THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:RHas1934174

12 June 2020

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: alex.kershaw@lawcouncil.asn.au

Dear Ms Nicoll,

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

Thank you for the opportunity to contribute to a Law Council submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 ("the Bill"). The Law Society's Human Rights Committee has provided input for this submission.

1. Overview of the Bill

The Bill would amend the *Migration Act 1958* (Cth) ("the Act") to allow the responsible Minister to declare something to be a "prohibited thing" in relation to people in detention. There is no defined list of prohibited things in the Bill, however the Explanatory Memorandum states that this may include controlled drugs as defined in the *Criminal Code Act 1995* (Cth), prescription drugs, mobile phones, SIM-cards and internet-capable devices. Under s 251A(2) in the Bill, the Minister would have the power to determine what is a "prohibited thing" for the purposes of the Act by way of a disallowable legislative instrument. The Bill is described in its second reading speech as "not introducing a blanket ban on mobile phones in detention",[1] however proposed ss 251B(6) would allow the Minister to require by legislative instrument that an authorised officer "must" seize a specified thing.

The Bill would also expand the search and seizure powers in the Act "in order to provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility".[2] By inserting new ss 252BA and 252BB into the Act, the Bill would allow authorised officers, as defined at s 5 of the Act, and their assistants, to search areas in immigration detention facilities including accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas, and to allow the use of detector dogs to conduct these searches.

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2020, 2441 (Alan Tudge).
[2] Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 37.

The Bill differs from its previous version, the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 ("the 2017 Bill"), in some respects. As noted above, the legislative instrument through which items are declared a "prohibited thing" in the Bill will be disallowable, whereas in the 2017 Bill the legislative instruments were not open to Parliamentary disallowance. In the Bill, medications and healthcare supplements will not be "prohibited things" where they are supplied by an authorised healthcare provider; and the Bill provides that detector dogs will be used to search immigration detention facilities operated by or on behalf of the Commonwealth, and not detainees or people entering a detention facility, as was proposed in the 2017 Bill.

2. Relevant sections of the Law Society's submission on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

The Law Society provided a submission on the 2017 Bill, and we **enclose** a copy of that submission. The Law Society reiterates the following aspects of our earlier submission, which remain relevant in relation to the Bill.

2.1. Legal professional privilege

The Law Society retains its concerns about the impact the Bill may have on legal professional privilege, which is a fundamental common law right and is also enshrined in various international human rights instruments.[3] In the experience of our members, detainees in immigration centres often make use of their mobile phone to access legal advice from their legal representative. 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.

2.2. Availability of existing powers

As the Law Society noted in our submission on the 2017 Bill, s 252 of the Act already permits authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security. The Act currently allows for a detainee's clothing and property to be searched without the need for a warrant (s 252(1)). The purpose of the search is currently limited to finding out whether the detainee is hiding a weapon or other thing that is capable of being used to inflict bodily injury or to help the person escape from immigration detention. The search power may also be used to search for a document (or other thing) that may be used as evidence for cancelling a person's visa (this would only apply to people at airports/ports who have not been immigration cleared) (s 252(2)).

In relation to searches, the Act allows for a strip search to be conducted (without warrant) if an officer suspects on reasonable grounds that a detainee has a weapon or a thing that can be used to inflict bodily injury or escape detention (s 252A). Detainees can also be subjected to a screening process (s 252AA).

The Law Society is of the view that the Bill is not necessary, given the powers that already exist under the Act. If criminal activities are taking place inside detention centres, as suggested

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[3] We note that the UN HRC 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.

in the second reading speech accompanying the bill, standard criminal law processes should be followed, including obtaining a warrant to seize any relevant item(s).

2.3. Broad discretionary powers granted to the Minister and authorised officers

Proposed s 251A(2)(b) of the Bill provides the Minister with broad discretion to declare an item as a "prohibited thing" if "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". In a note to s 251A(2), the Bill states that mobile phones, SIM cards and internet-capable devices may be determined to be prohibited things. As the Law Society noted in our submission on the 2017 Bill, this provision does not require any standard by which the Minister is required to consider whether something "might" be a risk, and there is no 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.

Proposed s 252(4) would allow authorised officers to seize a prohibited thing and retain it "for such time as the authorised officer thinks necessary for the purposes of this Act". The Bill does not provide for any avenues by which a detainee can challenge the confiscation of things in error, or things taken improperly (that is, things that are not in fact prohibited things) or to recover items wrongly confiscated. There is no provision to require that authorised officers properly safeguard the things seized and retained, and no consequences if these things are lost or otherwise compromised. Further, there is no guidance in the Bill in respect of the purposes for which authorised officers might access information held in the things seized and retained (such as mobile phones and computers). There is no safeguard against information found in mobile phones and computers being used improperly, and there is also no effective safeguard against accidental (or indeed purposeful) disclosure of personal and sensitive material in computers and mobile phones.

Proposed ss 252A(1) and 252A(3)(a) would provide authorised officers with broad powers to conduct strip searches on detainees, without a warrant, if the officer suspects "on reasonable grounds" that there is a weapon, escape aid or prohibited thing on the detainee's clothing or body. Section 252BA provides for similarly broad search powers, without a warrant, in relation to accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas, and would allow the use of detector dogs to conduct these searches. The Law Society retains our concerns about the use of detector dogs outlined in our submission on the 2017 Bill. We also retain our overall concerns about the broad discretionary powers available to the Minister and authorised officers in the Bill, which in our view are disproportionate, unreasonable, and not sufficiently connected with the objective of protecting the health, safety and security of people in immigration detention and maintaining order in the facilities.

2.4. International human rights engaged

The Law Society retains its concerns about the impact the Bill is likely to have on detainees' right to privacy and the right to family life. Further context to these concerns is contained in our submission on the 2017 Bill.

3. The Minister's powers to cancel visas on character grounds

The Law Council has also sought the views of the Law Society in relation to the Minister's powers to cancel visas on character grounds, given that the Explanatory Memorandum accompanying the Bill states that the Bill is necessary as there has been a "change to the demographics of the [immigration] detention population" with an increasing number of detainees having entered "directly from a correctional facility, including members of outlaw

motorcycle gangs" due in part to an increase in visa refusal or cancellation on character grounds.[4]

We **enclose** for your information a copy of the Law Society's 26 November 2018 submission on the Migration Amendment (Strengthening the Character Test) Bill 2018, which addresses this issue.

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

Enc.

[4] Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 36.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/PWvk:1404575

17 October 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: Natasha.Molt@lawcouncil.asn.au

Dear ~~Mr Smithers~~ Jonathan,

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

Thank you for the opportunity to provide input to the Law Council's submission to the inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the "Bill"). The Human Rights Committee of the Law Society of NSW has contributed to this submission.

1. Summary of the Law Society's position

We strongly oppose the Bill, and query the necessity and utility of the breadth of powers the Bill proposes to afford the Minister, without adequate scrutiny. We are concerned about the nature of items that may become prohibited things, as well as the expansive additional powers to search and seize. In our view, the Bill significantly and unreasonably interferes with the right to privacy and family life (Article 17 of the International Covenant on Civil and Political Rights (ICCPR)). We also consider that the effect of the Bill (such as the confiscation of medicines and mobile phones) may amount to cruel, inhuman or degrading treatment, engaging Articles 7 and 10 of the ICCPR.

We are very concerned about the effect of the Bill on the ability of lawyers to provide legal assistance to their clients in detention, particularly if mobile phones and SIM cards are determined to be prohibited things. In this event, the Bill is also likely to interfere with material that may attract legal professional privilege. Our concerns are discussed in more detail below.

In our view, the Bill should not be passed. Ordinarily, the Law Society attempts to suggest amendments that might mitigate the more egregious aspects of legislation that offends fundamental rights and rule of law principles. However, in this instance, we submit that the Bill represents a significant executive overreach. The Bill is an attempt to deal collectively with an issue that should be addressed on a case by case basis. In our view, the approach taken under the Bill amounts to collective punishment. Items should only be confiscated if there is reasonable suspicion that it is being used in the commission of an offence. It would therefore be very difficult to propose amendments that would adequately mitigate the deleterious effects of the Bill.

2. Brief overview of the Bill

The Bill would allow the Minister to determine, by legislative instrument, "prohibited things" in relation to immigration detention facilities.

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The Minister may determine a thing to be prohibited if the Minister is satisfied that the thing is prohibited by law or possession or use of the thing might be a risk to the health, safety or security of persons in the facility, or the order of the facility (proposed s 251A). A note to s 251A states that examples would include mobile phones, SIM cards, computers, medication/health supplements and material that could incite violence, racism or hatred.

The Bill would also:

- extend the search powers in s 252 of the *Migration Act 1958* (Cth) (the "Act") and strip search powers in s 252A of the Act to identifying prohibited things;
- authorise officers to use a dog in conducting screening procedures;
- provide for a general search power including of the detainees' rooms and personal effects (with a dog). There is no requirement for a warrant, or even reasonable suspicion to enliven the search powers;
- allow authorised officers to be assisted by other persons in exercising or performing functions or duties in respect of searches of immigration detention facilities and the retention of prohibited items that are seized.

3. Existing powers

We note that s 252 of the Act already permits authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security. This was confirmed in the reasoning of Judge Smith in *SZSZM v Minister for Immigration & Ors* [2017] FCCA 819 at [73]-[79], although we note that cases concerning mobile phone confiscation are currently on appeal and yet to be determined by the Federal Court.

The Act currently allows for a detainee's clothing and property to be searched without the need for a warrant (s 252(1)). The purpose of the search is currently limited to finding out whether the detainee is hiding a weapon or other thing that is capable of being used to inflict bodily injury or to help the person escape from immigration detention.

The search power may also be used to search for a document (or other thing) that may be used as evidence for cancelling a person's visa (this would only apply to people at airports/ports who have not been immigration cleared) (s 252(2)).

The Act allows for a strip search to be conducted (without warrant) if an officer suspects on reasonable grounds that a detainee has a weapon or a thing that can be used to inflict bodily injury or escape detention (s 252A).

Further, detainees can be subjected to a screening process (s 252AA).

Although the items listed in the "Note" to proposed s 251A do not form part of the Bill, they will necessarily inform an interpretation of what might be determined to be a "prohibited thing" under s 251A. To that end we note that:

- Materials which incite violence/hatred/racism are already prohibited under the *Racial Discrimination Act 1975* (Cth) (RDA) by virtue of the operation of ss 17, 18C and the *Convention on the Elimination of Racial Discrimination*, which is scheduled to the RDA and referred to in s 3(1).
- Use of a carriage service to convey child pornography materials is already prohibited by s 474.19(1) *Criminal Code Act 1995* (Cth)

In our view, the Government has not demonstrated the necessity for the Bill, given the powers that already exist.

4. Broad powers disproportionate to, and not rationally connected with, the objectives of the measure

In our view, the Bill is drafted so broadly as to be disproportionate, unreasonable, and not rationally connected with the objective of protecting the health, safety and security of people in immigration detention and maintaining order in the facilities. The proposed provisions discussed below are particularly concerning.

Proposed s 251A(2)(b) provides that the Minister may determine a thing is prohibited because "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 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. The items included in the note to this provision include mobile phones, SIM cards and medications/health supplements.

Proposed s 252(4A) allows authorised officers to take possession of a prohibited thing and retain it. It does not provide for any avenues by which a detainee can challenge the confiscation of things in error, or things taken improperly (that is, things that are not in fact prohibited things) or to recover items wrongly confiscated. There is no provision to require that authorised officers properly safeguard the things seized and retained, and no consequences if these things are lost or otherwise compromised. Further, there is no guidance in the Bill in respect of the purposes for which authorised officers might access information held in the things seized and retained (such as mobile phones and computers). There is no safeguard against information found in mobile phones and computers being used improperly, such as to intimidate or harass detainees. There is also no effective safeguard against accidental (or indeed purposeful) disclosure of personal and sensitive material in computers and mobile phones (or the privacy of personal information relevant to medications).

Proposed s 252BA provides for very broad general search powers. 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 weapons or a prohibited thing. The searches can be entirely arbitrary. 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; how many times individuals can be repeatedly searched, and so forth. In our view, this provision is unacceptable.

Proposed s 252AA(3A) contemplates the use of sniffer dogs during the screening procedure and proposed s 252BA(3) permits the use of sniffer dogs in searches of detention facilities. There is nothing in the Bill that prohibits the use of sniffer dogs in a manner intended to intimidate or harrass detainees. In our view, the protection purportedly afforded by s 252BA(6) in relation to the use of force would not make intimidating or harassing conduct during a search unlawful. The Law Society 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).[1]

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[1] We note that according to the NSW Ombudsman report in June 2006 on the use of sniffer dogs for drug detection in NSW, "No drugs were located in almost three-quarters of searches following indications, raising questions about the accuracy of drug detection dogs. This in turn casts doubt on the legitimacy of police relying on the dogs to determine whether they may reasonably suspect that a person is in possession of a prohibited drug." [p.iii]

The report goes on to query the legality of using such dogs and their 'cost effectiveness'. Although officers in IDCs are not searching to establish reasonable suspicion of offences, such arguments about effectiveness might apply by analogy, especially when balanced with cultural considerations. The same report refers to 'fearful or anxious reactions to the drug detection dog' [vi] on the basis of cultural background. Again, use of sniffer dogs does not represent the least onerous means of conducting searches and remains ineffective.

(See NSW Ombudsman's Report, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006)

Proposed s 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; why they would be present and what background checks have been carried out. This is of concern given that the assistants may be indefinitely invested with State power to carry out very intrusive and potentially cruel, inhuman and degrading actions. If there are indeed directions given to the assistants by authorised officers, the Bill is clear that such direction is not a legislative instrument.

5. Legal professional privilege

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. There is no requirement in the Bill that detainees be advised of their rights. In the experience of our members, detainees are rarely, if ever, advised of their rights in detention.

Legal professional privilege is a fundamental common law right and one enshrined in various international human rights instruments.[2] We note that in the absence of explicit abrogation in the Bill, legal professional privilege is preserved (*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49).

In considering whether to address this issue in its submission, the Law Council might take into account whether the Government might respond to this submission by simply amending the Bill to explicitly abrogate legal professional privilege. If the Law Council considers that risk to be genuine, we would recommend inserting an exemption in the Bill which explicitly protects "privileged material" sent between detainees and legal representatives or other exempt persons/bodies. A model for such exemption can be found in Part 5, Division 6 of the Crimes (Administration of Sentences) Regulation 2014 (NSW).

6. Inadequate level of scrutiny available

In the Law Society's view, the legislative instrument contemplated in proposed 251A is not disallowable. This view is based on a reading of the Legislation (Exemptions and Other Matters) Regulations 2015 (see section 10, item 20)[3], read together with s 44(2)(b) of the *Legislation Act 2003* (Cth) (the instrument would be made under Part 2 of the *Migration Act 1958)*. This restricts the level of scrutiny and avenues available for challenging the instrument.

7. International human rights engaged

We note that Article 17 of the ICCPR provides in part: "No one shall be subjected to arbitrary or unlawful interference with her privacy, family, home or correspondence..." Article 23 provides that the state is to protect family as the fundamental group unit of society.[4]

A measure of proportionality must accompany any interference of this right, a contention supported by *Hatton and others v United Kingdom* (ECHR 8 July 2003): "...States are required to minimise, as far as possible, the inference with these rights, by trying to find alternative solutions

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[2] We note that the UN HRC 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.
[3] Available here: https://www.legislation.gov.au/Details/F2017C00684
[4] Australia has reserved its implementation, allowing for actions which may impinge on those rights if necessary in a democratic society in the interests of national security. (Australian Treaty Series 1980, no. 23, Australian Government Publishing Service. http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html)

and by generally seeking to achieve their aims in the least onerous way as regards human rights."

As noted above, the Bill proposes to empower authorised officers to search for and confiscate certain prohibited items including mobile phones, SIM cards, computers/tablets, medications/health care supplements and materials inciting hatred, violence or racism. The Statement of Compatibility with Human Rights acknowledges that the proposed measures "represent a limitation to the right to detainees' privacy" under Article 17(1) but states that such measures "are reasonable, necessary and proportionate and are directed at the legitimate objective of protecting the health, safety and security of people in immigration detention and or to the order of the facility."

However, in our view, this statement ignores jurisprudence on this point. For example, the European Court of Human Rights has determined that "necessary" does not mean "merely expedient": *Observer and Guardian v. the United Kingdom* of 26 November 1991, A 216, paragraph 71. Further, on an "acceptable assessment of the relevant facts" (*Oberschlick v. Austria* judgment of 23 May 1991, A 204, para 60), we submit that the expansion of the power to confiscate items such as medications, health supplements, mobile phones and SIM cards on a collective basis is disproportionate to the objective of the Bill, and does not represent the least onerous way to achieve the legitimate end of safety and security.

Further, Article 10 of the ICCPR provides that "[A]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." While the Statement of Compatibility considers Article 10 of the ICCPR, it refers only to the restriction on mobile phones, and fails to address how confiscation of other items might degrade a detainee's dignity. The protective provisions are also not directed at such consideration.

The Statement of Compatibility further fails to consider cruel, inhuman or degrading treatment under Article 7 of the ICCPR.

Medications and health supplements

It is arguable that the confiscation of medications, supplements and tablets engages Article 7 of the ICCPR, and the exercise of power in this way is not sufficiently narrow to be justifiable (noting that legitimate objectives must be narrowly construed: see *Klass v. the Federal Republic of Germany* judgment 6 September 1978, A 28).

We note that 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.[5]

In our view, it is disproportionate, unnecessary and unreasonable to address this issue via a blanket prohibition of medications and health supplements. The Law Society's concerns in this regard would be addressed if the note at s 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.

Mobile phones and SIM cards

We consider that confiscating items such as mobile phones and SIM cards will seriously and negatively impact on the right of detainees to family life. Our members advise that for many long-term detainees, mobile phones are the only means by which they can "see" and have meaningful contact with their family (via video chat). We also note that mobile phones are likely to hold photographs of family members. We are aware of one particular case example of a detainee who has not been able to see her family, including her children, for seven years. In circumstances

[5] Explanatory Memorandum, [18]

where it is clear that the conditions of immigration detention are already presenting a threat to the mental well-being of detainees and where adequate health care is not available,[6] the Law Society has serious concerns for the mental well-being of detainees, some of whom are already acutely vulnerable, should their ability to have meaningful contact with their families be arbitrarily restricted.

We are of the view that the Bill also engages Articles 7 and 10 in this instance. We bring to your attention the case of *SD v Greece* (application no. 53541/07), where the European Court of Human Rights held that denial of access to telephones formed part of a matrix of treatment which was degrading and in breach of the equivalent article (Article 3) under the European Convention on Human Rights.[7] Here, even if detainees maintain access to landlines, that access will be so limited in light of the ratio of detainees to available phones as to render this right of access nugatory, and is likely to constitute a practical denial. By way of context, we understand that in some detention facilities, detainees are required to give 24 hours' notice in order to use the telephone. In other facilities, telephones are only available on speaker phone; or only available if detainees have accrued enough "points" to use the phone via engagement with other activities such as working in the cafeteria. Such pathways to access cannot properly be classified as a meaningful way to maintain privacy and family life.

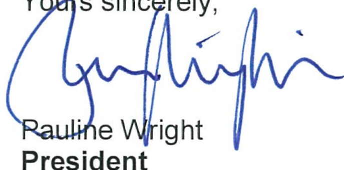
The Law Society notes that lack of timely access to telephones will also engender a lack of timely access to legal representation in circumstances of extremely short procedural time limits imposed by the government. Effective denial of access to lawyers may constitute an unreasonable interference with 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 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.

8. Conclusion

For the reasons set out in this submission, the Law Society strongly opposes this Bill. We are of the view that the Bill affords almost unfettered latitude to the Government and authorised officers to interfere with the fundamental rights of detainees to privacy and family life. The collective approach taken by the Bill is arbitrary, and entirely disproportionate to the aim of the Bill. We consider that a case by case approach to searching and confiscating dangerous items is the proportionate response in this regard and submit that the Government already has such powers in existing legislation. We are concerned that such treatment may amount to cruel, inhuman and degrading treatment, and interfere with the right to be treated with humanity and dignity. We are concerned about the effect of the Bill on detainees, many of whom are already acutely vulnerable. We urge the Law Council to oppose this Bill in strong terms.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,



Pauline Wright
President

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[6] The Law Society notes that there have been a number of suicides in Australian immigration detention facilities, including a recent suicide by a 32 year old Sri Lankan man on Manus Island. We note reports that there have been two suicides within two months on Manus Island. See: http://www.theaustralian.com.au/national-affairs/sixth-asylum-seeker-on-manus-island-dies/news-story/3ca1314274da80af19cd9a7145e45d44

[7] The judgment is only available in French or Greek. A summary is available here: https://hudoc.echr.coe.int/eng-press#{"itemid":["003-2765162-3025664"]}

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/DHas: 1616266

26 November 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
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By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Smithers,

Migration Amendment (Strengthening the Character Test) Bill 2018

Thank you for the opportunity to contribute to a Law Council submission to the Senate Legal and Constitutional Affairs Committee inquiry on the *Migration Amendment (Strengthening the Character Test) Bill 2018* ("the Bill").

The views of the Law Society have been informed by our Human Rights Committee.

The intention of the Bill

The Bill would amend the *Migration Act 1958* (Cth) ("*Migration Act*") to provide new grounds for non-citizens who have been convicted of certain offences (referred to as "designated offences") to be considered for visa refusal and cancellation by the Minister or delegate. In doing so, the Bill adopts a recommendation from the December 2017 report of the Joint Standing Committee on Migration, "No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes".

> "The Committee is also recommending that anyone over 18 years of age who has been convicted of a serious violent offence which is prescribed, such as serious assaults, aggravated burglary, sexual offences and possession of child pornography, have their visa cancelled under section 501 of the *Migration Act 1958*."[1]

Designated offences in the Bill that would fall within the scope of the amended s 501 of the *Migration Act* include:

a) Offences involving violence;
b) Non-consensual conduct of a sexual nature;
c) Breach of a protection order;
d) Using or processing a weapon (weapon has a very broad definition);
e) Aiding, abetting, counselling, conspiring, inducing the commission of or being in any way (directly or indirectly) knowingly concerned with the commission of the offences in a–d above.

[1] Joint Standing Committee on Migration, Parliament of Australia, *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes* (December 2017), 175.

The definition of designated offence in the Bill also requires that the offence be punishable by either life in prison; imprisonment for a fixed period of not less than two years; or imprisonment for a maximum term of not less than two years. There is no requirement that the non-citizen is given a custodial sentence, only that they have been eligible for a sentence of at least two years.

The amendments in the Bill, for the purpose of visa refusal, will apply to any application that has not been finally determined at commencement of the amendments or applications made after commencement. For the purposes of a visa cancellation the amendments will apply to anyone who holds a visa and committed or was convicted of a designated offence at any time.

Potential for infringement of Chapter III of the Constitution

In the case of *Djalic v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

> "It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth."[2]

The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if "on its true construction, it authorises the Executive to impose punishment for criminal conduct".[3] The Full Court stated that a decision to cancel a visa cannot be considered a punishment if it "can be fairly said to protect the Australian community".[4] The Full Court also held that the Minister or delegate may take into account "the expectations of the Australian community that non-citizens should obey Australian laws while in Australia" in deciding whether to cancel a visa pursuant to s 501, without their action equating to the imposition of a punishment.

Notwithstanding this broad scope for the Minister or delegate to cancel or deny a visa based on character grounds, there is a risk that the exercise of the broad discretion provided to the Executive by the amendments in the Bill – for instance, by proposed s501(7AA)(vii) – may infringe Chapter III of the Constitution if there is no evidence that the non-citizen in question poses a future risk to the Australian community.

Other key concerns with the Bill

We note that s 501 of the *Migration Act* already provides the Minister with broad powers to cancel and refuse visas on character grounds. Under the present law, a non-citizen will fail the character test if, inter alia:

- The person has been sentenced to imprisonment for a period of 12 months or more (s 501(7)(c)); or
- The minister reasonably suspects that the person is/has been a member of a group involved in criminal conduct (s501(6)(b)); or
- Having regard to the person's past and present general/criminal conduct there is a "risk" (the test is not a "real risk" or a "significant risk") that they would either engage in criminal conduct, incite discord in the Australian community, harass another

[2] *Djalic v MIMIA* [2004] FCAFC 151, 58.
[3] Ibid. 73.
[4] Ibid. 66.

person in Australia, vilify a segment of the community or represent a danger to the community (s501(6)(d)).

As the Law Council noted in its submission to the Joint Standing Committee on Migration Inquiry into Migrant Settlement Outcomes, the character test is arguably already too broad. A similar observation was made by Youthlaw and Smart Justice for Young People.[5] Making the character test even broader will only serve to heighten these concerns.

A further legal consequence of the operation of the Bill would be permanent exclusion of non-citizens from Australia and, in some cases, permanent separation from family. This is mainly because of the operation of public interest criteria 4001 and special return criteria 5001 in the *Migration Regulations 1994* (Cth).[6] This consequence of the Bill has implications for Australia's compliance with the Convention on the Rights of the Child, which states that "in all actions concerning children... the best interests of the child shall be the primary consideration", and the International Covenant on Civil and Political Rights, which at Article 23(1) states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". In the Statement of Compatibility with Human Rights accompanying the Bill the Minister for Immigration, Citizenship and Multicultural Affairs asserts that "the decision to refuse or cancel will appropriately weigh the impact of separation from family and the best interests of any children against the non-citizen's risk to the community". We note, however, that there is no reference to the best interests of the child as a factor to be considered by the Executive in cancelling or refusing visas under s 501 in the present legislation; similarly, the proposed amendments fail to include any reference to the best interests of the child.

We also note that if the power to cancel or refuse a visa is exercised in relation to a non-citizen who either holds or has applied for a protection visa, by the operation of s 197C and s 198 of the *Migration Act* the applicant would be removed to their home country immediately.[7] This would potentially result in a breach of the principle of non-refoulement, with which Australia is obliged to comply as a signatory to the 1951 Convention Relating to the Status of Refugees.

Thank you for the opportunity to provide comments on this issue. Questions may be directed to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

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[5] Joint Standing Committee on Migration, Parliament of Australia, *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes* (December 2017), 155.
[6] See also: *DND and Minister for Home Affairs (Migration)* [2018] AATA 2716, 9.
[7] *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448, 26.