

16 July 2020

Senator Amanda Stoker  
Chair  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon@aph.gov.au](mailto:legcon@aph.gov.au)

Dear Senator

### **Supplementary Submission: Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020**

On 3 July 2020, the Law Council of Australia (**Law Council**) appeared before the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) as part of a public hearing on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (**the Bill**).

The Committee raised two issues during the Law Council's appearance, which the Law Council took as Questions on Notice. This supplementary submission addresses those issues.

#### Facilitating Access to Justice Without Mobile Phones

Senator Henderson asked the Law Council to provide information regarding the improvements that would need to be made to landlines and other shared facilities in order to facilitate access to justice for detainees who do not have mobile phones.

In its written submission, the Law Council noted that the Explanatory Memorandum stated detainees 'will continue to have reasonable access' to landline telephones and internet services to contact their legal representatives,<sup>1</sup> and recommended that the Department of Home Affairs (**the Department**) clarify the full meaning of 'reasonable access'.<sup>2</sup> The Law Council further recommended that the Department release information about the quality, reliability and availability of landline telephones and computers (with access to internet

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 2-3: '*Detainees will continue to have reasonable access to landline telephones, facsimile, the internet, postal services and visits in order to maintain contact with their support networks and legal representatives. Family, friends, legal representatives and advocates can also contact detainees directly via the immigration detention facility.*'

<sup>2</sup> Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (29 June 2020) 23, [82] <<https://www.lawcouncil.asn.au/resources/submissions/migration-amendment-prohibiting-items-in-immigration-detention-facilities-bill-2020>>.

video conferencing, scanning, printing and faxing facilities), emphasising that this should include information about the privacy of arrangements in which such facilities are used, and including with respect to alternative places of detention (**APODs**).<sup>3</sup> These recommendations were made on the basis that members of the Law Council's constituent bodies remain extremely concerned that the facilities currently on offer to their clients are inadequate, lack privacy and are not readily available.<sup>4</sup>

The Law Council cannot make specific recommendations regarding improvements to landlines and shared facilities without receiving this baseline information from the Department. The data will be different from each facility, as will any comment in relation to inadequacy and required improvement. The Law Council is pleased however to add the following general information and recommendations.

Australia's democratic system is based on the rule of law.<sup>5</sup> The Law Council's longstanding policy position is that, as a fundamental principle of the rule of law, all persons should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.<sup>6</sup> Among other things, this requires that:

- the government provide adequate resources to guarantee access to a competent and independent lawyer in circumstances where individuals do not have the independent means to retain a lawyer;
- lawyer-client communications be regarded as confidential (except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law); and
- lawyers be given timely access to relevant information and documents about their client in order to enable them to provide effective legal assistance to their clients.<sup>7</sup>

On the basis of this longstanding policy position,<sup>8</sup> the previous recommendations from the Committee (recommendations which have not been implemented),<sup>9</sup> and other sources such as the UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>10</sup> the Law Council suggests that improvements might be made to the provision of landlines and shared facilities in immigration detention facilities in order to achieve the following:

- reasonable and publicly reported ratios between the population of the facility and the number of telephones and computers in the facility;
- very limited curfews on use of such facilities, with a view to enabling maximum access;
- specific provision made for lawyers to contact their clients urgently (ie relaxation of the rule that phone calls need to be booked a day/s in advance);

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<sup>3</sup> Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (29 June 2020) 23-24, [82].

<sup>4</sup> *Ibid* 23, [82].

<sup>5</sup> Australian Government, Attorney-General's Department, *Rule of Law* (website, undated, accessed 9 July 2020) <<https://www.ag.gov.au/about-us/rule-law>>: 'The rule of law underpins the way Australian society is governed'.

<sup>6</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011) 3.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*.

<sup>9</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (Report, 2017).

<sup>10</sup> *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173 (9 December 1988).

- specific provision for lawyers to be able to speak to their clients for as long as necessary, noting the complexity of migration law and the fact that translators are often needed and connecting to a translator via a landline can be a complex process;
- private rooms be made available for telephone calls, in particular to ensure that all contact with legal services is private and timely;
- subject to confidentiality and privacy obligations, the Department ensure that a central information registry regarding the status and location of detainees is available to inform a detainee's lawyer quickly of his or her whereabouts;
- the Department provide notice to detainees in *all* cases prior to transportation, removal or prohibition (in the opinion of the Law Council, it is insufficient that '*most* people, particularly if they're going to be removed, are given a notice period'<sup>11</sup>);
- computers be equipped with necessary hardware and software, including to complete electronic forms, video conferencing, printing, photocopying, document scanning and faxing facilities; and
- the Department provide assurances that other than in narrowly defined circumstances where it is necessary to uphold facilities' duties of care to staff and detainees, private information (passwords, passport numbers, banking details, personal history) shared over these facilities cannot be accessed by other users or staff. Further, legal information (evidence, arguments, advice) must at all times remain subject to lawyer-client confidentiality.

However, the Law Council retains its position that in the present age, access to justice in immigration detention facilities will always be able to be better facilitated through the use of mobile phones, smart phones and other personal electronic devices, rather than through the use of landlines and shared facilities.

Even if the landlines and shared facilities provided by the Department were of the highest standard and greatest number, they would not offer the same flexibility and availability of a mobile phone, which, by definition, can be with a person at all times.

Moreover, there are numerous immigration detention facilities where the Department is not in control of the provision of landlines and shared facilities – the most obvious being certain APODs, such as private hospitals and motels. The Law Council is therefore concerned that the Department would not in practice be able to provide 'reasonable access' to landlines and shared facilities at these locations.

In some instances, there are no alternatives to mobile phones to ensure that detainees are able to access justice. For example, this includes where detainees are being transported or awaiting transport, either in a vehicle or on a plane. The Law Council understands from migration lawyers that in some cases a mobile phone has been the only thing that has stood between their clients and potential *refoulement*.

The Law Council reiterates that legal representation is not the only reason for allowing mobile phones in immigration detention facilities. As it noted in its written submission, mobile phones can enhance mental health and provide connection to family, which is particularly important in the case of detainees with young children, who require flexibility in their communications. Landlines cannot be used to keep photographs of family and friends.

Finally, in many instances, mobile phones contribute in a positive way to the health, safety and security of immigration detention facilities. They provide for day to day occupation,

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<sup>11</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 3 July 2020, 31 (Pip De Veau) (emphasis added). Please note that this is an uncorrected proof of evidence.

prevent conflict arising from competition over shared resources (which is particularly vital throughout the current COVID-19 pandemic), and allow for transparency within immigration detention facilities.

The Law Council maintains that the breadth of the proposed powers has not been justified and is not necessary, reasonable and proportionate.

### Reasonable Suspicion Threshold

In the course of the Law Council's evidence before the Committee, Senator Henderson asked whether it would be difficult for an officer to establish a reasonable suspicion in relation to a mobile phone, without being privy to the communication occurring on that mobile phone. In response, the Law Council stated that reasonable suspicion is 'not a high bar' – 'it is the test that is regularly and routinely applied by police in the community', and 'the same measure is reasonable within a detention facility'.<sup>12</sup> The Law Council reasserts this response.

As the courts have explained with respect to the exercise of relevant police powers, 'to say that a suspicion is reasonable does not necessarily imply that it is well-founded or that the grounds for suspicion must be factually correct'.<sup>13</sup> It 'does not require proof'.<sup>14</sup> It does require 'more than a possibility'<sup>15</sup> or 'more than imagination'.<sup>16</sup> The wording of the case law is used by police departments across the country to explain the test to their officers. For example, Queensland Police training material for recruits contains the following excerpt:

*Reasonable suspicion is defined as a suspicion based on facts which, objectively seen, are sufficient to give rise to an apprehension of the suspected matter ... more than a mere matter of idle speculation or mere imagination'.*

*Reasonable suspicion is further explained in Gough v Braden [1993] Qd r 100 [sic]:*

*'Reasonable suspicion' means that there must be something more than imagination or conjecture. It must be the suspicion of a reasonable man, warranted by facts from which inferences can be drawn, but is something which falls short of proof.'*

*Reasonable suspicion has both subjective and objective elements. The subjective refer to the state of mind of the officer involved. The objective element refers to the reasonableness of that suspicion.<sup>17</sup>*

The Department provided a number of examples in its written submission, which it states are evidence of its need for the extraordinarily broad powers outlined in the Bill.<sup>18</sup> The Law Council does not agree. In the opinion of the Law Council, a reasonable suspicion would be likely to be founded in these examples. For example, in the fourth example in section 2.8.3

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<sup>12</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 3 July 2020, 8 (Pauline Wright). Please note that this is an uncorrected proof of evidence. It erroneously attributes the aforementioned evidence at page 8 to 'Ms Wrigley'. This should be 'Ms Wright'.

<sup>13</sup> *Tucs v Manley* (1985) 62 ALR 460.

<sup>14</sup> *George v Rockett* (1990) 170 CLR 104.

<sup>15</sup> *R v Rondo* (2001) 126 A Crim R 562; [2001] NSWCCA 540.

<sup>16</sup> *R v Chan* (1992) 28 NSWLR 421.

<sup>17</sup> Queensland Police Service, *Recruit Training Program: Phase 1 Learning Guide* (2018) 69 <<https://www.police.qld.gov.au/sites/default/files/2019-07/Phase%201%20Learning%20Guide%20v3.3.pdf>>.

<sup>18</sup> Department of Home Affairs, Submission No 69 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (1 July 2020) 6, [2.3.1] and 9, [2.8.3].

on page 9, if a tennis ball thrown over the fence was found by officers to contain methamphetamine, and two other tennis balls thrown over the fence had been collected by detainees, then it would be open to an officer to form a reasonable suspicion that those detainees were in possession of methamphetamine.<sup>19</sup> Importantly, officers in immigration detention facilities could then confiscate these items based on their common law powers to confiscate these items, and police should then be called to attend and exercise their relevant powers (as discussed below).

In relation to mobile phones specifically, the Law Council posits that a reasonable suspicion might arise from any number of surrounding circumstances. These might include, for example, where the mobile phone was being hidden, where the person in possession of the phone or their known acquaintances appeared under the influence of drugs or had been observed to be in possession of drugs, where officers were told or overheard seemingly relevant information or conversation, where the person in possession of the phone was being visited by, or was otherwise connected to, persons of interest in a criminal investigation, where officers received a complaint, and so on. It has already been established in relevant case law, for example, that hearsay can be grounds for reasonable suspicion.<sup>20</sup>

Where there is so little evidence that it would not be open to an officer to form even a reasonable suspicion, then the Law Council queries why it should be possible to search for and seize a detainee's mobile phone. In the language of the Department, 'handbrakes' against abuse of power are necessary.<sup>21</sup> There must be safeguards to ensure that officers do not exercise their power on the basis of speculation, convenience (such as the use of routine random checking) or for improper purposes such as punishment for perceived disrespectful behaviour. Baseless search and seizure of detainees' mobile phones would form a significant incursion on their rights to privacy and freedom of expression, and to be free from trespass. Such powers, without appropriate safeguards and pre-conditions, are at high risk of being misused.

In responding to this question above, the Law Council maintains its position that:

- the Department, including in its submission and the examples provided, does not give proper weight to the role of the Australian police in investigating crime across all areas of the community, including in immigration detention facilities, and the preferability of upholding this role rather than providing expansive and unchecked powers to contracted service providers;
- in particular, as the Law Council's submission has noted, federal, state and territory police are empowered to investigate crimes under their well-established search and seizure powers. Under the federal *Crimes Act 1901* (Cth), for example, police can obtain a warrant for searching premises or a person where satisfied that there are reasonable grounds for suspecting that there is, or will be, any evidential material at the premises or in possession of the person.<sup>22</sup> They can then seize a thing, including a mobile phone, where the police officer believes on reasonable grounds that it is

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<sup>19</sup> Department of Home Affairs, Submission No 69 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (1 July 2020) 9, [2.8.3].

<sup>20</sup> *R v Rondo* (2001) 126 A Crim R 562; [2001] NSWCCA 540.

<sup>21</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 3 July 2020, 31 (Pip De Veau). Please note that this is an uncorrected proof of evidence.

<sup>22</sup> *Crimes Act 1914* (Cth) ss 3E(1), 3E(2) and 3E(5)(c). See ss 3C and 3ZZAC for associated definitions. See also Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (29 June 2020) 14-15.

necessary to prevent its concealment, loss or destruction or its use in committing an offence;<sup>23</sup> and

- in justifying the Bill, the Department has also not addressed (including in its submission) the availability of its common law duty of care powers to maintain the safety and wellbeing of detainees, with respect to specific situations of concern. According to its Detention Services Manual, these enable it to conduct searches of premises (including targeted searches of private areas where a reasonable suspicion exists) for a broader range of items than those permitted under its Migration Act powers, and to confiscate illegal items such as drugs and child pornography, which must be notified to police.<sup>24</sup>

The Law Council continues to maintain that the police are the appropriate port of call should illegal activity be suspected in immigration detention facilities. However, should the Bill be passed, the proposed expanded Migration Act powers should be significantly amended, including to require a reasonable suspicion threshold for their exercise. Other key amendments include narrowly confining the meaning of 'prohibited thing' to an exhaustive list of specific items which reasonably present a risk to health, safety and security, removing the Bill's delegated legislation powers, and ensuring that strip search powers are limited to extraordinary circumstances.

Finally, the Law Council reiterates that the Department should provide quantitative and qualitative evidence as to the amount of criminal activity taking place in immigration detention facilities to justify the necessity of the proposed amendments, and explain why police are unable to exercise their existing law enforcement functions in these contexts. According to Freedom of Information requests filled by the Department, from 1 January 2015 to 31 March 2020, of the 4,115 assaults that occurred in immigration detention centres or APODs, only 184 were reported to the Australian Federal Police or relevant state police, and in 17.39 per cent of incidents, the alleged offender was not recorded as a detainee.<sup>25</sup> It is not justifiable for immigration detention officers to be given new powers to use against detainees, where the existing police powers are either not necessary or not being utilised.

The Law Council thanks the Committee for the opportunity to lodge this supplementary submission. Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at [leonie.campbell@lawcouncil.asn.au](mailto:leonie.campbell@lawcouncil.asn.au), in the first instance, should you require further information or clarification.

Yours sincerely



**Pauline Wright**  
**President**

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<sup>23</sup> *Crimes Act 1914* (Cth) ss 3E(6)(a) and 3E(7)(a). See also Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (29 June 2020) 14-15.

<sup>24</sup> See, eg, Detention Services Manual, [P A207-6.2], [P A207-6.3] and [P A095-18]. See also Law Council of Australia, Submission No 64 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (29 June 2020) 11-13.

<sup>25</sup> Department of Home Affairs, Freedom of Information request FA 20/04/00030 and FA 20/04/00040.