Australian Government

Department of Immigration and Border Protection

Questions on Notice

Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions].

Senate Legal and Constitutional Affairs Legislation Committee.

Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions] Public Hearing - Friday, 27 October 2017 Questions on Notice	
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QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 27 October 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(*PIID/001*) – Inquiry - Prohibiting items in Immigration Detention - DIBP response to legal issues that were raised at the hearing -

Asked:

Ms de Veau: Chair, perhaps I could just take you up on your earlier invitation in relation to addressing some of the legal questions that might require a response. In the event that we don't have time to do that, can I perhaps have the liberty to provide, on notice, some responses on things that I think might require correction from a legal point of view, that were raised in other submissions?
CHAIR: I would prefer you to do that, in fairness to Senator Pratt; I want her to have up to 11.30. So, if you don't get the opportunity—
Senator PRATT: I have no questions on this, actually.
CHAIR: But if you don't get the opportunity, do it in writing, and I would appreciate that.

Answer:

Please find below some of the legal issues raised during the Senate Legal and Constitutional Affairs Legislation Committee hearing into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, which the Department seeks to clarify.

1. Will the Bill give the Department the ability to search private homes?

The Bill does not give authorised officers the power to search private homes.

As stated in the Explanatory Memorandum to the Bill new section 252BA “Searches of certain immigration detention facilities – general” provides a clear and express statutory power for an authorised officer to undertake a search of an immigration detention facility (IDF) operated by or on behalf of the Commonwealth. This power will only allow for searches of detention centres established under section 273 of the *Migration Act 1958* (the Migration Act) and facility-based Alternative Places of Detention (APODS) approved in writing by the Minister for the purposes of defining ‘immigration detention’ for subparagraph 5(1)(b)(v) of the Migration Act. Section 252BA limits the new search and seizure powers to ensure they only apply to places owned or operated by the Commonwealth and, as such, these powers will not extend to private homes being used as non-facility-based APODs.

An APOD is a place of immigration detention used by the Department to meet the specific needs of detainees who cannot be adequately catered for in an Immigration Detention Centre (IDC). This term covers a number of different types of facilities including Immigration Transit Accommodation (ITA), 'facility-based APODs' and 'non-facility-based APODs'.

There are currently three ITA facilities authorised as APODs and controlled by the Department:

- Brisbane Immigration Transit Accommodation (BITA)
- Melbourne Immigration Transit Accommodation (MITA)
- Adelaide Immigration Transit Accommodation (AITA)

In addition to these there are three facility-based APODs operated the Department and approved by the Minister at:

- Phosphate Hill (Christmas Island)
- Construction Camp (Christmas Island)
- Northern APOD (Darwin)

Non-facility based places of accommodation in the broader community such as leased private housing, hotel and motel accommodation, hospitals and schools, which have been approved as places of immigration detention by the Minister, are also used as APODs from time to time. The search powers under new section 252BA expressly do not extend to these non-facility based APODs as they are not places owned or operated by the Commonwealth.

2. Subsections 251A(1) and (2) of the Bill appear to be circular in nature. Why are both parts of this provision required to determine a 'prohibited thing'?

Subsection 251A(1) and (2) have been specifically included in the Bill to define prohibited things and to give the Minister a head of power to determine these things in a legislative instrument. Subsections 251A(1) and (2) must be read together to understand how things will be defined and determined as prohibited things, and therefore be subject to the new powers of search and seizure introduced by the Bill.

As outlined in the Explanatory Memorandum to the Bill subsection 251A(1) defines prohibited things in relation to a person in detention or in relation to an immigration detention facility. A thing will be a prohibited thing if:

(a) both:
  (i) possession of the thing is unlawful because of a law of the Commonwealth, or a law of the State or Territory in which the person is detained or in which the facility is located; and
  (ii) the thing is determined by the Minister by legislative instrument under subsection 251A(2)(a); or
(b) the thing is determined by the Minister by legislative instrument under paragraph 251A(2)(b).

Under subsection 251A(2) the Minister may determine by legislative instrument things for the purposes of subsection 251A(1) if:

(a) possession of the thing is prohibited by law in a place or places in Australia; or
(b) possession of the thing in an IDF may be a risk to the health, safety or security of persons in the facility, or the order of the facility.

Subsection 252(2)(b) will allow the Minister to determine as a prohibited thing a range of things which may not be unlawful and, as such, not be captured by a law in a place or places in Australia, but which may pose a serious risk to the health, safety or security of staff and detainees in IDFs. These types of things can quickly become a threat in the IDF environment and the types of things that pose such a risk may change rapidly. The Minister requires the flexibility which the legislative instrument provides to adapt and respond to emerging threats in order to protect the health, safety and security of all people within IDFs.

3. People will have no rights over items which the Department takes under the new search and seizure powers in the Bill.

The Bill contains a number of provisions which specify how an authorised officer is to deal with a prohibited thing found during a screening, search or strip search of a person and searches of facilities conducted under the new search or seizure powers.

Item 8 of the Bill inserts new subsections 252(4A), (4B) and (4C) which together address the retention, return, forfeiture and disposal of prohibited things that may be a risk to the health, safety or security of person at an IDF or to the order of that IDF if they are found during the course of a search under section 252.

New subsection 252(4A) specifies that if such a prohibited thing is found in the course of a search of a detainee under section 252, the authorised officer may take possession of this thing and retain it. If that thing appears to be owned or was controlled by a detainee or other person, subparagraph 252(4A)(c) and (d) require that the officer must take all reasonable steps to return it to the person.

Where an item has been retained by an authorised officer under paragraph (4A)(b) and that officer has taken all reasonable steps to return the thing but the officer considers on reasonable grounds that the owner cannot be identified, the thing is abandoned or the thing cannot be returned to the owner upon leaving the IDF, that item is forfeited to the Commonwealth.

Similar provisions for retention and forfeiture have been included in relation to such a prohibited thing for the other search and seizure provisions in the Bill. The intention of these provisions is that items such as perishable foods or other things that cannot be returned to their owner should be forfeited to the Commonwealth and as far as practicable, all other such prohibited things found during a search or screening by an authorised officer should be returned to their legal owner.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 27 October 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(*PIID/002*) – Inquiry - Prohibiting items in Immigration Detention - Security Risk Assessments of individuals and items -

Asked:

Senator PRATT: Can I ask: are you are able to table documents or answer on notice how the department defines risk in relation to these populations? It's very difficult to make judgements about this legislation without that information. And in that regard, it does seem strange to me that this legislation has the capacity to ban all items irrespective of the risk of the population to which the item is banned. So, if you could give us an assessment of the risk of individuals—I don't know what risk assessments you have done on particular items. Have you done risk assessments on particular items?
Mr Wilden: Senator, with your permission, we will come back with a brief that really goes through the way we look at each individual—at the personal level—and then how in the construction of this bill we have looked at the risks associated with certain specific items and where we see some of those thresholds as sitting.

Answer:

Risk assessment for individuals
Serco has mechanisms in place to assess and calculate the security risk each immigration detainee poses within the Immigration Detention Network (IDN).

Review mechanisms are also in place to ensure that individual risk ratings are appropriate for detainees.

Risk assessment on 'prohibited things'
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. This risk assessment process has already been conducted on things such as detainees possessing mobile phones in the IDN, and has informed this legislative amendment process.

Removing things such as mobile phones from the IDN altogether, rather than providing only certain detainees with access, has been assessed as 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 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 threshold that will be applied is taking into account all relevant information, whether possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons or to the order of the facility.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 27 October 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(*PIID/003*) – Inquiry - Prohibiting items in Immigration Detention - Contraband statistics -

Asked:

Senator PRATT: Okay. Thank you. How many instances of illicit substances have you discovered in immigration detention centres? And how many of those were from people who had character cancellations?—in the current financial year, if possible.
Mr Woodford-Smith: I can give you part of that. I can't actually go back and provide you all of that right now. I may have to take it on notice in terms of contraband found and what group it was found against. There are a couple of issues here. If I look at contraband found in, say, 2015-16, 1857 items of contraband were found.
Senator PRATT: What about the current financial year?
Mr Woodford-Smith: In 2016-17, there were 1,644 items. As of 30 September 2017, for this financial year, there were 332 items of contraband found.

Answer:

Between 1 July 2016 and 30 June 2017, there were 1,644 instances of contraband found involving 2,148 detainees. Of the 2,148 detainees, seven groups were identified and comprise of: 778 s501 Visa Cancellation, 212 other Visa Cancellation, 714 Irregular Maritime Arrivals, 341 Overstayers, 71 Unauthorised Air Arrivals, 18 Seaport Arrivals and 14 Illegal Foreign Fishers.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 27 October 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(*PIID/004*) – Inquiry - Prohibiting items in Immigration Detention - Response to recommendation 5 of AHRC submission -

Asked:

CHAIR: We've arranged with Hansard that I will now be connected by teleconference. Ms de Veau, I am attracted to the Human Rights Commission's recommendations 2, 3, 4 and 5, particularly 5, which we didn't have a chance to get into. Could I ask you on notice to indicate what you don't like about 5?
Ms de Veau: Is that the recommendation in relation to the ombudsman?
CHAIR: Yes.
Ms de Veau: In very short order, I will simply say that those powers already exist for the ombudsman, and there are already some policies around what we have to do by way of reporting strip searches. I will put that in writing for you.
CHAIR: If you could put that in writing, because I am attracted to 2, 3, 4 and 5, but if they are not needed. If you could give it to me, because that would form part of my report.

Answer:

<u>Recommendation 5</u>
The Commission recommends that Bill be amended to provide that:

- **the Department must maintain a log of the conduct of strip searches including details about the compliance with each of the requirements of ss 252A and 252B of the Migration Act**
- **the Department must notify the Commonwealth Ombudsman when it receives a complaint about the conduct of a strip search**
- **the Commonwealth Ombudsman have the power to inspect the records of the Department in relation to the conduct of strip searches for the purpose of reviewing the Department's processes for conducting strip searches and dealing with complaints**
- **the Commonwealth Ombudsman must conduct an annual review and prepare a report about the comprehensiveness and adequacy of the Department's internal processes relating to strip searches to be tabled in Parliament**
- **the Commonwealth Ombudsman have the power to conduct ad hoc reviews into the way in which strip searches are conducted at any time.**

The Department considers that the intent of recommendation 5 of the submission from the Australian Human Rights Committee (AHRC) is already sufficiently

addressed by the *Ombudsman Act 1976* (the Ombudsman Act) and further supported by the section 499 Ministerial Direction No.51 (the Direction) and the Detention Services Manual of the Department (the DSM).

The Strip Search Power
The strip search power was introduced by the *Migration Legislation Amendment (Immigration Detainees) Act (No.2) 2001* which commenced on 28 September 2001.

The power has been designed to reflect a reasonable balance between preserving a detainee's dignity and privacy while providing for the protection of the detainee community, detention facility staff and the Australian community. Strip searches are only undertaken as a measure of last resort. There must be good reasons based on reasonable suspicion that a strip search is warranted. There are many safeguards built into the legislation to ensure that the power is not abused and officers are accountable for its use.

Responses to recommendations
Detailed below are the Department's responses to the following sub-recommendations of the AHRC by reference to the relevant provisions of the Ombudsman Act, the Direction and the DSM:

That the Department must notify the Commonwealth Ombudsman when it receives a complaint about the conduct of a strip search.

That the Commonwealth Ombudsman have the power to conduct ad hoc reviews into the way in which strip searches are conducted at any time.

Section 5 of the Ombudsman Act - Functions of the Ombudsman – Under this section the Commonwealth Ombudsman (the Ombudsman) may:

- respond to complaints about a matter of administration by a Department or a prescribed authority; or
- on his or her own motion investigate any administrative action taken by a Department or a prescribed authority.

On the basis of the wide operation of this section, we do not consider that it is necessary that the Bill be amended to expressly require the Department to notify the Ombudsman when it receives a complaint about the conduct of a strip search, or that it be given the power to conduct *ad hoc* reviews in relation to strip searches.

If a detainee is of the view that the he or she has not been treated with respect or that the Department has not followed the correct processes in relation to a strip search, they have the right to complain directly to the Ombudsman and the Ombudsman may investigate the complaint. When the Ombudsman has jurisdiction to perform his or her functions in relation to immigration, including immigration detention, he or she may choose, under subsection 4(4), to be called the Immigration Ombudsman when performing these functions.

That Commonwealth Ombudsman have the power to inspect the records of the Department in relation to the conduct of strip searches for the purpose of reviewing

the Department's processes for conducting strip searches and dealing with complaints.

Section 9 of the Ombudsman Act - Power to obtain information and documents

This section allows the Ombudsman to compel provision of information and documents relating to an investigation, including from:

- an officer of the Department or prescribed authority; or
- a Commonwealth Service provider of a Department or prescribed authority under a contract; or
- an employee of Commonwealth service provider of a Department or prescribed authority under a contract.

This power would currently empower the Ombudsman to inspect the records of the Department in relation to the conduct of strip searches for the purpose of reviewing the Department's processes for conducting strip searches and dealing with complaints.

On the basis of the wide operation of this section, we do not consider that it is necessary that the Bill be amended to expressly give the Ombudsman the proposed power to inspect documents.

That the Commonwealth Ombudsman must conduct an annual review and prepare a report about the comprehensiveness and adequacy of the Department's internal processes relating to strip searches to be tabled in Parliament.

Division 2 of the Ombudsman Act – Reports – This Division describes how the Ombudsman must report on an investigation. The Division includes requirements for reporting to Parliament, including**:**

- **Section 19 Reports to Parliament** – Under this section the Ombudsman may, from time to time, give the Minister, for presentation to Parliament, a report on the operations of the Ombudsman during a part of the year, or in relation to any matter relating to, or arising in connection with, the exercise of the powers, or the performance of the functions of the Ombudsman.

In combination with the Ombudsman's power in section 5 to commence an own motion investigation, the requirements in this section, including the requirement to table section 19 reports in Parliament, address this sub-recommendation.

On this basis, we do not consider that it is necessary that the Bill be amended to expressly impose this obligation on the Ombudsman.

That the Department must maintain a log of the conduct of strip searches including details about the compliance with each of the requirements of ss 252A and 252B of the Migration Act.

Together, the requirements of the Direction and the DSM ensure that this recommendation is also already addressed:

The Direction provides record keeping requirements and reporting requirements. Under the record keeping requirements at section 39 an authorised officer must maintain an accurate record of all strip searches and this record must contain details of the person searched, the place where the search was conducted, the reasons for the search and the details of the officers who conducted the search.

The reporting requirements at section 40 of the Direction state that an authorised officer must report to their Regional Manager, as soon as reasonably practicable but within 24 hours, on the use of the powers under sections 252A and 252B of the Migration Act so the Minister and the Secretary can be informed within 24 hours of the authorisation for the strip search being given.

The DSM also requires that, where a strip search has been conducted in contravention of the Migration Act, this must be reported immediately to the Australian Federal Police for investigation.

On this basis, we do not consider that it is necessary that the Bill be amended to expressly impose this obligation on the Department.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 27 October 2017

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(*PIID/005*) – Inquiry - Prohibiting items in Immigration Detention - 24/7 IDF landlines -

Asked:

Senator PRATT: You said that people can call into immigration detention 24 hours a day. Can I just confirm that phone switchboards are staffed 24 hours a day? If someone calls in from overseas at two o'clock in the morning to say, 'Yes, we will be at the airport to come and get you,' and 'Yes, we've arranged somewhere for you to stay when you come back to your country that you've been deported to,' are those switchboards staffed 24 hours a day?
Mr Woodford-Smith: That's my understanding—that they are staffed 24/7. If that's not correct, then I'll correct that as a question on notice.
Senator PRATT: If you're able to correct that as quickly as possible, if need be—please let me know.
Mr Woodford-Smith: Yes.

Answer:

Under the Immigration Detention Facilities and Detainee Services Contract the Service Provider (Serco) must make provision for Detainees to have access to incoming telephone calls at any time; and notify Detainees of any calls received for them when the Detainee was not available to receive the call.

Due to the nature of the infrastructure at each facility, some facilities allow external phone calls direct to accommodation area telephones at any time of the day or night. The remaining facilities call-divert to a manned control room after 8pm. However, in the latter case if the call is not an emergency call, Serco receipt a message and pass the message to the detainee the following morning.