

AUSTRALIAN CUSTOMS SEARCH AND DETENTION

Own motion investigation of issues relating
to the detention and search of suspects
by the Australian Customs Service
under the Customs Act

April 1996

Report pursuant to section 35A of the *Ombudsman Act 1976*


OMBUDSMAN

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Canberra
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1. Background

The new ACS detention and search regime introduced in April 1991

1.1 In April 1991 new provisions were included in the *Customs Act 1901* setting various levels of personal search to replace the previous general search power in section 196 of the Act. Under new Division 1B of the Act, searches were split into three subdivisions of search — frisk (Subdivision A); external (Subdivision B) and internal (Subdivision C). As the level of intrusiveness increases there is a corresponding progressive strengthening of the statutory protections to ensure the informed consent and rights of persons to be searched. In accordance with the Act, an external body search may proceed where there are reasonable grounds to suspect that a person is unlawfully carrying prohibited goods and the person consents to such a search.

1.2 An internal search may proceed where there are reasonable grounds to suspect that a person is internally concealing a trafficable quantity of narcotic drugs and the person provides consent in writing to the search. In the absence of consent, an external search may only proceed where it is ordered by a senior Australian Customs Service (ACS) officer or a Justice and an internal search may only proceed where it is ordered by a Judge or Magistrate.

1.3 In practice, ACS has split the external search level into two categories:

- B1 (removal of any or all outer clothing); and
- B2 (removal of any or all under clothing).

ACS involvement in the final level of search — category C, the internal search — is in practice limited to forming a reasonable suspicion, obtaining the written consent of the suspect to an internal search and detaining the suspect until handover to the AFP after which, if the AFP decides to proceed with the detention, he or she can be taken to hospital

or other appropriate facility for an internal search. Only a medical practitioner may conduct an internal search.

My decision to conduct an own motion investigation

1.4 In December 1993 I decided to conduct an own motion investigation of general issues relating to the detention and search of suspects by the ACS under the *Customs Act 1901*. At that time the personal detention and search regime introduced by way of amendments to the Customs Act had been in place for about 18 months. In that 18 month period my office had received and decided to investigate five complaints about personal search by ACS officers. In that period we had also received another 11 complaints about the actions of the Australian Federal Police (AFP) in relation to the detention and search of suspects under the Customs Act. Although those 11 complaints arose from AFP involvement they also raised issues relating to ACS procedures and practices.

1.5 Details of the number of persons searched and "success" rates for searches conducted are included in sections 4.4 and 4.5. The complaints referred to in section 1.4 obviously represented only a tiny proportion of the number of persons searched at airports. The complaints to this office raised important issues, particularly in relation to the basis for selection for search; the suspects' understanding of what was happening; and the embarrassment and indignity of external and internal body searches. Given the fact that so many passengers who are searched are not found to be carrying prohibited goods or drugs it is even more important that the rights of innocent passengers are protected.

Areas of initial concern to my office

1.6 In deciding to conduct my own motion investigation, the areas of initial concern to me were:

- the recording of reasons for detention and search, including the reasons for any upgrading of the detention or search level;
- the provision of a reasonable opportunity to the person detained to allay the concerns of the detaining officer;

- the success of targeting strategies;
- statistical recording of search outcomes;
- the rights of the person detained; and
- procedures for dealing with persons of non-English speaking backgrounds.

1.7 One of the most significant issues to emerge from our consideration of the complaints made to this office was whether suspects were sufficiently well informed to understand that they were not compelled to submit to a search in the absence of an order by, in the case of an external search, a senior ACS officer or a Justice, or, in the case of an internal search, a Judge or Magistrate. A consistent theme in the complaints received was that the complainant believed that he or she had no choice but to comply. In my view the wording of the information cards provided to suspects did not fully explain a person's rights. In particular, I considered that the wording could be read as indicating that detention or search was inevitable, whether by consent or by order.

1.8 A number of complainants had also expressed surprise about the nature of the search they consented to. Consequently I was very concerned that the rights of persons detained, as provided for in the legislation, and the nature of the search procedures may not be made clear to them, particularly where English was not their first language.

Additional issues that arose during the investigation

1.9 In the course of the investigation, I considered a number of additional issues, namely:

- the use by ACS of non-invasive testing techniques (this issue was raised by ACS);

- the use of force by ACS officers during a search (this issue was raised during my consideration of my separate own motion investigation on an incident at Sydney airport in November 1994); and
- the level of intrusiveness of search procedures followed by ACS officers during external body searches (this issue was raised with ACS by me after I considered further individual complaints to my office). The questions relevant to this issue are addressed in sections 9 and 10 of this report.

2. The Investigation

Conduct of the Investigation

2.1 During the investigation I obtained comments from ACS about the issues raised. My office also examined the relevant legislative provisions, Hansard records, ACS procedures and operating directions and other ACS documentation. Evidence obtained under oath or affirmation from witnesses during my investigation of an individual complaint about a search in September 1994 and during my separate own motion investigation of the November 1994 incident at Sydney airport was relevant to several issues I considered in this investigation. My officers had extensive discussions with ACS and viewed videotape material provided by ACS. All relevant complaints to my office since April 1991 have been considered by my office in the context of this own motion investigation.

2.2 In June and December 1995 I provided ACS with draft reports under section 15 of the Ombudsman Act. In those reports I set out my draft conclusions and recommendations. ACS provided comments on the draft reports and this final report takes into account those comments. In responding to my draft reports, ACS agreed to make a number of significant changes in addition to those changes it had already agreed to during the investigation.

ACS cooperation

2.3 The ACS cooperated fully in the investigation. Its responses reflected a high level of consciousness about the sensitive issues involved and I am satisfied that it does not take lightly its powers of detention and search. It worked cooperatively with my office in reviewing the current practices and procedures and providing constructive comment on the issues raised, as well as making changes to procedures.

3. Changes in documentation and procedures agreed to by ACS during my investigation

Changes agreed to by ACS

3.1 As a result of the investigation the ACS agreed to:

- **Changes to the search register.** These changes to the search register will assist in the fuller recording of reasons for selection for search, including the reasons for upgrading of search level; and
- **Changes to the rights cards provided to suspects.** The new external search and internal search rights cards clarify the rights of the suspect, and in particular make it quite clear that a possible outcome of a request for review is immediate release. These changes addressed one of my concerns that the suspect believed that he or she had no choice but to comply. The external search rights card now also makes it clear that during an external search a suspect will be required to remove part or all of his or her clothing. This addresses another concern I had that people were not adequately briefed on what they were consenting to. I note that my views on this matter were fully supported by legal advice obtained by ACS during my investigation. In accordance with that legal advice, the right to refuse consent and a full description of what is about to occur must be put very clearly to the detainee.

The internal search rights card has also been changed to ensure that it is clear to a suspect that the internal search will be carried out by a medical practitioner, usually at a hospital, and that the search may include an x-ray, ultra sound and/or physical examination of body cavities if necessary:

- **Extend the range of language rights cards.** Rights cards will now be available in a much wider range of languages and will cover most of the languages likely to be used by travellers and Australian residents;
- **Changes to the internal search consent form.** The internal search consent form now specifies the nature of the procedures which may be conducted and records that the suspect is satisfied that he or she has been advised of relevant rights under the

Customs Act. The ACS has also agreed to provide consent forms in the same range of languages as the rights cards; and

- **Changes to ensure a right to independent review at the external search level.** The legislation currently provides that an external search may be ordered by a senior ACS officer or a Justice. Under revised arrangements a passenger refusing to agree to an external search will first be offered the opportunity to appear before a Justice to determine whether an order for an external search will be made or whether the passenger should be released.

If the passenger is concerned about potential delays in obtaining the services of a Justice, ACS will make available a senior ACS officer to undertake the review process. These changes were announced by the then Minister, Senator Schacht, following the incident on 22 November 1994 involving the detention and search of a Taiwanese woman at Sydney airport. I was pleased to note the prompt action taken by the Minister to ensure that if a person does not consent to an external search, he or she will have the right to have the matter reviewed by an independent Justice. I endorse this action but I considered that the administrative change should be enshrined in legislation;

ACS agreed to seek amendment of the Customs Act to ensure that an ACS senior officer should only conduct a review if the detainee does not wish to exercise his or her right to have the matter reviewed by a Justice. ACS undertook to prepare the necessary drafting instructions quickly.

- **Upgrade standards of record-keeping and training.** The ACS acted to improve its officers' standard of record-keeping and training provided to its officers. Clearly, the keeping of proper records and adequate training is fundamental to good administration and is of assistance in the event of a complaint about an incident.

Steps taken by ACS to improve training

3.2 At an early stage of my investigation ACS acknowledged that training was a high priority area and indicated that it would be focussing on training and skill development of staff. In this regard I understand that ACS has engaged an educational psychologist

consultant to provide training specifically designed to meet the needs of officers involved in airport passenger processing. Areas to be addressed will include development of communication skills, including the interpretation of non-verbal communication; aspects of conflict resolution; question structures; active listening; and human behaviour related especially to cross-cultural actions and gestures. ACS advised me that nation-wide training courses were being conducted. I am very pleased to note these training initiatives. In particular, I hope that the training will serve to remind ACS officers that a nervous or alarmed response is not necessarily a sign of guilt and that all suspects should be given a reasonable opportunity to allay the concerns of the detention officer.

3.3 In responding to my draft findings, ACS also advised me that it had initiated a review and upgrading of the training package for officers involved in the detention and search of suspects. That package would introduce a system of testing and certification. Under the proposed new system only certified officers would be permitted to perform searches, act as witnesses or fulfil the role of detention officer across all categories of search. ACS further advised me that it would introduce a system of annual re-certification through a formal process of workplace assessment. ACS has undertaken to consult with my office on any revised operating direction and training material prior to its dissemination to officers.

4. "Success" rates and statistical recording of outcomes

4.1 I am aware that the new detention and search regime was passed by Parliament in the knowledge that the success rate of personal searches was low. At the time of passage of the legislation the overall success rate of 7.35% covered all levels of search. In parliamentary discussion a success rate of 10% for internal searches was quoted. On the figures provided to this office I note that for the first year of operation the average monthly success rate for internal searches was 11.3%, with the monthly figure fluctuating from a high 35% for November 1991 to a low of 3.3% for March 1992. On the basis of these figures, the success rate for the first year under the new regime was generally consistent with the success rate apparently accepted by Parliament as reasonable. Of course Parliament also accepted the new regime on the basis that as each level of detention or search became more intrusive, the controls and review rights strengthened.

4.2 In relation to the above-mentioned success rates, clearly the keeping of accurate records is extremely important for monitoring whether the targeting of persons for search is appropriate. In this regard, ACS maintains a record of the number of passengers searched at the various levels, that is, Subdivision A: Frisk; Subdivision B: External Search (further broken down into B1 - removal of outer garments and B2 - removal of under garments); and Subdivision C: Internal Search. ACS also records the success rate for the various levels of search.

4.3 One of my specific concerns was that the method of compilation by ACS of statistical figures on searches appeared to require inaccurate recording of a higher success rate for the more intrusive levels of search. This concern was triggered by the relevant instruction for compilation of statistics which required that a positive find be recorded against the highest level of search conducted on a person. In this way a positive find of drugs or prohibited goods discovered at an earlier and lower level of search might be recorded as a positive find against what was in fact an unsuccessful external or internal search. ACS assured me that changes to the definitions for statistical recording had been made with effect from 1 July 1993 to make it clear that a positive find should only

be recorded against the category of search at which it was identified. This is clearly an improvement on the previous requirement that a positive find be recorded against the highest level of search conducted, irrespective of whether the find was identified at a lower level of search.

4.4 Statistics for the 1992–93, 1993–94 and 1994–95 years show that the vast majority of passengers searched were not carrying prohibited goods or drugs as suspected. I note that the overall success rate for all searches in 1992–93 and 1993–94 is about half the success rate recorded at the time of introduction of the new regime, while the 1992–93 success rate for internal searches is significantly lower than the 10% success rate apparently accepted by Parliament as a reasonable level.

Overall success rate for searches

1994–95		1993–94		1992–93	
Frisk	4.05%	Frisk	2.42%	Frisk	2.34%
External B1	9.51%	External B1	6.58%	External B1	8.75%
External B2	7.41%	External B2	5.74%	External B2	4.77%
Internal C	6.45%	Internal C	7.84%	Internal C	3.93%
All Searches	5.14%	All Searches	3.32%	All Searches	3.47%

4.5 In 1992–93 a total number of 2524 passengers were subjected to external body searches (at B1 or B2 level) by ACS officers, and 178 were detained for internal searches which were conducted by medical practitioners. In 1993–94 1928 passengers were subjected to external body searches and 153 were detained for internal searches. In 1994–95, while around the same number of passengers were detained for internal

search as in the previous year, significantly fewer passengers (1161) were subjected to external body searches with an improved success rate of 9.51% for B1 level searches and 7.41% for B2 level searches. I am hopeful that this improvement reflects better targeting strategies by ACS. Having said that, the success rates since introduction of the new regime have not been high and ACS must remain mindful of the high proportion of negative outcomes. Given the fact that so many passengers who are searched are not found to be carrying prohibited goods or drugs it is even more important that the rights of innocent passengers are protected.

5. Treatment of persons of non-English speaking background

Issues raised

5.1 A number of complaints to my office raised the issue of whether suspects of non-English speaking background understood what was happening and, in the case of suspects agreeing to be subjected to an internal search, whether they understood the consent forms (written in English) which they signed.

5.2 Section 219ZD of the Act provides that where an ACS or police officer detaining a person has reasonable cause to believe that the person is unable, because of inadequate knowledge of the English language or for any other reason, to communicate orally with reasonable fluency in the English language, the officer must take all reasonable steps to ensure that, at all times during the person's detention when communication with or by the person is to take place, a person competent to act as an interpreter is present. That provision does not apply if the person detained and the officer are able to communicate in another language with reasonable fluency or are able to communicate satisfactorily by any other means. I note that the relevant provisions do not require provision of an interpreter at the request of the detainee. The onus is placed on the ACS or police officer detaining the person to be satisfied about the level of understanding of what is being said.

5.3 In complaints from persons of non-English speaking background where the issue raised is lack of understanding of what was happening, it can be difficult for my office to establish the level of English understanding of the person involved. We examine the accounts given by the AFP members or ACS officers involved but there is usually little or no documentary evidence held by the ACS or AFP which indicates the suspect's understanding of English. It is also evident that a person's grasp of English may deteriorate significantly when that person is placed under the type of stress experienced by detainees.

5.4 During my investigation I raised with ACS various issues concerning the treatment of detainees of non-English speaking background. Given the acknowledged difficulty in later establishing a person's level of understanding of English I suggested that a contemporaneous recording of a detention officer's assessment of a detainee's level of understanding of English would at least remind the detention officer of the requirements of section 219ZD of the Act and would indicate that some consideration has been given to whether there is effective communication with the suspect. ACS agreed that the redesigned register should include provision for the detention officer to specifically record that he or she has addressed the issue of whether an interpreter is required.

Extended range of language rights cards and introduction of foreign language consent forms

5.5 During my investigation, ACS also decided to extend its range of language rights cards from the current 20 foreign languages to cover an additional 10 languages. After obtaining legal advice, the ACS also agreed to provide consent forms for internal search in the same range of languages.

Cultural awareness training

5.6 As mentioned in section 3.2, ACS has also decided to give a high priority to training, including cultural awareness training. A training package has been developed by ACS to deal with such issues as greater awareness and understanding of cultural differences; negotiation and conflict resolution skills; awareness of Customs' authority and its impact on non-English speaking background staff and clients; and how to overcome communication barriers. The package covers all cultures that are represented in the ACS workforce and its clients. ACS has advised my office that it will also identify and deliver training on specific nationalities to focus on the compliance aspect of cross-cultural understanding.

Arrangements with AFP in relation to use of ACS interpreting staff

5.7 An additional issue relating to use of interpreting staff also arose in the course of my investigation. In one individual complaint considered by my office ACS deemed it necessary to use the services of one of its staff who was fluent in a foreign language up to the point of handover to the AFP. However, the detention by the AFP and conveyance of the

suspect to hospital then proceeded without use of any interpreter. I propose to raise this matter separately with the AFP, both in relation to the specific case and generally. In the meantime, I considered that ACS should liaise closely with the AFP on the issue of use by the AFP of ACS interpreting staff who have been used up to the point of handover of the suspect.

In responding to my draft findings on this issue, ACS agreed to explore with the AFP possible arrangements for making its interpreting staff available to the AFP where such staff have been used to the point of handover of a suspect to the AFP.

6. Withdrawal of consent during a search

6.1 One area which was not specifically addressed in the legislation or in any instruction by ACS to its officers is the issue of withdrawal of voluntary consent by a suspect during a search. The issue is particularly relevant for officers involved in conducting an external search of a suspect where a decision is made during the search to upgrade from the External B1 level to the External B2 level.

6.2 In my view, where an external search is being conducted with the consent of the detainee the searching officer should be aware that it is open to the detainee to withdraw consent at any stage of the search. The officer should be alert to indications, verbal or otherwise, by the detainee that he or she is no longer happy about continuing and should clarify with the detainee whether he or she is still consenting to the search on a voluntary basis.

6.3 There should be no assumption by the searching officer that because consent was initially given this commits the detainee irrevocably to the search. I can understand, for example, that a person who has consented to what they believe will be a search involving only the removal of outer garments might balk at removing all underclothes and submitting to other requests made of suspects in the final stages of a External B2 search. In practice, all that may be required of the searching officer is clarification of what is about to happen and a reassurance that the detainee will not be touched. On the other hand, the clarification given may lead the detainee to withdraw voluntary consent.

In responding to my draft findings on this issue, ACS agreed to address, in its instructions and training, the issue of withdrawal of consent. The relevant instructions have now been issued.

6.4 The need for clarification is particularly relevant in cases where there is any language communication difficulty. Ideally, an interpreter of the same sex as the detainee should be available so that oral communication can continue throughout the search process. I acknowledge that it is not possible for ACS to always make available interpreters of the same sex as the detainee and that, as mentioned below, the legislation provides that the presence of an interpreter is not required where effective communication is possible through any other means. Where an interpreter of the same sex as the detainee is not available and therefore the interpreter is unable to be present during the

search, it is important that prior to the search clear and explicit details of what might be required during the search are provided to the detainee. Alternatively, where the need for clarification arises during the search, the search could be halted and the detainee allowed to re-dress so that the interpreter can be involved in the discussions.

6.5 ACS officers involved in searches should be reminded that where they are unable to use language to communicate with the suspect during the search they risk breaching section 219ZD if any alternative method of communication which they adopt is not effective at all times. While I accept that body or sign language during the actual search might on occasions be effective this would only be where the suspect is, because of prior use of an interpreter, in no doubt about the nature of the search to be conducted.

In considering my draft findings on this issue, ACS sought legal advice which supported my views. ACS agreed that the issue of use of interpreters *during* a search would be addressed in ACS instructions and training. The relevant instruction has now been issued.

7. Possible introduction of non-invasive testing techniques

7.1 During my investigation, ACS sought my views on possible amendment of the Customs Act to utilise certain new technologies that might be offered as alternative to the current more invasive techniques. I have advised ACS that, in principle and subject to certain safeguards, I have no objection to the use of non-invasive testing techniques, such as urinalysis and skin vapour testing, as optional alternatives to be offered to persons detained on reasonable grounds to suspect that they are concealing illicit drugs. I believe that testing would have to be offered as a genuine alternative to body search and should be offered only at the stage where the detaining officer has formed the view that the person should be detained for search. I would be concerned if the new testing techniques were used simply as a random screening device. However, I have been assured by the ACS that this would not be the case.

7.2 Although there are a number of important issues to be fully considered and resolved before appropriate draft legislation could be settled I consider that possible alternative testing techniques for use in drug detection under the Customs Act are worth further investigation and consideration by ACS. I have asked ACS for a further opportunity to comment after it has formed a clearer view of how the new testing might operate.

7.3 ACS has advised me that, in addition to consideration of the above-mentioned non-invasive testing techniques such as urinalysis and skin vapour testing, ACS is evaluating body scan x-ray equipment as a possible alternative for persons detained for an external search. ACS is aware that use of such equipment raises many issues, the most important being safety concerns, for detainees and officers alike, and privacy aspects.

8. Use of force by ACS officers where a search is ordered and the detainee refuses to comply

8.1 This issue arose in the context of my consideration of my separate own motion investigation of an incident on 22 November 1994 at Sydney airport involving a Taiwanese woman who was detained and, on the order of a senior ACS officer, searched by ACS officers. After careful review of the facts of the case my conclusion was that there were reasonable grounds to suspect that the woman may have been carrying prohibited goods and that the level of force used by ACS officers was limited to the level necessary to detain her and to conduct the search. Certainly, the newspaper reports about the incident suggesting that the woman had been forcibly stripped naked with her clothes being torn during the search were not accurate. On the basis of my investigation, I was satisfied that at no stage during the search was the woman naked nor were her clothes torn. The woman did, however, become very disturbed in the course of the search. The case highlights the sensitivity and care required of ACS officers in their practices and procedures.

8.2 For reasons that cannot now be determined (but which do not seem to include a difficulty with language communication) the woman apparently did not understand or accept the search decision or procedure. At no stage did she consent to the search and she offered strong physical resistance at least in the initial part of the search. The search was one conducted pursuant to an order by a senior ACS officer who anticipated that force would be required. Because of the woman's resistance, the ACS officers conducting the search were obliged to use force for the purposes of carrying out the search.

8.3 Clearly, the power of ACS officers to use force should be exercised with great care and sensitivity and, in my view, only in pursuance of an order given by a person independent of ACS. In considering the case, I examined relevant ACS internal legal advice about the issue of use of force. I accept that in accordance with the provisions of subsection 219ZC(2) of the Customs Act it is arguable that, in exercising the power of search under section 219R of the Act, an ACS officer is entitled to use reasonable and necessary force in the conduct of a search. However,

rather than relying on the indirect and general provisions of 219ZC(2), I consider that the Customs Act should be amended to clearly provide that reasonable and necessary force may be used by ACS or police officers in conducting a lawful search where the person does not submit to the search. I also consider that the legislation should provide that such force may only be used where a Justice has ordered the search.

In considering my draft findings on this issue, ACS sought legal advice which supported my view that the legislation should make explicit provision regarding use of force. ACS agreed to seek an appropriate amendment of the Customs Act. I accepted that provision would need to be made for certain circumstances in which the detainee consciously chooses senior officer review, for example in remote areas.

9. Procedures followed by ACS officers during external body searches

Wearing of gloves

9.1 Another issue which arose from our consideration of complaints to this office was the possible concern that might be felt by suspects who saw ACS officers put on rubber gloves prior to conducting an external body search. I accept that it is appropriate for officers to wear gloves during an external search as they are required to examine items of clothing because dangerous items such as needles might be hidden in that clothing. However, I consider that in the absence of some clear explanation by the officers a suspect might quite reasonably believe that an internal body search was about to be conducted.

ACS agreed to ensure that its officers explain to a detainee why the gloves are necessary and that they also emphasise to the suspect that they will not be touched during the course of the search.

The procedures involved in the actual search and the fine distinction between external and internal searches

9.2 During the course of my investigation I received several new complaints which raised a concern about ACS procedures during external body searches. That concern related to various procedures adopted in External B2 searches such as asking a suspect to bend over and part the buttocks; to put one leg up on a chair; or in the case of female suspects, to remove a tampon.

9.3 At least two of these procedures - asking a suspect to part the buttocks and asking a female suspect to remove a tampon - were mentioned in relevant ACS instructions to officers. The other procedures were not mentioned but were apparently accepted by ACS officers as correct procedure.

9.4 According to the definitions in the Customs Act an "external search" is a search of the body of, and of anything worn by, the person to determine whether the person is carrying any prohibited goods. An "internal search" is an examination (including an internal examination)

of the person's body to determine whether the person is internally concealing a substance or thing.

9.5 Having looked at these definitions of "external search" and "internal search" I was extremely concerned that the procedures in question may have constituted a breach of the law. In particular, I was concerned that the procedures in question were really for the purpose of checking whether there were any signs in or around the anus or vagina to indicate that the person was internally concealing goods rather than for the purpose of checking whether goods were being carried externally in that area. If so, the procedures in question went beyond the ambit of an external search and constituted an internal search within the meaning of the Customs Act.

9.6 Under the Customs Act internal searches may only be conducted with written consent or by order of a Judge or Magistrate, and only by a medical practitioner. Given the serious nature of my concern and the implications for past and future searches I asked ACS to seek urgent legal advice from the Attorney-General's Department.

9.7 The subsequent lengthy legal advice given by the Attorney-General's Department included advice that an external search should not include a request that a female suspect remove a tampon.

ACS took immediate steps to advise its officers that it is not permissible as part of an external search to ask a female detainee to remove a tampon for inspection.

9.8 On the issue of scrutiny of the areas of skin around the entrances to the vagina and anus, the legal advice obtained by ACS from the Attorney-General's Department was that observation of any part of the surface of a detainee's body is lawful provided that a genuine purpose of the search is to determine whether a person is carrying prohibited goods on the body. According to the legal advice, as long as the searching officer is genuinely conducting the search to find externally carried goods, he or she may lawfully ask the detainee to expose the external parts of his or her anal or genital area, for the additional purpose of finding evidence of internal concealment.

“...the searching officer must at all times be conducting the search for the purpose (even if this is one purpose among several) of determining whether there are prohibited goods attached to the surface of the detainee’s body.”

9.9 According to the legal advice, the possibility of securing evidence to justify an internal search is not a ground for ordering an external search. However, if an external search is validly ordered, then while ever grounds for conducting the search continue to exist, and the search is conducted in the manner allowed by the legislation, it does not matter that the searching officer is partly motivated by a desire to obtain evidence that will justify an internal search. As long as the searching officer is genuinely conducting the external search to find externally carried prohibited goods, he or she may lawfully ask the suspect to expose the external parts of his or her anal or genital area. If the searching officer is not genuinely searching for externally carried prohibited goods and is only looking for evidence of internal concealment the search would be unlawful.

9.10 The advice obtained by ACS supports my view that the current law does not allow ACS officers at the B2 level of external search to visually inspect a suspect's vaginal or anal areas where the only genuine purpose of the inspection is to determine whether drugs are internally secreted. Once the originating purpose for conducting an external search (namely, to find externally carried prohibited goods) has been exhausted by the searching officer, that officer should not make further requests of a detainee to expose areas of the body.

In the course of my investigation and in the light of legal advice, ACS issued a fresh staff instruction advising staff that an external search can only be used to determine whether a suspect is carrying prohibited goods concealed on their person; there should be no attempt to examine or look into body cavities and the search must not be used as a “fishing expedition” to gather material for an internal search.

9.11 I was concerned about the complexity of, and the level of intrusiveness allowed by, the current legislation. I was particularly concerned that the lawfulness of certain procedures relied so much on the establishment of genuine purpose. It may not always be possible to establish the genuine "purpose" of the searching officer in seeking to look in the vicinity of the vaginal or anal areas. My concern about this issue was strengthened by two individual complaints where I had concerns as to the purpose of the procedures.

9.12 I was also uncertain that Parliament, in passing the relevant legislation, ever intended that an external body search could include the scrutiny of the skin around, and the entrances to, the anus and vagina. I considered whether I should recommend that ACS should arrange for legislation to more clearly define the limits of an external search and the ambit of an internal search. This issue was taken up with ACS in my draft findings. However, after further consideration of the complex issues involved, I accepted that pursuit of legislative amendment raised enormous drafting and administrative difficulty in setting clear definitions. In the light of the ACS undertakings and revised procedures referred to in section 10.3 I decided not to pursue any recommendation for legislative change.

10. Reasonableness of the extent of the external search

10.1 It was clear to me that the procedures followed by ACS officers were consistent with what they had been trained to do, and that their requests of detainees were technically lawful provided a genuine purpose of the search was to look for prohibited goods being carried on the body. However, irrespective of any technical legality of requests of suspects during an external search to bend over, spread the legs, part the buttocks, and put a leg up on a chair, I remained concerned about the reasonableness of these requests.

10.2 While I accepted that in some circumstances, a request that a suspect part the buttocks might be reasonable during an external body search, I could not accept that certain other procedures employed in the late stage of an external search were reasonable. In my view, requests of a naked person to bend over while parting the buttocks, or in the case of a female to put a leg up on a chair to allow an ACS officer to scrutinise the vaginal entrance were oppressive and amounted to an unreasonable indignity and affront to personal privacy. I considered that the fact that there was legal uncertainty about how much of the female genitalia is external (and I assumed the same legal uncertainty applies to the question of how much of the anus might be considered external) reinforced the unreasonableness of scrutiny by ACS officers of that vicinity of the body. I was also mindful of the further blurring of lines between internal and external searching where "genuine" purpose is the relevant determinant.

10.3 Having regard to all these factors, I concluded that such requests by ACS officers of suspects to expose such intimate parts of the body were "unreasonable and oppressive".

In my draft findings, I included a draft recommendation that the ACS restrict to certain specified occasions, the procedure of asking a detainee to part his or her buttocks. I also included a draft recommendation that the ACS forthwith cease the procedures of asking suspects to take any action beyond the parting of the buttocks to display their anal or vaginal regions for scrutiny during an external body search, irrespective of the stated purpose of the procedure.

ACS agreed and acted quickly to issue interim directions precluding its officers from requiring, as routine practice during an External B2 search, parting of the buttocks by the detainee. In accordance with the new direction, officers must only request a detainee to part his or her buttocks where a conscious decision has been taken that this procedure is necessary to the search. ACS has advised me that it expects that in most searches the procedure will not be required.

ACS also agreed that it would forthwith cease the procedure of asking suspects to take any action beyond the parting of the buttocks to display their anal or vaginal regions for scrutiny during an external body search. ACS acted quickly to convey this change to ACS officers in the interim directions.

11. Changes in procedures and practices adopted by ACS directly as a result of my investigation

11. In the course of my investigation I identified a number of deficiencies in ACS practices and procedures. As mentioned in section 3, ACS agreed to make a number of changes and I am satisfied that appropriate steps have now been taken to address those areas of deficiency. Summarised below are the significant changes in procedures and practices agreed to and adopted by ACS in the course of my investigation:

- changes to the search register, rights cards provided to suspects and the internal search consent form to clarify the rights of the suspect;
- measures to ensure better recording of the reasons for decisions to search and decisions to upgrade the level of search;
- the extension of the range of language rights cards from 20 foreign languages to cover an additional 10 languages; the provision of consent forms in the same range of languages; development of training programs to ensure better communication between ACS officers and persons of non-English speaking backgrounds; and amendment of the search register to remind a detention officer of the statutory requirement relating to use of interpreters;
- steps to clarify actual search procedures for detainees, for example, changes to the rights cards and internal search consent form, and steps to ensure that ACS officers explain to a detainee why the officers are wearing rubber gloves during an external search, with a view to reassuring the detainee that no internal search is intended; and
- steps to enhance the training and development of officers involved in searches.

12. Initiatives taken by ACS or the Minister in the course of my investigation

12. In the course of my investigation I was pleased to note the following initiatives:

- evaluation by ACS of body scan x-ray equipment and the possible introduction of non-invasive testing techniques that might be offered as an alternative to the current more invasive techniques; and
- implementation of the then Minister's initiative (which I fully endorse), of ensuring that a Justice rather than a senior ACS officer will conduct a review of an external search decision where a suspect has refused to consent to a search. Review by a senior ACS officer will only occur where the detainee is concerned about delay and specifically agrees that the senior ACS officer may conduct the review. In response to my draft findings, ACS agreed to seek amendments to the Customs Act to give legislative force to the change.

13. ACS responses to my draft findings and recommendations

13. In December 1995, in a draft report under section 15 of the Ombudsman Act I set out my draft findings and a number of draft recommendations. Those recommendations and the ACS response are as follows:

(a) That ACS should restrict the “external search” procedure of asking a detainee to part his or her buttocks during a B2 category search to those occasions;

(i) where there is a reasonable suspicion that prohibited goods are secreted **on** the skin between the buttocks;

(ii) where the anatomy of the detainee makes such action essential to the conduct of the search; and

(iii) where the detainee is under no misapprehension that he or she is obliged to comply without consent or order made under the provisions of the Customs Act.

ACS agreed (refer section 10.3).

(b) That ACS should forthwith cease the procedure of asking suspects to take any action beyond the parting of the buttocks to display their anal or vaginal regions for scrutiny during an external body search, irrespective of the stated purpose of the procedure.

ACS agreed (refer section 10.3).

(c) That ACS should seek amendment of the Customs Act to exclude close scrutiny of the skin in the immediate vicinity of the anus or vagina from the definition of an external search and include it in the definition of an internal (Subdivision C) search.

While understanding the reasons behind this suggested amendment, ACS was concerned about drafting and practical difficulties in pursuing this solution. After further consideration I accepted that the practical solution offered by ACS (refer section 10.3) removed the need to seek legislative amendment.

(d) That ACS should seek amendment of the Customs Act to ensure that an ACS senior officer should only conduct a review if the detainee does not wish to exercise his or her right to have the matter reviewed by a Justice. This amendment will provide legislative force to the change in practice which has already been implemented administratively.

ACS agreed to seek appropriate amendment of the Customs Act (refer section 8.3).

(e) That ACS should seek amendment of the Customs Act to clearly provide that reasonable and necessary force may be used by ACS or police officers in conducting an external search where a Justice has ordered the search but the person does not submit to that search. This change would limit the use of force to circumstances where a search is ordered by a Justice.

ACS agreed with the qualification that provision would need to be made for certain circumstances in which the detainee consciously chooses senior officer review, for example in remote areas. I accept that qualification.

(f) That ACS should take steps to address in its instructions and training the issue of withdrawal of consent of the suspect and the issue of satisfactory communication with persons of non-English speaking background *during* a body search.

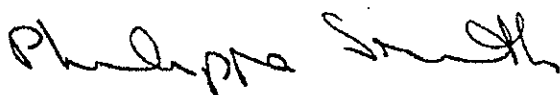
ACS agreed that the issue of withdrawal of consent and the issue of use of interpreters *during* a search would be addressed in ACS instructions and training. ACS acted quickly to provide instructions to its officers.

(g) That ACS should explore with the AFP possible arrangements for making its interpreting staff available to the AFP where such staff have been used to the point of handover of a suspect to the AFP.

ACS agreed.

14. Final comments

14. My investigation was a major project for my office and considerable resources were required to pursue the issues raised. I am very pleased to report that as a result of my investigation and ACS's responsiveness, many significant changes to the search and detention regime are already in place or should be in place soon. I am confident that the changes will strike a better balance between protecting the rights of the individual and preserving the role of ACS in protecting Australia against the importation of drugs and other prohibited goods. My office will monitor ACS implementation of the changes.

A handwritten signature in black ink, appearing to read 'Philippa Smith', written in a cursive style.

Philippa Smith
Commonwealth Ombudsman

