

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

16 October 2017

Dear Committee Secretary,

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

1. Introduction

We, as members of the Andrew and Renata Kaldor Centre for International Refugee Law welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the Bill).

The Bill seeks to insert a new s 251A into the *Migration Act 1958* (Cth) that would allow the Minister for Immigration and Border Protection to determine by legislative instrument, a 'prohibited thing' in relation to immigration detention facilities and detainees. As elaborated on in the proposed subsection 251A(2), a 'prohibited thing' includes the possession of things already prohibited by Australian law (such as narcotic drugs), as well the possession of a thing that the Minister is satisfied 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'. A note to the the proposed section provides further explains that a 'prohibited thing' may include "mobile phones, Subscriber Identity Module (SIM cards), computers and other electronic devices, such as tablets, medications or health care supplements, in specified circumstances, or publications or other material that could incite violence, racism or hatred".

In addition, the Bill seeks to provide new search powers to authorised officers, who would be able to search persons in immigration detention for possession of a prohibited thing,

including a person's clothing and property under their immediate control (proposed s 252(2)). It also provides for an extension of powers to use detector dogs as well as the power to conduct strip searches for items determined to be a prohibited thing (proposed s 252G and 252A).

We acknowledge that these proposed amendments are sought in light of the fact that the 'profile of the detainee caseload across the immigration detention network has changed significantly over the past two years'.¹ This appears to be a reference to the fact that the detainee caseload has changed as a result of a substantial increase in s 501 visa 'character cancellations' since passing of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth),² resulting in detainees who have committed serious crimes being transferred from prison and correctional facilities to immigration detention.³ We also acknowledge that there is a legitimate need to ensure the safety and welfare of detainees in immigration detention.

However, for the reasons outlined in Part 2 below, we are of the view that the Bill is a disproportionate response to the problem, and we urge the Committee to consider the proposed measures against less restrictive, and we believe, more suitable alternatives.

A prohibition on communication items such as mobile phones not only risks a breach of the implied freedom of political communication, but would also disproportionately affect asylum seekers and refugees who need access to legal assistance and representation. We are also concerned that the measures run contrary to Australia's international obligations both under international human rights law and the Refugee Convention.

As a result of our concerns, we suggest that the Committee reject the Bill on the basis that there are more proportionate, less restrictive measures, that could be implemented to achieve the intended policy outcomes. Such measures may include confiscating or revoking access to items on an individual basis, where it has been shown that possession of an item by an individual represents an unacceptable risk.

2. Concerns with the Bill

2.1. The Bill is not evidence-based, and is a disproportionate response

The Explanatory Memorandum to the Bill states that it 'is necessary to provide authorised officers with the resources to continue to manage the safety, security and peace of our immigration detention facilities'.⁴ We endorse this objective. However, we do not believe that

¹ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, 2.

² For an overview of the increase in s 501 cancellations see Department of Immigration and Border Protection (2017), *Key Visa Cancellation Statistics* <<https://www.border.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>>.

³ In particular, that Act introduced s 501(3A) under which the Minister must automatically cancel a non-citizen who has been sentenced to a term of imprisonment of 12 months and are serving that sentence in prison. The result is that such persons are transferred from prison to immigration detention at the end of their sentence, as they no longer hold a substantive visa. Such persons are to remain in immigration detention if they seek revocation of the automatic decision to cancel their visa or if they seek judicial review.

⁴ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) 2.

the measures adopted in this Bill address these objectives in a proportionate and evidence-based manner.

The Bill proposes to empower the Minister to determine a thing to be 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'.⁵ In our view, this leaves too much discretion to the Minister for Immigration to impose a blanket ban. Once a 'prohibited thing'—for example mobile phones or SIM card—is determined, the prohibition would apply to all cohorts of detainees in detention facilities, regardless of whether possession of that thing by the individual would present a risk to the health, safety or security of persons in detention.

The government has failed to demonstrate the need for such sweeping powers to implement blanket bans. The Explanatory Memorandum states that '[t]he profile of the detainee caseload across the immigration detention network has changed significantly over the past two years. Immigration detention facilities now accommodate an increasing number of higher risk detainees ... including child sex offenders and members of outlaw motorcycle gangs or other organised crime groups'.⁶ However, it does not acknowledge that a number of other classes of detainees are also held in immigration detention, including those who are seeking asylum and visa overstayers, who do not fall within the higher risk categories identified in the Explanatory Memorandum. Neither the Bill nor any of the explanatory material surrounding it seek to limit the Minister's powers to implement such bans to high risk detainees.

Further, while the Explanatory Memorandum notes that 'evidence indicates that detainees are using mobile phones to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats' no material is proffered to demonstrate that these concerns are so prevalent or spread across all detainee cohorts that it is necessary to empower the Minister to implement blanket bans. Further, to the extent that the explanatory materials refer to concerns arising among the asylum seeker cohort held in detention, the explanatory memorandum is limited to 'reports that mobile phones have contributed to abusive and aggressive altercations between detainees with mobile phones and Unauthorised Maritime Arrival detainees who are already prohibited from accessing mobile phones'. No further information is provided. It is not clear whether these are isolated incidents, or a more systemic issue that requires a legislative response of the kind proposed in this Bill.

2.2. Policy-based concerns

We are concerned that the Bill may, in practice, result in denying asylum seekers and refugees timely access to communication with their legal representatives or to seek legal representation. It is well understood that in order to meet their obligations under the Refugee Convention — in particular to ensure that the principle of *non-refoulement* is observed — State parties should establish a refugee status determination system that is timely, efficient, fair and which has in place procedures to identify and assist vulnerable asylum seekers.⁷ Further, States are under an obligation to provide refugees with free access to courts of law on their territory.⁸ In our view, indirect denial of access to legal representation or to courts,

⁵ Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) cl 2.

⁶ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) 2.

⁷ See eg, UNHCR (2005), *Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards*, 3.

⁸ UN Convention Relating to the Status of Refugees 1951, art 16.

including through such measures as banning access to a mobile phone, is not be within the spirit of Refugee Convention.

We note that the current policy already discriminates against unauthorised maritime arrivals (i.e. those who have come to Australia by boat) in relation to their access to mobile phones. The policy is contained in the *Procedures Advice Manual 3 - Detention Services Manual* at Chapter 8 which states that 'for security and safety purposes all mobile phones are classified as controlled items and are not permitted in IDFs, except under conditions specified by the Department'.⁹ Reference is then made to Chapter 4 of the manual which specifies that access to mobile phones differs depending on whether the person is an unauthorised maritime arrival, or not. It is stated that in relation to unauthorised maritime arrivals that such persons:

- *cannot use mobile phones in IDFs. If an IMA possesses a mobile phone it is to be placed in property storage while the detainee is in immigration detention;*
- *are not to be given a mobile phone by a departmental or Serco staff member; and*
- *are to be informed of the policy and asked to surrender a mobile phone that may have been given to them from a visitor.*¹⁰

By contrast, detainees who are not unauthorised maritime arrivals are able to access mobile phones provided that they do not have 'recording capabilities such as camera, audio, video; or internet access functions'.¹¹

We also note that in February and March 2017, the Federal Circuit Court of Australia and the Federal Court of Australia issued interlocutory injunctions to prevent the government from confiscating mobile phones of asylum seekers pursuant to the policy referred to above.¹² An appeal by the Government that the court had no jurisdiction to hear the matter was dismissed on 17 March 2017.¹³ We note with some concern that the Bill may be seen as an attempt to mute any adverse court decision in relation to the implementation of this policy.

As it stands, the policy operates to discriminate against people seeking asylum who arrived in Australia by boat from accessing mobile phones and the Bill would, in principle, allow the government to entrench this policy in legislation by potentially banning mobile phones to all cohorts of detainees.

However, we stress that there are very important policy reasons why asylum seekers should have access to mobile phones. To give but an example of its importance, we can consider a case of an asylum seeker who has had his or her Bridging Visa E cancelled and is in immigration detention due to that cancellation. In such a case, the person has **two working days** from the the date of notification of the decision to seek merits review.¹⁴ In such an instance, a person's ability to quickly access legal representation or to find legal

⁹ *Procedures Advice Manual 3, Detention Services Manual*, Chapter 8—Safety and Security.

¹⁰ *Ibid*, Chapter 4, *Communication—Mobile Phones*.

¹¹ *Ibid*.

¹² See *SZSZM v Minister for Immigration & Ors* [2017] FCCA 819; *Veraga v Minister for Immigration & Ors* [2017] FCCA 865 (03 May 2017).

¹³ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 (17 March 2017).

¹⁴ See *Migration Act 1958* (Cth) s 338(4)(b) and *Migration Regulations 1994* (Cth) reg 4.10(2).

representation is crucial for their ability to access justice. While the explanatory memorandum refers to the availability of landline and internet access, this is not a suitable substitute for mobile communication.¹⁵

We endorse the submissions of the Refugee Council of Australia and the Australian Human Rights Commission on this point, particularly noting the inadequacies of alternative communication tools available in immigration detention facilities. We further endorse the Commission's analysis that the provisions in this Bill may present a breach of Australia's obligations under international human rights law.¹⁶

We are also concerned with the provisions that seek to expand search powers, including the use of dogs and strip searches for prohibited items. There does not appear to be any consideration of how these new powers might adversely affect those vulnerable such as children or women, or indeed, consideration as to how such practices may re-traumatise asylum seekers who have been subjected to persecution in the past. At the very least, we suggest that the legislation should require strip searches to be used as a last resort, and — as the Australian Human Rights Commission suggests—allow adequate oversight of the use of the power.

2.3. Impact on the freedom of political communication

If the Bill is passed, there will be a significant burden on communication about political matters, both by its direct operation and its chilling effect.

The explanatory memorandum justifies the need for the bill by reference to 'reports that mobile phones have contributed to ... efforts to coordinate internal demonstrations to coincide with external protests'.¹⁷ Thus, one of the expressed justifications of the bill is to curtail the ability of immigration detainees to participate in legitimate protest activities which impacts directly on the freedom of political communication.

Additionally, the imposition of a blanket ban on mobile phones, SIM cards, computers or other electronic devices may have a chilling effect on detainees' communications. The explanatory memorandum notes that '[d]etainees will continue to have reasonable access to communication facilities in order to maintain contact with their support networks ... Contact will be provided via landline telephones, facsimile, internet access in compliance with the *Conditions of Use of Internet* agreement, postal services and visits'.¹⁸ However, this may both limit detainees' ability and willingness to communicate. Detainees may be reluctant to use these facilities to discuss sensitive matters such as conditions of detention or other matters that may be relevant to political discourse on asylum seeker issues because of fears their communications may be monitored. The perception of the possibility of monitoring, regardless of whether such monitoring is occurring is sufficient to have a chilling effect on communication. Issues relating to the scarcity of resources and its impact on a detainee's ability to communicate are discussed in further detail below.

It is our view that the proposed legislation would be open to constitutional challenge on the grounds that it infringes the implied freedom of political communication, and that such a

¹⁵ Reasons for this are well made out in the submission of the Australian Human Rights Commission. p 9–11.

¹⁶ *Ibid.*, 4–5.

¹⁷ *Ibid.*

¹⁸ *Ibid.* 6.

challenge would have reasonable prospects of success. In *McCloy v NSW*,¹⁹ the High Court held that a law that imposes a burden on freedom of communication about government and political matters, will not infringe the freedom of political communication, provided the purpose of the law and the means adopted to achieve that purpose are compatible with the maintenance of the constitutionally prescribed system of representative government. This is assessed via a proportionality analysis that examines three considerations:

- suitability (whether the law has a rational connection to its purpose);
- necessity (whether there is an obvious and compelling alternative that has a less restrictive effect on the freedom); and
- adequacy in its balance (whether the importance of the purpose served by the impugned provision outweighs the restriction imposed on the freedom)

The proportionality concerns we outline above raise the significant possibility that the Bill, in its current form, would not pass this test. As noted, it appears that one of the stated purposes for this bill is to limit the ability of those in immigration detention to engage in protest and exercise their freedom of political communication. Moreover, imposing a ban on items such as mobile phones only where there is an identifiable risk to the 'safety, security and peace of our immigration detention facilities' represents an obvious and compelling alternative to the standard adopted in the Bill which would have a less restrictive effect on the freedom.

3. Recommendation

We endorse the submissions of the Australian Human Rights Commission and the Refugee Council of Australia that alternative and less restrictive measures than outright prohibitions on items should be considered. It appears sensible to provide items may only be prohibited where there is a identifiable risk — for example, on the basis of past conduct — that a person would use the item in a manner that presents a risk, health or security of others.

Yours sincerely,

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¹⁹ *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).