



Refugee Action Collective (Vic)

Committee Secretary
Legal & Constitutional Affairs Legislation Committee
PO Box 6021, Parliament House, Canberra ACT 2600
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10 June 2020

Dear Legal and Constitutional Affairs Legislation Committee,

Re: MIGRATION AMENDMENT (PROHIBITING ITEMS IN IMMIGRATION DETENTION FACILITIES) BILL 2020

Refugee Action Collective (Vic) welcomes the opportunity to provide input into the Committee's inquiry into the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (the Bill).

RAC (Vic) is deeply concerned that the Bill will be extremely damaging to the health and well-being of people in immigration detention and that it stands to violate their human rights. We consider the proposed powers to be unnecessary, to pose the risk of exacerbating existing overreach in the use of force and blanket security measures, and to be based on spurious arguments.

Our submission focuses on the situation of refugees and asylum-seekers, however our concerns are also relevant to the well-being, rights, and dignity of others in immigration detention. We believe that the detention of refugees and asylum-seekers is not administrative but rather has been shown to be punitive in nature. The Bill would further exacerbate an already damaging and unsustainable situation. RAC (Vic) recommends that the Bill not be passed.

Please note that Appendix B includes material not intended to be available to the general public. We request that Appendix B be kept confidential. We would like the main text of this submission, as well as Appendix A, to be made public.

Thank you for the opportunity to participate in this inquiry.

Yours sincerely,

Margaret Sinclair, Max Costello and Eleanor Davey
Members of Refugee Action Collective, Victoria

About us

Refugee Action Collective (Vic) was established in 2000 as a democratic grassroots collective representing a broad cross-section of the community. The Collective was established as, and continues to be, a voluntary activist group. It is a non-profit entity with the objective of protecting refugee rights through campaign activism.

Refugee Action Collective stands for the humane and dignified treatment of asylum seekers and refugees in accordance with Australia's international and humanitarian obligations. Many of our members are visitors to detention centres, including Melbourne Immigration Transit Accommodation (MITA) and the Mantra Hotel, and/or in contact with people detained in other facilities such as Kangaroo Point, Brisbane Immigration Transit Accommodation (BITA), Yongah Hill and Villawood via phones and social media. The statements and evidence provided in this submission reflect this contact with people in detention.

Executive Summary

Refugee Action Collective (Vic) strongly recommend that the proposed legislation be rejected in full. The immigration detention system already lacks openness, transparency and accountability. Access to smartphones has helped expose abuses. We believe that increasing the powers of Serco and Australian Border Force (ABF) officers would lead to more frequent and serious abuses, exacerbating existing threats facing people in detention and further damaging Australia's international reputation. Additional powers are unnecessary due to extensive existing powers which already show overreach. The issues with overreach of powers in the current system would be exacerbated if this legislation were to be allowed through. The proposed powers would have extreme negative health impacts. This is particularly true as regards use of force and strip searches. We believe the proposed legislation is incompatible with Australia's Human Rights obligations. We are also of the opinion that the proposed legislation is likely to be incompatible with Home Affairs duties prescribed in the *Work Health and Safety Act 2011* (Cth). The main text of this submission further articulates and substantiates these points.

Additionally, Appendix A documents in detail that the Second Reading speech: (a) totally fails to prove that the bill is needed; (b) devalues the multi-faceted importance of mobile phones to detainees; and (c) makes many vague, sweeping, unproven allegations. The speech shamelessly spruiks a bill that would give unchecked powers to a department and officers who, by apparently committing health and safety offences (including COVID-19 breaches), and endlessly detaining human beings outside the criminal justice system, are remorselessly destroying their physical and psychological health.

Appendix A also suggests specific points to which the Committee should direct its scrutiny.

Mobile phones

We object to section 251A(2)(b) which seeks to prohibit mobile phones. We note that immigration detention centres have a history of banning mobile phones with recording capabilities or internet access: while phones without these functions had been permitted prior to February 2017, from that date the use of all mobile phones and SIM cards in immigration detention was prohibited. The Federal Court ruled that prohibition invalid in June 2018 and all kinds of mobile phones, including smartphones, are currently allowed in immigration detention.

The release of information from immigration detention has been tightly controlled by the Department for many years.¹ Since the ban on mobile phones has been lifted, phones have been used to record events within detention that is in the public interest to know. For example:

- Current use of force on detainees including knee on neck, use of handcuffs and multiple security holding down one person.² See Appendix B(i).
- Videos and photos of the fire at Yongah Hill in September 2018.³ See Appendix B(ii).
- Conditions of detention showing overcrowding during COVID 19 pandemic.⁴ See Appendix B(iii).

In addition, mobile phones are used for entertainment to support mental health such as games (such as Simcity and CandyCrush), for social media use (Twitter and Facebook), to watch movies and TV shows, to create music collaborations for those people who are professional musicians.⁵

Computer and landline phone access is not conveniently available. Times are restricted and the many gates between compounds also impede physical access. This is especially true in the middle of the night when it is more convenient to be in contact with family who live in a different time zone or when it is urgent at times of poor mental health to be able to talk to friends or supporters, who have previously talked down detainees when suicidal. On 12 May 2020, a Mantra detainee, after attempting suicide, was taken to Royal Melbourne Hospital (RMH). A Serco guard kept watch: the detainee's mobile phone was confiscated. On 13 May, a very close friend and refugee advocate went to RMH bearing an envelope containing a heartfelt letter to buoy the detainee's spirits. She gave it to a hospital staff member, stressing how absolutely vital it was that the incommunicado detainee be given her letter. But the Serco guard intercepted it, read it, and just left it pinned to a noticeboard. That letter did not reach the detainee. On 15 May he was discharged and taken to MITA, where his mobile phone was subsequently returned.

Smart phones have video functions and this function, when speaking to family and friends, cannot be replaced by any of the suggested alternatives in the proposed legislation as outlined in the Explanatory memorandum.⁶ Detention centre computers are in public spaces which are not appropriate for discussing personal matters such as talking with lawyers or saving electronic documents or medical records. Websites that are not inherently dangerous in nature have been known to be inaccessible on detention centre computers, such as the Australian Human Rights Commission.

1 Linda Briskman, "Technology, Control, and Surveillance in Australia's Immigration Detention Centres," *Refuge*, vol. 29, no. 1 (2013).

2 <https://www.facebook.com/100027178337066/videos/550074379241835/>

3 Helen Davidson, 'Confusion reigns three days after fire and unrest at detention centre,' *The Guardian*, 5 September 2018. Available: <https://www.theguardian.com/australia-news/2018/sep/05/yongah-hill-unrest-confusion-reigns-three-days-after-fire-at-detention-centre>

4 Hannah Ryan, 'A Leaked Video Shows Scared Refugees Questioning Immigration Officials About The Coronavirus,' BuzzFeed News, 19 March 2020. Available: <https://www.buzzfeed.com/hannahryan/refugees-coronavirus-detention-brisbane-guard-diagnosed>

5 Rebekah Powell, 'Iranian-Kurdish metal musician among 80 refugees holed up in Brisbane hotel,' ABC News, 11 February 2020. Available: <https://www.abc.net.au/news/2020-02-11/refugees-in-brisbane-kangaroo-point-hotel-metal-music-among-them/11949086>

6 Hannah Ryan, 'I WhatsApped Refugees To Ask Why They're So Freaked Out About The Government Taking Their Phones Away,' BuzzFeed News, 22 May 2020. Available: <https://www.buzzfeed.com/hannahryan/refugees-phones-australia-whatsapp-interview>

People are moved between detention centres frequently, for example 8,000 forced movements between mid-2017 to mid-2019.⁷ This is usually suddenly during the night with very little notice. In August 2019, a Tamil family from Biloela in Queensland who were being held at MITA were moved in the middle of the night so suddenly they were unable to phone their lawyers.⁸ While a last minute injunction was put in place, that was in spite of the efforts of Home Affairs, via the Department of Immigration and Australian Border Force to forcibly deport the family who had not exhausted all legal avenues. The Biloela family had their mobile phone, a smart phone, confiscated and now only have use of an analogue phone. This example of people being suddenly moved in the night is the norm rather than the exception. It has been normalised over the past several years.

We reject assertion 24 in the explanatory memorandum outright as being untrue and misleading.

Room searches

We object to increased search powers as outlined in section 251B.

The powers being asked for in the Bill before parliament are powers that are currently being used by Home Affairs within immigration detention centres. Room searches and head counts by ABF/Serco are part of daily life at every immigration detention centre.⁹ The Australian Human Rights Commission (AHRC) report on risk management in immigration detention reports that ‘Most of the people interviewed by the Commission reported that their rooms and property were searched for contraband on a regular basis. They also indicated that they were routinely subject to pat and wand searches when entering or leaving the facility, before and after visits, after returning from meals and during room searches.’¹⁰

Officers do not knock when opening doors, they go through all belongings and there is nothing to stop them from confiscating any items they deem fit to be confiscated. There have been complaints about pat searches being rough or invasive.¹¹ There have even been examples of dogs being used as far back as 2015 and 2016 at MITA.¹² At that time, the main item looked for were mobile phones.

We refer to the explanatory memorandum (assertion 22) which refers to weapons and drugs. We reject the unsubstantiated premise that these are in any sort of abundance. Detention centres are run as prisons, although with much less oversight, and there is little if any scope for making weapons, or introducing or hiding drugs. Detention centres are run as prisons by the same companies that run prisons in Australia. All exterior fences have CCTV cameras, there are large numbers of CCTV cameras through the centres and all visitors are subject to metal detectors and drug swabs before entering.

7 Nick O’Malley, ‘The 8000 “forced movements” on Australian flights in two years,’ *Sydney Morning Herald*, 7 June 2019. Available: <https://www.smh.com.au/politics/federal/the-8000-forced-movements-on-australian-flights-in-two-years-20190906-p52oq8.html>

8 Victoria Pengilly, ‘Deportation of Tamil asylum seeker family interrupted midair by last-minute injunction,’ ABC News, 29 August 2019. Available: <https://www.abc.net.au/news/2019-08-29/tamil-asylum-seeker-family-from-biloela-facing-deportation/11463176>

9 <https://twitter.com/forlovenfreedom/status/1145959330111320066>

10 AHRC, *Risk management in immigration detention* (2019), 54. Available: <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019#JPKPF>

11 Ibid.

12 There are similar reports from BITA. See <https://www.bmrsg.org.au/whats-going-on-in-detention-centres/>

In May 2020, it was reported by people detained in BITA that their personal doonas would no longer be allowed. Visitors are not allowed to bring paper and pens into the visit rooms. These are examples of the petty nature of the rules with regard to 'prohibited items'.

Strip searches

We object to increased search powers, specifically strip search powers, as outlined in section 252B(4) and 252A(1).

People in immigration detention from a refugee background often have disclosed or undisclosed histories of torture and trauma. Some forms of torture have included cruel and degrading treatment and anal rape. The long years of detention have been detrimental to any person with this background and prevents the ability to recover.

Strip searches of people who are extra vulnerable because of their torture and trauma backgrounds, or because of a built-in lack of transparency and accountability, will be further traumatised by this treatment. It is our belief that of all aspects of this potential legislation, it is this part which will be open to most abuse. Further, it is likely that such strip searches would violate our obligations under the Optional Protocol to the Convention against Torture (OPCAT), as explained in more detail below.

Even if a person is not strip searched, merely being threatened with it as a means of intimidation would be highly traumatic for any person held in immigration detention. Considering the punitive nature of immigration detention, we consider these threats to also be highly likely to happen.

These points are extremely important given the very vague and fluid definition of a 'prohibited thing', under proposed section 251A which states that a thing can be prohibited 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.' Additionally, because the proposed powers would not require staff members to have seen any item deemed prohibited prior to searching for it, or even to 'have any suspicion' of the presence of the item, there is a risk of arbitrary and unjustified searches, including strip searches, being inflicted upon people in detention.

Use of force

We object to the increased powers with regard to use of force (including the use of dogs in section 252BA(4)).

Independent monitoring of conditions is severely limited.¹³ We are extremely concerned at the likelihood of continuing and increased use of force in a context of expanded powers.

Excessive use of force has been a key aspect of the picture of immigration detention that has emerged since the overturn of the ban on mobile phones. In March 2019, *The Guardian* reported on recordings of incidents of intimidation and force. Their investigation found:

- 'guards had allegedly discouraged detainees from pursuing complaints
- allegations of abuse and mistreatment of detainees
- allegations by a former Serco employee that complaints were "covered up"
- allegations that detainees had been arbitrarily transferred away from their home state

13 Caroline Fleay, 'The limitations of monitoring immigration detention in Australia,' *Australian Journal of Human Rights* 21:1 (2015): 21-46.

- claims of “prison-like” conditions in detention centres
- allegations of an increasingly militarised approach from authorities and rising tension within the centres.¹⁴

The following give some examples of use of force in immigration detention:

- A man tackled to the ground at MITA South after kicking a bin had his collar bone broken in August 2019. Use of force was again used in January 2020 which resulted in a dislocated elbow for the same person.
- Numerous incidents documented through AHRC investigations.¹⁵
- Numerous incidents documented in the leaked incident reports known as the Nauru Files.¹⁶

The Australia OPCAT Network has recently asserted that ‘the challenge of managing risks in the detention network does not appear to be met in a proportionate way that is appropriate for asylum seekers and other noncitizens without criminal histories.’¹⁷ Amongst other concerns, it identified an overuse of restraints, including claims that individuals were required to wear restraints during their medical appointments, contributing to some people declining health appointments in order to avoid the resulting humiliation and distress. A report by the Public Interest Advocacy Centre (PIAC) also highlighted the damaging effects of this overuse of handcuffs and other restraints on mentally ill asylum seekers and refugees, exacerbating trauma and undermining already insufficient medical care.¹⁸

We assert that giving ABF and Serco more powers to use force when current powers are misused and abused should be rejected outright.

Drugs and medication

We dispute that drugs and contraband are being smuggled into detention centres to the extent that the department is claiming. No proof is given to back up the statements at points no. 22 and 29 in the Explanatory Memorandum. This statement that Minister Alan Tudge has given to support a perceived need for changes to section 252 in the proposed legislation is not based in the realities faced by the vast majority of people in immigration detention. But through the use of this statement, all people detained have been vilified and smeared.

- 14 Helen Davidson, ‘Secret recordings allege excessive force by guards in Australia’s detention centres,’ *The Guardian*, 25 March 2019. Available: <https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres>
<https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres>
- 15 AHRC, *Use of force in immigration detention* (2019). Available: https://humanrights.gov.au/sites/default/files/document/publication/2019_aushrc_130.pdf
- 16 *The Guardian*, Nauru Files database. Available: <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>
- 17 *The Implementation of OPCAT in Australia: Submission by the Australia OPCAT Network to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD)*, January 2020, 53. Available: https://www.kaldorcentre.unsw.edu.au/sites/default/files/Implementation_of_OPCAT_in_Australia.pdf
- 18 PIAC, *In Poor Health: Health Care in Australian Immigration Detention* (2018), 24. Available: <https://piac.asn.au/wp-content/uploads/2018/06/18.06.14-Asylum-Seeker-Health-Rights-Report.pdf>

The normal processes for visitors entering detention consist of highly sensitive metal detection screening of all items and visitors entering. This is followed by drug swabs of several items of clothing before being allowed to enter the visitors room. All people detained who have a visitor are subject to pat downs upon entering and leaving. All visits are in the presence of Serco officers and CCTV cameras. The AHRC found that the blanket approach to security procedures for visits, like other areas of risk management in immigration detention, are not proportional to the risks and should be modified to a more individualised, targeted approach in which restrictions are applied only with specific cause.¹⁹ The processes to ensure that staff are not bringing in contraband items are unknown.

Immigration detention centres upon the whole are still remote and largely inaccessible. A number of centres are situated on Army bases, such as MITA and BITA. There are not only CCTVs within the centre but also exterior to the fences. The idea that people are able to successfully toss drugs over high, prison style fences is fanciful at best. According to OPCAT Australia, due to the increase of security features, restrictions placed on people detained in the centres, and restrictions placed on visitors, 'it is no longer possible to consider ITAs as low or medium security facilities.'²⁰

Medications are distributed from the International Health and Medical Services (IHMS) clinic and consumed there. There is a lengthy request process simply to access Panadol. Prescription medications are not circulated among other people within the detention centre system.

Examples of medications being confiscated without regard to duty of care:

- Epilepsy medication taken away from a young child who subsequently suffered seizures.²¹
- Medications reportedly confiscated for people evacuated for medical treatment from Papua New Guinea and Nauru upon arrival.

Compatibility with human rights obligations

We dispute that this legislation is compatible with Australia's Human Rights obligations.

Refugee Action Collective (Victoria) is a human rights group primarily focused on the human rights of people seeking asylum. We cannot find one human rights lawyer who agrees with the assessment of the Australian government that the Migration Amendment Bill 2020 (or indeed the Migration Bill as it currently stands) is compatible with Australia's human rights obligations. We note in the appendix of the explanatory memorandum that only the International Covenant on Civil and Political Rights has been referenced. However, Australia has Human Rights Obligations under other covenants that we are also signatories to. The most relevant to Immigration detention centres is the Optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OPCAT). We re the senate to require that this also be looked at and responded to by the Australian government..

Article 17 (1) of the International Covenant on Civil and Political Rights (ICCPR) refers to people not having their honour or reputation attacked and yet the premise of this Bill is that the people

19 AHRC, *Risk management in immigration detention*, op cit, 60.

20 *The Implementation of OPCAT in Australia*, op cit, 49.

21 Rebecca Barrett and Karen Barlow, 'Immigration detention inquiry: Government tried to cover up asylum seekers' mental health problems, inquiry told,' ABC News, 31 July 2014. Available: <https://www.abc.net.au/news/2014-07-31/detention-centre-inquiry-hears-claims-of-immigration-cover-up/5637654?nw=0>

detained are criminal in nature, Acting Immigration Minister, Mr Tudge, has referred to violence, assaults, child pornography, criminal gangs and the supposed proliferation of illegal drugs. In doing this, every person held in Immigration detention has had their honour and reputation besmirched, including hundreds of people who had passed all security screening and arrived in Australia under the now defunct Medevac bill.

In addition, the laws interfere with family by making communication with family living in another time zone impossible without a mobile phone.

Article 19(2) of ICCPR states that everyone shall have freedom of expression and yet under the current system with the use of detention centre computers, people are not even allowed to create blogs. Furthermore, since mobile phones are currently used to record the goings on inside detention centres, including the current use of force used by officers and use of handcuffs to take people to medical appointments.

Article 10(1) of ICCPR refers to people deprived of their liberty being treated with humanity and respect. This is currently being breached in immigration detention centres. It is impossible to find a single person who has been treated with dignity or respect. This is particularly true of current pat down methods and would be doubly true of strip searches.

Complaints made by the people detained are almost never found in their favour by Serco or ABF.

Following complaints, the Australian Human Rights Commission (AHRC) has previously found that the use of force against individuals in immigration detention has constituted a breach of human rights.²² This is relevant to concerns that the proposed legislation will increase the frequency and severity of the kinds of incidents described in this submission.

Compatibility with 2011 Work Health and Safety Act (Cth)

We wish to bring to the attention of the Senate that this legislation is likely incompatible with the Commonwealth *Work Health and Safety Act 2011* (WHS Act) which has jurisdiction at all immigration detention centres as they are all Commonwealth government workplaces. As such, they're subject to the Act. It requires each Commonwealth workplace operator to pro-actively and preventatively ensure the safety and health, including psychological health, of not only "workers", but also any "other persons" at the workplace, such as the people detained.

The Department of Home Affairs (whose Minister is Peter Dutton) is in over-all charge, with its Australian Border Force unit being specifically in charge. As ABF's website says, "We are responsible for the management of ... detention facilities, including the health and welfare of detainees". ABF also controls the Commonwealth's detention contractors – International Health and Medical Services, and Serco, whose guards 'manage' detainees. The Commonwealth of Australia via the Department of Home Affairs is the Person Conducting Business or Undertaking (PCBU).

The two key WHS Act duties are in sections 19 and 27.

- Section 19 imposes on workplace operators such as ABF a 'primary duty of care'. It obliges ABF to eliminate all workplace-related risks. Only when elimination of risks is impracticable, to minimise them.

²² AHRC, *Use of force in immigration detention*, op cit.

- Section 27 imposes on the top ‘officers’ concerned a duty to ensure, by exercising due diligence, that Home Affairs/ABF complies with all its health and safety duties.

The Commissioner of Australian Border Force (currently Mr Michael Outram) has prescribed officer duties under section 27.

Breaches of health and safety duties are serious criminal offences punishable by substantial fines and/or, if appropriate for an officer found guilty, imprisonment.

Section 19(2) in full is as follows:

‘Primary Duty of Care

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that *the health and safety of other persons is not put at risk* from work carried out as part of the conduct of the business or undertaking.’

In order to be compliant with this section, sections 17 and 18 must also be complied with. These sections deal with the requirement of the PCBU to undertake hazard identification and risk assessments, followed by risk elimination or control.

All of the above-mentioned provisions are quoted in full and further explained in submission no. 75 – co-authored by Robert Richter QC and Max Costello – to the Senate’s 2019 ‘Medevac repeal bill’ Committee. Their submission alleges systemic detainee-related non-compliance with WHS Act duties by Home Affairs/ABF and senior officers, mainly at offshore facilities; while supplementary submission 75.1 alleges continuing non-compliance onshore, including failure to ensure that the ‘Medevaced’ detainees now held at the two hotel APODs receive the specialist care they were flown here for.²³ We ask the Senate to discover these documents.

Conclusion

The majority of the Amending Migration Bill 2020 is aimed at confiscating items that are legal in Australian society such as phones, SIM cards and internet capable devices. Illegal drugs are already prohibited substances and Australian authorities already have the powers to search and find them.

We are against the increased use of force powers, including the use of dogs and powers to strip search the people held in immigration detention. We assert that this Bill has little to do with ‘keeping the good order of immigration detention facilities’ and much to do with intimidation, abuse and the prevention of transparency and oversight.

We recommend that the Senate rejects the ‘Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

23 Submissions available:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RepairMedicaltransfers/Submissions?main_0_content_1_RadGrid1ChangePage=4_20

Appendix A: Analysis of Second Reading Speech

Sent as a separate 28-page supplementary document.

Appendix B: Supporting material (confidential)

Sent as a separate 3-page supplementary document.