Aviation Transport Security Amendment (Screening) Bill 2012

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Law and Bills Digest Section

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Aviation Transport Security Amendment (Screening) Bill 2012

Date introduced: 16 February 2012
House: House of Representatives
Portfolio: Infrastructure and Transport

Commencement: The formal provisions of the Bill commence on Royal Assent. Schedule 1 commences on a day to be fixed by proclamation, however if no proclamation is made within six months of the Bill’s Assent, then the Schedule commences on the next day.

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/Parliamentary_Business/Bills_Legislation. 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 Bill amends the Aviation Transport Security Act 2004 (the Act) so that:

- a person who presents at an aviation security screening point is presumed to consent to any screening procedure, with the exception of a body frisk search
- provision is made for regulations to deal with ‘persons or things’ that must not pass through a screening point
- a non-exhaustive list is provided of the types of equipment (including body scanners) that may be used for aviation security screening purposes
- a body scanner may only produce a generic image of a person (that is, an image which is gender-neutral and from which the person cannot be identified), and must not store or transmit any image of the person or any personal information, and
- a person may no longer choose to undergo a full body frisk search as an alternative to another screening procedure.

Background

It is interesting to note that the background for the 2009 Bill on this topic is still applicable:

Australia’s current aviation security framework came into effect in March 2005 following the commencement of the Aviation Transport Security Act 2004 (Principal Act) and the

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subsequent making of the Aviation Transport Security Regulations. The Principal Act has been amended a number of times since its enactment to improve its operation.¹

Especially since the events of 11 September 2001, aviation security has assumed a high priority for the Australian government. It has therefore been subject to an ongoing assessment, so as to maintain the appropriate response capacity of the aviation regulatory framework regime in relation to new and changing security threats to the industry.³

Basis of policy commitment

In his second reading speech, the Minister for Infrastructure and Transport, Anthony Albanese stated:

On 25 December 2009, a passenger attempted to bomb Northwest Airlines flight 253 en route from Amsterdam to Detroit.

This would-be bomber successfully smuggled a viable improvised explosive device through aviation security screening and onto the aircraft without being detected.

The device, which was concealed inside the passenger’s underwear, contained no metallic components and was therefore able to be carried through a walk-through metal detector without triggering any alarm.

This event highlighted a significant vulnerability in global aviation security screening practices, including in Australia.³

In response to this incident, but also within the context of the conclusions and recommendations of the Aviation White paper⁴, on 5 February 2012, Anthony Albanese (the Minister for Infrastructure and Transport) announced that:

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3. A Albanese, ‘Second reading speech: Aviation Transport Security Amendment (Screening) Bill 2012’, House of Representatives, Debates, 16 February 2012, p. 1571, viewed 23 March 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4745%20Title%3A%22second%20reading%22%20Content%3A%22%20move%22%7C%22move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20%20 )(Dataset%3Ahansards%20%7C%20Dataset%3Ahansards)\;rec=0

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Body scanners will be introduced at all of Australia’s international airports providing the travelling public with the most advanced passenger screening technology available in the world.

The machines only produce a generic outline (attached) to display the location of metal and non-metal items under clothing.

To protect people’s privacy, the image will appear as a stick figure so all men will have the same outline and all women will have the same outline with no defining features. [See figure 1]

**Figure 1:** Stick figure of an individual shown by active millimetre wave technology which will be used in Australia.  

On 9 February 2010, the Government announced a series of measures aimed at strengthening Australia’s international and domestic aviation security regime against emerging threats.

These measures are intended to be consistent with the security strategy set out in the Government’s Aviation White Paper, as well as the National Security Adviser’s review of aviation security in light of the attempted terrorist attack on a United States-bound flight on 25 December 2009. The package included:

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5.  A Albanese (Minister for Infrastructure and Transport), *Advanced screening technology for major airports*, media release, 5 February 2012, viewed 23 March 2012,  

6.  Ibid.

7.  A Albanese (Minister for Infrastructure and Transport), K Rudd (Prime Minister) and B O’Connor (Minister for Home Affairs), *Strengthening aviation security*, media release, 9 February 2010, viewed 23 March 2012,  

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increasing the number of passengers who will be subject to explosive trace detection at major international and domestic airports

$28.5 million to assist the industry to introduce a range of new screening technologies at passenger screening points. These technologies include the latest body scanners, next generation multi-view X-ray machines and bottle scanners capable of detecting liquid-based explosives

$32 million to bring forward screening at a number of additional regional airports that are currently served by larger passenger turbo-prop aircraft, and

more stringent training and performance requirements for security screening staff.  

Other measures included, in general terms, enhanced policing and passenger security processing measures, strengthening international cooperation and better securing the air cargo supply chain.

The Bill’s measures and new technologies are designed to assist in lessening the vulnerabilities in the existing aviation security screening regime.

This Bill contains amendments designed to support the introduction of body scanner Australia’s international airports. At this stage, the Government only has plans to introduce active millimetre wave scanners, however the amendment proposed by item 3 of the Bill envisages that regulation will provide for new equipment (technologies) to be deployed for screening purposes. The technology that may be deployed in the future is indeterminate.

Types of scanners

There are a range of body scanners that could be used under the proposed legislation:

A millimetre wave scanner is a whole–body imaging device used for detecting objects concealed underneath a person’s clothing.

It is one of the common technologies of full body scanner used for body imaging; a competing technology is backscatter X-ray. Millimeter wave scanners themselves come in two varieties: active and passive. Active scanners direct millimeter wave energy at the subject and then interpret the reflected energy. Passive systems read only the raw energy that is naturally emitted from the human body or objects concealed on the body. The key difference is that passive systems direct no energy at the subject being screened and are as safe as a digital camera for both the screener and the subject.

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8. Ibid.
9. Ibid.
10. Wikipedia, ‘Millimeter wave scanner’, viewed 22 March 2012, 
http://en.wikipedia.org/wiki/Millimeter_wave_scanner
(Wikipedia uses the American spelling of ‘millimeter’.)

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Several countries employ the scanners for security screening.

Privacy advocates are concerned about the use of active millimeter wave technology because it effectively implements routine and, in many cases, mandatory virtual strip searches. It allows screeners to see the surface of the skin under clothing, prosthetics including breast prostheses, and other medical equipment normally hidden, such as colostomy bags [see figure 1]. Passive millimeter wave devices do not have the same privacy concerns because the images produced with passive screening technology expose no anatomical details.

While the radiation itself cannot distinguish between private and non-private areas, software imaging technology can mask specific body parts. Proposed remedies for privacy concerns include scanning only people who are independently detected to be carrying contraband, or developing technology to mask genitals and other private parts. In some locations, travellers have the choice between the body scan or a traditional "patdown". In locations such as the UK, the scans are mandatory.\textsuperscript{11}

**Backscatter X-ray** is an advanced X-ray imaging technology. Traditional X-ray machines detect hard and soft materials by the variation in transmission through the target. In contrast, backscatter X-ray detects the radiation that reflects from the target. It has potential applications where less-destructive examination is required, and can be used if only one side of the target is available for examination.\textsuperscript{12}

The backscatter pattern is dependent on the material property, and is good for imaging organic material.\textsuperscript{13}

In contrast to millimeter wave scanners which create a 3D image, backscatter X-ray scanners will typically only create a 2D image. For airport screening, images are taken from both sides of the human body.\textsuperscript{14}

Backscatter x-ray technology has been proposed as an alternative to personal searches at airport and other security checkpoints easily penetrating clothing to reveal concealed weapons. It raises privacy concerns about what is seen by the person viewing the scan. Some worry that viewing the image violates confidential medical information, such as the fact a passenger uses a colostomy bag, has a missing limb or wears a prosthesis, or is transgender, despite the fact that the person viewing the image can't see the person they are screening.\textsuperscript{15}

The British newspaper *The Guardian* has revealed concern among British officials that the use of such scanners to scan children may be illegal under the *Protection of Children Act 1978*, which prohibits the creation and distribution of indecent images of children. This concern may delay the introduction of routine backscatter scanning in UK airports.\textsuperscript{16}

\begin{footnotes}
\item[11] Ibid.
\item[13] Ibid.
\item[14] Ibid.
\item[15] Ibid.
\item[16] Ibid.
\end{footnotes}

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Unlike cell phone signals, or millimeter-wave scanners, the energy being emitted by a backscatter X-ray is a type of ionizing radiation that damages chemical bonds. This has raised health concerns.\(^\text{17}\)

**Main issues**

The main issues arising out of the amendments proposed by this Bill are canvassed in the discussion of committee consideration and also the main provisions.

**Committee consideration**

**House of Representatives Committee Inquiry**

On the 16 February 2012, this Bill was referred to the House of Representatives Standing Committee on Infrastructure and Communications for inquiry and report. On 9 May 2012, the Committee tabled its advisory report on the Bill.\(^\text{18}\) In summary, the main issues raised by the inquiry were:

**Technology used by proposed body scanning units**

The Committee understands that other types of body scanning units operate elsewhere in the world, including those which use ‘back-scatter x-ray’ technologies. According to government policy, only active millimetre wave body scanners will be used in Australia.\(^\text{19}\)

**Health impacts**

The Committee pointed to the dearth of longitudinal studies on the health effects of millimetre wave scanners— a necessary consequence of a newly developed technology. The Committee also noted that it seems to be generally accepted that millimetre wave scanners provide a comparatively lesser risk to health than a few alternative technologies, though there is no consensus on the level of risk produced by both the millimetre wave scanner and the backscatter x-ray scanner.\(^\text{20}\)

The Queensland Council for Civil Liberties, for example, welcomed the Federal Government’s commitment to using millimetre wave scanners only, but recommended that further research be

\(^{17}\) Ibid.


\(^{20}\) Ibid.

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undertaken to ensure that queries as to the existence of a scientific consensus on the safety of the scanners could be addressed.\(^\text{21}\)

**Security effectiveness**

The benefit of introducing body scanning technology to aviation security were questioned in some of the submissions, reflecting in part, the uncertainty as to whether the millimetre wave body scanners would have detected the explosives of the type used by the Northwest Airlines Flight 253 bomber.\(^\text{22}\)

It was also claimed that body scanners are ineffective and time-consuming due to excessive false-positive rates.\(^\text{23}\)

The submission by the Department of Infrastructure and Transport described a trial of the proposed body scanning equipment involving 23,577 body scans in Melbourne and Sydney airports conducted during a seven week trial period. The Department stated that ‘overall, public reaction to the trial was positive,’ and that most volunteers remarked that ‘it was quick and easy.’\(^\text{24}\) It is to be noted that participants were volunteers rather than operating within a legislative requirement to participate.

**Comment**

In December 2011, *Pro Publica* published an investigation into millimetre wave scanners. The article stated that ‘France and Germany, have decided to forgo the millimetre-wave scanners because of false alarms triggered by folds in clothing, buttons and even sweat.’\(^\text{25}\) Its report claimed that false positive rates of the machines ranged from five per cent in Britain to 54 per cent in Germany.

Despite the high rate of detection, the delays caused by frequent false alarms were so unbearable that Germany decided that the technology was not ready for everyday use. Nearly seven out of 10 passengers had to be stopped for further screening.


\(^{24}\) Department of Infrastructure and Transport, Submission to the House of Representatives Standing Committee on Infrastructure and Communications, *Inquiry into the Aviation Transport Security Amendment (Screening) Bill 2012*, attachment C, submission no. 9, 28 February 2012, p. 3.

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The vast majority of false alarms, affecting 39 percent of all passengers, were attributed to sweat, buttons or folds in clothing. Another 10 percent resulted from passengers moving during the scan, while 5 percent couldn’t be explained at all.\(^{26}\)

On the issue of effectiveness, when the UK was looking at adopting this technology it was reported that:

Ben Wallace, the Conservative MP, who was formerly involved in a project by a leading British defence research firm to develop the scanners for airport use, said trials had shown that such low-density materials [those containing liquids, chemicals or plastic explosive] went undetected. [...] And that “doubts [existed] over whether the millimetre-wave body scanners being discussed by the Government would have picked up Abdulmutallab’s hidden explosive”.

Indeed, there isn’t a single technology out there that is an answer to the whole problem.

Chris Yates, Aviation Security Editor of Jane's Information Group, says: "Body scanning (whether it be millimetre-wave or X-ray based and manufactured by any of the companies in this sector), has a significant role to play in enhancing UK airport security immediately.

"Body scanning is only half the story, though. The Government cannot ignore the liquid aspect any more. Liquid explosive became a high-agenda issue following the thwarted transatlantic bomb plot of 2006 and is clearly implicated in the attempted downing of Northwest Airlines Flight 253.\(^{27}\)

On 6 March 2012 the *Asian Age* newspaper reported that full body scanners are not foolproof. A senior official from the Indian Central Industrial Security Force was reported as saying:

“[…] We cannot share the operational details but these scanners cannot be the only layer of security check at airports. So the question we are studying is whether there is any real need to buy such expensive scanners?”\(^{28}\)

Other countries that have deployed millimetre-wave scanners -- Canada with 51 machines and the Netherlands with 60 -- said they had not experienced problems with false alarms. They declined to disclose their false-positive rates.\(^{29}\)

26. Ibid.

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Removal of the ‘opt-out’ provision

The Australian Privacy Foundation (APF), Australian Airline Pilots Association, and Civil Liberties Australia did not support the removal of the option to choose alternative screening measures. One inquiry participant claimed that the European Union allows passengers to choose a frisk search over a body scan.

Privacy implications

The Committee acknowledged concerns in the community over the use of digital images produced by body scanners.

The APF was concerned that ‘the existence of an anomaly [on the screen] may be broadcast by voice, which on occasion will inevitably draw the attention of others in the vicinity.’ The Committee heard concerns about digital images being stored following a body scan. As government policy states that these images will not be stored, the Committee believes there is no basis for these concerns.

It was noted that no personal or identifying information will be collected, used, stored or disclosed as a result of body scanning screening (proposed subsection 44(3C)).

Comment

The report published by Pro Publica mentioned above, states that in many countries where this technology has been installed, privacy software was subsequently installed which automates detection and no longer creates an image of a passenger’s body (as will be the case with millimetre wave scanner which will be used in Australian airports).

Committee's conclusion

The Committee concluded that there were obvious benefits in adopting the technology and that it accommodated those persons who would not have the technology apply to them on account of medical conditions. In conclusion, the Committee recommended that the House of Representatives consider and pass the Bill [unamended].

33. M Grabell and C Salewski, op. cit.
**Senate Committee Inquiries**

This Bill was referred to the Senate Standing Committee for the Scrutiny of Bills. The key concerns raised by the Committee are mentioned in the Main Provisions section of this Bills Digest.

On 1 March 2012, this Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee for report by 9 May 2012. On 9 May 2012, the Senate extended the reporting date to 18 May 2012. The Committee tabled its report on 30 May 2012.

The Senate Selection of Bills Committee gave the following reasons for its decision to refer the Bill for inquiry:

- the privacy and health issues at stake with the technology described in the bill require input from experts
- security and counter-terrorism experts should be consulted as to whether the new screening arrangements contained in the bill would enhance security, and
- a Senate inquiry would help to provide more detail about the consultation process between the Office of the Information Commissioner and the Office of Transport Security on the screening arrangements.

The Greens referred this Bill for inquiry because of privacy and health concerns.

The Committee considered basically the same issues as those raised by the House of Representatives inquiry. The Committee supported enhanced security in airports while stating that this should be subject to certain safeguards and better balanced with human rights concerns. The Committee made the following recommendations:

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The use of frisk searches continue to be available as an alternative screening procedure at Australian international airports and, accordingly, that the bill not repeal section 95A of the *Aviation Transport Security Act 2004*.

The Government amend the bill to limit the use of ionising backscatter x-ray equipment for security screening to certain, clearly defined exceptional circumstances.

Prior to the introduction of any new security screening technology at international airports, the technology be thoroughly tested for compliance with the relevant health regulations.

Subject to the above recommendations, the Senate pass the Bill.  

The Committee also commented

the government should ensure that clear information on a passenger’s ability to refuse to undergo a screening procedure and the consequences of such a refusal, should be provided at the entry point to all relevant screening areas.  

the government should work actively with the aviation industry to develop a clear and effective set of signage and informational products and training arrangements to maximise the security outcomes of the body scanners roll-out.

**Policy position of non-government parties/independents**

The Liberal and National parties have expressed their support for this Bill.

The Australian Greens have stated:

[...] the health problems experienced overseas with back-scatter scanners that use ionising radiation are serious enough to warrant more attention. There are compelling reasons to reject outright the use of ionising backscatter x-ray equipment, rather than limit it to ‘certain clearly defined exceptional circumstances’, especially as other technology is available.

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39. Ibid., p. 19.

40. Ibid., p. 29.


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The Greens also pointed out that the EU has banned the use of backscatter body scanners because of the possible health risks, even though they are used in the USA, where passengers still enjoy the right to ask for a frisk search as an alternative. They also maintain that the government should ensure that screening technology is thoroughly tested for compliance with health regulations.\(^{42}\)

**Financial implications**

The Explanatory Memorandum to the Bill states that the financial implications are expected to be nil.\(^{43}\)

In his media release on 5 February 2012, Anthony Albanese (Minister for Infrastructure and Transport) stated that:

> The Gillard Government announced a package of measures in 2010 to strengthen aviation security as a result of global events.

> The $28 million package provides for new screening measures, including body scanners, at Australia’s eight international gateway airports.\(^{44}\)

According to an article published in *Crikey*, no cost-benefit analysis was conducted before the Government’s decision to impose body scanning on international passengers departing the country.\(^{45}\)

**Key provisions**

**Item 1**: inserts proposed section 41A into the Act to provide that a person who presents at an aviation security screening point is presumed to consent to any screening procedure, with the exception of a frisk search, unless the person expressly states their refusal to undergo a particular screening procedure. The Senate Committee for the Scrutiny of Bills raised the issue of the potential breadth of this deemed consent in light of the privacy concerns and the potential range of screening procedures to which passengers may be subject.\(^{46}\) The Government has stated that the proposed technology will not be capable of storing or transmitting any information or data (proposed subsection 44(3C)).

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42. Ibid.
44. A Albanese, media release, op. cit.

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Item 2: section 44 of the Act deals with the requirements for screening and clearing. It provides that regulations may prescribe requirements, among other things, in relation to screening. Currently, subsection 44(2) of the Act provides that without limiting the matters that may be dealt with by regulations made in relation to screening, the regulations may deal with the following:

the persons who are authorised or required to conduct screening

things that must not pass through a screening point.

[...]

Item 2 amends paragraph 44(2)(aa) so that regulations may deal with ‘persons or things’ that must not pass through a screening point. By including persons, this will enable subsequent changes in regulations to provide that if a person refuses to submit themselves for a screening procedure, they will be refused clearance and will not be permitted to pass through the screening point. The requirement to undergo screening in order to be cleared to board an aircraft already exists under the Act for the purposes of the current screening equipment that is used.

Item 3: For the purposes of safeguarding against unlawful interference with aviation, subsection 44(1) of the Act enables regulations to prescribe requirements in relation to screening, receiving clearance, and the circumstances in which persons, goods (other than cargo) or vehicles are required to be cleared. Without limiting the matters that may be dealt with by regulations made under subsection 44(1), paragraph 44(2)(j) currently provides that the regulations may among other things, deal with the methods, techniques and equipment to be used for screening.

Proposed section 44(3A) would provide a further non-exhaustive list signalling and anticipating new equipment (technologies) to be deployed for screening purposes, and for which regulations may be made under subparagraph 44(2)(j). This equipment would be stated to include but not be confined to:

- metal detection equipment
- explosive trace detection equipment
- body scanning equipment such as an active millimetre wave body scanner.

The automatic consent provision, coupled with the potential range of scanning equipment that can be used by airport security is a very wide power for a government to wield, and has been raised as a concern. More specifically, the issue may become the multiple layers of technology that travellers may be subject to, and it is the total number of such technologies that may be applied which may give rise to further concerns about the loss of balance between human rights and the pursuit of

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47. For example, A and M Schafer, Submission to the Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Aviation Transport Security Amendment (Screening) Bill 2012, p. 2.

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security. In its submission to the Senate inquiry into the Bill, the NSW Council for Civil Liberties put forward an amendment, to ‘restrict the technology to that currently known to have minimal danger to health’.

The Explanatory Memorandum states that the Government is committed to only introducing body scanners that have a range of privacy enhancements. Perhaps this specification of equipment that has privacy enhancements should be incorporated into the drafting as some sort of minimum assurance that the right to privacy will continue to be a consideration in any future choice of technology. Inclusion in the legislative provisions would have greater legal effect than discussion of the matter in the Explanatory Memorandum.

**Proposed subsection 44(3B)** seems to be designed to address privacy issues and preservation of personal modesty by providing that, where a body scanner is used for screening of a person, and the equipment produces an image of that person, the image must only be a generic body image that is gender-neutral and from which the person cannot be identified.

The Explanatory Memorandum states that no anatomical or physical attributes of that person are to be revealed and that the generic image produced is such that the person is not identifiable. However, the term ‘anatomical’ encompasses among other things, the torso, arms, legs and breasts and so forth. And, there are body scanners that do reveal certain parts of the anatomy while not making it possible to identify the person, to the extent that physical identification is most commonly associated with an image of a person’s face. Notwithstanding the further information provided by the Explanatory Memorandum, the Bill itself does not expressly exclude visibility of anatomical attributes. Also, the Bill uses the term ‘gender-neutral’ (a sociological and not biological term) in reference to the body image that is generated by the equipment. While the term ‘gender-neutral’ is often used as a synonym for sex-neutral, strictly speaking the two are not identical concepts.

Given the serious privacy concerns that have been raised by the Bill in relation to the images that may be produced by such technology, it may be the case that tighter drafting needs to be considered.

**Item 4:** repeals current section 95A of the Act, which allows a person to choose to undergo a body frisk search as an alternative to another screening procedure. This option will no longer be available for election by the person, except in special circumstances where physical or medical reasons prevent a person from being screened by a body scanner. While the Explanatory Memorandum mentions this exception, it is unhelpfully not expressly provided for in the Bill itself. In light of the

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50. Explanatory Memorandum, p. 3.

51. Ibid., p. 7.

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importance of this exception for balancing human rights concerns of those with disabilities and medical concerns, it is perhaps best placed in the Bill rather than the regulations for certainty and ease of access to the average citizen.

The Senate Committee for the Scrutiny of Bills raised the issue of whether the right to freedom of movement has been limited in an appropriate, reasonable and proportionate manner. The Committee noted 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’. However, the Committee remained unsure as to how this would be guaranteed in practice for persons with medical conditions or disabilities. The Minister responded by stating there has been extensive consultation with relevant stakeholders in order to ensure that appropriate and relevant measures and practices are adopted.

The power of a screening officer to require that a person undergo a frisk search before being cleared to board an aircraft is retained. The logic underpinning this is unclear as the House of Representatives Committee’s report on this Bill states that the reason for not allowing passengers to opt for an alternative screening method, including a frisk search, (unless there are physical or medical reasons) is being proposed to prevent people selected for scanning from choosing a less effective form of screening.

52. Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 2 of 2012, op. cit.

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