

# Labor Party Senators' Dissenting Report

1.1 The Australian Labor Party (Labor Party) dissents from the majority report of the Legal and Constitutional Affairs Legislation Committee (the committee) inquiry into the provisions of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill).

1.2 The Labor Party recognises that the risks associated with the changing profile of detainees in immigration detention may require new management policies. However, the government has not demonstrated any attempt to address these risks in less restrictive ways than those proposed in the bill. The government had the opportunity to have an open discussion about the challenges and risks to staff, visitors and detainees in immigration detention facilities but has failed to do so.

1.3 Labor senators are strongly of the view that items like narcotic drugs, child exploitation material or weapons or other items that are illegal should not now, nor ever have been permitted within immigration detention centres on reviewing the evidence provided to the committee. The government however has not made the case for the necessity of some of the other proposed amendments.

1.4 Many submitters expressed valid concerns that the measures in the bill were disproportionate to the stated risks.<sup>1</sup> In particular, the bill enables blanket prohibitions on all detainees regardless of their needs, vulnerabilities, or risk profile. This point was made by Rural Australian for Refugees:

While groups such as child sex offenders and members of outlaw motorcycle gangs are currently detained in an increasing number and 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 have committed violent crimes and are assessed to be of high risk to self or others.<sup>2</sup>

The visitors to detention centres who are our members report that they are often given contradictory information about this issue even during one visit, depending on the staff they speak to.<sup>3</sup>

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1 See for example, Refugee Advice and Casework Service (RACS), *Submission 50*, p. 1; Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 52*, p. 2.

2 Rural Australian for Refugees, *Submission 26*, p. 2.

3 Rural Australian for Refugees, *Submission 26*, p. 4.

1.5 Furthermore, the bill would allow blanket prohibitions of items that can be used for positive purposes as well as negative ones. As put by the Australian Human Rights Commission (AHRC):

...blanket restrictions on the possession of items that do not present an inherent risk to safety or security may not be reasonable, particularly when many of the individuals affected have never used these items in a manner that threatens safety or security.<sup>4</sup>

1.6 These prohibitions would be effected by proposed section 251A, which provides for the circumstances in which the minister may prohibit an item. This threshold is too low. As argued by the Law Council of Australia (Law Council):

...any number of things could fall within this broad definition, particularly because the provision does not require any standard by which the Minister is required to consider whether something might be a risk, nor is there any guidance on what would constitute a risk to the 'order of the facility'. There is also no guidance on what 'order of the facility' means in this context.<sup>5</sup>

1.7 Further, the current bill would allow items to be prohibited if the minister is satisfied that they '*might* pose a risk' [emphasis added] to immigration detention facilities. The AHRC noted that:

[t]he Minister need not be satisfied that the thing is *likely* to present a risk, let alone that the thing is likely to present a risk in any particular circumstances that relate to a detention facility or group of people in detention. The Minister's power is also not conditioned on any nexus between prohibiting the item in question and addressing the risk the Minister has identified.<sup>6</sup>

1.8 Rural Australians for Refugees expressed valid concerns 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'.<sup>7</sup> Indeed, submitters indicated that previous prohibitions have been applied inconsistently,<sup>8</sup> contrary to the testimony of the Department of Immigration and Border Protection. This risks reducing confidence in the immigration detention network.

1.9 The bill would not require the minister to justify prohibitions, and the minister's determinations would not be subject to administrative review.<sup>9</sup> The proposed legislative instruments are not disallowable by the Senate.<sup>10</sup>

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4 Australian Human Rights Commission (AHRC), *Submission 11*, p. 8.

5 Law Council of Australia (Law Council), *Submission 64*, p. 9.

6 AHRC, *Submission 11*, pp. 8–9.

7 Rural Australians for Refugees, *Submission 26*, p. 5.

8 Rural Australians for Refugees, *Submission 26*, p. 4; Refugee Council of Australia (Refugee Council), *Submission 55*, p. 6.

9 Law Council, *Submission 64*, pp. 9–10; Mr Paul Power, Refugee Council, *Committee Hansard*, 27 October 2017, p. 12.

1.10 Importantly, the Labor Party's concerns on this subject do not assume or imply bad faith on the part of any minister making ministerial determinations under the bill. Rather, as the Australian Lawyers for Human Rights (ALHR) submitted, '[l]egislation should always represent an appropriate and proportionate response to the harms being dealt with by the legislation...'<sup>11</sup>

1.11 In light of its concerns, Legal Aid New South Wales suggested that "[p]rohibited thing" should be defined in the statute itself, rather than via legislative instrument, to enable proper Parliamentary scrutiny of the scope of the definition.<sup>12</sup> Additionally, the first recommendation of the Law Council was that '[t]he definition of 'prohibited thing' should be narrowly confined to for example items which justifiably may cause a risk to the health or safety of a person in IDFs (such as weapons or narcotics).'<sup>13</sup>

1.12 The Labor Party supports prohibiting items that are already illegal under state, territory, or Commonwealth law, particularly narcotic drugs, child exploitation material or weapons as these items present a demonstrable risk within the detainee population, however the government has failed to make a case for why other items should be prohibited or why the risk cannot be managed on a case by case basis as suggested by Amnesty International 'any purported risk should be assessed on an individual case- by-case basis against defined criteria and thresholds...'<sup>14</sup>

## **Recommendation 1**

**1.13 Labor Party senators recommend that the bill be amended in accordance with the first recommendation of the Law Council of Australia to narrowly confine the definition of 'prohibited thing', and in accordance with the Legal Aid New South Wales proposal that 'prohibited thing' be defined in statute to enable appropriate parliamentary oversight.**

1.14 Although the bill and Explanatory Memorandum countenance a prohibition on mobile phones, such a ban was not supported by the evidence received by the committee and instead suggested such a ban would cause harm and create barriers to detainees having access to justice. In fact, the evidence highlights the importance of mobile phones in allowing detainees to communicate with their legal representatives and external support networks.

1.15 Ms Fiona McLeod SC of the Law Council explained the significance of this issue, arguing that '[m]obile phones play a significant role in ensuring detainees can access timely legal advice, which is of course a fundamental underpinning of the rule of law...'<sup>15</sup> Both the Kaldor Centre for International Refugee Law and the Refugee

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10 Ms Pip de Veau, *Committee Hansard*, 27 October 2017, p. 29.

11 Australian Lawyers for Human Rights (ALHR), *Submission 34*, p. 3.

12 Legal Aid New South Wales, *Submission 49*, p. 3.

13 Law Council, *Submission 64*, p. 10.

14 Amnesty International, *Submission 62*, p. 4.

15 Ms Fiona McLeod SC, Law Council, *Committee Hansard*, 27 October 2017, p. 1.

Council of Australia (Refugee Council) highlighted the tight legal timeframes that often apply to detainees' cases, and emphasised that mobile phones can be critical to allow timely and private access to legal services.<sup>16</sup>

1.16 The Refugee Advice and Casework Service (RACS) argued that the bill does not appropriately weigh the benefits of mobile phones against their possible negative uses:

...the Bill fails to balance concerns over particular uses of mobile phones by a small number of people in immigration detention with the overwhelming number of safe, legitimate and important uses for them. The rationale for the Bill also underestimates the difficulties currently faced by people in detention in accessing legal services and the importance of mobile phones in this context.

1.17 These concerns take on particular significance when considering the adequacy of alternate communication facilities, the lived experience of legal representatives who have experienced barriers in speaking with their clients in a timely manner and the failure of the government to make a case that they have taken appropriate steps to ensure detainees have appropriate access to phones and other communication channels. The Refugee Council stated that it 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.<sup>17</sup>

1.18 The Refugee Council, Legal Aid NSW and Refugee Legal highlighted lived experience of lawyers who have experienced barriers in communicating with their clients:

Lawyers who spoke to RCOA [Refugee Council of Australia] 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.<sup>18</sup>

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16 Kaldor Centre, *Submission 52*, pp. 4–5; Refugee Council, *Submission 55*, p. 3.

17 Refugee Council, *Submission 55*, p. 3.

18 Refugee Council, *Submission 55*, p.

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 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.<sup>19</sup>

Telephone appointments in a private area generally require a period of notice, eg 24 hours, which is not always possible with urgent matters.<sup>20</sup>

Refugee Legal has had recent experience of trying to contact a person detained in an Alternative Place of Detention (APOD), where we were informed that the Serco staff had only one mobile for the facility so it could not be given to the applicant. The formal request process for arranging a telephone call was delayed, with the result that the person did not access legal advice in the required time.<sup>21</sup>

1.19 Moreover, as RACS highlighted, '[t]he Explanatory Memorandum promises that access to communication facilities will be maintained and enhanced but the Bill itself contains no provisions to this effect.'<sup>22</sup>

1.20 The committee also heard evidence from Rural Australians for Refugees about the increased risk factors of the detainee population competing for access to a limited number of public phones:

The limited number of landline telephones results 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.<sup>23</sup>

1.21 Given the importance of mobile phones to detainees to communicate with their legal representatives and external support network the Labor Party supports the Law Council recommendation that '[i]n the absence of evidence to suggest necessity and proportionality, immigration detainees should not be prevented from possessing

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19 Legal Aid New South Wales, *Submission 49*, pp. 6–7.

20 Refugee Legal, *Submission 69*, p. 6.

21 Refugee Legal, *Submission 69*, p. 6.

22 RACS, *Submission 50*, p. 2.

23 Rural Australians for Refugees, *Submission 26*, p. 3.

or using electronic devices such as mobile phones.<sup>24</sup> The Labor Party also supports the AHRC recommendation that '[t]he Australian Government should ensure that all people in immigration detention have adequate opportunities to communicate with people outside detention.'<sup>25</sup>

## **Recommendation 2**

**1.22 Labor Party senators recommend that the bill be amended in accordance with the second recommendation of the Law Council of Australia to ensure that detainees are not prevented from possessing or using electronic devices such as mobile phones unless there is evidence that their removal is both necessary and proportionate, and in accordance with the third recommendation of the Australian Human Rights Commission to ensure that all people in immigration detention have adequate opportunities to communicate with people outside detention.**

1.23 The Labor Party is also concerned that the current bill is not clear regarding a prohibition on detainees having direct access to their medication. As the ALHR submitted, it is troubling that 'if this Bill becomes law, detained refugees could be arbitrarily deprived of their essential medication'.<sup>26</sup>

1.24 The government has not made the case for detainees being deprived of their medication. This is a duty of care issue, and detainees should have the opportunity to be involved in the management of their own health. In order to ensure that the bill contains appropriate protections, the Labor Party endorses the third recommendation of the Law Council:

The reference to 'medications or health care supplements' in the note to subsection 251A(2) should be amended to ensure that medications obtained under prescription or supplements recommended by a health practitioner are not caught by the provision, and that it is only directed at narcotic or restricted substances.<sup>27</sup>

## **Recommendation 3**

**1.25 Labor Party senators recommend that the bill be amended in accordance with the third recommendation of the Law Council of Australia to ensure that medications obtained under prescription, or supplements recommended by a health practitioner, are not caught by the provision, and that the provision is directed only at narcotic or restricted substances.**

1.26 Labor Party senators recognise the need for increased search powers but believe the current bill does not contain sufficient safeguards. As argued by Refugee Legal:

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24 Law Council, *Submission 64*, p. 12.

25 AHRC, *Submission 11*, p. 4.

26 Australian Lawyers for Human Rights (ALHR), *Submission 34*, p. 3.

27 Law Council, *Submission 64*, p. 12.

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The extension of the search powers proposed by the Bill lacks adequate justification; fails to recognise the many different forms of immigration detention and the circumstances of detainees; and has concerning implications for the treatment of people in detention, including refugees and asylum seekers with past experiences of torture and trauma.<sup>28</sup>

1.27 The Law Council highlighted the implications of enabling a search for any prohibited item, rather than only for weapons and other similar things:

A power of search for dangerous weapons or means of escape is one thing. To extend the power of search to anything which might be a risk to the health, safety or security of person in the facility, or to the order of the facility allows the Minister to declare virtually any kind of item contraband subject to search. A pen or pencil and paper could be in that category.<sup>29</sup>

1.28 Labor senators share this concern that the measure is not appropriately targeted and support the fourth recommendation of the Law Council:

Paragraphs 252BA(1)(d) and (e), which would allow for the searches of detainees' personal effects and rooms without warrant, be amended and limited to situations where there is a reasonable suspicion of contraband in a detainee's possession.<sup>30</sup>

#### **Recommendation 4**

**1.29 Labor Party senators recommend the bill be amended in accordance with the fourth recommendation of the Law Council of Australia to limit searches of detainees' personal effects and rooms to cases where there is reasonable suspicion that contraband is in the detainee's possession.**

1.30 Labor senators are very conscious that a strip search is intrusive and is a significant imposition on the person being searched. Strip searches are sometimes necessary to ensure that detainees and staff are kept safe, but it is critical that the legislation contains adequate safeguards.

1.31 The Law Council highlighted that the bill would allow strip searches to be conducted where there is reasonable suspicion that the detainee possesses a 'prohibited thing'. Labor Party senators share the Law Council's concern that, given the breadth of items that may be determined 'prohibited things', the current bill is too broad. Given this, Labor Party senators support amending the bill in accordance with the fifth recommendation of the Law Council:

Subsection 252A, which would allow for the strip searches to be conducted for prohibited things, be amended and expressly refer to the principle that detainees not be searched unless there is a reasonable suspicion that illegal

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28 Refugee Legal, *Submission 69*, p. 2.

29 Law Council, *Submission 64*, p. 9.

30 Law Council, *Submission 64*, p. 14.

substances or items are in their possession and that strip searches only be conducted in exceptional circumstances.<sup>31</sup>

### **Recommendation 5**

**1.32 Labor Party senators recommend that the bill be amended in accordance with the fifth recommendation of the Law Council of Australia to expressly refer to the principle that detainees not be searched unless there is a reasonable suspicion that illegal substances or items are in their possession, and that strip searches only be conducted in exceptional circumstances.**

1.33 Labor senators acknowledge that detector dogs can be a useful tool for authorities to conduct reasonable searches, especially in the detection of illegal narcotic drugs. However, the use of detector dogs must acknowledge the particular vulnerabilities of people in immigration detention centres.

1.34 As expressed by Rural Australians for Refugees, '[f]or many people, seeing dogs during these search processes can bring to mind memories of police raids in countries of origin.'<sup>32</sup> Further, the Law Council noted that 'there are relevant cultural sensitivities in respect of the use of sniffer dogs that the Bill does not adequately address...'<sup>33</sup>

1.35 In addition to the protections already in the bill, Labor Party senators believe that detector dogs should only be used in a manner that respects these sensitivities and that steps should be taken to avoid causing detainees to suffer distress or trauma.

### **Recommendation 6**

**1.36 Labor Party senators recommend that the bill be amended to ensure that detector dogs are able to be used in immigration detention and transit centres, but are not permitted to be used on detainees.**

### **Recommendation 7**

**1.37 Subject to the preceding recommendations, Labor Party senators recommend that the bill be passed.**

**Senator Louise Pratt  
Deputy Chair**

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31 Law Council, *Submission 64*, p. 15.

32 Rural Australians for Refugees, *Submission 26*, p. 4.

33 Law Council, *Submission 64*, p. 16.