

## Inquiry into Prohibiting Items in Immigration Detention Facilities

Legal Aid NSW submission to  
Senate Legal and Constitutional  
Affairs Legislative Committee

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**Legal Aid**  
NEW SOUTH WALES 

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. In partnership with Settlement Services International, Legal Aid NSW provides accessible legal services to culturally and linguistically diverse community members experiencing disadvantage and limited access to legal assistance. Outreach clinics are operated in eight locations, according to need. Legal Aid NSW also provides community legal education workshops to Migrant Resource Centre staff, clients and communities.

Our Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. We also give advice on detention, removal, cancellation procedures and exclusion periods.

Legal Aid NSW welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislative Committee Inquiry into Prohibiting Items in Immigration Detention Facilities. Should you require any further information, please contact:

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## Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Senate Legal and Constitutional Affairs Legislative Committee's Inquiry into proposed amendments to the *Migration Act 1958* (Cth) (**the Migration Act**). Legal Aid NSW has a number of significant concerns about these proposed amendments. If enacted, they would create broad powers to search for and seize 'prohibited things' in detention centres. Such powers will have significant detrimental impact on some of the most vulnerable members of our community, including refugees and their families to whom Australia owes protection under the Refugee Convention and under broader international human rights instruments.<sup>1</sup>

In summary, our concerns are that:

- The measures, including the capacity of the Minister to prohibit mobile phones, are punitive. As such, they are inappropriate in the context of administrative detention (as compared to court-ordered detention).
- 'Prohibited thing' should be defined in the statute itself, rather than via legislative instrument, to enable proper Parliamentary scrutiny of the scope of the definition.
- The potential prohibition on the possession of mobile phones will make it more difficult for detainees to access support from family and friends, with detrimental impact on their mental health.
- A prohibition of mobile phones would make it more difficult for detainees to access legal advice and communicate with external monitoring bodies.
- The proposed amendments may extend to prohibit the use of mobile phones by detainees living in the community in leased private housing, hotels and motels.

We provide further detail of these concerns in the following submission.

## The nature of immigration detention

Legal Aid NSW is concerned that the proposed amendments, particularly the broad power for the Minister to prohibit possession of mobile phones where such possession '*might be a risk to the health, safety or security of persons in the facility, or to the order of the facility*'<sup>2</sup> reflects a characterisation of immigration detention as punitive. The High Court has confirmed in *Al-Kateb v Godwin* that detention pursuant to the Migration Act is

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<sup>1</sup> *Convention Relating to the Status of Refugees; International Covenant on Civil and Political Rights; Convention on the Rights of the Child.*

<sup>2</sup> Proposed section 251A(2)(b)

administrative detention, 'it is not a form of extra-judicial punishment'<sup>3</sup> and it is 'not detention for an offence'.<sup>4</sup>

Most places of immigration detention have some of the characteristics commonly found in prisons. It is a legitimate aim to ensure that places of immigration detention are secure and that detainees do not commit offences, including the possession of drugs and child abuse material. However, we consider that by introducing restrictions similar to those exercised in places of criminal detention, the measures in the Bill are punitive and significantly alter the character of immigration detention. While we acknowledge that immigration facilities accommodate increasing numbers of people whose visas have been cancelled on character grounds, many people within immigration detention facilities have never been convicted of any crime.

Like other members of our community, immigration detainees have a right to be treated with humanity and with respect for the inherent dignity of the person,<sup>5</sup> a right to the presumption of innocence and a right to privacy.<sup>6</sup> We agree with the position of the Human Rights Commission that they should enjoy the '*least restrictive environment possible... The primary concern of immigration detention authorities should be one of care for the well-being of detainees*'.<sup>7</sup>

The Explanatory Memorandum to the Bill acknowledges that the proposed amendments limit the right to privacy, but argues that the limit is '*commensurate to the risk ... of drug distribution, violence and the facilitation of other criminal activities*'.<sup>8</sup> We disagree. We consider that the breach of privacy rights by this Bill is not proportionate, because the powers infringe the rights of all detainees, not only those considered 'higher risk', but those who are not suspected of breaking any law, including children.

## 'Prohibited thing' should be defined in statute

As noted above, proposed section 251A(2) of the Bill would allow the Minister to determine that something is to be a prohibited thing by legislative instrument, if the Minister is satisfied that possession of the thing is prohibited by law, or that possession or use of the thing '*might be a risk to the health, safety or security of persons in the facility, or to the order of the facility*'. Later provisions allow for the confiscation, retention, forfeiture and disposal of prohibited things (see proposed subsections 252(4A), (4B) and (4C)). This is a significant expansion of the current power in section 252 of the Migration Act to search for '*hidden weapons or other things that may be used to inflict bodily injury or to help the*

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<sup>3</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, [1] Gleeson CJ

<sup>4</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, [266] Haynes J

<sup>5</sup> *International Covenant on Civil and Political Rights* art 10

<sup>6</sup> *International Covenant on Civil and Political Rights* art 17

<sup>7</sup> Australian Human Rights Commission *Human rights standards for immigration detention* (2013) 9

<sup>8</sup> Explanatory Memorandum 24

*person to escape from immigration detention, to ensure the personal safety of authorised officers’.*

The notes to the proposed section 251A(2) include a list of examples of things that might be considered to pose a risk to the health, safety or security of persons in the facility, or to the order of the facility. The list includes mobile phones, SIM cards and computers. The Explanatory Memorandum indicates that ‘the Minister will specify by legislative instrument under the proposed new power in section 251A that mobile phones and SIM cards will be “prohibited things”’.<sup>9</sup>

In light of our above concerns around the impact on the rights of detainees and significant expansion of the powers of authorised officers in detention facilities, Legal Aid NSW suggests that ‘prohibited thing’ should be defined in the Migration Act, rather than in delegated legislation which is not subject to the same degree of Parliamentary scrutiny. In our view, a statutory definition would be appropriately limited to the prohibition of illicit drugs and child abuse material. The latter are, in themselves, harmful and their possession is unlawful in all circumstances. Mobile phones and SIM cards should not be categorised in the same manner given their ubiquity in the community.

### **The power to prohibit mobile phones (proposed section 251A(2)(b))**

Should our views as to the appropriate definition of “prohibited thing” not be supported, Legal Aid NSW considers that mobile phones should only be seized and confiscated in circumstances where there are reasonable suspicions that they have been used for illicit purposes. They should not be subject to the same search and seizure regime as illicit drugs and child abuse material.

Legal Aid NSW is concerned that the prohibition of mobile phones will inhibit contact with family and friends and will have a significant impact on the mental health of detainees.

As reported by the Australian Human Rights Commission,

*Numerous studies have documented high rates of mental health problems amongst people in immigration detention in Australia, ranging from depression, anxiety and sleep disorders to post-traumatic stress disorder, suicidal ideation and self-harm. Between 1 January 2013 and 25 August 2016, there were 1,730 recorded incidents of self-harm in immigration detention.*<sup>10</sup>

Access to mobile phones are vital for detainees to maintain contact with family, friends and their lawyers. In our experience, many detainees, including children, rely on mobile phones for contact with family. Denying access to mobile phones will add to the acknowledged stress caused by immigration detention. This is the case irrespective of the

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<sup>9</sup> Explanatory Memorandum 25

<sup>10</sup> Australian Human Rights Commission *Asylum seekers, refugees and human rights: Snapshot Report* (2nd ed) (2017), 20

detainee's profile – they may be an asylum seeker, a person who has overstayed their visa or a person who has had their visa cancelled on character grounds and is waiting for their revocation request to be determined. The ability to maintain contact with family supports detainees' resilience and mental health, as acknowledged by the Explanatory Memorandum to the Bill.<sup>11</sup> Restricting a detainee's ability to contact family members also undermines Australia's international legal obligations to protect the right to family life<sup>12</sup> as well as the Government's stated commitment to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).<sup>13</sup>

The proposed amendments threaten to remove the most convenient way for detainees to maintain regular contact with family and friends. In the 21<sup>st</sup> century, reliance on landlines, facsimile machines and postal services, as suggested in the Explanatory Memorandum,<sup>14</sup> does not sufficiently protect detainees' rights to privacy and family life.

Legal Aid NSW does not consider that sufficient evidence has been made available to justify such a step. The *Statement of Compatibility with Human Rights* indicates that illegal activities are being facilitated by mobile phone usage. If a detainee is using a mobile phone for drug distribution, the maintenance of criminal enterprises or other criminal activities, it is unclear that current laws are not adequate to address that type of criminal conduct. Taking away an important means of communication from all detainees in administrative detention in order to address criminal activity by a few is a disproportionate response.

## Mobile phones and access to legal advice and monitoring bodies

Legal Aid NSW is concerned that the prohibition of mobile phones in immigration detention will inhibit access to legal advice.<sup>15</sup> While the Explanatory Memorandum indicates that the Department 'will ensure that communication avenues are maintained and enhanced',<sup>16</sup> our practice experience is that access to people in immigration detention is significantly more difficult via fixed telephone lines than via mobile phones.

The lawyers in Legal Aid NSW's Government Law team have extensive experience with trying to contact people seeking immigration advice or clients with ongoing immigration cases at Villawood, Christmas Island and, to a lesser extent, Yongah Hill. In our experience, it is quicker, more straightforward and more efficient to communicate with clients through their mobile telephone than attempting to contact them through the general

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<sup>11</sup> Explanatory Memorandum [20]. See also Australian Human Rights Commission *Asylum seekers, refugees and human rights: Snapshot Report* (2nd ed) (2017), 22

<sup>12</sup> The *International Covenant on Civil and Political Rights (ICCPR)*, Articles 17 and 23 protect the right to family life. The *Convention on the Rights of the Child* art 8 protects a child's right to family relations.

<sup>13</sup> On 9 February 2017, the Australian Government announced it intends to ratify OPCAT by December 2017. OPCAT applies to persons in immigration detention and provides that such persons are not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

<sup>14</sup> Explanatory Memorandum, 25

<sup>15</sup> In contravention of ICCPR, Articles 9 and 19

<sup>16</sup> Explanatory Memorandum, [21]

detention centre telephone numbers. This is especially so when clients require telephone interpreters to communicate with their representatives, which is not uncommon. The Telephone Interpreter Service (**TIS**) works very quickly and easily when a client has a mobile telephone. Calling with a TIS interpreter through the switchboard is logistically very difficult and time consuming, and inhibits important communication between a client and their representative.

Legal Aid NSW is also concerned that the amendments to the Migration Act are being proposed in the context of the random and arbitrary movement of immigration detainees. In our experience, detainees are regularly moved from places where they have family and/or other support networks, to more isolated places such as Christmas Island. These movements can impact on detainees' and their families' mental health, and their ability to access lawyers. Lack of access to mobile phones will compound these difficulties.

Finally, we are concerned that any prohibition on the possession and use of mobile phones will inhibit the ability of detainees to communicate freely and in full confidentiality with monitoring bodies including the Commonwealth Ombudsman, the Australian Human Rights Commission, the United Nations High Commissioner for Refugees and Australian Red Cross.<sup>17</sup>

## Extension of definition of immigration detention facility

Proposed section 251A(3) of the Bill makes it clear that the new search and seizure powers would apply not only to immigration detention facilities but also to Alternative Places of Detention (**APODs**). According to the Department of Immigration and Border Protection's website, these include

- Immigration Residential Housing (IRH) which is indistinguishable from other housing in the general community, and provides detainees with an increased amount of independence to access community facilities under supervision.
- Immigration Transit Accommodation (ITA) which provides semi-independent living in hostel-style accommodation. Individuals are able to attend appointments in the community under supervision.
- Places in the broader community which can be designated as places of immigration detention, such as leased private housing, hotels and motels, and hospitals including mental health facilities.<sup>18</sup>

The Explanatory Memorandum indicates that the rationale for the proposed changes include the fact that immigration detention now accommodates 'higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional

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<sup>17</sup> A right which is safeguarded by the OPCAT, Articles 4, 12, 14, 15, 19 and 21

<sup>18</sup> Department of Immigration and Border Protection, *Immigration detention* <http://www.border.gov.au/about/immigration-detention-in-australia/detention-facilities>, accessed 6 October 2017

facility, including child sex offenders and members of outlaw motorcycle gangs or other organised crime groups'.<sup>19</sup> However, people living in APODs include children and families who do not fall into the above categories. Legal Aid NSW considers it is inappropriate for these people to be subject to the same restrictive regime as the 'higher risk detainees' referred to in the Explanatory Memorandum.

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<sup>19</sup> Explanatory Memorandum, 2