



Refugee Council  
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

## **SUBMISSION TO THE INQUIRY ON THE MIGRATION AMENDMENT (PROHIBITING ITEMS IN IMMIGRATION DETENTION FACILITIES) BILL 2017**

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* and its likely impact on people in detention, their families and support networks as well as visitors to immigration detention facilities. We are greatly concerned that this Bill aims to introduce further restrictions to an immigration detention environment that is already highly restrictive. RCOA is troubled that these restrictions and the proposed strengthened search and seizing powers of authorised officers are planned to be implemented in all types of immigration detention facilities, irrespective of the vulnerabilities and needs of people detained in those facilities. We are also disappointed that, similar to a number of other Bills and policies introduced in relation to immigration detention in recent years, this Bill does not address the real problems with Australia's immigration detention system, namely the lack of a time limit on detention and limited oversight of decisions to detain.

### **1. A highly securitised detention system**

- 1.1 In recent years, the increased security and the enforcement-centred approach of the Australian Border Force (ABF) to the management of detention facilities has changed the detention environment for both those in detention and for their visitors.
- 1.2 In the same period and following changes to character cancellation provision, the number of people in detention who had spent time in correctional facilities and as a result, had their visas cancelled, increased. It is understandable that the management of the risks this group may present might necessitate the implementation of more restrictive detention management policies. However, it is of great concern that the restrictive policies have been applied to all people in detention, without much consideration of their needs, vulnerabilities and past experiences.
- 1.3 In recent years, all people in detention have had their movement even within the same detention facility further restricted. People are mechanically restrained even for appointments with health professionals located outside the detention facilities and restrictive detention is used more frequently. The number of outside excursions offered (as well as the number of people eligible for them) has also significantly reduced. Earlier this year, RCOA published a

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comprehensive [report<sup>1</sup>](#) about the challenges visitors to detention facilities face. We are greatly concerned that this Bill seeks to make immigration detention even more restrictive, isolating and intimidating by seeking to prohibit access to mobile phones and by granting more search powers to officers. We emphasise that immigration detention is for administrative purposes and is not punitive. And yet perversely, many people in detention report that currently, the conditions of prisons are much better than the administrative immigration detention facilities.

- 1.4 As mentioned above, lack of a time limit on detention and limited oversight of decisions to detain remain two of the main issues with Australian immigration detention system. According to the latest Departmental statistics, as of 31 July 2017, the average length of detention is 442 days, with 22% of the detention population spending more than two years in detention.<sup>2</sup> While the number of children in onshore detention facilities has significantly dropped, there is still no legislation to prevent the detention of children, resulting in concerns that what this Bill is seeking to implement can and will impact children.
- 1.5 In the Explanatory Memorandum to this Bill and the narrative justifying the passage of this Bill, there is repeated reference to the risk profile and the crimes committed by some people in detention. While we do not deny that groups, such as child sex offenders and those who committed violent crimes are currently detained in an increasing number and that ABF and detention service providers need to implement measures to manage their needs and risks, there is almost no reference to the fact that the Australian immigration detention facilities still accommodate a large number of people with much lower risk ratings. These groups include those who have sought asylum, those who did not comply with their visa conditions (for example, visa overstayers) and those had their visa cancelled for crimes such as traffic offences. This Bill fails to protect the rights of these groups and requires them to face the same restrictive measures as those who committed violent crimes and are assessed to be of high risk to self or others.

## **2. Prohibited items**

- 2.1. The Bill proposes to amend the Migration Act to insert a new section (section 251A) to enable the Minister for Immigration to determine, by legislative instrument, 'prohibited things' in relation to immigration detention facilities. One category of prohibited things is the items whose possession and use 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". Mobile phones and SIM cards are some of the items in this category.
- 2.2. The Minister for Immigration has a wide ranging discretionary power in relation to people's visas and detention. There is limited or no option to review and challenge these decisions. This Bill seeks to grant the Minister yet another discretionary power to declare any item a 'prohibited thing' and prevent people in detention and their visitors from possessing and using that item. RCOA is deeply concerned that this Bill provides no provision for oversight, consultation and review of this decision, giving the Minister an absolute power to declare an item prohibited based on broadly-termed provisions being satisfied that the item is a risk to health, safety or security of those in detention.
- 2.3. Over a number of years, RCOA and a number of other NGOs raised their concerns with the Department of Immigration and Border Protection (DIBP) and ABF about a discriminatory policy which allowed some in the immigration detention facilities to have access to mobile phones, while at the same time not allowing people who have come by boat seeking asylum to have them. These concerns were supported by Australian Human Rights Commission which highlighted the impacts of this policy in its 2014 report on conditions of people in immigration

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<sup>1</sup> See [https://www.refugeecouncil.org.au/wp-content/uploads/2017/08/Detention\\_visitors\\_FINAL.pdf](https://www.refugeecouncil.org.au/wp-content/uploads/2017/08/Detention_visitors_FINAL.pdf)

<sup>2</sup> Department of Immigration and Border Protection, *Immigration Detention Community Statistics Summary* (31 July 2017) <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-july-2017.pdf>

detention facilities. In this report, the Commission called for the reconsideration of this policy and greater access to mobile phones for asylum seekers in detention.<sup>3</sup> RCOA is troubled to see that the current Bill disregards the documented evidence and NGOs' ongoing advocacy and proposes to ban access to mobile phones by all people in detention.

- 2.4. While in the Explanatory Memorandum there is detailed explanation of how mobile phones enabled criminal activity within the immigration detention network, there is little attention made to the positive role of mobile phones for those detained in immigration detention facilities.
- 2.5. We believe that mobile phones are particularly essential for people in detention who are more isolated and have fewer contacts within and outside of the detention facility. Mobile phones facilitate contact between people in detention and their legal representatives, allowing quick and private phone consultations with lawyers who are working to tight deadlines. They also allow people to easily speak to their families and support network, alleviating the strain that prolonged detention has on mental health. RCOA notes that many people detained are parents of young children in the community. In meeting the best interest of these children, it is imperative that they have ready and flexible access to communicate with their parents at all hours by mobile phone.
- 2.6. The Explanatory Memorandum accompanying this Bill states that without access to mobile phones, people in detention will continue to maintain contact with their support network using landline telephones, internet, facsimile, postal services and visits. According to the Explanatory Memorandum, the instalment of additional landline telephones at most detention facilities means people in detention have alternative communication channels that are "readily available".
- 2.7. RCOA is not convinced that the mere fact of installing additional telephone landlines provides people with appropriate communication channels that are on par with mobile phones. We believe this argument disregards many reports and documented evidence presented to the Department about the challenges people face when trying to use other communication channels.
- 2.8. Lawyers who spoke to RCOA report that it is extremely challenging to work within the tight deadline when their clients are detained in remote detention facilities and do not have access to mobile phones. Setting up time for an interview, often across different time zones on limited landlines creates significant challenges for lawyers to submit applications to important courts and tribunals. To assist someone with their protection visa applications or their appeal against the cancellation of their visas, lawyers need to speak to people about confidential and sensitive issues, for example accounts of rape and torture. The public nature of landlines means many people will be reluctant to disclose sensitive and personal information. Similarly, talking about highly personal matters with family and loved ones in an open setting where landline telephones are located is extremely difficult.
- 2.9. The Bill and its Explanatory Memorandum argue that to maintain the safety of detention facilities, access to mobile phones should be banned. The reports we have received do not support this argument. The limited number of landline telephones result in increased competition over their use and create heightened tensions. There are usually queues forming directly behind a person speaking on the landline, limiting the privacy and creating tension among both those on the phones and those waiting. Those detained for character cancellation reasons will likely be making more local calls to family, while those seeking asylum will often be making international calls, hence cost and length of calls will be vastly different.
- 2.10. Landlines are in particular inadequate when families attempt to contact a person in detention from overseas. Over the years, we have received numerous reports of repeated failed attempts

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<sup>3</sup> Australian Human Rights Commission (2014), *Community Arrangements for Asylum Seekers, Refugees and Stateless Persons*, [https://www.humanrights.gov.au/sites/default/files/content/human\\_rights/immigration/2012community-arrangements/community\\_based\\_arrangements.pdf](https://www.humanrights.gov.au/sites/default/files/content/human_rights/immigration/2012community-arrangements/community_based_arrangements.pdf), p.43.

of family members overseas trying to contact loved ones in detention by contacting the switchboard, an issue that will add to the stress and isolation of people in detention. Family and friends of those detained continue to report that staff answering the switchboard refuse to put the call through to people in detention, or for extended periods of time, the switchboard number is not contactable, creating undue stress, especially when the matter is urgent.

- 2.11. The internet connection in remote facilities like Christmas Island is often unreliable. In many facilities, access to computers and internet is based on rosters set by detention service providers, offering rigid time slots that do not consider the time difference with people's countries of origin.
- 2.12. The Explanatory Memorandum also mentions visits from family and friends as a way of ensuring people in detention maintain contact with their support network. And yet, RCOA recently published a [report<sup>4</sup>](#) on the challenges the very same groups face when trying to access detention facilities. From constantly changing rules and their inconsistent applications, to challenges in securing a visit and getting through the screening process, visitors to immigration detention facilities are faced with increasing difficulties. We understand that ABF plans to implement further restrictive policies regarding the number of people a visitor can visit, the notice they need to provide and the identification documents they need to present to be able to secure a visit.
- 2.13. In February this year, a federal court challenge resulted in an injunction against the ABF's then policy to remove and ban all mobile phones from immigration detention facilities. In August, a federal court judge rejected a jurisdictional challenge over the February injunction. RCOA is concerned that this Bill seeks to grant the Minister for Immigration a legislative instrument to undermine the court decision the Minister finds unfavourable. This can set a dangerous precedent for disregarding the decisions made by the justice system by granting further discretionary powers to a Minister.
- 2.14. As mentioned, RCOA along with other NGOs, has argued against the current discriminatory policy that prevents those who have come by boat from using mobile phones in detention, while allowing others to have them. We have called for access to mobile phones for all people in detention, given their essential role in allowing people to maintain contact with their support network, family and legal representatives. However, the concerns presented in this Bill and Explanatory Memorandum that some people in detention may use and have used these devices for illegal activities are valid. The way to address this issue is through a risk-based placement. If those who pose a high risk to health and safety of others and are capable of using mobile phones for illegal activity are accommodated in separate parts of detention facilities to those with a low risk profile, they can be managed according to the risk they present. For example, they can be prohibited from accessing mobile phones. RCOA strongly disagrees with the current position that to address the risks one group of people in detention pose, the entire population (including people for whom mobile phones are lifelines) should be faced with a restrictive policy, in this case lack of access to mobile phones.

### **3. Strengthened search and screening powers**

- 3.1. The following sections of the Migration Act already grant substantial search, screening and seizing powers to authorised officers in relation to people in detention and their visitors:
  - Section 252 (Searches of persons),
  - Section 252AA (Power to conduct a screening procedure),
  - Section 252A (Power to conduct a strip search),
  - Section 252C (Possession and retention of certain things obtained during a screening procedure or strip search),

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<sup>4</sup> [https://www.refugeecouncil.org.au/wp-content/uploads/2017/08/Detention\\_visitors\\_FINAL.pdf](https://www.refugeecouncil.org.au/wp-content/uploads/2017/08/Detention_visitors_FINAL.pdf)

- And section 252G (Powers concerning entry to a detention centre).

RCOA is deeply concerned that this Bill seeks to strengthen those powers even further.

- 3.2. Currently the above sections allow authorised officers to search and screen (without warrant) a person, their clothing and property or conduct a strip search of a person in detention. This is to look for weapons and items that can be used to inflict bodily injury or to help the person to escape from the detention facility. They can also look for documents and other things that are evidence for cancelling a person's visa. Visitors can be searched for items that can endanger the safety of people in detention and staff and disrupt the order of the facility. This Bill seeks to allow officers to also search for prohibited items, such as mobile phones. It is particularly disturbing that this Bill can authorise a strip search merely to determine whether or not a person has concealed a mobile phone or a SIM card.
- 3.3. In recent years, we have received numerous reports from people in detention and their supporters about frequent room searches. People reported that often room searches make them feel intimidated and humiliated. People seeking asylum and their supporters reported that at times room searches are conducted early in the morning and in a manner that make people feel like criminals. Rooms are left in a state of disarray and at times items are confiscated with no explanation provided. Those who were transferred within the detention network reported that sometimes the items they were allowed to keep in one detention facility or even purchased from the facility's shop were confiscated during the room search in another detention facility. People in detention and their supporters often talk about the extremely negative impacts of these room searches on their sense of self-worth and on their mental health. On more than one occasion, we heard from people that the room searches made them "feel less than a human". We are extremely concerned that this Bill through the inclusion of section 252BA (searches of certain immigration detention facilities—general) seeks to strengthen the power of officers to conduct the searches without a warrant.
- 3.4. Immigration Transit Accommodation (ITA) and Alternative Places of Detention (APOD) usually accommodate lower risk groups, including children.<sup>5</sup> By adding subsection 251A(3) and providing a new definition of 'immigration detention facility', this Bill allows the power to search people in detention and their accommodation areas to be extended to all places of detention, including ITAs and APODs, where children can witness and experience a highly invasive and traumatising search process.
- 3.5. RCOA is alarmed by the inclusion of medical examination areas in the areas that can be searched, as set out by section 252BA. There is no further information or safeguarding provision to emphasise the importance of privacy when a person in detention is attending a consultation with a health professional. As it stands, this section does not prevent authorised officers from interrupting a private consultation with a doctor or a mental health professional to search for various illegal or prohibited items, including mobile phones.
- 3.6. We are particularly concerned that this Bill seeks to support through legislation the use of dogs in search and screening process. Sections 252AA, 252BA and 252G all seek to strengthen the power of authorised officers to use dogs in the screening of people in detention, their visitors and during the search of accommodation areas. While there are some safeguards about the handling of detector dogs, the use of dogs – no matter how trained they are in giving a passive response – is highly inappropriate in a place where people with history of trauma, torture and mental health issues are deprived of their liberty. For many people, seeing dogs during these search processes can bring to mind memories of police raids in countries of origin. In many cultures, it is not acceptable to continue to use items that were touched by a dog, something that is inevitable if they were to be used in a room search.

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<sup>5</sup> Even though the number of children in onshore held detention significantly dropped, there are still children detained in those facilities. According to the latest publicly available statistics, some children (albeit less than five) were detained in Melbourne Immigration Transit Accommodation as of 31 July 2017.

- 3.7. The issues highlighted in this section again are the consequences of applying the same set of restrictive policies to all people in detention, irrespective of their past history, risk rating and vulnerabilities, to mitigate the risk presented by some. If the Department and ABF have to extend the search powers to search for items such as narcotics, this has to be applied only to the group that present such a risk: something that is only possible if people in detention are accommodated separately according to their risk rating.

#### **4. Screening of visitors**

- 4.1. Section 252G already allows authorised officers to search visitors for items that might endanger the safety of staff and people in detention and disrupt the order and security of the facility. By adding new subsections to section 252G, this Bill seeks to extend the power of officers to look for prohibited things in the possession of visitors. The officers can use detector dogs for this purpose.
- 4.2. While section 251A provides some information about the items that can be considered prohibited things, this information is broad and it is ultimately at the discretion of the Minister for Immigration to determine an item a 'prohibited thing'. As detailed in our report on the challenges visitors face when accessing detention facilities, the rules about the items visitors can or cannot take to the detention facilities are inconsistent. The detention visitors who speak to RCOA continue to report that they are often given contradictory information about this issue even during one visit, depending on the staff they speak to.
- 4.3. Recently, the detention visitors reported that they have been banned from taking in board or card games to the detention facilities, with no explanation provided. They reported playing board and card games used to give people in detention a sense of normalcy, help with learning English and could assist in overcoming social isolation. The detention visitors have also been banned from taking in pens and papers (even blank paper), again with no explanation provided. For many volunteer and community groups, not being able to take papers in meant they were not able to have people in detention sign their consent forms. That subsequently prevented them from keeping people's information on record, advocate on their behalf or refer them to external service providers, including essential services such as legal assistance. Detention visitors reported that as a result of this policy, they were not able to take in the list of people they wanted to visit or follow up and were not able to assist people in form-filling, despite the fact that many were encouraged by their DIBP case managers to approach these groups for assistance.
- 4.4. Furthermore, RCOA heard disturbing accounts of religious services being interrupted and abruptly ended because the security staff treated items used in a Catholic mass as contraband.
- 4.5. A new food policy implemented recently prevents visitors from taking in fresh, home cooked or unsealed food to the visit area. However, the way this policy is interpreted and implemented is reportedly inconsistent. For example, some people were prevented from taking in factory packaged and sealed food because they are not made in Australia or because the packaging advised the items are recommended to be served chilled.
- 4.6. We are concerned that broadening the list of prohibited items for visitors will result in more frequent and unexpected changes, more inconsistent practice and greater challenges for visitors to access detention facilities. As demonstrated in the above examples, preventing visitors from taking in one set of items can have a grave impact on the experience of visitors and people in detention.
- 4.7. Currently section 252G of the Migration Act allows officers to screen and search visitors and their property. As part of the screening process, officers can conduct drug tests. In our report on the challenges of visitors to detention facilities, we pointed out a number of issues in relation to the way drug tests were conducted and their subsequent impacts on visitors and people in detention. We are concerned that by providing a new definition of 'immigration detention facility' these tests will be carried out in ITAs and APODs as well, impacting the experiences of visitors to these facilities.

### **Recommendation 1**

*RCOA recommends that Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 not be passed.*

### **Recommendation 2**

*RCOA strongly recommends against implementing restrictive policies to all people in detention to mitigate the risks presented by some. Through risk-based placement, the Department can determine the needs and challenges of each group of people in detention and implement policies appropriate to that specific population.*

### **Recommendation 3**

*RCOA has long argued for comprehensive reforms of Australia's detention system to prevent prolonged, indefinite and unnecessary detention. The central focus of detention reform should be on ensuring the immigration detention is used as a last resort and for the shortest possible time. As a general rule, people should only be subject to immigration detention after having undergone a thorough, individualised and risk-based assessment which has determined that there is a genuine need for detention and no other alternatives are available. When people are subject to detention, clear legislative time limits should apply and a system of regular judicial review should be established to monitor the ongoing need for detention.*