Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Legislation Committee

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Table of Contents

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Migration Law Committee of its Federal Litigation and Dispute Resolution Section, its National Criminal Law Committee and National Human Rights Committee, and the Law Institute of Victoria, Law Society of New South Wales and Queensland Law Society, in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (**the Bill**).

2. The *Migration Act 1958* (Cth) (**the Migration Act**) already permits authorised officers, without a warrant, to search, screen and strip search detainees, in order to find out if there is hidden on the person, or in their clothing or possessions, a weapon or escape aid (including a thing capable of being used as a weapon or escape aid). The use of such force as is reasonably necessary to conduct these searches, screening procedures or strip searches is already permitted, as is the seizure of these items. These existing powers incorporate fewer safeguards than comparable police powers to search a person or premises.

3. The Law Council supports effective management of safety in immigration detention facilities. However, this must occur in accordance with the rule of law. The powers granted to the Minister and authorised officers must be justified and subject to appropriate oversight and safeguards.

4. If there are criminal activities taking place in immigration detention facilities, then the Law Council suggests that police should be notified and standard criminal law processes should be followed, including police obtaining a warrant to search for and seize evidentiary material that may be used to commit a criminal offence. This is the normal occurrence across Australian jurisdictions. The Law Council does not agree with the Bill's proposed response to dealing with criminal activity, which would allow the Minister to prevent whole populations from possessing everyday items - particularly items which are critical to the provision of legal information and advice, such as mobile phones.

5. The Law Council's position is that the Bill should not be passed, as the case has not been made that it is necessary, reasonable or proportionate. It is concerned that:

   - the Bill grants an exceptional level of discretion to the Minister regarding the scope and exercise of coercive powers. This may be an inappropriate delegation of power from the Legislature to the Executive;
   - the purpose of immigration detention must be administrative, not punitive, and restrictions on the rights of persons in immigration detention must be necessary, reasonable and proportionate. It is impermissible for immigration detention to become punitive in character, as this would infringe the Constitution, which vests the judicial power of the Commonwealth only in Chapter III courts;
   - the definition of 'prohibited thing' is not appropriately adapted to the stated purpose of the Bill;
   - the Bill allows for the imposition of blanket bans on prohibited items which are yet to be determined, rather than a proportionate response to individuals who pose particular risks;
   - the anticipated prohibition of mobile phones or other internet-capable devices will have a direct and adverse effect on the timely and confidential provision of legal information and advice, and the rights of detainees;
   - the Bill significantly expands existing search and seizure powers, including the purposes for which a strip search may be conducted. It does not provide sufficient safeguards or oversight of their exercise, and waters down existing safeguards, increasing risks of potential misuse and arbitrary decision-making;

- sufficient quantitative and qualitative evidence has not been provided to justify the reasonableness, necessity and proportionality of the proposed amendments. The Law Council recommends that the Committee seek detailed Departmental information to assist its deliberations on the Bill in several important respects; and
- several provisions lack clarity.

6. In the alternative, should the Bill proceed, the Law Council recommends that:

- the definition of a 'prohibited thing' under proposed subsection 251(2) should be narrowly confined to an exhaustive list of specific items which reasonably present a risk to the health, safety or security of persons or staff in immigration detention facilities, such as weapons, drugs, child pornography and alcohol. The Minister should not be delegated the power to determine 'prohibited things' via legislative instrument;
- in the absence of sufficient evidence that such a prohibition is necessary, reasonable and proportionate, detainees should not be prevented from possessing or using mobile phones or other internet-capable devices;
- the exemption of medications from the definition of a 'prohibited thing' (proposed subsection 251A(3)) should be extended to ensure that parents or guardians can possess such items where prescribed for their children or dependants;
- the words 'whether or not the person is detained in an immigration detention facility' should be removed from proposed subsection 251A(1);
- the power to search certain immigration detention facilities (proposed section 252BA) should be amended so that searches of a detainee's room or personal effects are limited to situations where there is a reasonable suspicion that a weapon, escape aid or unlawful thing (under proposed new paragraph 251A(2)(a)) is in their possession;
- the appointment of assistants under proposed section 252BB should be removed, along with the use of dogs under proposed subsection 252BA(4);
- proposed section 252A (and related section 252B) should be amended to provide that any power to conduct a strip search should be limited to situations where there is a reasonable suspicion that a weapon, escape aid or unlawful thing (under proposed paragraph 251A(2)(a)) is on their person, or in their clothing or possession. Strip searches should not be permitted for prohibited items which do not fall into these categories. Further, strip searches should be limited to exceptional circumstances;
- proposed sections 252 and 252AA should be amended to provide that any power to conduct a search or screening procedure (other than for initial entry or return to immigration detention after a temporary absence) of a detainee should be limited to situations where there is a reasonable suspicion that a weapon, escape aid or prohibited thing (narrowly confined in accordance with the first recommendation above) is on their person, or in their clothing or possession;
- proposed subsection 252(4A) allowing for the seizure of a 'prohibited thing' as determined under proposed paragraph 251A(2)(b) should be amended to align with the first recommendation above to narrowly confine the definition of a 'prohibited thing'; and
- proposed subsections 251B(6)-(8), enabling the Minister to issue a legislative instrument directing that seizure powers be exercised, should be removed.

Introduction

7. The Migration Act currently permits authorised officers, without a warrant, to search, screen and strip search detainees, in order to find out if there is hidden on the person, or in their clothing or possessions, a weapon or escape aid (including a thing capable of being used as a weapon or escape aid). The use of such force as is reasonably necessary to conduct these searches, screening procedures or strip searches is already permitted, as is the seizure of these items. These powers are outlined below.

8. The Bill seeks to expand these existing powers significantly. It would delegate to the Minister an exceptionally broad power to declare an item a 'prohibited thing' in relation to a person in detention or an immigration detention facility, as well as to mandate that seizure powers be exercised, and would permit authorised officers, without a warrant, to search, screen and strip search detainees, as well as search the rooms and personal effects of detainees, for a 'prohibited thing'.

9. The definition of 'prohibited thing' includes anything the Minister is satisfied 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'. The extraordinary breadth of this definition would allow the Minister to declare virtually any item a 'prohibited thing'. A pen and paper, art supplies, musical instrument, and any number of everyday items, could be in this category.

10. One major purpose behind the Bill appears to be to allow the Minister to impose a blanket ban on mobile phones. The Bill explicitly includes mobile phones as an example of something the Minister may determine to be a 'prohibited thing' in relation to a person in detention or in relation to an immigration detention facility. This responds to the Full Federal Court's recent decision in *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 (**ARJ17**), which found that a blanket policy ban on mobile phones lacked a legislative basis.

11. More broadly, the Bill provides for:

    - a new power to the Minister to direct that an authorised officer must exercise one or more of the relevant seizure powers. The direction can be in relation to any individual or class of persons, things, facilities or circumstances;
    - a new power to authorised officers to search immigration detention centres operated by or on behalf of the Commonwealth. The search can extend to a wide range of areas regardless of whether these are thought of as 'public' or 'private', from common areas to storage areas to medical examination rooms, including the rooms and personal effects of detainees, and can involve the use of search dogs;
    - authorised officers to be assisted by 'assistants' in conducting searches of immigration detention centres operated by or on behalf of the Commonwealth, with no standards provided as to: who can be an assistant, how they are appointed; what training they receive; and what background checks are conducted. An assistant may exercise nearly all of the same powers, functions and duties as are conferred on the authorised officer; and
    - a broad definition of 'immigration detention facility' as including a 'detention centre' or 'another place approved by the Minister in writing', as well as a 'prohibited thing' relating to a person in detention 'whether or not the person is detained in an immigration detention facility'.

12. The justification for the amendments according to the Explanatory Memorandum is 'to ensure that the Department can provide a safe and secure environment for staff,

detainees and visitors in an immigration detention facility'.[1] It specifically notes 'an increasing number of higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups' and that 'detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities'.[2]

13. The Law Council notes the Bill reintroduces into the Australian Parliament an earlier unsuccessful attempt to legislate on this issue. In 2017, the Law Council submitted to this Committee its strong concerns in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (**the 2017 Bill**).[3] It is concerned by the reintroduction of these amendments during a time of reduced scrutiny due to the global pandemic. The Bill seems particularly concerning given the COVID-19 restrictions people in detention are currently facing, such as the suspension of personal visits including from legal representatives.

Context

14. The Law Council's views on the Bill draw upon its *Rule of Law* policy principles, which maintain that the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law.[4] This means that Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used.

15. It maintains that where legislation allows for the Executive to issue subordinate legislation, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision. The Executive should not be able to issue an instrument which confers new powers on Executive agencies. Further:

- the use of Executive powers should be subject to meaningful parliamentary and judicial oversight, particularly coercive powers including those which enable it: to use force; to detain; to enter private premises; to seize property; and to compel the attendance or cooperation of a person;
- mechanisms should be in place to safeguard against the misuse or overuse of Executive powers;
- where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress; and
- Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.[5]

16. The Law Council is also cognisant of Australia's relevant international human rights obligations which are engaged by the Bill. While it is directed towards achieving the legitimate objectives of safety, security and order in detention facilities, it also represents a significant incursion on several fundamental rights and freedoms,

[1] Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth), 2.
[2] Ibid.
[3] Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (20 October 2017) <https://www.lawcouncil.asn.au/resources/submissions/migration-amendment-prohibiting-items-in-immigration-detention-facilities-bill-2017>; <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ImmigrationDetentionFac/Submissions>.
[4] Law Council of Australia, *Rule of Law Principles Policy Statement* (2011), 4.
[5] Ibid.

including:

(a) freedom from torture or cruel, inhuman and degrading treatment or punishment, as provided under Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**)[6] – a right from which no derogation is permissible;[7]

(b) the right to liberty and security of the person, which, under Article 9, includes:

> *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*[8]

(c) the right to humane treatment in detention;[9]

(d) the right to privacy and family: 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …', [10] and the further provision that the family group unit is entitled to protection by the state;[11]

(e) under Article 19(2), that a detainee has the right to freedom of expression, including the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. Restrictions on freedom of expression can only be for one of two reasons – 'respect for the rights or reputations of others',[12] or 'the protection of national security or of public order, or of public health or morals'[13] – and must, like all restrictions on derogable rights, be necessary, reasonable and proportionate;

(f) similarly, the right to freedom of assembly and association as contained in Articles 21 and 22 of the ICCPR, and Article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);[14] and

(g) the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[15]

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[6] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[7] ICCPR, art 4(2).
[8] Ibid, art 9(1).
[9] Ibid, art 10.
[10] Ibid, art 17.
[11] Ibid, art 23.
[12] Ibid, art 19(3)(a).
[13] Ibid, art 19(3)(b). Note the following clarification of 'public order' provided by the Attorney-General's Department, 'Right to freedom of opinion and expression' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression>:

> *'Public order' is understood to mean the rules which ensure the peaceful and effective functioning of society. The limitation in article 19(3) would justify prohibitions on speech that may incite crime, violence or mass panic, provided the prohibition is reasonable, is effective to protect public order, and restricts freedom of expression no more than is necessary to protect public order.*

[14] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[15] ICESCR, art 12(1).

Issues of Concern

17. The Law Council submits that the proposed prohibition, search and seizure powers are not necessary or proportionate to achieving the Bill's stated purpose of ensuring the health, safety and security of detainees, staff and visitors to an immigration detention facility. Rather, the wide scope of the proposed powers and the absence of sufficient scrutiny and safeguard mechanisms may have the unintended consequence of undermining the health, safety and security of persons in immigration detention facilities.

Constitutional Issues - Immigration Detention Is Not Punitive

18. The Law Council wishes to clarify that the purpose of immigration detention is administrative, not punitive. Immigration detention differs from criminal detention in that it is administrative in character and is not triggered by criminal offending or suspicion. It is impermissible for immigration detention to become punitive in character, as this would offend against the constitutional principle that the judicial power of the Commonwealth can only be vested in Chapter III courts.[16]

19. Given this, the Law Council is concerned that the Bill's proposed powers are similar to powers that apply in a prison context. For example, the anticipated prohibition on mobile phones under proposed new paragraph 251A(2)(b), which would restrict people's communication with legal representatives and family members and take away access to information, communication and entertainment on the internet and social media, might be described as punitive.

Availability of Existing Powers

20. The Law Council submits that the proposed prohibition, search and seizure powers are not necessary, given the existing powers available to authorities.

Searches of Detainees

21. Section 252 of the Migration Act already permits authorised officers to undertake searches, without a warrant, of persons 'detained'[17] in Australia to find and confiscate certain items.

22. Under subsections 252(1) and 252(2), a warrantless search of a detainee, detainee's clothing, and any property under the immediate control of the detainee, may be conducted for the purposes of finding out whether there is hidden on the person, their clothing or in their property 'a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape from immigration detention' (**a potential weapon or escape aid**).

23. Subsection 252(8) authorises the use of such force as 'is reasonably necessary to conduct the search'.

[16] See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562.
[17] See Migration Act, s 5 (definition of 'detain'): ''*detain*' means: (a) take into immigration detention; or (b) keep, or cause to be kept, in immigration detention; and includes taking such action and using such force as are reasonably necessary to do so. Note: this definition extends to persons covered by residence determinations (see section 197AC).' See also Migration Act, s 5 (definition of 'immigration detention').

24. These searches can be conducted at any time without a warrant, provided that they are conducted for the specified purposes. As a matter of standard policy, they 'may' also be conducted 'when a detainee first enters immigration detention',[18] and 'when a detainee is leaving or re-entering an immigration detention facility during an external escort'.[19]

25. Under subsection 252(4), an authorised officer may take and retain the above items 'for such time as he or she thinks necessary for the purposes of this Act'. The Law Council emphasises that these are already wide-ranging powers, requiring no warrant. There is no specified threshold of suspicion or belief on the part of the authorised officer that such an item is hidden, although there are implied duties on the officer to exercise the power reasonably in the circumstances.[20]

26. In addition to these statutory powers, according to the Department's Detention Services Manual (**Detention Services Manual**),[21] searches of property (**premises**) by the Department and the service provider can also occur under the common law duty of care to maintain the safety and wellbeing of detainees and others in the immigration detention facility. These searches detect and control the presence of illegal or prohibited items (including drugs, child pornography and alcohol).[22] For example:

    (a) targeted searches are conducted of a specific area of property, including areas considered private, such as sleeping quarters, and require that the provider has a reasonable suspicion that specific items may be found;[23] and

    (b) routine searches can be conducted of the premises without reasonable suspicion in order to maintain the safety and control of detention property. Routine searches to detect and control illegal, excluded or controlled items will usually be of public areas or areas (such as kitchens) where many detainees may have access.[24]

27. However, it also states that there is no common law right to search a detainee's personal effects, without sufficient lawful justification,[25] as this may constitute unlawful trespass.

28. While the only items that can be confiscated if found during a section 252 search are a potential weapon or escape aid, illegal or prohibited items discovered during a search that comes within the scope of the common law duty of care may be retained

[18] Department of Home Affairs, *Procedures Advice Manual 3: Detention Services Manual*, [P A 207-5.4] (**Detention Services Manual**): 'if the detainee has not already been screened under s 252G of the Act or has refused a request under s 252G(4)'.
[19] Detention Services Manual, [P A207-5.4].
[20] Although challenging the exercise of this power on such grounds is difficult: Justice Greenwood, Federal Court of Australia, 'Judicial Review of the Exercise of Discretionary Public Power' (Speech, Queensland Chapter of the Australian Institute of Administrative Law, 27 April 2017). See also Detention Services Manual, [P A207-4.3].
[21] Detention Services Manual, [P A 207-6].
[22] Ibid: the Facilities and Detainees Service Provider (**FDSP**) can conduct such searches under the common law principles relating to owners and occupiers of land, which allow the occupier of premises to conduct searches of these premises.
[23] Ibid, [P A207-6.2]. This means 'items inherently capable of affecting the safety of the premises and those within it': Ibid, [P A207-6.3].
[24] Ibid, [P A207-6.2].
[25] Ibid, [P A207-6.6]: for example, if elements of the duty of care are met, such as for minors where a search of a minor is to be conducted only in the most exceptional circumstances where there is a firm belief that there is on their person a weapon or other thing capable of being used to inflict bodily injury or to help the minor to escape from immigration detention.

under that duty, according to the Detention Services Manual.[26] This includes illegal items such as drugs and child pornography, which must be notified to police.[27]

Screening Procedures and Strip Searches of Detainees

29. Authorised officers also already have powers to conduct, without a warrant, screening procedures and strip searches of persons detained under respective sections 252AA and 252A of the Migration Act.

30. Under subsection 252AA(1), a screening procedure – involving screening equipment such as a metal detector or similar device – of a detainee or a detainee's clothing or possessions may be undertaken to find out whether there is hidden on the detainee, in his or her clothing or a thing in his or her possession a potential weapon or escape aid. The exercise of these screening procedure powers does not require a warrant or any specified threshold of belief or suspicion on the part of the authorised officer.[28] They may be exercised at any time while a person is held in immigration detention. As a matter of policy, authorised officers 'must screen' when a detainee 'first enters an immigration detention facility',[29] or 'is leaving and re-entering the facility on an external escort (for example, to attend a tribunal hearing or medical appointment)'.[30]

31. Under subsection 252A(1), a strip search of a detainee, including an examination of the detainee's body, clothing and possessions, may be undertaken to find out whether there is hidden on the detainee, in his or her clothing or a thing in his or her possession a potential weapon or escape aid.[31] The exercise of these strip search powers does not require a warrant.[32] However, the authorised officer must:

    (a) form a reasonable suspicion that a potential weapon or escape aid is hidden on the detainee or in the detainee's clothing or possessions;[33]

    (b) form a reasonable suspicion that it is necessary to conduct a strip search to recover the potential weapon or escape aid;[34]

    (c) receive authorisation to conduct a strip search from:

        (i) the Department if the detainee is an adult;[35] or

        (ii) a magistrate if the detainee is at least 10 but under 18;[36] and

    (d) comply with the rules for conducting a strip search set out in section 252B.

32. Under subsection 252C(1), an authorised officer may take and retain a thing found in the course of a screening procedure or strip search if the thing might provide evidence

[26] Ibid, [P A2075.8].
[27] Ibid, [P A207.9].
[28] Although as above, they must be exercised reasonably.
[29] Detention Services Manual, [P A095-9]9: 'if the detainee has not already been screened under s 252G or has refused a request under s 252G(4)'.
[30] Ibid, [P A095-9]9.
[31] Migration Act, s 252A(1). See also s 252A(2) for the definition of 'strip search'.
[32] Ibid, s 252A(1).
[33] Ibid, s 252A(3)(a). See also s 252A(3A)(a)-(c) for the basis on which an officer may form a suspicion on reasonable grounds.
[34] Ibid, s 252A(3)(b).
[35] Ibid, s 252A(3)(c)(i): this must be from the Secretary or Australian Border Force Commissioner, or an SES Band 3 employee in the Department (who is not the officer referred to in paragraphs (a) or (b) nor the authorised officer conducting the strip search). See also ss 252A(4)(a)-(b), (5), (8) for further authorisation laws and the definition of 'SES Band 3 employee'.
[36] Ibid, s 252A(3)(c)(ii). See also ss 252A(4)(a)-(b), (5), (6A) for further authorisation laws.

of the commission of an offence against the Migration Act or is forfeited or forfeitable to the Commonwealth.

33. An authorised officer must not return a thing that is forfeited or forfeitable to the Commonwealth,[37] which means, in accordance with subsection 252C(2), a potential weapon or escape aid.[38] Such a thing must be given, as soon as possible, to a constable.[39]

34. An authorised officer must take reasonable steps to return any other thing retained under subsection 252C(1),[40] which means, in accordance with subsection 252C(1), a thing that might provide evidence of the commission of an offence against the Migration Act.[41] However, there are a number of caveats around this requirement.[42]

35. The Detention Services Manual states that should illegal items, for example, drugs or child pornography, be found during a section 252AA screening procedure or a section 252A strip search, these items must be confiscated and the police notified.[43]

36. If a detainee is held in a State or Territory prison or remand centre, then the laws of that State or Territory conferring or affecting powers to search persons and their possessions in prisons or remand centres apply to the detainee in accordance with section 252F, and sections 252AA and 252A do not apply.[44]

Screening Visitors

37. Similarly, authorised officers already have powers to request to screen and inspect persons about to enter a detention centre (including visitors) and temporarily confiscate things,[45] in accordance with section 252G of the Migration Act. In particular, if they suspect on reasonable grounds, that a person possesses a thing that might endanger the safety of the detainees, staff or other persons at the detention centre, or disrupt the order or security arrangements at the detention centre,[46] they may request to inspect a person's possessions etc,[47] and request the person to leave a thing in a place specified.[48] Persons who decline these requests may be denied entry.[49]

Criminal Law Search and Seizure Powers

38. If criminal activities are taking place inside detention centres, as suggested in the Explanatory Memorandum and Second Reading Speech, and these criminal activities involve items that cannot be obtained under the above-mentioned provisions of the

[37] Migration Act, s 252C(3). Instead, the authorised officer must, as soon as practicable, give the thing to a constable (within the meaning of the *Crimes Act 1914*).
[38] Ibid, s 252C(2).
[39] Ibid, s 252C(3).
[40] Ibid, s 252C(4).
[41] Ibid, s 252C(1).
[42] See ibid, ss 252C(4)-(5), 252D, 252E.
[43] Detention Services Manual, [P A095-18]. See also Detention Services Manual, [P A207-9].
[44] Migration Act, s 252F(3).
[45] Ibid, s 252G(3)-(5). However, if the possession of the thing by the person is unlawful under a Commonwealth law or in the relevant state or territory, then it must not be returned and must be provided as soon as practicable to a constable: s 252G(6).
[46] Ibid, s 252G(3).
[47] Ibid, s 252G(4)(a)-(d).
[48] Ibid, s 252G(4)(e), (5). However, if the possession of the thing by the person is unlawful under a Commonwealth law or in the relevant state or territory, then it must not be returned and must be provided as soon as practicable to a constable: s 252G(6).
[49] Ibid, s 252G(7). In addition, a detainee who refuses a request may nevertheless be searched or screened using the powers under eg, ss 252 and 252AA.

Migration Act (that is, items that are not potential weapons or escape aids), then standard criminal law processes can and should be followed, including obtaining a warrant for search and seizure.

39. The Commonwealth, states and territories already have laws prohibiting criminal activity and preventing the possession of illicit drugs and weapons. Federal, state and territory police are empowered to investigate these and other crimes, including in immigration detention facilities in Australia, under their well-established search and seizure power regimes. They also receive significant training on the exercise of these powers.

40. For example, section 3E of the *Crimes Act 1914* (Cth) provides for the issue of a warrant to search 'premises',[50] or to undertake an 'ordinary search'[51] or a 'frisk search'[52] of a person.[53] The issuing officer must be satisfied that there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, any evidential material at the premises or in possession of the person.[54]

41. Subsection 3E(5) sets out that the warrant must contain certain statements, including, in accordance with paragraph 3E(5)(c), 'the kinds of evidential material that are to be searched for under the warrant'.

42. Subsection 3E(6) provides that the issuing officer is also to state, in a warrant in relation to premises:

    (a) that the warrant authorises the seizure of a 'thing'[55] found at the premises in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be:

        (i) evidential material in relation to an offence to which the warrant relates;

        (ii) a thing relevant to another offence that is an indictable offence; or

        (iii) 'evidential material'[56] or 'tainted property';[57]

        if the executing officer or a constable assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence;[58] and

    (b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed if the executing

[50] *Crimes Act 1914* (Cth), s 3E(1). 'Premises' includes a place and a 'conveyance': Ibid, s 3C (definition of 'premises'). 'Conveyance' includes an aircraft, 'vehicle' or vessel: Ibid, s 3 (definition of 'conveyance'). 'Vehicle' includes any means of transport (and, without limitation, includes a vessel and an aircraft): Ibid, s 3UA (definition of 'vehicle').
[51] Ibid, s 3C (definition of 'ordinary search'). 'Ordinary search' means a search of a person or of articles in the possession of a person that may include: (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and (b) an examination of those items.
[52] Ibid, s 3C (definition of 'frisk search'). 'Frisk search' means: (a) a search of a person 'conducted' by quickly running the hands over the person's outer garments; and (b) an examination of anything worn or carried out by the person that is conveniently and voluntarily removed by the person. 'Conduct' includes any act or omission: Ibid, s 3C (definition of 'conduct').
[53] Ibid, s 3E(2).
[54] Ibid, ss 3E(1) and 3E(2).
[55] Other than the evidential material of the kind which would already be referred to in the warrant in accordance with s 2E(5)(c). 'Thing' includes a thing in electronic form: Ibid, s 3ZZAC (definition of 'thing').
[56] Within the meaning of the *Proceeds of Crime Act 2002* (Cth).
[57] Withing the meaning of the *Crimes Act 1914* (Cth).
[58] *Crimes Act 1914* (Cth), s 3E(6)(a).

officer or a constable assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession.[59]

43. Subsection 3E(7) provides that the issuing officer is also to state, in a warrant in relation to a person:

(a) that the warrant authorises the seizure of a 'thing'[60] found, in the course of the search, on or in the possession of the person or in a 'recently used conveyance', being a thing that the executing officer or a constable assisting believes on reasonable grounds to be:

(i) evidential material in relation to an offence to which the warrant relates;

(ii) a thing relevant to another offence that is an indictable offence; or

(iii) 'evidential material'[61] or 'tainted property';[62]

if the executing officer or a constable assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence;[63] and

(b) the kind of search of a person that the warrant authorises.[64]

44. Section 3ZH provides a constable with the power to conduct an ordinary search[65] or a strip search[66] on a person who has been arrested for an offence and brought to a police station (as well as, following a strip search, a forensic procedure[67]). To conduct such a strip search, the constable must suspect on reasonable grounds: that the person has in their possession a 'seizable item'[68] or 'evidential material';[69] and that it is necessary to conduct a strip search to recover the item or material.[70] A superintendent or higher must have approved the search.[71] Some states, such as New South Wales, have wider parameters in which police may conduct strip searches.[72]

Nature of Search and Seizure Powers

45. As highlighted above regarding rule of law principles, coercive search and seizure powers represent a significant incursion on individual rights and freedoms. This is also reflected in the need for police to seek a search warrant based on a 'reasonable suspicion' threshold. It is also reflected in the recent comments of Justice Rares in *ARJ17*:[73]

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[59] *Crimes Act 1914* (Cth), s 3E(6)(b).
[60] Other than the evidential material of the kind which would already be referred to in the warrant in accordance with s 2E(5)(c). 'Thing' includes a thing in electronic form: Ibid, s 3ZZAC (definition of 'thing').
[61] Within the meaning of the *Proceeds of Crime Act 2002* (Cth).
[62] Withing the meaning of the *Crimes Act 1914* (Cth).
[63] *Crimes Act 1914* (Cth), s 3E(7)(a).
[64] Ibid, s 3E(7)(b).
[65] Ibid, s 3ZH(1)(a).
[66] Ibid, s 3ZH(1)(b).
[67] Ibid, s 3ZH(2A).
[68] Ibid, s 3ZH(2)(a)(i)). 'Seizable item' means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody: Ibid, s 3C (definition of 'seizable item').
[69] Ibid, s 3ZH(2)(a)(ii). 'Evidential material' means a thing relevant to an indictable or summary offence, including a thing in electronic form: Ibid, s 3C (definition of 'evidential material').
[70] Ibid, s 3ZH(2)(b).
[71] Ibid, s 3ZH(2)(c).
[72] See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 33.
[73] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 (**ARJ17**).

> *Statutory authority is necessary for any search of an individual or his or her property. This is because the common law does not allow government officials to enter private property or, except in limited circumstances, not applicable here, to arrest or detain individuals … Over 250 years ago, the common law firmly set its face against general warrants that did not particularise a person whose premises were to be searched or the objects of the search … legislation authorising search warrants "seeks to balance long established individual rights against the public interest in combatting crime".*
>
> *By parity of reasoning, s 252 strikes this balance, in relation to persons in immigration detention, by its specification of the purposes of any search without warrant and the strictures on its conduct.* [Caselaw has] *established that:*
>
> > *acts in invasion of the liberty of the subject, or in interference with his property, are unlawful, unless they are justified by some statute or known principle of law. All that was decided, or rather, declared by that case is that* ***an act which is an interference with liberty or property is unlawful unless a positive law can be found to authorize it****.*[74]

46. This Full Federal Court decision found that the Department's decision to issue a blanket policy authorising officers to search for and seize mobile phones of all persons held in immigration detention was invalid as it was not authorised by the Migration Act. The Law Council emphasises Justice Rares' remarks that section 252 of the Migration Act, as currently framed, 'strikes the balance' between long established individual rights and the public interest in combatting crime.[75]

Lack of Justification

47. Against the existing powers above, and the established role of police in investigating crimes across Australian society rather than alternative law enforcement regimes, the Law Council considers that a strong, detailed justification is needed to further expand the Migration Act regime.

48. The Law Council notes that the Explanatory Memorandum to the Bill asserts the following:

> *Immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups.*
>
> *Evidence indicates that detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape effort, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff. …*
>
> *The existing search and seizure powers in the Migration Act are not sufficient to prevent the misuse of drugs, mobile phones, SIM cards and*

[74] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98, [84] (Rares J) (emphasis added) (**ARJ17**).
[75] Ibid.

internet-capable devices or other things that are of concern within the context of immigration detention facilities.[76]

49. However, no statistics or data have been provided, including on the volume of the criminal and behavioural issues that the Bill seeks to address. The Department has not published evidence on the use of mobile phones to facilitate 'contraband' activity (which is undefined in the Explanatory Memorandum but commonly refers to illegal or prohibited traffic in goods[77]), beyond the assertion that there has been 'a significant number of incidents involving the misuse of these devices in the last 12 months'.[78] Without a credible case, it is difficult to see why existing laws are insufficient. It is the general position of the Law Council that new laws are not supported without a sufficient evidence base as to their necessity.

50. The Law Council recommends that the Committee request the Department to publish quantitative and qualitative data to justify the decision to introduce powers beyond the substantial powers that already exist under the Migration Act as well as under Commonwealth, state and territory criminal laws. As far as is possible in light of privacy and confidentiality obligations, this should indicate the numbers and nature of specific incidents of concern, and how they were addressed.

51. Given the Bill's rationale of addressing criminal activity, the Law Council also recommends that the Committee seek Departmental information as to why police are unable to exercise their existing law enforcement functions effectively in immigration detention facilities. Options may include providing additional police resources in close proximity to such facilities, should their availability be at issue. The Explanatory Memorandum does not canvass at any length the role of police,[79] whose occasional presence in immigration detention centres might also offer avenues of redress to detainees who are victims of crimes.

Primary Recommendation

- **The Committee refer to the existing powers available under the Migration Act, as well as to police under Commonwealth, state and territory laws, to recommend that the Bill not be passed.**

Recommendation 1

- **The Committee request that the Department:**
  - **publish quantitative and qualitative evidence to justify the necessity of the proposed amendments; and**
  - **provide evidence as to why police are unable to exercise their existing law enforcement functions effectively in immigration detention facilities.**

[76] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum, 2-3.
[77] Merriam Dictionary.
[78] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 3441 (The Hon Alan Tudge MP) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/df9bb27b-ec32-4383-84c6-058df197388f/0017/hansard_frag.pdf;fileType=application%2Fpdf> (**Second Reading Speech**).
[79] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum.

Definition of Prohibited Thing

52. The Bill seeks to strengthen the ability of the Department to regulate the possession of items by a person in detention beyond a potential weapon or escape aid to a 'prohibited thing'.

Breadth of Ministerial Power

53. Proposed new section 251A confers a wide discretion on the Minister to determine that a thing is a 'prohibited thing'. In the opinion of the Law Council, the scope of this term is far from adequately defined and it is inappropriately delegated, having regard to principles underpinning the rule of law.[80] Proposed subsection 251A(2) provides that the Minister may determine a thing to be a 'prohibited thing' for the purposes of proposed subsection 251A(1), via legislative instrument, if the Minister is satisfied that either:

> *(a) possession of the thing is prohibited by law in a place or places in Australia; or*
>
> *(b) 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.*

54. The notes accompanying the subsection provide a non-exhaustive list of examples of things that may be determined to be prohibited things (discussed below), but there are no other limits on the definition or any guidance as to what standards the Minister should apply, particularly in relation to the open terms used in proposed paragraph 251A(2)(b).

55. The Law Council considers proposed paragraph 251A(2)(b) to be excessively and unacceptably broad in what it may prohibit. It notes that the Minister must only be 'satisfied' of relevant matters, a subjective test, compared with 'satisfied on reasonable grounds'. It also submits that the phrase 'the order of the facility' is substantially broader than the phrase 'the health, safety or security of persons in the facility', which is the purported target of the Bill. However, any number of things could fall under either of the descriptors provided in this paragraph.

56. A power of search and seizure for potential weapons or escape aids is one thing. To extend the power to anything which '**might** be a **risk** [read together, a very low standard] to the health, safety and security of persons in the facility, **or to the order** of the facility' (emphasis added) allows the Minister to declare virtually any item contraband, depending on the subjective standard applied in considering whether something 'might' be a risk, what constitutes a 'risk', the scope given to 'health, safety and security' in this context, or the interpretation of the word 'order'. A pen and paper, art supplies or musical instrument could be in that category.

57. Providing a broad definition with excessive power vested in the Minister to change his or her determination at any time through legislative instrument creates significant uncertainty. In turn, this may subsequently lead to higher levels of anxiety and mental health problems in persons in detention. It may be used to prohibit items which have

[80] As discussed, the scope of delegated authority should be carefully confined and remain subject to parliamentary supervision; the Executive should not be able to issue an instrument which confers new powers on Executive agencies; and the use of Executive powers should be subject to meaningful parliamentary and judicial oversight, particularly coercive powers.

been or may be used by immigration detainees for the purposes of peaceful protest, which 'might' be considered a 'risk' to future order, having a silencing effect.

58. Proposed new subsection 251A(4) ensures that the Minister's legislative instrument is a disallowable legislative instrument, which provides a limited level of parliamentary scrutiny. However, the volume of disallowable instruments is considerable, having significantly increased and now consistently averaging between 1500 and 2000 instruments a year.[81] This means that in practice, the Australian Parliament may have little opportunity to scrutinise the Minister's instruments made under the Bill.

Recommendation 2

- **Should, contrary to the Law Council's recommendation, the Bill be pursued, the definition of a 'prohibited thing' under proposed new subsection 251A(2) should be narrowly confined to an exhaustive list of specific items which reasonably present a risk to the health, safety or security of persons or staff in immigration detention, such as weapons, drugs, child pornography and alcohol.**
- **The Minister should not be delegated the power to determine prohibited things by legislative instrument.**

Mobile Phones and Other Devices

59. The Bill is explicitly directed at making it easier to ban mobile phones, SIM cards, and computers and other electronic devices capable of being connected to the internet.[82] This purpose is recognised in the Explanatory Memorandum,[83] which notes that it is intended to address the decision of *ARJ17*,[84] which found that a 'blanket' policy ban on mobile phones in immigration detention facilities lacked a legislative basis,[85] and the Second Reading Speech.[86]

60. As noted above, the Law Council considers that the Explanatory Memorandum and Second Reading Speech do not justify this type of prohibition. No data has been provided on the use of mobile phones to facilitate criminal activity, beyond the assertion that there has been 'a significant number of incidents involving the misuse of these devices in the last 12 months'.[87]

61. Moreover, it is not usual democratic practice in addressing criminal risks to ban entire populations from using the everyday tools employed by some criminals – which may also include pen, paper or landline telephones. Instead, the focus is on whether existing offences are appropriately framed, and law enforcement agencies have the necessary tools to investigate them. To cite Justice Rares' remarks in *ARJ17:*

> *the fallacy of the argument is to conflate a potential nefarious use to which a mobile phone can be put by a person… with the ordinary and innocent*

[81] Odgers Australian Senate Practice, Ch 15.
[82] See the notes accompanying proposed new section 251A.
[83] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum, 2.
[84] Ibid, 3.
[85] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 (***ARJ17***).
[86] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 3441 (The Hon Alan Tudge MP) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/df9bb27b-ec32-4383-84c6-058df197388f/0017/hansard_frag.pdf;fileType=application%2Fpdf> (**Second Reading Speech**).
[87] Ibid, 3441.

> *use of that device as a commonplace feature of modern daily life around the world.*[88]

62. The Law Council considers that a prohibition on items such as mobile phones has not been demonstrated to be a necessary or proportionate measure, particularly in the context of the important role that mobile phones and internet-capable devices play in both facilitating access to legal advice (below) and aiding mental well-being. Critical to this last point is the vulnerability of many detainees and the lengthy periods that a person may be required to spend in an immigration detention facility.

63. As noted above, if detainees are engaged in criminal activities then these activities should be investigated by police law enforcement on a case-by-case basis under existing laws.

64. One rationale put forward in favour for the ability to prohibit mobile phones in immigration detention facilities is that they have been used by detainees to intimidate and threaten the safety and welfare of staff, with staff being filmed and photographed by detainees, with this material then transmitted to associates outside of detention facilities via social media, causing staff and their families significant fear and stress.[89] The Law Council notes that under the *Criminal Code Act 1995* (Cth), it is already an offence, punishable by up to three years imprisonment, for a person to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.[90]

Recommendation 3

- **In the absence of sufficient quantitative and qualitative evidence that such a prohibition is necessary, reasonable and proportionate, detainees should not be prevented from possessing or using mobile phones or other internet-capable devices.**

Access to Legal Representation

65. The rule of law requires that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.[91] The Law Council believes that the Bill, and in particular its explicit focus on mobile phones, has the potential to make access to legal representation and support significantly more difficult, and will unjustifiably exacerbate what is already a challenging process that must operate within strict procedural time limitations.

66. Mobile phones play a significant role in ensuring immigration detainees are able to access timely legal advice. In fact, they (and access to internet-based devices) are critical to ensuring that the detainee is aware of their right to legal advice in the first place – a right which is not made sufficiently clear. In this context, the Law Council refers to the Commonwealth Ombudsman's recent concerns raised as part of their oversight of immigration detention facilities:

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[88] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98, [79] (Rares J) (***ARJ17***). Rares J was specifically referring to whether the mobile phone was 'hidden' as crucial to determining whether the power under current s 252 of the Migration Act could be exercised.
[89] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 3441 (The Hon Alan Tudge MP) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/df9bb27b-ec32-4383-84c6-058df197388f/0017/hansard_frag.pdf;fileType=application%2Fpdf> (**Second Reading Speech**).
[90] *Criminal Code Act 1995* (Cth), s 474.17.
[91] Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011) 3.

> *Detainees have access to a series of external independent administrative and judicial review options. However, we remain concerned that detainees may not be aware of their right to access these services. While the Act requires the department to facilitate access to legal support if requested,*[92] *it does not require that detainees are advised of the options open to them … We did not note any signage in the immigration detention facilities that would alert detainees to their rights of review. While service provider staff advised information about review is provided during the induction process, there do not appear to be practices in place to reinforce this information following the initial induction.*[93]

67. Effective denial of access to lawyers may also constitute an unreasonable interference with the right to privacy. Similar cases before the European Court of Human Rights have upheld claims of interference with access to and contact with lawyers as an interference with access to the courts.[94] To the extent that it is relevant, the Law Council notes that such denial cannot be justified for the sake of 'the prevention of disorder or crime' and may also constitute the denial of a fundamental right.[95]

68. Further, material that may attract legal professional privilege (for example, legal advice provided by text message, or by email accessed on a mobile phone) may be confiscated under this Bill.[96] There is no requirement in the Bill that detainees be advised of their rights, and the provisions of the Bill do not provide any procedural safeguards in this respect.

69. Legal professional privilege is a fundamental common law right and one enshrined in various international human rights instruments.[97] The Law Council notes that in the absence of explicit abrogation in the Bill, legal professional privilege is preserved.[98]

Transparency and Democracy

70. An additional concern arises that the removal of mobile phones from detainees may contribute to an inappropriate opacity of detention facilities in Australia. The ban may prevent the release of information about immigration detention facilities even where it would be in the public interest for such information to come to light. The lack of transparency or independent oversight over immigration detention facilities has been a consistent concern over many years in Australia.[99]

71. The use of mobile phones to raise issues of critical public importance has most recently been demonstrated in the George Floyd case, culminating in global protests. In Australia, mobile phone footage of several events has prompted public concern recently about police use of force with respect to Indigenous persons in custody, as well as the situation of the Biloela Tamil family, who were filmed in significant distress during an attempt to deport them to Sri Lanka. While the Law Council appreciates

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[92] Migration Act, s 256.
[93] Commonwealth Ombudsman, *Immigration Detention Oversight: Review of the Ombudsman's activities in overseeing immigration detention*, January to June 2019 (February 2020), 6.
[94] See, eg, *Golder v the United Kingdom* judgment of 21 February 1975, A 18.
[95] The Law Council acknowledges input from the Law Council of New South Wales regarding this point.
[96] Ibid.
[97] The United Nations Human Rights Committee has warned against 'severe restrictions or denial' of the right to legal professional privilege with respect to individuals' right to communicate confidentially with lawyers.
[98] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.
[99] See, eg, Australia OPCAT Network*, Submission on the Implementation of OPCAT in Australia to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD)* (January 2020).

that mobile phone footage may not always portray the full story, the public interest in such issues is significant, and democratic debate is underpinned by access to such information.

Mental Health and Wellbeing

72. In addition to the important role of mobile phones in providing immigration detainees with timely access to legal representatives, the Law Council is aware of the role of mobile phones in allowing detainees to communicate with family members and friends easily, consistently and without anxiety. In this regard, the Australian Human Rights Commission (**AHRC**) has concluded:

> *The reintroduction of mobile phones in immigration detention centres is a net positive, given its significant benefits for the well-being of people in detention and their capacity to maintain contact with people outside detention.*[100]

73. On the basis of their direct experience with clients, members of the Law Council's constituent bodies advise that for many detainees, mobile phones are the only means by which they can 'see' and have meaningful contact with their family (via video chat). Mobile phones are also likely to hold photographs of family members. The Law Council has legitimate concerns for the mental health of detainees, some of whom are already acutely vulnerable, should their ability to have meaningful contact with their families be restricted as a result of a prohibition on mobile phones.

Breach of International Human Rights Obligations

74. The Bill's attempted prohibition on mobile phones is likely to have an impact on several rights provided under international human rights law, including the right to privacy and right to family life discussed above.[101]

75. Denying contact with family members can be considered a violation of article 7 and article 10 of the ICCPR, as noted in the AHRC's *Human Rights Standards for Immigration Detention*,[102] prepared under paragraph 11(1)(n) of the *Australian Human Rights Commission Act 1986* (Cth), and in the decisions of international courts.[103]

76. Under international human rights law, there are few absolute rights, and most rights may therefore be subjected to reasonable limitations. However, any measure that limits a human right must be: prescribed in law; in pursuit of a legitimate objective; rationally connected to its stated objective; and proportionate to achieving that objective – often summarised as 'necessary, reasonable and proportionate'.[104]

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[100] Australian Human Rights Commission, *Risk Management in Immigration Detention* (Report, 2019) 57.
[101] ICCPR, art 17 and 23.
[102] Australian Human Rights Commission, *Human Rights Standards for Immigration Detention* (April 2013) 9.
[103] See, eg, *SD v Greece* (application no 53541/07), where the European Court of Human Rights held that denial of access to telephones formed part of a matrix of treatment which was degrading and in breach of the equivalent article under the European Convention on Human Rights.
[104] Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015). This approach to Article 17 in particular is supported in *Hatton v United Kingdom* (EHCR 8 July 2003), which considered that 'States are required to minimise, as far as possible, interference with [the equivalent] Article 8 right [to respect for private and family life, home and correspondence], by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights'.

77. The AHRC recently published a report on *Risk Management in Immigration Detention*.[105] In its report, the AHRC accepted that the composition of Australia's immigration detention population has changed in recent years, noting:

> *In particular, there has been an increase in the number and proportion of people detained due to having their visa cancelled on character grounds (often due to their criminal history).*[106]

78. Despite recognising this increase in the number of detainees with a prior criminal history, the AHRC emphasised that any strategies used by the Department to manage risk that restrict human rights must be implemented in a manner that is necessary, reasonable and proportionate.[107]

79. The AHRC specifically investigated the misuse of mobile phones. Relevantly, it found:

> *Information provided to the Commission by facility staff suggests that only a small proportion of people in immigration detention are using mobile phones inappropriately, and that incidents of a serious nature involving mobile phone use are exceptional rather than commonplace.*
>
> *On this basis, the Commission considers that any blanket prohibition on mobile phones in immigration detention would not be a necessary, reasonable or proportionate response to the risks arising from their use.*[108]

80. As noted by the AHRC, 'any risk management practices used in this context should be the least restrictive possible and be properly tailored to individual circumstances'.[109]

Clarification of Reasonable Access

81. The Law Council notes that, according to the Explanatory Memorandum, if the Bill is passed:

> *Detainees will continue to have reasonable access to landline telephones, facsimile, the internet, postal services and visits in order to maintain contact with their support networks and legal representatives. Family, friends, legal representatives and advocates can also contact detainees directly via the immigration detention facility.*[110]

82. To clarify what is 'reasonable access', the Law Council requests that the Department release information about the quality, reliability and availability of computers (with access to internet, video conferencing, scanning, printing and faxing facilities) and telephones in immigration detention facilities (including eg, alternative places of detention) by reference to each facility's population. On the basis of their direct experience with clients, members of the Law Council's constituent bodies are extremely concerned that the facilities on offer to their clients are inadequate, lack privacy and are not readily available.

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[105] Australian Human Rights Commission, *Risk Management in Immigration Detention* (Report, 2019) <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019>.
[106] Ibid, 5.
[107] Ibid, 6.
[108] Ibid, 58.
[109] Ibid, 6.
[110] Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth) 2-3.

Recommendation 4

- **The Department release detailed information about the quality, reliability and availability of telephones and computers (with access to internet, video conferencing, scanning, printing and faxing facilities) in relation to all immigration detention facilities including alternative places of detention. This should include information about the privacy of arrangements in which such facilities are used.**

Medications and Health Care Supplements

83. The Law Council is pleased that proposed new subsection 251A(3) provides for a medication or health care supplement to be exempt from the definition of a 'prohibited thing', provided it 'has been prescribed or supplied for the person's individual use by a health service provider authorised for the purpose by the person in charge of the facility'. This addresses a number of the earlier concerns the Law Council put to the Committee in 2017.[111]

84. However, the Law Council recommends that the exemption be broadened further, to ensure that a parent or guardian can be in possession of a medication or health care supplement prescribed or supplied for their child or dependant, without the potential for this to be seized as a prohibited thing. This logical operation of subsection 251A(3) is currently restricted by the use of the words, 'prescribed or supplied for the person's individual use'.

Recommendation 5

- **Should, contrary to the Law Council's overarching recommendation, the Bill be pursued, the exemption in proposed subsection 251A(3) should be extended to ensure that parents or guardians can possess medications or health care supplements which are prescribed or supplied for children or dependants.**

Prohibited Things Outside Immigration Detention Facilities

85. Under proposed new subsection 251A(1), an item may be a 'prohibited thing' in relation to a person in detention or in relation to an immigration detention facility.

86. The Bill stipulates that a thing is a 'prohibited thing' in relation to a person in detention '*whether or not the person is detained in an immigration detention facility*'. The effect of these words is to expand the reach of the Minister's determination of a 'prohibited thing' in relation to 'a person in detention'.

87. In the opinion of the Law Council, this provision lacks clarity. Presumably, the emphasis within these words is on 'immigration detention facility' rather than 'detained', with the intention of the drafter being to ensure the reach of the Minister's determination of a prohibited thing to *a person in detention* – that is, a *detainee* within

[111] Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (20 October 2017).

the meaning of section 5 – whether or not that detainee is *inside or outside the geographical bounds of an immigration detention facility*.[112]

88. Depending on how it is interpreted, the provision may therefore apply to allow an authorised officer to conduct a search of a detainee for a prohibited thing under proposed new subsections 252(1) and (2), and seize from a detainee a prohibited thing under proposed new subsections 252(4) and (4A),[113] when the detainee is in *any geographical place*, for example, when the detainee is being transported in a vehicle, going to or in court. This may impede a person from eg, contacting and making arrangements with their lawyer when going to court.

89. This has the potential to have unsafe or unintended consequences, impacting on the health, safety and security of detainees, in direct opposition to the Bill's stated objectives. While an authorised officer would still be constrained by the other subsections applicable to searches of detainees, including existing subsection 252(8) to 'not use more force, or subject a person to greater indignity, than is reasonably necessary', the Law Council submits that it remains inappropriate and potentially unsafe to have search and seizure powers applying this broadly.

90. The Law Council questions the necessity of this potential added reach given that 'immigration detention facility' is already broadly defined under proposed new subsection 251A(5) as encompassing a 'detention centre' (itself broadly defined under section 273) or 'any other place approved by the Minister in writing for the purposes of subparagraph (b)(v) of the definition of immigration detention in subsection 5(1)'.

91. The Minister has the power under section 273 to 'cause detention centres to be established and maintained', where 'detention centre' has the very broad meaning of any place that might be considered 'a centre for the detention of persons whose detention is authorised under this Act'.

92. Under subparagraph (b)(v) of the definition of immigration detention in subsection 5(1), immigration detention means 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.

93. The Law Council considers that the definition of 'immigration detention facility' is broad enough, without the Minister's reach also being attached to the personhood of a detainee by the words, 'whether or not the person is detained in an immigration detention facility', in proposed new subsection 251A(1).

Recommendation 6

- **Should, contrary to the Law Council's recommendation, the Bill be pursued, the words 'whether or not the person is detained in an immigration detention facility' should be removed from proposed subsection 251A(1).**

[112] That is, presumably the intention of the drafter was to expand the application of the provision to detainees outside an immigration detention facility ('whether or not the person is detained *in an immigration detention facility*'), and not to persons other than detainees within an immigration detention facility ('whether or not the person is *detained* in an immigration detention facility'). See paragraph 27 of the Explanatory Memorandum.
[113] Although, this would not apply to 'a detainee covered by a residence determination who is residing at the place specified in the determination': Bill, proposed section 252(4B)(a).

Search and Seizure Powers

94. The Bill seeks to further expand the search and seizure powers of the Department.

Directions Requiring Seizure Powers to be Exercised

95. The Bill proposes to grant the Minister a new power to direct, by legislative instrument, that an authorised officer must seize a thing by exercising one or more of the relevant seizure powers. Under proposed new subsection 251B(6), the Minister can make such a direction in relation to one or more of the following:

> *(a) a person in a specified class of persons, or all persons, to whom the relevant seizure power relates;*
>
> *(b) a specified thing, a thing in a specified class of things, or all things, to which the relevant seizure power relates;*
>
> *(c) a specified immigration detention facility, an immigration detention facility in a specified class if such facilities, or all immigration detention facilities;*
>
> *(d) any circumstances specified in the directions.*

96. The Law Council is again concerned that the Minister is being granted an unjustifiably broad discretion to make blanket decisions affecting the lives of persons in immigration detention, without sufficient oversight. It appears possible to make a direction compelling seizure with respect to 'all persons' to whom the relevant seizure power relates, 'all things' to which it relates, and 'all detention facilities' under 'any circumstances'. There is no test by which the Minister must be reasonably satisfied of any matters before making such an instrument. This is a power which can be applied in a blanket fashion, and has the effect of overriding the authorised officer's discretion to exercise the power in a manner which responds to the circumstances.

97. Having a provision that allows the Minister to compel the exercise of seizure powers in specific situations of heightened or exceptional risk is one thing. However, proposed new paragraphs 251B(6)(a)-(d) are exceptionally broad in their terms, and, indeed, proposed new paragraph 251B(6)(d) confirms the list as non-exhaustive. The Law Council is concerned that the provisions as they are currently drafted may operate to enforce prohibitions differently for different cohorts on an arbitrary or even discriminatory basis.

98. For example, under proposed new paragraph 251B(6)(a), the Minister has a broad discretionary power to decide how to define a class of persons. The Example noted in the Bill suggests that the Minister may direct the relevant seizure powers to be used in relation to 'all detainees in a facility other than those who are unauthorised maritime arrivals'.[114] In 2016, the Department imposed the opposite policy, prohibiting mobile phones for all unauthorised maritime arrivals – an outcome which is equally possible under the Bill. According to the Second Reading Speech, the Bill is 'proposing to allow the Minister to direct officers to seize mobile phones from certain categories of people', and the Explanatory Memorandum and Second Reading Speech single out groups at varying levels of specificity including 'higher risk detainees', persons 'having entered detention directly from a correctional facility', and 'members of outlaw

[114] Bill, proposed new s 251B(6), Example.

motorcycle gangs'. However, the Minister is not required by the Bill to limit the making of an instrument to these groups.

99. The Law Council is also deeply concerned by the Bill's implicit sanction of a tiered hierarchy of rights for persons in detention based on past behaviour. It does not support the idea that certain detainees – for example, unauthorised maritime arrivals, persons with past criminal convictions or persons whose visas have been cancelled under section 501 of the Migration Act – deserve a lesser version of rights simply by virtue of past behaviour and independent of a present risk assessment. Even where a risk exists, the making of such an instrument should be reasonable, necessary and proportionate to the circumstances.

100. The only real guidance is contained in subsection 251B(8), which provides that 'subsection (6) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations'. However, the Law Council suggests that in a practical sense this will do little to fetter the Ministerial power.

101. As proposed new paragraph 251B(6) comes under Part 2 of the Migration Act, it will not be disallowable by either House of Parliament, as would usually be the case under section 42 of the *Legislation Act 2003* (Cth) (**Legislation Act**). This is due to the operation of paragraph 44(2)(b) of the Legislation Act and table item 20 in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015. This means that the Minister's legislative instruments issued under this paragraph will not be subject even to limited parliamentary scrutiny. This is particularly concerning in the present context where there is already limited transparency of immigration detention facilities, and the Minister has the power to affect the rights of detainees (for example, if a particular class is singled out by the Minister). Should blanket directions to exercise seizure powers be issued, this is likely to in turn result in the more frequent exercise of corresponding searches (including strip searches) of persons and facilities, and screening powers for these items. As discussed below, there is a worrying lack of limitations on the exercise of these powers. As such, a non-disallowable instrument is inappropriate.

Recommendation 7

- **Should, contrary to the Law Council's recommendation, the Bill be pursued, proposed subsections 251B(6)-(8) should be removed.**

Searches of Certain Immigration Detention Facilities

102. Proposed new section 252BA would provide authorised officers with sweeping new powers to search immigration detention facilities operated by or on behalf of the Commonwealth. The broad definition of 'immigration detention facility' is discussed above. In accordance with proposed new subsection 252BA(2), such a search may be conducted, not only for a potential weapon or escape aid, but also for a prohibited thing, including a prohibited thing under paragraph 251A(2)(b) – so, in effect, virtually any item as discussed above.

103. Proposed new subsection 252BA(1) would allow such a search to cover, 'without limitation', a wide range of areas regardless of whether these are thought of as 'public' or 'private', from 'common areas' to 'storage areas' to 'medical examination rooms', including the personal 'rooms' and 'personal effects' of detainees. Further, in accordance with proposed new subsections 252BA(1) and 252BA(3) respectively, an authorised officer would not need a warrant or any suspicion that such a thing exists at the facility in order to conduct such a search. Similarly, in accordance with proposed

new subsection 251B(1), an authorised officer would not need to be prompted by the visibility of the thing immediately prior to the search or its intentional concealment in order to exercise his or her power to conduct such a search.

104. The explicit inclusion of subsection 252BA(3), which states that an authorised officer may search a facility 'whether or not the officer has any suspicion that there is such a thing at the facility' is extraordinary. As noted above, the existing section 252 does not include an explicit threshold (compared to police search powers, which can only be exercised once a 'reasonable suspicion' test has been satisfied and a warrant obtained). However, there remains the implicit duty on the authorised officer to exercise the power reasonably.[115] This would require some basic threshold of a suspicion to be met in the circumstances, based on the evidence, before exercising such a power. Subsection 252BA(3) overrides this.

105. The Law Council is strongly concerned that these proposed new powers are excessively broad, while lacking sufficient safeguards to prevent misuse. Proposed new subsection 252BA(7) applies the general constraint, which is also applied in relation to searches of persons, screening procedures and strip searches, that an authorised officer 'must not use more force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search'. However, there are no specific safeguards to prevent the decision to conduct a search being made arbitrarily, on the basis of flimsy reasoning, and the overall effect may be to harass or intimidate detainees. There are no specified limitations in respect of how often searches may be conducted; what time of day searches may be conducted; how many times an individual may be repeatedly searched or affected by searches; and so on. The proposed new Ministerial power to direct, by legislative instrument, that an authorised officer must seize a thing (discussed above) may also have the effect of prompting over-zealous exercise of these powers.

106. The Law Council maintains that searches conducted without a warrant should only be allowed under tightly defined circumstances, based on a reasonable suspicion test, and not for the kinds of everyday objects that could be determined a 'prohibited thing'. While the immigration detention population has changed, particularly vulnerable demographics remain (with asylum seekers making up approximately 40 per cent of the immigration detention centre population[116]), to whom arbitrary searches may be especially traumatising and triggering.

107. The Law Council does not support this expansion. At a minimum, the Law Council considers section 252BA should be amended to provide that, regardless of the status of a detainee, any power to search a detainee's room or personal effects should be limited to situations where there is at least a reasonable suspicion that a weapon, escape aid or unlawful thing (a prohibited thing under paragraph 251A(2)(a)) is in their possession.

108. This recommendation would also bring the searches closer to the AHRC's standards. The AHRC advocates that:

[115] Justice Greenwood, Federal Court of Australia, 'Judicial Review of the Exercise of Discretionary Public Power', address given to the Queensland Chapter of the Australian Institute of Administrative Law, 27 April 2017.
[116] Australian Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (31 March 2020): 'There were 542 people who arrived unlawfully by air or boat, in held immigration detention facilities at 31 March 2020 representing 39.5 per cent of the total immigration detention population. There were also 831 people (60.5 per cent of the total immigration population) who were taken into immigration detention for either overstaying or having their visas cancelled for breaching visa conditions.'

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.[117]

Recommendation 8

- **Should, contrary to the Law Council's recommendation, the Bill be pursued, the power to search certain immigration detention facilities under proposed new section 252BA should be amended to provide that any power to search a detainee's room or personal effects should be limited to situations where there is a reasonable suspicion that a weapon, escape aid or unlawful thing (under paragraph 251A(2)(a)) is in their possession.**

Assistants

109. Proposed new section 252BB provides that authorised officers may be assisted by "assistants" in conducting searches of immigration detention facilities under proposed new section 252BA, and the seizure powers associated with such searches. The Law Council finds it concerning that no standards are provided to guide the appointment of these assistants.

110. The Bill provides no parameters for who the assistants can be; how they are appointed or for how long; what training they receive; and what background checks are carried out. The Law Council is concerned that such a lackadaisical approach increases the risk of the officer, the assistant or the detainee inflicting or suffering damage and could leave the government open to litigation. It is also concerned with the scope of powers, functions and duties that may be granted to an assistant, particularly in the context where there are no apparent requirements regarding their background or training. Under proposed new section 252BB, an assistant may exercise nearly all of the same powers and perform nearly all the same functions and duties as are conferred on the authorised officer in relation to searches of immigration detention facilities,[118] and must also comply with 'any directions' given by the authorised officer.

111. The Law Council does not support this expansion.

Recommendation 9

- **Should, contrary to the Law Council's overarching recommendation, the Bill be pursued, the appointment of assistants under proposed new section 252BB should be removed.**

Dogs

112. The Law Council further notes that dogs would be able to be used to conduct searches of immigration detention facilities under proposed new section 252BA, in accordance with proposed new subsections 252BA(4)-(6). The Law Council is concerned that these provisions do not adequately address potential cultural sensitivities around the use of dogs or the risk that dogs are used to harass or intimidate detainees or in a manner that is particularly traumatising for certain vulnerable populations. In the opinion of the Law Council, the use of dogs should be restricted to rare and

[117] Australian Human Rights Commission, *Human Rights Standards for Immigration Detention* (April 2013) 10.
[118] Other than proposed new subsection 242BA(4) of the Bill, using a dog to conduct a search of an immigration detention facility.

exceptional circumstances, such as where there is a reasonable suspicion of narcotics, a bomb threat, etc. These involve criminal offences and should appropriately rely on the exercised established police powers involving the use of dogs.

113. The Law Council does not support this expansion.

Recommendation 10

- **Should, contrary to the Law Council's recommendation, the Bill be pursued, the use of dogs should not be permitted under any expanded immigration detention search and seizure powers. Proposed subsection 252BA(4) should therefore be removed.**

Strip Searches

114. Currently in relation to detainees, as noted above, an authorised officer is permitted to undertake a strip search for the purpose of finding a potential weapon or escape aid, without requiring a warrant – although they must have a reasonable suspicion:

    (a) that a potential weapon or escape aid is hidden on the detainee or in the detainee's clothing or possessions;[119] and

    (b) that it is necessary to conduct a strip search to recover the potential weapon or escape aid.[120]

115. The Bill would expand this strip search power. Proposed new subsection 252A(1) would allow an authorised officer to conduct a strip search in relation to a detainee, without a warrant, not only for the purpose of finding a weapon or escape aid (s 252A(1)(a)), but also a prohibited thing (s 252A(1)(b)).

116. While the requirement that an authorised officer have a reasonable suspicion in order to conduct a strip search remains under proposed new paragraph 252A(3)(a), proposed new subsection 251B(2) effectively confirms that is not necessary for the thing to have been intentionally concealed before the strip search was conducted in order to establish a reasonable suspicion, potentially lowering the standard that may, in practice, have been previously applying.

117. The Law Council is firmly opposed to expanding the grounds on which strip searches may be conducted, particularly as virtually any item may be declared a prohibited thing under proposed new paragraph 251A(2)(b). This broad and open definition of a 'prohibited thing', which is, as discussed, left to the Minister's future discretion through the issuing of legislative instruments, is likely to have the effect of significantly expanding the possibilities of employing strip searches of detainees. For example, an instrument may be issued providing that a pencil is a 'prohibited thing'. Should the authorised officer, subsequently, have a reasonable suspicion that a detainee has on their body or in their possession a pencil (which does not need to be hidden from view), it would seem possible to conduct a warrantless strip search on this basis.

118. At the very minimum, the Bill should be amended to restrict the application of proposed new paragraph 252A(1)(b) to a prohibited (unlawful) thing determined under proposed new paragraph 251A(2)(a), not 251A(2)(b).

[119] Migration Act, s 252A(3)(a).
[120] Ibid, s 252A(3)(b).

Recommendation 11

Should, contrary to the Law Council's recommendation, the Bill be pursued:

- **proposed section 252A (and related section 252B) should be amended to provide that any power to conduct a strip search should be limited to situations where there is a reasonable suspicion that a weapon, escape aid or unlawful thing (under proposed new paragraph 251A(2)(a)) is on their person, or in their clothing or possession;**
- **strip searches should not be permitted for prohibited items which do not fall into the above categories; and**
- **strip searches should be explicitly limited to exceptional circumstances.**

Screening Procedures

119. Currently in relation to detainees, as noted above, an authorised officer is permitted to undertake a screening procedure for the purpose of finding whether there is hidden on the detainee, his or her clothing or in his or her possession, a potential weapon or escape aid, without requiring a warrant, and without a specific threshold of belief or suspicion. However, as above, they must exercise this power reasonably in the circumstances.

120. The Bill would expand this screening procedure power. Proposed new subsection 252AA(1) would allow an authorised officer to conduct a screening procedure in relation to a detainee, without a warrant, not only for the purpose of finding a potential weapon or escape aid, but also a prohibited thing. Proposed new subsection 252AA(1A) clarifies that such a screening procedure may occur 'whether or not the officer has any suspicion that the person has such a thing'. Similarly, in accordance with proposed new subsection 251B(2), it may be conducted 'whether or not the thing had been intentionally concealed before the screening procedure'. The combination of these amendments, together with the Minister's new power to require the seizure of items in circumstances yet to be determined, will significantly expand the circumstances in which such screening procedures may occur.

121. The Law Council does not support this expansion.

Recommendation 12

Should, contrary to the Law Council's recommendation, the Bill be pursued, proposed section 252AA should be amended to provide that any power to conduct a screening procedure of a detainee is limited to:

- **finding a weapon, escape aid or prohibited thing (as narrowly defined in accordance with Recommendation 2); and**
- **a detainee's initial entry, or returning after a temporary absence, to immigration detention; or**
- **in all other cases, situations in which there is a reasonable suspicion that such a weapon, escape aid or thing is on their person, or in their clothing or possession.**

Searches of Persons

122. Section 252 of the Migration Act currently provides authorised officers with powers to search the person, the person's clothing, and any property under the immediate control of the person, in relation to persons detained in Australia.

123. Currently in relation to detainees, as noted above, an authorised officer is permitted to undertake such a search for the purpose of finding out whether there is hidden on the person, their clothing or property, a potential weapon or escape aid, without requiring a warrant or any specified threshold of belief or suspicion. These items may be seized 'for such a time as he or she thinks necessary for the purposes of this Act'.

124. Under amendments proposed to section 252, the Bill would expand this search and seizure power in relation to detainees – except in relation to 'a detainee covered by a residence determination who is residing at the place specified in the determination'.[121]

125. It would allow an authorised officer to undertake a search, not only for the purpose of finding a weapon or escape aid, but also a prohibited thing. The proposed amendment would clarify that such a search may occur 'without warrant' and 'whether or not the officer has any suspicion that the person has such a thing'. Similarly, in accordance with proposed new subsection 251B(1), an authorised officer would not need to be prompted by the visibility of the thing immediately prior to the search or its intentional concealment in order to exercise his or her power to conduct such a search.

126. As above, while the requirement to exercise this discretion reasonably would lend weight towards the conclusion that some basic threshold of a suspicion must be met in the circumstances and based on the evidence, before exercising the existing section 252 power. However, this is overridden by the Bill's amendments.

127. Justice Rares has commented of existing section 252 that the section authorises, if its conditions are met, what would otherwise be a trespass to the person or his or her property.[122] It 'strikes [a] balance, in relation to persons in immigration detention, by its specification of the purposes of any search without warrant and the strictures on its conduct'.[123] This includes the confined purpose of finding out whether there is international concealment of potential weapons or escape aids, which 'supplies the statutory justification for the search being without warrant'.[124]

128. The amendments to section 252, in combination with the Bill's other amendments, remove this balance with respect to searches of persons under section 252. For example, as discussed, the Minister, may by future legislative instrument, determine that a pencil is a prohibited item. He or she may also mandate by legislative instruments the seizure of all pencils held by all detainees in all immigration detention facilities. This is likely to prompt in practice additional searches, without a warrant, of persons, their clothing and their property, under section 252 in order to find pencils. Regardless of whether an authorised officer has any suspicion that a person has a pencil, of whether a person is intentionally concealing a pencil or not, and the purposes for which the pencil was being used or intended, such a search may be

[121] Paragraph 252(4B)(a). Subsection 252(4B) applies to ensure that this particular category of detainees, as well as a non-citizen covered by paragraph 252(1)(b), cannot be searched for a 'prohibited thing', although search and seizure powers still apply to these persons for the purpose of finding and confiscating a weapon, escape aid or possible visa-cancellation evidence).
[122] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98, [78] (Rares J) (***ARJ17***).
[123] Ibid, [85] (Rares J).
[124] Ibid, [80] (Rares J).

conducted. Under existing subsection 252(8), it may also involve the use of force provided that it is no more than reasonably necessary in order to conduct the search.

129. For a prohibited thing determined under paragraph 251A(2)(a), and still for a weapon or escape aid, an authorised officer would be able to retain the thing 'for such time as the authorised officer thinks necessary for the purposes of the Act'. For a prohibited thing determined under paragraph 251A(2)(b), an authorised officer would be required to 'take all reasonable steps, when that detainee ceases to be in detention, to return it to that detainee'.

130. The Law Council is concerned that while the category of items has been broadened, and could include things such as mobile phones with important documentary, monetary, sentimental, etc value, there is no guidance in the legislation as to keeping these in a safe and secure means. The effect that important personal property – which is not unlawful in any other part of Australia – may never be returned to the person to whom it belongs, or may be returned in an altered or damaged condition. This is confirmed by subsection (4D) and (4E), which allow for forfeiture and disposal.

131. The Law Council does not support the amendments to section 252. If, however, contrary to its recommendations, the Bill is progressed, it would only support searches under section 252:

    (a) being extended only for the purposes of finding out whether there is hidden on a person's body, clothing or property a 'prohibited thing' narrowly defined in accordance with Recommendation 2; and

    (b) being conducted on the basis of a reasonable suspicion that they are on a person's body, in a person's clothing or in their possession.

Recommendation 13

Should, contrary to the Law Council's recommendation, the Bill be pursued, proposed section 252 should be amended to provide that any power to conduct a search of a detainee should be limited to situations where there is a reasonable suspicion that a weapon, escape aid or prohibited thing (as narrowly defined in accordance with Recommendation 2) is hidden on their person, or in their clothing or possession.

Recommendation 14

Should, contrary to the Law Council's overarching recommendation, the Bill be pursued, proposed subsection 252(4A) allowing for the seizure of a 'prohibited thing' as determined under proposed paragraph 251A(2)(b) should be amended to align with a prohibited thing as narrowly defined in accordance with Recommendation 2.