Chapter 2

Key issues

2.1 The following key issues were raised by submitters and at the public hearing:

- The need for the bill.
- The proposed ministerial discretion to prohibit items.
- Particular items that may be prohibited.
- Increased search, screen and seizure powers.
- The nature of detention and constitutional concerns.

2.2 The Department of Immigration and Border Protection (the department) responded to submitters' key concerns at the public hearing on 27 October 2017 as well as in answers to questions on notice.

The need for the bill

2.3 The department submitted that the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) would '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.'[1] To this end, the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, referred in his second reading speech to previous amendments to section 501 of the *Migration Act 1958* (the Act):

> Since these changes were enacted, we have cancelled the visas of 54 murderers, 223 child sex offenders and 150 organised crime figures. This action has resulted in a significant increase in criminals in our immigration detention facilities.[2]

2.4 The department provided the following statistics with respect to the 1257 detainees in the immigration detention network:[3]

- There were 879 detainees (or 70 per cent) rated as high risk.[4]
    - There were 446 detainees whose visas had been cancelled under section 501 of the Act, of which 421 were rated as high or extreme risk.[5]

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1 Department of Immigration and Border Protection (the department), *Submission 44*, p. 4.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 13 September 2017, p. 10180.

3 The statistics were current as at 30 September 2017.

4 Mr Kingsley Woodford-Smith, Assistant Commissioner, Detention and Offshore Operations Command, the department, *Committee Hansard*, 27 October 2017, p. 29.

5 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 29.

- There were 332 contraband items found in 2017-18 (to 30 September 2017), 1644 items found in 2016-17, and 1857 items found in 2015-16.[6]
- There were 26 cases of contraband being introduced by visitors in 2016-17 and 39 cases in 2015-16.[7]
- There were no successful escapes in 2017-18 (to 30 September 2017), six escapes in 2016-17 and 13 escapes in 2015-16.[8]
    - A detainee used a mobile phone to coordinate an escape in at least one of the escapes in 2016-17.[9]

2.5 Moreover, the department argued that there are several areas in which the current act does not clearly support officers to take action, including the ability to:

- 'restrict access to items that are not unlawful' but are of concern;
- 'search detainees, their possessions and their accommodation areas' for items of concern, including using detector dogs; and
- 'seize and retain or dispose of items of concern.'[10]

2.6 The department added that it has 'increasingly relied on the common law as the basis for taking certain action…for example, searching accommodation areas within detention facilities.'[11]

2.7 Several submitters questioned whether all detainees whose visa had been cancelled under section 501 of the Act had been convicted of serious offences or posed a risk to the order of immigration detention facilities.[12] The committee however notes that the gravity of the offences detailed in the elements of the section 501 character test would likely meet any casual observer's estimation of 'serious' conduct.

2.8 The Asylum Seeker Resource Centre (ASRC) outlined concerns regarding the current approach to assessing the risk posed by detainees:

> In our experience, many people categorised as 'medium' or 'high risk' are categorised as such not because of any previous instances of violence or threat of violence, but because of a perception of lack of compliance with the DIBP's detention regime in a general sense. This idea of 'compliance'

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6 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 30.

7 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 34.

8 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 36.

9 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 36.

10 *Submission 44*, p. 3.

11 *Submission 44*, p. 4.

12 See for example, Australian Human Rights Commission (AHRC), *Submission* 11, p. 7; Hunter Asylum Seeker Advocacy, *Submission 47*, p. 2; Brigidine Asylum Seeker Project, *Submission 48*, p. 4; National Justice Project, *Submission 58*, p. 2; Ms Christine Bourke and Mr Michael Chalmers, *Submission 60*, p. 2; Asylum Seeker Resource Centre (ASRC), *Submission 80*, paragraph 20.

> with the DIBP and its detention service providers, separate to any actual risk, appears to have become a norm in assessing risk. We are deeply concerned that risk assessment has become a tool to engender compliance rather than a genuine assessment of risk to others.[13]

2.9 The department explained that risk assessments consider 'a number of elements' including the detainee's criminal record, the number of incidents in immigration detention relating to the detainee, and also the detainee's intent and capability.[14] The department added the following in response to a question on notice:

> Serco has mechanisms in place to assess and calculate the security risk each immigration detainee poses within the Immigration Detention Network (IDN).
>
> Review mechanisms are also in place to ensure that individual risk ratings are appropriate for detainees.[15]

The proposed ministerial discretion to prohibit items

The breadth of ministerial discretion

2.10 Proposed subsection 251A(2) would enable the minister to determine a thing to be prohibited in immigration detention facilities. The Explanatory Memorandum (EM) states that '[t]his 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.'[16]

2.11 Some submitters posited that it would be preferable to list the prohibited items in statute rather than allow the minister to prohibit items by legislative instrument.[17] Ms Fiona McLeod SC of the Law Council of Australia (Law Council) stated that this would benefit 'clarity and transparency', while Legal Aid New South Wales (Legal Aid NSW) argued that delegated legislation 'is not subject to the same degree of Parliamentary scrutiny.'[18]

2.12 However, the department explained why the bill provides for ministerial discretion rather than listing all items to be prohibited:

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13 *Submission 80*, paragraph 28.

14 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 29.

15 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 6.

16 Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Explanatory Memorandum), p. 6.

17 See for example, Legal Aid New South Wales (Legal Aid NSW), *Submission 49*, pp. 4–5; Law Council of Australia (Law Council), *Submission 64*, pp. 9–10; Ms Katie Wrigley, Senior Solicitor, Civil Law Division, Government Law Team, Legal Aid NSW, *Committee Hansard*, 27 October 2017, p. 15.

18 Ms Fiona McLeod SC, President, Law Council, *Committee Hansard*, 27 October 2017, p. 5; Legal Aid NSW, *Submission 49*, p. 5.

> You either define [a prohibited thing] by way of making an assessment as to how it can be used and the risk it poses, which is what has happened here, or you can try to attempt to provide an exhaustive list. I think that would be probably almost impossible and quite unwieldy in terms of its currency. So the way it's been crafted is to provide the ability to make decisions about the risks that things present, but it's bounded within the framework of having to be something that is 'a risk to the health, safety or security of persons in the facility, or to the order of the facility.'[19]

2.13 The Law Council questioned the need for paragraph 251A(2)(a):

> Possession of these items may already be illegal, and searches for such items are already permitted at law. Further, existing powers under section 252 of the Migration Act already permit authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security.[20]

2.14 The department explained that the purpose of proposed paragraph 251A(2)(a) (regarding items that are already illegal in Australia) is to allow the minister to determine an item to be a 'prohibited thing' under proposed section 251A, thereby triggering the associated search, screen and seizure powers in the bill. Without the proposed legislative instrument, the thing would still be prohibited under Australian law but authorities would require reasonable suspicion or a warrant to search for it.[21]

2.15 Many submitters expressed concern about the breadth of proposed paragraph 251A(2)(b) (regarding items that pose a risk to immigration detention facilities).[22] For instance, Refugee Legal referred to the proposal as 'an unjustifiably broad personal power' and highlighted that '[t]he Minister need only be satisfied that the thing "might" be a risk, a very low threshold.'[23]

2.16 Many submitters were also concerned that the proposed legislative instruments would enable blanket prohibition of certain items for all detainees in immigration detention facilities, regardless of the risk posed by an individual

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19 Ms Pip de Veau, First Assistant Secretary, Legal Division, the department, *Committee Hansard*, 27 October 2017, p. 32.

20 *Submission 64*, p. 9.

21 Ms De Veau, *Committee Hansard*, 27 October 2017, pp. 24–25.

22 See for example, Combined Refugee Action Group, *Submission 30*, p. 1; Brigidine Asylum Seeker Project, *Submission 48*, p. 6; Refugee Advice and Casework Service (RACS), *Submission 50*, p.1; Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 52*, pp. 2–3; New South Wales Council for Civil Liberties (NSW Council for Civil Liberties), *Submission 54*, p. 4; Refugee Council of Australia (Refugee Council), *Submission 55*, pp. 2–3; Refugee Legal, *Submission 69*, pp. 4–5;

23 *Submission 69*, p. 4.

detainee.[24] The Refugee Advice and Casework Service (RACS) argued that '…the Bill's failure to distinguish between high risk and low risk detainees is of significant concern.'[25]

2.17 Some submitters argued that prohibiting items, such as mobile phones, for all detainees rather than on the basis of risk assessments may disproportionately limit detainees human rights, including the right to privacy, right to family life, and right to freedom of expression.[26]

2.18 In considering these issues, the Australian Human Rights Commission (AHRC) recommended that:

> …the Bill be amended to stipulate that items that do not present inherent risks to safety and security may only be prohibited in immigration detention:
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> - on the basis of individual risk assessments
> - where there is evidence that the person has used or is reasonably likely to use the item in a manner that presents clear risks to safety or security; and
> - where those risks cannot be managed in a less restrictive way.[27]

2.19 Mr Edward Santow of the AHRC explained the importance of this recommendation for items that have a 'dual use':

> In relation to something that may have more than one use—that is, an innocuous use or a dangerous use, and a mobile phone is an example of that—we're concerned that the minister is being put in, essentially, an invidious position, because the minister won't be able to identify the nuance in the particular situation. Whoever the decision-maker is…if they are able to consider the specific risks of an individual using a mobile phone—that is, the specific risks of a specific individual using a mobile phone—then they'll be able to tailor the restriction appropriately and it will be no more restrictive than is needed in the circumstances.[28]

2.20 However, the department explained that the bill allows the minister to prohibit items only in certain cases, rather than a blanket restriction. For instance, the legislative instrument may be drafted such that 'it only targets prescription medication

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24 See for example, Supporting Asylum Seekers Sydney (SASS), *Submission 21*; Liberty Victoria, *Submission 25*, p. 4; Refugee Advice & Casework Service (RACS), *Submission 50*, pp.2–4; Kaldor Centre, *Submission 52*, p. 3; National Justice Project, *Submission 58*, p. 2; Amnesty International, *Submission 62*, pp. 1–2; Castan Centre for Human Rights Law at Monash University (Castan Centre), *Submission 79*, p. 2.

25 *Submission 50*, p. 4.

26 Legal Aid NSW, *Submission 49*, pp. 3–6; Castan Centre, *Submission 79*, p. 3, p. 5, p. 7.

27 *Submission 11*, p. 4.

28 Mr Edward Santow, Human Rights Commissioner, AHRC, *Committee Hansard*, 27 October 2017, p. 23.

that is not otherwise dispensed or prescribed to you', or that it prohibits '"mobile phones in centres X, Y and Z".'[29]

2.21 The department however cautioned that the prohibition of items such as mobile phones may be necessary to ensure the safety and security of detainees and staff throughout the immigration detention network. The department stated that:

> [r]emoving things such as mobile phones from the [immigration detention network] altogether, rather than providing only certain detainees with access, has been assessed as the most effective way to mitigate risk.…It is the least restrictive way to manage the threat that things such as mobile phones pose to the [immigration detention network], as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics from other detainees.[30]

Review of ministerial determinations

2.22 Due to existing provisions, determinations made by the minister via the proposed legislative instrument would not be disallowable by the Senate.[31] This raised concerns from some submitters.[32]

2.23 Additionally, some submitters expressed concern that the bill does not provide for administrative review of ministerial determinations.[33] As stated by Mr Paul Power of the Refugee Council of Australia (Refugee Council), '[w]e are concerned that other items are being declared prohibited without the need to provide justification and with no form of independent review.'[34]

2.24 The National Justice Project similarly argued that ministerial determinations would 'fall within the definition of a privative clause decision for the purposes of the *Migration Act*', and therefore would not be subject to judicial review.[35]

2.25 However, the department explained that the legislative instrument would be judicially reviewable under section 39B of the *Judiciary Act 1903*:

> …a court might say that food, without any further qualifications, doesn't meet the test that is required for it to be on the list; namely, that it presents

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29 Ms de Veau, *Committee Hansard* , 27 October 2017, pp. 27–28.

30 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), pp. 6–7.

31 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 29.

32 RACS, *Submission 50*, p 1; Refugee Legal, *Submission 69*, p. 5.

33 National Justice Project, *Submission 58*, p. 3; Law Council, *Submission 64*, pp. 9- 10; Ms Fiona McLeod SC, Law Council, *Committee Hansard*, 27 October 2017, p. 5; Mr Paul Power, Refugee Council, *Committee Hansard*, 27 October 2017, p. 12.

34 Mr Power, Chief Executive Officer, Refugee Council, *Committee Hansard*, 27 October 2017, p. 12.

35 National Justice Project, answers to question on notice, 27 October 2017 (received 3 November 2017), pp. 2–3.

> the risks that are outlined in that section of the bill, and therefore it's not valid. So there is the ability to have it considered and reviewed.[36]

Particular items that may be prohibited

2.26 Submitters expressed concern that the bill would allow the minister to prohibit items that may benefit detainees. In particular, submitters and witnesses were concerned about a prohibition of mobile phones, food items and medication.

2.27 The department reiterated that an item would only be prohibited if the minister was appropriately satisfied of the risk posed by the item, and further stated that '[t]his satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.'[37]

Mobile phones

2.28 The EM states that that mobile phones may be prohibited as there is evidence that they have been used for various negative purposes, including 'to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats.'[38]

2.29 Numerous submitters noted that prohibition of mobile phones could have negative implications for detainees. In general, these concerns related to detainees' wellbeing[39], access to legal services[40], and freedom of political communication[41].

The wellbeing of detainees

2.30 Ms Christine Bourke and Mr Michael Chalmers argued that detainees' 'use of a mobile to make contact with their family and with those who seek to assist them is crucial to their mental and emotional wellbeing.'[42] Refugee Legal further emphasised that people are in detention facilities for an average of 445 days, and therefore the ability of detainees to contact friends and family '…in private without navigating

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36 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 35.

37 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 6.

38 Explanatory Memorandum, p. 2.

39 See for example, Federation of Ethnic Communities' Councils of Australia and the Settlement Council of Australia, *Submission 1*, p. 2; SASS, *Submission 21*, p. 3; Ms Jackie Mayers, *Submission 43*, p. 2; Brigidine Asylum Seeker Project, *Submission 48*, p. 5; Immigration Advice and Rights Centre, *Submission 51*, pp. 4–5, Refugee Legal, *Submission 69*, p. 6.

40 See for example, Liberty Victoria, *Submission 25*, pp. 2–4; Legal Aid NSW, *Submission 49*, pp. 6–7; RACS, *Submission 50*, pp. 2–3; Kaldor Centre, *Submission 52*, pp. 4–5; NSW Council for Civil Liberties, *Submission 54*, pp. 4–6; National Justice Project, *Submission 58*, p. 4; Refugee Legal, *Submission 69*, pp. 5–6.

41 See Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 3.

42 *Submission 60*, p. 3.

administrative or practical barriers, is of crucial importance for maintaining family relationships and mental health.'[43]

2.31 The Refugee Council also argued that detainees' mobile phones can be important for family and children who are not in detention, submitting that:

> …many people detained are parents of young children in the community. In meeting the best interest of these children, it is imperative that they have ready and flexible access to communicate with their parents at all hours by mobile phone.[44]

Detainees' access to legal services

2.32 RACS argued that prohibiting detainees from possessing mobile phones would exacerbate the effect of existing barriers to legal advice. It highlighted the tight legal timeframes that apply to many elements of Australian refugee law, and argued that it is therefore critical that detainees' can quickly access legal services.[45] Refugee Legal added that '[t]elephones in public areas of the detention centre are not appropriate for discussing legal matters, frequently involving sensitive or personal subject matter.' Moreover, '[t]elephone appointments in a private area generally require a period of notice, eg 24 hours, which is not always possible with urgent matters.'[46]

2.33 With respect to claims that the bill may reduce detainees' access to legal services, the department referred to section 256 of the Act:

> That provision quite specifically calls out a positive obligation. Where people are in detention facilities, there's a positive obligation to provide 'all reasonable facilities' to obtain legal advice or for that person to be able to take legal proceedings.[47]

2.34 However, RACS submitted that despite this statutory requirement, 'the ability of detainees to communicate with legal representatives is often frustrated in practice.'[48] The Law Council also referred to section 256 and submitted that:

> [n]oting that many detainees are vulnerable, lacking financial resources, and without English capability, it is already difficult and onerous for them to take the step of seeking legal advice.[49]

Detainees' freedom of political communication

2.35 The Kaldor Centre for International Refugee Law (Kaldor Centre) raised the possibility that prohibiting mobile phones may infringe the implied freedom of

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43 *Submission 69*, p. 6.

44 *Submission 55*, p. 3.

45 *Submission 50*, pp. 2–3.

46 *Submission 69*, p. 6.

47 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 25.

48 *Submission 50*, p. 2.

49 *Submission 64*, p. 8.

political communication. Dr Sangeetha Pillai of the Kaldor Centre argued that prohibiting mobile phones would impose:

> …a burden on communication about political matters. The lack of a compelling justification for a blanket prohibition on such communication devices in detention centres and the availability of less burdensome means by which the end of securing safety, security and order in detention centres might be achieved creates a real risk that the bill may also infringe the implied freedom of political communication.[50]

Alternative communication facilities

2.36 The inquiry accepted the evidence of the Department that considered detainees who could not possess mobile phones would have access to adequate alternative communication facilities.

2.37 According to the EM, '[d]etainees will continue to have reasonable access to communication facilities in order to maintain contact with their support networks', including via 'landline telephones, facsimile, internet access in compliance with the Conditions of Use of Internet agreement, postal services and visits.' The department stated that 'there's access to computers as well across the network, largely 24/7' which offer email, Facebook, and in some cases Skype.[51]

2.38 Further, the department submitted that it will review the availability of alternative facilities and that previous reviews have resulted in additional landline phones at most immigration detention facilities.[52] The department also set out the required process for access to incoming calls:

> …the Service Provider (Serco) must make provision for Detainees to have access to incoming telephone calls at any time; and notify Detainees of any calls received for them when the Detainee was not available to receive the call.
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> Due to the nature of the infrastructure at each facility, some facilities allow external phone calls direct to accommodation area telephones at any time of the day or night. The remaining facilities call-divert to a manned control room after 8pm. However, in the latter case if the call is not an emergency call, Serco receipt a message and pass the message to the detainee the following morning.[53]

50 Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 3.

51 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, pp. 25–26.

52 *Submission 44*, p. 5.

53 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 13.

2.39 Nonetheless, several submitters expressed concern about the adequacy of alternative communication facilities.[54] The AHRC noted that:

> …providing access to additional landline phones is not equivalent to permitting possession of mobile phones. For example, most landline telephones in immigration detention facilities are located in public areas. While facilities for private phone calls are generally available, they are often accessible on request rather than on demand and cannot be accessed at all times.[55]

2.40 Ms Katie Wrigley, Legal Aid NSW, provided an account of the difficulties currently faced when contacting detainees who do not have a mobile:

> There is no central number or contact point where I can find out which immigration detention centre my client is located within, and my clients are moved frequently between those centres. The process to find out the location of your client is to telephone each individual detention centre around Australia. This can take some time, spelling out your client's full name and date of birth each time and only receiving a, 'Yes, they are here,' or, 'No, they are not,' answer.[56]

2.41 Further, Mr Prince of the Law Council argued that this issue 'has to be understood also in the context of Serco…moving detainees around the country', meaning that a detainee's mobile phone may be 'the only form of contact' they have with family and friends.[57]

Certain food items

2.42 A number of submitters, including volunteer visitors to immigration detention facilities, raised concerns about the prohibition of certain food items in immigration detention facilities.[58] Restrictions on bringing certain food into the facilities were recently introduced under policy and could be further supported by a ministerial determination under the bill.[59]

2.43 Supporting Asylum Seekers Sydney argued that '[t]hese restrictions on food that visitors can take in has become a collective punishment for a cohort who are not

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54 See for example, AHRC, *Submission 11*, pp 9–11; Legal Aid NSW, *Submission 49*, pp. 6–7; Refugee Council, *Submission* 55, p. 3; ASRC, *Submission 80*, pp. 7–8; Mr Prince, Law Council, *Committee Hansard*, 27 October 2017, p. 8.

55 *Submission 11*, p. 10.

56 Ms Wrigley, *Committee Hansard*, 27 October 2017, p. 10.

57 Mr David Prince, Chair, Migration Law Committee, Law Council, *Committee Hansard*, 27 October 2017, p. 6.

58 See for example, Mr Gerald Grove-White, *Submission 13*, pp. 3–4; SASS, *Submission 21*, pp. 5–6; Dr Graeme and Mrs Susan Swincer, *Submission 66*, p. 2; Ms Christine Wang, Ms Isobel Blomfield, Ms Sarah Easy, Ms Christine Maibom, Mr Adrian Vipond, Ms Zoe Stojanovic-Hill, *Submission 68*, pp. 2–3; ASRC, *Submission 80*, p. 13.

59 Ms de Veau and Mr Woodford-Smith, the department, *Committee Hansard*, 27 October 2017, pp. 34–35.

meant to be punished.'[60] It also submitted that there are many benefits to bringing food to share with detainees, and that previously:

> …we were allowed to bring in fresh food consisting of a lot of fruit, flat breads, Middle Eastern dips, bakery bread, and other foods commonly eaten in the respective home countries of the detainees. We took in food that would not normally be served in an institution, for example, mangoes, strawberries, watermelon. This was greatly appreciated and enjoyed by the asylum seekers. The food we took in provided variety to their diets, and had become a method of encouraging social interaction and friendship.[61]

2.44 The department argued that '[f]ood items are also being used as a method for concealing contraband being brought into immigration detention facilities, this includes narcotic drugs and prescription medications.'[62] The department also holds health concerns:

> From our perspective, with takeaway food or home-cooked food—which the centre has no understanding of how it's been prepared or looked after—the opportunity is there to introduce bacteria into the centre, which maybe creates gastro or any number of diseases within the centre.[63]

2.45 The department further explained what kinds of food are permissible:

> …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.[64]

Medication and other items

2.46 The EM states that medication is listed in the note to proposed section 251A in order to 'capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person.'[65] The department submitted that:

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60 *Submission 21*, p. 6.

61 *Submission 21*, p. 5.

62 *Submission 44*, p. 7.

63 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 35.

64 *Submission 44*, pp. 6–7.

65 Explanatory Memorandum, p. 6.

> [t]here 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.[66]

2.47 In contrast the Law Council recommended that:

> [t]he reference to 'medications or health care supplements' in the note to subsection 251A(2) should be amended to ensure that medications obtained under prescription or supplements recommended by a health practitioner are not caught by the provision, and that it is only directed at narcotic or restricted substances.[67]

2.48 The department highlighted that 'there is a satisfaction that the minister has to reach before something can become a prohibited thing.' In response to concerns that some stationery items could be banned, the department provided reassurance that 'I can't imagine that pens and paper would fall into that category [of a prohibited thing].'[68]

Increased search, screen and seizure powers

The basis on which searches may be conducted

2.49 Several submitters expressed concern that the proposed search powers could be exercised without a warrant or reasonable suspicion and are therefore disproportionate.[69] Refugee Legal posited that:

> [a] power to search to "find out whether" a prohibited item is at the facility is very broad. It should be noted that the power extends to searching detainees' rooms and personal effects, interfering with their privacy.[70]

2.50 Similarly, the Law Council submitted that '…there are inadequate protections for detainees that may have their personal effects and rooms, intruded upon.' It argued that '…regardless of the status of the detainee, any power to search a person's room and property should be limited to where there is at least a reasonable suspicion that some contraband is in their possession.'

2.51 The ASRC expressed another concern, which related to the ability of officers conducting searches:

> …it is unacceptable that invasive powers to search are handed to private contractors and their undefined 'assistants'. There seems to be no requirement that authorised officers or their assistants have completed any training in relation to the use of such powers including against people who

66 *Submission 44*, p. 7.

67 *Submission 64*, p. 12.

68 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 31.

69 See for example, Liberty Victoria, *Submission 25*, p. 2; RACS, *Submission 50*, p. 4; ASRC, *Submission 80*, p. 9.

70 *Submission 69*, p. 7.

> often have acute vulnerabilities. We are concerned that there is extensive opportunity for misapplication and misuse of these powers.[71]

Locations that may be searched

2.52 The EM makes clear that proposed sections 252BA and 252BB would allow searches, without warrant, of 'immigration detention facilities operated by or on behalf of the Commonwealth', which include 'accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas.'[72]

2.53 Regarding medical examination areas, the Refugee Council submitted that:

> [t]here is no further information or safeguarding provision to emphasise the importance of privacy when a person in detention is attending a consultation with a health professional. As it stands, this section does not prevent authorised officers from interrupting a private consultation with a doctor or a mental health professional to search for various illegal or prohibited items, including mobile phones.[73]

2.54 A number of submitters expressed concern that the bill may allow searches at certain types of Alternative Places of Detention (APODs), including Immigration Transit Accommodation facilities or leased private housing, hospitals and schools.[74] However, in an answer to a question on notice, the department stated that the proposed search and seizure powers are limited 'to ensure they only apply to places owned or operated by the Commonwealth and, as such, these powers will not extend to private homes being used as non-facility-based APODs.'[75]

Use of detector dogs

2.55 Submitters, including many of those who submitted a form letter, expressed concern about the use of detector dogs for searches.[76] The ASRC expressed particular concerned about the use of dogs in an immigration detention facility setting, and submitted that '[r]ecognising that people in detention come from a variety of cultural backgrounds, it must be considered that dogs are particularly distressing and in some cases intolerable for particular cultures and religions.'[77] A similar point was made by Mr Prince of the Law Council:

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71 *Submission 80*, p. 9.

72 Explanatory Memorandum, p. 3.

73 *Submission 55*, p. 5.

74 See for example, Legal Aid NSW, *Submission 49*, pp. 7–8; Refugee Council, *Submission 55*, p. 5; Refugee Legal, *Submission 69*, p. 7; Mr Prince, Law Council, *Committee Hansard*, 27 October 2017, p. 6.

75 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 3.

76 See for example, Ms Penny Jerrim, *Submission 78*, p. 1.

77 *Submission 80*, p. 9.

> I think it is important to recognise—especially for asylum seekers and refugees, who have already experienced trauma—that these types of intrusive powers will further add to their trauma and affect their mental wellbeing.[78]

2.56 The Law Council held further concerns about the protections surrounding searches, with Mr Prince arguing that '[t]here are no safeguards here, apart from: "Do your best not to let the dog touch the individual."'[79] Further, the Law Council submitted that '[t]here is nothing in the Bill that prohibits the use of sniffer dogs in a manner intended to harass or intimidate detainees', and that 'there are relevant cultural sensitivities in respect of the use of sniffer dogs that the Bill does not adequately address, notwithstanding proposed ss 252AA(3A) and 252BA(4).'[80]

2.57 Liberty Victoria held similar concerns, submitting that '[t]he power to use dogs to conduct searches is disproportionate and inappropriate.' It added that '[t]here is no requirement that the dog be reasonably necessary to effect the purpose of the search.'[81]

2.58 Additionally, the New South Wales Council for Civil Liberties doubted the effectiveness of trained dogs detecting contraband. It referred to a June 2006 report of the NSW Ombudsman concerning the general use of detector dogs, which 'reported that: "No drugs were located in almost three-quarters of searches following indications, raising questions about the accuracy of drug detection dogs…"'[82]

2.59 The department's submission outlined the procedure relating to the use of dogs for searches:

> 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.[83]

2.60 Further, the department highlighted that:

> …there are specific safeguards, and the safeguard that has been included in the bill is one that has been modelled on a series of compatible interstate pieces of legislation where detector dogs are used. The provision is that each of the areas where the introduction of the use of a dog as a screening procedure or a searching procedure has been included says that the officer must take all reasonable precautions to prevent the dog touching any person

78 Mr Prince, *Committee Hansard*, 27 October 2017, p. 6.

79 Mr Prince, *Committee Hansard*, 27 October 2017, p. 9.

80 *Submission 64*, p. 16.

81 *Submission 25*, p. 5.

82 NSW Council for Civil Liberties, *Submission 54*, p. 7.

83 *Submission 44*, p. 9.

> other than the officer and keep the dog under control while conducting the screening procedure.[84]

Provisions regarding strip searches

2.61 The Immigration Advice & Rights Centre argued that allowing strip searches to find any prohibited item would be '…disproportionate to the intention of the bill.' It stated that '[i]t is difficult to accept that mobile phones, tablets and health supplements pose the same immediate threat as a weapon or other thing capable of inflicting bodily injury so as to justify extending the strip search powers.'[85] The ASRC made a similar point, submitting that:

> [w]e note that many people in detention have acute vulnerabilities including because of their experiences in detention. Where the search for a 'prohibited thing' falls outside of a weapon or thing capable of inflicting bodily injury, we do not believe that the rights of an authorised officer to strip search a person to find a 'prohibited thing' is proportionate to the violation of that person's rights, the potential for trauma and distress.[86]

2.62 The Law Council recommended that strip searches '…only be conducted in exceptional circumstances…' and the Kaldor Centre recommended that the legislation should '…require strip searches to be used as a last resort…'[87]

2.63 On behalf of the AHRC, Mr Santow acknowledged that '…a strip search is a very significant impingement on an individual's basic human rights.'[88] The AHRC advanced that 'the expansion of the scope of strip search powers has the potential to result in such searches becoming routine', and emphasised the importance of independent oversight to ensure that strip searches 'are applied in a reasonable and proportionate manner.' It recommended that the bill:

> …be amended to provide that:
>
> - the Department must maintain a log of the conduct of strip searches including details about the compliance with each of the requirements of ss 252A and 252B of the Migration Act
> - the Department must notify the Commonwealth Ombudsman when it receives a complaint about the conduct of a strip search
> - the Commonwealth Ombudsman have the power to inspect the records of the Department in relation to the conduct of strip searches for the purpose of reviewing the Department's processes for conducting strip searches and dealing with complaints

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84 Ms de Veau, *Committee Hansard,* 27 October 2017, p. 36.

85 *Submision 51*, p. 6.

86 *Submission 80*, p. 9; see also Law Council, *Submission 64*, p. 15.

87 Law Council, *Submission 64*, p. 15; Kaldor Centre, *Submission 52*, p. 5.

88 Mr Santow, *Committee Hansard,* 27 October 2017, p. 20.

- the Commonwealth Ombudsman must conduct an annual review and prepare a report about the comprehensiveness and adequacy of the Department's internal processes relating to strip searches to be tabled in Parliament
- the Commonwealth Ombudsman have the power to conduct ad hoc reviews into the way in which strip searches are conducted at any time.[89]

2.64 The AHRC stated that these recommendations resemble, to some degree, existing provisions in the *Australian Federal Police Act 1979*. Those provisions allow for the Commonwealth Ombudsman to oversee the Australian Federal Police process for internal review of complaints.[90]

2.65 The department responded to each element of the above recommendation in its response to a question on notice. The department's overall view was that:

> [t]he Department considers that the intent of recommendation 5 of the submission from the Australian Human Rights Committee (AHRC) is already sufficiently addressed by the *Ombudsman Act 1976* (the Ombudsman Act) and further supported by the section 499 Ministerial Direction No.51 (the Direction) and the Detention Services Manual of the Department (the DSM).[91]

2.66 The department further stated that:

> [s]trip searches are only undertaken as a measure of last resort. There must be good reasons based on reasonable suspicion that a strip search is warranted. There are many safeguards built into the legislation to ensure that the power is not abused and officers are accountable for its use.[92]

The nature of detention and constitutional concerns

2.67 Some submitters argued that the measures in the bill are more suited to a criminal context than administrative detention.[93] The Law Council submitted that:

> The proposed new coercive powers in the Bill are similar to powers that apply in a criminal law context. It is not proportionate to apply such powers in the case of immigration detention where detainees are innocent and vulnerable people…[94]

89 *Submission 11*, pp. 12–13.

90 AHRC, answers to question on notice, 27 October 2017 (received 3 November 2017).

91 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), pp. 9–10.

92 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 10.

93 See for example, Law Council, *Submission 64*, p. 5; Ms McLeod SC, Law Council, *Committee Hansard*, 27 October 2017, p. 1; Mr Khanh Hoang, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 2;

94 *Submission 64*, p. 5.

2.68 The AHRC emphasised the importance of proportionality in any new measures, noting that Australia's human rights obligations '…require Australia to ensure that people in detention are treated fairly and reasonably, and in a manner that upholds their dignity.'[95]

2.69 Legal Aid NSW explained that the nature of detention is also significant from a constitutional perspective, and referred to *Al-Kateb v Godwin* where the High Court 'confirmed…that detention pursuant to the Migration Act is administrative detention, "it is not a form of extra-judicial punishment" and it is "not detention for an offence".'[96] This point was further explained by Ms McLeod SC of the Law Council:

> It's very clear that administrative detention does not and must not have a punitive character for it to survive a constitutional challenge. That is, the courts have asserted a fundamental issue concerning constitutionality or the separation of powers, and that's because, if you create an administrative detention centre as a punitive centre, then you commit the administration to exercise powers of criminal process, if you like. [97]

2.70 Dr Pillai, Kaldor Centre, explained why the bill may be open to constitutional challenge:

> In every case that has considered whether immigration detention is compatible with the constitutional separation of judicial power or not, the question has involved detention that is seen as reasonably necessary for the purposes of affecting consideration of a visa or affecting deportation…This legislation potentially creates something quite different, where the conditions of detention—for the purposes of dealing with a cohort that is said to involve an increasing number of people who have had a history of criminality—are made prisonlike. That potentially raises quite a different question that very well may give rise to a viable constitutional challenge.[98]

2.71 In the view of the AHRC, '[t]he fact that immigration detention cannot be undertaken for a punitive purpose heightens the importance of minimising the impingement on the human rights of people who are detained.'[99]

Committee View

2.72 The committee strongly supports the objective of this bill, namely to maintain health, safety, security, and good order in immigration detention facilities. This aim is particularly important in light of the changing profile of detainees in immigration detention centres, of whom 70 per cent are assessed to be high risk.

2.73 Nonetheless, the committee also accepts that there is a broad mix of detainees in immigration detention facilities, ranging from those seeking asylum to those whose

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95 *Submission 11*, p. 5.

96 Legal Aid NSW, *Submission 49*, pp. 3–4.

97 Ms McLeod SC, *Committee Hansard*, 27 October 2017, p. 3.

98 Dr Pillai, *Committee Hansard*, 27 October 2017, p. 5.

99 Australian Human Rights Commission, *Submission 11*, p. 5.

visa has been cancelled on serious character grounds such as outlaw motorcycle gang membership. The committee notes that the presence of section 501 immigration detainees requires greater vigilance on the part of the department to ensure its stated objectives are achieved: the protection of all detainees; the safe and secure operation of detention centres; the safety of employees in these centres; and the security of the wider community. The committee is of the view that diluting the measures contemplated in the bill would fundamentally impair the achievement of these objectives.

2.74 The committee accepts the department's advice that prohibitions would be subject to the minister being satisfied beyond a specified threshold, and that ministerial determinations would be informed by departmental intelligence-based briefings. The committee is further satisfied by the department's evidence that the inclusion of a prescriptive list of prohibited items in the bill would have a limiting effect on the purpose of the amendment.

2.75 The committee is conscious of submitters' concerns regarding the proposed ministerial discretion. The committee is of the view, however, that the assessment of risk, and the application of the new measures, rests with departmental and detention centre staff under the guidance of the relevant legislative scheme. The committee is satisfied that risk assessments will continue to be made on a case-by-case basis in accordance with relevant legislative and regulatory schemes, and without compromising the human rights of immigration detainees.

2.76 Committee members are satisfied that the department is mindful of all of its obligations regarding the human rights of detainees—particularly in respect of searches of property and persons—and are confident that the new legislative scheme provided by this bill will be deployed in line with best practice.

2.77 Many of the submissions expressing concern about the measures in the bill appear to contemplate bad faith on behalf of either the department or the minister. The committee rejects this suggestion completely and notes that no credible evidence has been presented that would lend any credence to such an imputation.

2.78 The committee accepts the department's concerns regarding the negative ways in which mobile phones have been used in immigration detention facilities, and recognises that prohibitions may be necessary in some circumstances to ensure the health, safety, security, and good order of immigration detention facilities. The committee acknowledges the department's advice that it may not be feasible to prohibit items, such as mobile phones, in relation to only a subset of detainees

2.79 The committee further notes that the department has provided evidence that the individual protections and rights of review sought by submitters, in particular those detailed in the recommendations of the AHRC, already operate under the auspices of existing legislative and regulatory schemes.

2.80 The committee does, however, agree that providing immigration detainees with a means of communication with advocates and support networks is an important operational function of immigration detention in Australia. While acknowledging the reasons for restricting the presence of mobile telephony and data devices in

immigration detention centres, the committee urges the department to review—with a view to augmenting—communications infrastructure within immigration detention centres, with the possible aim of providing additional private communications facilities.

Recommendation 1

2.81 The committee recommends that the department provide a central information registry regarding the status and location of immigration detainees in order to facilitate greater ease of communication with families, legal representatives and advocates.

Recommendation 2

2.82 The committee recommends that the government consider amending the bill in accordance with the third recommendation of the Australian Human Rights Commission, to ensure that detainees have access to communication facilities that will reasonably meet their needs, and enable timely, and where appropriate, private contact with friends, family, and legal services.

Recommendation 3

2.83 Subject to the preceding recommendations, the committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald

Chair