



Australian Government
Department of Home Affairs



Australian
BORDER FORCE

Submission to the Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

**Senate Legal and Constitutional Affairs Legislation
Committee**

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1. Introduction

The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the Bill), following the introduction of the Bill into the House of Representatives on 14 May 2020.

This submission provides a response to the reason for referral and principal issues for consideration which were raised by the Senate Selection of Bills Committee, and will also provide further information about the measures included in the Bill

1.1. Reason for Referral/Principal Issues for Consideration

The Bill was referred to the Committee by the Selection of Bills Committee in its Report No. 4 of 2020, on 14 May 2020. The reasons for referral and principal issues for consideration by the Committee are:

- *Banning of items in administrative detention. This is a legacy bill the government left on the notice paper for years. There is a very high likelihood there will be changes to the legislation, which will need substantial reconsideration by committee.*
- *Concerns regarding human rights, and rights of the child (will provide for: prohibition of items in immigration detention, facilities; searches without warrants; extra screening and seizure powers; and use of dogs for screening and searching detainees)*

2. Home Affairs' Submission

2.1. Purpose of the Bill

The Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 makes amendments to the *Migration Act 1958* (the Migration Act) to determine 'prohibited things' and strengthen the powers of the Department of Home Affairs to search for and seize 'prohibited things' from detainees in immigration detention facilities. The amendments also clarify the intended operation of the search and seizure provisions, following the Full Federal Court decision in *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

The Bill amends the Migration Act to:

- define immigration detention centres and alternative places of detention collectively as 'immigration detention facilities'; and
- insert a new section, 251A, that will enable the Minister to determine, by disallowable legislative instrument, things to be prohibited in relation to immigration detention facilities and detainees. There are two categories of prohibited things under the proposed legislation that could be included in the disallowable instrument.
 - The first category relates to things the possession of which is prohibited by law in a place or places in Australia, such as controlled drugs.
 - The second category relates to things the possession of which is generally lawful in the Australian community, but which might pose a risk to the health, safety or security of persons in the facility, or to the good order of the facility. For example, these things may include mobile phones and internet-capable devices.

- Enable the Minister, by non-disallowable legislative instrument, to issue binding written directions to authorised officers requiring officers to seize specified types of things in specified circumstances. The instrument must be registered on the Federal Register of Legislation, which is publicly available.
- Allow authorised officers to screen or search for and seize prohibited things from detainees and in immigration detention facilities.

This Bill seeks to provide the legislative basis to enable departmental officers to effectively combat the incursion, distribution and use of contraband, including controlled drugs, which has proven to pose a significant risk to the safety and security of the immigration detention environment.

Home Affairs considers that the existing legislative arrangements are inadequate, and it is incongruous that an agency mandated to protect Australia's community and borders from the entry of controlled drugs, is not sufficiently empowered to prevent the entry and unlawful distribution of controlled drugs into its own immigration detention facilities. Such a position poses a risk to the good order, and the safety and security of immigration detention facilities, detainees and staff.

The Bill will also reduce the Australian Border Force's (ABF) reliance on State and Territory or Federal Police to attend in support of searches for and seizures of items that are not currently provided for by the Migration Act, such as controlled drugs.

2.1.1. Examples

Four people arrested at Villawood Immigration Detention Centre as part of a criminal syndicate that NSW Police allege used stolen credit cards to purchase motor vehicles, and also distribute illicit drugs within immigration detention. Mobile phones were used to facilitate the alleged crimes. During a search of the detainees' rooms, police located an amount of white powder and several mobile phones. During further searches inside the detention centre, police located a small amount of cannabis, methylamphetamine, prescription medication and an improvised weapon.

2.2. Background and chronology of the Bill

On 13 September 2017, the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 was introduced into the House of Representatives.

On 7 February 2018, the Bill was passed in the House of Representatives and was introduced into the Senate on 8 February 2018. On 29 May 2018, the Government circulated amendments to the Bill to address recommendations raised by Parliamentary Committees, the Australian Labor Party and the Australian Greens. The amendments included:

- making the legislative instrument that would list 'prohibited things' disallowable;
- preventing the application of the new search and seizure powers in relation to prescribed medications where these have been prescribed or supplied to a detainee, who is detained in an immigration detention facility, for that person's individual use by an authorised health service provider; and
- removing the use of detector dogs for personal searches of detainees, goods in their possession and in screening procedures for persons entering a detention facility.

On 21 April 2019, the Bill lapsed when Parliament was prorogued.

The amendments made by the Bill seek to address the significant threats to the health, safety and security of immigration detention facilities posed by mobile phones, SIM cards, internet-capable electronic devices, controlled drugs and prescription medication not taken as prescribed.

2.3. Current provisions

Officers currently have limited powers to search and screen detainees.

Section 252 allows authorised officers to search a person, the person's clothing and any property under the immediate control of the person without a warrant if:

- (a) the person is detained in Australia; or
- (b) the person is a non-citizen in immigration clearance and an authorised officer has reasonable grounds for suspecting there are reasonable grounds for cancelling their visa.

An authorised officer may only carry out a search under s 252 for the following purposes:

- (a) To find out whether there is hidden on the person, in their clothing or in the property, a weapon or other item capable of inflicting bodily harm or enabling an escape from immigration detention;
- (b) To find out whether there is hidden on the person, in their clothing or in the property, a document or other item that could lead to the cancellation of their visa.

Section 252AA allows authorised officers to conduct a screening procedure in relation to a detainee to find out whether there is hidden on the detainee, in their clothing or in their possession a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape from detention.

Section 252A allows authorised officers to conduct a strip search of a detainee to find out whether there is hidden on the detainee, in their clothing or in their possession a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape from detention. The strip search must be authorised by the Secretary, the Australian Border Force Commissioner or an SES Band 3 employee in the Department (if the detainee is over 18) or by a magistrate (if the detainee is over 10 but under 18). The authorised officer must suspect on reasonable grounds that:

- (a) the weapon/escape aid or other thing may be on the detainee's body, in their clothing or in their possession, and;
- (b) a strip search is necessary to recover that weapon or escape aid.

Section 252B provides a set of rules that an authorised officer conducting a strip search under s252A must comply with.

Section 252G allows authorised officers to request anyone who enters a detention centres to:

- (a) walk through screening equipment;
- (b) allow an officer to pass hand-held screening equipment over or around the person or around things in the person's possession;
- (c) allow things in the person's possession to pass through screening equipment or to be examined by X-ray.

If there are reasonable grounds to suspect an individual has in their possession a thing that might endanger the safety of persons at the detention centre or disrupt the security arrangements of the centre, an officer may request that the person:

- (a) allow the authorised officer to inspect the things in the person's possession;
- (b) remove some or all of the person's outer clothing such as a coat, jacket or similar item;
- (c) remove items from the pockets of the person's clothing;
- (d) open a thing in the person's possession, or remove the thing's contents, to allow the authorised officer to inspect the thing or its contents;

- (e) leave a thing in the person's possession, or some or all of its contents, in a place specified by the authorised officer if he or she suspects on reasonable grounds that the thing or its contents are capable of concealing something that might:
- (i) endanger the safety of the detainees, staff or other persons at the detention centre; or
 - (ii) disrupt the order or security arrangements at the detention centre.

2.3.1. Examples

A detainee downloads extremist material on his iPad and is showing it to other detainees. The ABF is powerless to confiscate the detainee's iPad.

ABF officers see a visitor hand over a bag containing a white substance to a detainee. The detainee places the bag in his pocket. The ABF is powerless to search the detainee for the suspected drugs.

A convicted child sex offender who is looking at child abuse material on his phone in plain sight cannot have his phone removed.

A detainee uploads a photo to social media of a contracted medical officer falsely accusing her of criminal acts. The comments on the post include abusive and violent messages towards the medical officer. The ABF is powerless to remove the detainee's internet enabled devices.

2.4. Proposed operational policy if Bill is passed

Implementation of existing legislation and the proposed enhancements will be guided by the Department's operational policy framework. Operational policy provides detailed guidance on the powers available to officers under the Migration Act, how and when those powers may be utilised and record keeping and reporting requirements.

Implementation of all relevant legislative provisions is undertaken in accordance with the APS Code of Conduct, the Secretary's Professional Standards Direction and key guiding principles in detention, that include:

- detainees will be treated fairly and reasonably within the law and conditions of detention will ensure the inherent dignity of the human person,
- such actions must be conducted for a lawful purpose,
- only officers who have completed relevant training and are lawfully authorised are permitted to exercise search, screening and seizure powers.

In relation to the proposed enhancements to the Migration Act, operational policy instructions will provide guidance on the use of discretionary search and seizure powers, as well as mandatory seizure in accordance with a Ministerial direction. This guidance will be made publicly available on the Department's website.

2.5. Affected individuals

Measures proposed in the Bill will apply to detainees (whether or not they are in an immigration detention facility) and to immigration detention facilities operated in Australia by or on behalf of the Commonwealth.

In addition, officers will be able to request that people seeking to enter such a facility to undergo screening. If an authorised officer suspects on reasonable grounds that a person about to enter an immigration detention facility operated by or on behalf of the Commonwealth has in their possession a prohibited thing that might present an unacceptable risk to the safety, security and good order of the immigration detention facility, to allow the officer to inspect for the thing the officer may ask the person to remove outer items of clothing, to

remove items from the person's pocket, to open a thing in the person's possession, or to leave the thing in a specified place.

Officers will not be able to search for and seize prohibited things from detainees in community detention. Other limitations include that detector dogs cannot be used to search any detainee or premises where a detainee in community detention resides.

Detainees retain access to various means of communication across the detention network. Landline phone, internet and facsimile services are widely available, including in private settings, for people to contact (and be contacted by) family members, legal representatives and migration agents, amongst others.

2.6. What items will be prohibited things?

Things can be made prohibited things through a legislative instrument if the Minister is satisfied that possession of the thing is prohibited by law in a place or places in Australia, or the Minister is satisfied that possession or use of the thing in an immigration detention facility might pose a risk to the health, safety and security of persons within the facility, or to the order of the facility. The legislative instrument must be registered on the Federal Register of Legislation, which is publicly available, and is disallowable.

Prohibited things may include mobile phones, SIM cards, internet capable devices, controlled drugs and prescription medication not in the possession of the person to whom it is prescribed as well as other things that are unlawful to possess.

2.7. How do these items present a risk in immigration detention?

Mobile phones, SIM cards, internet capable devices, controlled drugs, and prescription drugs not taken by the person to whom they been prescribed present an unacceptable risk to the safety, security and good order of the immigration detention facilities.

Mobile phones and internet capable devices have been and may continue to be used to coordinate escape efforts, to access child exploitation material and to intimidate and threaten the safety and welfare of staff or other detainees. Staff have been filmed and photographed by detainees, and this material has been transmitted to associates outside the detention facility and uploaded to social media, causing significant fear and distress for staff and their families.

Mobile phones and internet capable devices have been used to facilitate the movement and supply of controlled drugs across the detention population. This presents a risk to the stability of immigration detention facilities and contributes to violent and anti-social behaviour.

The access to controlled drugs, their use and distribution within immigration detention facilities presents a serious health and safety risk to detainees, ABF, Departmental and contracted service provider staff who encounter unknown substances or interact with substance-affected detainees.

Controlled drugs are also known to be introduced into detention facilities by visitors, through mail, in person, or by being thrown over the fences of the facilities.

Intelligence and incident reporting indicate that distribution and use of illegal drugs within the immigration detention network involves dangerous substances such as methamphetamine, heroin, cocaine and Fentanyl.

There has an increase in instances where prescription medication like Xanax and Suboxone is found in the possession of detainees who do not hold a prescription for these medications. The misuse of prescription medication poses a serious risk to the health and safety of the detainees, can affect their clinical management and serves as a form of currency amongst detainees.

2.8. When will those items be searched for and seized?

2.8.1. Searching

While not limiting an officer's discretion to use powers in accordance with the guiding principles, outlined above in 2.4, operational policy will provide guidance on when it is appropriate for detainees to be searched. The use of search and screening powers will be primarily focussed on the following circumstances:

- a detainee is moving in and out of a facility or visitor's area,
- a detainee is moving between secure sections of an IDF,
- during movements outside of an IDF,
- in response to a detainee's behaviour, an occurrence or incident, or
- a targeted, intelligence led operation is being undertaken to locate prohibited things.

Reasonable suspicion that a detainee has a prohibited thing and that a strip search is necessary to recover the thing, and authority from the Secretary, ABF Commissioner or an SES Band 3 officer (or from a magistrate for detainees over 10 but under 18) is still required for a strip search to be conducted. A child less than 10 years must not be strip searched.

Officers undertaking searches of detainees will be required to report all instances of searches in accordance with current reporting requirements.

The Bill does not amend current powers relating to strip searches other than to extend them to prohibited things. Strip searches must be carried out in accordance with the rules set out under section 252B of the Migration Act and existing statutory protections in the Migration Act in relation to when and how a strip search is conducted will not be altered.

The screening of mail and detainee property will be conducted to identify things that may pose a risk to the health, safety and security of detainees and staff and the order of the facility.

2.8.2. Seizing

Officers will have the authority to seize a thing in the course of a search or screening procedure in line with operational policy guidance. Further, the Minister will be able to issue binding written directions to authorised officers, which require the officers to seize specified types of things in various circumstances. The written directions will be a legislative instrument that must be registered on the Federal Register of Legislation, which is publicly available. However, the directions will not be disallowable.

For example, the Minister may direct officers to seize mobile phones from detainees who engage in behaviours including targeting or bullying of other detainees or staff via telephone or social media; or suspected involvement in unlawful activity as identified by law enforcement agencies.

Officers will be provided, as they are now, with operational policy guidance on when it is appropriate for a prohibited thing to be returned prior to the cessation of detention. For example, where a mobile phone is seized by an authorised officer on referral from the police that they suspect the mobile phone has been used in the commission of a criminal offence, however the police have advised they will not be continuing with the investigation, the phone may be returned to its owner.

The Department is not proposing the introduction of a blanket ban on mobile phones in detention. It is proposing to recommend to the Minister to direct officers to seize mobile phones from certain categories of people in certain circumstances, while providing officers with the discretion to search and seize for mobile phones in other circumstances. Detainees who are not using their mobile phones for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility would be able to retain their mobile phones under this proposed policy approach.

These measures will not apply to medications or health care supplements prescribed by an authorised health service provider in an immigration detention facility. However, these measures apply to circumstances where a detainee may be in a possession of medication that has not been prescribed for that person's use by an authorised health service provider.

2.8.3. Examples

Currently a detainee could have a bag of cocaine, instructions on how to build a bomb, or child exploitation images sitting on their bed and the ABF would have no statutory powers to seize the item. Under the proposed provisions in the Bill the Minister through disallowable instrument could determine child abuse material as prohibited things, and an authorised officer could seize the item and refer the matter to the police.

An unknown person was captured on CCTV outside the detention centre. The person was on their phone and threw an object over the fence. On review of the footage, staff identified two detainees retrieving the object, believed to be illicit drugs. Due to the current legislation, the ABF is unable to search the detainees for these items. Under the proposed provisions in the Bill the Minister through disallowable instrument could determine illicit drugs as prohibited things and authorised officers would then be empowered to search detainees and premises and seize prohibited things found and refer the matter to the police.

A detainee who was already facing charges including possess child abuse material was found to have been interfering with witnesses, including by contacting the parents of his alleged victims by mobile phone while in immigration detention. Under the proposed provisions in the Bill the Minister through disallowable instrument could determine mobile phones as prohibited things and authorised officers would then be empowered to search detainees and seize prohibited things found and refer the matter to the police.

Staff found a 300g gas can and a tennis ball, believed to have been thrown over the fence. Both items contained methamphetamine. Two other tennis balls in the same location had previously been collected by detainees. The ABF was able to remove the gas can and the tennis ball that was on the ground. They were not able to search for and seize the other two tennis balls that had been collected by the detainees. Under the proposed provisions in the Bill the Minister through disallowable instrument could determine illicit drugs as prohibited things and authorised officers would then be empowered to search detainees and premises and seize prohibited things found and refer the matter to the police.

2.9. What protection provisions exist?

Current provisions stipulate an authorised person who conducts a search under subsections 252(1) and 252AA(1) shall not use more force, or subject a person to greater indignity, than is reasonably necessary to conduct the search or screening procedure. The existing statutory protections in the Migration Act in relation to when and how a strip search is conducted will also not be altered.

Strip searches must be carried out in accordance with the rules set out under section 252B of the Migration Act.

All persons in immigration detention have the right to lodge complaints while they are in detention. Detainees are made aware that they are able to complain without hindrance or fear of reprisal including their avenues of complaint and redress including:

- written complaints addressed to Serco, International Health and Medical Services or the ABF
- directly with the Department through the Global Feedback Unit on 133 177 or through the Department's website
- direct communication with external agencies such as the Australian Human Rights Commission, the Commonwealth Ombudsman or the Australian Red Cross

2.10. How does the 2020 version of the Bill address concerns raised about the 2017 version?

The 2017 version of the Bill was referred to the Senate Standing Committee for Legal and Constitutional Affairs Legislation Committee, the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills. The Department made submissions to all three Committees.

The Senate Standing Committee for Legal and Constitutional Affairs (the Legal and Constitutional Affairs Committee) handed down its report which made three recommendations. The Labor Party and the Australian Greens tabled dissenting reports, with Labor making seven recommendations.

The current version of the Bill includes amendments to specifically address these concerns to ensure the amendments do not unduly trespass on personal rights and liberties of the detainees. The proposed amendments are reasonable, necessary, proportionate, operationally achievable and the most effective way to mitigate risk and maintain the safety of all detainees and staff, and the good order of facilities.

Those changes include:

- the power of the Minister to determine things that are prohibited things is a disallowable legislative instrument (in the 2017 Bill, that legislative instrument was not disallowable);
- medications and health care supplements prescribed or supplied for a detainee's individual use by an authorised health service provider cannot be prohibited things in relation to the detainee when he or she is detained in an immigration detention facility (in the 2017 Bill, such medications and health care supplements could be prohibited things);
- detector dogs can only be used to search immigration detention facilities, not detainees or people entering an immigration detention facility (in the 2017 Bill, detector dogs could be used to search detainees and people entering a detention facility);
- the amendments in the Bill to section 252 of the Migration Act in relation to searching for and seizing prohibited things do not apply to detainees who are covered by a residence determination under section 197AB of the Migration Act (otherwise known as community detention). This means that detainees in community detention cannot be searched for prohibited things, and such things cannot be seized from them

The implementation of the measure to determine a thing to be a prohibited thing in the 2020 Bill will address concerns by adhering to the following principles:

- A decision by the Minister to make an item a prohibited thing will be informed by an intelligence and risk-based briefing. This briefing may include information about threats, risk assessments, recommendations from external scrutiny agencies and internal review findings.
- The legislative instrument will be subject to continued review to ensure that things which are no longer considered to be a risk to the safety or security of persons in immigration detention facilities or to the order of the facilities are removed; or to add things which have become a risk, based on changing operational requirements or technology advances.
- Prohibited things such as mobile phones and internet capable devices will only be seized from detainees who are considered to pose a high risk of threat to the safety and security of immigration detention facilities, detainees and staff.