Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Committee

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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
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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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 its Migration Law Committee of the Federal Litigation and Dispute Resolution Section, National Criminal Law Committee, the Law Institute of Victoria and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (**the Bill**).

2. The Bill seeks to impose more stringent measures governing those housed in immigration detention facilities (**IDFs**). Broadly, it provides for:

    - A definition of 'immigration detention facility' as a 'detention centre' under section 273 *Migration Act 1958* (Cth) (**Migration Act**), or another place 'approved by the Minister in writing';
    - Ministerial determination, by legislative instrument, of what will be considered a 'prohibited thing' within IDFs. This confers a wide discretion on the Minister to determine what items may be confiscated after screening and search;
    - Search of persons and immigration detention facilities without a warrant or reasonable suspicion; and
    - Strengthening of screening, search and seizure powers, including by way of strip search and use of detector dogs.

3. The Law Council supports the effective management of IDFs that operate in accordance with the rule of law. It also recognises the many challenges the Australian Government faces as it seeks to address difficulties that might arise regarding immigration detention and appreciates that the development of solutions requires careful consideration.

4. However, the Law Council does not support the Bill in its current form for the following reasons:

    - The broad approach to defining a 'prohibited thing' does not appear to be necessary or proportionate when considered in the context of the objectives of the measure.
    - The discretion granted to the Minister to declare by legislative instrument a 'prohibited thing' raises a concern that these aspects may amount to an inappropriate delegation of legislative power.
    - The proposed new coercive powers in the Bill are similar to powers that apply in a criminal law context. It is not proportionate to apply such powers in the case of immigration detention where detainees are innocent and vulnerable people, including asylum seekers and refugees to whom Australia may owe protection obligations under international law.
    - There is no requirement for there to be, as a minimum, a reasonable suspicion before the proposed coercive powers in the Bill are exercised.

5. Broadly speaking, the Law Council considers there is not sufficient justification for the broad and non-specific changes proposed. It is suggested that the proposed changes could lead to uncertainty and to potential misuse. The Law Council also notes the paramount importance of the principle that administrative detention must not have a punitive character and must not infringe Chapter III of the Constitution.[1] Further

[1] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099 (6 August 2004).

evidence is required to justify the proposed changes as necessary and proportionate given how significant and far-reaching they are.

6. For these reasons, the Law Council's primary recommendation is that the Bill not be passed in its current form.

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

    - the definition of 'prohibited thing' should be narrowly confined to for example items which justifiably may cause a risk to the health or safety of a person in IDFs (such as weapons or narcotics);

    - in the absence of evidence to suggest necessity and proportionality, immigration detainees should not be prevented from possessing electronic devices such as mobile phones;

    - the reference to ‘medications or health care supplements’ in the note to subsection 251A(2) should be amended to ensure that medications obtained under prescription or supplements recommended by a health practitioner are not caught by the provision, and that it is only directed at narcotic or restricted substances;

    - proposed paragraphs 252BA(1)(d) and (e), which would allow for the searches of detainees’ personal effects and rooms without warrant, be amended and limited to situations where there is a reasonable suspicion of contraband in a detainee’s possession;

    - subsection 252A, which would allow for the strip searches to be conducted for prohibited things, be amended and expressly refer to the principle that detainees not be searched unless there is a reasonable suspicion that illegal substances or items are in their possession and that strip searches only be conducted in exceptional circumstances; and

    - detector dogs should not be used in immigration detention facilities, particularly where there is no basis for suspicion of illegal activity. That is, they should be only rarely used, if at all.

Background

8. Immigration detention centres are established under section 273 of the Migration Act. Subsection 273(2) permits regulations to make provisions in relation to the operation and regulation of detention centres. 'Immigration detention' is defined at section 5 of the Migration Act. The mandatory detention of unlawful non-citizens is authorised by section 189 of the Migration Act. 'Unlawful non-citizen' is defined at section 14 of the Migration Act. [2]

9. A detainee's ability to access legal representation, should they choose to do so, is enshrined in the law. Section 256 of the Migration Act provides as follows:

> *Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.*

10. The clause has had various iterations since its inception but is largely unchanged. Relevantly, however, section 256 of the Act was amended by the *Migration Legislation Amendment Act (No. 2) 1998* (Cth) to 'ensure that the onus is clearly placed on the detainee to first request assistance'.[3] The heading was amended, importantly, as follows:

> *A notation is made after the proposed amendment to section 256 to provide that the heading to section 256 (Persons in immigration to have access to legal advice) is to be replaced with 'Person in immigration detention may have access to certain advice, facilities etc'.*

11. Crucially, however, it was intended that '[o]nce a detainee has made a request for that assistance, there is an obligation on the person responsible for that detention to facilitate that assistance.'[4]

12. Section 193 of the Migration Act limits obligations to certain non-citizens in immigration detention. That group, defined in paragraphs 193(1)(a)-(d), can be broadly characterised as detained individuals who have not been immigration cleared or who are not in the migration zone. Subsection 193(2) provides as follows:

> *Apart from section 256, nothing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer to:*
>
> *(aa) give a person covered by subsection (1) an application form for a visa; or*
>
> *(a) advise a person covered by subsection (1) as to whether the person may apply for a visa; or*
>
> *(b) give a person covered by subsection (1) any opportunity to apply for a visa; or*

[2] The Law Council acknowledges the input from the Law Institute of Victoria for this background.
[3] Explanatory Memorandum, *Migration Legislation Amendment Bill (No. 2) 1998* (Cth).
[4] Ibid.

(c) allow a person covered by subsection (1) access to advice (whether legal or otherwise) in connection with applications for visas.

13. There is an express exclusion in section 193 of the requirements of subsections 194 and 195 of the Migration Act where a non-citizen falls within the groups defined in section 193(1)(a)-(d).

14. The legislative context and history of the provision is relevant because it makes plain that the onus is on detainees to seek advice. Noting that many detainees are vulnerable, lacking financial resources, and without English capability, it is already difficult and onerous for them to take the step of seeking legal advice.

Extraneous Considerations

15. The Detention Services Manual is a policy document guiding the operation of immigration detention centres. It sets out seven key immigration detention values. Relevantly, they include:

    - *detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review;*

    - *detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time;*

    - *people in detention will be treated fairly and reasonably within the law; and*

    - *conditions of detention will ensure the inherent dignity of the human person.*

16. The service delivery values enshrined in the Detention Services Manual are respect for human dignity, fair and reasonable treatment within the law, and appropriate services.

17. Articles 9, 10, 17 and 19 of the *International Covenant on Civil and Political Rights* (**ICCPR**) protect fundamental human rights relevant in this context, importantly the right to not be subjected to arbitrary interference with privacy, and the right for those deprived of liberty to be treated with humanity and respect and the inherent dignity of the human person.

18. Immigration detention differs from criminal detention in that it is administrative in character and is not triggered by criminal offending or the suspicion thereof. It is impermissible for immigration detention to become punitive in character, as it would offend against the principle that the judicial power of the Commonwealth could only be vested in Chapter III courts. The Law Council supports the policy objectives set out by the Australian Government and considers that they are consistent with the rights afforded to detainees by section 256 of the Migration Act and by the ICCPR.

Issues of concern

Prohibition of items

Breadth of Ministerial power

19. Item 2 of Schedule 1 of the Bill confers a wide discretion on the Minister to determine that a thing is a 'prohibited thing.' Under new proposed section 251A of the Migration Act, the Bill would allow for the Minister to determine an item to be prohibited if possession or use of that thing 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.[5]

20. The justification for this, broadly, according to the Explanatory Memorandum, is that IDFs house:

> *… an increasing number of higher risk detainees often having entered immigration detention directly from a correctional facility … including child sex offenders and members of outlaw motorcycle gangs or other organised crime groups.*[6]

21. The Bill does not define the ambit or the scope of the term 'prohibited thing', and provides a non-exhaustive list of examples of what might fall within the scope of the definition, including mobile phones, SIM cards, electronic devices, medications or health care supplements, or publications or material that could 'incite violence, racism or hatred[7]'. The Law Council considers any number of things could fall within this broad definition, particularly because the provision does not require any standard by which the Minister is required to consider whether something might be a risk, nor is there any guidance on what would constitute a risk to the 'order of the facility'. There is also no guidance on what 'order of the facility' means in this context.

22. A power of search for dangerous weapons or means of escape is one thing. To extend the power of search to anything which might be a risk to the health, safety or security of person in the facility, or to the order of the facility allows the Minister to declare virtually any kind of item contraband subject to search. A pen or pencil and paper could be in that category.

23. The Explanatory Memorandum provides altogether different examples, including narcotic drugs and child pornography, which would be prohibited things under new proposed paragraph 251A(2)(a).[8] Possession of these items may already be illegal, and searches for such items are already permitted at law. Further, existing powers under section 252 of the Migration Act already permit authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security.

24. The Law Council considers the definition of 'prohibited thing' in the Bill to be unacceptably broad in what it may prohibit. Moreover, there is no recourse in the Bill to avenues of administrative redress when one might want to contest the decision to make a thing a 'prohibited thing', nor is there any provision requiring that authorised

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[5] *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill* 2017, p. 3. 1. Item 25 of Schedule 1 goes on to provide for the ability for things determined to be prohibited under paragraph 251A(2)(b) to be retained after screening and strip searches of detainees.
[6] Explanatory Memorandum, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill* 2017, p. 2.
[7] *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill* 2017, pp. 3-4.
[8] Explanatory Memorandum, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill* 2017, p. 6.

officers properly safeguard the things seized and retained, and no consequences if these things are lost or otherwise compromised.

25. The Law Council therefore considers that it is unacceptable to make allowance for almost any item to be banned at any time. Accordingly, should the Bill proceed, it should be amended to specify prohibited items which justifiably may cause a risk to the health or safety of a person in IDFs (such as weapons or narcotics).

Recommendation:

- **The definition of 'prohibited thing' should be narrowly confined to for example items which justifiably may cause a risk to the health or safety of a person in IDFs (such as weapons or narcotics).**

Access to electronic devices

26. The Bill is designed to make it easier to ban electronic devices, including mobile phones, in Australia's onshore detention centres as there are concerns that such devices have been used for illegal and contraband activity. The Bill or its Explanatory Memorandum does not outline in sufficient detail or provide any statistics relating to this claim that would justify a collective ban on such devices.

27. The Law Council therefore does not consider that a proposed prohibition on items such as mobile phones has been demonstrated to be a necessary or proportionate measure, particularly in the context of the vulnerability of many detainees and the important role mobile phones play in both accessing legal support services and emotional well-being. If detainees are engaged in illegal activity then this activity should be investigated and prosecuted on a case-by-case basis, rather than placing a collective ban on devices which are frequently available to individuals.

28. Similarly, the rationale for the measures on the basis of coordinated protests via mobile phone does not appear to justify the ban on electronic devices, particularly in view of immigration detainees having a right to freedom of peaceful assembly.[9] That is, electronic devices may be used to coordinate peaceful or violent protests. There is a positive obligation on Australia to take reasonable steps to facilitate the right to freedom of assembly, and to protect participants in peaceful demonstrations from disruption by others. If mobile phones are being used to coordinate violent protests, it is not clear why other measures to deal with violent protests are not sufficient to deal with the situation.

29. The Law Council believes that the Bill in its current form, and in particular its explicit focus on mobile phones, has the potential make access to legal representation and support significantly more difficult, and will unjustifiably exacerbate what is already a challenging environment that must operate within strict procedural time limitations.

30. Mobile phones play a significant role in ensuring immigration detainees are able to access timely legal advice. Effective denial of access to lawyers may 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 – see eg *Golder v. the United Kingdom* judgment of 21 February 1975, A 18. To the extent that it is relevant, we note

[9] International Covenant on Civil and Political Rights, article 21.

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.[10]

31. Indeed, the courts have already expressed concern with the ban on mobile phones. On 21 November 2016, the Commonwealth announced a policy change providing that the Commonwealth and its agents would confiscate all mobile phones and SIM cards in the possession of all persons in immigration detention after 19 February 2017. The Detention Services Manual was amended to state 'For security and safety purposes all mobile phones are classified as controlled items and are not permitted in [IDFs], except under conditions specified by the Department'. On 19 February 2017, the Federal Court of Australia granted an interlocutory injunction restraining the implementation of this policy.[11] On 17 March 2017, the Federal Court of Australia found that the court does have jurisdiction to consider the issue, and the Full Court of the Federal Court of Australia on 17 August 2017 confirmed that was so.[12]

32. 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. [13] 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.

33. Legal professional privilege is a fundamental common law right and one enshrined in various international human rights instruments.[14] We note that in the absence of explicit abrogation in the Bill, legal professional privilege is preserved.[15]

34. 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 IDFs even where it would be in the public interest for such information to come to light.

35. Finally, 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 as tools for allowing immigration detainees to communicate with family members, and have concerns that collectively confiscating such items will seriously and negatively impact on the right of detainees to family life. The Law Council has legitimate concerns for the mental health of detainees, some of whom are

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[10] The Law Council acknowledges input from the Law Council of New South Wales regarding this point.
[11] See *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 [1]-[2].
[12] See *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125. See further: ‘Peter Dutton loses appeal over detention phones’, *The Sydney Morning Herald* (online) 17 August 2017 <www.humanrights.gov.au/sites/default/files/document/publication/Factsheet-on-use-of-force-in-immigration-detention-facilities.pdf>.
[13]The Law Council acknowledges the input from the Law Society of New South Wales for drawing this issue to the Law Council’s attention.
[14] 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:

United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [23]. Further, Principle 22 of the Basic Principles on the Role of Lawyers provides for confidentiality in communications between lawyers and clients: *Basic Principles on the Role of Lawyers*, Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August-7 September 1990, UN Doc A/Conf.133/28/Rev.1 (1991), principle 22.

[15] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49

already acutely vulnerable, should their ability to have meaningful contact with their families be arbitrarily restricted as a result of a collective ban on mobile devices.

Recommendation:

- **In the absence of evidence to suggest necessity and proportionality, immigration detainees should not be prevented from possessing or using electronic devices such as mobile phones.**

Medications and health supplements[16]

36. The Explanatory Memorandum states that medications might be confiscated in order to capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person.

37. The Law Council considers it disproportionate, unnecessary and unreasonable to address this issue via a blanket prohibition of medications and health supplements. These concerns may be addressed if the note at subsection 251A(2) is amended to ensure that medications obtained under prescription or supplements recommended by a health practitioner are not caught by the provision, and that it is only directed at narcotic or restricted substances.

Recommendation:

- **The reference to 'medications or health care supplements' in the note to subsection 251A(2) should be amended to ensure that medications obtained under prescription or supplements recommended by a health practitioner are not caught by the provision, and that it is only directed at narcotic or restricted substances.**

Powers of search, seizure and screening

38. The Bill also:

- proposes to allow a search to find a prohibited thing, without any warrant, including on persons in immigration clearance;[17]

- strengthens the screening and seizure powers in relation to detainees by inserting a new proposed 252AA.[18] The provision would give authorised

[16] The Law Council acknowledges the input from the Law Society of New South Wales for drawing this issue to the Law Council's attention.
[17] Items 3–9, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, pp. 4-6. These items insert rules pertaining to searches of detainees and non-citizens in immigration clearance. Item 8 addresses the retention, return, forfeiture and disposal of prohibited things determined under paragraph 251A(2)(b).
[18] Ibid, Items 10 – 14, Schedule 1. These items insert rules pertaining to screening procedures.

officers the ability to use detector dogs when screening detainees in IDFs.[19] The use of detector dogs is discussed below; and

- confers additional screening powers on the Minister, including the use of detector dogs, regarding people entering IDFs, including visitors.[20]

Expansion of power to conduct searches of IDFs

39. The Bill proposes to insert new sections 252BA and 252BB[21] to allow authorised officers and officers' assistants to search immigration detention facilities operated by or on behalf of the Commonwealth without a warrant. These proposals increase existing powers to conduct searches and confiscate items deemed to pose a risk to safety and security under section 252 of the Migration Act.

40. Section 252BA of the Bill provides that an authorised officer may without warrant conduct a search of an immigration detention facility operated by or on behalf of the Commonwealth including a search of a detainee's personal effects and of their rooms.[22]

41. Subsection 252BA(2) of the Bill provides that a search of the facility may only occur under this section to find out whether a detainee has a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape from immigration detention, or to find a 'prohibited thing'.[23]

42. The Explanatory Memorandum explains that currently common law is relied on to search for prohibited items in areas within the detainee's accommodation and common areas, and that these new sectors 'provide for a clear and express statutory power for an authorised officer to undertake a search of an immigration detention facility'.[24] The concern underpinning the Bill is that existing search and seizure powers in the Migration Act are insufficient to manage 'narcotic drugs, mobile phones, SIM cards or other things that are of concern'. [25] The provision would allow for searches of IDFs, without warrant or limitation for the purpose of finding prohibited things.

43. Existing powers within the Migration Act already permit authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security, however they do not confer such wide powers of search.[26] As noted previously, extending the power of search to anything which might be a risk to the health, safety or security of persons in the facility, or to the order of the facility, allows the Minister to declare virtually any kind of item contraband subject to search.

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[19] Explanatory Memorandum, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 11. See item 14, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*.
[20] S 252G *Migration Act 1958* (Cth), s 252G.
[21] Section 252BB makes provision for an authorised officer to be assisted by another person, called an assistant, in exercising powers or performing functions or duties in conducting a search under s 252BA (other than under subsection 252BA(3)), or under s 252C or 252CA, if such assistance is necessary and reasonable.
[22] Paragraph 252BA(1)(d) and (e) *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*.
[23] Item 21, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 9. This item widens the search powers already conferred on authorised officers. Emphasis added.
[24] Explanatory Memorandum, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill* 2017, p. 14.
[25] Ibid.
[26] See section 252 *Migration Act 1958* (Cth) which is only confined to a search of persons.

44. An additional concern arises in that the power conferred on authorised officers is extremely broad, and there are inadequate protections for detainees that may have their personal effects and rooms, intruded upon. There is no requirement for a warrant, nor is there a requirement for the authorised officer to hold a reasonable suspicion that a detainee might be harbouring a prohibited thing. The Bill contains no limitations on how searches are to be carried out, including in respect of how often they are conducted, what time of day they can be carried out, or how many times individuals can be searched.

45. Further, proposed section 252BB provides that authorised officers may be assisted by 'assistants' in performing certain functions or duties. However, there is no guidance on who the assistants can be, how they are appointed or for how long, what training they receive, and what background checks have been carried out. If there are indeed directions given to the assistants by authorised officers, the Bill is clear that such direction is not a legislative instrument.[27]

46. In the Law Council's view, the new amendments may violate the human rights of detainees under article 17 of the ICCPR, which provides that 'no one shall be subjected to arbitrary and unlawful interference with his privacy, family, home or correspondence'.[28] While the Bill's Statement of Compatibility with Human Rights acknowledges that the proposed measures amount to a 'limitation to the right to detainee's privacy', it suggests that such limitations are 'reasonable, necessary and proportionate'. The Law Council disagrees with this assessment of proportionality and reasonableness.

47. The Law Council considers that regardless of the status of the detainee, any power to search a person's room and property should be limited to where there is at least a reasonable suspicion that some contraband is in their possession. It is suggested that this may be one way in which concerns raised by different groups of detainees could be addressed.[29]

48. This recommendation would also make the searches undertaken more consistent with the base standards recommended by the Australian Human Rights Commission, which advocates for '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'.[30]

Recommendation:

- **Paragraphs 252BA(1)(d) and (e), which would allow for the searches of detainees' personal effects and rooms without warrant, be amended and limited to situations where there is a reasonable suspicion that contraband is in their possession.**

[27] The Law Council acknowledges the input from the Law Society of New South Wales for drawing this issue to the Law Council's attention.
[28] ICCPR, article 17.
[29] There is said to be a large number of high risk detainees with convictions for serious offences in IDFs. If this group of detainees is the problem, it is difficult to see why the powers ought to extend to all categories of detainees. It is also difficult to see how, in exercising a duty of care in relation to all detainees, it could be justified to allow contact between such detainees and other detainees.
[30] Australian Human Rights Commission, Human rights standards for immigration detention (2013), <www.humanrights.gov.au/sites/default/files/document/publication/HR_standards_immigration_detention%20%284%29.pdf> p. 10.

Strip searches

49. The Bill proposes to strengthen the screening and seizure powers in relation to detainees by inserting a new proposed 252A[31] and 252B,[32] which makes provision for strip searches to be conducted without warrant for a 'prohibited thing'.[33]

50. Item 17 of Schedule 1 makes a technical amendment to paragraph 252A(3)(a) to include the new category of 'prohibited thing' in the list of things that an authorised officer must reasonably suspect is hidden on the detainee in order for the authorised officer to be able to conduct a strip search.[34] It is considered that the broad definition of 'prohibited thing' in the Bill gives rise to serious concerns that this intrusive form of search may be utilised more often than is necessary.

51. These proposed amendments are unnecessary and unjustified given the uncertainty about what might constitute a 'prohibited thing' from time to time.

52. The below recommendation would also make any strip searches undertaken more consistent with the base standards recommended by the Australian Human Rights Commission, which advocates that strip searches only be conducted 'in exceptional circumstances for sound security reasons'.[35]

Recommendation:

- **Subsection 252A, which would allow for the strip searches to be conducted for prohibited things, be amended and expressly refer to the principle that detainees not be searched unless there is a reasonable suspicion that illegal substances or items are in their possession and that strip searches only be conducted in exceptional circumstances.**

Use of detector dogs

53. The Bill proposes to strengthen the screening and seizure powers in relation to detainees enabling the use of detector dogs for screening detainees, and persons about to enter an immigration detention facility operated by or on behalf of the Commonwealth, and for searching these facilities.[36]

54. Items 12, 14, 21, 28 and 29 of Schedule 1 of the Bill allow for warrantless, broadly-directed searches to be conducted with the use of a dog.

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[31] Items 15 – 18 Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, pp. 7-8.
[32] Items 19 – 20 Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 7-8. Item 20 inserts the phrase "including a prohibited thing" after existing subsection 252A(1), thus widening strip searches to include strip searches for prohibited things.
[33] Item 16 Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*.
[34] S 252A(3) *Migration Act 1958* (Cth).
[35] Ibid.
[36] See new proposed item 252AA(3), items 12 and 14, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*; new proposed s 252BA(3), item 21, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 9; new proposed s 252G(1) and (2), items 28 and 29, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, pp. 13-14.

55. There is provision for the appropriate use of dogs in the Bill and dogs can only be used where

> *… all reasonable precautions [are used] to prevent the dog from touching any person (other than the officer) … and [the authorised officer is to] keep the dog under control while conducting the screening procedure or search*[37]

56. There is nothing in the Bill that prohibits the use of sniffer dogs in a manner intended to intimidate or harass detainees. In our view, the protection purportedly afforded by section 252BA(6) in relation to the use of force would not make intimidating or harassing conduct during a search unlawful. The Law Council also notes that there are relevant cultural sensitivities in respect of the use of sniffer dogs that the Bill does not adequately address, notwithstanding proposed ss 252AA(3A) and 252BA(4).[38]

57. The Law Council does not support the use of detector dogs in circumstances where 'prohibited thing' is inadequately defined, and the powers that flow from its definition are serious and not demonstrated to be necessary. The use of detector dogs in a IDF has an emotional impact on detainees and is likely to add to a sense of violation particularly as in many cases detainees share rooms.

58. The Law Council opposes the use of detector dogs in immigration detention centres, particularly where there is no basis for suspicion of illegal activity. That is, they should be only rarely used, if at all.

Recommendation:

- **Detector dogs should not be used in immigration detention centres, particularly where there is no basis for suspicion of illegal activity. That is, they should be only rarely used, if at all.**

[37] See item 12, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 7;), item 21, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, p. 9; item 29, Schedule 1, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, pp. 14.

[38] The Law Council acknowledges the input from the Law Society of New South Wales on this point.