



The Hon Alan Tudge MP

Minister for Population, Cities and Urban Infrastructure
Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Ref No: MS20-001239

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator,

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 11 June 2020 in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

The Committee has requested further information on a number of issues in relation to the Bill in its *Scrutiny Digest 7 of 2020*.

Please find my detailed response to the additional questions posed by the Committee below at Attachment A.

Thank you for bringing this matter to my attention.

Yours sincerely

Alan Tudge

7/1/8/2020

Attachment A

Question 1 – Personal rights and liberties

The committee therefore requests the minister's more detailed advice regarding why it is necessary and appropriate to broadly extend powers for the search and seizure of items in immigration detention facilities, including by allowing the use of force, noting that doing so may trespass on the personal rights and liberties of all detainees, including those detainees that are not 'higher risk' and have never been convicted of an offence

Answer

I consider the safety, security and well-being of all people in immigration detention facilities as well as staff working in Immigration Detention Facilities a high priority.

Controlled drugs are being introduced to detention facilities by visitors, through mail, in person, or by throwing items over the fences of the facilities. Mobile phones have been used to coordinate escape efforts, to bring drugs into detention facilities, and organise criminal activity including the grooming of children by sexual predators. Detainees have also used phones to post photos and videos of staff on social media. These have identified staff and include threatening and defamatory allegations.

The Bill clarifies and enhances the power in the Migration Act to manage the increasing prevalence of illegal and anti-social behaviour in immigration detention facilities. The presence of controlled drugs and other contraband such as mobile phones poses a risk to the health, safety, security and order of the immigration detention network.

I consider that the greater security of the immigration detention facility environment and persons in them that these amendments provide for are necessary to appropriately manage these risks, especially given that current search and seizure powers are limited in their ability to manage these risks. Currently in relation to searches (including strip searches) of persons detained in Australia, the Department can only search for a weapon or other thing capable or being used to inflict bodily injury, or to help the person to escape from immigration detention; not any other things that may facilitate criminal activities.

If the Bill were to pass, the powers would also ensure that authorised officers can also search for and seize things that are concealed with no intention to hide them, or that are visible, in addition to things that are intentionally concealed.

I am not proposing the introduction of a blanket ban on mobile phones in detention. Detainees who are not using their mobile phones for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility would be able to retain their mobile phones under the proposed policy approach.

Across immigration detention facilities, detainees have access to 227 landline phones and 242 computers with internet.

The Bill does not prohibit the possession of goods by detainees or in detention centres. The Bill only creates the category of goods that are prohibited things, which can then, in the exercise of discretion, be searched for and seized by authorised officers. Therefore, there is no prohibition on the possession of prohibited things that applies to all detainees. In the exercise of discretionary search and seizure powers, the focus will be on whether the possession of such a thing by an individual detainee poses any risk.

For the reasons set out above, I do not consider that these amendments will unduly trespass on personal rights and liberties of all detainees.

Question 2 – Significant matters in delegated legislation

The committee requests the minister's more detailed advice as to:

- *why it is considered necessary and appropriate to allow the minister to determine, by legislative instrument, what things are to be prohibited in immigration detention facilities; and*
- *whether the bill can be amended to include additional high-level guidance regarding when the power in subsection 251A(2) may be exercised, including providing a definition for 'order of the facility'.*

Answer

The Bill is designed to mitigate risks across the Immigration Detention Network (IDN) and a legislative instrument is the appropriate means to ensure public accountability, transparency and consistency is maintained across the IDN. It is anticipated that the Bill will maintain and assure the safety of all cohorts within Immigration Detention Facilities.

A significant percentage of the current IDN cohort have criminal histories or have been convicted of criminal offences in Australia and are pending removal from Australia. There is significant risk associated with this cohort. As such, appropriate mitigation strategies need to be implemented to ensure they do not pose a risk to other detainees, staff employed by the Department of Home Affairs (the Department) or themselves.

Specific examples of mobile phones and other things being a risk to the health, safety or security of persons in the facility or to the order of the facility include:

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

- A detainee downloads extremist material on his iPad and is showing it to other detainees. The ABF is powerless to confiscate the detainee's iPad.
- ABF officers see a visitor hand over a bag containing a white substance to a detainee. The detainee places the bag in his pocket. The ABF is powerless to search the detainee for the suspected drugs.
- A detainee uploads a photo to social media of a contracted medical officer falsely accusing her of criminal acts. The comments on the post include abusive and violent messages towards the medical officer. The ABF is powerless to remove the detainee's internet enabled devices.

The examples set out above highlight the need for me to have the ability to determine things to be prohibited things where I am satisfied that possession or use of the thing might be a risk to the health, safety or security of persons in an immigration detention facility or to the order of an immigration detention facility. A legislative instrument provides me with greater flexibility and immediacy to determine a thing as prohibited thing as issues are identified and will be done in a considered and responsible way.

Question 3 – Broad discretionary powers

The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to provide the minister with broad discretionary powers to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when the powers may be exercised.

Answer

The exercise of the powers in the Bill by officers will be guided by the Department's operational policy framework. This framework provides detailed guidance on the powers available to officers under the Migration Act 1958 (Migration Act), how and when those powers should be utilised, and record keeping and reporting requirements

The Bill proposes to provide the power for me to direct officers to seize certain prohibited items from detainees in prescribed circumstances, which will override the exercise of the discretion by authorised officers. It is expected that this power will only be exercised in relation to the most serious circumstances, where there is no question that it is appropriate that things should be seized from detainees. For example, convicted child sex offender who is looking at child abuse material on his phone in plain sight.

A non-disallowable instrument provides my Department with greater flexibility and immediacy to update directions as issues are identified and will be done in a considered and responsible way. The delegation is held at a Ministerial level to provide proper parliamentary scrutiny.

Question 4 – Significant matters in delegated legislation

The committee therefore requests the minister's advice as to:

- *who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to exercise coercive powers and whether these will include non-government employees;*
- *why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such persons are to be appointed; and*
- *what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised officers and assistants.*

Answer

The established authorisation process of authorised officers under section 5 of the Migration Act will continue to ensure that an appropriate level of control is applied to determine who is an authorised officer. Under this section an authorised officer is a person authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of the relevant provision.

The Migration Act already provides for 'other persons' or authorised officers' assistants to perform certain roles. The Bill would provide for additional powers under Subsection 252BB that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties. This would be if the assistance is necessary and reasonable and for the purposes of a search under section 252BA or in relation to seizing and retention of things found in the course of a screening process or search under sections 252C, 252CA and 252CB. The assistant must exercise these powers in accordance with any directions given by the authorised officer. By including the wording 'necessary and reasonable' this restricts the use of officers' assistants to situations where such assistance is necessary to ensure the authorised officer can carry out their powers, functions or duties.

The current Facilities and Detainee Services Contract (Serco) requires that training is provided by a Registered Training Organisation and delivered by a level IV accredited trainer, covering the proper exercise of these duties. Persons completing this training are issued with a certificate that demonstrates that the person has the competencies required to exercise the power.

Officers authorised to carry out strip searches of detainees will be subject to satisfying training and qualification requirements in the following areas:

- civil rights and liberties
- 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.

Officers authorised to use detector dogs for searches will also be required to undergo specific training in relation to handling detector dogs to ensure the dog is prevented from touching any person and is kept under control for the duration of the search.