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Office of the President

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By email: [redacted]

Dear Ms Nicoll

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

Thank you for the opportunity to provide feedback on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the **Bill**). The Queensland Law Society (**QLS**) appreciates the opportunity to provide comments on this important piece of legislation.

QLS acknowledges there is a need to effectively manage immigration detention facilities (**IDF**s) but strongly endorses submissions made by the Law Council that any measures must be implemented in accordance with the rule of law. Laws which govern these facilities must accord to the international human rights treaties to which Australia is a party and the rules of custom which govern immigration detention.

We understand that the Bill is a second attempt to legislate on prohibited items in detention. The *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (the **2017 Bill**) was introduced in September 2017 but lapsed in July 2019.

QLS notes there have been some amendments made to the Bill, following consultation with stakeholders on the 2017 Bill, as mentioned in the Second Reading Speech.[1] However, in our view the amendments do not go far enough, and there remain several areas of concern.

The Government must adequately justify that the provisions which infringe on recognised human rights are in pursuit of, rationally connected to, and proportionate to achieving a legitimate objective.[2] QLS does not consider that a reasonable and proportionate justification exists in relation to key aspects of the Bill.

In particular, we raise the following concerns:

- The breadth of "prohibited things" under the definition in s251A and ministerial power under s251A(2)
- The focus on mobile phones as a 'prohibited thing'
- The search powers of detention officers under sections 251B and 252(2)

[1] Second Reading Speech, Thursday 14 May 2020, Alan Tudge
[2] Parliamentary Joint Committee: Guide to Human Rights https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

QLS notes that similar issues were raised in the Law Council of Australia's (**LCA**) submission on the 2017 Bill, of which we are supportive.

We have not had the opportunity to undertake a comprehensive and detailed analysis of every clause. Therefore there may be further provisions in the Bill which are potentially problematic, but are not within the scope of this submission.

The breadth of the definition of "prohibited things" under s251(A) and Ministerial Power

The definition of "prohibited thing" under the Bill remains excessively broad. It includes things which are illegal to possess under Commonwealth or State laws, or under s251A:

> *(2) The Minister may, by legislative instrument, determine a thing for the purposes of subsection (1) if the Minister is satisfied that:*
>
> *(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.*

The Bill and Explanatory Memorandum provide examples such as "*mobile phones, SIM cards, computers and other electronic devices capable of being connected to the internet,*" but notes they *"are not limited to"* these.[3] The insertion of the catch all *"are not limited to"* expands the definition beyond any reasonable and clearly defined framework, and this expansion has not been justified.

Further, there is no definition provided to clarify the use of the phrase, "the order of the facility." The provision therefore effectively enables anything to be designated as a "prohibited" item at the Minister's direction. It is the view of QLS that this enables the law to be wielded arbitrarily, which is contrary to fundamental legislative principles.

Section 251A(4) of the Bill states:

> *(4) Despite any regulations made for the purposes of paragraph 44(2)(b) of the Legislation Act 2003, section 42 of that Act (disallowance of legislative instruments) applies to a legislative instrument made under subsection (2) of this section.*

Whilst this is a welcome addition to the 2017 Bill, in a practical sense this will do little to fetter the Ministerial power in determining prohibited things. Further, disallowable instruments are open to parliamentary veto for 15 days. If the Minister designates a thing as prohibited, and as a result an officer has authority to strip search a detainee under s252(A) and that action is undertaken immediately, there is little utility that it can be disallowed within 15 days.

Our concerns regarding the broad Ministerial power are heightened upon review of proposed subsection 251B(6), which provides:

> *The Minister may, by legislative instrument, direct that an authorised officer (or an authorised officer in a specified class of relevant officers) must seize a thing by*

[3] Explanatory Memorandum, page 8.

> *exercising one or more specified relevant seizure powers (or all relevant seizure powers) 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 of such facilities, or all immigration detention facilities;*
>
> *(d) any circumstances specified in the directions.*

This means that searches of detainees and the relevant exercise of those powers is subject to broad ministerial discretion to the extent that directions may be made requiring those seizure powers to be exercised and things to be seized without due process.

We note that the definition of immigration detention facility has been expanded for the purposes of searches of detainees and 'prohibited things' under proposed section 251A(5) and includes "*a detention centre established under this Act* (see section 273); or *another place approved by the Minister in writing for the purposes of subparagraph (b)(v) of the definition of immigration detention in subsection 5(1)*". The Explanatory Memorandum states that alternative places of detention (**APODs**) "include facility-based forms of detention, such as Immigration Transit Accommodation (ITAs) and places in the broader community (eg. hotels and motels) which have been designated as alternative places of immigration detention (non-facility)"[5]. We are very concerned that the broad search powers will apply to persons detained in all APODs as well as to persons not detained in an immigration detention facility. Therefore, a mobile phone may, if determined under proposed section 251A(2)(b) be a 'prohibited thing' in relation to a person in detention even if they are detained in places in the broader community where devices would ordinarily be easily accessible.

There has been no evidence or data provided, spoken to in the Second Reading Speech, or in the Explanatory Memorandum to support the inclusion of such broad ministerial powers. The expansiveness of the proposed section to include, *"a specified thing, a thing in a specified class of things, or all things"* is of particular concern as there is no clarity for individuals to ascertain items which may be prohibited and/or seized under legislative direction.

Focus on mobile phones as a prohibited thing

QLS shares the concern expressed by the LCA in its submission on the 2017 Bill regarding the particular focus on mobile phones. This focus was reiterated in the Second Reading Speech and the Explanatory Memorandum of the Bill. QLS notes that no statistics, evidence or data has been provided regarding the use of mobile phones for facilitating contraband activity, beyond the assertion that it is "significant."[6] Given the lack of specificity, there is no evidence to suggest this provision is a necessary or proportionate response.

We note that in 2019 the Australian Human Rights Commission (**the AHRC**) conducted its inquiry into Risk Management in Immigration Detention. Relevantly, it investigated the

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[5] Explanatory Memorandum, page 10.
[6] Second reading speech.

reported misuse of mobile phones. Having consulted with IDF staff, it was found "*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.*"[7]

QLS supports the Law Council's position that banning mobile phones due to their role in organising peaceful protests is not valid, given the enshrined right to freedom of peaceful assembly.[8] Where protests turn violent, measures to deal directly with violence, rather than modes of communication, are more appropriate.[9] Such measures are more rationally connected to the legitimate objective of curtailing violence. Targeting the activity, rather than the purportedly 'significant' conduit is especially important in relation to mobile phones, which allow detainees to communicate with persons outside the centre, including family members, the press, and legal representatives. In this regard, the AHRC report stated "*that the reintroduction of mobile phones in immigration detention facilities is a net positive, given its significant benefits for the wellbeing of people in detention and their capacity to maintain contact with people outside detention.*"[10]

Crucially the AHRC considered that a more appropriate response to any phone misuse was to address the misuse with the individuals involved. We also note the AHRC's recommendation that, *"The Department of Home Affairs should commission a review of existing laws and policies that may assist in addressing concerns regarding inappropriate use of mobile phones in detention.*"[11]

The Department of Home Affairs' response did not adequately address this recommendation.[12] It referred to the prospective 2017 Bill as a potential way to address these concerns, and did not acknowledge the positive role of mobile phones in facilitating the benefits described in the AHRM report.

QLS is particularly concerned that this proposal will negatively impact the ability of detainees to access timely legal advice and representation, which is a fundamental right.[13] Whilst the Explanatory Memorandum details that detainees will still have access to landlines, mail, fax and the internet, access to these is subject to restrictions which will limit the time and regularity in which detainees can reach external legal support. The Explanatory Memorandum notes that the Department of Foreign Affairs and Trade will *"ensure that communication avenues are maintained and enhanced"* between detainees and their representatives, however there is little information about the substance or timing of these enhancements.[14] As a result, QLS fears that the confiscation of mobile phones under the Act will impede detainees' access to justice. Detention must be for the *"shortest practicable time"*,[15] and we do not consider that this measure has been appropriately justified, nor is it proportionate to the purported legitimate objective, and will likely burden the expedient facilitation of accessing legal advice – potentially leading to longer periods of detention.

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[7] https://humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf
[8] International Covenant on Civil and Political Rights, article 21; LCA 2017 Submission
[9] Law Council Submission
[10] AHRC, 2019, Risk management in immigration detention, p 57
[11] AHRC, 2019, Risk management in immigration detention, p 58.
[12] https://humanrights.gov.au/sites/default/files/home_affairs_response_ahrc_risk_report2019.pdf
[13] https://www.lawcouncil.asn.au/policy-agenda/international-law/rule-of-law
[14] Explanatory Memorandum, page 8
[15] Detention Services Manual

Discretion provided to officers to search detainees under s251(B) and 252(2).

QLS is particularly concerned by the powers afforded to officers under s251(B) and 252(2) to search detainees for 'prohibited items'. Section 251(B)(2) is drafted to permit officers to conduct a screening procedure for a prohibited item, "*whether or not that thing is visible to the officer*" or *"whether or not the thing had been intentionally concealed."*[16] This is an exceptionally broad power.

Section 252(2) allows an authorised officer to perform a search of the person and their property, *"whether or not the officer has any suspicion that the person has such a thing on the person's body, in their clothing, or in any such property."*[17] This power is alarming and of real concern.

As drafted the provision will permit searches to take place without any reasonable suspicion. This is an arbitrary use of power, which is contrary to the principles of the rule of law and which could be prone to misuse. It is extremely concerning that this unfettered power extends to the ability to strip search a detainee. Strip searches are a significant incursion of privacy. The potential for these to occur without reasonable suspicion of possession of a prohibited item contravenes the fundamental principal that laws will "respect the inherent dignity of the human person."[18]

The Attorney General's Department's 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'[19] notes that such search powers should only "be provided for in exceptional circumstances." It further requires that "strong justification" be provided in the Explanatory Memorandum and that Criminal Justice Division be consulted. Neither of these guidelines have been complied with. The guidelines also refer to the Scrutiny of Bills Committee's report which states:

- that broader powers should be enacted "*only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny.*"
- *"the justification for the expansion of intrusive enforcement and investigatory powers should not be considered to be self-evident, no matter how beneficial such powers might be in a national security context"*
- That personal search powers outside the arrest context are likely to be criticised by the Scrutiny of Bills Committee.
- powers to allow personal searches by persons other than police officers are also likely to be criticised.

No reasonable justification for the proposed search powers has been provided. Under s252 of the current *Migration Act,* officers already have the power to conduct a search of a person, their clothing and property for an item when they have *"reasonable grounds for suspecting a person's visa should be cancelled"* and to "*establish whether the person is carrying weapons or other things that may be used to inflict injury or help the person escape from immigration detention*" in order to *"ensure the safety of authorised officers and detainees."*[20] Even this

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[16] Explanatory Notes, Page 10.
[17] Explanatory memorandum, page 14, 69-70
[18] https://www.lawcouncil.asn.au/policy-agenda/international-law/rule-of-law
[19] https://www.ag.gov.au/sites/default/files/202003/A%20Guide%20to%20Framing%20Cth%20Offences.pdf
[20] Explanatory Memorandum, Page 13-14, paragraph 66.

broad power does not extend to a strip search. There has been no evidence provided to suggest the current powers are inadequate for the purposes of the intention of the Bill, as described in the Explanatory Memorandum. QLS considers the proposed amendment is a troubling overreach which is not necessary for or proportional to the objective being achieved. These concerns are exacerbated when it is realised these provisions may be used in the case of detained children.

Furthermore, the reach of these personal search powers is exceptionally broad. According to the Explanatory Memorandum they will "*apply in relation to persons detained in all types of APODs (as well as to detainees who are not detained in an immigration detention facility).*"[21]

Extending the application to those not even detained in an IDF would seem to extend these laws beyond their jurisdiction. This has not been sufficiently justified as necessary or proportional. It does not seem to be legitimate considering the Attorney General's Guidelines.

In relation to these provisions, it is pertinent to consider the recent decision handed down by the High Court of Australia in *Binsaris, Webster, O'Shea and Austral v Northern Territory [2020]* HCA 22. As legal commentators have suggested, this decision behoves us to remain vigilant about "*how those who administer and operate centres of detention, whether they are adult prisons, youth detention facilities or immigration detention centres, exercise their powers when confronted with challenging behaviours by those who are detained.*"[22]

QLS is concerned that the power to perform a strip search without reasonable suspicion of a prohibited item may be used coercively. Absent of a reasonable suspicion, this may happen even when so called "challenging behaviours" are not present. In our view, this is an unnecessary and unjustifiable extension of power which could be prone to the type of abuse we must be mindful to prevent.

Finally, QLS wishes to strongly reiterate the fundamental principle that immigration detention is administrative, not criminal. The Government has attempted to justify many of these provisions based on the criminal offences, including historical offences, of detainees leading to visa cancellations. However, they have failed to provide any cogent data to support this assertion.

The AHRC's report noted that the population of IDFs is diverse, including *"people with a range of risk profiles, many of whom would not present any identifiable risk to community safety."*[23] Where there are convictions, they were either historic, non-custodial, or those with custodial sentences had served their time.[24] Continuing periods of immigration detention can be considered punitive, and is not an appropriate way to deal with what is essentially an administrative matter. Continuing detention should only be used where there is a genuine risk to the population. Even then, these risks must be managed with practices that balance the protection of basic human rights.

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[21] Explanatory Memorandum, Page 10, paragraph 40.
[22] https://www.smh.com.au/national/don-dale-ruling-a-strong-message-against-use-of-force-on-children-20200604-p54zhc.html

[23]https://humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf at p67.
[24]https://humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf at p67.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

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Luke Murphy
President