



**Australian Government**

**Department of Immigration  
and Border Protection**

# **Parliamentary Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017**

Senate Legal and Constitutional Affairs Legislation  
Committee

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## Introduction

The Department of Immigration and Border Protection (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) Inquiry into the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (the Bill), following the introduction of the Bill into the House of Representatives on 13 September 2017.

This submission provides a response to the reasons for referral/principal issues for consideration raised by the Selection of Bills Committee and will also provide further information about the measures included in the Bill.

## Reason for Referral/Principal Issues for Consideration

The Bill was referred to the Committee by the Selection of Bills Committee in its Report No. 11 of 2017, on 14 September 2017. The reasons for referral and principal issues for consideration by the Committee are:

- Amending the *Migration Act 1958* (the Migration Act) to allow the Minister to determine a thing as prohibited is a significant change to the operation of immigration detention facilities
- There is a level of concern among stakeholders about the proposed amendments that suggests that further examination of the Bill is necessary.

## Portfolio Submission

### Purpose of the Bill

The Bill will amend several provisions in the Migration Act to prohibit narcotic drugs, mobile phones, Subscriber Identity Module (SIM) cards, child pornography and other things of concern in relation to persons in immigration detention and immigration detention facilities. The Bill also strengthens search and seizure powers, including through the use of detector dogs for screening procedures for detainees and visitors and searching facilities, in order to enforce these prohibitions.

### Background to the Bill

The Bill enables the Department to provide a safe and secure environment for people accommodated at, visiting or working in an immigration detention facility.

Current powers under the Migration Act do not clearly support officers to:

- restrict access to items that are not unlawful (for example alcohol, mobile telephones, SIM cards and other personal electronic devices that are not unlawful but nonetheless impact upon the health, safety and security of persons and the order of immigration detention facilities)
- search detainees, their possessions and their accommodation areas for items such as mobile phones, SIM cards, narcotic drugs and other prohibited things that pose a risk to the order and safety of immigration detention facilities – including using detector dogs for these searches
- seize and retain or dispose of items of concern.

Officers have increasingly relied on the common law as the basis for taking certain action to manage risks and maintain control of immigration detention facilities, for example, searching accommodation areas within detention facilities.

The Bill provides express statutory authority for authorised officers to conduct searches and seize things, in order to restrict certain things from entering the detention environment. This includes things that could be used to facilitate criminal activity, escape attempts, organise disturbances or access child pornography.

These changes better equip the Department to manage the heightened risk profile of the immigration detention population, and illegal activity that has been increasing across the detention network.

In 2011, Labor passed legislative amendments to the Character provisions of the Migration Act, strengthening the Department's ability to effectively maintain the health, safety and security within immigration detention facilities, and empowering staff to take the necessary action required to maintain the order of these facilities.

These legislative amendments provide that a person will fail the character test should they be convicted of an offence committed while in, during an escape from, or after escaping but before taken into, immigration detention; and increased the maximum penalty for the manufacture, possession, use or distribution of weapons by immigration detainees from three to five years.

The 2011 amendments were made following riots at Northwest Point Immigration Detention Facility on Christmas Island, and Villawood Immigration Detention Centre in 2011. The riots caused considerable damage to detention infrastructure, placing the safety of some detainees and staff under serious threat. Order was restored only after control of the incident was handed over to the Australian Federal Police.

In addition, Dr Allan Hawke AO and Ms Helen Williams AM were commissioned to conduct a comprehensive review into the 2011 riots. The 'Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre' found that (among other things) visitor screening processes were not sufficiently robust at these centres, and made a number of recommendations relevant to the Bill, including:

- that staff induction training and procedures emphasise the need to secure vehicles and storage areas in the vicinity of immigration detention places to prevent access to tools which may assist in a breach (Recommendation 8)
- that the use of aerosol cans be banned and prevented from entering medium and high security immigration detention facilities (Recommendation 9)
- that more stringent screening of visitors to IDFs be undertaken in line with controls at Australia's airports and that improved exclusion zones be put in place around immigration detention facilities perimeters (Recommendation 13)
- that dangerous items usually located in kitchens or Medical Centres be appropriately secured within those locations, and that a protocol be developed that dangerous items be removed from such places at times of increased tension within an immigration detention facilities (Recommendation 14).

In 2016, the Commonwealth Ombudsman conducted an own motion investigation into the use of restricted practices within the immigration detention network. The investigation noted that the legislative framework that supports the good order and welfare of the detention network is not robust and relies heavily on Common Law and case law precedents to support detention operations. The Bill addresses the following recommendation made by the Ombudsman's own motion investigation:

- The Department moves to establish a legislative framework to support the internal operations of the immigration detention network as soon as possible.

## Measures in Schedule 1 to the Bill

The Bill proposes to amend the Migration Act to:

- insert new definitions under subsection 5(1) to define section 273 detention centres and places approved in writing by the Minister or under subparagraph (b)(v) of the definition of immigration detention in subsection 5(1) of the Migration Act (otherwise known as Alternative Places of Detention (APODs)) collectively as ‘immigration detention facilities’ and to define a ‘prohibited thing’
- insert new section 251A to enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities. These things will include illegal things, specifically narcotic drugs and child pornography and things that present a risk within immigration detention facilities including mobile phones and SIM cards
- insert new sections 252BA and 252BB to allow authorised officers and officers’ assistants to search immigration detention facilities operated by or on behalf of the Commonwealth without a warrant, including accommodation areas, administrative areas, common areas, detainees’ rooms, detainees’ personal effects, medical examination areas and storage areas
- strengthen the screening and seizure powers in relation to detainees in sections 252, 252AA, 252A, 252B, 252C and 252CA
- strengthen the powers under section 252G in relation to a person about to enter an immigration detention facility operated by or on behalf of the Commonwealth to expressly allow an authorised officer to screen and search for narcotic drugs and other prohibited things
- amend the forfeiture powers in relation to things seized from detainees and persons about to enter an immigration detention facility operated by or on behalf of the Commonwealth
- enable the use of detector dogs for screening detainees, and persons about to enter an immigration detention facility operated by or on behalf of the Commonwealth, and for searching these facilities.

## Affected individuals

The measures in the Bill will apply to all individuals accommodated within an immigration detention facility, both on the mainland and on Christmas Island, regardless of their immigration circumstances.

The arrangements will also apply to people visiting an immigration detention facility. The measures will not apply to offshore processing facilities.

Applying these arrangements equally across the detention facility population is necessary to maintain the order of the immigration detention network.

While the proposed search and seizure powers provided by this Bill will apply in relation to persons detained in all types of APODs, these new powers will not extend search and screening powers to non-facility-based places of accommodation or visitors to these type of APODs, for example hospitals and schools.

Although mobile phones and SIM cards will be specified as ‘prohibited things’, a number of alternative communication avenues will remain available to detainees. These include landline telephones, access to the internet, access to facsimile machines and postal facilities.

The Department will continue to review the availability of these communication facilities for use by detainees across the immigration detention network to ensure these facilities are adequate to contact and be contacted by family, friends and legal representatives. As a result of reviews, additional landline telephones have been installed at most immigration detention facilities. Detainees therefore have even greater access to means of communication. Additionally, immigration detention facilities will continue to facilitate visits by detainees’ family members and other visitors.

## What items will be restricted?

Subsection 251A(1) defines a *prohibited thing* in relation to a person in detention, or in relation to an immigration detention facility. In these circumstances, a thing will be a *prohibited thing* if:

- a. both:
  - i. possession of the thing is unlawful because of a law of the Commonwealth, or a law of the State or Territory in which the person is detained or in which the facility is located; and
  - ii. the thing is determined by the Minister by legislative instrument under subsection 251A(2)(a); or
- b. the thing is determined by the Minister by legislative instrument under paragraph 251A(2)(b).

New subsection 251A(2) enables the Minister to determine, by legislative instrument, a thing for the purposes of subsection 251A(1) if the Minister is satisfied that:

- a. possession of the thing is prohibited by law in a place or places in Australia; or
- b. possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

This instrument will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the things determined by the Minister and the things to be prohibited need to be amended.

It is currently intended that under paragraph 251A(2)(a) the Minister will determine narcotic drugs and child pornography for the purposes of subsection (1).

To clarify the operation of new subsection 251A(2), a note has been included at the end of subsection 251A(2) to provide examples of things that might be considered to pose a risk to the health, safety or security of persons in the facility, or to the order of the facility.

The 'prohibited things' that are intended to be restricted include, but are not limited to, the following things:

- mobile phones
- SIM cards
- computers and other electronic devices
- medications or health care supplements in specified circumstances
- publications or other material that could incite violence, racism or hatred
- cigarette lighters and lighter fluid
- drug paraphernalia
- aerosol and pressure propelled products
- cash, cheques and bankcards
- alcohol
- certain food items.

The Bill will enhance the search and seizure powers for things that can be restricted, however, in discretionary circumstances, prior approval can be sought to allow entry of a specified thing, for example alcohol for use in approved religious ceremonies, birthday cakes, fruit and special purpose foods.

Other food items can be brought in by visitors if they are commercially packaged and labelled, factory sealed, have visible and valid expiry date and the prescribed name is easily identified and complies with Australian and New Zealand Food Standards Code.

Food brought in by visitors cannot be contained in any metal or glass packaging and the amount of food must be proportionate to the needs, duration and intent of the visit. The food is to be consumed in the visitors area only; and any leftover food is to be disposed of at the end of the visit or removed from the premises by the visitor.

All items brought into an immigration detention facility by visitors will be screened.

## How do these items present a risk to immigration detention facilities?

More than half of the detainee population consists of high-risk individuals who do not hold a visa and have been transferred from a correctional facility, pending their removal from Australia. These cohorts have significant criminal histories, such as child sex offences or links to criminal gangs such as outlaw motorcycle gangs and other organised crime groups.

Illegal Maritime Arrivals make up around 25 per cent of the detention population, this cohort is complex and includes people with criminal histories or other security concerns which present a risk to the Australian community.

The change to the demographics of the detention population is due to the Government's successful border protection policy and the increase in visa refusal or cancellation on character grounds. The changing nature of the detention population has, however, seen an increase in illegal activities in immigration detention facilities across Australia.

Currently, mobile phones and SIM cards are enabling criminal activity within the immigration detention network. Activity facilitated or assisted by mobile phone usage includes:

- drug distribution
- maintenance of criminal enterprises within and outside of immigration detention facilities
- as commodity of exchange or currency
- owners of mobile phones being subjected to intimidation tactics (including theft of the phone)
- facilitating threats and /or assaults between detainees including an attempted contract killing
- enabling access to child pornography.

Food items are also being used as a method for concealing contraband being brought into immigration detention facilities, this includes narcotic drugs and prescription medications.

More specific examples include:

A detainee being held on Christmas Island used a mobile phone to arrange an attempted contract killing on another detainee being held at Maribyrnong Immigration Detention Centre. Another detainee used a mobile phone to successfully coordinate an escape from the Villawood Immigration Detention Centre by climbing a wall to a waiting car.

There has been a significant increase of prescription medication such as Xanax and Suboxone being found in the possession of detainees who do not hold a prescription for these medications. The misuse of medications are a serious risk to health and safety of detainees, they are also being used as a form of currency. Medications or health care supplements in specified circumstances are listed in a note at the end of subsection 251A(2) of the Bill, it is intended to capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person.

Recent screening procedures conducted on food being brought into detention facilities highlighted the lengths to which detainees will go to smuggle illicit substances into immigration detention facilities. Narcotic drugs were discovered concealed in food items such as bread and chocolate bars.

## Detention placements and assessing of risk

The National Detention Placement Model utilises a risk-based approach to the placement of detainees, whereby the detainee's risk assessment and the risk rating of the facility are matched. This approach utilises the assets available to the Department and is designed to ensure the safety and security of detainees in immigration detention.

Placement decisions are part of a process of assessing and minimising risk to other detainees, service providers, visitors and staff. In making placement decisions, medical needs are given priority, and family and community links are carefully considered. Detainee needs are considered in line with the Department's duty of care to all detainees.

In considering the placement of an individual, the broader immigration detention network is also considered. There is finite capacity across the national network and there is often an operational need to transfer detainees to rebalance the network and ensure detention facility stability.

The Department maintains operational oversight of the status of the network in relation to key indicators of risk, including detention facility capacity, cohort types and network stability indicators, such as incidents of self-harm, complaints and non-compliance incidents.

The Department promotes flexible management of the capacity of each detention facility due to changing requirements of the Department and of the individuals detained in each detention facility. Immigration detention facilities must also maintain some flexibility in their capacities to support a number of Departmental activities at Australia's international airports, or as a result of compliance action.

## What protection provisions exist?

In relation to the conduct of the searches of persons authorised by section 252 of the Migration Act, there are current provisions and a number of additional protections set out in the amendments that are designed to protect detainees (including those who are victims of torture and trauma) and their property. It should be noted that strip searches under section 252A are extremely rare.

### **Current provisions**

In line with section 252A of the Migration Act, authorisation for strip searches for people at least 18 years old will still need to be obtained from the Secretary of the Department or the Australian Border Force Commissioner (or a Senior Executive Service Band 3 level delegate) prior to a strip search being undertaken. For people between 10 and 18 years old, magistrate orders are required. Strip searches under section 252A will also remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that a strip search of a detainee under section 252A:

- must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search
- must be conducted in a private area
- must be conducted by an authorised officer of the same sex as the detainee
- must not be conducted on a detainee who is under 10
- must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- must not involve a search of the detainee's body cavities
- must not be conducted with greater force than is reasonably necessary to conduct the strip search.

### ***Additional protections***

Additionally, the Bill seeks to introduce a number of provisions to protect detainees and their property. These include section 252BA - *Searches of certain immigration detention facilities – general*. This section includes sub-paragraph 252BA(6) – *an authorised officer who conducts a search under this section must not use more force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search*. This provision will provide additional protections in relation to detainees and their property to ensure that searches of immigration detention facilities under section 252BA do not subject the person to disproportionate force or indignity.

The use of detector dogs will also be subject to a number of additional protections. For example, section 252AA(3A) of the Bill provides that if an authorised officer uses a dog in conducting a screening procedure under this section, the officer must:

- a. take all reasonable precautions to prevent the dog touching any person (other than the officer) and
- b. keep the dog under control while conducting the screening procedure.

These amendments will give authorised officers the ability, under the Migration Act, to use highly trained detector dogs to search detainees in immigration detention facilities when conducting a screening procedure, while also ensuring these officers comply with strict conditions to control the dogs and prevent them from touching people.

Detector dogs are specifically trained to find concealed things such as narcotics, and are routinely used at Australian international airports and seaports and mail centres. The dogs are trained to give a passive or "sit" response where they detect a person may be carrying or concealing something or a pawing or scratching response to areas (not persons) where things may be hidden. Departmental officers involved in using a dog to conduct a screening procedure will be specifically authorised for the purpose of handling a dog and will have undergone extensive training in handling detector dogs.

The amendments also set out a number of provisions that seek to return certain 'prohibited things' to detainees on their release from detention. For example, section 252CA(2) will provide that an authorised officer must take all reasonable steps to return a 'prohibited thing' seized during a screening procedure, a strip search or a search of an immigration detention facility to the detainee on their release from detention, if it appears that the thing is owned or was controlled by the detainee.