

# Memo

To: Pauline Wright, President of Law Council of Australia

From: Sam Pandya, President of Law Institute of Victoria

Subject: Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020

Date: **11 June 2020**

---

## **Introduction**

1. The Law Institute of Victoria (**‘LIV’**) welcomes the opportunity to provide input into the Law Council of Australia’s (**‘LCA’**) submission to the Senate Legal and Constitutional Affairs Legislation Committee’s Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (**‘the Bill’**).<sup>1</sup>
2. The LIV strongly opposes the proposed Bill which introduces extraordinary measures governing immigration detention facilities. We request that the LCA strongly advocates to renounce the passage of the Bill.

## **The Bill**

3. Broadly, the Bill seeks to provide the Minister the power to declare an item a ‘prohibited thing’ in relation to people in detention and to expand the search and seizure powers of authorised immigration detention officers.<sup>2</sup> The justification for these amendments according to the Explanatory Memorandum are due to the “increasing number of high-risk detainees in immigration detention facilities” and the evidence demonstrating trafficking and illicit drug use.<sup>3</sup>
4. Whilst, the LIV supports effective management of safety in immigration detention centres, we are concerned that the Bill provides the Minister and authorised officers with unjustified overreaching powers further limiting the

---

<sup>1</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth).

<sup>2</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) s 251A.

<sup>3</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) 2.

# Memo

rights of people in immigration detention. In addition, the Bill does not provide for oversight of these powers and guidance on how it will be implemented.

5. The LIV advocates that the Bill should not be passed for the following reasons:
  - a. There is no adequate definition of ‘prohibited thing’. Furthermore, permitting the definition to be amended in future by instrument, with the approval of Parliament, may lead to uncertainty and excessive power vested in the Minister.
  - b. Detainees are often vulnerable and navigating a complex and time-sensitive legal case at the same time. Access to legal representation and support for detainees within immigration detention facilities is critical and must not be compromised.
  - c. Justifications for the changes set out in the Explanatory Memorandum, such as preventing possession of illicit drugs, and weapons are already provided for by Federal and State laws. Consequently, the LIV believes no further laws are required to ban particular items in immigration detention centres.
  - d. The timing of the re-introduction of this Bill in the current COVID-19 pandemic where detainees’ rights have been already restricted due to no personal visits including legal representation is inappropriate.

## **Purpose of the Bill**

6. The Explanatory Memorandum and Second Reading Speech outlined that the purposes of the Bill are to ensure the safety of people in immigration detention facilities, the staff and people visiting.<sup>4</sup> The LIV considers that the increasing limitations imposed on detainees and lack of proportionality further undermine the rights of detainees. Our members report that the proposed powers are too

---

<sup>4</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) 2; Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 3441-3443.

# Memo

extreme to achieve the purposes of the Bill. Furthermore, the harsh nature of the Bill also undermines the safety of the detainees.

7. The LIV notes that the Explanatory Memorandum and Second Reading Speech does not include data on the volume of the issues that the Bill seeks to address. The absence of data demonstrates that the Bill lacks proportionality and is unjustifiable. The LIV recommends that the Inquiry requests that the Department of Home Affairs' (**'the Department'**) provide data to explain the reasoning behind the decision to introduce this Bill.

## S 501 Cancellations

8. As outlined in the Explanatory Memorandum, the Bill seeks to combat the increasing number of high-risk detainees in immigration detention facilities.<sup>5</sup> The LIV submits that regardless of existing criminal convictions, no person in detention should be subjected to such punitive measures. Our members report that the increase in persons being transferred directly from correctional facilities is a result of the Department's amendments to s 501 of the *Migration Act 1958* (Cth) (**'the Act'**) and the introduction of mandatory cancellation.<sup>6</sup> The LIV wishes to clarify that those who are in detention (rather than a correctional facility) have completed their sentence, and if they were considered a risk, would remain in prison. Specifically, it is our members' experiences that people in prison who are eligible to apply for parole are denied the opportunity to do so when their visas have been cancelled. This prevents people in prison who still have time left of their sentence entering immigration detention facilities. Many people held in immigration detention have not undergone any visa cancellation and, for those who have had their visas cancelled under s 501, they may not have been convicted for violent or sexual offences.

---

<sup>5</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020.

<sup>6</sup> *Migration Act 1958* (Cth) s 501.

# Memo

9. The LIV reiterates that no person in immigration detention should be subjected to the punitive restrictions in the Bill irrespective of criminal convictions. We are deeply concerned by the Bill's implicit sanction of a tiered hierarchy of rights for those in detention. The LIV does not support the idea that certain detainees whose visas have been cancelled under s 501 deserve a lesser version of rights simply because of previous convictions and independent of the actual risk posed, if any.

## Purpose of Immigration Detention

10. The LIV wishes to remind the Government that the purpose of immigration detention is not punitive. Immigration detention differs from criminal detention in that it is administrative in character and it is not triggered by criminal offending or suspicion.<sup>7</sup> However, it is in the LIV's view that the proposed amendments are punitive in their nature as they seek to take away people's communication to legal representatives and family, and access to information on the internet and social media.

## **Banning Mobile Phones**

11. The proposed amendments seek to ban mobile phones and internet-capable devices in immigration detention facilities.<sup>8</sup> The LIV advocates that removing mobile phones from detainees will have a significant detrimental impact on the mental health of people in detention. Eliminating a detainee's ability to communicate with their family has been found to violate Article 10 of the International Covenant on Civil and Political Rights ('ICCPR') by the Australian

---

<sup>7</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley*; *Ex parte M276/2003* (2004) 225 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M96A/2016 v Commonwealth* (2016) 261 CLR 582.

<sup>8</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) s 251A(2)(b).

# Memo

Human Rights Commission.<sup>9</sup> Article 10 of ICCPR ensures the right to humane treatment in detention.<sup>10</sup> Subjecting detainees to the arbitrariness of the detention system and restricting meaningful contact with family and friends will add to their anxiety and distress.<sup>11</sup>

12. The LIV notes that according to the Explanatory Memorandum, detainees will still have “reasonable access” to landline telephones, facsimiles, the internet and postal services if the Bill is passed.<sup>12</sup> To clarify what is “reasonable access”, the LIV asks that the LCA requests that the Department release information about the adequacy, quality and availability of computers (with access to internet, scanning, printing and faxing facilities) and telephones in immigration detention facilities. On the basis of their direct experience with clients, our members are extremely concerned that the facilities on offer to their clients are inadequate, lack privacy and are not readily available.

## Access to Legal Representation

13. The LIV advocates s 251A(2)(b) of the Bill limits detainees’ access to legal representation. Our members consider that it will restrict participation in legal processes by disrupting people’s ability to communicate with lawyers, advocates, courts and tribunals. Many of our members represent clients in immigration detention facilities and often communicate to their clients via mobile phones.

---

<sup>9</sup> Australian Human Rights Commission, *Human rights standards for immigration detention*, (Report, April 2013) 23

[https://humanrights.gov.au/sites/default/files/document/publication/HR\\_standards\\_immigration\\_detention%20%284%29.pdf](https://humanrights.gov.au/sites/default/files/document/publication/HR_standards_immigration_detention%20%284%29.pdf).

<sup>10</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>11</sup> The Australian OPCAT Network, *The Implementation of OPCAT in Australia*, Submission to the Sub Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and The United Nations Working Group on Arbitrary Detention, January 2020, 51

[https://www.refugeecouncil.org.au/wpcontent/uploads/2020/02/Implementation\\_of\\_OPCAT\\_in\\_Australia.pdf](https://www.refugeecouncil.org.au/wpcontent/uploads/2020/02/Implementation_of_OPCAT_in_Australia.pdf).

<sup>12</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) 2.

# Memo

Furthermore, immigration detention centres are located in rural areas and are not easily accessed by lawyers, family or support persons. Therefore, phone, email and social media correspondence is essential and, in some cases, the only means of communication for detainees.

- 14.** The LIV notes that the right to legal representation in detention is recognised internationally by the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Principle 18 provides that any detainee should have access to a lawyer, to consult, communicate, without delay or censorship and in full confidentiality.<sup>13</sup> Mobile phones are an integral tool for detainees to seek legal and other support while in detention. Detainees may need urgent and private access to their legal representatives or to family or support persons for a number of reasons.
  
- 15.** The LIV is informed by its members that communication with clients in immigration detention centres is unreliable. Given that there is no central point of communication for lawyers to raise concerns, it is important that lawyers can maintain direct line of communication to detainees. Some members report that processes to contact clients in immigration detention centres via the ABF are onerous and slow. In addition, it has been reported that no flexibility is provided by detention officers for urgent requests to speak to clients.
  
- 16.** The LIV believes that the Bill makes access to legal representation and support unduly more difficult in seeking to remove access to mobile telephones, electronic devices and SIM cards.

## **'Prohibited Things'**

---

<sup>13</sup> *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN Doc A/RES/43/175 (adopted 9 December 1988).

# Memo

17. Section 251A(2) allows the Minister to determine a ‘prohibited thing’ by a legislative instrument. The LIV does not agree to the Minister holding this power as an item can be found to be a ‘prohibited thing’ without parliamentary or democratic scrutiny. The LIV notes that the power to disallow the instrument is provided under s 251A(4) and s 42 of the *Legislation Act 2003* (Cth),<sup>14</sup> however disallowance motions are practically difficult to achieve.
18. The LIV is concerned that the broad discretion given to the Minister to determine prohibited items may be used to introduce different prohibited things for different cohorts. In 2016, a policy was created prohibiting Unauthorised Maritime Arrivals possessing mobile phones by the Australian Border Force (‘ABF’). This policy did not extend to any other cohorts in immigration detention.<sup>15</sup> The Full Court of the Federal Court of Australia (‘Full Court’) overturned the blanket policy as it was not authorised by any provision of the Act.<sup>16</sup> According to the Second Reading Speech, Minister Tudge states that the Bill is:

*“proposing to allow the Minister to direct officers to seize mobile phones from certain categories of people”.*<sup>17</sup>

19. Our members are concerned that the proposed Bill introduces unfair discretionary policies which have been specifically identified by the Full Court as problematic. The LIV therefore recommends that Government amends the Bill to include oversight provisions to ensure democratic and parliamentary scrutiny of decisions regarding ‘prohibited things’.

---

<sup>14</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) s 251A(4); *Legislation Act 2003* (Cth) s 42.

<sup>15</sup> *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 [9].

<sup>16</sup> *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

<sup>17</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 3442.

# Memo

## Search and Seizure Powers

20. LIV members are particularly concerned with the broad powers given to authorised officers to conduct searches of detainees' rooms, personal items, clothing and strip searches.

21. Section 252(1) and (2) states that:

*An authorised officer may, **without warrant**, search a person, the person's clothing and any property under the immediate control of the person for any thing that may be seized from the person under paragraph (4)(a) or (4A)(a), **whether or not the officer has any suspicion** that the person has such a thing on the person's body, in the person's clothing or in any such property.*<sup>18</sup>

22. The LIV is concerned by the insertion of this provision as an authorised officer does not need to justify using these search powers to conduct a normal search for prohibited things. Our members maintain that any searches conducted without a warrant or reasonable suspicion are degrading and dehumanising procedures which should only be permitted in exceptional circumstances. Furthermore, strip searches should only be allowed under exceptional circumstances and not for the kinds of everyday objects that could be deemed 'prohibited things'.

23. Our members inform us that detainees from refugee backgrounds are likely to have experienced persecution at the hands of authorities in their home countries. Furthermore, people in detention may have experienced arbitrary detention and torture and therefore these invasive searches would be traumatising and triggering to detainees, and particularly detainees suffering from post-trauma issues and those who have been previously harmed by government authorities.

---

<sup>18</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth) s 251(1) and (2).

# Memo

Given the broad powers granted to detention officers, there is potential for these powers to be used to intimidate and assert power. Under the proposed Bill, this would be lawful. LIV members inform that this will increase litigation seeking damages against the Commonwealth and therefore expanding the burden on Courts.

## Excessive Force

24. Given the broad discretionary nature of s 252(1) and (2), LIV members report that the Bill may allow for excessive force to be used during search and seize powers. The Australian Human Rights Commission (**‘the Commission’**) states that there must be a legitimate reason for using force, for example, in order to protect the safety of others, and the degree of force used should be proportionate to that legitimate reason.<sup>19</sup>
25. The Commission’s recent report on force in immigration detention has raised concerns that force has been used without reasonable explanation or provocation in these facilities. Furthermore, the Commission specified that the use of restraints should be a last resort after it scrutinised the Serco’s policies of using restraints.<sup>20</sup>
26. The LIV considers that the Bill seeks to give increased powers to authorised officers without evidencing any need for such increased powers given the broad discretionary powers which already exist for search and seizure in immigration detention. Further, there is no provision made for the necessary specialist training required for people using discretionary powers to use force. Clarification is required as to how the Department will prevent the abuse of power and what disciplinary action would be taken against an ABF or authorised officer. The LIV

---

<sup>19</sup> Australian Human Rights Commission, *Use of force in immigration detention*, (Report, May 2019) 9.

<sup>20</sup> Australian Human Rights Commission, *Use of force in immigration detention*, (Report, May 2019) 19.

# Memo

also notes that the increased search powers may cause psychological harm and emotional distress to detainees.

27. There has been an international condemnation of excessive force used by authorities against minority groups and people in custody. This Bill seeks to extend powers to authorities to use force and restrict rights of vulnerable minorities who are detained. It is of the LIV's view that these types of measures will not be condoned by the Australian public. Excessive force must never be used against any person by government authorities. The LIV is deeply concerned that the Bill not only overly overreaches in terms of the discretionary powers provided to an authorised officer, but also creates a climate for impermissible use of force.

## Use of Dogs in Detention

28. The combined effect of s 252BA (2) and (3) provides for officers to use a dog in conducting a search for a weapon, escape-aid or prohibited thing whether or not the officer has any suspicion that there is such a thing in the facility. We submit that the use of dogs in immigration detention centres should be restricted to where there is a reasonable suspicion by an officer that there is a prohibited thing and that the use of a dog is reasonably required in that context. The use of dogs may be intimidating for many detainees (irrespective of dog breed), and it should only be permitted in exceptional circumstances.

## **Power to dispose of forfeited items**

29. The LIV notes that there are several references in the amendments to officers disposing of forfeited items in 'any way the officer thinks appropriate'.<sup>21</sup> We have concerns about this broad discretion given to an authorised officer and

---

<sup>21</sup> Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (Cth S 252(4E); S 252CB(3); s 252G(6B)).

# Memo

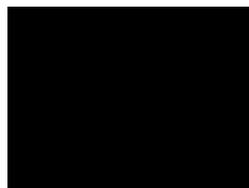
recommend that there is a strict procedure in regards to the way in which forfeited items are disposed of. Particularly, as a forfeited item could include a mobile phone or sim card, which could hold personal information about a detainee.

## **Conclusion**

**30.** The LIV strongly believes that those in immigration detention should not suffer undue or disproportionate restrictions, particularly with respect to access to legal advice and support given the significant vulnerabilities of many detainees. The extension of powers combined with the arbitrary nature of ‘prohibited things’ provided in the Bill lack proportionality and justification. It further undermines the rights of people in immigration detention more than necessary to achieve the purposes of the Bill. Lastly, given the COVID-19 pandemic, people in detention are even more restricted and vulnerable due to the absence of visits from family and legal representation. It is for these reasons that the LIV recommends that the Bill should not be passed.

**31.** Should you wish to discuss these matters further, please contact Nethmi Perera, Policy Officer for the LIV’s Administrative Law and Human Rights Section on 9607 9338 or [nperera@liv.asn.au](mailto:nperera@liv.asn.au).

Yours sincerely,



Sam Pandya

**President**

Law Institute of Victoria