Appendix 3

Correspondence

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MS17-002503

Mr Ian Goodenough
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
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Dear Mr Goodenough Ian

I thank the Parliamentary Joint Committee on Human Rights for its consideration of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the Bill).

The Bill introduces important measures to further protect the community from the dangers of child sex offenders by targeting all aspects of the child sex offender cycle—from commission of the offence through to bail, sentencing and post –release options.

I am pleased to offer the response at **Attachment A** to the questions raised by the Committee in its *Report 11 of 2017*.

The relevant adviser for this matter in my office is Talitha Try who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Response to a request from the Parliamentary Joint Committee on Human Rights for information in relation to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Mandatory minimum sentencing

How mandatory minimum sentencing is effective to achieve its stated objective

The introduction of mandatory minimum sentencing for the most serious Commonwealth child sex offences and for repeat child sex offenders is central to achieving the Bill's objectives of protecting the community, adequately reflecting the harm inflicted on victims and ensuring that sexual predators receive a sentence that is commensurate to the severity of their offences. Addressing the current disparity between the seriousness of child sex offending and the lenient sentences handed down by courts is at the core of the Bill. The measures, including mandatory minimum sentences, advance the principles underpinning the Convention on the Rights of the Child and implement obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography to criminalise child sexual abuse and apply appropriate penalties that reflect the grave nature of those crimes. These measures are designed to protect the rights of children, in particular the right of children to be protected from sexual abuse.

The Government considers that mandatory minimum sentences should be used only rarely and reserved for the most serious offences. Mandatory minimums are already in place for terrorist offenders and people smugglers, and the Government is firmly of the view that—with the safeguards set out in the Bill—the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.

Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring that serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

Whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:

why the exercise of judicial discretion is inappropriate or ineffective

Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning the majority of convicted offenders

are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just 6 months.

Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to stand as a yardstick for the courts in applying more appropriate penalties for Commonwealth child sex offences. The appropriateness of Parliament setting minimum sentences in addition to maximum penalties has been upheld by the High Court.

whether less rights restrictive alternatives are reasonably available
The mandatory minimum sentencing scheme provides the courts with enough discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes.

the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances
The safety and protection of children is the Government's paramount concern. Individuals convicted of serious child sex offences or who are repeat offenders deserve to spend time in jail for their offences. This protects the community by ensuring that these offenders receive significant penalties and that they are removed from the streets.

The Government understands that sentencing decisions involve the careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing scheme includes mechanisms for courts to retain appropriate discretion in determining the most suitable sentence in each individual case.

Additionally, under Commonwealth law, courts have the discretion to determine the appropriate treatment of people with cognitive disability or mental impairment in the criminal justice system. Mental impairment is defined in the Criminal Code Act 1995 (Criminal Code) as including senility, intellectual disability, mental illness, brain damage and severe personality disorder. These protections have not been limited by the Bill.

the scope of judicial discretion maintained by the measures
The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

If Mandatory Minimum Sentencing is maintained, whether the bill could be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence

The introduction of the mandatory minimum sentencing scheme provides direction to the courts in relation to sentences for serious child sex offences. Importantly, the mandatory minimums are not intended to be seen as a suggested penalty but rather as a floor for penalties. The courts should exercise their discretion with regard to the both the minimum and maximum penalty for an offence and determine a sentence of a severity appropriate in all the circumstances of the case.

With the exception of a limited number of offences (such as terrorism, treason and espionage), the Crimes Act 1914 does not prescribe how a non-parole period should be determined. Furthermore, there is no common law principle requiring a judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period.[1] As such, there is no need to amend the Bill in the manner suggested.

Whether mandatory minimum sentencing is compatible with the right to have a sentence reviewed by a higher court under Article 14(5) of the ICCPR

The mandatory minimum sentencing regime set out in the Bill does not impact on the right to have a sentence reviewed by a higher court. All avenues of appeal remain available. Nor do the reforms impact the current requirement for the courts to consider all the circumstances, including the sentencing factors listed in section 16A of the Crimes Act 1914, when fixing a non-parole period. Additionally, although the Bill introduces mandatory minimums for certain child sex offences in respect of the head sentence, the courts will exercise discretion over the non-parole period. It is therefore not the case that appellate courts would have nothing to review.

Conditional release of offenders after conviction

Whether the presumption in favour of a term of actual imprisonment is effective to achieve its stated objective

Yes, as the intention is to increase imprisonment of child sex offenders. Additionally, the presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.

The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

[1] Hili v The Queen; Jones v The Queen [2010] HCA 45

Whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:

why the exercise of judicial discretion, by judges who have experience in sentencing, is inappropriate or ineffective in achieving the stated objective
As discussed above, the issuing of wholly suspended sentences for child sex offenders has resulted in sentences that do not adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment allows courts to consider all the circumstances when setting the pre-release period under a recognizance release order.

whether less rights restrictive alternatives are reasonably available
This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

whether there are adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances
Please refer to the response above which equally applies in this instance.

what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognizance order and what is the scope of judicial discretion maintained by the measure
'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

Presumption against bail

Whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective and how the measure is effective to achieve its stated objectives

Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and repeat offenders. The presumption against bail for this cohort of the most serious child sex offenders is a necessary and effective crime prevention measure for a crime that targets our children.

Whether the limitation on the right to release pending trial under Article 9(3) of the ICCPR is a reasonable and proportionate measure to achieve the stated objective including:

why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure

The measure does not remove the current balancing exercise undertaken by bail authorities and the courts. Rather, the measure puts the responsibility on a person charged with a child sex offence to demonstrate to the court that circumstances exist to grant bail. It is appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail. This is particularly the case for Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect.

whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail)

The Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this on its own has not proven to be sufficient to protect the community.

the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances

The presumption against bail is rebuttable and provides judicial discretion determining whether a person's risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption, which is not limited to specific criteria.

advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail

The Bill does not require there to be 'exceptional circumstances' to justify bail. Rather, the person charged or convicted of the child sex offence will need to satisfy the court that circumstances exist to grant bail. The presumption was deliberately not defined by reference to specific criteria to ensure that appropriate discretion is retained and that the courts can take individual circumstances into account.

Power to restrict information provided to offenders with respect to national security grounds

How the measure is effective to achieve its stated objective

The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 1B of the Crimes Act.

It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the

community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.

A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. In practice, the measures are likely to only apply to offenders with terrorist links. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the community—could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

Whether the limitation on the right to a fair hearing under Article 14 of the ICCPR is reasonable and proportionate measure to achieve the stated objective including:

the inability of affected individuals to contest or correct information on which the refusal of parole is based

The reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions, including those which are refused on national security grounds, are subject to judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

the absence of any standard against which the need for confidentiality of information is independently assessed or reviewed and whether a decision to withhold information on the basis that it prejudices national security could be based on objective criteria

The agency that has provided the information–such as the AFP or ASIO –will advise the Attorney-General or a delegate as to whether information is likely to prejudice national security. The Attorney-General would make his assessment based on this advice and the circumstances of the case.

whether there are less rights restrictive approaches which are reasonably available

A parole decision is an administrative decision that is made having regard to a range of matters that are listed in section 19ALA of the *Crimes Act 1914*. The decision of the Attorney-General is appealable and subject to review in the Federal Court. Once before a court, the ordinary rules of evidence in relation to a civil proceeding will apply. Proposed section 22B in the Bill is restricted to parole decisions made under Part IB of the *Crimes Act 1914* and will not bind a court reviewing the decision of the Attorney-General.

Reverse burden offence

Whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law; how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the Criminal Code to

criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:

- the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
- the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
    - the sender, or
    - a participant who is, or who the sender believes to be, at least 18 years of age; or
    - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
- the child was under 16, or the sender believed the child was under 16.

Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.

Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.

The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant believes the child is under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in

conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

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MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-003838

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Dear ~~Mr~~ Ian Goodenough

Thank you for your letter of 18 October 2017 in which further information was requested on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

My response to your request is attached.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 02/11/17

Parliamentary Joint Committee on Human Rights
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Prohibiting items in relation to persons in immigration detention and the immigration detention facilities

Compatibility of the measure with the right to privacy

Committee comment

1.83 The preceding analysis raises questions whether the prohibition of certain items, including mobile phones, from immigration detention facilities, is compatible with the right to privacy.

1.84 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on the right to privacy, in particular:

- whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective for the purposes of international human rights law; and
- whether the measure is accompanied by adequate safeguards to protect against arbitrary application (including whether the minister's state of satisfaction when determining whether an item is to be prohibited must be 'reasonable' or that the risk arises in relation to all detainees).

Response

There are seven key immigration detention values that guide and drive immigration detention policy and procedures. Two of these values articulate that people in detention will be treated fairly and reasonably within the law, and the conditions of detention will ensure the inherent dignity of the human person.

Removing things such as mobile phones from the Immigration Detention Network (IDN) altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees, staff and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, 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. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff.

The proposed amendments provide a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees.

Detainees are afforded a variety of communication channels in private settings within immigration detention facilities. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with the strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are

delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

Safeguards

The Department of Immigration and Border Protection (the Department) uses an intelligence led, risk based approach to focus on mitigating the risks, including security risks, posed by the complex composition of the detention network. The Department has implemented a broad suite of program management initiatives aimed at defining its objectives and associated program requirements, in order to sufficiently identify emerging issues before they impact negatively on the IDN. These initiatives include the development and implementation of a risk management framework designed specifically to identify and counter associated risks. The Onshore Immigration Detention Network Risk Management Framework provides a range of tools, including a centrally administered national risk register that enables a standardised approach to both strategic and operational risk assessment and reporting.

As part of the process of identifying emerging issues, the Department monitors detention population and capacity, incident analysis trends, intelligence reports and other statistics to support assessment of risks and associated decisions, as part of due diligence business processes. Sitting under the national risk framework, tactical risk assessments are also conducted in relation to the implementation of new business policies or procedures.

Prior to making an item a 'prohibited thing' the Minister will need to be satisfied that possession of the thing is prohibited by law in a place or places in Australia; or possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility. This satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.

As the proposed amendments will enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities; the Minister will be able to respond quickly if operational requirements change or as emerging risks are identified. However, as the prohibition is by way of legislative instrument, any decisions by the Minister to prohibit an item will be open to scrutiny by Parliament thus providing an appropriate balance of transparency.

Compatibility of the measure with the right not to be subjected to arbitrary or unlawful interference with family

Committee comment

1.89 The prohibition of certain items, including mobile phones, from immigration detention facilities, engages and limits the right not to be subjected to arbitrary or unlawful interference with family.

1.90 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on this right, in particular whether the measure is the least rights restrictive way to achieve the stated objective. Information regarding the extent of access to landline telephones, internet access, access to facsimile machines and postal services (including any restrictions on access, and the privacy afforded to detainees when accessing) will assist in determining the proportionality of the measure.

Response

As outlined in the previous response, removing things such as mobile phones from the IDN altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, 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. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff. As such, it is view of the Government that prohibiting certain items to all detainees is the only way to implement such a measure without risking the health, safety or security of all persons in the facility. The proposed amendments provide a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees.

Detainees are able to access a variety of communication avenues to maintain contact with family. These include landline phones, internet, fax, post services and visits from community members. Landline phones, fax and post facilities are available 24 hours a day, seven days a week with no limits on access. Internet is available to detainees through a booking system, generally between the hours of 6 am to 11.59 pm. Each facility has different visiting hours, which are available on the Department's website.

Detainees are not required to lodge a request to use the landline phones, fax or post facilities. The booking system to access the internet is straightforward and there are no delays in this process. The application process for personal visits has a processing time of up to five business days. The application process for visits by legal representatives, agents or consular officials has a processing time of one business day. Visit applications are available via the Facilities and Detainee Services Provider (FDSP) and departmental websites.

Landline to landline calls are free of charge. An Individual Allowance Program is in place within detention facilities, allowing detainees to earn up to 60 points per week (one point equals one dollar). Detainees can use these points to 'purchase' phone cards for international and mobile calls, and postage stamps, all of which are charged at standard rates. Use of internet and fax facilities are all free of charge.

Detainees are able to access these communication channels in private settings. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

As a result of the extensive nature of the facilities provided to detainees and the availability and manner in which they are provided as detailed above, the Government is of the view that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation and does not amount to arbitrary or unlawful interference with family.

Compatibility of the measure with the right to freedom of expression

Committee comment
1.97 The right to freedom of expression is engaged and limited by the bill.

1.98 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on the freedom of expression, in particular whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

Response

As noted in respect to the previous response regarding arbitrary or unlawful interference with family, the Government is of the view that the extensive nature of the facilities provided to detainees, their open availability and the manner in which they are provided ensures that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation on the freedom of expression. The measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

Amend search and seizure powers in relation to prohibited things in relation to detainees and detention facilities

Compatibility of the measures with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and rights to humane treatment

Committee comment
1.109 The preceding analysis raises questions as to whether the proposed amendments to the search and seizure powers are compatible with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and right to humane treatment in detention.

1.110 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including the sufficiency of any relevant safeguards, whether strip searches to seize 'prohibited items' are only conducted when absolutely necessary, and any monitoring and oversight over the use of force by authorised officers).

1.111 In relation to the right to humane treatment in detention, the committee seeks the advice of the minister as to:

- the adequacy of the safeguards in relation to strip searches, in particular whether conducting strip searches to seize 'prohibited items' are conducted only when absolutely necessary; and
- whether there exists any monitoring and oversight over the use of force by authorised officers in section 252BA(6), including access to review for detainees to challenge the use of force.

Response

What protection provisions exist in the Migration Act?
In relation to the conduct of the searches of persons authorised by section 252, 252AA, 252A and 252G of the *Migration Act 1958* (the Migration Act), there are current provisions and a number of additional protections set out in the amendments that are designed to protect detainees (including those who are victims of torture and trauma) and their property.

It should be noted that the occurrence of strip searches under section 252A are extremely rare. It is also clearly stated in departmental operating procedures that strip searches are a

measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures - such as walk-through devices, hand-held scanners or x-rays
- searching - such as a pat down search.

Current provisions

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

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

Additional protections

Additionally, the Bill seeks to introduce a number of provisions to protect detainees and their property. Section 252BA will provide additional protections in relation to detainees and their property to ensure that searches of immigration detention facilities under section 252BA do not subject the person to disproportionate force or indignity.

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

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

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

Detector dogs are specifically trained to find concealed things such as narcotics, and are routinely used at Australian international airports and seaports and mail centres. The dogs are trained to give a passive or "sit" response where they detect something or a pawing or scratching response to areas (but 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.

Use of Force

In some cases the use of force and/or restraint while in held immigration detention may be necessary in order to achieve lawful and operational outcomes in the IDN.

The Department has developed a set of principles that guide the application of use of force and/or restraint in the immigration detention environment. These principles ensure that any application of use of force or restraint used in immigration detention will not meet the threshold levels of severity of harm so as to be torture or cruel, inhuman or degrading treatment or punishment and are only used as a last resort. The principles set out that:

- conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
- reasonable force and/or restraint should only be used as a measure of last resort
- reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping immigration detention or destruction of property
- reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary. If the management of a detainee can be achieved by other means, force must not be used
- the use of force and/or restraint must not include cruel, inhumane or degrading treatments
- the use of force and/or restraint must not be used for the purposes of punishment
- the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
- the use of excessive force on a detainee may constitute an assault.

It is important to note that all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant reporting protocols.

Training

Officers authorised to carry out searches under sections 252AA and 252A will be subject to strict training and qualification requirements whether they are departmental officers, contracted staff, or any other person appointed as an authorised officer.

The Department currently expects and has stipulated in the FDSP contract that all service provider personnel are trained and instructed according to the specified contractual obligations. In addition, officers who manage security at an immigration detention facility, are required to hold at least a Certificate Level IV in Security Operations or Technical Security or equivalent and will have acquired at least five years of experience in managing security.

For authorised officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent or obtain a Certificate Level II in Security Operations within six months of commencement. The Department requires:

- the successful completion of the FDSP's mandatory induction training, which leads to staff being awarded the Certificate II in Security Operations
- that no officer will be placed in an immigration detention facility without this essential qualification.

The Certificate II in Security Operations includes the competency based unit 'CPPSEC2004B – Respond to security risks situations', the curriculum of which covers the knowledge and skills required for an authorised officer to use reasonable force. Security accreditation must be provided by a Registered Training Organisation and be delivered by a Level IV accredited trainer. The current FDSP is a Registered Training Organisation. Tier 1 and Tier 2 FDSP officers are also trained in 'CPPSEC2017A – Protect Self and Others using Basic Defensive Techniques', which is included as part of the required refresher training. Competency requires demonstration of ability to:

- apply basic defensive techniques in a security risk situation
- use basic lawful defensive techniques to protect the safety of the individual and others.

This training forms part of the licensing requirements for persons engaged in security operations in those States and Territories where these are regulated activities. This training, while not formally equivalent to police training, is similar to police and corrections training in so far as it includes control holds and other defensive measures, but training in strikes or use of impact tools is not required nor provided.

The FDSP contract requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force. In addition, all authorised officers will attend regular refresher training on the use of reasonable force in immigration detention facilities, the curriculum of which includes:

- legal responsibilities
- duty of care and human rights
- cultural awareness
- occupational health and safety
- mental health awareness
- managing conflict through negotiation
- de-escalation techniques.

In addition to these training requirement, any individual who is appointed as an authorised officer for the purposes of conducting a strip search under section 252A must satisfy the minimum training and qualification requirements, which include training in the following areas:

- cultural awareness
- the grounds for conducting a strip search
- the pre-conditions for a strip search
- the role of officers involved in conducting a strip search
- the procedures for conducting a strip search
- the procedures relating to items retained during a strip search
- record keeping
- reporting.

As outlined in the Explanatory Memorandum to the Bill, officers authorised to use dogs for searches under section 252AA and 252A will also be required to undergo specific training in relation to handling dogs to ensure they keep the dog is prevented from touching any person and is kept under control for the duration of the search.

Oversight and assurance processes
There are laws, policies, rules and practices that govern the treatment of people in the IDN, and the length and conditions of immigration detention are subject to regular internal and external review.

Internal
Internal oversight processes help to care for and protect people in immigration detention and to maintain the health, safety and wellbeing of all detainees.

The Department has a number of internal assurance processes, including the Detention Assurance team and Internal Audit.

The Detention Assurance team is part of the Department's corporate Integrity, Security and Assurance function, and operates independently of immigration detention management. Detention Assurance works with stakeholders to ensure continual improvement in our immigration detention processes. It strengthens assurance and integrity in the management of detention services, including the operations delivered by Australian Border Force.

The work of Detention Assurance forms part of the Department's broader assurance activities, and provides confidence that the Department is able to achieve its strategic, operational and tactical objectives fairly and effectively. The Detention Assurance function reviews allegations or incidents within the IDN.

In addition to the work of Detention Assurance, internal audits are undertaken to determine the effectiveness of the detention control framework and decision-making processes and reported to the Department's audit committee.

External
The Department, including the Australian Border Force, works with independent external bodies, the Minister's Council on Asylum Seekers and Detention (MCASD), the Commonwealth Ombudsman and the Australian Human Rights Commission, to provide regular access to immigration detention facilities to allow for review of the management of these facilities.

The members of MCASD are drawn from the community and appointed by the Minister for Immigration and Border Protection, for their expertise. The Council gives independent advice to the Minister about policies, processes, services and programmes relating to asylum seekers and immigration detention. MCASD conducts regular meetings at immigration detention facilities with detainees and members of the community and reports back to the Minister and the Department.

The Commonwealth Ombudsman undertakes regular oversight inspections of immigration detention facilities and provides feedback to the Department about any areas of concern they identify as well as providing suggested improvements.

The Australian Human Rights Commission investigates and resolves complaints about alleged breaches of human rights in immigration detention. If a complaint is not resolved, the President of the Australian Human Rights Commission may decide to hold a public hearing to ascertain whether a breach of human rights has occurred. Should the President be satisfied that a breach of human rights has occurred, it will be reported to the Federal Attorney-General. In this report, the President can make recommendations about how to resolve the issues raised. This report is tabled in Parliament.

Immigration detainees are advised about these agencies during their induction program when they arrive at an immigration detention facility and advised about how to contact them.

The Australian Red Cross also visits immigration detention facilities. They monitor the conditions of detention and the treatment of people within the network, and offer services to restore family links.

Complaints management processes
Complaints and feedback are integral to the continuous improvement process for the Department and its contractors. Complaints might come from a number of sources, including detainees, visitors, departmental staff and contractors.

Detainees have a right to lodge a complaint or provide feedback on any aspect of their immigration detention without hindrance or fear of reprisal. To that end, the FDSP is required to have in place a complaints management system to manage complaints or feedback from detainees as well as members from the community and other stakeholders.

Detainees are also able to make complaints directly to the Commonwealth Ombudsman, the Australian Human Rights Commission, the police and state / territory child welfare authorities.

All complaints are investigated and a written response provided to the complainant.

The Government is committed to ensuring that all people in administrative immigration detention are not subjected to harsh conditions, are treated fairly and reasonably within the law, and are provided with a safe and secure environment.

The Government is of view that this balance of internal and external oversight and complaint mechanisms ensures the measure is compatible with the prohibition on torture, or cruel, inhuman and degrading treatment or punishment

Compatibility of the measures with the right to bodily integrity

Committee comment
1.118 The committee seeks the advice of the minister as to whether the limitation on the right to bodily integrity is proportionate, in particular whether the power to conduct strip searches to locate and seize a 'prohibited item' is the least rights restrictive measure available, and whether the power to conduct a strip search is appropriately circumscribed.

Response

For the same reasons noted in the response to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the Government is of the view that the limitation on the right to bodily integrity is proportionate. The power to conduct a strip search currently exists under section 252A of the Migration Act and importantly, strip searches conducted under section 252A will remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that a strip search of a detainee under section 252A:

- must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search
- must be conducted in a private area
- must be conducted by an authorised officer of the same sex as the detainee
- must not be conducted on a detainee who is under 10

- must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- must not involve a search of the detainee's body cavities
- must not be conducted with greater force than is reasonably necessary to conduct the strip search.

Compatibility of the measures with the rights of children

Committee comment
1.121 The preceding analysis raises questions as to whether the bill is compatible with the rights of the child.

1.122 The committee seeks the advice of the minister as to whether the amended search and seizure powers (in particular the power to strip search) are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child.

Response

The Government has made significant efforts to ensure children are no longer in immigration detention. The Government is of the view that the amended search and seizure powers, with their associated internal and external oversight mechanisms are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child. The amended search and seizure powers seek to reduce the risk to the health, safety and security of persons in the facility, or the order of the facility and complements the strip search powers currently in the Act.

While the power to strip search a person between 10 and 18 years of age remains, the search can only occur by power of a Magistrate. It is clearly stated in departmental operating procedures that strip searches are a measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures - such as walk-through devices, hand-held scanners or x-rays
- searching - such as a pat down search.

Strip searches under section 252A will also remain subject to rules currently set out at section 252B, which include (but are not limited to) that a strip search of a detainee under section 252A:

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

The Department has also developed 'The Child Safeguarding Framework' (the framework) which provides the blueprint for how the Department will continue to build and strengthen its policies, processes and systems to protect children in the delivery of all relevant departmental programmes, and asserts the pre-eminence of 'the best interests of the child' as a key consideration in decision-making processes that affect minors.

The framework clearly establishes the Department's expectations of staff and contracted service providers, who engage, interact and work with children. It outlines high-level actions and strategies that the Department and our contracted service providers will take to provide a safe environment for children and their families within the existing legislative and policy parameters. The policy requires that a departmental officer or contracted service provider must immediately report a child-related incident to their supervisor and the Department's Child Wellbeing Branch, in accordance with local operating procedures and within the relevant departmental system.