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# Detention and Search (s.252 Migration Act)

## Procedural Instruction

This instruction applies to the searching of a non-citizen and any belongings in their immediate possession in immigration clearance under the *Migration Act 1958*.

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s. 22(1)(a)(ii)



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# 1. Introduction

## 1.1. Background

The power to conduct searches is provided under section 252 of the *Migration Act 1958* (the Migration Act) and does not apply to Australian citizens. The person searched must be a non-citizen who:

- has been detained in Australia; or
- has not been immigration cleared and an authorised officer suspects there are reasonable grounds for considering cancellation of the person's visa.

For procedures relating to the detention and search of persons, including the frisk search, external search, internal non-medical scan and internal search of persons under the *Customs Act 1901* (the Customs Act), see *Procedural Instruction: Detention and Search (s.219 Customs Act)*.

Australian Border Force (ABF) officers may seek assistance in performing the search from other government agencies present at the port, such as the Australian Federal Police (AFP).

ABF officers are authorised to search a person, their clothing and any property under their immediate control without a warrant for one of the purposes set out in section 252(2), which are:

- a) to find out whether there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape from immigration detention
- b) to find out whether there is hidden on the person, in the clothing or in the property, a document or other thing that is, or may be, evidence for grounds for cancelling the person's visa

Care should be taken to ensure the person is subjected to the least amount of indignity and force required while performing the search. Special authorisation under section 252A(3) of the Migration Act is required to conduct a strip search. Unless conducting an authorised strip search, the person cannot be required to remove clothing.

Searches must be conducted under the Migration Act when considering the cancellation of a visa. Searches cannot be conducted under section 219L of the Customs Act. Detention under 219L is to be used only when an ABF officer suspects on reasonable grounds that a person is unlawfully carrying prohibited goods.

## 2. Scope

### 2.1. In Scope

This procedural instruction applies to officers in the Aviation and Maritime environments providing immigration clearance under the Migration Act 1958.

A search conducted on a non-citizen under section 252 (Searches of persons) of the Migration Act.

A search conducted on a non-citizen under section 252A (Power to conduct a strip search) of the Migration Act.

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## **2.2. Out of Scope**

Clearance of persons and/or goods under the Customs Act 1901.

Detention and search of Australian Citizens.

A search conducted under section 219 of the Customs Act.

A screening procedure conducted under section 252AA (Power to conduct a screening procedure) of the Migration Act.

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### 3. Glossary

Table 1 – [Insert Table title]

Term	Acronym (if applicable)	Definition
Australian Border Force	ABF	The Australian Border Force is an agency within the Home Affairs portfolio responsible for offshore and onshore border control enforcement, investigations, compliance and detention operations in Australia.
Australian Border Force Commissioner	ABF Commissioner	Is the Commissioner/ head of the ABF.
Australian Border Force officer	ABF officer	An ABF officer is an Immigration and Border Protection worker (see section 4 Australian Border Force Act) authorised to perform border clearance duties.
Australian citizen		Has the meaning given by section 4 of the <i>Australian Citizenship Act 2007</i> ( <i>Australian Citizenship Act</i> ).
Australian Federal Police	AFP	Is the organisation whose role is to enforce Commonwealth criminal law, contribute to combating complex, transnational, serious and organised crime affecting Australia's national security and to protect Commonwealth interests from criminal activity in Australia and overseas.
Australian Federal Police officer	AFP officer	Is a person engaged under section 24 of the <i>Australian Federal Police Act 1979</i> ( <i>Australian Federal Police Act</i> ).
Authorised Search officer	ASO	An ABF officer who has successfully completed the Detention and Search training course. Officers are required to successfully complete an online course and assessment, undertake practical (role-play) assessments and be assessed as competent by a Workplace Assessor. Officers are required to undergo Detention and Search recertification every two years.
Baggage		Consists of (but is not limited to) bags, cases, and containers which hold a traveller's articles during transit.
Detain		Has the meaning given by section 5 of the <i>Migration Act 1958</i> ( <i>Migration Act</i> ). To detain means to: <ul style="list-style-type: none"> <li>take into immigration detention</li> <li>keep, or cause to be kept, in immigration detention</li> </ul> take such action and use such force as are reasonably necessary.

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Term	Acronym (if applicable)	Definition
Detainee		Has the meaning given by section 5 of the Migration Act 1958 (Migration Act) to mean a person detained.
Immigration clearance		Is a person who is in immigration clearance in the circumstances set out in the <i>Migration Act 1958</i> (Migration Act).
Immigration detention		<p>Under the <i>Migration Act 1958</i> (Migration Act) immigration detention means:</p> <p>(a) being in the company of, and restrained by:</p> <ul style="list-style-type: none"> <li>i) an officer</li> <li>ii) in relation to a particular detainee—another person directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the detainee</li> </ul> <p>(b) being held by, or on behalf of, an officer:</p> <ul style="list-style-type: none"> <li>i) in a detention centre established under this Act</li> <li>ii) in a prison or remand centre of the Commonwealth, a State or a Territory</li> <li>iii) in a police station or watch house</li> <li>iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel</li> <li>v) in another place approved by the Minister in writing</li> </ul> <p>but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).</p> <p><b>Note 1:</b> Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to immigration detention.</p> <p><b>Note 2:</b> This definition extends to persons covered by residence determinations (see section 197AC).</p>
Non-citizen		Has the meaning given by Section 5 of the <i>Migration Act 1958</i> (Migration Act) as a person who is not an Australian citizen.
Secretary		Means the Secretary/ head of the Department of Home Affairs.
SES Band 3 employee		For the purposes of the Migration Act 1958 (in particularly to relation to section 252A of the Migration Act), an SES Band 3 employee means an SES employee with a classification of Senior Executive Band 3, and includes an SES employee who has been temporarily assigned duties that have been allocated a classification of Senior Executive Band 3.
Strip search		As per section 252A(2) of the Migration Act 1958 (Migration Act), a strip search of a detainee means a search of the person, of their clothing or of a thing in their possession, and may include requiring the person to remove some or all of their

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Term	Acronym (if applicable)	Definition
		clothing and/or an examination of that clothing and of the person's body (but not the person's body cavities, including the mouth).

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## 4. Procedural Instruction

The Migration Act confers on certain persons the powers to conduct three types of searches of non-citizens under sections 252, 252A and 252AA, namely:

- search of persons and their immediate property (section 252)
- strip search (section 252A)
- screening procedure (section 252AA) – out of scope of this instruction.

### PART A: SECTION 252 SEARCH

#### 4.1. Circumstances for conducting a search

Section 252 of the Migration Act specifies the circumstances in which an authorised officer (as defined under the Migration Act) may conduct a search. In accordance with section 252(1), a search may be conducted of a person, the person's clothing, and any property under the immediate control of the person without warrant for one of the purposes set out in section 252(2).

- is detained in Australia (in accordance with the definition of 'detain' in section 5(1) of the Migration Act, (this means the person is in 'immigration detention' in Australia)
- has not been immigration cleared and an authorised officer suspects there are reasonable grounds for considering cancellation of the person's visa.

#### 4.2. Reason for conducting a search

The purposes for conducting a search under section 252(1) are set out in section 252(2) of the Migration Act. The two purposes are:

- to find out whether there is hidden on the person, in the clothing or in the property, a weapon or other thing capable of being used to inflict bodily injury or to help the person to escape from immigration detention
- to find out whether there is hidden on the person, in the clothing or in the property, a document or other thing that is, or may be, evidence for grounds for cancelling the person's visa.

Where an ABF officer has suspicions the non-citizen (who is not a detainee) is concealing a weapon, but has no belief there may be grounds for cancelling the non-citizen's visa, the officer may request a fellow ABF officer who is an Authorised Search Officer (ASO) to perform a search under section Division 1B of the Customs Act. The ASO should ensure prerequisite conditions under the Customs Act to conduct the search have been met. See Procedural Instruction: *Detention and Search (s.219 Customs Act)*.

The AFP may also undertake a search of the non-citizen. In such cases, ABF officers must record in their official notebooks they are ceasing the exercise of their power under section 252 of the Migration Act and include the details of the action taken.

Failure to comply with the scope of the specified power as set out in the Migration Act may expose officers and/or the ABF to civil or criminal proceedings and sanctions and negatively impact the image of the ABF.

Property in the immediate control of the person is considered to be the items which the person has with them at the time they are to be searched. This may include:

- baggage and suitcases

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- outer clothing/apparel
- unworn clothing
- packages (sealed or unsealed)
- sporting equipment
- musical instruments
- electrical equipment.

An Authorised Officer cannot exercise their search powers under section 252 of the Migration Act to search for items that do not fall within the scope of section 252(2). Section 252 can be used to search for illicit drugs and chemicals in limited circumstances where the relevant item may be capable of inflicting bodily injury or be evidence for grounds for cancelling the person's visa.

The following are examples of items that may be located during a search and fall within the scope of section 252 of the Migration Act. This list is not exhaustive.

### **Documents or other items that are, or may be, evidence for cancelling a person's visa**

- counterfeit travel documents
- employment records
- pay slips
- resumes
- laptop/notebook or personal internet enabled devices (PIED)
- tools of trade.

### **Weapons**

- guns (including replicas), knives, machetes, clubs or ammunition
- items capable of being used to inflict bodily injury include pocket knives, razor blades, syringes, fireworks, lighters or matches, disabling sprays, scissors and other cutting implements.

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### 4.3. Restrictions on searches

There are restrictions placed on searches of a person, a person's clothing and their property under section 252 of the Migration Act.

The Authorised Officer **must not**:

- require the person to remove items of clothing (section 252(5))
- use more force than is reasonably necessary to conduct the search (section 252(8))
- subject the person to greater indignity than is reasonably necessary required to perform the search (section 252(8))
- conduct a search for any reason other than to find out whether there is hidden on the person, in the clothing or in the property under the immediate control of the person items within scope of section 252(2) of the Migration Act.

An Authorised Officer may take possession of a weapon or any other item capable of being used to inflict bodily injury, or document or other thing that is, or may be, evidence for grounds for cancelling the person's visa, found in the course of a search. The Authorised Officer may retain any such item for such time as he or she thinks necessary for the purpose of the Migration Act (section 252(4)).

In accordance with section 252(6) of the Migration Act, a search under section 252 of the Migration Act of a person and the person's clothing shall be conducted by:

- an Authorised Officer of the same sex as the person
- in a case where an Authorised Officer of the same sex as the person is not available to conduct the search - any other person who is of the same sex and:
  - is requested by an authorised officer
  - agrees to conduct the search.

It is Departmental policy that the person requested to do the search pursuant to section 252(6)(b) of the Migration Act is:

- another ABF officer
- a police officer who is readily available or involved in the operation.

Under these circumstances, the search must be conducted in the presence of the ABF officer.

### 4.4. Searching minors

The "best interests of the child" principle is a primary consideration for minors (persons under 18 years of age). ABF Officers should ensure the treatment and conditions of the search procedure for minors are humane and have as little adverse impact on the individual as possible.

Under policy, a search of a minor is to be conducted only where there is the belief that there is on their person a weapon or other thing capable of being used to inflict bodily injury or to help the minor to escape from immigration detention. Approval by an ABF Superintendent must be sought before a search is conducted on a minor who is under 12 years of age.

Any search of a minor should be conducted in the presence of a parent or guardian. If the minor does not want to have their parent or guardian present, another adult must be present who is capable of representing the minor's best interests and who, as far as is practicable in the circumstances, is acceptable to the minor.

Every opportunity, including a reasonable timeframe, must be given to the minor to comply with the request to progress with a search request.

## **4.5. Conducting the search**

### **Preparation**

In preparation for conducting the search, the ABF officer who is an Authorised Officer should consider conducting the search in an interview room or private area

- the person's privacy, avoiding wherever possible the indignity of a public search
- having another Departmental/ABF employee present where possible as a witness during the search.

Where the person is of indeterminate sex the ABF officer should:

- check the person's passport and official records to determine the person's sex
- discuss the case with a supervisor

### **Searching**

4.5.1. When conducting the search, the ABF officer should:

- be of the same sex
- use an interpreter if required
- ensure a witness of the same sex is present during the search
- identify themselves
- identify the witness(es) who will be present during the search
- explain the purpose of, and legislative authority for the search
- if searching a minor, ensure a parent or guardian is present if at all possible, or alternatively an independent observer. See *Procedural Instruction: Managing Minors in Immigration Clearance*
- provide the person an opportunity to relinquish any items of interest or to empty pockets/bags prior to the search
- only ask persons to remove jackets, hats etc., as persons are not required to remove clothing unless an authorised strip search is being performed
- conduct the search wearing gloves
- pat the person's clothing with open hands to determine if the person has anything of interest in their clothes or on their body
- not use more force or subject a person to greater indignity than is reasonably necessary in order to conduct the search
- search property in a way that will not be offensive to the person or damage the person's property
- cease the search as soon as it is evident the search will not yield any items that provided the reasons for the search under section 252(2) of the Migration Act
- cease the search if the person's clothing becomes dislodged
- recommence the search only once the person has secured their clothing
- issue property receipts for any items seized, using Form 41 Property receipt (see appendix A).

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Where a person refuses to co-operate and participate in a search, they may be detained under section 252(3) of the Migration Act for the purposes of conducting the search.

ABF officers must record any searches they have conducted in their notebooks and in the departmental referral system.

s. 22(1)(a)(ii), s. 47E(d)

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s. 22(1)(a)(ii)

## **PART D: REPORTING REQUIREMENTS**

### **4.11. Record keeping**

ABF officers must make contemporaneous records of all searches conducted under section 252 and s252A of the Migration Act. It is preferable that such records include notes taken during the search and digital recordings and are recorded in TRIM. This requirement is to protect the person undergoing the search as well as the ABF officers concerned in the event of an allegation of impropriety in relation to the search.

On completion of the search, the ABF officer must ensure the following is recorded within Departmental Referrals system and on the detainee's file:

- reasons for the search, clearly stipulating the suspicions held in relation to grounds for cancellation
- authority for carrying out the search
- details of the Authorised Officer who conducted the search and any witnesses present
- details of any items of interest located
- details of any items retained
- details of any articles that are not of interest to the Department/ABF but might be of interest to other law enforcement agencies which are subsequently reported to any relevant agencies.

If items are to be retained for a significant period of time then receipts for any property that has been taken possession of should be issued to the person, s. 22(1)(a)(ii)

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