



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS17-004215

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 16 November 2017 in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

The Committee has requested further information on a number of issues in relation to the Bill in its Digest 13 of 2017. This information is in addition to the responses that I provided in my letter dated 2 November 2017 to the Committee's queries in its Digest 12 of 2017.

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

PETER DUTTON

27/11/17

Attachment A

Question 1 – Significant matters in delegated legislation

The committee seeks the Minister's detailed justification as to the appropriateness of exempting from the usual parliamentary disallowance process a legislative instrument made by the Minister prohibiting possession of any 'thing' in an immigration detention facility (such as mobile phones or food).

Answer

The legislative instrument, made under new section 215A to be inserted into the *Migration Act 1958* by the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the Bill), containing the list of prohibited things will be tabled in both Houses of Parliament for scrutiny. However, as the instrument falls within the Migration Act exemptions under the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation), it will not be disallowable.

Section 10, table item 20, of the Regulation provides that an instrument (other than a regulation) made under Part 1, 2 or 9 of the Migration Act is not subject to disallowance. As such, the exemption applies to all instruments made under Part 2 of the Migration Act. New section 215A falls within Part 2 of the Migration Act and is therefore captured by the exemption. As a result of the operation of the Regulation the legislative instrument listing prohibited things will not be disallowable.

As noted in my previous response to the Committee, it is necessary and appropriate for the Minister to determine things to be prohibited by legislative instrument as this will enable the Department of Immigration and Border Protection (the Department) to respond quickly and flexibly to emerging threats to the health, safety or security of all persons in an immigration detention facility and maintain the order of these facilities. The satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.

The legislative instrument is appropriate and will remain the subject of extensive internal and external scrutiny.

For the reasons set out above, I consider that it is appropriate that the list of prohibited things is set out in a non-disallowable legislative instrument.

Question 2 – Broad delegation of administrative power

The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the Acts Interpretation Act 1901).

Answer

I support the Committee's comments as to the importance of the Explanatory Memorandum as a point of access to understanding the Bill and as a key tool to assist in its interpretation. I consider that the Explanatory Memorandum as tabled on the introduction of the Bill in the House of Representatives on 13 September 2017 adequately and appropriately addresses the key information that I provided to the Committee in my previous letter of response dated 2 November 2017.

Question 3 – Broad delegation of administrative power

The committee considers that, from a scrutiny perspective, it would be appropriate for the bill to be amended to, at a minimum, require that authorised officers and any person assisting possess specified skills, training or experience.

Answer

As noted in my previous response, authorised officers conducting searches in immigration detention facilities will be subject to strict training and qualification requirements whether they are departmental officers or non-government employees.

As the Committee is aware, under section 5 of the Migration Act to be an authorised officer a person must be authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of the relevant provision. This authorisation process ensures that an appropriate level of control is applied to determine who is an authorised officer. I reassure the Committee that only persons who possess the specified skills, training or experience necessary to perform the duties required under the relevant provisions of the Migration Act will be appointed as authorised officers.

On that basis, I do not consider it necessary to amend the Bill to include this as an express statutory requirement.

For the purpose of the Bill, any person assisting an authorised officer would provide this assistance on the basis that they have specialised skills that the authorised officer does not possess, making this assistance necessary and reasonable. As also noted in my previous response to the Committee, an example of such assistance would be if a locksmith is required on a one-off basis to unlock a door within an immigration detention facility in order to facilitate a search of that premises. The Bill does not require that an "authorised officer's assistant" be appointed – they will be deployed as and when their skills are required in accordance with new section 252BB. As such I also do not consider it necessary to amend the Bill to require any person assisting an authorised officer to possess specified skills, training or experience.