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Liberty's response to the Department of Transport's consultation on the Code of Practice for the acceptable use of advanced imaging technology (body scanners) in an aviation security environment

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

1. This consultation response addresses the use and operation of Advanced Imaging Technology ('body scanners'), recently introduced as an additional security screening method in UK airports. Body scanners were introduced¹ in direct response to the unsuccessful attempt by Umar Farouk Abdulmutallab on 25 December 2009 to blow up a plane over the United States by detonating explosives hidden in his underwear. At the time he boarded the plane he was known to the US authorities and had been placed on a terrorism watch-list.²

2. A body scanner produces images of a person's body, similar to an x-ray, and can reveal objects concealed under a person's clothing. It does not show body organs, or hair or facial features, but a person's gender is revealed as are certain medical conditions. Body scanners are currently deployed at both Heathrow and Manchester airports with a view to further roll out. Passengers are selected for scanning randomly or on the basis of undisclosed criteria. There is no alternative: if a person selected for scanning refuses he or she will not be permitted to board their flight. While the scanners themselves were deployed without a consultation process in January of this year, an interim Code of Practice ('the Code') was later published on 1 February 2010 to govern the use and operation of body scanners in airports. Consultation on the Code began on 29 March 2010. The Code seeks to address the significant concerns with regard to privacy and discrimination which the use of body scanners raises. This consultation, narrowly drawn, seeks feedback on the operation and content of the Code before a final version is due to be published later this year.

3. Consultation on this Code provides an important opportunity to scrutinise the deployment of body scanners and their impact on human rights. We have a number of serious concerns about the way in which this technology has been introduced and the manner of its current use. We explore these concerns in more detail below and look, in particular, at:

¹ See the statement of Lord Adonis, then Secretary of State for Transport, made jointly with the then Home Secretary, announcing a package of additional measures to enhance aviation security, on 5 January 2010. Accessed at <http://www.dft.gov.uk/press/speechesstatements/statemetns/aviationbordersecurity>.

² See Spillius, A "Detroit Bomber: Barack Obama criticises US intelligence agencies for missing 'red flags'" *The Telegraph*, 5 January 2010, accessed at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/6938855/Detroit-bomber-Barack-Obama-criticises-US-intelligence-agencies-for-missing-red-flags.html>.

- the fact that key information has been withheld, including the legal basis for the Code in the form of a Direction, as well as the protocol for selection for scanning;
- the interference with the right to privacy which the body scanners present, which is disproportionate and which will affect minority and marginalised groups more acutely;
- the inadequate evidence base put forward by the Government to justify this intrusive measure; and
- the potentially discriminatory impact of the operation of the scanners and the lack of an effective monitoring system to ensure discrimination will not occur.

4. For all of these reasons and more, Liberty believes that the current framework for and operation of Advanced Imaging Technology in the UK may well be in breach of the right to privacy in the *Human Rights Act 1998* (HRA).

Background: new approaches to aviation security

5. The introduction of body scanners in January 2010 was part of a package of ‘new and improved’ security measures. Other proposals included the introduction of explosive trace detection equipment by the end of 2010; the training of airport security staff in behavioural analysis techniques of passengers to trigger additional searches; and, potentially, the use of “*additional targeted passenger profiling*”, which the Government pledged to consider carefully.³ On 20 January 2010, the then Prime Minister Gordon Brown announced further measures to promote aviation security, including the extension of a Home Office ‘watch list’ to include two further lists, one for individuals who will be subject to ‘special measures’ before flying and one for those on a ‘no-fly’ list to be prevented from flying at all.⁴

6. In response to this series of announcements the House of Commons Home Affairs Committee (HAC) conducted a review in March 2010 of the proposed security measures to determine their potential impact on aviation security and passengers.⁵

³ Statement of Lord Adonis, then Secretary of State for Transport, made jointly with the Home Secretary, announcing a package of additional measures to enhance aviation security, on 5 January 2010. Accessed at <http://www.dft.gov.uk/press/speechesstatements/statemetns/aviationbordersecurity..>

⁴ House of Commons Hansard, 20 January 2010, Column 303.

⁵ House of Commons, Home Affairs Committee *Ninth Report, Counter-terrorism measures in British Airports* (16 March 2010).

The Committee received evidence from the Government to the effect that they are adopting a 'multi-layered' approach to security in response to the variety of threats they have identified.⁶ In relation to body scanners, Lord West, the then Minister for Security and Counter-Terrorism, informed the House that the scanners are only 50 to 60% effective at detecting the type of explosive which Abdulmutallab had placed in his underwear.⁷

7. The possible use of body scanners in airports appears to have been in contemplation for some time. Evidence given to the HAC noted that the technology has already been used at British airports, though not by random selection, and trials of similar equipment have been taking place since 2006.⁸ It is somewhat perplexing then that the scanners were so rapidly deployed earlier this year with no consultation and apparently minimal regard for the human rights implications for passengers. Indeed the HAC concluded the government has adopted "*a wholly reactive stance*" to terrorist threats in the implementation of the new security measures.⁹ While the importance of security measures cannot be understated, any interference with human rights must be closely scrutinised and proportionate to a level of contemplated risk. Rapid production of policy, if only due to lack of time, does not allow for such an analysis to take place.

8. These concerns are shared by the European Parliament, which, in response to the implementation of body scanners in 2008,¹⁰ called for a detailed investigation into their implementation and for a fundamental rights impact assessment to ensure that the introduction of scanners is justified, proportionate and necessary.¹¹ Body scanners, it considered, "*cannot be considered mere technical measures related to aviation security*" given the "*serious impact on the fundamental rights of citizens*".¹²

⁶ Evidence of the former Home Secretary and Paul Clark MP, former Parliamentary Under-Secretary of State, Home Affairs Committee *Ninth Report*, *ibid* at para 4.

⁷ Evidence of Lord West, former Minister for Security and Counter-Terrorism, Home Affairs Committee *Ninth Report*, *ibid* at para 7.

⁸ Home Affairs Committee, *Ninth Report*, *ibid*, at para 9. See also Merrick, J "Are planned airport scanners just a scam?" *The Independent*, 3 January 2010; and *ACLU Backgrounder on Body Scanners and "Virtual Strip Searches"* 8 January, 2010.

⁹ Home Affairs Committee, *Ninth Report*, *ibid* at para 11.

¹⁰ Regulation (EC) 300/2008 sets out common rules in the field of aviation security, including the use of body scanners.

¹¹ Resolution of the European Parliament, B6-0562/2008.

¹² Resolution of the European Parliament, B6-0562/2008, at para 2.

Legislative Framework

9. The legal basis governing the deployment and operation of body scanners in airports is unclear. We are told that airport operators, as private facilities, are free to implement any security measures they consider necessary. The consultation document repeatedly implies that the Code is superfluous, and that private airport operators could implement any security measure they desire within the aerodrome they operate. This assertion should not distract either the Government or airport operators from their human rights, privacy and equalities obligations. The *Human Rights Act 1998* requires any public authority or person or body performing “*functions of a public nature*” to act in a way that is compatible with human rights.¹³ We believe, and do not understand there to be any dispute in this regard, that airport operators performing security checks are either part of a public authority or are in any case exercising public functions and are therefore bound by the Act.

10. The Code of Practice is part of a Direction, pursuant to the *Aviation Security Act 1982* (1982 Act), issued to those airports the Government requires to deploy security scanners.¹⁴ The Direction is secondary legislation which sets down the “*mandatory controls*” for the use of body scanners¹⁵ and requires the scanners to be operated “*in accordance with detailed protocols*” which include the “*selection criteria for those to be scanned*”.¹⁶ However, the text of the Direction itself, including a protocol setting out how a person will be selected for a body scan, has, for reasons of ‘national security’, not been made public.

11. The power to make such a direction is set out in Part II of the 1982 Act. Section 12 enables the Secretary of State to give a direction to an airport operator not to permit a person or property to board an aircraft unless they or it has been searched by persons specified in the direction. Section 13 governs the promotion of certain searches within an airport, and section 14 allows for a specific direction to be given to an airport manager to act in a particular way in order to guard the airport against acts of violence. Section 15 sets out what may be included in the direction, such as the manner in which the search is to be carried out and the minimum number of searches to be undertaken, the qualifications of the person conducting the search

¹³ Section 6 of the *Human Rights Act 1998*.

¹⁴ As stated in the Consultation Paper, *ibid*, at para 27; and the Impact Statement, *ibid* at p 9.

¹⁵ Impact Assessment, *ibid*, at p 9.

¹⁶ Consultation Paper, *ibid*, at para 27.

must have and any apparatus, equipment or other aids to be used for the purpose of carrying out the search.

12. Apart from the Code, however, the text of the Direction, including the protocols, has not been made public. We have been informed by the Department of Transport that due to the 'sensitive nature of the information' within the Direction it has only been issued to those named within it, Parliament and other 'relevant authorities'. Providing feedback to the Department of Transport on such invasive security measures without knowing the legal framework for their use is obviously difficult. Worse still, and as we examine in more detail below, the absence of any clear legal basis for the measures calls into question the lawfulness of body scanners as currently deployed.¹⁷ Under the Human Right Act, a public authority can justify interfering with or limiting certain qualified rights, including the right to privacy, only where it can be shown that the interference or limitation is set out in law, seeks to achieve a legitimate aim, and is necessary and a proportionate means of achieving that aim. That the measure in question is in accordance with the law is therefore the first hurdle, one which, for example, the UK Government failed to make out in the recent case of *Gillan*, which placed the UK in immediate breach of Article 8 regardless of the aim and proportionality of the interference.¹⁸ Given the Code of Practice which will govern the use of body scanners does not seem to be binding and much of the Protocols setting out details of when and how the body scanners will be used has not been made public, and as set out below, there are insufficient safeguards in place to prevent powers being used arbitrarily or discriminatorily, the use of body scanners in these circumstances may well breach the right to privacy as the limitation is not sufficiently prescribed by law.

¹⁷ See further the published Legal Advice provided to the Equality and Human Rights Commission by Helen Mountfield QC and Professor Conor Gearty, Matrix Chambers, *In the Matter of The Human Rights and Equality Implications of the Introduction of Full Body Scanners at Airports*, 8 February 2010. Accessed at http://www.equalityhumanrights.com/uploaded_files/2010_02_16_body_scanners_in_uk_airports_-_counsels_advice_sml_2.pdf. At para's 4, 26 to 35.

¹⁸ *Gillan and Quinton v United Kingdom* (App No. 4158/05), [2010] ECHR 4158/05. Liberty represented the applicants in these proceedings, see <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/12-01-10-liberty-wins-landmark-stop-and-search-case-in-court-of-human-righ.shtml>.

The interim Code of Practice for Body Scanners

13. The Department of Transport launched its consultation on the interim Code of Practice roughly one month after deployment of the scanners.¹⁹ We are told that the purpose of the Code is to “ensure that the use of security scanners is proportionate and in accordance with the law and that passengers are treated sensitively and with respect”.²⁰ Broadly, the Code imposes measures on airport operators in relation to privacy, data protection, health and safety, training and also seeks to ensure an effective communication strategy with regard to scanner operation. It states that passengers are not to be selected for scanning on the basis of their gender, age, race or ethnic origin. Crucially, however, it does not reveal the content of protocols which will be relied on to select passengers for screening and which will govern the operation of the body scanner generally.

14. Ensuring compliance with the Code and accountability for its breach is somewhat unclear. The consultation document states the Code will be enforced by the Department of Transport’s “aviation security compliance Inspectors”, but we have been told little to nothing about the consequences for breach. We urge the Government to ensure that there is a system in place to guarantee strict compliance with its provisions and to make clear, to both the public and airport operators, what the effective remedy for a breach will be.

Safeguarding passengers’ privacy

The right to privacy

15. The right to privacy under Article 8 of the *Human Rights Act*²¹ guarantees respect for a person’s private and family life. There is no doubt that body scanners engage the Article 8 right to privacy. Body scanners are similar to an x-ray, in that they reveal the outline of a person’s body under their clothing, including a person’s genitalia, and can reveal certain medical conditions such as a colostomy bag etc. It

¹⁹ Department of Transport, *Impact Assessment on the use of security scanners at UK airports* (29 March 2010), accompanying the consultation document, in which it is stated that “it is believed that some airport operators would still use security scanners outside of any regulatory requirement, as operators have the right to do”, at p 7.

²⁰ Consultation Paper, *ibid*, at para 6.

²¹ Article 8 (right to privacy) of the European Convention on Human Rights, as incorporated by the *Human Rights Act 1998*.

is, in a sense, a virtual strip-search.²² As with many of the rights protected under the HRA, the right to private life is not absolute. Instead the Act provides a sensible framework through which the value, impact and ultimately the lawfulness of any interference can be measured. Below, using the framework provided in the HRA we assess whether the current deployment and operation of body scanners – even with the Code of Practice in place – would be in keeping with the spirit and legal requirements of the HRA.

In ‘accordance with law’

16. The Code contemplates that the right to privacy may be interfered with by the imposition of a body scan. To this end it has inserted a number of measures which it relies on to allay potential privacy concerns. Safeguards include the implementation of the Code itself; requiring airport operators to have in place a privacy policy; ensuring that the operator of the scanner must not be able to see the person being screened; providing that the person being scanned may request the operator to be of the same sex; providing that if a further search is required the operator must communicate this without using the image; and requiring operating staff to be security vetted and trained.

17. The consultation clearly envisages that the adoption of the Code will ameliorate privacy concerns. While privacy safeguards contained in a Code of Practice may help to address privacy concerns (and issues of proportionality) in part, the Code cannot put right the question of whether the measure is lawful in the first instance. In order to be so the measure needs to contain sufficient safeguards to protect rights from arbitrary interference. Because the Code does not contain sufficient safeguards, and it is not clear that the Code is binding on airport operators, Liberty believes that the current implementation and use of body scanners is unlikely to comply with the Article 8 requirement that any interference with the right to private life is in ‘accordance with the law’. Therefore, the effect of body scanners on personal privacy cannot be said to fall within one of the qualifications to Article 8 and it is likely that the use of such measures in these circumstances may well fall foul of the HRA.

²² Body scanning equipment in the US has been labelled by the American Civil Liberties Union a “*virtual strip search*”, see *ACLU Backgrounder on Body Scanners and “Virtual Strip Searches”* 8 January, 2010.

Necessity and Proportionality

18. Any interference with the right to privacy must address a legitimate aim and engage lawful and proportionate means to achieve that aim. When it comes to our security, there will always be a need to balance the impact on the right to privacy with the obligation on government to protect the right to life. But that balancing exercise must still take place in a carefully reasoned and transparent way. We have already noted that the rapid deployment of body scanners did not provide sufficient time to consider the privacy implications of the new technology. Evidence provided to the Home Affairs Committee that privacy concerns were “*over-emphasised...rather than being a genuine concern*”²³ was far too readily accepted, the Committee concluding that passengers “*already tolerate a large invasion of their privacy*” and body scanners won’t “*add greatly*” to this.²⁴ The Government ought to be extremely wary of such a steady encroachment on human rights in the context of aviation security. For many people the introduction of scanners is a huge leap from walking through a metal detector and putting their luggage through an x-ray machine.

19. Body scanners were rolled out as an emergency knee-jerk measure. Yet a review of the evidence base used to justify the deployment of scanners does not stand up to scrutiny, and does not appear to justify either the compulsory nature of the use of scanners nor their enormous cost.²⁵ The consultation document states that “*it is clear that security scanners help to detect devices such as the one used*” by Abdulmutallab.²⁶ Yet advice from those in the security industry suggest that the scanner would not in fact have picked up the explosive he used as they do not pick up low density materials such as liquid, chemicals or plastic explosives known to be used in explosive devices.²⁷ As noted above, Lord West, the former Minister for Security and Counter-Terrorism, gave evidence to the Home Affairs Committee that the scanners are only 50 to 60% effective in detecting threats.²⁸ The former Prime Minister Gordon Brown, when introducing the scanners, said they were not foolproof and avoided a direct question from the current Prime Minister as to whether the

²³ Evidence provided by Peter Baum, an aviation expert, to the Home Affairs Committee, *Ninth Report*, *ibid*, at para 29.

²⁴ Home Affairs Committee, *Ninth Report*, *ibid*, at para 30. See also para’s 28 and 29.

²⁵ Each body scanner costs £100,000 each as an initial outlay cost, and £200,000 including staff training. See *Impact Assessment on the use of security scanners at UK airports* (29 March 2010), accompanying the consultation document.

²⁶ Consultation Paper, *ibid*, at para 19.

²⁷ Question from Ben Wallace MP, House of Commons *Hansard*, 20 January 2010, Column 312.

²⁸ Home Affairs Committee, *Ninth Report*, *ibid* at para 7.

scanners would have prevented Abdulmutallab from boarding the plane which he did.²⁹ In the face of this evidence, we are confused, as was the Home Affairs Committee, why body scanners have been prioritised over more effective and lesser intrusive measures in the form of explosive trace detection equipment, which is not required to be introduced until late 2010.³⁰

20. It is the nature of the right to privacy that the impact and extent of interference with it is subjective. As recognised in the consultation document, the use of scanners is less intrusive than a pat down for “*many people in society*”.³¹ This may be the case for some, but for others a virtual strip search is going to feel far more intrusive than a pat down. Physical appearance, medical conditions etc go to the core of personal identity; transgendered people, for example, may not have revealed certain aspects of their identity to their friends let alone complete strangers. Or it will strike at the core of a person’s dignity, as may be the case for a disabled person, or conflict with a person’s religious beliefs, such as requiring a Muslim woman who chooses to wear a burka to reveal her body to an unknown security officer. We are already aware of reports of a Muslim woman who recently refused to undergo a body scan for religious reasons after being randomly selected at Manchester airport. In accordance with the Code, she was consequently stopped from boarding her flight.³² Further, airport operators in other countries have chosen not to deploy body scanners, favouring other aviation security measures which do not have the same impact on the privacy rights of passengers.³³

21. The issue here is not a refusal to submit to a security search, but the disproportionate impact on some people’s privacy – and indeed freedom of movement – caused by the lack of an alternative means of being searched. While some may not object to revealing these intimate details and may prefer this to be being physically touched, human rights concerns the dignity of *individuals* and, a majority-rules approach is not only inappropriate, it may also be unlawful.

²⁹ House of Commons *Hansard*, 20 January 2010, Columns 306 to 307.

³⁰ The Committee concluded “*We still have not received a satisfactory answer as to why there is such a discrepancy in deadlines between the introduction of body scanners and trace detection equipment*”, see Home Affairs Committee, *Ninth Report*, *ibid*, at para 19.

³¹ Consultation Paper, *ibid*, at para 22.

³² Pavia, W “Muslim woman refuses body scan at airport” *The Times*, 3 March 2010, accessed at <http://www.timesonline.co.uk/tol/news/uk/article7048576.ece>.

³³ Dubai, for example, recently announced that it would not deploy body scanners on grounds of national custom and ethics. See <http://www.independent.co.uk/travel/news-and-advice/dubai-stamps-on-body-scanners-2025973.html>.

22. We have been told by the Government that this type of scan may reveal threats not possibly revealed in any other way, but there is no evidence provided for this, nor any reassurance that scanning will pick up all the potential threats the Government states it will (as discussed below). It is however worth reiterating here that if selected for screening there is no alternative, including for children, and refusal to be scanned will result in the person not being able to fly. Until the evidence base is improved people selected for no other reason than that they are the n^{th} person through a security check point must be given the opportunity to choose a physical search. We note that in some American airports this choice is still being offered to passengers.³⁴ The comparative lack of control passengers have in UK airports simply highlights and compounds this potentially irreversible impact on a person's privacy.

23. The consultation document also asserts that the purchase of a plane ticket constitutes 'consent' to undergo any security measure, however invasive it may be.³⁵ The consultation document states that when individuals choose to fly they are in effect accepting that they must comply with any security arrangements imposed by airport operators.³⁶ It goes on to state that passengers should be informed at the earliest possible stage about the possibility of being scanned and if they have "concerns" they "can then make a decision whether to continue with their travel plans or make alternative arrangements".³⁷ This slippery concept of consent is a dangerous one and broadens both socially accepted and legal notions of what consent actually consists of. As Helen Mountfield QC and Professor Conor Gearty, Matrix Chambers note in their Advice on this issue:

*"If a person were compelled to consent to any form of search as a condition of flying, whenever the requirement to undergo it was introduced, however intrusive it may be, however discriminatory, and however arbitrary and unjustified, there might come a point where the consent could not be held to be 'true consent'..."*³⁸

³⁴ See Tran, M "Airport worker given police warning for 'misusing' body scanner" *The Guardian*, 24 March 2010, accessed at <http://www.guardian.co.uk/uk/2010/mar/24/airport-worker-warned-body-scanner>.

³⁵ Consultation Paper, *ibid* at para 42.

³⁶ Consultation Paper, *ibid* at para 42.

³⁷ Consultation Paper, *ibid* at para 58.

³⁸ *Ibid* at para 29.

There is also the issue of course that a number of people wishing to travel internationally may not speak English and unless interpreters are to be provided it is very difficult to see how a person can truly consent to such a search.

Equal Treatment and the Selection Process

24. We welcome the provisions of the Code which state that selection will not be on account of age, gender, race, ethnic origin or religious belief.³⁹ Selection on the basis of any of these characteristics, rather than on the basis of suspicion, is, as the now Prime Minister himself has put it “*neither right nor effective*”.⁴⁰ We note that selection will instead apparently be at random, or on the basis of some other evidence-based concern (although as stated above the protocol for selection has not been made public).

25. It is crucial that selection for an invasive security measure is not discriminatory in its effect. However the only monitoring mechanism provided is for passengers to voluntarily and anonymously provide details of age, gender, race, ethnic origin and religion or belief. There is no indication of what will happen to these statistics and to whom they will be made available. It is also questionable whether such a system will be effective in any case, asking a passenger to even further delay their trip through the labyrinth of airport security is unlikely to elicit a high percentage of voluntary compliance. Having the statistics, however, is an important check on the operation of the powers and if, as is currently the case, the protocol is not published, it may be the only way for an individual to challenge the basis of their selection should, for example, they consider it to be racially or religiously motivated. We recommend therefore that a method of collecting statistics is established. There are other ways to ensure that ethnicity, for example, is collected by sight or verbally from passengers, making sure to explain to the passenger that the collection is for statistical purposes only.

26. Similarly, we do not consider assertions that staff training will ensure that people will be dealt with sensitively to be a sufficient safeguard. Compounding this inadequacy is the Government’s apparently laissez-faire attitude towards airport

³⁹ Consultation Paper, *ibid*, at para’s 30 and 60.

⁴⁰ David Cameron, House of Commons Hansard, 20 January 2010, Column 306.

staffing.⁴¹ An important safeguard in the Code, for example, is that a person will be able to request someone of the same gender to analyse their scan. This will obviously be rendered defunct if there is an insufficient number of female airport security staff, which was a concern of the Home Affairs Committee. Yet evidence of the Government to the Committee was that staffing is an operational decision of airport managers and not one the Government would address or interfere with.⁴² This raises the question of what else falls within the realm of 'operational decisions'. Disciplinary proceedings no doubt would be, as would be training. To this end we refer back to our initial concern that these important safeguards are placed in a non-binding Code of Practice and not squarely and transparently contained in legislation or regulations which, when it comes to privacy and equalities, shores up accountability and leaves nothing to the discretion of a private operator occasionally assessed by an independent monitor.

Data Protection

27. The Code sets out a number of provisions which the Department considers will ensure compliance with the *Data Protection Act 1998* (DPA). The DPA sets out a number of principles which impose on bodies or individuals in charge of data certain obligations with the view to protecting the data subject's privacy.⁴³ The Code states that the image will be destroyed and will be irretrievable once the person scanned has moved on from the device; the analysis will only be by the screeners (unless a threat is detected in which case another security officer may also look at the screen); that there is no method of copying, transferring or recovering images at a later date; and images cannot be saved, stored or printed. It is clear that a number of data protection principles are raised by the use of body scanners, including the requirement that data be processed 'fairly and lawfully' for an identified purpose; that the data is not further processed in a manner which is incompatible with the identified purpose; and that the data collected is 'adequate, relevant and *not excessive*' in relation to the purpose for which the data is processed. If, as we believe, these

⁴¹ Home Affairs Committee *Ninth Report*, *ibid*, at para 34, 36. See also the Letter from Lord Adonis to the Chairman of the Committee, dated 14 February 2010 in which he states "On the subject of the recruitment of female staff, I would say that recruitment is primarily the responsibility of the employer".

⁴² Home Affairs Committee, *Ninth Report*, at para 33.

⁴³ The eight data protection principles are set out in Schedule 1 of Part 1 of the DPA. The Act provides that any "data controller" (defined as to mean any person, either alone or jointly or in common with others, who "determines the purpose for which and the manner in which any personal data are, or are to be processed") must comply with the principles.

scanners have been introduced not in accordance with the requirements of law and are therefore in breach of Article 8, so too will the scanners fall foul of the DPA.

28. Further, while the Code may put in place the required safeguards, the potential for misuse and abuse of the data collected on the scanner highlights the extent of the potential impact on a person's privacy. Reported incidents in the media of staff members inappropriately using the scanners, clearly in breach of the Code and contrary to the Government's assertion that the machines cannot actually operate to reproduce images, does little to reassure us that the privacy implications have been effectively dealt with by the Code. Nor will disciplinary action undertaken in a private employment context after the fact do much to restore a passenger's dignity. One can imagine circumstances where a breach of the Code resulting in a scan being revealed by a staff member will have irreversible effect, such as the printing of a photo of a celebrity or the revealing of a body feature that a person does not want revealed. In such cases assurances in a Code of Practice may not be sufficient to allay those concerns and the lack of accountability, at least on the information currently available to us, may mean that that Code is all too easily broken.

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