part XII, a person is in need of protection if, and only if, the person is:

(a) under 18 years of age; or

(b) in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs.

Although pregnant women are referred to in the press release above, they are not covered by the definition in the Act. Similarly certain physically unwell persons are a class of persons who are also not protected by the definition. It should be noted however, that scanning will not take place in the absence of informed consent.

**Proposed paragraph 219SA(1)(a)** provides that a Customs officer can go ahead with the scan if there are reasonable grounds that a person is not in need of protection and the person has given their consent.

The Minister states in his second reading speech that the Office of the Australian Information Commissioner has provided information to the privacy impact assessment and all the comments made have been incorporated.<sup>7</sup> Also he states that the Office of International Law in the Attorney-General's Department had advised that the amendments do not breach the right to privacy as set out in the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child.

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6. B O'Connor (Minister for Home Affairs, Minister for Justice and Minister for Privacy and Freedom of Information), *Using technology to stop drug couriers at our airports*, media release, 23 February 2011, viewed 22 March 2011, [http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases\\_2011\\_FirstQuarter\\_23February2011-Usingtechnologytostopdrugcouriersatourairports](http://www.ministerhomeaffairs.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2011_FirstQuarter_23February2011-Usingtechnologytostopdrugcouriersatourairports)

7. Op. cit.

The Minister states that the approach taken by Australia is based on the United Kingdom's Border Agency model which has operated successfully since 2005.<sup>8</sup> The Border Agency in the UK use compass machines however this does not mean that Australia will be using the same technology.

Compass — A low-dose radiation body-scanner used on passengers who are suspected of concealing packages. The dose is far less powerful than a traditional x-ray and is in place across Heathrow.<sup>9</sup>

## Possible Health Risks

As mentioned above, there are provisions in the Bill which will involve consultation between the Customs CEO and relevant Commonwealth authorities with expertise and responsibilities for matters concerned in the statements that the CEO makes to Parliament. This will concern the safety of the equipment being used and that its use will not pose a threat to the health of a person being scanned. There is not much information available on the type of equipment to be used in relation to this legislation. However, as a means of making some sort of comparison, in 2008 there was trial of advanced screening technologies at Adelaide Airport by the Office of Transport Security. That trial is unrelated to the current legislation and the proposed prescribed equipment. The following information is offered to give some idea of the safety levels involved although it cannot be compared directly with the current situation:

The technologies include the latest in vapour and liquid analysers, explosive detecting X-ray technologies, and 'millimetre wave' and 'backscatter' body scanning technologies. Each of these technologies has undergone rigorous testing by the Australian Nuclear Science Technology Organisation and the Defence Science and Technology Organisation...

The technologies have all been approved for use by the Australian Radiation Protection and Nuclear Safety Authority. Actual radiation levels are very low. The dosage from one body scan is 400 times less than a single medical X-ray. It would take 10,000 scans to reach the maximum level of safe radiation recommended in a year.<sup>10</sup>

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8. Op. cit., B O'Connor, media release.

9. Home Office, Border Agency, media release, viewed 21 March 2011, <http://www.homeoffice.gov.uk/media-centre/press-releases/europes-largest-removal>.

10. Department of Infrastructure and Transport, *Advanced screening technologies demonstrated at Adelaide Airport*, media release, 1 October 2008, viewed 22 March 2011, [http://www.infrastructure.gov.au/department/media/2008/d2\\_2008.aspx](http://www.infrastructure.gov.au/department/media/2008/d2_2008.aspx)

## Committee consideration

The Senate Selection of Bills Committee resolved at its meeting of 2 March 2011 to recommend that the Customs Amendment (Serious Drugs Detection) Bill 2011 not be referred to Committee.<sup>11</sup>

The Senate Standing Committee for the Scrutiny of Bills has drawn attention to the following matters concerning possible matters that may arise in relation to personal rights and liberties. The Bill will allow Customs and Border protection staff to undertake an internal non-medical scan of a person who is suspected of concealing a suspicious substance internally. A detainee's consent is required for the scan to be done. The Committee notes the requirements in the Bill concerning consent. The Bill provides for informed consent (**proposed subsection 219ZAA(1)**), an invitation to consent and for it to be recorded by audiotape, videotape or other means or in writing (**proposed subsection 219ZAA(2)**) and that the equipment be operated by an authorised officer of the same sex as the detainee (**proposed subsection 219ZAA(3)**).<sup>12</sup>

The Committee drew attention to a matter mentioned in the Explanatory Memorandum concerning the broader scan capability in order to limit the scan to internal cavities within the skeletal structure which cannot be changed by an officer at the airport. The report states that this matter is not reflected in the legislation and the Committee sought the Minister's advice as to whether this will be included in the primary legislation.<sup>13</sup>

The Committee also drew attention to item 16 of the Bill which states that a non- medical scan can be done if there are reasonable grounds to believe that the detainee is 'not in need of protection'. Examples are given in the Explanatory Memorandum. The Committee sought the Minister's advice as to "whether consideration has been given to including a definition of the circumstance when a person is in need of protection".<sup>14</sup>

The Minister has responded to the Committee's concerns in relation to these matters. On the matter of the broader scan capability of the technology, the Minister's response was that if the technology procured has the broader scanning capability, he will "undertake that the regulations to prescribe this equipment for the purposes of the new internal non-medical scan will include the requirement for locked calibration by the supplier".<sup>15</sup>

However, the Committee takes the view "that the principle that the capacity of any technology should be limited to the level necessary to undertake the action allowed by the legislation should be

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11. Senate Selection of Bills Committee, Report no. 2 of 2011, 3 March 2011, viewed 21 March 2011, [http://www.aph.gov.au/senate/committee/selectionbills\\_ctte/reports/2011/rep0211.pdf](http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2011/rep0211.pdf)

12. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest no. 2 of 2011*, 2 March 2011, p. 16, viewed 21 March 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2011/d02.pdf>

13. *Ibid.*, p. 17.

14. *Ibid.*, p. 17.

15. Senate Standing Committee for the Scrutiny of Bills, Third report of 2011, 23 March 2011, p. 125, viewed 24 March 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/bills/2011/b03.pdf>

included in the primary legislation". The Committee seeks further advice from the Minister on this point.<sup>16</sup>

The Minister responded to the matter concerning the definition 'in need of protection' pointing to the existing definition in the *Customs Act 1901* section 4(20) stating that it applies to the new internal non-medical scan regime and that no further definition of the term is required in the Bill.<sup>17</sup>

## Financial implications

The Explanatory Memorandum states that the Bill has no financial impact.<sup>18</sup>

## Key provisions

**Item 3** repeals and substitutes the definition of internal search with a new definition.

**Item 12 repeals sections 219RAB to 219RAF.** These sections deal with external searches and the prescribed equipment used for those searches and the records of results of external searches. "These provisions are being consolidated in new Subdivision CA of Division 1B of Part XII of the Customs Act, so that they equally apply to the use of prescribed equipment in carrying out the new internal non-medical scan of a detainee."<sup>19</sup>

## Detain a person suspected of concealing a suspicious substance

**Item 13 repeals and substitutes subsection 219S(1). Proposed subsection 219S(1)** provides that if a Customs or police officer suspects a person of internally concealing a suspicious substance, they may detain the person in order to carry out an internal non-medical scan under **proposed section 219SA** or make an application to detain the person under section 219T.

## Internal non-medical scan

**Item 16 inserts proposed section 219SA** which deals with the internal non-medical scan using prescribed equipment. **Proposed subsection 219SA(1)** provides that a Customs officer may carry out an internal non-medical scan as soon as practicable after the person has been detained under section 219S, if there are reasonable grounds to believe that the person is not in need of protection and the person consents to the scan (using prescribed equipment by an authorised officer) after the Customs officer has explained the requirements in section 219ZAA inviting the consent of the

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16. Ibid., p. 126.

17. Ibid., p. 127.

18. Explanatory Memorandum, [Customs Amendment \(Serious Drugs Detection\) Bill 2011](#), p. 3, viewed 21 March 2011.

19. Ibid., p. 7.

person. **Proposed subsection 219SA(2)** provides that a scan of the detainee must be carried out using equipment prescribed for the purpose by an authorised officer who is the same sex as the detainee. **Proposed notes to the section** state in Note 1 that the officer must be the same sex as the detainee as prescribed in subsection 219ZAA(3). Note 2 states that any photograph or image taken using the prescribed equipment must be destroyed in accordance with section 219ZAE.

**Proposed section 219SB** deals with seeking a detention order following invitation to consent to an internal non-medical scan. **Proposed section 219SB** provides that the Customs CEO or a police officer must apply for an order under section 219T to detain the person and consent of the person was sought and any of the following conditions apply:

- the detainee does not consent
- an internal non-medical body scan was begun but not completed and there are reasonable grounds to suspect the detainee is internally concealing a suspicious substance
- after carrying out the scan, the detainee is suspected of internally concealing a suspicious substance, and
- subsection 219V(2) does not apply (consent to an internal medical search).

**Proposed note 1 to section 219SB** states that an internal medical search must be arranged if subsection 219V(2) applies. **Proposed note 2 to section 219SB** states that the detainee must be released under section 219ZE if the detention officer suspects no reasonable grounds exist for suspecting the detainee of concealing a suspicious substance.

## Order to detain

**Item 17 inserts proposed subsection 219T(1A)** into existing section 219T which relates to the initial order for detention. **Proposed subsection 219T(1A)** provides that the section applies to a person detained under section 219S, that the detainee has not consented to an internal medical and the person has been asked to consent to the internal non-medical scan. The Customs CEO or police officer is then required under section 219SB to apply for an order under section 219T to detain the person.

## Use of prescribed equipment for external search or internal non-medical scan

**Item 32 inserts proposed subdivision CA** which deals with prescribed equipment for external searches and internal non-medical scans. **Proposed section 219ZAA** deals with the use of prescribed equipment for an external search or an internal non-medical scan. **Proposed subsection 219ZAA(1)** sets out the information which the Customs officer must explain to the detainee before asking them to consent to an external search or in an internal non-medical scan. Certain of the information to be provided includes the following:

- what the prescribed equipment is
- the purpose for which it is used
- that any evidence obtained could be used in court

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- known risks of using the equipment (if any)
- the procedure to be used
- that an order may be sought for the detainee to be detained for an internal medical examination in certain circumstances.

**Proposed subsection 219ZAA(2)** provides for the recording of the invitation to consent and any consent by audiotape, videotape, or other electronic means or in writing. **Proposed subsection 219ZAA(3)** provides that the prescribed equipment must be operated by an authorised officer of the same sex as the detainee.

**Proposed section 219ZAB** deals with prescribing equipment for use in external searches and internal non-medical scans. **Proposed subsection 219ZAB(1)** provides that regulations may prescribe only equipment that will indicate whether a person may be carrying prohibited goods on his/her body. Similarly, **proposed subsection 219ZAB(2)** provides that regulations may prescribe only equipment that can indicate whether a person is internally concealing a suspicious substance.

**Proposed subsection 219ZAB(3)** provides that before the Governor-General can make a regulation prescribing equipment for external searches or an internal non-medical scan, the Minister must obtain a statement from the Customs CEO to the effect that:

- the equipment can be safely used to detect prohibited goods and suspicious substances, and
- that it poses little or no health risks to the person being searched, and
- that a person does not require professional qualifications to operate the equipment.

**Proposed subsection 219ZAB(4)** provides that the Customs CEO must consult with Commonwealth authorities expert in the matters addressed in the statement. Any advice received by the CEO under (4) must be tabled in Parliament within 7 sitting days of that House after the Minister has received the statement (**proposed subsection 219ZAB(5)**).

**Proposed subsection 219ZAC(1)** provides the Customs CEO may authorise a Customs officer to use the prescribed equipment after appropriate training specified in writing by the CEO. The specification is not a legislative instrument and therefore not subject to parliamentary scrutiny (**proposed subsection 219 ZAC(2)**).

## **Record of results of external search or internal non-medical scan**

**Proposed subsection 219ZAE(1)** provides that this section applies to any of the search records produced during external searches or internal non-medical scans:

- a videotape or other electronic record of an external search
- photograph or image of the detainee's body taken using prescribed equipment for the purposes of an external search or an internal non-medical scan
- photograph or image of the detainee's body
- a photograph of the prohibited goods on the detainee

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- a sample taken from the outer surface of the detainee's hand using prescribed equipment.

**Proposed subsection 219ZAE(2)** provides that a search records must be destroyed as soon as practicable after 12 months if the proceedings in relation prohibited goods or suspicious substances have either not been instituted or have been discontinued. A magistrate may extend the 12 month period if requested by a Customs officer or the Director of Public Prosecutions and the magistrate is satisfied that good reasons exist for doing so (**proposed subsection 219ZAE(3)**).

**Proposed subsection 219ZAE(4)** provides that search records must be destroyed if:

- a detainee is found to have committed a relevant offence but no conviction is recorded
- a detainee is acquitted of a relevant offence and no appeal is lodged or an appeal is lodged and the acquittal is confirmed or the appeal is withdrawn.

Search records may be retained however if there is an investigation or a proceeding pending in relation to another relevant offence (**proposed subsection 219ZAE(5)**). **Proposed subsection 219ZAE(6)** provide that the regulations **must** provide for the secure storage of any search record pending its destruction.

## Concluding comments

There is little information available about the actual scanning technology to be used. This may be for security reasons. However the Bill ensures that there is mandatory consultation between the Customs CEO and relevant Commonwealth authorities on the safety of the equipment to be used and possible health risks to persons being scanned.

Generally the scanning will only be of a selected number of persons who are suspected of carrying prohibited goods or carrying suspicious substances internally and who consent in writing to the scan. It will not apply to travellers generally.

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