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

Legal Aid NSW submission to the Senate Legal and Constitutional Affairs Committee

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services.

Our Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. We also give advice on detention, removal, cancellation procedures and exclusion periods.

The state-wide specialist Refugee Service helps to improve refugees' legal literacy through community legal education and increased access to legal services to prevent their legal problems from escalating. It provides outreach and telephone advice, minor assistance, extended legal assistance and grants of aid in some instances, across a broad range of legal issues including immigration, housing, Centrelink, fines, bills and debts, employment and domestic and family violence.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the **Bill**).

Legal Aid NSW previously made a submission to the Committee regarding the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, in which we expressed significant concern about the proposed amendments, including the proposed broad powers to search for and seize prohibited items. We understand that the current Bill is drafted in largely the same terms.

Legal Aid NSW agrees that it is a legitimate objective for the Department of Home Affairs to provide a safe and secure environment for staff, detainees and visitors in immigration detention facilities. However, we remain concerned that the Bill excessively expands the Minister's power to prohibit 'things' in immigration detention and the powers of authorised officers to search for and seize 'prohibited things'. Such powers will have significant detrimental impact on some of the most vulnerable members of our community, including refugees and their families to whom Australia owes protection under the Refugee Convention and under broader international human rights instruments.[1]

In summary, our concerns are that:

- The measures, including the capacity of the Minister to prohibit any item that might be a risk to health, safety or order of a facility are punitive. As such, they are inappropriate in the context of administrative detention (as compared to court-ordered detention).

- 'Prohibited thing' should be defined in the statute itself, rather than via legislative instrument[2], to enable proper Parliamentary scrutiny of the scope of the definition.

- The potential prohibition on the possession of mobile phones will make it more difficult for detainees to access support from family and friends, with detrimental impact on their mental health.

- Prohibiting mobile phones would make it more difficult for detainees to access legal advice and communicate with external monitoring bodies.

- The proposed amendments may extend to prohibit the use of mobile phones by detainees living in the community in leased private housing, hotels and motels.

[1] *Convention relating to the Status of Refugees* 189 U.N.T.S. 150, (entered into force April 22, 1954); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('Convention on the Rights of the Child'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

[2] Legislative instruments are laws on matters of detail made by a person or body authorised to do so by the relevant enabling legislation. Examples include regulations, rules and determinations. The *Legislation Act 2003* (Cth) defines 'legislative instrument' in section 8 and requires that all legislative instruments be registered on the Legislation Register (section 15G(1)).

- The Bill provides no protection for people not using their phones or other 'prohibited things' for illicit purposes to retain their items, or appeal the seizure of their items.

- The proposed amendments will remove important protections for conducting strip searches.

- The expanded powers to search people[3] and detention facilities for 'prohibited things' are oppressive and inappropriate in immigration detention.

- The Bill provides no avenue to appeal the seizure of mobile phones and other otherwise legal 'prohibited items' that have not been used for illicit purposes.

We provide further detail of these concerns in the following submission.

The nature of immigration detention

The High Court has confirmed that immigration detention is administrative in character, and differs from criminal detention as it is not triggered by criminal offending. It is also *'not a form of extra-judicial punishment*'.[4] We consider that by introducing restrictions similar to those exercised in places of criminal detention, the measures in the Bill are punitive and significantly alter the character of immigration detention. While we acknowledge that immigration facilities accommodate increasing numbers of people whose visas have been cancelled on character grounds, many people within immigration detention facilities have never been convicted of any crime.

Like other members of our community, immigration detainees have a right to be treated with humanity and with respect for the inherent dignity of the person,[5] a right to the presumption of innocence and a right to privacy.[6] We agree with the position of the Australian Human Rights Commission that they should enjoy the *"least restrictive environment possible…The primary concern of immigration detention authorities should be one of care for the well-being of detainees."*[7]

[3] Including detainees and people who are not Australian citizens, who have not been immigration cleared and where an authorised officer has reasonable grounds for suspecting there are reasonable grounds for cancelling the person's visa and they are not in detention (proposed section 251(1) Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (Cth)).
[4] *Al-Kateb v Godwin* (2004) 219 CLR 562, 1.
[5] ICCPR (n1), Article 10
[6] ICCPR (n1), Article 17
[7] Australian Human Rights Commission, *Human rights standards for immigration detention,* (2013) https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention, 9.

The Statement of Compatibility with Human Rights for the Bill acknowledges that the proposed amendments limit the right to privacy, but argues that the limit is "*commensurate to the risk … of drug distribution, violence and the facilitation of other criminal activities.*"[8] We disagree—we consider that the breach of privacy rights by this Bill is not proportionate, because the powers infringe on the rights of all detainees, not only those considered 'higher risk', but those who are not suspected of breaking any law, including children.

'Prohibited thing' should be defined in statute

Clause 251A of the Bill would allow the Minister to determine that something is a 'prohibited thing' by disallowable legislative instrument, if the Minister is satisfied that possession of the thing is prohibited by law in a place or places in Australia, or that 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*'. Later provisions allow both people and detention facilities to be searched and for prohibited things to be confiscated, retained, forfeited and disposed of (see clauses 252, 252A and 252BA).

We are concerned that the very broad criteria for the Minister to determine that a thing is a 'prohibited thing' in clause 251A(2)(b) of the Bill risks being oppressive in the context of administrative detention. Clause 251A(2)(b) requires only that the Minister is satisfied that "*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* [Legal Aid NSW emphasis]." The notes to the proposed section include examples of items that may be determined to be 'prohibited things' including mobile phones, SIM cards and computers or other electronic devices designed to be capable of being connected to the internet. It appears that many other everyday items could also fit the criteria for 'prohibited thing', and there is no requirement to also consider reasonableness in the circumstances.

This is a significant expansion of the current power in section 252 of the *Migration Act 1958* (Cth) (the **Migration Act**) to search for hidden *'weapons or other things that may be used to inflict bodily injury or to help the person to escape from immigration detention*' or a hidden '*document or other thing that is, or may be, evidence for grounds for cancellation of the person's visa*'.

We consider that 'prohibited thing' should be defined in the Migration Act, and therefore subject to proper Parliamentary scrutiny. We acknowledge that the disallowance process in section 42 of the *Legislation Act 2003* (Cth)[9] provides for the opportunity for a legislative

[8] Explanatory Memorandum to *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (Cth), 37 ('Explanatory Memorandum').

[9] The disallowance process is set out in section 42 of the *Legislation Act 2003* (Cth). It allows a senator or member of the House of Representatives to give notice of a motion to disallow a legislative instrument (in whole or in part) within 15 sitting days of the instrument being tabled. If the motion is agreed to, the instrument is disallowed and it then ceases to have effect. If a notice of motion to disallow the instrument has not been resolved or withdrawn within 15 sitting days after having been given, the instrument is deemed to have been disallowed and it ceases to have effect. A guide to the disallowance process is available at https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_19.

instrument to be subjected to some level of scrutiny by members of the Senate or House of Representatives. However, we consider this to be insufficient.

The Explanatory Memorandum states that the power to prohibit items by legislative instrument "*will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the list of things determined by the Minister as prohibited things needs to be amended*."[10] In our view this is not necessary or appropriate. The Migration Act already allows search and seizure of hidden weapons, escape tools and documents that constitute evidence to cancel a person's visa,[11] (and the Bill would broaden these powers to include other items that are and are not visible or concealed (clause 251B). The Explanatory Memorandum makes clear that the Federal Government is intending to prohibit mobile phones, SIM cards and other internet capable devices. We consider that any additional items that the Federal Government considers should be prohibited should be properly considered and debated by Parliament through amendment to the Migration Act, rather than through the legislative instrument.

In our view, a statutory definition of 'prohibited thing' should be appropriately limited to the prohibition of illicit drugs and child abuse material. The latter are, in themselves, harmful and their possession is unlawful in all circumstances. Mobile phones, SIM cards and electronic devices capable of being connected to the internet should not be categorised in the same manner given their many legal uses and ubiquity in modern life.

The power to prohibit mobile phones (clause 251A(2)(b))

Should our views as to the appropriate definition of 'prohibited thing' not be supported, Legal Aid NSW considers that mobile phones should only be seized and confiscated in circumstances where there are reasonable suspicions that they have been used for illicit purposes. They should not be subject to the same search and seizure regime as illicit drugs and child abuse material.

We note that the Minister stated in the second reading speech:[12]

> While not introducing a blanket ban on mobile phones in detention, we are proposing to allow the minister to direct officers to seize mobile phones from certain categories of people, while providing officers with the discretion to search and seize for mobile phones in other circumstances. So people who are not using their mobile phone for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility will still be able to retain their mobile phones.

We disagree with this description of the intention of the Bill. The Bill does not protect the ability for people in detention to retain their phone or any other 'prohibited thing' if they are not using them for criminal activity or to affect the health, safety and security of staff,

[10] Explanatory Memorandum, (n 7), 7.
[11] *Migration Act 1958* (Cth) s 252.
[12] Minister Alan Tudge, Second Reading Speech, 14 May 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fdf9bb27b-ec32-4383-84c6-058df197388f%2F0017%22>

detainees or the facility. It provides no recourse to challenge the actions of an authorised officer who searches and seizes a mobile phone from a person who is not using it for criminal activity or in a way that risks the health and safety of others. The Bill provides no limits on when an authorised officer 'may' search for and seize prohibited things, but expressly provides that authorised officers may do so without a warrant, and whether or not the authorised officer has any suspicion that the person has a 'prohibited thing' (clause 252(2)).

Legal Aid NSW does not consider that sufficient evidence has been made available to justify these expanded powers. The Explanatory Memorandum and Statement of Compatibility with Human Rights states that immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal who have arrived directly from correctional centres, and that illegal activities are being facilitated by mobile phone usage. However, while 45 per cent people in immigration detention in March 2020 were there due to visa cancellation, 55 per cent of people in immigration detention were not.[13]

If a detainee is using a mobile phone for drug distribution, the maintenance of criminal enterprises or other criminal activities, we consider that current laws are adequate to address that type of criminal conduct. Taking away an important means of communication from all detainees in administrative detention in order to address criminal activity by a few is a disproportionate response.

Mobile phones and contact with family and friends

Legal Aid NSW is concerned that a prohibition on mobile phones will inhibit contact with family and friends and will have a significant impact on the mental health of detainees.

As reported by the Australian Human Rights Commission,

> Numerous studies have documented high rates of mental health problems amongst people in immigration detention in Australia, ranging from depression, anxiety and sleep disorders to post-traumatic stress disorder, suicidal ideation and self-harm. Between 1 January 2013 and 25 August 2016, there were 1,730 recorded incidents of self-harm in immigration detention.[14]

Access to mobile phones are vital for detainees to maintain contact with family, friends and their lawyers. In our experience, many detainees, including children, rely on mobile phones for contact with family. Denying access to mobile phones will add to the acknowledged stress caused by immigration detention. This is the case irrespective of the detainee's profile – they may be an asylum seeker, a person who has overstayed their visa or a person who has had their visa cancelled on character grounds and is waiting for their revocation request to be determined. The ability to maintain contact with family supports detainees' resilience and mental health, as acknowledged by the Explanatory

[13] Australian Government Department of Home Affairs, Immigration Detention and Community Statistics Summary, (31 March 2020), <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf> .
[14] Australian Human Rights Commission*, Asylum seekers, refugees and human rights: Snapshot Report* (2nd ed) (2017), 20

Memorandum to the Bill.[15] Restricting a detainee's ability to contact family members also undermines Australia's international legal obligations to protect the right to family life[16] as well as the Federal Government's obligations under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).[17]

The proposed amendments threaten to remove the most convenient way for detainees to maintain regular contact with family and friends. In the 21st century, reliance on landlines, facsimile machines and postal services, as suggested in the Explanatory Memorandum,[18] does not sufficiently protect detainees' rights to privacy and family life.

Mobile phones and access to legal advice and monitoring bodies

Legal Aid NSW is concerned that the prohibition of mobile phones in immigration detention will inhibit access to legal advice.[19] While the Explanatory Memorandum indicates that the Department 'will ensure that communication avenues are maintained and enhanced',[20] our practice experience is that access to people in immigration detention is significantly more difficult via fixed telephone lines than via mobile phones.

Legal Aid NSW lawyers have extensive experience in trying to contact people seeking immigration advice or clients with ongoing immigration cases at Villawood Immigration Detention Centre, Melbourne Immigration Transit Accommodation and Yongah Hill. In our experience, it is quicker, more straightforward and more efficient to communicate with clients through their mobile telephone than attempting to contact them through the general detention centre telephone numbers. This is especially so when clients require telephone interpreters to communicate with their representatives, which is not uncommon. The Telephone Interpreter Service (TIS) works very quickly and easily when a client has a mobile telephone. Calling with a TIS interpreter through the switchboard is logistically very difficult and time consuming, and inhibits important communication between a client and their representative.

Our clients report that it is very difficult to have a confidential conversation using the landlines at detention facilities. Our clients have informed us that other people in detention, as well as staff, can see and hear them while they are speaking on the phone. For many of our clients who are asylum seekers, disclosure of things like their political opinions, their sexuality or their religious beliefs can be dangerous. It is imperative that people in

[15] Explanatory Memorandum,(n7), 8.
[16] ICCPR (n 1), Articles 17 and 23 protect the right to family life. The Convention on the Rights of the Child (n1), Article 8 protects a child's right to family relations.
[17] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* A/RES/57/199 OPCAT (entered into force 22 June 2006) ('OPCAT'). OPCAT applies to persons in immigration detention and provides that such persons are not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[18] Explanatory Memorandum, (n7), 8.)
[19] In contravention of ICCPR (n1) Articles 9 and 19
[20] Explanatory Memorandum (n7), 8.

immigration detention have access to confidential means of speaking with those providing them with legal advice and representation.

Legal Aid NSW is also concerned that the amendments to the Migration Act are being proposed in the context of the random and arbitrary movement of immigration detainees. In our experience, detainees are regularly moved from places where they have family and/or other support networks, to more isolated places such as Christmas Island. These movements can impact on detainees' and their families' mental health, and their ability to access lawyers. Lack of access to mobile phones will compound these difficulties.

Finally, we are concerned that any prohibition on the possession and use of mobile phones will inhibit the ability of detainees to communicate freely and in full confidentiality with monitoring bodies including the Commonwealth Ombudsman, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees and the Australian Red Cross.

Search powers

Legal Aid NSW is concerned that the expansive search powers outlined in the Bill are punitive, intrusive and inappropriate in immigration detention. We are also concerned that the use of these powers, particularly strip searches and detector dog powers when not reasonably necessary, are likely to have a harmful effect on asylum seekers and those affected by torture and trauma, particularly those who have previously been tortured by authorities in their home country.

Strip searches

Legal Aid NSW does not support the proposed amendment to section 252A of the Migration Act, which would remove existing protections applying to strip searches. The Bill would permit an authorised officer to conduct a strip search without a warrant and where the officer suspects on reasonable grounds that the detainee has a weapon, escape aid, or 'prohibited thing' (clause 252A). The Bill would remove current requirements for the officer to also suspect on reasonable grounds that it is necessary to conduct a strip search, and for the search of an adult to be authorised by the Secretary or Australian Border Force Commissioner, or a different SES Band 3 employee to the officer conducting the search, or be ordered by a Magistrate for children aged between 10 and 18.[21] The Explanatory Memorandum does not explain why these protections have been removed.

We consider that the existing protections in section 252A(3) of the Migration Act should be retained, and that strip searches should not be permitted for 'prohibited things' unless there is a reasonable suspicion that the detainee has a 'prohibited thing' and has used it for illicit purposes.

We note that section 252B of the Migration Act sets out rules for conducting strip searches, We consider that additional protections should also apply to strip searches, similar to those

[21] *Migration Act 1958* (Cth) s 252A(3).

in section 32, 'Preservation of privacy and dignity during search', of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) including that:

- The officer must inform the person to be searched of the following matters:
  - whether the person will be required to remove clothing during the search,
  - why it is necessary to remove the clothing.

- The officer must ask for the person's co-operation.

- The officer must conduct the search as quickly as is reasonably practicable.

- The officer must conduct the least invasive kind of search practicable in the circumstances.

- The officer must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.

- A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.

- A person must be allowed to dress as soon as a search is finished.

We also suggest that officers are specifically trained on the requirements for conducting strip searches under the Migration Act and how to preserve the privacy and dignity of detainees, and that a best practise guide is developed.

Personal searches, screening procedures and searches of immigration detention facilities

The Bill appears to permit unlimited searches of people and certain facilities with no reasonable basis. It would expand existing powers to conduct personal searches, screening procedures and searches of certain immigration detention facilities[22] to include searches for 'prohibited things', and searches without any suspicion that the person has an item that may be seized (clauses 252(2), 252AA(1A) and 252BA(3)). The Bill would also allow searches of all areas of certain immigration detention facilities including with detector dogs (clause 252BA).

Legal Aid NSW does not support these amendments and we do not consider that existing powers, including police powers, are insufficient to respond to suspected illegal activity in immigration detention. If search powers are expanded, we consider that personal searches and searches of detention facilities should only be permitted where there is a reasonable basis to suspect that the person has a weapon, escape aid, evidence for

[22] The facility search powers in clause 252BA of the Bill is limited to 'immigration detention facilities operated by or on behalf of the Commonwealth'. The Explanatory Memorandum (p 22) states these powers will only allow searches of detention centres established under section 273 of the Migration Act and facility-based Alternative Places of Detention (APODS), and would not extend to non-facility based APODs such as hotels, motels, schools or hospitals.

cancelling the person's visa, or a 'prohibited thing' such as a mobile phone and has used it for illicit purposes.

Extension of definition of immigration detention facility

Clause 251A(5) of the Bill makes it clear that the new personal search and seizure powers would apply not only to people detained in immigration detention centres but also to people detained in Alternative Places of Detention (**APODs**). According to the Explanatory Memorandum, APODs include facility-based forms of detention and non-facility based types of accommodation in the broader community, such as leased private housing, hotel and motel accommodation, hospitals and schools.[23]

There is no rationale in the Explanatory Memorandum for why the proposed personal search and seizure powers should include people living in APODs. People living in APODs include children and families who do not fall into the categories of high-risk detainees. Legal Aid NSW considers that it is inappropriate for these people to be subject to the same restrictive regime as the 'higher risk detainees' referred to in the Explanatory Memorandum.

[23] Explanatory Memorandum (n1), 10.