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Migration Legislation Amendment (Immigration
Detainees) Bill (No. 2) 2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 14 2001–02

Migration Legislation Amendment (Immigration Detainees)
Bill (No. 2) 2001

Jennifer Norberry
Law and Bills Digest Group
2 August 2001

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Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001

Date Introduced: 27 June 2001

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: The Bill's substantive provisions commence 6 months after the date of Royal Assent if not commenced earlier by Proclamation.

Purpose

To amend the Migration Act to provide a regime for strip searching immigration detainees without a warrant.

Background

The Migration Legislation Amendment (Immigration Detainees) Bill 2001 (the No. 1 Bill) was introduced into the House of Representatives on 5 April 2001. It increased the penalty for escaping from immigration detention, made it an offence for immigration detainees to manufacture or possess weapons, established a regime for strip searching immigration detainees, and introduced security monitoring provisions governing visitors to detention centres.

Background information about Australia's system of immigration detention and Commonwealth laws relating to searches of the person can be found in the Bills Digest for the No. 1 Bill ([Bills Digest no. 131 of 2000–2001](#)).

The provisions relating to strip searching produced some controversy.¹ On 21 June 2001, Government amendments to the Bill in the House of Representatives removed the provisions relating to strip searching immigration detainees.² The Bill, as amended, was then agreed to and also passed the Senate. The Bill received Royal Assent on 18 July 2001.³ The Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001 (the No. 2 Bill) re-introduces the strip searching provisions with some modifications. The Minister said in his Second Reading Speech:

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I would also like to highlight two new measures that have been incorporated in this Bill as a result of my discussions with the Shadow Minister for Immigration and Multicultural Affairs.

First, a search can now only be authorised by very senior officers in the central office of my department, namely, the Secretary or a Senior Executive Service Band 3 employee such as the Deputy Secretary.

Second, a detainee who is to be searched will be able to nominate another person to attend the strip search.⁴

The Minister also noted that a draft protocol governing the exercise of strip searching powers, which he foreshadowed when introducing the No. 1 Bill, had been settled in conjunction with the Attorney-General and would be 'incorporated into written directions pursuant to section 499 of the Migration Act'.⁵

Immigration detention continues to be in the news. For example, on 26 May 2001, Commonwealth and State police, DIMA and Australian Protective Services officers, and Australasian Correctional Management raided the Port Hedland Detention Centre in order to arrest detainees alleged to have rioted at the Centre on 11 May 2001.⁶ On 30 May 2001, Amnesty International issued its annual assessment of Australia and criticised Australia's policy of immigration detention.⁷ On 2 June 2001 there was a disturbance which reportedly involved up to 200 detainees at the Curtin Detention Centre.⁸ In early June 2001, seven detainees escaped from the Woomera Detention Centre.⁹ On 18 June 2001, the Joint Standing Committee on Foreign Affairs, Defence and Trade presented its report entitled *Visits to Immigration Detention Centres*.¹⁰ In mid-2001, it was reported that the United Nations High Commissioner for Refugees had criticised a number of countries, including Australia, for their handling of asylum seekers.¹¹ On 9 July 2001, the Minister for Immigration and Multicultural Affairs issued a press release detailing progress on implementing recommendations from the Flood Report on immigration detention facilities.¹² In early July 2001, it was reported that the Minister had issued a tender for an organisation to provide probity advice on how to select a group to manage Australia's detention centres.¹³ On 19 July 2001, 23 detainees escaped from the Villawood Detention Centre.¹⁴ A further 23 detainees escaped on 22 July 2001.¹⁵ Following these escapes, the Minister ordered a review of security needs and procedures at Villawood and flagged a review of contractual arrangements.¹⁶ On 26 July 2001, a Nigerian man in the Villawood Detention Centre died, a suspected suicide.¹⁷ At the time of writing, further developments were occurring. For instance, the Minister foreshadowed tightened security at the Villawood Detention Centre after receiving a report about the escapes.¹⁸

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Main Provisions

Although this Bill's provisions largely replicate proposed sections 252A-252F in the No. 1 Bill, for ease of reference the provisions will be described again in this Digest. Substantive differences between the strip searching regimes in the No. 1 and No. 2 Bills will be highlighted.

Definition

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

Such searches can be conducted without a warrant [**new subsection 252A(1)**].

Purpose of a strip search

The purpose of a strip search is to determine whether a detainee has a hidden weapon or thing which is capable of inflicting bodily injury or assisting an escape [**new subsection 252A(1)**].

Applying for a strip search authorisation

An 'officer' seeking a strip search authorisation must suspect on reasonable grounds that:

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

Under the Migration Act, 'an officer' means a Department of Immigration and Multicultural Affairs (DIMA) officer, a Customs or Australian Protective Services officer, a police officer or a person authorised by the Minister under subsection 5(1) of the Act. Persons who have been authorised by the Minister include employees of Australasian Correctional Management Pty Ltd¹⁹ and other companies.²⁰

Who can authorise a strip search and on what grounds?

The No. 1 Bill provided that a strip search could be authorised by an authorised SES²¹, an acting SES DIMA employee, or an authorised DIMA employee.²²

The No. 2 Bill makes a number of changes to the authorisation provisions:

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- first, only the Secretary or acting Secretary²³ of DIMA, an SES Band 3 DIMA employee or acting Band 3 employee can authorise a strip search [**new paragraph 252A(3)(c)** and **new subsection 252A(8)**]. The DIMA's *Annual Report* for 1999-2000 shows that at 30 June 2000 there was one SES Band 3 employee in the Department.²⁴
- second, this power cannot be delegated [**new subsection 252A(6)**].

The authorising officer must be satisfied that there are reasonable grounds for the suspicions held by the 'officer' making the application [**new paragraph 252A(3)(c)**].

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

Conducting a strip search

If the application and authorisation preconditions are met, a strip search may be conducted by an 'authorised officer' without a warrant [**new subsection 252A(1)**]. The expression 'authorised officer' is defined in subsection 5(1) of the Migration Act in the following way: '[authorised officer] when used in a provision of this Act, means an officer authorised in writing by the Minister or the Secretary for the purposes of that provision'. Such a person might include an immigration detention centre guard who is appropriately authorised under the Migration Act.

Record keeping

The strip search authorisation must be recorded in writing and signed by the person giving the authorisation within one 'business day'²⁵ of the authorisation being given [**new subsection 252A(4)**]. However, failure to comply with these requirements does not invalidate the search [**new subsection 252A(5)**].

General rules for conducting a strip search

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

- must not subject the detainee to more indignity than is reasonably necessary²⁶
- must be conducted in a private area²⁷
- cannot involve a search of the detainee's body cavities²⁸
- must not involve the removal of more clothing or more visual inspection than is reasonably necessary²⁹

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- must not be conducted with greater force than is reasonably necessary.³⁰

An additional requirement contained in the No. 2 Bill is that a strip search of a competent adult detainee must be conducted in the presence of a nominee of the detainee—if that person is ‘readily available at the same place as the detainee, and willing to attend the strip search within a reasonable time’ [**new paragraph 252B(1)(h)**]. However, a detainee’s failure or refusal to nominate a person or their inability to nominate a person who can attend does not prevent a strip search being carried out [**new subsection 252B(4)**].

Special rules relating to minors, ‘incapable’ persons, and gender

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

Detainees aged less than 10 years cannot be strip searched.³¹ For detainees aged 10 years but under 18 years, or detainees who are incapable of managing their own affairs, the strip search must be conducted in the presence of the person’s parent or guardian (if at the detention centre and available) or another person who is independent, able to represent the detainee’s interests and acceptable to the detainee.³²

With certain exceptions, a strip search must be conducted by an authorised officer who is the same sex as the detainee.³³ It must not be carried out in the presence or view of a person of the opposite sex to the detainee—unless that person is a parent, guardian or person representing the detainee’s interests.³⁴ An authorised officer can be assisted in carrying out the strip search by another person.³⁵ The person assisting cannot be a person of the opposite sex to the detainee, unless the person is a doctor and a doctor of the same sex is not available within a reasonable time.³⁶

Immunities

New subsection 252B(6) provides immunity against criminal or civil liability for a person who is asked to assist in a strip search and does so in good faith and within the parameters of **new section 252B**.

Provision of clothing

New subsection 252B(7) requires a detainee to be provided with adequate clothing if his or her garments are damaged, destroyed or retained as a result of the strip search.

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Retention of items found during a strip search

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

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

Under **new subsections 252E(1) and (2)** a magistrate may grant the application and, if so, must specify time period for the retention of the thing.

New subsections 252E(3) and (4) are designed to address any separation of powers issues that could arise when a magistrate who otherwise exercises federal judicial power carries out a non-judicial function—in this case, when making an order for the retention of an item seized during a strip search. They do so by providing that the magistrate's power is exercised voluntarily and in a personal capacity.³⁷

Immigration detainees held in State or Territory correctional institutions

If a detainee is held in immigration detention in a State or Territory prison or remand centre, any laws of the relevant State or Territory relating to personal searches apply to that detainee and displace new section 252A [**new subsection 252A(1)** and **new section 252F**].

Concluding Comments

Readers of this Digest are referred to the Concluding Comments in *Bills Digest No. 131 of 2000-2001* for a discussion of issues such as duty of care and legislating for the strip searching of immigration detainees. While there are changes in the No. 2 Bill, those comments remain generally relevant.

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Endnotes

- 1 See, for example, 'Government moves to beef up immigration security with new laws', *AAP* reported in *Australian Current Law News*, 5 April 2001, 'Ruddock's heavy hand will make detention centre conditions worse', *Australian Democrats Media Release*, 5 April 2001, 'Child detainees to be strip searched', *Sydney Morning Herald*, 6 April 2001, 'Ruddock pushes law to strip-search detainees', *The Age*, 6 April 2001, 'Crackdown on detainees', 6 April 2001, 'Philip Ruddock discusses current immigration issues', *Sunday Sunrise*, 8 April 2001, 'Cycle of violence among refugees', *The Age* (editorial), 9 April 2001, 'Labor vows to block strip search moves', *Sydney Morning Herald*, 25 May 2001,
- 2 Hon. P Ruddock MP, Minister for Immigration and Multicultural Affairs, House of Representatives, *Parliamentary Debates (Hansard)*, 21 June 2001, p. 28367.
- 3 *Migration Legislation Amendment (Immigration Detainees) Act 2001*, No. 85, 2001.
- 4 House of Representatives, *Parliamentary Debates (Hansard)*, 27 June 2001, p. 28645.
- 5 *ibid.*
- 6 'Seeking shelter in an inhospitable land', *Financial Review*, 8 June 2001; 'Detainees charged over detention centre riot', *Australian Immigration Media Release, DPS 18A/2001*, 26 May 2001.
- 7 'Amnesty attacks human rights record', *The Age*, 31 May 2001; 'Reputation at historic low. Australia under fire over human-rights abuses', *Canberra Times*, 31 May 2001; 'Amnesty International Report on Australia', *Philip Ruddock MP News Room*, MPS 068/2001, 31 May 2001.
- 8 'Disturbance at Curtin Detention Centre', *Australian Immigration Media Release, DPS 19/2001*, 2 June 2001.
- 9 'Detainees abscond from Woomera Detention Centre', *Australian Immigration Media Release, DPS 20/2001*, 10 June 2001.
- 10 <http://www.apf.gov.au/house/committee/jfad/IDCVisits/IDCindex.htm> (current at 1 August 2001).
- 11 'UNHCR goes up against Govt in plight of refugees', *7:30 Report*; 19 June 2001; 'Don't kick refugees just to score points' (by Ruud Lubbers, UN High Commissioner for Refugees), *The Australian*, 20 June 2001; 'Australia in the dock over its treatment of refugees', *Sydney Morning Herald*, 9 July 2001; 'UN should fix itself before criticising, says Ruddock', *Sydney Morning Herald*, 10 July 2001.
- 12 'Improvements in immigration detention', *Philip Ruddock MP, News Room, MPS 093/2001*, 9 July 2001. And see Philip Flood AO, *Report of Inquiry into Immigration Detention Procedures*, February 2001.
- 13 'Detention contract up for grabs', *Financial Review*, 13 July 2001.
- 14 '23 escape from immigration detention', *Australian Immigration Media Release, DPS 27/2001*, 19 July 2001; 'Villawood escapes', *Sydney Morning Herald* (editorial), 24 July 2001.

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- 15 'The refugee breakout. Ruddock reviews detention firm', *The Australian*, 23 July 2001.
- 16 *ibid*; 'Ruddock's fury at second mass breakout', *Sydney Morning Herald*, 23 July 2001; 'Transcript. Villawood escapes—23 through fence', *News Conference at Villawood, 12 midday, 22 July 2001*, Hon P. Ruddock MP.
- 17 'Ruddock rejects calls for more services in wake of detention centre death', *The Canberra Times*, 28 July 2001; 'Another tragedy in Australia's detention centres', Senator Andrew Bartlett, *Media Release*, 27 July 2001.
- 18 'Tighter security for Villawood detention centre', *Canberra Times*, 1 August 2001; 'Escapes force detainee controls', *The Age*, 1 August 2001; 'Curfews in Villawood clampdown', *The Australian*, 1 August 2001.
- 19 See, for example, *Commonwealth of Australia Gazette* No. GN 22, 7 June 2000 and *Commonwealth of Australia Gazette* No. GN 28, 19 July 2000.
- 20 See, for example *Commonwealth of Australia Gazette* No. GN 22, 7 June 2000 authorising a number of employees of Pacific Rim Employment Pty Ltd to be officers for the purpose of the Migration Act. Pacific Rim Employment Pty Ltd is a wholly owned subsidiary of Wackenhut Corrections Corporation.
- 21 Senior Executive Service.
- 22 See paragraph 252A(3)(c) of the No. 1 Bill.
- 23 *Public Service Act 1999* and *Acts Interpretation Act 1901*.
- 24 See Appendices 2 and 3.
- 25 The expression 'business day' is defined as a day that is not a Saturday, Sunday or public holiday in the place where the authorisation is given [**new subsection 252A(8)**].
- 26 **New paragraph 252B(1)(a)**.
- 27 **New paragraph 252B(1)(b)**.
- 28 **New paragraph 252B(1)(i)**.
- 29 **New paragraph 252B(1)(j)**.
- 30 **New paragraph 252B(1)(k)**.
- 31 **New paragraph 252B(1)(f)**.
- 32 **New paragraph 252B(1)(g)**.
- 33 **New paragraph 252B(1)(c)**.
- 34 **New paragraphs 252B(1)(d) and (g) and new subsections 252B(2) and (3)**.
- 35 **New subsection 252B(5)**.
- 36 **New subsection 252B(5)**.
- 37 These provisions respond to High Court decisions such as *Grollo v. Palmer* (1995) 184 CLR 348.

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