Department of the Parliamentary Library

INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 131 2000–01

Migration Legislation Amendment (Immigration Detainees) Bill 2001

ISSN 1328-8091

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Department of the Parliamentary Library can be found at:
http://www.aph.gov.au/library/

Published by the Department of the Parliamentary Library, 2001

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 131 2000–01

Migration Legislation Amendment (Immigration Detainees) Bill 2001

Jennifer Norberry & Nathan Hancock
Law and Bills Digest Group
12 June 2001

Contents

Migration Legislation Amendment (Immigration Detainees) Bill 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: In general, on proclamation or six months after Royal Assent if not proclaimed earlier.

Purpose

The purposes of the Bill are to:

- establish a regime under which immigration detainees can be strip searched
- strengthen the offence of escape from immigration detention and create a new offence in relation to weapons, and
- introduce additional security measures for visitors to immigration detention centres.

Background

Introduction

The Migration Legislation Amendment (Immigration Detainees) Bill 2001 (the Bill) affects 'unlawful non-citizens' who are mandatorily detained in Australian immigration detention centres. For this reason, the Digest outlines the legislative background to current mandatory detention policies, the administration of detention centres, and standards and management practices in those centres. One of the major purposes of the Bill is to introduce a regime under which immigration detainees can be strip searched. The Digest also describes some other statutory strip searching regimes.

History and legislative overview of immigration detention legislation in Australia

The current regime for mandatory immigration detention is a response to what is often called the 'second wave' of boat people.

On 28 November 1989 and 31 March 1990 two groups of Chinese and Vietnamese asylum seekers arrived in Broome in the *Pender Bay* and the *Beagle*. All of the asylum seekers were Cambodian nationals. None of them held valid visas and they were subsequently detained. Most lodged applications for refugee status but most were refused between 3 and 6 April 1992. The decisions were appealed and a hearing was set down for 7 May 1992.[1]

The resulting litigation culminated in *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*, a High Court decision which considered favourably the constitutionality of 'administrative detention' and the lawfulness of existing detention provisions in the *Migration Act 1958*. The litigation also contributed to the passage of the *Migration Amendment Act 1992* and *Migration Reform Act 1992*, which introduced a requirement for mandatory detention into the *Migration Act 1958*. Ultimately, the claims of the applicants resulted in *A v Australia*[2] where adverse views were expressed by the United Nations Human Rights Committee on the *Migration Amendment Act 1992*.

Originally, the *Migration Act 1958* adopted an artificial distinction between unauthorised border arrivals (persons who arrive at the border without a visa and seek to enter Australia) and illegal entrants (persons who have entered Australia but subsequently have offended against Australia's immigration laws). The former were deemed not to have 'entered' Australia and were subject to 'turn around' provisions. This resulted in boat people invariably being detained for a period of weeks or years to prevent their entry and facilitate their deportation. The latter, that is visa overstayers, were liable to be deported but could only be detained for 48 hours and then for periods of seven days with the permission of a magistrate.

Prior to May 1992 boat people were detained under section 88 of the *Migration Act 1958*. Section 88 authorised an officer to detain stowaways and any other persons whom s/he reasonably believed were 'seeking to enter Australia in circumstances in which the person would become an illegal entrant'.

From May 1992 boat people were subject to specific mandatory detention provisions. Anticipating the outcome in *Lim's Case*, the *Migration Amendment Act 1992* abolished the concept of deemed non-entry and introduced a requirement to detain 'designated persons' (ie, boat people). A discretion continued in relation to illegal entrants and deportees (ie, other persons unlawfully in Australia). The Act was introduced and passed on 5 May 1992 and commenced on 6 May,[3] in time to affect hearings in the Federal Court on the release of the plaintiffs on 7 May. It was expressed to be an 'interim measure' intended to target 'a specific class of persons', addressing 'the pressing requirements of the current situation'.[4]

The 'interim measure' was later formalised by the *Migration Reform Act 1992* to include all 'unlawful non-citizens' (ie, persons present in Australia who do not have a valid visa).[5] Using the *Migration Amendment Act 1992* model, the amendments introduced by this Act required mandatory detention of all boat people, illegal entrants and deportees. The relevant provisions, sections 189[6] and 196,[7] commenced on 1 September 1994.[8]

As introduced, these provisions imposed a rigid mandatory detention regime which risked being in conflict with international human rights law[9] and possibly domestic constitutional law.[10] Following the recommendations of a parliamentary committee inquiry, the Migration Regulations 1994 were amended to introduce some flexibility into the mandatory detention regime via the bridging visa.[11] The amendments commenced with the commencement of the *Migration Reform Act 1992* on 1 September 1994.

Bridging visas are available to 'eligible non-citizens' who, in the present context include:

- minors where release would be in the best interests of the child and parents
- spouses and family members of Australian citizens or permanent residents
- the elderly, that is persons aged 75 years and over, and
- persons with special needs based on health or previous experience of torture or trauma.

The Minister may also make a personal determination in relation to an individual where:

- the person has made a valid application for a protection visa
- the person has been in detention for over 6 months since the application
- the Minister has not yet made a primary decision, and
- the Minister considers that release would be in the public interest.

To recap, under the *Migration Act 1958* unlawful non-citizens are detained until either they are granted permission to remain in Australia or are removed. [12]

People in immigration detention include:

- visa over-stayers and those who have breached visa conditions and are waiting for arrangements to be made for their departure from Australia, and
- people who arrive by sea or at Australian airports without visas. These people are held while any claims they make to stay in Australia are processed or until arrangements are made for their removal if they have no legitimate claim to stay.[13]

Immigration detention centres—administration, service provision and location

Service provision at immigration detention centres (IDCs)[14] has changed substantially since the mid-1990s. The extent and quality of services has developed over time and with experience. Moreover, responsibility for service provision has shifted from the public to the private sector, under departmental control.

In 1994 the Australian Protective Services (APS) provided custodial services for all IDCs. They also served a contract management function within some of the IDCs, particularly those at Villawood and Port Hedland.[15]

While APS provided the custodial services, the Department retained responsibility for 'determining and assessing the level and standard of services that are provided'.[16] At the time, a range of services was provided: health, education, welfare, sport and recreation, interpreter services, access to 'religious workers', postal and telephone. The Station Instructions for Port Hedland and Perth IDCs required APS to maintain security.

In 1997, the Department contracted the day-to-day management of all IDCs—including guarding, catering, health, welfare and educational services—to Australasian Correctional Services Pty Ltd (ACS). ACS is a subsidiary of the US Wackenhut Corrections Corporation. ACS has subcontracted actual service delivery to Australasian Correctional Management Pty Ltd (ACM) which is the operational arm of ACS. The agreement with ACS comprises three separate contracts:

- General Agreement: an overview document
- Occupational Licence Agreement: which authorises the contractor to use the IDCs, and
- Detention Services Contract: which details the services to be provided.

Under the Detention Services Contract (DSC), the services encompass 'all that is required to provide care and security for detainees from the point of transfer of a detainee from the Commonwealth to the Contractor to completion of removal or release from detention'.[17] The services include, 'guarding, interpreting and translation, catering, cleaning, maintenance, education, clothing, welfare and health services'.[18] In addition, separate Detention Standards require ACM to prevent detainees from escaping from detention 'inside and outside the facility, … monitor tensions within the facility and take action to manage behaviour to prevent disturbances and personal disputes from arising between detainees'. In responding to disturbances and disputes, the Detention Standards require staff to 'deal with the matters swiftly and fairly to restore security to all in the facility'.[19]

Today, ACS, on behalf of the Department of Immigration and Multicultural Affairs (DIMA), administers and manages six immigration detention facilities:

- Villawood Immigration Detention Centre (IDC) in Sydney, established in 1976—capacity 270 people

- Maribyrnong IDC in Melbourne, established 1996—capacity 80 people
- Perth IDC, established 1991—capacity 40 people
- the Immigration Reception and Processing Centre (IRPC) in Port Hedland, WA, established 1991—capacity over 800 people
- leased accommodation (IRPC) at the Curtin RAAF Air Base near Derby, WA—capacity 1000 people, and
- Woomera IRPC in South Australia, commissioned November 1999—capacity (by March 2001) 2000 people. [20]

Major redevelopment is planned for the Villawood IDC and there are plans for new centres to be built in Darwin (capacity 500) and Brisbane.[21]

Immigration detainees held in State and Territory prisons

Immigration detainees are sometimes held in State and Territory correctional facilities as a result of 'behavioural issues' or because they have finished serving a prison sentence and are awaiting deportation. In 1999-2000 there were 98 transfers from IDCs to State or Territory prisons involving 91 immigration detainees. At June 2000 there were a further 41 immigration detainees held in prisons awaiting criminal deportation or removal following cancellation of a permanent visa.[22]

Inquiries

Between 1989 and 1994 the detention centres were the subject of various reviews.[23] In 1994 the Joint Standing Committee on Migration (JSCM) released what is often regarded as the definitive report in this area: *Asylum, Border Control and Detention.* However, since 1994 the mandatory detention regime has continued to be examined and criticised. [24]

The inquiries and reports to date have focused, with decreasing emphasis over time, on:

- the underlying need and rationale for mandatory detention,
- the consistency of mandatory detention with domestic and international laws, and
- standards and management practices at detention centres in general and in particular.

To some extent, discussion of the first two issues has become otiose given the tenor of the *Asylum, Border Control and Detention* report in 1994. In that report, the JSCM basically supported the policy of mandatory detention on the basis that it was consistent with Australian sovereignty and was essential to Australia's system of immigration control.[25]

Significantly, discussion has continued on the issue of alternatives to prolonged detention. While the JSCM supported mandatory detention, concern was expressed as to the period of detention and the need to ameliorate the regime. Thus, the JSCM made a number of recommendations in favour of release or conditional release of detainees. Recently, the Minister has announced a trial release of women and children from the Woomera IDC.

Moreover, discussion of the third issue has continued both within and outside Parliament. In particular, at least since the outsourcing of management to ACS, the JSCM has kept a watching brief on detention centres to assess their standards and management practices.

Both of these issues are briefly discussed below.

Alternatives to Mandatory Detention

Since the introduction of mandatory detention, various alternatives have been raised, including a two month limit on detention with the onus on DIMA for extensions,[26] bail,[27] parole,[28] and temporary residence for persons detained for two or more years.[29]

In 1994 the JSCM recommended that an option for conditional release be available where the period of detention exceeded six months.[30] It made specific recommendations in relation to cases where 'continued detention' had been 'brought about by a lack of action or administrative error by the Department'[31] or cases involving persons who 'particularly are vulnerable to any effects of long term detention, namely those persons with a special need based on age, health, or previous experiences of torture or trauma'.[32]

On 25 May 2001, the Minister announced a trial release of detainees at the Woomera IDC. The trial would involve a maximum of 25 'accompanied women with children who have a family member remaining at the IDC' who had applications for asylum 'before [DIMA]', had undergone health assessments and who had been assessed as posing no 'character or management risks'. Any person(s) who attempted to abscond would have their asylum application rejected. Any person(s) who 'behaved in an inappropriate manner' would be returned to detention.[33]

Significantly, despite being released the trial participants would still be in 'immigration detention'. Specifically, they would be under 24 hour surveillance by ACM and would be accompanied by ACM officers in any movements beyond the relevant house and yard.[34] The trial was expected to commence by 1 July 2001 and to run for 3 to 6 months.

Standards and Management Practices

Even before the formal introduction of mandatory detention, criticisms began to emerge regarding the standards and management practices in IDCs in Australia.[35] These concerns have since crystallised on a set of issues which are discussed briefly below.

Early Reports

In the early reports comments were made on the adequacy and appropriateness of the services provided. Concerns were raised in relation to a range of issues including the duration of detention, racial discrimination, lack of professional torture and trauma counselling and counselling for incidents such as suicide and self-harm.

Various observations were made on the effects of detention including that long term detention was deleterious to detainees, that detainees suffered boredom, frustration and anxiety and that the fences and bars give a prison like appearance to IDCs,[36] that detainees were feeling depressed and tense,[37] and that there had been some loss of culture in the detention processes, principally in children through their exposure to the Australian education system, Australian television, etc.[38]

These observations were reinforced in submissions to the JSCM in 1994. One group suggested that detention per se 'can only create fear and tension especially for traumatised people who have lived most of their lives distrusting authority'.[39] Other evidence alleged that the living conditions were impoverished and could have a detrimental effect particularly on children. In particular it was alleged that that there was inadequate living space, minimal privacy and poor or culturally inappropriate food.[40]

For its part the JSCM concluded that 'there could be no valid comparison made between immigration detention centres and prisons'.[41] However, it acknowledged that there had been difficulties with the detention centres based principally on their transformation from short term to long term facilities. In particular, it expressed concern regarding the level and appropriateness of health and education services and the suitability of Port Hedland as a detention centre given its remoteness.[42] Acknowledging that complaints would continue, it recommended an Immigration Detention Centres Advisory Committee be established.[43]

Later Reports

In later reports, similar concerns were raised with special interest in overcrowding,[44] access to legal advice,[45] segregated detention,[46] the use of force,[47] including practices of searches[48] and physical and chemical restraints,[49] and the transfers to state prisons.[50]

In September 2000, the JSCM concluded that 'the facilities provided were adequate, and that the cultural sensitivities of detainees were being accommodated'[51] and that the detention administration was 'appropriate and professional'.[52] While it noted problems with overcrowding but stated that 'the solution is not more centres, it is fewer arrivals'.[53] On the whole the JSCM was 'convinced that Australia was taking seriously its responsibilities for those in its care',[54] but recommended that it continue its watching brief.

Searches, Restraints and Prisons

Of particular relevance in the present context is the use of searches, restraints and prisons.

In 1994 APS stated that general searches had only occurred twice at Villawood and none had occurred at Port Hedland. However, searches were conducted of rooms if there were reports of 'activities which raise concern', such as 'reports that weapons have been secreted or foodstuffs and other groceries are being horded'.[55] In 1998 the Department advised that searches were conducted where it was considered reasonably necessary to ascertain whether there was 'a concealed weapon which may be used to inflict bodily harm or assist the person escape from custody'.[56] In February 2001 Philip Flood stated in relation to the Woomera IDC that '[c]redible witnesses have told me of derogatory remarks to detainees, humiliation of people in room searches and people sworn at in an abusive manner'. The author was satisfied 'on the basis of the credibility of these witnesses' that the claims were valid.[57] Nevertheless, in March 2001, the Commonwealth Ombudsman observed that the *Migration Act 1958* 'does not appear to provide staff with the powers to conduct intrusive searches of the detainees or to search visitors to IDCs for drugs, weapons and the like'.[58]

Similarly, in 1994 the APS advised that it pursued a philosophy of minimum use of force at IDCs. In evidence the APS noted that staff did not routinely carry batons, handcuffs, firearms, etc as would be expected in a prison.[59] In 1998 the Human Rights and Equal Opportunity Commission (HREOC) investigated various allegations of assault, finding in one case that unreasonable force was used by APS staff on a female detainee.[60] In 2001 the Commonwealth Ombudsman noted that DIMA and ACM staff restrained or took disciplinary action against detainees '[o]n many occasions' by using force 'to remove or restrain, handcuff, or to forcibly place a detainee in a more restrictive detention facility such as isolation'.[61] As above, it was noted that, while provisions of the *Migration Act 1958* conferred some powers in this regard, 'it is arguable whether they clearly express or particularise adequately the methods of restraint or punishment that might be imposed'.[62]

Existing powers of personal search under the *Migration Act 1958*

Section 252 of the Migration Act presently allows authorised officers and, in some cases, other persons to conduct searches of the clothing and property of persons in detention or immigration clearance for the purpose of finding weapons or documents that would show that a person's visa should be cancelled.[63] Strip searching is explicitly prohibited under section 252.[64]

Powers of personal search under the common law and Commonwealth statutes

The major purpose of the Migration Legislation Amendment (Immigration Detainees) Bill 2001 is to provide a regime under which immigration detainees can be strip searched.

Police officers have no power under the common law to order searches of a person or seizure of their property unless the person has been arrested. However, statutes like the *Crimes Act 1914* (Cwlth), confer powers on police officers to search a person who is in

lawful custody and seize anything found during the search. Under the *Customs Act 1901* (Cwlth), Customs officers are provided with powers of personal search.

Strip search powers are found in three Commonwealth statutes—the Crimes Act, the Customs Act and the *International War Crimes Tribunal Act 1995*.[65] Some other Commonwealth statutes give authorised regulatory officers the power to carry out ordinary searches and frisk searches—for example, the *Environment Protection and Biodiversity Conservation Act* 1999[66] and the W*ildlife Protection (Regulation of Imports and Exports) Act 1982*[67]—but explicitly prohibit them from carrying out strip searches.

Types of personal search

A number of types of personal search are provided for in Commonwealth statutes. In ascending level of intrusiveness, these are ordinary searches, frisk searches (also known as pat down searches), strip searches (also known as external searches) and internal searches (also known as body cavity searches). In general, the greater the level of intrusiveness the greater the amount of protection afforded the person who is to be searched.

- An 'ordinary search' is defined in the Crimes Act as a search of a person or items in their possession which may include requiring the person to remove outer garments and then examining those garments.[68]

- A 'frisk search' is defined in the Crimes Act as a search of the person that involves running hands over the person's outer garments and examining anything worn or carried by the person that is easily and voluntarily removed by that person.[69]

- A 'strip search' is defined in the Crimes Act as a search of a person or items in their possession which may include requiring the person to remove all or some of their clothing and examining the person's body (but not body cavities) and garments.[70] The expression 'external search' is used in the *Customs Act 1901* instead of the expression 'strip search' for a search of the body of, or anything worn or possessed by a person.[71]

- An 'internal search' is defined in the Customs Act as 'an examination (including an internal examination) of the person's body to determine whether the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed'.[72]

Strip search regimes in the Crimes Act, the Customs Act and the Bill

In part, the strip searching regime contained in the Crimes Act is reflected in the Bill—for example, provisions about the grounds on which an application for a strip search authorisation can be made; the privacy that must be afforded to a person during a strip search; the requirement that the search must be conducted by a person of the same sex as the detainee; and the prohibition on strip searching children under the age of 10 years. In

particular, **new section 252B** closely follows the rules for strip searching contained in section 3ZI of the Crimes Act.

There are also differences between the Crimes Act and the Bill. Broadly speaking, these differences relate to threshold issues (ie what preconditions must exist before authorisation for a strip search can be sought); who can apply for, authorise and conduct a strip search; the protections afforded to minors aged between 10 and 18 years; the provision of searches by consent; and record keeping requirements.

For example, under the Crimes Act:

- the power to strip search is exercisable by a constable, at a police station, after a person has been arrested for an offence[73]
- the strip search must be authorised by someone of the rank of superintendent or higher[74]
- not only must the decision to authorise or refuse a strip search be recorded, so must the reasons for the decision[75]
- in some circumstances the search may be conducted with the consent of the arrested person[76]
- there are particular protections for juveniles aged between 10 and 18 years and 'incapable persons'. Thus, a strip search in such a case can only be carried out if the person has been arrested and charged, or if a magistrate orders the search, and[77]
- there are general protections relating to the questioning of a person who is under arrest—for example, requirements for cautioning, rights of communication, and provision of interview friends[78] and interpreters.[79]

Provision for strip searching (external searching) is also found in the Customs Act. While there are some similarities between the Bill and the Customs Act regime, there are also many differences including:

- an 'external search' can be conducted under the Customs Act with the consent of the person if that person has refused to consent to a frisk search, has been frisk-searched but refuses to produce an item, or where a detention officer or police officer suspects on reasonable grounds that the person is unlawfully carrying prohibited goods on his or her body[80]
- absent consent, a police officer or authorised customs officer must apply to a justice of the peace for an external search order. However, if the detainee has waived the right to have the application dealt with by a justice or a justice is not reasonably available, the application can be made to an 'authorised officer'. [81] An 'authorised officer' is a person authorised by the CEO of Customs.[82]

- the search must be carried out by a police or an authorised customs officer[83]
- a person who is not in need of protection can consent to an external search[84]
- prescribed equipment can be used to carry out an external search if the person consents[85]
- a detainee can, at any time, communicate with another person—unless such communication would prejudice law enforcement or safety[86]
- the detainee can be questioned for certain purposes but must first have been told of their right to silence, that anything said could be used in evidence and that they have a right to communicate with another person[87]
- a videotape or electronic record can be made of the external search and, if made, must be made by a person of the same sex as the detainee[88]
- the request for the detainee's consent to the search must be recorded and a copy given to the detainee[89]
- a copy of an external search order must also be given to the detainee or, in the case of a detainee in need of protection, the person present during the search, and[90]
- any recording of the external search must be destroyed if 12 months have elapsed and proceedings have not been commenced or have been discontinued.[91]

Powers of personal search under State corrective services legislation

State and Territory corrective services legislation also contains powers of personal search. These provisions are relevant for two reasons. First, it could be argued that people in administrative detention—like immigration detainees—should be governed by rules similar to those applied to prisoners in correctional facilities. Second, the Bill itself provides that those immigration detainees who are housed in State and Territory prisons will be subject to any relevant State or Territory personal search law.

One example of State corrective services legislation is the *Correctional Services Act 1982* (SA). Section 37 governs the search of prisoners. It provides that a prison manager can order a prisoner or the prisoner's belongings to be searched in a number of circumstances including:

- on entry to the prison, and
- where the manager has reasonable cause to suspect the prisoner has prohibited items in his or her possession.

For the purposes of the search the prisoner may be required to open his or her mouth, strip, adopt particular postures, and do anything reasonably necessary for the purposes of the search. If the prisoner does not comply, reasonable force can be used. Certain protections are provided to the prisoner. For example, if the prisoner is naked during the search only persons of the same sex can be present (except in the case of a medical practitioner), at least two people must be present during the search if the prisoner is naked, force cannot be used to open a prisoner's mouth except under medical supervision, and a search must be carried out expeditiously and without undue humiliation.

Main Provisions

'Immigration detention'

The new offences and strip search provisions apply to 'immigration detention' and 'detainees'. These terms are defined in section 5 of the Migration Act. 'Immigration detention' applies not only to detention centres, but to prisons, remand centres, other places approved by the Minister in writing and to a person who is being restrained by an officer.

A 'detainee' is a person in immigration detention.

Offences

Item 3 of the Schedule inserts two offence provisions into the *Migration Act 1958*. **New section 197A** contains an offence of escaping from immigration detention. The maximum penalty is 5 years imprisonment—an increase on the current penalty of 2 years imprisonment (see below).

New section 197B creates an offence of making, possessing, using or distributing a weapon. The penalty is imprisonment for 3 years. The term 'weapon' is defined in **new subsection 197B(2)** to include things made or used to inflict bodily injury or things intended to be so used.

Item 8 repeals section 491 of the Migration Act. Section 491 creates offences of escaping from custody and attempting to escape from custody. The penalty is a maximum of 2 years imprisonment. The principal offence of escaping from custody found in section 491 will be replaced by **new section 197A**. The secondary offence of attempting to escape from custody currently found in section 491 will no longer be necessary following the application of Chapter 2 of the Criminal Code to **new Division 7A**[92] of the Migration Act (see **new section 197C**). Chapter 2 contains a regime for secondary offences—like attempt and incitement—in Commonwealth legislation.

Strip searching

Item 7 inserts a regime for strip searching immigration detainees.

Definition

New section 252A(2) defines a 'strip search' as a search of a detainee which may include requiring the detainee to remove some or all of their clothing and examining their clothing or body. It specifically excludes body cavity searches.

Purpose of a strip search

The purpose of a strip search must be to determine whether there is a hidden weapon or thing on or in the possession of a detainee which is capable of being used to inflict bodily injury or assist in an escape [**new subsection 252A(1)**].

Applying for, authorising and conducting a strip search

Applying

Before an authorisation can be sought, an 'officer' must suspect on reasonable grounds that:

- the detainee has a hidden weapon or thing capable of causing injury or assisting in an escape (see above), and
- it is necessary to conduct a strip search to recover the weapon or thing [**new paragraphs 252A(3)(a) and (b)**].

Under the Migration Act, 'an officer' means a DIMA officer, a Customs or Australian Protective Services officer, a police officer or a person authorised by the Minister under subsection 5(1) of the Act. Persons who have been authorised by the Minister include employees of Australasian Correctional Management Pty Ltd[93] and other companies.[94]

Authorising

Under **new paragraph 252A(3)(c)** a strip search must be authorised by an authorised SES[95] or acting SES DIMA employee, or an authorised DIMA employee. The authorising officer must be satisfied that there are reasonable grounds for the suspicions held by the 'officer' making the application.

Conducting

If these preconditions are satisfied, a strip search may be conducted by an 'authorised officer' without a warrant. The expression 'authorised officer' is defined in subsection 5(1) of the Migration Act in the following way: '[authorised officer] when used in a provision of this Act, means an officer authorised in writing by the Minister or the

Secretary for the purposes of that provision'. Such a person might include an immigration detention centre guard who is appropriately authorised under the Migration Act.

The person authorising the strip search cannot be the same person as the person who applied for the authorisation or the person who will be conducting the strip search [**new paragraph 252A(3)(c)**].

Record keeping

The strip search authorisation must be recorded in writing and signed by the person giving the authorisation within one business day of the authorisation being given. However, failure to comply with these requirements does not invalidate the search [**new subsections 252A(4) & (5)**].

General rules for conducting a strip search

The general rules for conducting a strip search are set out in **new section 252B**. For example, a strip search:

- must not subject the detainee to more indignity than is reasonably necessary[96]
- cannot involve a search of the detainee's body cavities[97]
- must not involve the removal of more clothing or more visual inspection than is reasonably necessary[98]
- must not be conducted with greater force than is reasonably necessary.[99]

Special rules relating to minors, 'incapable' persons, and gender

Special rules relating to minors, 'incapable persons' and gender are also found in **new section 252B**.

Detainees aged less than 10 years cannot be strip searched.[100] For detainees aged 10 years but under 18 years, or detainees who are incapable of managing their own affairs, the strip search must be conducted in the presence of the person's parent or guardian (if at the IDC and available) or another person who is independent, able to represent the detainee's interests and acceptable to the detainee.[101]

A strip search must be conducted by an authorised officer who is the same sex as the detainee.[102] It must not be carried out in the presence of a person who does not need to be present—unless that person is a parent, guardian or person representing the detainee's interests.[103] An authorised officer can be assisted by another person to carry out the strip search. The person assisting cannot be a person of the opposite sex to the detainee, unless the person is a doctor and a doctor of the same sex is not available within a reasonable time.[104]

Immunities

New subsection 252B(4) provides immunity against legal action to a person who is asked to assist in a strip search and does so in good faith and within the parameters of section 252B.

Provision of clothing

New subsection 252B(5) provides that a detainee must be provided with adequate clothing if his or her garments are damaged, destroyed or retained as a result of the strip search.

Retention of items found during a strip search

New section 252C enables items found during the course of a strip search to be retained if they provide evidence of the commission of an offence against the Migration Act or if they are forfeitable to the Commonwealth. Forfeitable items include weapons and things that might be used to assist an escape from a detention centre. Forfeited items must be given to a police officer. With exceptions, an item must be returned to the detainee if it is not to be used in evidence or 60 days has elapsed.

New section 252D provides that an authorised officer may apply to a magistrate to retain an item seized as the result of a strip search.

Under **new section 252E** a magistrate may grant the application for a specified period. **New subsections 252E(3) and (4)** are designed to address any separation of powers issues that might otherwise arise when a magistrate invested with federal jurisdiction exercises non-judicial power—in this case, by making an order for the retention of an item seized during a strip search. They do so by providing that the power is exercised voluntarily and in a personal capacity.

Immigration detainees held in State or Territory correctional institutions

If a detainee is held in immigration detention in a State or Territory prison or remand centre, any laws of the relevant State or Territory relating to personal searches apply to that detainee and displace new section 252A [**new section 252F**].

In its *Alert Digest No. 6,* the Senate Standing Committee for the Scrutiny of Bills asked whether it is appropriate to apply 'State and Territory search laws as laws of the Commonwealth without the Commonwealth Parliament having the opportunity to consider those laws'.[105]

Screening equipment and visitors to detention centres

New section 252G establishes a screening equipment regime for visitors to detention centres. It enables an officer to request a visitor to subject themselves or their belongings to screening by screening equipment or x-ray [**new subsection 252G(1)**]. It also enables

an authorised officer to request a visitor to a detention centre to allow their belongings to be inspected, and their outer clothing to be removed if it is suspected that the visitor has possessions that might be used to endanger safety or security [**new subsections 252G(3) & (4)**]. In such a situation the person may also be requested to relinquish belongings reasonably suspected of being capable of endangering safety or security. Failure to comply with these requests may result in the person being refused entry to the detention centre [**new subsection 252G(7)**].

Concluding Comments

Policy

In his Second Reading Speech on 5 April 2001, the Minister for Immigration and Multicultural Affairs said:

> It is both alarming and regrettable that in recent times there have been a number of major incidents of antisocial and violent behaviour at immigration detention centres.
>
> Members will recall that there have been major disturbances at the Woomera, Curtin and Port Hedland immigration reception and processing centres. In fact, yesterday there was a major disturbance at the Curtin immigration reception and processing centre.
>
> There have been violent protests, burning of buildings, assaults on officers and other detainees, and mass escapes.
>
> The violent actions of some detainees have endangered both other detainees and staff, and caused considerable damage to Commonwealth property.
>
> We need enhanced powers to discourage and, where necessary, to more effectively manage this inappropriate behaviour in detention centres.
>
> Whatever its reason, violent and threatening behaviour by immigration detainees, which would be unacceptable in the Australian community, cannot be tolerated in these centres.
>
> We respect the dignity and cultural values and beliefs of detainees, and we expect that they in turn will respect the rights of fellow detainees, staff working at detention centres and the Australian community.
>
> The measures in this bill will provide assistance in ensuring the safety of all persons within detention centres.[106]

The Minister continued:

> Frequently, detainees have hidden items[107] … in their clothing or on their person, that have later been used for self-harm, to injure others or to attempt to escape.
>
> Existing search powers do not permit the removal and examination of items of clothing without the detainee's consent.
>
> The inability to examine clothing for concealed weapons is of serious concern. It places all persons in danger, particularly as detention centre staff are unarmed.[108]

The proposal to enable strip searching of detainees has been criticised by the ALP, the Australian Democrats and Amnesty International.[109] An Amnesty International spokesperson was reported as saying:

> The vast majority of recent arrivals have been found to be genuine refugees, in which case they may have suffered torture or trauma. How do you convince a 10-year-old child[110] who has fled Afghanistan or Iraq and … then is subjected to a strip search that the country he has arrived at is any different to the country he or she has fled?[111]

The ALP spokesperson on immigration, the Hon. Con Sciacca MP, said that 'with the behaviour of so many guards at Australasian Correctional Management under scrutiny, granting them extra powers [would be] an unwise move.'[112] And in a press release issued by Australian Democrats spokesperson on immigration and multicultural affairs, Senator Andrew Bartlett, remarked:

> 'This Bill is contrary to all the recommendations that are coming out of independent inquiries into detention centres. …
>
> Riots are caused by asylum seekers' frustration, fear and isolation. Minister Ruddock's heavy-handed approach would not calm things down but make conditions worse.
>
> These [detention centres] are not jails they are centres where families live, sometimes for years. These sort of excessive measures are not appropriate in the circumstances.'[113]

Duty of Care

It is apparent that a key rationale behind some of the proposed measures is the need to meet the duty of care owed by DIMA and ACS in relation to immigration detainees.

There is no general duty of care to prevent a third party from causing injury to another. However where the third party is under the care and control of a person or body, a duty of care may arise in relation to the actions of the third party and the consequences for others. Thus, DIMA and ACS, in assuming control of detainees and depriving them of their liberty, would have a duty to exercise reasonable care for their safety.[114] Moreover, the duty would extend to detainees individually, in terms of protection against self-harm,[115]

and generally in terms of protection against harm by others.[116] Doubtless, a duty would also extend to detention centre staff and to third parties.

Significantly, the duty is not to take *all* measures to eliminate *every* possible harm. It is only to take *reasonably necessary* measures to eliminate *reasonably foreseeable* harm. Thus, measures need only address foreseeable harm or identifiable risks. Moreover, the measures must be reasonable in the circumstances. Ordinarily, reasonableness is measured by various factors including the economic burden of the proposed measure on the body which owes the duty. In the present context relevant factors may include the marginal utility of such measures[117] and their impact on the liberty and privacy of detainees.[118]

It is against this background that the Minister in his Second Reading Speech said:

> I emphasise at the outset that strip searches will not be undertaken as a matter of routine. There must be strong reasons for undertaking such a search. It is a measure of last resort, to be used only in exceptional circumstances. A search may only be undertaken where there is a reasonable suspicion that the detainee has a hidden weapon or other thing capable of being used to inflict bodily injury —including to the detainee himself or herself—or to help the detainee or any other detainee to escape.[119]

And, perhaps more significantly:

> These search provisions have been designed to reflect a reasonable balance between preserving a detainee's dignity and privacy, while providing for the protection of the detainee community as a whole, the centre staff and the Australian community.[120]

It should be noted that a duty of care is relevant not only in terms of justifying measures such as strip searches but also in terms of assessing how those measures are undertaken. It follows from the general principles discussed above that DIMA and ACS must exercise reasonable care in relation to the exercise of the powers to be conferred in this Bill. They must take reasonable measures to avoid causing reasonably foreseeable harm to detainees.

The proposed legislative regime

If it is accepted that there should be a power to strip search immigration detainees, the question then becomes how should the power be exercised and overseen—in particular, who should propose, authorise and conduct a strip search, what protections should detainees have, and what recording and reporting procedures should there be.

In his Second Reading Speech, the Minister stated that safeguards are needed and indicated that:

- strip searches will not be used as a matter of routine, only as a last resort
- a detainee will be provided with information about a search before the search is conducted

- approval for a strip search can only be given by an authorised, senior departmental officer
- before conducting a strip search the search officer must satisfy himself or herself that the permission to search has been properly sought and provided
- there will be appropriate training for search officers and authorising officers, and
- a written, twice-yearly report will be provided by the Minister to Parliament on the use of the strip search power.[121]

It is proposed that rules governing strip searching of immigration detainees will be contained in legislation and guidelines. The Minister indicated that a protocol being developed in association with the Attorney-General '… will set down directions in relation to [strip] searches, will ensure that the power is not abused and officers are accountable for its use'.[122]

It is arguable that a high level of protection should be contained in any legislative scheme enabling people in administrative detention to be strip searched. Immigration detainees are not convicted criminals. Based on current information, many will be granted permission to stay in Australia.[123] Their numbers include children. Immigration detention centres are managed by private companies. Many are geographically isolated from major cities. Women and children released under the trial proposed by Minister Ruddock on 25 May 2001 may also be subject to the strip searching regimes. On the other hand, it could be said that greater powers are needed to implement a strip search regime for immigration detainees because of their status (unlawful non-citizens), the fact that they are in detention, the possible duration of that detention and because the Commonwealth owes a duty of care to those in its custody and control and to detention centre staff.

The Senate Standing Committee for the Scrutiny of Bills examined the Bill and raised questions about:

> .. the appropriateness of conferring police powers on persons other than police officers; [and] the appropriateness of applying a power to search persons under arrest to persons in immigration detention ..[124]

However, irrespective of whether the Crimes Act or, indeed, the external search provisions in the Customs Act provide entirely appropriate models for the strip searching of immigration detainees, those two statutes do contain additional protections not found in the Bill. For example, as the Senate Committee pointed out, a strip search under the Crimes Act must be conducted by a police officer. In the case of a minor aged 10 but under 18 years, a strip search cannot be conducted unless the person has been arrested and charged or a magistrate orders the search. The reasons for the strip search must be recorded. Under the Customs Act, subject to certain exceptions, an external search is authorised by a justice of the peace. It must be carried out by a police or customs officer, and there are record keeping and recording requirements. For more details about the

relevant provisions in the Crimes Act and Customs Act, readers are referred to pages 9-11 of this Digest.

Taking into account the strip searching regimes in the Crimes Act and Customs Act, and the matters raised by the Minister in his Second Reading Speech, the following questions might be asked:

- to what extent should protections be contained in legislation and to what extent in non-legislative instruments
- whether it is appropriate for detention centre guards employed by private companies to be empowered to strip search detainees
- whether it is appropriate for persons who are not 'officers' for the purposes of the Migration Act to be able to assist in a strip search and what training will these people have[125]
- whether the proposed legislation should prescribe the minimum level of seniority required before a DIMA officer can be authorised to approve a strip search. The Bill specifies that such officers must be authorised SES or acting SES officers or 'another employee in the Department who is authorised …'
- whether only a person independent of DIMA should have the power to authorise a strip search—especially when it is proposed that a minor be strip searched
- whether the Bill itself should explicitly provide that before conducting a search an authorised officer must satisfy himself or herself that the permission to search has been properly sought and provided
- whether the Bill itself should prescribe the information that is given to a detainee who is to be strip searched
- whether the written authorisation for a strip search which is provided for in the Bill should be accompanied by a statement of reasons and whether a copy should be provided to a detainee
- whether the Bill should provide for a register of strip searches conducted, the reasons for each search, details of any force used and by whom[126]
- whether detainees subject to a strip search should have rights to communicate with others
- should the Bill specify whether a detainee can or cannot be questioned during a strip search and, if so, for what purposes
- should strip searches be electronically recorded,[127] and

- whether the Bill itself should provide for regular reporting to the Minister and to Parliament about strip searching of detainees and the nature of that reporting.

Endnotes

---

1 These facts were recited in the judgement of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 15.

2 UN. Doc No. CCPR/C/59/D/560/1993.

3 The provisions relating to mandatory detention commenced on 6 May 1992. Other provisions commenced 3 June 1992 and 6 November 1992.

4 The Hon Gerry Hand, MP, Migration Amendment Bill 1992, Second Reading Speech, House of Representatives, *Debates*, 5 May 1992, p. 2370.

5 The delay was intended to allow drafting of subordinate legislation, design and printing of forms, training, development of new information technology systems and programs.

6 Section 189 of the *Migration Act 1958* provides:

> (1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.
>
> (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
>
> (a) is seeking to enter the migration zone; and
>
> (b) would, if in the migration zone, be an unlawful non-citizen; the officer must detain the person.
>
> ['Officer' is defined in section 5 to include immigration officers, police officers, protective service officers and persons authorised by the Minister by way of notice in the *Gazette*.]

7 Section 196 provides:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or
>
> (c) granted a visa.
>
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
>
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

8 These provisions were inserted as sections 54W and 54ZD by the *Migration Reform Act 1992*. The *Migration Reform Act 1992* was due to commence on 1 November 1993 but was deferred by the *Migration Laws Amendment Bill 1993* to 1 September 1994.

9 Within international human rights law, a wide range of other prohibitions and requirements are cited as being relevant to the mandatory detention of asylum seekers. It has been argued that mandatory detention is contrary to the prohibitions on cruel, inhuman and degrading punishment in the *International Covenant on Civil and Political Rights* (ICCPR) (Article 7) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (Article 16). It has also been argued that it is contrary to the prohibition on arbitrary detention in the ICCPR (Article 9(1)) and the *Convention on the Rights of the Child* (CROC) (Article 37).Thus, in *A v Australia*, the United Nations Human Rights Committee, while accepting that detention *per se* was not arbitrary or contrary to international law, concluded that prolonged detention and the application of the detention policy indiscriminately to all unlawful non-citizens was arbitrary for the purposes of Article 9 the *International Covenant on Civil and Political Rights*: ibid, para 9.4. In response the Australian Government argued that mandatory detention was an 'exceptional measure' which was justified 'for compelling reasons of public policy', including the need to determine legality of entry, uphold the integrity of the migration program, prevent access of unlawful entrants into the community and facilitate processing and removal. It also noted that '[t]he length of time a person may spend in detention is largely dependent on the amount of time required to investigate and process his or her claims to remain in Australia and to finalise any legal proceedings relating to these claims' and that it was government policy 'to keep to a minimum the length of time a person may spend in such detention'. *Response of the Australian Government to the Views of the Committee in Communication No. 560/1993 A v Australia*, paras 5 & 6. In addition, it reiterated the 'fair and generous nature of Australia's system for processing claims for refugee status, and in particular, the fact that the system allows claimants opportunities to seek both merits and judicial review of adverse decisions on their claims': ibid, para 10.

However, the key issue has been the prohibition on unnecessary or arbitrary detention. See generally, Nick Poynder, 'Human Rights Law and the Detention of Asylum-seekers' in Mary Crock (Ed.) *Protection or Punishment: The Detention of Asylum Seekers in Australia*, The Federation Press, 1993; Chris Sidoti, 'Asylum seekers: human rights obligations', *Migration Action*, Vol 22 No. 2, 2000 pp. 13–16; Commonwealth Parliament of Australia, Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, February 1994, Chapter 3; Human Rights and Equal Opportunity Commission, *Immigration Detention - Human Rights Commissioner's 1998-99 Review*, 1999; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program*, 1999; Elizabeth Evatt, 'Australia's Performance in Human Rights', *Alternative Law Journal*, Vol. 26 No. 1, 2001, pp. 11–16; *A v Australia*, 1997, op. cit., United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. CCPR/CO/69/AUS (28 July 2000).

10 The key issue for constitutional law is that mandatory detention is a form of administrative rather than criminal detention. Moreover, administrative detention which is characterised as punitive will contravene the constitutional requirement for separation of powers. In *Lim's*

Case, op. cit., Brennan, Deane and Dawson JJ expressed the view that administrative detention will not be punitive if it can be characterised as being reasonably necessary for immigration processing (at p. 33). McHugh J said that a law permitting administrative detention 'cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object' (at pp. 71–72). A key issue in the case was the prolonged period of detention. However, the majority judges rejected the view that the mandatory detention regime was punitive. To some extent, they relied on the circumstances surrounding detention. Brennan, Deane and Dawson JJ referred to various aspects of the regime, such as the initial time limit on detention, the requirement to deport or remove detainees as soon as practicable and the ability of detainees to unilaterally terminate their detention (at pp. 33-34). McHugh J referred to the 'administrative burden' placed on DIMA in processing the vast number of refugee applications (at pp. 71-72).

11 Migration Regulations (Amendment) SR No. 280 of 1994.

12 Sections 189 and 196, Migration Act. And see Department of Immigration and Multicultural Affairs, DIMA Fact Sheet 82, 'Immigration Detention', http://www.immi.gov.au/facts/82detain.htm (current at 14 May 2001), last update 24 March 2000.

13 ibid.

14 Centres may be referred to as Immigration Reception and Processing Centres (IRPCs) (Woomera, Curtin, Port Hedland) or Immigration Detention Centres (IDCs) (Perth, Villawood, Maribyrnong). For convenience, unless the context suggests otherwise, IDC is used in the Digest to refer to both.

15 Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, February 1994, p. 163.

16 ibid.

17 Commonwealth Ombudsman, *Report of an Own Motion Investigation into The Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, March 2001, p. 38.

18 Joint Standing Committee on Migration, *Immigration Detention Centres Inspection Report*, August 1998, p. 9.

19 Commonwealth Ombudsman, *Immigration Detention Centres*, March 2001, op.cit., p. 38.

20 Millbank, loc.cit.

21 ibid.

22 See Commonwealth Ombudsman, *Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities*, March 2001.

23 Australian Institute of Criminology, *The Future of Immigration Detention Centres in Australia*, July 1989; Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers – Darwin and Port Hedland: Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991*, March 1992; *Report to the Australian Council of Churches on the Present Situation of Asylum Seekers Detained at Port Hedland Reception and Processing Centre*, March 1992.

24 Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of Immigration detainees to State prisons*, December 1995; Commonwealth Ombudsman, *Final Report to the Department of Immigration and Ethnic Affairs of Investigation of Complaints Concerning Onshore Refugee Processing*, September 1997; Human Rights and Equal Opportunity Commission, *Preliminary Report on the Detention of Boat People*, November 1997; Australian National Audit Office, *The Management of Boat People*, ANAO Report No 32, February 1998; Human Rights and Equal Opportunity Commission, *Those who've come across the seas: detention of unauthorised arrivals*, May 1998; Commonwealth Ombudsman, *Administrative Arrangements for Indonesian Fishermen Detained in Australian Waters, Report under Section 35A of the Ombudsman Act 1976*, July 1998; Joint Standing Committee on Migration, *Immigration Detention Centres: Inspection Report*, August 1998; Joint Standing Committee on Migration, *Not the Hilton – Immigration Detention Centres: Inspection Report*, September 2000; Philip Flood AO, *Report of Inquiry into Immigration Detention Procedures*, February 2001; Commonwealth Ombudsman, *Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities*, March 2001; Commonwealth Ombudsman, *Report of an Own Motion Investigation into The Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, March 2001.

25 Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., pp. 148–156.

26 'A common view was that beyond a two month time frame, the onus should be placed on DIEA to demonstrate to an independent authority why detention is necessary': Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 122.

27 In 1989 the Australian Institute of Criminology recommended that a bail system be established and evaluated: Australian Institute of Criminology, *The Future of Immigration Detention Centres in Australia*, July 1989 paraphrased in Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 168.

28 Catherine DeMayo and Phillipa McIntosh, 'Blueprints for a Parole System', in Mary Crock (Ed.) *Protection or Punishment: The Detention of Asylum Seekers in Australia*, The Federation Press, 1993.

29 Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers – Darwin and Port Hedland: Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991*, March 1992, paraphrased in Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 169.

30 The JSCM recommended that there be a general capacity to consider release where the period of detention exceeds 6 months' for detainees who claimed refugee status: Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., Recommendation 10 at p. 156. See also Recommendation 13 regarding conditions that might be attached to bridging visas for unauthorised arrivals. In 1994, Canada, the United Kingdom, the United States and Japan permitted release of illegal entrants into the community, pending determination of their status. Conditions included risk assessment, bonds, movement restrictions, assurances or guarantees from citizens. In 1989 the Australian Institute of Criminology recommended that maximum use be made of conditional release: Australian Institute of Criminology, *The Future of*

Immigration Detention Centres in Australia, July 1989 paraphrased in Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 168.

31 Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., Recommendation 11 at p. 157.

32 Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., Recommendation 12 at p. 157.

33 The Department of Immigration and Multicultural Affairs, Immigration Detention Trial to Begin in Woomera, *Press Release*, MPS 060/2001, 25 May 2001.

34 This would not prevent 'released detainees' from visiting each other. As the Minister indicated that '[t]he houses are all side-by-side and trial participants will be able to visit one another freely': ibid.

35 For example see a report by the (Australian) Human Rights Commission, *The Observance of Human Rights at the Villawood Immigration Detention Centre*, 1983.

36 Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 167, paraphrasing comments made in Australian Institute of Criminology, *The Future of Immigration Detention Centres in Australia*, July 1989.

37 ibid., p. 170, paraphrasing comments made in *Report to the Australian Council of Churches on the Present Situation of Asylum Seekers Detained at Port Hedland Reception and Processing Centre*, March 1992.

38 ibid., p. 169, paraphrasing comments made in Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers–Darwin and Port Hedland: Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991*, March 1992.

39 Hedland Reception and Processing Centre Support Group, Evidence to the Joint Standing Committee on Migration in Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 174.

40 Joint Standing Committee on Migration, *Asylum*, op.cit., p. 176.

41 ibid., p. 189.

42 ibid., pp. 191–192. The Minister announced the establishment of this committee on 27 February 2001 (see Second Reading Speech, House of Representatives, *Parliamentary Debates (Hansard)*, 5 April 2001, p.25533).

43 ibid., p. 190. This recommendation was repeated in Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas*, May 1998, op.cit., recommendation 15.1, p xix. Apparently, since this recommendation all centres have been required by their contract to establish a Community Reference Group. However 'slow progress' had been made during 1998 on the appointment of these groups: Human Rights and Equal Opportunity Commission, *Immigration Detention - Human Rights Commissioner's 1998-99 Review*, 1999, p 44. Moreover, HREOC considered that the Community Reference Groups did not meet with 'minimum guidelines on accountability' for those groups which were articulated in HREOC's *Immigration Detention Guidelines*: ibid, pp. 44–45. In the Second Reading Speech, the

Minister announced the establishment of a (general) Immigration Detention Advisory Group, to be chaired by the Hon. John Hodges, a former Minister for Immigration and Ethnic Affairs: The Hon Philip Ruddock, MP, Migration Legislation Amendment (Immigration Detainees) Bill 2001, Second Reading Speech, House of Representatives, *Debates*, 5 April 2001, p. 26529.

44 Joint Standing Committee on Migration, *Immigration Detention Centres,* August 1998, op.cit., p. 41. Commonwealth Ombudsman, *Immigration Detention Centres,* op.cit., March 2001.

45 Joint Standing Committee on Migration, *Immigration Detention Centres,* August 1998, op.cit., p. 40. Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre*, HRC Report No. 12, November 2000.

46 ibid.

47 Commonwealth Ombudsman, *Immigration Detention Centres*, March 2001, op.cit., pp. 28–9.

48 The Human Rights and Equal Opportunity Commission recommended that the Department and APS should 'review the reason for and the manner in which room searches are conducted, so that they are appropriate to administrative detention': *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, May 1998, p. x.

49 The Senate Legal and Constitutional References Committee recommended that an inquiry be undertaken into the use of sedation to assist detention and removal: Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p. 324.

50 Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit; Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas,* May 1998, op.cit., pp. 115–119; Commonwealth Ombudsman, *Investigation of Complaints Concerning the Transfer of Immigration Detainees to State Prisons*, December 1995; Commonwealth Ombudsman, *Immigration Detainees held in State Correctional Facilities*, March 2001, op.cit.

51 Joint Standing Committee on Migration, *Not the Hilton*, September 2000, op. cit., p. 84.

52 ibid, p. 89

53 ibid.

54 ibid, p. 84

55 Department of Immigration and Ethnic Affairs, Evidence to the Joint Standing Committee on Migration in, Joint Standing Committee on Migration, *Asylum*, February 1994, op.cit., p. 175.

56 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas*, May 1998, op.cit., p. 89.

57 Philip Flood AO, *Report of Inquiry into Immigration Detention Procedures*, February 2001, p. 28.

58 Commonwealth Ombudsman, *Immigration Detention Centres*, March 2001, op.cit., p. 28.

59 Joint Standing Committee on Migration, *Asylum*, op.cit., p. 175.

60 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas*, May 1998, op.cit., p. 94.

61 Commonwealth Ombudsman, *Immigration Detention Centres*, March 2001, op.cit., p. 28.

62 ibid.

63 Section 252.

64 Subsection 252(5).

65 The International War Crimes Tribunal Act enables a police officer to carry out a strip search after a person has been arrested or brought to a police station under warrant. The circumstances in which a strip search is permitted and the rules under which it must be conducted are set out in sections 71 and 72 of the Act.

66 Sections 413 and 427.

67 Sections 4, 64A and 64N.

68 Section 3C.

69 Section 3C.

70 Section 3C.

71 While the relevant provisions in the Customs Act do not refer to a person being required to remove some or all of their clothing, the power to conduct an external search is said to be equivalent to a power to strip search.

72 Section 4.

73 Subsection 3ZH(1).

74 Paragraph 3ZH(2)(c).

75 Subsection 3ZH(6).

76 Subsection 3ZH(3).

77 Subparagraph 3ZI(1)(f)(i).

78 An interview friend is defined by *Butterworths Encyclopaedic Legal Dictionary* as 'a relative or person chosen by or provided to a suspect for the purposes of being present during the course of an interrogation by police or other investigating officials.'

79 See Part 1C.

80 Sections 219L, 219P, 219Q and subsection 219R(1).

81 Paragraph 219R(1)(d).

82 Paragraph 219R(14).

83 Paragraph 219R(1)(c) and subsection 219R(10).

84 Paragraph 219R(1)(c).

85 Subsection 219R(11A).

86 Subsections 219R(7) & (8).

87 Subsections 219R(12) and (13).

88 Section 219RAA.

89 Paragraph 219RAA(1)(d) and subsection 219RAE(1).

90 Subsection 219RAE(2).

91 Section 219RAF.

92 Escape and weapons offences.

93 See, for example, *Commonwealth of Australia Gazette* No. GN 22, 7 June 2000 and *Commonwealth of Australia Gazette* No. GN 28, 19 July 2000.

94 See, for example *Commonwealth of Australia Gazette* No. GN 22, 7 June 2000 authorising a number of employees of Pacific Rim Employment Pty Ltd to be officers for the purpose of the Migration Act. Pacific Rim Employment Pty Ltd is a wholly owned subsidiary of Wackenhut Corrections Corporation.

95 Senior Executive Service.

96 **New paragraph 252B(1)(a)**.

97 **New paragraph 252B(1)(h)**.

98 **New paragraph 252B(1)(j)**.

99 **New paragraph 252B(1)(k)**.

100 **New paragraph 252B(1)(f)**.

101 **New paragraph 252B(1)(g)**.

102 **New paragraph 252B(1)(d)**, and **new subsections 252B(2) and (3)**.

103 **New paragraph 252B(1)(e)** and **new subsections 252B(2) and (3).**

104 **New subsection 252B(3)**.

105 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2001*, 23 May 2001, p. 44.

106 House of Representatives, *Parliamentary Debates (Hansard)*, 5 April 2001, pp. 26530-31.

107 Earlier in his speech the Minister gave as examples 'razor blades melted into toothbrushes, a shard of mirror attached to a piece of wood to make a knife, and a ballpoint pen with a needle fastened to its centre'. House of Representatives, *Parliamentary Debates (Hansard)*, 5 April 2001, p. 26531.

108 ibid.

109 'Ruddock pushes law to strip-search detainees', *The Age [Melbourne]*, 6 April 2001; 'Child detainees to be strip-searched', *Sydney Morning Herald*, 6 April 2001.

110 The Bill prohibits the strip searching of detainees aged less than 10 years.

111 *The Age*, loc.cit.

112 'Crackdown on detainees', *Canberra Times*, 6 April 2001. See also 'Legal and illegal immigrants continue to pose administrative difficulties', *PM*, 4 April 2001.

113 'Ruddock's heavy hand will make detention centre conditions worse', *Media Release No. 01/216*, 5 April 2001.

114 See for example *Oliviera v New South Wales*, Unreported 24 August 1995, Supreme Court of New South Wales, per Spender J, citing *Howard v Jarvis* (1958) 98 CLR 177; *Ellis v Home Office* (1953) 2 All ER 149; *L v Commonwealth of Australia* (1976) 10 ALR 269; *Cekan v Haines* (1990) 21 NSWLR 296 at 297, Kirby P; *Kirkham v Chief Constable of the Greater Manchester Police* (1990) 2 QB 283 at 293-294, Farquharson LJ. It is accepted that DIMA and ACS owe a duty of care to detainees: Joint Standing Committee on Migration, *Immigration Detention Centres: Inspection Report*, August 1998, p 5; Commonwealth Ombudsman, *Report of an Own Motion Investigation into The Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, March 2001, p 27. Moreover it may be argued that DIMA owes a non-delegable duty which carries a high standard of care, given the relationships between the department and the immigration detainees: Commonwealth Ombudsman, op. cit., pp. 27–28.

115 *Howard v Jarvis*, op. cit. involved negligence in relation to self-inflicted injuries.

116 *Ellis v Home Office*, op. cit., *L v Commonwealth of Australia*, op. cit. and *Oliviera v New South Wales*, op. cit. involved negligence in relation to assaults on the plaintiffs by other criminal detainees.

117 In *Cekan v Haines*, op. cit. Kirby P, in examining arguments in favour of constant surveillance, discussed '[t]he countervailing consideration of marginal utility': '[e]ven if the precautions which the appellant urged had been adopted, it is by no means certain they would have prevented the kind of injury from which the appellant suffered. It is here that the marginal utility of introducing a procedure for constant surveillance must be weighed against the marginal cost of doing so … In recognition of this fact [that resources are limited] the common law does not impose in these circumstances, an absolute duty to safeguard the prisoner' (p. 308).

118 Kirby P also discussed 'countervailing considerations of prisoner privacy': '[h]uman beings, even in custody are entitled to respect for their individuality and dignity. They suffer their loss of liberty as punishment .. They are not, without authority of law, to suffer punishment additional to the loss of liberty and all that is necessarily involved in that' (ibid, p. 305).

119 House of Representatives, *Parliamentary Debates (Hansard)*, 5 April 2001, pp. 26531–26532.

120 ibid, p. 26532.

121 House of Representatives, *Parliamentary Debates (Hansard)*, 5 April 2001, pp. 265321–2.

122 ibid.

123 About 90 per cent are being found to be 'legitimate refugees' under the terms of the 1951 Refugee Convention. See Millbank, op.cit.

124 Senate Standing Committee, op.cit., p. 44.

125 In the context of police powers of strip searching, the Queensland Criminal Justice Commission (CJC) recommended against the use of civilians to conduct strip searches because those searches 'are an invasion of a person's privacy and may pose a serious threat to the health and safety of the person conducting such searches. Criminal Justice Commission', *Police Strip Searches in Queensland. An Inquiry into the Law and Practice*, June 2000.

126 The CJC recently endorsed the current requirement in Queensland law for the reasons for a strip search to be recorded and recommended that whenever force is used to conduct a strip search all details of the use of force including the names of the officers involved should also be recorded (ibid).

127 As well as providing verification for the detainee or the officer of what occurred during a strip search electronic surveillance or recording of a search also raises privacy issues (ibid).