

# Chapter 1

## Introduction

1.1 On 14 September 2017 the Senate referred the provisions of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 14 November 2017.

1.2 The Selection of Bills Committee stated that the bill would see:

...a significant change to the operation of Immigration Detention Centres. There is a level of concern among stakeholders about the proposed amendments that suggests that further examination of the bill is necessary.<sup>1</sup>

### Purpose of the bill

1.3 The bill would enable the Minister for Immigration and Border Protection to determine things to be prohibited in immigration detention facilities, and would also increase the screening, search and seizure powers for authorised officers with respect to immigration detention facilities, detainees, and visitors to facilities. In his second reading speech the minister stated:

This bill will ensure our officers can carry out their responsibilities properly, minimising unacceptable risks to the health, safety and security of persons in immigration detention facilities and to the order of these facilities.<sup>2</sup>

1.4 The Explanatory Memorandum (EM) presents the bill in the context of changes to the profile of detainees in immigration detention facilities:

Immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional facility, including child sex offenders and members of outlaw motorcycle gangs or other organised crime groups.<sup>3</sup>

1.5 The EM further states that '[t]he presence of narcotic drugs and other dangerous things in the immigration detention network poses a risk to the ongoing safety, security and order across the network.' It also argues that '[t]he existing search and seizure powers in the Migration Act are not sufficient to manage narcotic drugs, mobile phones, SIM cards or other things that are of concern within the context of immigration detention facilities.'<sup>4</sup>

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1 Selection of Bills Committee, *Report No. 11 of 2017*, September 2017, Appendix 4.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 13 September 2017, p. 10181.

3 Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, (Explanatory Memorandum), p. 2.

4 Explanatory Memorandum, p. 2.

## **Key provisions of the bill**

1.6 Schedule 1 of the bill contains 35 items that would amend the *Migration Act 1958* (the Act). The key provisions of the bill are explained below.

### ***Ministerial determinations of prohibited things***

1.7 Proposed subsection 251A(2) would enable to minister to determine, by legislative instrument, a thing to be prohibited in immigration detention facilities, 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.<sup>5</sup>

1.8 A ministerial determination made under this proposed subsection would apply in relation to a person in detention, or in relation to an immigration detention facility.<sup>6</sup>

1.9 With respect to proposed paragraph 251A(2)(a), the EM states that it is currently intended that the minister will determine narcotic drugs and child pornography to be prohibited items.<sup>7</sup>

1.10 The bill includes the following note to clarify what might be considered to pose a risk:

- (a) mobile phones;
- (b) SIM cards;
- (c) computers and other electronic devices, such as tablets;
- (d) medications or health care supplements, in specified circumstances;
- (e) publications or other material that could incite violence, racism or hatred.<sup>8</sup>

1.11 The EM provides some further clarification about the items listed in the note. It states that the reference to medications or healthcare supplements 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.' It also states that the reference to publications is 'intended to capture things which could pose a serious risk to the safety, security of persons in the facility and to the order of facilities.'<sup>9</sup>

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5 Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, proposed (the bill), ss. 251A(2).

6 Subsection 251A(1) of the bill.

7 Explanatory Memorandum, p. 6.

8 Section 251A of the bill.

9 Explanatory Memorandum, p. 6.

1.12 The EM also states that '[d]etainees will continue to have reasonable access to communication facilities in order to maintain contact with their support networks.'<sup>10</sup>

1.13 Prohibitions determined by the minister may apply to both immigration detention facilities and to Alternative Places of Detention (APODs). The EM explains that '[a]n APOD is a place of immigration detention used by the Department to meet the specific needs of detainees that cannot be adequately catered for in an [immigration detention centre].'<sup>11</sup> Some APODs are facility-based while others are '[n]on-facility-based places of accommodation in the broader community' including 'leased private housing, hotel and motel accommodation, hospitals and schools.'<sup>12</sup>

1.14 The proposed legislative instrument would not be disallowable by the Senate by virtue of Part 2 of the *Migration Act 1958* being exempt from the disallowance requirements of section 42 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

### ***Increased screening, search and seizure powers***

1.15 The Act currently allows authorised officers to search a detainee to find out whether the person is carrying a weapon or an item capable of helping the person escape from immigration detention.<sup>13</sup> The bill would allow authorised officers to also search detainees 'to find out whether a prohibited thing [as determined by legislative instrument]...is hidden on the person, in the clothing or in the property.'<sup>14</sup>

1.16 The EM states that currently, common law is relied on when authorised officers search immigration detention facilities, including detainee accommodation and common areas.<sup>15</sup> The bill would insert new section 252BA to provide 'a clear and express statutory power for an authorised officer to undertake a search of an immigration detention facility...'<sup>16</sup> This would 'allow an authorised officer to search accommodation areas, administrative areas, common areas, detainees' personal effects, detainees' rooms, medical examination areas and storage areas to find prohibited things.'<sup>17</sup> The officer '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.'<sup>18</sup> Proposed section 252BB would also allow an authorised officer to be assisted by another person when conducting these searches if that assistance is

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10 Explanatory Memorandum, p. 6.

11 Explanatory Memorandum, p. 7.

12 Explanatory Memorandum, p. 7.

13 *Migration Act 1958*, ss. 252(2).

14 Paragraph 252(2)(c) of the bill.

15 Explanatory Memorandum, p. 14.

16 Explanatory Memorandum, p. 14.

17 Explanatory Memorandum, p. 14.

18 Explanatory Memorandum, p. 15; Subsection 252BA(6) of the bill.

necessary and reasonable.<sup>19</sup> These new powers would enable searches of immigration detention facilities and facility-based APODs, but not of non-facility-based APODs.<sup>20</sup> A warrant is not required for these searches.<sup>21</sup>

1.17 The bill would also allow for authorised officers to use detector dogs when screening detainees or visitors as well as when searching immigration detention facilities.<sup>22</sup>

1.18 Currently, authorised officers may conduct a strip search to find a weapon or a thing that could help a detainee escape from immigration detention.<sup>23</sup> The bill would extend existing strip search powers to allow authorised officers to conduct strip searches of detainees in immigration detention facilities to find a prohibited thing. The officer must reasonably suspect that a prohibited thing is hidden on the detainee in order to be able to conduct a strip search.<sup>24</sup>

1.19 The bill also includes provisions for the retention, return, forfeiture, and disposal of prohibited things found by authorised officers when conducting searches.<sup>25</sup>

### **Financial implications of the proposed measures**

1.20 The EM states that the proposed amendments would have no financial impact.<sup>26</sup>

### **Consideration by other committees**

1.21 The bill was considered by the Parliamentary Joint Committee on Human Rights (PJCHR) and by the Scrutiny of Bills Committee (SBC).<sup>27</sup>

#### ***Parliamentary Joint Committee on Human Rights***

1.22 The PJCHR made a number of points regarding the human rights implications of the bill and sought advice from the minister with respect to each of them. Its concerns primarily related to:

- a) The prohibition of certain items from immigration detention facilities, such as mobile phones, and whether the prohibition is compatible with the right to privacy;<sup>28</sup> the right to freedom of expression;<sup>29</sup> or a proportionate

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19 Explanatory Memorandum, p. 15.

20 Explanatory Memorandum, p. 14.

21 Explanatory Memorandum, p. 3.

22 Explanatory Memorandum, p. 11, pp. 14–15, pp. 19–20.

23 *Migration Act 1958*, ss. 252A(1).

24 Explanatory Memorandum, pp. 12–13.

25 Explanatory Memorandum, p. 9, pp. 16–17.

26 Explanatory Memorandum, p. 3.

27 Parliamentary Joint Committee on Human Rights (PJCHR), *Human Rights Scrutiny Report 11 of 2017*, October 2017, pp. 19–34; Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, pp. 38–43.

28 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 23.

limitation on the right not to be subject to arbitrary or unlawful interference with the family.<sup>30</sup>

- b) The proposed amendments relating to the search and seizure powers and whether these powers are compatible with 'the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention';<sup>31</sup> whether the powers are a permissible limitation on the right to bodily integrity';<sup>32</sup> and whether the seizure powers, particularly the power to strip search, 'raises questions as to whether the bill is compatible with the rights of the child.'<sup>33</sup>

### *Scrutiny of Bills Committee*

1.23 The SBC raised concerns that the bill may unduly trespass on personal rights and liberties of detainees as it would limit the possession of things such as mobile phones and introduce 'extensive search powers', noting that these provisions would apply to all detainees regardless of the level of risk they posed.<sup>34</sup>

1.24 The SBC noted that 'around half the detention population is not made up of high-risk individuals' and that:

[t]he level of risk posed by persons detained due to the exercise of the Minister's character ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa.<sup>35</sup>

1.25 Additionally, the SBC noted that this bill would delegate the power to the minister to determine, through delegated legislation, a thing to be prohibited and that, in its view, such matters should be included in primary legislation unless sound justification is provided.<sup>36</sup> The SBC sought the minister's advice on this point, including why it is necessary and appropriate to delegate this power to the minister and what type of consultation is envisaged will be conducted prior to the making of the legislative instrument.<sup>37</sup>

1.26 The SBC also noted that the bill would allow increased search powers for 'authorised officers' and their assistants. It noted that its 'consistent scrutiny position is that coercive powers should generally only be conferred on government employees

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29 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 27.

30 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 25.

31 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 31.

32 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 33.

33 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 33.

34 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 40.

35 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 40.

36 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 42.

37 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 42.

with appropriate training.<sup>38</sup> The SBC sought the minister's advice on this point, including:

- (a) whether the power to conduct coercive searches would apply to non-government employees,
- (b) why it is necessary to confer powers on the assistants of authorised persons, and
- (c) what training will be required of persons conferred with these powers.<sup>39</sup>

### **Note on references**

1.27 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

### **Conduct of the inquiry**

1.28 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 13 October 2017.<sup>40</sup> The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received 82 submissions, which are listed at appendix 1 of this report. The committee also received 171 form letters, of which it published five samples.<sup>41</sup>

1.29 The committee held a public hearing in Canberra on 27 October 2017. The program of this hearing is at appendix 2 of this report.

### **Structure of this report**

1.30 This report consists of two chapters:

- This chapter provides a brief overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised in submissions and at the public hearing, and provides the committee's views and recommendations.

### **Acknowledgements**

1.31 The committee thanks all organisations and individuals that made submissions to this inquiry.

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38 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 43.

39 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 43.

40 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs).

41 See Ms Judith Worrall, *Submission 74*; Mr Freddie K.Y. Leong, *Submission 75*; Ms Gillian Blair, *Submission 76*; Dr Cecily Mason, *Submission 77*; and Ms Penny Jerrim, *Submission 78*.