National Justice Project

Response to Questions on Notice

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

National Justice Project

GENERAL COMMENTS

On the 27th October 2017, the Senate Legal and Constitutional Affairs Legislation Committee conducted a public hearing concerning the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*. Professor George Newhouse was one of the witnesses who gave evidence to the Committee in the hearing.

In his evidence, Professor Newhouse raised concerns to the Committee that there are no review mechanisms for the new search powers that would be endowed upon the Minister, should the Bill be legislated in its current form. The Chair of the Committee, Senator Ian Macdonald, asked that these concerns be put on notice pending further clarification. The Hansard detailing the relevant question on notice between Professor Newhouse and the Chair is extracted in the section below.

SPECIFIC QUESTION ON NOTICE

> ***Prof. Newhouse****: There also needs to be better access to judicial review if this is passed. The whole purpose of this legislation is to take away the oversight of the court on decisions as to what the risks to health and safety are. The provisions already exist in the legislation. We have an injunction at the moment on the minister from implementing a blanket policy, and this legislation is intended to take away judicial oversight.*
>
> ***CHAIR****: I don't quite understand that, but, perhaps on notice—because we have run out of time—you could just elaborate on that particular point? That was Professor Newhouse, was it?*
>
> ***Prof. Newhouse****: Yes. I will*

Answer: The following answer to the specific question on notice is divided into two parts. First the answer will detail the review mechanisms in place for the current search powers under the *Migration*

Act. The second part will discuss the review mechanisms, or lack thereof, for the exercise of the Minister's expanded search powers under the proposed amendments.

1 – The Current Scheme

The current power for the search of persons subject to the *Migration Act* is contained in Section 252 of that Act. Searches are limited to a specified class of persons,[1] and may only be conducted to find 'weapons, or other thing capable of being used to inflict bodily injury or to help the person escape from immigration detention'.[2] Decisions of such kind are non-privative legislative instruments,[3] and thus can be judicially reviewed.[4] As much was confirmed by the Court in the recent decision of *SZSZM v Minister for Immigration & Ors.*[5]

2 – The scope for review of decisions taken under the proposed changes to the *Migration Act*

In Schedule 1 of the Bill, Section 251A is to be inserted into Part 2 of the *Migration Act*, allowing the Minister to make a determination that an item as a 'prohibited thing' inside an immigration detention facility (which may include places of immigration detention not confined to detention centres). The only condition precedent is that the possession of the thing is prohibited by Australian law, or that Minister is satisfied it poses a risk to health, safety, security of persons in the facility, or to the order of the facility .[6] Furthermore, the Bill also provides for the insertion of Section 252(4A) into Part 2 of the Act, which will permit an authorised officer to search a detainee for such prohibited items (with no need for reasonable suspicion as is currently required) and confiscate such items if found.

Under the *Legislation Act 2003* (Cth), these legislative instruments made under Part 2 of the *Migration Act*, which includes ss 251A and 252, cannot be disallowed by the Federal Parliament.[7]

Further, under s 474(3) the Minister making a determination under the proposed s 251A(2) (determination of a prohibited item by the Minister) would fall within the definition of a privative

[1] *Migration Act 1958* (Cth), s 252(2).
[2] Ibid s 252(2)(a).
[3] *Migration Act 1958* (Cth), s 474(4).
[4] *Migration Act 1958* (Cth), s 476.
[5] [2017] FCCA 819.
[6] *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (Cth), sch 1, s 251A(2).
[7] *Legislation Act 2003* (Cth), s 44; *Legislation (Exemption & Other Matters) Regulation 2015*, s 10(20).

clause decision for the purposes of the *Migration Act*. Therefore, these decisions will be 'final and conclusive' and not subject to judicial review.

There is no proposal in the Bill to change s 474(4), which identifies decisions that are not privative clause decisions. This currently includes s 252 which means that decisions relating to searches of persons under s 252 are not subject to the s 474(1) limitations for review.

However, it is our submission that any review power available is limited and, in reality, ineffective if the Minister's determination to prohibit items in the first place is not disallowable and if not reviewable. For example the Minister may declare a mandarin as a prohibited item, giving authorised officers power to search. Review of the search power will be futile because the search is clearly authorised by the Minister's non-reviewable determination.

We acknowledge that the operation of the privative clause does not preclude judicial review of matters that exceed constitutional limits or on the basis of a narrow jurisdictional error or male fides (e.g. R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598 (Dixon J)) but these are inadequate measures to review the Minister's ability to make a determination regarding a 'prohibited thing' and we reaffirm Prof Newhouse's submissions to the committee.

3 November 2017