



Australian
Human Rights
Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Australian Human Rights Commission

Submission to the Senate Standing Committee on Legal and
Constitutional Affairs

11 June 2020

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Contents

1	Introduction	3
2	Summary.....	4
3	Recommendations.....	6
4	Prohibition on mobile phones.....	8
5	Relevant human rights obligations	10
6	Changing profile of immigration detainees and risk	11
7	Disproportionate use of restrictive measures.....	13
8	Broad power to determine prohibited items.....	15
9	Expansion of search and seizure powers.....	19
10	Access to alternative communication facilities.....	22
11	Expanded power to conduct strip searches	24

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs (Committee) in its Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the Bill).
2. The Commission also made a submission to the Committee in its Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the 2017 Bill).¹
3. The concerns outlined in this submission draw on the Commission's work inspecting Australia's immigration detention facilities. The Commission has conducted such inspections since the mid-1990s. This has included periodic monitoring of detention facilities across the country² and three major national inquiries into immigration detention.³ The purpose of the Commission's detention monitoring work is to ensure that Australia's immigration detention system complies with this country's obligations under international human rights law.
4. In recent years, the Commission has conducted and reported on the following:
 - inspections of all purpose-built immigration detention facilities on the Australian mainland and on Christmas Island in 2017;⁴ and
 - a series of thematic inspections of immigration detention facilities in 2018⁵ to examine risk management practices in immigration detention.⁶
5. During 2019, the Commission conducted inspections of all immigration detention facilities on the Australian mainland.⁷ The Commission will report on its findings later this year.
6. The Commission acknowledges that there has been a shift in the composition of the immigration detention population in recent years. Most significantly, there has been an increase in the number and proportion of people who have had their visas cancelled on character grounds (often due to their criminal history) in immigration detention.⁸

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

7. Despite these changes in composition, the immigration detention population includes people with a range of risk profiles. Some have a long history of serious criminal convictions, others have committed low-level offences, while others have never been convicted or even accused of any offence.
8. No-one held in immigration detention has forfeited their human rights, and immigration detention must never be imposed as punishment. Australian law allows a person to be held in an immigration detention centre *only* for certain administrative purposes, such as to facilitate their removal from Australia when they do not have a legal right to be here.
9. It is therefore imperative that Australia adopts laws and policies that respond proportionately to risks posed by high-risk individuals, and protect the human rights of all people held in immigration detention.

2 Summary

10. The Bill would amend the *Migration Act 1958* (Cth) (Migration Act) to allow the Minister to determine that an item is a 'prohibited thing' in relation to immigration detention facilities. Prohibited things may include things that are subject to specific legal restrictions inside or outside of a detention context, such as specifically controlled drugs. Under cl 2(b) of the Bill, the Minister could also prohibit things that are not subject to such legal restrictions, if the Minister considers that possession or use of those things 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'. This could include mobile phones, SIM cards and internet-capable devices. Any determination by the Minister regarding a prohibited item is in the form of a disallowable legislative instrument.
11. The Bill would also:
 - allow authorised officers to search, without a warrant and regardless of whether officers suspect the presence of a prohibited thing, immigration detention facilities, including accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas, and to allow the use of detector dogs to conduct these searches

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- expand existing search and seizure powers, including strip searches, to be used in relation to prohibited things
 - allow the Minister to issue binding written directions to officers in relation to the exercise of their seizure powers.
12. In September 2017, the Government introduced the 2017 Bill. On 16 November 2017, the Committee tabled its report on the 2017 Bill, with the majority of the Committee recommending that it be passed subject to two amendments. There were also two dissenting reports that recommended, respectively, more extensive amendments or that the 2017 Bill not be passed. In 2019, the 2017 Bill lapsed and has now been reintroduced with some amendments. Some, but not all, of the recommendations have been implemented.⁹
13. The current bill contains most of the same provisions as the 2017 version of the bill. Some key amendments include:
- In the 2017 Bill, legislative instruments made by the Minister to prohibit things would not be subject to disallowance. The current bill explicitly provides that such legislative instruments will be disallowable.
 - The current Bill creates a new power for the Minister to issue binding written directions to officers in relation to the exercise of their seizure powers.
 - The current Bill clarifies that medications and health care supplements supplied to, and in the possession of, a detainee in an immigration detention facility will not be a prohibited thing.
14. The Commission acknowledges that the increase in the number of people in immigration detention due to visa cancellations under s 501 of the Migration Act has created significant challenges for the Department of Home Affairs and staff of immigration detention facilities, including in relation to safety and security.
15. However, the Commission considers that the broad application of restrictive measures such as those proposed in the Bill may lead to unreasonable limitations on human rights. In particular, the proposed power for the Minister to declare items prohibited in immigration detention facilities may lead to restrictions on the possession of items in

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

circumstances where they do not present a significant risk to safety and security in all cases.

16. In particular, the Commission emphasises three key concerns with the Bill. First, the Bill would enable a general prohibition on the possession of mobile phones in immigration detention facilities. The Bill would not require that such a prohibition be limited to specific individuals who are assessed as posing an unacceptable risk if they continue to possess a mobile phone. The Commission considers that such a prohibition would unreasonably limit a range of human rights.
17. The Minister has indicated that the Government does not intend to introduce a blanket ban on mobile phones. In light of this, the Commission considers that the Bill should be amended to remove the power to impose a blanket ban on prohibited items.
18. Secondly, the Commission considers that an authorised officer should have a reasonable suspicion that a detainee is in possession of a prohibited item before conducting a search of the detainee themselves, or their personal effects or room.
19. Thirdly, the Commission also considers that strip searches should not be conducted for items that are not unlawful and should only occur as a measure of last resort.

3 Recommendations

16. The Commission makes the following recommendations.

Recommendation 1: That the Bill not be passed in its current form.

Recommendation 2: That the Bill be amended to stipulate that items that do not present inherent risks to safety and security may be prohibited in immigration detention only:

- **on the basis of rigorous individual risk assessments**
- **where the decision maker forms a view, on reasonable grounds, that the person is likely to use the item in a manner that presents a clear and significant risk to safety or security, and**
- **where those risks cannot be managed in a less restrictive way.**

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Recommendation 3: That s 252BA be amended to require an authorised officer to have a reasonable suspicion that a detainee is in possession of a prohibited item before conducting a search of the detainee’s personal effects or room.

Recommendation 4: That the Bill be amended to stipulate that items that do not present inherent risks to safety and security may only be seized in immigration detention:

- on the basis of rigorous individual risk assessments
- where the decision maker forms a view, on reasonable grounds, that the person is likely to use the item in a manner that presents a clear and significant risk to safety or security, and
- where those risks cannot be managed in a less restrictive way.

Recommendation 5: That the Bill be amended to specify that s 42 of the Legislation Act 2003 (Cth), which provides for disallowance of legislative instruments, apply to legislative instruments made under s 251B(6) of the Bill.

Recommendation 6: Access to items such as mobile phones should be restricted only to the extent necessary, and on an individualised basis. The Australian Government should ensure that all people in immigration detention have adequate opportunities to communicate with people outside detention.

Recommendation 7: That the Bill only extend strip search powers to prohibited things that are unlawful and that the Bill explicitly state that strip searches only be conducted as a measure of last resort.

Recommendation 8: In the alternative, if the strip search provisions are introduced, 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.

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- **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.**

4 Prohibition on mobile phones

17. Up until February 2017, people in immigration detention (other than those who arrived by boat) were permitted to possess and use mobile phones, provided that the phones did not have recording capabilities or internet access functions.¹⁰
18. In February 2017, the Australian Government introduced a new policy that prohibited the possession and use of all mobile phones and SIM cards in immigration detention facilities. This policy change aimed to respond to concerns that some people in immigration detention were using mobile phones 'to organise criminal activities, threaten other detainees, create or escalate disturbances and plan escapes by enlisting outsiders to assist them'.¹¹
19. In June 2018, the Federal Court of Australia ruled that this mobile phone policy was invalid on the basis that it was not authorised by any provision of the Migration Act.¹² Since that decision, people in immigration detention have been permitted to possess and use SIM cards and mobile phones of any kind, including smartphones..
20. During the Commission's 2018 immigration detention visits, staff pointed to benefits and problems associated with detainees having mobile phones. Some staff reported that the reintroduction of mobile phones, and particularly the use of smartphones, had created some risk management challenges. Staff provided examples of cases where smartphones had been used to take photos or recordings of staff members or people in detention, which could then be distributed publicly without permission.
21. At all of the facilities inspected by the Commission in 2018, staff indicated that only a small proportion of people in immigration detention were using mobile phones in this manner. Nonetheless, this issue was clearly of significant concern to facility staff and was seen to have a negative impact on relationships between staff and people in detention.
22. At the same time, staff acknowledged that the reintroduction of mobile phones had significant benefits, such as allowing people in detention to

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

have more regular contact with family members, and facilitating communication with people outside detention more generally (including with status resolution staff). Increased contact with family members was noted to have a positive impact on mental health.

23. This feedback was echoed by people in immigration detention themselves. A significant number of people interviewed by the Commission provided strong positive feedback on the benefits of increased mobile phone access, particularly in relation to maintaining contact with family members and friends outside detention. Some detainees went even further, saying that having a mobile phone was critical to their ability to cope with the mental health and other impacts of prolonged immigration detention.
24. More recently, the Government has suspended face-to-face visits by family and friends of people in immigration detention, as a way of reducing the risk of COVID-19. It is anticipated that, when such visits resume, this is likely to be gradual, with some restrictions continuing at least for some time on who may visit and how visits take place. The Commission understands that access to mobile phones, including smartphones that enable video calls, has been and will continue to be especially important for people in immigration detention maintaining vital connections with family (including young children) and friends, and in supporting detainees' mental health.
25. More generally, the Commission considers that the reintroduction of mobile phones in immigration detention facilities is a net positive, especially given its significant benefits for the wellbeing of people in detention and their capacity to maintain contact with people outside detention.
26. The Commission acknowledges the reports from staff that a small proportion of people in immigration detention are using mobile phones unlawfully or otherwise inappropriately. Serious problems involving mobile phone use appear to be exceptional rather than commonplace, and so any response to those problems should be proportionate to the nature and prevalence of these problems, especially given the significant negative impact of removing an individual's mobile phone.
27. Therefore, the Commission strongly opposes any blanket prohibition on mobile phones in immigration detention or at a particular immigration detention facility as it would not be a necessary, reasonable or

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

proportionate response to the risks arising from their use. A more appropriate response would be to restrict or remove mobile phones on an individual basis, and only if the individual is found to have used their phone to conduct unlawful activity, or to carry out other forms of serious misconduct.

28. In some cases, this could be achieved through existing laws and policies. For example, existing offences relating to threats, intimidation and misuse of carriage services may be relevant in cases where mobile phones are used to threaten facility staff; and internal standards of behaviour could be revised to include clear rules that strike an appropriate balance between the right to privacy and freedom of expression.

5 Relevant human rights obligations

29. Australia is obliged under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) to, respectively, uphold the right to security of the person and ensure that people in detention are treated with humanity and respect for the inherent dignity of the human person.¹³ Australia also has obligations under article 7 of the ICCPR and articles 2(1) and 16(1) of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), not to subject anyone to torture or to cruel, inhuman or degrading treatment or punishment; and to take effective measures to prevent these acts from occurring.¹⁴
30. These obligations require Australia to ensure that people in immigration and other forms of detention are treated fairly and reasonably, and in a manner that upholds their dignity. They should enjoy a safe environment free from bullying, harassment, abuse and violence. Security measures should be commensurate with identified risks and should be the least restrictive possible in the circumstances, taking into account the particular vulnerabilities of people in detention.
31. Australia also has a range of obligations under the ICCPR relevant to communication between people in detention and their family members, friends, representatives and communities outside detention. These include the right to freedom of expression, including the right to seek, receive and impart information and ideas (article 19(b)); the right to freedom of association with others (article 22); and the right of ethnic, religious and linguistic minorities, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language (article 27).¹⁵ Under the *International Covenant*

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

on Economic, Social and Cultural Rights (ICESCR), Australia also has an obligation to uphold the right to take part in cultural life (article 15(1)(a)).¹⁶

32. In addition, Australia has obligations under articles 23(1) of the ICCPR and 10(1) of the ICESCR to afford protection and assistance to the family as the natural and fundamental group unit of society.¹⁷ Australia also has obligations under article 17(1) of the ICCPR and article 16(1) of the *Convention on the Rights of the Child* (CRC) not to subject anyone to arbitrary or unlawful interference with their privacy, family or correspondence.¹⁸
33. These obligations require Australia to ensure that detention does not have a disproportionate impact on people's ability to express themselves, communicate and associate with others, and remain in contact with their family members, friends, representatives and communities. People in detention should be able to receive regular visits and should have access to adequate communication facilities (such as telephones and computers) as well as news and library services. The fact that immigration detention cannot be undertaken for a punitive purpose heightens the importance of minimising the impingement on the human rights of people who are detained.

6 Changing composition of immigration detainees and risk

34. For much of the period since the mid-1990s, most people in immigration detention have been asylum seekers who arrived by boat. However, in recent years there has been an increase in the number and proportion of people in immigration detention who have had their visas cancelled.¹⁹
35. The Migration Act contains a range of provisions for cancelling visas in specified circumstances.²⁰ For example, under s 501 of the Migration Act, a non-citizen may have an application for a visa refused or have their visa cancelled if they do not pass the 'character test'.²¹
36. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), which came into effect in December 2014, significantly broadened the scope of s 501, and introduced mandatory visa cancellations for people who have a 'substantial criminal record' or have committed a

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

sexually based offence involving a child, and are serving a full-time term of imprisonment for an offence against Australian law.²²

37. These changes led to a substantial increase in visa refusals and cancellations under s 501.²³ This increased overall numbers of people in immigration detention due to visa cancellations from 2015 onwards.²⁴
38. As a result of changes to the composition of people in immigration detention, the Commission has observed, during inspections of immigration detention facilities, a significant shift in how the risks that arise in immigration detention are assessed and managed.²⁵
39. During inspections in 2018, the Commission identified some strategies used to manage risks in immigration detention that limited the enjoyment of human rights, in a manner that was not necessary, reasonable and proportionate.²⁶ For example, the Commission found that some restrictions relating to excursions, personal items and external visits were applied on a blanket basis, regardless of whether they were necessary in a person's individual circumstances.²⁷
40. Despite these changes in composition, the immigration detention population remains varied and includes people with a range of risk profiles.
41. The most recent immigration detention statistics from the Department of Home Affairs indicate that, in March 2020, there was a total of 1,373 people in immigration detention facilities. This included people in the following groups:
 - 623 people subject to visa cancellations under s 501
 - 512 asylum seekers who arrived by boat
 - 238 categorised as 'other' (including people whose visa was cancelled under other provisions, people who had overstayed their visa, unauthorised air arrivals, seaport arrivals and illegal fishers).²⁸
42. During inspections in 2018, the Commission observed wide variation in the types of offences that may lead to a visa refusal or cancellation. In some cases, the relevant offences were of a serious, and in some cases violent nature. In others, the offences were less serious or non-violent (such as fraud, traffic violations and drug possession).²⁹

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

43. Some people in immigration detention have no criminal history and have never been convicted or even accused of any offence.
44. The changing composition of people in immigration detention, specifically the increase of people in detention due to visa cancellations under s 501, has created challenges in immigration detention facilities. For example, during inspections in 2017 and 2018, some facility staff reported that these changes had led to increased entry of prohibited items (such as illicit drugs),³⁰ and some people in immigration detention reported concerns in relation to their physical safety as a result.
45. As noted above, Australia is obliged under international law to ensure that people in immigration detention enjoy a safe environment free from abuse and violence. The Commission acknowledges that the fulfilment of this obligation may at times require the use of restrictive measures.
46. Circumstances in which the use of targeted, restrictive measures may be justified include where a person has been individually assessed as posing a high risk to the safety of others, or has consistently disregarded reasonable facility rules and operating procedures (such as rules relating to the use of illicit drugs).
47. However, the potentially broad application of restrictive measures to the entire detention population or to an entire facility—that is, without reference to the specific risk posed by particular individuals in detention—is unlikely to be necessary or proportionate to the safety and security risks in all cases. As such, the Commission is concerned that the new measures proposed in the Bill may lead to unreasonable limitations on human rights.

Recommendation 1: That the Bill not be passed in its current form.

7 Disproportionate use of restrictive measures

48. A key rationale for the measures proposed in the Bill is that people whose visas have been cancelled under s 501 of the Migration Act are, as a group, likely to pose a significant risk to facility security and the safety of others. However, there are three key problems with this rationale.
49. First, the Bill applies to all people in immigration detention, not only to those who have had visas cancelled under s 501. Other people in

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

detention who also may be subject to these restrictions include: people who arrived by boat to seek asylum; people who overstayed their visa; people whose visa was cancelled on non-character grounds; and people who were refused entry at an Australian airport. As of 31 March 2020, there were 512 irregular maritime arrivals in detention facilities.

50. The Commission acknowledges that some people in these groups may present risks to safety or security, even if they have not had a visa refused or cancelled on character grounds. However, it is likely that many of these individuals pose little or no risk to safety or security. The Commission is therefore concerned that if the Minister were to apply blanket restrictive measures to all people in immigration detention, or to all people in a particular facility, regardless of their individual circumstances, this would not be a necessary, reasonable or proportionate response to the identified risks.
51. The Senate Standing Committee for the Scrutiny of Bills considered the 2017 Bill and expressed concern about the blanket prohibition of items regardless of specific risk posed. That Committee was of the view that the provisions unduly trespassed on personal rights and liberties:

The Committee reiterates that as the amendments in the bill would apply regardless of the level of risk posed by different detainees, the committee considers that the bill, in restricting individual privacy and autonomy by denying detainees the ability to possess things, such as mobile phones or computers, and the extensive search powers (without the need to obtain a warrant), unduly trespasses on personal rights and liberties.³¹
52. Secondly, of the cohort of people whose visas have been cancelled under s 501, some present a risk of violence and others present little or no risk. Yet the rationale for the Bill assumes a homogenous, high-risk profile.
53. As previously observed, there is significant variation among people whose visas have been cancelled under s 501 with regard to the risk they pose to safety and security. In its recent inspections, the Commission met with people in immigration detention who have been detained after being released from prison having completed their custodial sentence; people who have been convicted of a crime but given a good behaviour bond rather than a custodial sentence; people who have been charged with a crime and granted bail; and people who have had their visa cancelled as a result of crimes committed some years earlier, and have long since been released from prison.

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

54. The grounds on which a person's visa can be cancelled under s 501 are very broad and include circumstances where the person has not been convicted or even accused of criminal activity. For example, a person can have their visa cancelled under s 501 on the basis of their suspected association with a person, group or organisation suspected of involvement in criminal conduct, or on the basis that they may engage in criminal conduct in the future.³²
55. Consequently, the Commission considers that it would not be reasonable to assume that all—or even most—people whose visas have been cancelled under s 501 necessarily pose a serious risk to safety or security, and thus may be reasonably subject to highly restrictive measures.
56. A third problem is that there appear to be less restrictive measures than those provided for in the Bill, which would achieve the Government's aim, such as separating high risk individuals who continue to engage in criminal activities from the general detention population.

8 Broad power to determine prohibited items

57. Proposed s 251A in the Bill would enable the Minister to determine, by legislative instrument, a thing to be prohibited if its possession is either prohibited by law, or 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.³³ The Bill lists examples of items that may fall into the latter category, including mobile phones, SIM cards, computers and electronic devices designed to be capable of being connected to the internet.
58. The Commission acknowledges that there would be greater parliamentary oversight of the exercise of this power, as compared with the corresponding provision in the 2017 Bill, because proposed s 251A(4) would make an instrument made under s 251A disallowable.
59. However, the Commission is concerned that these provisions could potentially be applied to a wide range of items, including in circumstances where the possession of these items does not present a significant risk. For example, while possession of a weapon may be reasonably likely to present a risk to safety or security regardless of circumstances, this may not be the case for items such as a mobile phone or an electronic device.

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

60. The Commission acknowledges that items can have more than one use, including an innocuous or beneficial use as well as a use that can threaten safety and security. For example, the Explanatory Memorandum accompanying the Bill indicates that mobile phones have been used by some individuals in detention 'to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff'.³⁴
61. Where there is clear evidence that items have been used in such a manner, prohibiting their possession on an individualised basis may be a reasonable measure. However, blanket restrictions on the possession of items that do not present an inherent risk to safety or security may not be reasonable, particularly when many of the individuals affected have never used these items in a manner that threatens safety or security.
62. The Minister stated in his second reading speech that the Government is not introducing a blanket ban on mobile phones:
- While not introducing a blanket ban on mobile phones in detention, we are proposing to allow the minister to direct officers to seize phones from certain categories of people, while providing officers with the discretion to search and seize for mobile phones in other circumstances. So people who are not using their mobile phone for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility will still be able to retain their mobile phones.³⁵
63. However, the Bill as it stands would be broad enough to permit the Minister to introduce a blanket ban on mobile phones. Proposed s 251A(1) permits a determination to be made that a thing is a prohibited thing either 'in relation to a person in detention' or 'in relation to an immigration detention facility'. The second of those options would apply to possession of the thing by anyone in the immigration detention facility.
64. The Commission is also concerned that the proposed provisions set a relatively low threshold for determining prohibited items, in that the Minister only need be satisfied that the thing 'might' pose a risk to safety or security. The Minister need not be satisfied that the thing is *likely* to present a risk, let alone that the thing is likely to present a risk in any particular circumstances that relate to a detention facility or group of people in detention. The Minister's power is also not conditioned on any nexus between prohibiting the item in question and addressing the risk the Minister has identified.

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

65. In practice, there is an almost limitless number of things that *might* be a risk to health, safety, security or order. A loaf of bread or a bucket of water, for example, could conceivably cause such a risk if an individual swung the bread or threw the bucket with the aim of harming someone. A ministerial determination prohibiting bread or water could fall within the scope of the proposed provision, notwithstanding that the risk involved would be low and the action taken to address that risk (namely, prohibiting bread or water) would be an unreasonable and disproportionate interference with the basic rights of people in detention.
66. The Commission does not suggest the current Minister is likely to make a determination such as the one referred to above. Rather, this example highlights the unnecessary breadth of the power. In addition to risks associated with a future minister exercising the full breadth of this power, the primary danger in legislative drafting that creates a power so broad that it can be used to cause unjustifiable harm is that other disproportionate and unintended consequences could arise from determinations being made that prohibit items more broadly than is necessary to address a serious, identified risk.
67. The Commission considers that as the Government does not intend to create a blanket ban on mobile phones, the Bill should be amended to remove the power to do so. The Commission's recommendations below, to prohibit items only on the basis of accurate individual risk assessments, would ensure blanket bans are not imposed.
68. The Parliamentary Joint Committee on Human Rights (PJCHR) considered and reported on the 2017 Bill in its Report 13 of 2017.
69. The Commission agrees with the PJCHR's detailed analysis that the broad scope of the Minister's power to declare items as prohibited things might be incompatible with human rights.
70. For example, the PJCHR considered there is a risk that the proposed provisions in s 251A are incompatible with the right to privacy:

noting the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones), there is a risk that the operation of section 251A(2) would be incompatible with the right to privacy. This is because the scope of the power, and the absence of sufficient safeguards, is such that the power could be exercised in a way that is likely to be incompatible with the right to privacy.³⁶

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

71. In relation to the right not to be subjected to arbitrary or unlawful interference with the family, the PJCHR stated:
- In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right not to be subjected to arbitrary or unlawful interference with family. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy rather than as legislative protections provides a less stringent level of protection.³⁷
72. The PJCHR was of a similar view that the broad power may impermissibly limit the right to freedom of expression:
- In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones, computers and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right to freedom of expression. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy rather than through legislative protections provides a less stringent level of protection.³⁸
73. Given the significant impact on individual rights, the Commission considers that the possession of items which do not present inherent risks to safety and security should be prohibited in immigration detention only:
- on the basis of rigorous individual risk assessments
 - where the decision maker forms a view, on reasonable grounds, that the person is likely to use the item in a manner that presents a clear and significant risk to safety or security, and
 - where those risks cannot be managed in a less restrictive way.
74. The Commission acknowledges that, in cases where possession of the item is generally prohibited by law (as is the case with illicit drugs or child pornography, for example), it would not be unreasonable to prohibit possession of the item within immigration detention facilities.

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

75. The Commission notes that it has recently raised a number of concerns with the way individual risk assessments are currently carried out by the Department of Home Affairs, and has made detailed recommendations to improve the process.³⁹ Risk assessments must be rigorous and sufficiently tailored to the particular circumstances of the detainee.

Recommendation 2: That the Bill be amended to stipulate that items that do not present inherent risks to safety and security may be prohibited in immigration detention only:

- **on the basis of rigorous individual risk assessments**
- **where the decision maker forms a view, on reasonable grounds, that the person is likely to use the item in a manner that presents a clear and significant risk to safety or security, and**
- **where those risks cannot be managed in a less restrictive way.**

9 Expansion of search and seizure powers

76. Currently, s 252 of the Migration Act allows authorised officers to search detainees to find out whether the person is carrying a weapon or an item capable of helping the person escape from immigration detention. There is no legislative power in the Migration Act to conduct searches of immigration detention facilities.
77. The Bill proposes to introduce ss 252BA and 252BB to allow authorised officers and authorised officers' assistants to search, without a warrant, immigration detention facilities for a weapon or escape aid, or a prohibited thing.
78. The provision would allow searches to be conducted in the following areas:
- accommodation areas
 - administrative areas
 - common areas
 - detainees' personal effects

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- detainees' rooms
 - medical examination areas
 - storage areas.
79. Proposed s 252BA(2) permits a search of the facility whether or not the officer has any suspicion that there is such a thing at the facility.
80. The Commission's Human Rights Standards for Immigration Detention stipulate that all searches of detainees, their accommodation or personal effects (such as mail) by staff respect the privacy of detainees and are therefore only conducted for sound security reasons and at reasonable times.⁴⁰
81. The Commission is concerned that this significant expansion of search powers may disproportionately curtail detainees' privacy. There is no requirement for an officer to have a suspicion, on reasonable or any other grounds, as to the presence of an item, making the power overly broad. There does not appear to be evidence-based justification for expanding the search power in this manner. Furthermore, it is concerning that searches under the proposed provisions could be carried out at any time of the day, regardless of demonstrable need.
82. The Commission recommends that s 252BA be amended to require an authorised officer to have a reasonable suspicion that a detainee is in possession of a prohibited item before conducting a search of the detainee's personal effects or room.
83. The Bill introduces a new power to allow the Minister to issue binding directions that make it mandatory for officers to seize items that are covered by their seizure powers. Proposed s 251B(6) provides that the Minister may, by legislative instrument, direct that an authorised officer must seize a thing by exercising one or more specified relevant seizure powers in relation to one or more of the following:
- a person in a specified class of persons, or all persons, to whom the relevant seizure power relates
 - a specified thing, a thing in a specified class of things, or all things, to which the relevant seizure power relates

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- a specified immigration detention facility, an immigration detention facility in a specified class of such facilities, or all immigration detention facilities
 - any circumstances specified in the directions.
84. The Bill provides two examples of situations where a binding direction may be made. First, a binding direction may be made in respect of all detainees in specified immigration detention facilities or all detainees in such a facility other than those who are unauthorised maritime arrivals. Secondly, a direction could specify a particular period during which the direction is to take effect, or the duration of a specified event.
85. The Explanatory Memorandum explains that the proposed power will allow the Department to implement, for example, a targeted, intelligence-led, risk-based approach in relation to the seizure of mobile phones, SIM cards and other prohibited things from detainees in facilities specified in a binding Ministerial direction, based on risk assessments and operational security.⁴¹
86. The Commission reiterates its concerns regarding the Minister’s proposed broad power to prohibit certain items such as mobile phones from immigration detention facilities. As set out in Recommendation 2 above, the Commission is of the view that items should neither be prohibited nor seized from an individual, unless there is evidence that the person has used or is reasonably likely to use the item in a manner that presents a clear and significant risk to safety or security.
87. The Commission is also concerned that legislative instruments made by the Minister under proposed s 251B(6) will not be disallowable. This would significantly reduce the capacity of Parliament to exercise oversight over the rule-making power granted to the Minister, without an obvious justification. Mandating items to be seized through a non-disallowable instrument is not a sufficient safeguard to protect detainees’ right to privacy.
88. The Commission recommends that the Bill be amended to specify that s 42 of the *Legislation Act 2003* (Cth), which provides for disallowance of legislative instruments, apply to legislative instruments made under s 251B(6) of the Bill.

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Recommendation 3: That s 252BA be amended to require an authorised officer to have a reasonable suspicion that a detainee is in possession of a prohibited item before conducting a search of the detainee’s personal effects or room.

Recommendation 4: That the Bill be amended to stipulate that items that do not present inherent risks to safety and security may only be seized in immigration detention:

- **on the basis of rigorous individual risk assessments**
- **where the decision maker forms a view, on reasonable grounds, that the person is likely to use the item in a manner that presents a clear and significant risk to safety or security, and**
- **where those risks cannot be managed in a less restrictive way.**

Recommendation 5: That the Bill be amended to specify that s 42 of the *Legislation Act 2003* (Cth), which provides for disallowance of legislative instruments, apply to legislative instruments made under s 251B(6) of the Bill.

10 Access to alternative communication facilities

89. The Statement of Compatibility with Human Rights accompanying the Bill asserts that the proposed prohibition on the possession of mobile phones in detention facilities would not unreasonably limit human rights, on the basis that other communication channels are readily available to people in detention (including landline telephones, internet access, facsimile machines, postal services and visits).

90. Since the use of mobile phones has been permitted in immigration detention, most of the people interviewed by the Commission during inspections report that they rely on their mobile phone (mostly smartphones) as their primary method of communication with family, friends and legal representatives. Many people in detention have reported that they use their mobile phones for communication that would previously have required the use of a landline phone or desktop computer.⁴²

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

91. The location and number of computers varies across immigration detention facilities, as well as within compounds in the same facility. For some people, computer facilities may be located in another area of the facility (outside of their compound) and can only be accessed on a rostered basis. For others, they may have access to a small number of computers shared between dozens of people in their compound that can be accessed at any time, or in some cases up until an evening curfew. Most computers in immigration detention facilities do not have a video function.
92. Landline phones are available in most common areas (including in compounds), but they offer limited privacy. Local calls from facility landlines are free; however, phone cards are required for international calls. During inspections in 2017, people in detention reported that the cost of calls when using these cards was significantly higher than under a mobile phone plan, and had a particular impact on people whose family members or friends lived overseas.⁴³
93. While all immigration detention facilities provide access to computers and landline phones, people in immigration detention have raised concerns about these facilities with the Commission over many years. For example: limited and rostered access to these facilities (in particular computers); lack of privacy; slow internet connection on desktop computers; and poor maintenance of communication facilities.
94. People in immigration detention are also able to receive in-person visits in all facilities. In recent years, the Department has introduced a range of policies to regulate visits to immigration detention facilities, such as the requirement for personal visitors (such as family members, friends and community groups) to apply through an online form at least five business days in advance of the visit. If they are over the age of 18, personal visitors must also provide 100 points of identification to support their application. Visitors must reapply each time they seek to visit a detention facility.⁴⁴
95. During inspections in 2018, people in detention reported a range of concerns with these policies. For example, the application process can be complicated and cumbersome, as regular visitors must apply five business days in advance, fill in the lengthy online form and provide ID for every visit; the online form may be difficult to use for some visitors (such as those who have limited English language skills or computer literacy); and

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

some people who do not have 100 points of identification may be unable to visit people in detention.⁴⁵

96. Moreover, as noted above, in response to the outbreak of the Coronavirus (COVID-19) pandemic, the Australian Border Force (ABF) has temporarily suspended the visitor program in all immigration detention facilities as a temporary measure.⁴⁶ While visits are suspended, the ABF is providing each detainee with a \$20 phone credit each week to support ongoing contact with family and friends on their mobile phones.⁴⁷
97. The Commission's immigration detention inspections in recent years have demonstrated that mobile phones are a vital resource for people in immigration detention. They allow regular contact with family, friends and legal representatives and offer significant benefits for the wellbeing of people in detention and their families.
98. Access to alternative communication channels, such as landline phones and computers, is unlikely to provide an equivalent substitute for mobile phones. Mobile phones allow communications that are unrestricted in the sense that they can occur at convenience, in private and for as long as needed, and they offer important functions such as video calls. Mobile phones are also essential to bridge any delays or gaps between in-person visits, such as where in person visits have temporally ceased in response to COVID-19.

Recommendation 6: Access to items such as mobile phones should be restricted only to the extent necessary, and on an individualised basis. The Australian Government should ensure that all people in immigration detention have adequate opportunities to communicate with people outside detention.

11 Expanded power to conduct strip searches

99. The Migration Act already contains a power to conduct strip searches of people in immigration detention in certain circumstances.⁴⁸ At present, this power is limited to circumstances where an officer suspects on reasonable grounds that a detainee has concealed:
 - a) a weapon;
 - b) another item capable of being used to inflict bodily injury; or

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- c) an item capable of being used to help the detainee, or any other detainee, escape from immigration detention,
- and the officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person to recover the weapon or item.
100. Strip searches must be authorised. For detainees 18 years old or over, authorisation is to be provided by the Secretary, the Australian Border Force Commander or an SES Band 3 employee in the Department of Home Affairs. For detainees over 10 years but under 18 years old, authorisation is to be provided by a magistrate.⁴⁹
101. There are rules for conducting a strip search, including that it:
- 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 in the presence or view of a person who is of the opposite sex to the detainee
 - must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the strip search
 - must not be conducted on a detainee who is under 10
 - if the detainee is at least 10 but under 18, or is incapable of managing his or her affairs, a search must be conducted in the presence of the detainee's parent or guardian or another person capable of representing the detainee's interests and who, as far as is practicable in the circumstances, is acceptable to the detainee
 - must not involve a search of the detainee's body cavities
 - must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether the thing being searched for is present

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- must not be conducted with greater force than is reasonably necessary to conduct the strip search.⁵⁰
102. The Bill would significantly expand the circumstances in which strip searches may be undertaken. They would not be limited to searches for weapons or items that could be used in an escape, but would be able to be carried out to search for any ‘prohibited thing’ determined by the Minister, for example SIM cards.⁵¹
103. The Statement of Compatibility with Human Rights properly recognises that this expansion of strip search powers engages article 10 of the ICCPR, dealing with the right of detained people to be treated with humanity and with respect for their inherent dignity.⁵²
104. The expansion of strip search powers also engages article 7 of the ICCPR. The prohibition in article 7 of the ICCPR is absolute and non-derogable. A person’s treatment in detention must not involve torture or cruel, inhuman or degrading treatment or punishment.
105. The content of article 10(1) draws on a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules);⁵³ and
 - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).⁵⁴
106. Rule 52(1) of the Mandela Rule provides:
- Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches. Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.
107. In *Frérot v France*,⁵⁵ the European Court of Human Rights (ECHR) held that particular strip searches conducted on the applicant violated the prohibition on degrading treatment in article 3 of the European Convention on Human Rights. The ECHR stated that body searches, ‘including full body searches, might sometimes be necessary to maintain security inside a prison, to prevent disorder or prevent criminal offences’.⁵⁶

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

108. When considering the 2017 Bill, the PJCHR expressed concerns that the proposed strip search provisions, without adequate safeguards, may be incompatible with articles 7 and 10 of the ICCPR:

While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the use of force and/or restraint must not be excessive) are contained in departmental policies rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with the prohibition on torture, cruel, inhuman and degrading treatment and which may constitute inhumane treatment of persons in detention.⁵⁷

109. The Commission is concerned about the extension of the strip search power to ‘prohibited things’ that are not unlawful—such as SIM cards. There does not appear to be sufficient evidence to justify why such an invasive measure would be required to search for an item that is not unlawful. Under international human rights law, strip searches should be conducted only when absolutely necessary. The Commission considers less invasive measures should be adopted to search for prohibited items that are not unlawful.
110. The Commission recommends that the Bill only extend strip search powers to prohibited things that are unlawful, such as guns and other weapons.
111. The Commission is also concerned that the expansion of the scope of strip search powers has the potential to result in such searches becoming routine.
112. An investigation by the Queensland Ombudsman on the use of strip search powers at Townsville Women’s Correctional Centre has shown how the exercise of these powers can become unreasonable when not subject to adequate oversight.⁵⁸
113. Independent oversight of the use of restrictive measures is central to ensuring that such measures are applied in a reasonable and proportionate manner.
114. There are models of oversight in other laws that could be used to ensure that these powers are being used appropriately. For example, Part V,

Australian Human Rights Commission

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Division 7 of the *Australian Federal Police Act 1979* (Cth) provides for a system of independent oversight by the Commonwealth Ombudsman of certain functions of the Australian Federal Police (AFP), including the way in which the AFP deals with complaints about inappropriate use of force.

115. The Commission previously made the following recommendation to the Committee in relation to improving oversight in the 2017 Bill:
- 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.
116. The Committee's report into the 2017 Bill sets out the Department's response to this recommendation:
- 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).⁵⁹
117. The Commission considers that oversight measures are an important safeguard to ensuring individual rights are protected. In general, it is preferable for significant human rights safeguards to be entrenched in primary legislation rather than delegated legislation or policy documents. The Commission acknowledges that some elements of the previous

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

recommendation proposed may already be captured by the *Ombudsman Act 1976* (Cth) and recommends that the Bill be amended to include the following safeguards which are not expressly found in legislation:

- 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 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.

Recommendation 7: That the Bill only extend strip search powers to prohibited things that are unlawful and that the Bill explicitly state that strip searches only be conducted as a measure of last resort.

Recommendation 8: In the alternative, if the strip search provisions are introduced, 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 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.**

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- ¹ Australian Human Rights Commission, Submission No 11 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (11 October 2017) <<https://humanrights.gov.au/our-work/legal/submission/migration-amendment-prohibiting-items-immigration-detention-facilities>>.
- ² Reports from previous monitoring visits to immigration detention facilities can be found on the Commission's website at 'Immigration detention reports and photos,' *Australian Human Rights Commission* (Report, 10 July 2013) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/immigration-detention-reports-and-photos>>.
- ³ Human Rights and Equal Opportunity Commission, 'Those who've come across the seas: Detention of unauthorised arrivals,' *Australian Human Rights Commission* (Report, 1998) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/those-who've-come-across-seas-detention>>; Human Rights and Equal Opportunity Commission, 'A last resort? National Inquiry into Children in Immigration Detention,' *Australian Human Rights Commission* (Report, 2004) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/last-resort-report-national-inquiry-children>>; 'The Forgotten Children: National Inquiry into Children in Immigration Detention,' *Australian Human Rights Commission* (Report, 2014) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/national-inquiry-children-immigration-detention-index>>.
- ⁴ Facilities visited by the Commission in 2017 include: Adelaide Immigration Detention Centre; Brisbane Immigration Transit Accommodation; Christmas Island Immigration Detention Centre; Maribyrnong Immigration Detention Centre; Melbourne Immigration Transit Accommodation; Perth Immigration Detention Centre; Villawood Immigration Detention Centre; and Yongah Hill Immigration Detention Centre. The Commission has not conducted inspections of non-facility-based alternative places of detention or the third country processing facilities in Nauru and Manus Island, Papua New Guinea during 2017.
- ⁵ In 2018 the Commission inspected four immigration detention facilities, including Villawood Immigration Detention Centre, Brisbane Immigration Transit Accommodation, Melbourne Immigration Transit Accommodation and Yongah Hill Immigration Detention Centre, as well as several 'alternative places of detention' in Brisbane and Melbourne.
- ⁶ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ⁷ Between August and November 2019, the Commission inspected the following immigration detention facilities: Perth Immigration Detention Centre, Yongah Hill Immigration Detention Centre, Adelaide Immigration Transit Accommodation, Melbourne Immigration Transit Accommodation, Villawood Immigration Detention Centre and Brisbane Immigration Transit Accommodation. The Commission also inspected several 'alternative places of detention' (APODs) in Melbourne and Brisbane.
- ⁸ 'Immigration Detention Statistics,' *Department of Home Affairs* (Web page) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/immigration-detention>>.
- ⁹ The 2020 bill implements the following recommendations from the ALP dissenting report. Recommendation 3: that the bill be amended in accordance with the third recommendation of the Law Council of Australia to ensure that medications obtained under prescription, or supplements recommended by a health practitioner, are not caught by the provision, and that the provision is directed only at narcotic or restricted substances and recommendation 6: that

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

the bill be amended to ensure that detector dogs are able to be used in immigration detention and transit centres, but are not permitted to be used on detainees.

- ¹⁰ Department of Immigration and Border Protection, *Detention Services Manual—Chapter 4—Access to Communication Services in IDFs* (September 2015).
- ¹¹ Australian Border Force, 'New Measures to Combat Illegal Activity within Immigration Detention Facilities,' *Parliament of Australia* (Media Release, 21 November 2016) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/4950103%22>>.
- ¹² *ARJ17 v Minister for Immigration and Border Protection* (2018) 250 FCR 446, [103–104].
- ¹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 9(1), 10(1).
- ¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 2(1), 16(1).
- ¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 19(b), 22, 27.
- ¹⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15(1a).
- ¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10(1).
- ¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16(1).
- ¹⁹ 'Immigration Detention Statistics', *Department of Home Affairs* (Web page) <<https://www.homeaffairs.gov.au/Research-and-Statistics/Statistics/Visa-Statistics/Live/Immigration-Detention>>
- ²⁰ See for example, *Migration Act 1958* (Cth) ss 501, 116, 109, 128, 134, 500A.
- ²¹ *Migration Act 1958* (Cth) ss 501(1)–(3A).
- ²² *Migration Act 1958* (Cth) s 501(3A).
- ²³ 'Key Visa Cancellation Statistics', *Department of Home Affairs* (Web page) <<https://www.Homeaffairs.Gov.Au/Research-and-Statistics/Statistics/Visa-Statistics/Visa-Cancellation>>.
- ²⁴ 'Immigration Detention Statistics', *Department of Home Affairs* (Web page) <<https://Www.Homeaffairs.Gov.Au/Research-and-Statistics/Statistics/Visa-Statistics/Live/Immigration-Detention>> .
- ²⁵ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) 10 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- ²⁶ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ²⁷ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) sections 3.2(d), 3.5(a) and (d) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ²⁸ 'Immigration Detention Statistics', *Department of Home Affairs* (Web page) <<https://www.Homeaffairs.Gov.Au/Research-and-Statistics/Statistics/Visa-Statistics/Live/Immigration-Detention>>.
- ²⁹ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) 59 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ³⁰ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) 5-6, 43 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ³¹ Standing Committee for the Scrutiny of Bills, the Senate, *Scrutiny Digest 13 of 2017* (15 November 2017) [2.131].
- ³² *Migration Act 1958* (Cth) ss 501(6b), (6d).
- ³³ Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) sch 1 item 2.
- ³⁴ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) 2.
- ³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2017, 10180 (Peter Dutton, Minister for Immigration and Border Protection).
- ³⁶ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 13 of 2017, 5 December 2017) 69.
- ³⁷ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 13 of 2017, 5 December 2017) 75.
- ³⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 13 of 2017, 5 December 2017) 73.
- ³⁹ 'Use of force in immigration detention,' *Australian Human Rights Commission* (Report, 23 October 2019) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>>.
- ⁴⁰ 'Human Rights standards for immigration detention,' *Australian Human Rights Commission* (Report, 11 April 2013) 10 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention>>.
- ⁴¹ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) 6.
- ⁴² 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) section 3.5(c) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ⁴³ 'Inspection of Melbourne Immigration Transit Accommodation,' *Australian Human Rights Commission* (Report, March 2017) 21 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-melbourne-immigration-transit>>.
- ⁴⁴ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) section 3.5(d) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.

Australian Human Rights Commission
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- ⁴⁵ 'Risk Management in Immigration Detention,' *Australian Human Rights Commission* (Report, May 2019) section 3.5(d) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>>.
- ⁴⁶ 'Immigration Detention in Australia' *Australian Border Force* (Web page, 06 May 2020) <<https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/visit-detention>>.
- ⁴⁷ 'Immigration Detention in Australia' *Australian Border Force* (Web page, 06 May 2020) <<https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/visit-detention>>.
- ⁴⁸ *Migration Act 1958* (Cth) s 252A.
- ⁴⁹ *Migration Act 1958* (Cth) s 252A(3).
- ⁵⁰ *Migration Act 1958* (Cth) s 252B.
- ⁵¹ Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 sch 1 items 11, 17.
- ⁵² Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth) 42.
- ⁵³ *Standard Minimum Rules for the Treatment of Prisoners*, GA Res 2858 (XXVI), UN GAOR, 3rd Comm, 26th sess, 2027th plen mtg, Agenda Item 12, UN Doc A/8588 (20 December 1971) <[https://undocs.org/en/A/RES/2858\(XXVI\)](https://undocs.org/en/A/RES/2858(XXVI))>. The Standard Minimum Rules were also approved by the UN Economic and Social Council by its resolutions ESC Res 663C (XXIV) 24 UN ESCOR Supp 1 UN Doc E/3048 (31 July 1957) and ESC Res 2076 (LXII) 62 UN ESCPR Supp 1 UN Doc E/5988 (13 May 1977).
- ⁵⁴ *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) <<https://undocs.org/en/A/RES/43/173>>.
- ⁵⁵ *Frérot v France* (European Court of Human Rights, Chamber, Application No 70204/01, 12 June 2007) [35] – [49].
- ⁵⁶ 'Chamber Judgment Frérot v France,' *European Court of Human Rights* (Press release, 12 June 2007) <https://hudoc.echr.coe.int/eng-press#_ftn1>.
- ⁵⁷ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 13 of 2017, 5 December 2017) 83.
- ⁵⁸ 'The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women's Correctional Centre,' *Queensland Ombudsman* (Report, September 2014) <<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T6082.pdf>>.
- ⁵⁹ Legal and Constitutional Affairs Legislation Committee, Senate, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions] (Report, November 2017) 22.