The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions]

November 2017

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Recommendations

Recommendation 1

2.81 The committee recommends that the department provide a central information registry regarding the status and location of immigration detainees in order to facilitate greater ease of communication with families, legal representatives and advocates.

Recommendation 2

2.82 The committee recommends that the government consider amending the bill in accordance with the third recommendation of the Australian Human Rights Commission, to ensure that detainees have access to communication facilities that will reasonably meet their needs, and enable timely, and where appropriate, private contact with friends, family, and legal services.

Recommendation 3

2.83 Subject to the preceding recommendations, the committee recommends that the Senate pass the bill.

Chapter 1

Introduction

1.1 On 14 September 2017 the Senate referred the provisions of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 14 November 2017.

1.2 The Selection of Bills Committee stated that the bill would see:

> …a significant change to the operation of Immigration Detention Centres. There is a level of concern among stakeholders about the proposed amendments that suggests that further examination of the bill is necessary.[1]

Purpose of the bill

1.3 The bill would enable the Minister for Immigration and Border Protection to determine things to be prohibited in immigration detention facilities, and would also increase the screening, search and seizure powers for authorised officers with respect to immigration detention facilities, detainees, and visitors to facilities. In his second reading speech the minister stated:

> This bill will ensure our officers can carry out their responsibilities properly, minimising unacceptable risks to the health, safety and security of persons in immigration detention facilities and to the order of these facilities.[2]

1.4 The Explanatory Memorandum (EM) presents the bill in the context of changes to the profile of detainees in immigration detention facilities:

> Immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional facility, including child sex offenders and members of outlaw motorcycle gangs or other organised crime groups.[3]

1.5 The EM further states that '[t]he presence of narcotic drugs and other dangerous things in the immigration detention network poses a risk to the ongoing safety, security and order across the network.' It also argues that '[t]he existing search and seizure powers in the Migration Act are not sufficient to manage narcotic drugs, mobile phones, SIM cards or other things that are of concern within the context of immigration detention facilities.'[4]

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1 Selection of Bills Committee, *Report No. 11 of 2017*, September 2017, Appendix 4.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 13 September 2017, p. 10181.

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

4 Explanatory Memorandum, p. 2.

Key provisions of the bill

1.6 Schedule 1 of the bill contains 35 items that would amend the *Migration Act 1958* (the Act). The key provisions of the bill are explained below.

Ministerial determinations of prohibited things

1.7 Proposed subsection 251A(2) would enable to minister to determine, by legislative instrument, a thing to be prohibited in immigration detention facilities, if the minister is satisfied that:

> (a) possession of the thing is prohibited by law in a place or places in Australia; or
>
> (b) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.[5]

1.8 A ministerial determination made under this proposed subsection would apply in relation to a person in detention, or in relation to an immigration detention facility.[6]

1.9 With respect to proposed paragraph 251A(2)(a), the EM states that it is currently intended that the minister will determine narcotic drugs and child pornography to be prohibited items.[7]

1.10 The bill includes the following note to clarify what might be considered to pose a risk:

> (a) mobile phones;
>
> (b) SIM cards;
>
> (c) computers and other electronic devices, such as tablets;
>
> (d) medications or health care supplements, in specified circumstances;
>
> (e) publications or other material that could incite violence, racism or hatred.[8]

1.11 The EM provides some further clarification about the items listed in the note. It states that the reference to medications or healthcare supplements is 'intended to capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person.' It also states that the reference to publications is 'intended to capture things which could pose a serious risk to the safety, security of persons in the facility and to the order of facilities.'[9]

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5 Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, proposed (the bill), ss. 251A(2).

6 Subsection 251A(1) of the bill.

7 Explanatory Memorandum, p. 6.

8 Section 251A of the bill.

9 Explanatory Memorandum, p. 6.

1.12 The EM also states that '[d]etainees will continue to have reasonable access to communication facilities in order to maintain contact with their support networks.'[10]

1.13 Prohibitions determined by the minister may apply to both immigration detention facilities and to Alternative Places of Detention (APODs). The EM explains that '[a]n APOD is a place of immigration detention used by the Department to meet the specific needs of detainees that cannot be adequately catered for in an [immigration detention centre].'[11] Some APODs are facility-based while others are '[n]on-facility-based places of accommodation in the broader community' including 'leased private housing, hotel and motel accommodation, hospitals and schools.'[12]

1.14 The proposed legislative instrument would not be disallowable by the Senate by virtue of Part 2 of the *Migration Act 1958* being exempt from the disallowance requirements of section 42 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Increased screening, search and seizure powers

1.15 The Act currently allows authorised officers to search a detainee to find out whether the person is carrying a weapon or an item capable of helping the person escape from immigration detention.[13] The bill would allow authorised officers to also search detainees 'to find out whether a prohibited thing [as determined by legislative instrument]…is hidden on the person, in the clothing or in the property.'[14]

1.16 The EM states that currently, common law is relied on when authorised officers search immigration detention facilities, including detainee accommodation and common areas.[15] The bill would insert new section 252BA to provide 'a clear and express statutory power for an authorised officer to undertake a search of an immigration detention facility…'[16] This would 'allow an authorised officer to search accommodation areas, administrative areas, common areas, detainees' personal effects, detainees' rooms, medical examination areas and storage areas to find prohibited things.'[17] The officer 'must not use more force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.'[18] Proposed section 252BB would also allow an authorised officer to be assisted by another person when conducting these searches if that assistance is

10 Explanatory Memorandum, p. 6.

11 Explanatory Memorandum, p. 7.

12 Explanatory Memorandum, p. 7.

13 *Migration Act 1958*, ss. 252(2).

14 Paragraph 252(2)(c) of the bill.

15 Explanatory Memorandum, p. 14.

16 Explanatory Memorandum, p. 14.

17 Explanatory Memorandum, p. 14.

18 Explanatory Memorandum, p. 15; Subsection 252BA(6) of the bill.

necessary and reasonable.[19] These new powers would enable searches of immigration detention facilities and facility-based APODs, but not of non-facility-based APODs.[20] A warrant is not required for these searches.[21]

1.17 The bill would also allow for authorised officers to use detector dogs when screening detainees or visitors as well as when searching immigration detention facilities.[22]

1.18 Currently, authorised officers may conduct a strip search to find a weapon or a thing that could help a detainee escape from immigration detention.[23] The bill would extend existing strip search powers to allow authorised officers to conduct strip searches of detainees in immigration detention facilities to find a prohibited thing. The officer must reasonably suspect that a prohibited thing is hidden on the detainee in order to be able to conduct a strip search.[24]

1.19 The bill also includes provisions for the retention, return, forfeiture, and disposal of prohibited things found by authorised officers when conducting searches.[25]

Financial implications of the proposed measures

1.20 The EM states that the proposed amendments would have no financial impact.[26]

Consideration by other committees

1.21 The bill was considered by the Parliamentary Joint Committee on Human Rights (PJCHR) and by the Scrutiny of Bills Committee (SBC).[27]

Parliamentary Joint Committee on Human Rights

1.22 The PJCHR made a number of points regarding the human rights implications of the bill and sought advice from the minister with respect to each of them. Its concerns primarily related to:

a) The prohibition of certain items from immigration detention facilities, such as mobile phones, and whether the prohibition is compatible with the right to privacy;[28] the right to freedom of expression;[29] or a proportionate

19 Explanatory Memorandum, p. 15.

20 Explanatory Memorandum, p. 14.

21 Explanatory Memorandum, p. 3.

22 Explanatory Memorandum, p. 11, pp. 14–15, pp. 19–20.

23 *Migration Act 1958*, ss. 252A(1).

24 Explanatory Memorandum, pp. 12–13.

25 Explanatory Memorandum, p. 9, pp. 16–17.

26 Explanatory Memorandum, p. 3.

27 Parliamentary Joint Committee on Human Rights (PJCHR), *Human Rights Scrutiny Report 11 of 2017*, October 2017, pp. 19–34; Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, pp. 38–43.

28 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 23.

limitation on the right not to be subject to arbitrary or unlawful interference with the family.[30]

b) The proposed amendments relating to the search and seizure powers and whether these powers are compatible with 'the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention';[31] whether the powers are a permissible limitation on the right to bodily integrity';[32] and whether the seizure powers, particularly the power to strip search, 'raises questions as to whether the bill is compatible with the rights of the child.'[33]

Scrutiny of Bills Committee

1.23 The SBC raised concerns that the bill may unduly trespass on personal rights and liberties of detainees as it would limit the possession of things such as mobile phones and introduce 'extensive search powers', noting that these provisions would apply to all detainees regardless of the level of risk they posed.[34]

1.24 The SBC noted that 'around half the detention population is not made up of high-risk individuals' and that:

> [t]he level of risk posed by persons detained due to the exercise of the Minister's character ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa.[35]

1.25 Additionally, the SBC noted that this bill would delegate the power to the minister to determine, through delegated legislation, a thing to be prohibited and that, in its view, such matters should be included in primary legislation unless sound justification is provided.[36] The SBC sought the minister's advice on this point, including why it is necessary and appropriate to delegate this power to the minister and what type of consultation is envisaged will be conducted prior to the making of the legislative instrument.[37]

1.26 The SBC also noted that the bill would allow increased search powers for 'authorised officers' and their assistants. It noted that its 'consistent scrutiny position is that coercive powers should generally only be conferred on government employees

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29 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 27.

30 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 25.

31 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 31.

32 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 33.

33 PJCHR, *Human Rights Scrutiny Report 11 of 2017*, October 2017, p. 33.

34 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 40.

35 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 40.

36 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 42.

37 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 42.

with appropriate training.'[38] The SBC sought the minister's advice on this point, including:

> (a) whether the power to conduct coercive searches would apply to non-government employees,
>
> (b) why it is necessary to confer powers on the assistants of authorised persons, and
>
> (c) what training will be required of persons conferred with these powers.[39]

Note on references

1.27 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

Conduct of the inquiry

1.28 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 13 October 2017.[40] The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received 82 submissions, which are listed at appendix 1 of this report. The committee also received 171 form letters, of which it published five samples.[41]

1.29 The committee held a public hearing in Canberra on 27 October 2017. The program of this hearing is at appendix 2 of this report.

Structure of this report

1.30 This report consists of two chapters:

- This chapter provides a brief overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised in submissions and at the public hearing, and provides the committee's views and recommendations.

Acknowledgements

1.31 The committee thanks all organisations and individuals that made submissions to this inquiry.

38 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 43.

39 Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, October 2017, p. 43.

40 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

41 See Ms Judith Worrall, *Submission 74*; Mr Freddie K.Y. Leong, *Submission 75*; Ms Gillian Blair, *Submission 76*; Dr Cecily Mason, *Submission 77*; and Ms Penny Jerrim, *Submission 78*.

Chapter 2

Key issues

2.1 The following key issues were raised by submitters and at the public hearing:

- The need for the bill.
- The proposed ministerial discretion to prohibit items.
- Particular items that may be prohibited.
- Increased search, screen and seizure powers.
- The nature of detention and constitutional concerns.

2.2 The Department of Immigration and Border Protection (the department) responded to submitters' key concerns at the public hearing on 27 October 2017 as well as in answers to questions on notice.

The need for the bill

2.3 The department submitted that the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) would 'better equip the Department to manage the heightened risk profile of the immigration detention population, and illegal activity that has been increasing across the detention network.'[1] To this end, the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, referred in his second reading speech to previous amendments to section 501 of the *Migration Act 1958* (the Act):

> Since these changes were enacted, we have cancelled the visas of 54 murderers, 223 child sex offenders and 150 organised crime figures. This action has resulted in a significant increase in criminals in our immigration detention facilities.[2]

2.4 The department provided the following statistics with respect to the 1257 detainees in the immigration detention network:[3]

- There were 879 detainees (or 70 per cent) rated as high risk.[4]
    - There were 446 detainees whose visas had been cancelled under section 501 of the Act, of which 421 were rated as high or extreme risk.[5]

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1 Department of Immigration and Border Protection (the department), *Submission 44*, p. 4.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 13 September 2017, p. 10180.

3 The statistics were current as at 30 September 2017.

4 Mr Kingsley Woodford-Smith, Assistant Commissioner, Detention and Offshore Operations Command, the department, *Committee Hansard*, 27 October 2017, p. 29.

5 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 29.

- There were 332 contraband items found in 2017-18 (to 30 September 2017), 1644 items found in 2016-17, and 1857 items found in 2015-16.[6]
- There were 26 cases of contraband being introduced by visitors in 2016-17 and 39 cases in 2015-16.[7]
- There were no successful escapes in 2017-18 (to 30 September 2017), six escapes in 2016-17 and 13 escapes in 2015-16.[8]
    - A detainee used a mobile phone to coordinate an escape in at least one of the escapes in 2016-17.[9]

2.5 Moreover, the department argued that there are several areas in which the current act does not clearly support officers to take action, including the ability to:

- 'restrict access to items that are not unlawful' but are of concern;
- 'search detainees, their possessions and their accommodation areas' for items of concern, including using detector dogs; and
- 'seize and retain or dispose of items of concern.'[10]

2.6 The department added that it has 'increasingly relied on the common law as the basis for taking certain action…for example, searching accommodation areas within detention facilities.'[11]

2.7 Several submitters questioned whether all detainees whose visa had been cancelled under section 501 of the Act had been convicted of serious offences or posed a risk to the order of immigration detention facilities.[12] The committee however notes that the gravity of the offences detailed in the elements of the section 501 character test would likely meet any casual observer's estimation of 'serious' conduct.

2.8 The Asylum Seeker Resource Centre (ASRC) outlined concerns regarding the current approach to assessing the risk posed by detainees:

> In our experience, many people categorised as 'medium' or 'high risk' are categorised as such not because of any previous instances of violence or threat of violence, but because of a perception of lack of compliance with the DIBP's detention regime in a general sense. This idea of 'compliance'

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6 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 30.

7 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 34.

8 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 36.

9 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 36.

10 *Submission 44*, p. 3.

11 *Submission 44*, p. 4.

12 See for example, Australian Human Rights Commission (AHRC), *Submission* 11, p. 7; Hunter Asylum Seeker Advocacy, *Submission 47*, p. 2; Brigidine Asylum Seeker Project, *Submission 48*, p. 4; National Justice Project, *Submission 58*, p. 2; Ms Christine Bourke and Mr Michael Chalmers, *Submission 60*, p. 2; Asylum Seeker Resource Centre (ASRC), *Submission 80*, paragraph 20.

> with the DIBP and its detention service providers, separate to any actual risk, appears to have become a norm in assessing risk. We are deeply concerned that risk assessment has become a tool to engender compliance rather than a genuine assessment of risk to others.[13]

2.9 The department explained that risk assessments consider 'a number of elements' including the detainee's criminal record, the number of incidents in immigration detention relating to the detainee, and also the detainee's intent and capability.[14] The department added the following in response to a question on notice:

> Serco has mechanisms in place to assess and calculate the security risk each immigration detainee poses within the Immigration Detention Network (IDN).
>
> Review mechanisms are also in place to ensure that individual risk ratings are appropriate for detainees.[15]

The proposed ministerial discretion to prohibit items

The breadth of ministerial discretion

2.10 Proposed subsection 251A(2) would enable the minister to determine a thing to be prohibited in immigration detention facilities. The Explanatory Memorandum (EM) states that '[t]his instrument will give the Minister flexibility to respond quickly if operational requirements change and, as a result, the things determined by the Minister and the things to be prohibited need to be amended.'[16]

2.11 Some submitters posited that it would be preferable to list the prohibited items in statute rather than allow the minister to prohibit items by legislative instrument.[17] Ms Fiona McLeod SC of the Law Council of Australia (Law Council) stated that this would benefit 'clarity and transparency', while Legal Aid New South Wales (Legal Aid NSW) argued that delegated legislation 'is not subject to the same degree of Parliamentary scrutiny.'[18]

2.12 However, the department explained why the bill provides for ministerial discretion rather than listing all items to be prohibited:

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13 *Submission 80*, paragraph 28.

14 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 29.

15 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 6.

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

17 See for example, Legal Aid New South Wales (Legal Aid NSW), *Submission 49*, pp. 4–5; Law Council of Australia (Law Council), *Submission 64*, pp. 9–10; Ms Katie Wrigley, Senior Solicitor, Civil Law Division, Government Law Team, Legal Aid NSW, *Committee Hansard*, 27 October 2017, p. 15.

18 Ms Fiona McLeod SC, President, Law Council, *Committee Hansard*, 27 October 2017, p. 5; Legal Aid NSW, *Submission 49*, p. 5.

> You either define [a prohibited thing] by way of making an assessment as to how it can be used and the risk it poses, which is what has happened here, or you can try to attempt to provide an exhaustive list. I think that would be probably almost impossible and quite unwieldy in terms of its currency. So the way it's been crafted is to provide the ability to make decisions about the risks that things present, but it's bounded within the framework of having to be something that is 'a risk to the health, safety or security of persons in the facility, or to the order of the facility.'[19]

2.13 The Law Council questioned the need for paragraph 251A(2)(a):

> Possession of these items may already be illegal, and searches for such items are already permitted at law. Further, existing powers under section 252 of the Migration Act already permit authorised officers to conduct searches and confiscate items deemed to pose a risk to safety and security.[20]

2.14 The department explained that the purpose of proposed paragraph 251A(2)(a) (regarding items that are already illegal in Australia) is to allow the minister to determine an item to be a 'prohibited thing' under proposed section 251A, thereby triggering the associated search, screen and seizure powers in the bill. Without the proposed legislative instrument, the thing would still be prohibited under Australian law but authorities would require reasonable suspicion or a warrant to search for it.[21]

2.15 Many submitters expressed concern about the breadth of proposed paragraph 251A(2)(b) (regarding items that pose a risk to immigration detention facilities).[22] For instance, Refugee Legal referred to the proposal as 'an unjustifiably broad personal power' and highlighted that '[t]he Minister need only be satisfied that the thing "might" be a risk, a very low threshold.'[23]

2.16 Many submitters were also concerned that the proposed legislative instruments would enable blanket prohibition of certain items for all detainees in immigration detention facilities, regardless of the risk posed by an individual

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19 Ms Pip de Veau, First Assistant Secretary, Legal Division, the department, *Committee Hansard*, 27 October 2017, p. 32.

20 *Submission 64*, p. 9.

21 Ms De Veau, *Committee Hansard*, 27 October 2017, pp. 24–25.

22 See for example, Combined Refugee Action Group, *Submission 30*, p. 1; Brigidine Asylum Seeker Project, *Submission 48*, p. 6; Refugee Advice and Casework Service (RACS), *Submission 50*, p.1; Kaldor Centre for International Refugee Law (Kaldor Centre), *Submission 52*, pp. 2–3; New South Wales Council for Civil Liberties (NSW Council for Civil Liberties), *Submission 54*, p. 4; Refugee Council of Australia (Refugee Council), *Submission 55*, pp. 2–3; Refugee Legal, *Submission 69*, pp. 4–5;

23 *Submission 69*, p. 4.

detainee.[24] The Refugee Advice and Casework Service (RACS) argued that '…the Bill's failure to distinguish between high risk and low risk detainees is of significant concern.'[25]

2.17 Some submitters argued that prohibiting items, such as mobile phones, for all detainees rather than on the basis of risk assessments may disproportionately limit detainees human rights, including the right to privacy, right to family life, and right to freedom of expression.[26]

2.18 In considering these issues, the Australian Human Rights Commission (AHRC) recommended that:

> …the Bill be amended to stipulate that items that do not present inherent risks to safety and security may only be prohibited in immigration detention:
>
> - on the basis of individual risk assessments
> - where there is evidence that the person has used or is reasonably likely to use the item in a manner that presents clear risks to safety or security; and
> - where those risks cannot be managed in a less restrictive way.[27]

2.19 Mr Edward Santow of the AHRC explained the importance of this recommendation for items that have a 'dual use':

> In relation to something that may have more than one use—that is, an innocuous use or a dangerous use, and a mobile phone is an example of that—we're concerned that the minister is being put in, essentially, an invidious position, because the minister won't be able to identify the nuance in the particular situation. Whoever the decision-maker is…if they are able to consider the specific risks of an individual using a mobile phone—that is, the specific risks of a specific individual using a mobile phone—then they'll be able to tailor the restriction appropriately and it will be no more restrictive than is needed in the circumstances.[28]

2.20 However, the department explained that the bill allows the minister to prohibit items only in certain cases, rather than a blanket restriction. For instance, the legislative instrument may be drafted such that 'it only targets prescription medication

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24 See for example, Supporting Asylum Seekers Sydney (SASS), *Submission 21*; Liberty Victoria, *Submission 25*, p. 4; Refugee Advice & Casework Service (RACS), *Submission 50*, pp.2–4; Kaldor Centre, *Submission 52*, p. 3; National Justice Project, *Submission 58*, p. 2; Amnesty International, *Submission 62*, pp. 1–2; Castan Centre for Human Rights Law at Monash University (Castan Centre), *Submission 79*, p. 2.

25 *Submission 50*, p. 4.

26 Legal Aid NSW, *Submission 49*, pp. 3–6; Castan Centre, *Submission 79*, p. 3, p. 5, p. 7.

27 *Submission 11*, p. 4.

28 Mr Edward Santow, Human Rights Commissioner, AHRC, *Committee Hansard*, 27 October 2017, p. 23.

that is not otherwise dispensed or prescribed to you', or that it prohibits '"mobile phones in centres X, Y and Z".'[29]

2.21 The department however cautioned that the prohibition of items such as mobile phones may be necessary to ensure the safety and security of detainees and staff throughout the immigration detention network. The department stated that:

> [r]emoving things such as mobile phones from the [immigration detention network] altogether, rather than providing only certain detainees with access, has been assessed as the most effective way to mitigate risk.…It is the least restrictive way to manage the threat that things such as mobile phones pose to the [immigration detention network], as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics from other detainees.[30]

Review of ministerial determinations

2.22 Due to existing provisions, determinations made by the minister via the proposed legislative instrument would not be disallowable by the Senate.[31] This raised concerns from some submitters.[32]

2.23 Additionally, some submitters expressed concern that the bill does not provide for administrative review of ministerial determinations.[33] As stated by Mr Paul Power of the Refugee Council of Australia (Refugee Council), '[w]e are concerned that other items are being declared prohibited without the need to provide justification and with no form of independent review.'[34]

2.24 The National Justice Project similarly argued that ministerial determinations would 'fall within the definition of a privative clause decision for the purposes of the *Migration Act*', and therefore would not be subject to judicial review.[35]

2.25 However, the department explained that the legislative instrument would be judicially reviewable under section 39B of the *Judiciary Act 1903*:

> …a court might say that food, without any further qualifications, doesn't meet the test that is required for it to be on the list; namely, that it presents

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29 Ms de Veau, *Committee Hansard* , 27 October 2017, pp. 27–28.

30 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), pp. 6–7.

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

32 RACS, *Submission 50*, p 1; Refugee Legal, *Submission 69*, p. 5.

33 National Justice Project, *Submission 58*, p. 3; Law Council, *Submission 64*, pp. 9- 10; Ms Fiona McLeod SC, Law Council, *Committee Hansard*, 27 October 2017, p. 5; Mr Paul Power, Refugee Council, *Committee Hansard*, 27 October 2017, p. 12.

34 Mr Power, Chief Executive Officer, Refugee Council, *Committee Hansard*, 27 October 2017, p. 12.

35 National Justice Project, answers to question on notice, 27 October 2017 (received 3 November 2017), pp. 2–3.

> the risks that are outlined in that section of the bill, and therefore it's not valid. So there is the ability to have it considered and reviewed.[36]

Particular items that may be prohibited

2.26 Submitters expressed concern that the bill would allow the minister to prohibit items that may benefit detainees. In particular, submitters and witnesses were concerned about a prohibition of mobile phones, food items and medication.

2.27 The department reiterated that an item would only be prohibited if the minister was appropriately satisfied of the risk posed by the item, and further stated that '[t]his satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.'[37]

Mobile phones

2.28 The EM states that that mobile phones may be prohibited as there is evidence that they have been used for various negative purposes, including 'to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats.'[38]

2.29 Numerous submitters noted that prohibition of mobile phones could have negative implications for detainees. In general, these concerns related to detainees' wellbeing[39], access to legal services[40], and freedom of political communication[41].

The wellbeing of detainees

2.30 Ms Christine Bourke and Mr Michael Chalmers argued that detainees' 'use of a mobile to make contact with their family and with those who seek to assist them is crucial to their mental and emotional wellbeing.'[42] Refugee Legal further emphasised that people are in detention facilities for an average of 445 days, and therefore the ability of detainees to contact friends and family '…in private without navigating

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36 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 35.

37 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 6.

38 Explanatory Memorandum, p. 2.

39 See for example, Federation of Ethnic Communities' Councils of Australia and the Settlement Council of Australia, *Submission 1*, p. 2; SASS, *Submission 21*, p. 3; Ms Jackie Mayers, *Submission 43*, p. 2; Brigidine Asylum Seeker Project, *Submission 48*, p. 5; Immigration Advice and Rights Centre, *Submission 51*, pp. 4–5, Refugee Legal, *Submission 69*, p. 6.

40 See for example, Liberty Victoria, *Submission 25*, pp. 2–4; Legal Aid NSW, *Submission 49*, pp. 6–7; RACS, *Submission 50*, pp. 2–3; Kaldor Centre, *Submission 52*, pp. 4–5; NSW Council for Civil Liberties, *Submission 54*, pp. 4–6; National Justice Project, *Submission 58*, p. 4; Refugee Legal, *Submission 69*, pp. 5–6.

41 See Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 3.

42 *Submission 60*, p. 3.

administrative or practical barriers, is of crucial importance for maintaining family relationships and mental health.'[43]

2.31 The Refugee Council also argued that detainees' mobile phones can be important for family and children who are not in detention, submitting 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.[44]

Detainees' access to legal services

2.32 RACS argued that prohibiting detainees from possessing mobile phones would exacerbate the effect of existing barriers to legal advice. It highlighted the tight legal timeframes that apply to many elements of Australian refugee law, and argued that it is therefore critical that detainees' can quickly access legal services.[45] Refugee Legal added that '[t]elephones in public areas of the detention centre are not appropriate for discussing legal matters, frequently involving sensitive or personal subject matter.' Moreover, '[t]elephone appointments in a private area generally require a period of notice, eg 24 hours, which is not always possible with urgent matters.'[46]

2.33 With respect to claims that the bill may reduce detainees' access to legal services, the department referred to section 256 of the Act:

> That provision quite specifically calls out a positive obligation. Where people are in detention facilities, there's a positive obligation to provide 'all reasonable facilities' to obtain legal advice or for that person to be able to take legal proceedings.[47]

2.34 However, RACS submitted that despite this statutory requirement, 'the ability of detainees to communicate with legal representatives is often frustrated in practice.'[48] The Law Council also referred to section 256 and submitted that:

> [n]oting that many detainees are vulnerable, lacking financial resources, and without English capability, it is already difficult and onerous for them to take the step of seeking legal advice.[49]

Detainees' freedom of political communication

2.35 The Kaldor Centre for International Refugee Law (Kaldor Centre) raised the possibility that prohibiting mobile phones may infringe the implied freedom of

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43 *Submission 69*, p. 6.

44 *Submission 55*, p. 3.

45 *Submission 50*, pp. 2–3.

46 *Submission 69*, p. 6.

47 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 25.

48 *Submission 50*, p. 2.

49 *Submission 64*, p. 8.

political communication. Dr Sangeetha Pillai of the Kaldor Centre argued that prohibiting mobile phones would impose:

> …a burden on communication about political matters. The lack of a compelling justification for a blanket prohibition on such communication devices in detention centres and the availability of less burdensome means by which the end of securing safety, security and order in detention centres might be achieved creates a real risk that the bill may also infringe the implied freedom of political communication.[50]

Alternative communication facilities

2.36 The inquiry accepted the evidence of the Department that considered detainees who could not possess mobile phones would have access to adequate alternative communication facilities.

2.37 According to the EM, '[d]etainees will continue to have reasonable access to communication facilities in order to maintain contact with their support networks', including via 'landline telephones, facsimile, internet access in compliance with the Conditions of Use of Internet agreement, postal services and visits.' The department stated that 'there's access to computers as well across the network, largely 24/7' which offer email, Facebook, and in some cases Skype.[51]

2.38 Further, the department submitted that it will review the availability of alternative facilities and that previous reviews have resulted in additional landline phones at most immigration detention facilities.[52] The department also set out the required process for access to incoming calls:

> …the Service Provider (Serco) must make provision for Detainees to have access to incoming telephone calls at any time; and notify Detainees of any calls received for them when the Detainee was not available to receive the call.
>
> Due to the nature of the infrastructure at each facility, some facilities allow external phone calls direct to accommodation area telephones at any time of the day or night. The remaining facilities call-divert to a manned control room after 8pm. However, in the latter case if the call is not an emergency call, Serco receipt a message and pass the message to the detainee the following morning.[53]

50 Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 3.

51 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, pp. 25–26.

52 *Submission 44*, p. 5.

53 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 13.

2.39 Nonetheless, several submitters expressed concern about the adequacy of alternative communication facilities.[54] The AHRC noted that:

> …providing access to additional landline phones is not equivalent to permitting possession of mobile phones. For example, most landline telephones in immigration detention facilities are located in public areas. While facilities for private phone calls are generally available, they are often accessible on request rather than on demand and cannot be accessed at all times.[55]

2.40 Ms Katie Wrigley, Legal Aid NSW, provided an account of the difficulties currently faced when contacting detainees who do not have a mobile:

> There is no central number or contact point where I can find out which immigration detention centre my client is located within, and my clients are moved frequently between those centres. The process to find out the location of your client is to telephone each individual detention centre around Australia. This can take some time, spelling out your client's full name and date of birth each time and only receiving a, 'Yes, they are here,' or, 'No, they are not,' answer.[56]

2.41 Further, Mr Prince of the Law Council argued that this issue 'has to be understood also in the context of Serco…moving detainees around the country', meaning that a detainee's mobile phone may be 'the only form of contact' they have with family and friends.[57]

Certain food items

2.42 A number of submitters, including volunteer visitors to immigration detention facilities, raised concerns about the prohibition of certain food items in immigration detention facilities.[58] Restrictions on bringing certain food into the facilities were recently introduced under policy and could be further supported by a ministerial determination under the bill.[59]

2.43 Supporting Asylum Seekers Sydney argued that '[t]hese restrictions on food that visitors can take in has become a collective punishment for a cohort who are not

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54 See for example, AHRC, *Submission 11*, pp 9–11; Legal Aid NSW, *Submission 49*, pp. 6–7; Refugee Council, *Submission* 55, p. 3; ASRC, *Submission 80*, pp. 7–8; Mr Prince, Law Council, *Committee Hansard*, 27 October 2017, p. 8.

55 *Submission 11*, p. 10.

56 Ms Wrigley, *Committee Hansard*, 27 October 2017, p. 10.

57 Mr David Prince, Chair, Migration Law Committee, Law Council, *Committee Hansard*, 27 October 2017, p. 6.

58 See for example, Mr Gerald Grove-White, *Submission 13*, pp. 3–4; SASS, *Submission 21*, pp. 5–6; Dr Graeme and Mrs Susan Swincer, *Submission 66*, p. 2; Ms Christine Wang, Ms Isobel Blomfield, Ms Sarah Easy, Ms Christine Maibom, Mr Adrian Vipond, Ms Zoe Stojanovic-Hill, *Submission 68*, pp. 2–3; ASRC, *Submission 80*, p. 13.

59 Ms de Veau and Mr Woodford-Smith, the department, *Committee Hansard*, 27 October 2017, pp. 34–35.

meant to be punished.'[60] It also submitted that there are many benefits to bringing food to share with detainees, and that previously:

> …we were allowed to bring in fresh food consisting of a lot of fruit, flat breads, Middle Eastern dips, bakery bread, and other foods commonly eaten in the respective home countries of the detainees. We took in food that would not normally be served in an institution, for example, mangoes, strawberries, watermelon. This was greatly appreciated and enjoyed by the asylum seekers. The food we took in provided variety to their diets, and had become a method of encouraging social interaction and friendship.[61]

2.44 The department argued that '[f]ood items are also being used as a method for concealing contraband being brought into immigration detention facilities, this includes narcotic drugs and prescription medications.'[62] The department also holds health concerns:

> From our perspective, with takeaway food or home-cooked food—which the centre has no understanding of how it's been prepared or looked after—the opportunity is there to introduce bacteria into the centre, which maybe creates gastro or any number of diseases within the centre.[63]

2.45 The department further explained what kinds of food are permissible:

> …in discretionary circumstances, prior approval can be sought to allow entry of a specified thing, for example alcohol for use in approved religious ceremonies, birthday cakes, fruit and special purpose foods.
>
> Other food items can be brought in by visitors if they are commercially packaged and labelled, factory sealed, have visible and valid expiry date and the prescribed name is easily identified and complies with Australian and New Zealand Food Standards Code.
>
> Food brought in by visitors cannot be contained in any metal or glass packaging and the amount of food must be proportionate to the needs, duration and intent of the visit. The food is to be consumed in the visitors area only; and any leftover food is to be disposed of at the end of the visit or removed from the premises by the visitor.[64]

Medication and other items

2.46 The EM states that medication is listed in the note to proposed section 251A in order to 'capture circumstances where a person in an immigration detention facility may be in possession of medication that has been prescribed for another person.'[65] The department submitted that:

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60 *Submission 21*, p. 6.

61 *Submission 21*, p. 5.

62 *Submission 44*, p. 7.

63 Mr Woodford-Smith, *Committee Hansard*, 27 October 2017, p. 35.

64 *Submission 44*, pp. 6–7.

65 Explanatory Memorandum, p. 6.

> [t]here has been a significant increase of prescription medication such as Xanax and Suboxone being found in the possession of detainees who do not hold a prescription for these medications. The misuse of medications are a serious risk to health and safety of detainees, they are also being used as a form of currency.[66]

2.47 In contrast the Law Council recommended that:

> [t]he 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.[67]

2.48 The department highlighted that 'there is a satisfaction that the minister has to reach before something can become a prohibited thing.' In response to concerns that some stationery items could be banned, the department provided reassurance that 'I can't imagine that pens and paper would fall into that category [of a prohibited thing].'[68]

Increased search, screen and seizure powers

The basis on which searches may be conducted

2.49 Several submitters expressed concern that the proposed search powers could be exercised without a warrant or reasonable suspicion and are therefore disproportionate.[69] Refugee Legal posited that:

> [a] power to search to "find out whether" a prohibited item is at the facility is very broad. It should be noted that the power extends to searching detainees' rooms and personal effects, interfering with their privacy.[70]

2.50 Similarly, the Law Council submitted that '…there are inadequate protections for detainees that may have their personal effects and rooms, intruded upon.' It argued that '…regardless of the status of the detainee, any power to search a person's room and property should be limited to where there is at least a reasonable suspicion that some contraband is in their possession.'

2.51 The ASRC expressed another concern, which related to the ability of officers conducting searches:

> …it is unacceptable that invasive powers to search are handed to private contractors and their undefined 'assistants'. There seems to be no requirement that authorised officers or their assistants have completed any training in relation to the use of such powers including against people who

66 *Submission 44*, p. 7.

67 *Submission 64*, p. 12.

68 Ms de Veau, *Committee Hansard*, 27 October 2017, p. 31.

69 See for example, Liberty Victoria, *Submission 25*, p. 2; RACS, *Submission 50*, p. 4; ASRC, *Submission 80*, p. 9.

70 *Submission 69*, p. 7.

> often have acute vulnerabilities. We are concerned that there is extensive opportunity for misapplication and misuse of these powers.[71]

Locations that may be searched

2.52 The EM makes clear that proposed sections 252BA and 252BB would allow searches, without warrant, of 'immigration detention facilities operated by or on behalf of the Commonwealth', which include 'accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas.'[72]

2.53 Regarding medical examination areas, the Refugee Council submitted that:

> [t]here 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.[73]

2.54 A number of submitters expressed concern that the bill may allow searches at certain types of Alternative Places of Detention (APODs), including Immigration Transit Accommodation facilities or leased private housing, hospitals and schools.[74] However, in an answer to a question on notice, the department stated that the proposed search and seizure powers are limited 'to ensure they only apply to places owned or operated by the Commonwealth and, as such, these powers will not extend to private homes being used as non-facility-based APODs.'[75]

Use of detector dogs

2.55 Submitters, including many of those who submitted a form letter, expressed concern about the use of detector dogs for searches.[76] The ASRC expressed particular concerned about the use of dogs in an immigration detention facility setting, and submitted that '[r]ecognising that people in detention come from a variety of cultural backgrounds, it must be considered that dogs are particularly distressing and in some cases intolerable for particular cultures and religions.'[77] A similar point was made by Mr Prince of the Law Council:

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71 *Submission 80*, p. 9.

72 Explanatory Memorandum, p. 3.

73 *Submission 55*, p. 5.

74 See for example, Legal Aid NSW, *Submission 49*, pp. 7–8; Refugee Council, *Submission 55*, p. 5; Refugee Legal, *Submission 69*, p. 7; Mr Prince, Law Council, *Committee Hansard*, 27 October 2017, p. 6.

75 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 3.

76 See for example, Ms Penny Jerrim, *Submission 78*, p. 1.

77 *Submission 80*, p. 9.

> I think it is important to recognise—especially for asylum seekers and refugees, who have already experienced trauma—that these types of intrusive powers will further add to their trauma and affect their mental wellbeing.[78]

2.56 The Law Council held further concerns about the protections surrounding searches, with Mr Prince arguing that '[t]here are no safeguards here, apart from: "Do your best not to let the dog touch the individual."'[79] Further, the Law Council submitted that '[t]here is nothing in the Bill that prohibits the use of sniffer dogs in a manner intended to harass or intimidate detainees', and that 'there are relevant cultural sensitivities in respect of the use of sniffer dogs that the Bill does not adequately address, notwithstanding proposed ss 252AA(3A) and 252BA(4).'[80]

2.57 Liberty Victoria held similar concerns, submitting that '[t]he power to use dogs to conduct searches is disproportionate and inappropriate.' It added that '[t]here is no requirement that the dog be reasonably necessary to effect the purpose of the search.'[81]

2.58 Additionally, the New South Wales Council for Civil Liberties doubted the effectiveness of trained dogs detecting contraband. It referred to a June 2006 report of the NSW Ombudsman concerning the general use of detector dogs, which 'reported that: "No drugs were located in almost three-quarters of searches following indications, raising questions about the accuracy of drug detection dogs…"'[82]

2.59 The department's submission outlined the procedure relating to the use of dogs for searches:

> The dogs are trained to give a passive or "sit" response where they detect a person may be carrying or concealing something or a pawing or scratching response to areas (not persons) where things may be hidden. Departmental officers involved in using a dog to conduct a screening procedure will be specifically authorised for the purpose of handling a dog and will have undergone extensive training in handling detector dogs.[83]

2.60 Further, the department highlighted that:

> …there are specific safeguards, and the safeguard that has been included in the bill is one that has been modelled on a series of compatible interstate pieces of legislation where detector dogs are used. The provision is that each of the areas where the introduction of the use of a dog as a screening procedure or a searching procedure has been included says that the officer must take all reasonable precautions to prevent the dog touching any person

78 Mr Prince, *Committee Hansard*, 27 October 2017, p. 6.

79 Mr Prince, *Committee Hansard*, 27 October 2017, p. 9.

80 *Submission 64*, p. 16.

81 *Submission 25*, p. 5.

82 NSW Council for Civil Liberties, *Submission 54*, p. 7.

83 *Submission 44*, p. 9.

> other than the officer and keep the dog under control while conducting the screening procedure.[84]

Provisions regarding strip searches

2.61 The Immigration Advice & Rights Centre argued that allowing strip searches to find any prohibited item would be '…disproportionate to the intention of the bill.' It stated that '[i]t is difficult to accept that mobile phones, tablets and health supplements pose the same immediate threat as a weapon or other thing capable of inflicting bodily injury so as to justify extending the strip search powers.'[85] The ASRC made a similar point, submitting that:

> [w]e note that many people in detention have acute vulnerabilities including because of their experiences in detention. Where the search for a 'prohibited thing' falls outside of a weapon or thing capable of inflicting bodily injury, we do not believe that the rights of an authorised officer to strip search a person to find a 'prohibited thing' is proportionate to the violation of that person's rights, the potential for trauma and distress.[86]

2.62 The Law Council recommended that strip searches '…only be conducted in exceptional circumstances…' and the Kaldor Centre recommended that the legislation should '…require strip searches to be used as a last resort…'[87]

2.63 On behalf of the AHRC, Mr Santow acknowledged that '…a strip search is a very significant impingement on an individual's basic human rights.'[88] The AHRC advanced that 'the expansion of the scope of strip search powers has the potential to result in such searches becoming routine', and emphasised the importance of independent oversight to ensure that strip searches 'are applied in a reasonable and proportionate manner.' It recommended that the bill:

> …be amended to provide that:
>
> - the Department must maintain a log of the conduct of strip searches including details about the compliance with each of the requirements of ss 252A and 252B of the Migration Act
> - the Department must notify the Commonwealth Ombudsman when it receives a complaint about the conduct of a strip search
> - the Commonwealth Ombudsman have the power to inspect the records of the Department in relation to the conduct of strip searches for the purpose of reviewing the Department's processes for conducting strip searches and dealing with complaints

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84 Ms de Veau, *Committee Hansard,* 27 October 2017, p. 36.

85 *Submision 51*, p. 6.

86 *Submission 80*, p. 9; see also Law Council, *Submission 64*, p. 15.

87 Law Council, *Submission 64*, p. 15; Kaldor Centre, *Submission 52*, p. 5.

88 Mr Santow, *Committee Hansard,* 27 October 2017, p. 20.

- the Commonwealth Ombudsman must conduct an annual review and prepare a report about the comprehensiveness and adequacy of the Department's internal processes relating to strip searches to be tabled in Parliament
- the Commonwealth Ombudsman have the power to conduct ad hoc reviews into the way in which strip searches are conducted at any time.[89]

2.64 The AHRC stated that these recommendations resemble, to some degree, existing provisions in the *Australian Federal Police Act 1979*. Those provisions allow for the Commonwealth Ombudsman to oversee the Australian Federal Police process for internal review of complaints.[90]

2.65 The department responded to each element of the above recommendation in its response to a question on notice. The department's overall view was that:

> [t]he Department considers that the intent of recommendation 5 of the submission from the Australian Human Rights Committee (AHRC) is already sufficiently addressed by the *Ombudsman Act 1976* (the Ombudsman Act) and further supported by the section 499 Ministerial Direction No.51 (the Direction) and the Detention Services Manual of the Department (the DSM).[91]

2.66 The department further stated that:

> [s]trip searches are only undertaken as a measure of last resort. There must be good reasons based on reasonable suspicion that a strip search is warranted. There are many safeguards built into the legislation to ensure that the power is not abused and officers are accountable for its use.[92]

The nature of detention and constitutional concerns

2.67 Some submitters argued that the measures in the bill are more suited to a criminal context than administrative detention.[93] The Law Council submitted that:

> The proposed new coercive powers in the Bill are similar to powers that apply in a criminal law context. It is not proportionate to apply such powers in the case of immigration detention where detainees are innocent and vulnerable people…[94]

89 *Submission 11*, pp. 12–13.

90 AHRC, answers to question on notice, 27 October 2017 (received 3 November 2017).

91 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), pp. 9–10.

92 The department, answers to questions on notice, 27 October 2017 (received 6 November 2017), p. 10.

93 See for example, Law Council, *Submission 64*, p. 5; Ms McLeod SC, Law Council, *Committee Hansard*, 27 October 2017, p. 1; Mr Khanh Hoang, Kaldor Centre, *Committee Hansard*, 27 October 2017, p. 2;

94 *Submission 64*, p. 5.

2.68 The AHRC emphasised the importance of proportionality in any new measures, noting that Australia's human rights obligations '…require Australia to ensure that people in detention are treated fairly and reasonably, and in a manner that upholds their dignity.'[95]

2.69 Legal Aid NSW explained that the nature of detention is also significant from a constitutional perspective, and referred to *Al-Kateb v Godwin* where the High Court 'confirmed…that detention pursuant to the Migration Act is administrative detention, "it is not a form of extra-judicial punishment" and it is "not detention for an offence".'[96] This point was further explained by Ms McLeod SC of the Law Council:

> It's very clear that administrative detention does not and must not have a punitive character for it to survive a constitutional challenge. That is, the courts have asserted a fundamental issue concerning constitutionality or the separation of powers, and that's because, if you create an administrative detention centre as a punitive centre, then you commit the administration to exercise powers of criminal process, if you like. [97]

2.70 Dr Pillai, Kaldor Centre, explained why the bill may be open to constitutional challenge:

> In every case that has considered whether immigration detention is compatible with the constitutional separation of judicial power or not, the question has involved detention that is seen as reasonably necessary for the purposes of affecting consideration of a visa or affecting deportation…This legislation potentially creates something quite different, where the conditions of detention—for the purposes of dealing with a cohort that is said to involve an increasing number of people who have had a history of criminality—are made prisonlike. That potentially raises quite a different question that very well may give rise to a viable constitutional challenge.[98]

2.71 In the view of the AHRC, '[t]he fact that immigration detention cannot be undertaken for a punitive purpose heightens the importance of minimising the impingement on the human rights of people who are detained.'[99]

Committee View

2.72 The committee strongly supports the objective of this bill, namely to maintain health, safety, security, and good order in immigration detention facilities. This aim is particularly important in light of the changing profile of detainees in immigration detention centres, of whom 70 per cent are assessed to be high risk.

2.73 Nonetheless, the committee also accepts that there is a broad mix of detainees in immigration detention facilities, ranging from those seeking asylum to those whose

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95 *Submission 11*, p. 5.

96 Legal Aid NSW, *Submission 49*, pp. 3–4.

97 Ms McLeod SC, *Committee Hansard*, 27 October 2017, p. 3.

98 Dr Pillai, *Committee Hansard*, 27 October 2017, p. 5.

99 Australian Human Rights Commission, *Submission 11*, p. 5.

visa has been cancelled on serious character grounds such as outlaw motorcycle gang membership. The committee notes that the presence of section 501 immigration detainees requires greater vigilance on the part of the department to ensure its stated objectives are achieved: the protection of all detainees; the safe and secure operation of detention centres; the safety of employees in these centres; and the security of the wider community. The committee is of the view that diluting the measures contemplated in the bill would fundamentally impair the achievement of these objectives.

2.74 The committee accepts the department's advice that prohibitions would be subject to the minister being satisfied beyond a specified threshold, and that ministerial determinations would be informed by departmental intelligence-based briefings. The committee is further satisfied by the department's evidence that the inclusion of a prescriptive list of prohibited items in the bill would have a limiting effect on the purpose of the amendment.

2.75 The committee is conscious of submitters' concerns regarding the proposed ministerial discretion. The committee is of the view, however, that the assessment of risk, and the application of the new measures, rests with departmental and detention centre staff under the guidance of the relevant legislative scheme. The committee is satisfied that risk assessments will continue to be made on a case-by-case basis in accordance with relevant legislative and regulatory schemes, and without compromising the human rights of immigration detainees.

2.76 Committee members are satisfied that the department is mindful of all of its obligations regarding the human rights of detainees—particularly in respect of searches of property and persons—and are confident that the new legislative scheme provided by this bill will be deployed in line with best practice.

2.77 Many of the submissions expressing concern about the measures in the bill appear to contemplate bad faith on behalf of either the department or the minister. The committee rejects this suggestion completely and notes that no credible evidence has been presented that would lend any credence to such an imputation.

2.78 The committee accepts the department's concerns regarding the negative ways in which mobile phones have been used in immigration detention facilities, and recognises that prohibitions may be necessary in some circumstances to ensure the health, safety, security, and good order of immigration detention facilities. The committee acknowledges the department's advice that it may not be feasible to prohibit items, such as mobile phones, in relation to only a subset of detainees

2.79 The committee further notes that the department has provided evidence that the individual protections and rights of review sought by submitters, in particular those detailed in the recommendations of the AHRC, already operate under the auspices of existing legislative and regulatory schemes.

2.80 The committee does, however, agree that providing immigration detainees with a means of communication with advocates and support networks is an important operational function of immigration detention in Australia. While acknowledging the reasons for restricting the presence of mobile telephony and data devices in

immigration detention centres, the committee urges the department to review—with a view to augmenting—communications infrastructure within immigration detention centres, with the possible aim of providing additional private communications facilities.

Recommendation 1

2.81 The committee recommends that the department provide a central information registry regarding the status and location of immigration detainees in order to facilitate greater ease of communication with families, legal representatives and advocates.

Recommendation 2

2.82 The committee recommends that the government consider amending the bill in accordance with the third recommendation of the Australian Human Rights Commission, to ensure that detainees have access to communication facilities that will reasonably meet their needs, and enable timely, and where appropriate, private contact with friends, family, and legal services.

Recommendation 3

2.83 Subject to the preceding recommendations, the committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald

Chair

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.[1] 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.[2]
>
> 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.[3]

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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.[4]

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.[5]

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.[6]

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'.[7] Indeed, submitters indicated that previous prohibitions have been applied inconsistently,[8] 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.[9] The proposed legislative instruments are not disallowable by the Senate.[10]

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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…'[11]

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.'[12] 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).'[13]

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…'[14]

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…[15] Both the Kaldor Centre for International Refugee Law and the Refugee

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.[16]

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.[17]

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.[18]

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.[19]

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

> 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.[21]

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.'[22]

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.[23]

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.'[24] 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.'[25]

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'.[26]

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.[27]

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.

> 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.[28]

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.[29]

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.[30]

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

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.[31]

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.'[32] 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…'[33]

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

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

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

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

Australian Greens Dissenting Report

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions]

1.1 The Australian Greens believe that the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions] further erodes the human rights of detainees in Australia's immigration detention centres.

1.2 The bill inserts a new section 251A to enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities. Further new sections relate to search and seizure powers.[1]

1.3 The Australian Greens have concerns that the provisions contained in this bill are more applicable to a prison environment than immigration detention. Persons held in immigration detention have committed no offence. A person needs only to fall within the statutory description of 'an unlawful non-citizen' to be detained.

1.4 In his second reading speech, the minister stated:

> …more than half of the detainee population consists of high-risk cohorts. These cohorts have significant criminal histories, like child sex offences or links to criminal gangs, such as outlaw motorcycle gangs and other organised crime groups, or represent an unacceptable risk to the Australian community otherwise.[2]

1.5 While policy decisions made by the government have led to an increase in the number of persons with criminal histories in immigration detention there are a significant number of people with no criminal record who are currently detained. People in Australia's immigration detention centres are incredibly diverse, in both background and personal circumstances. Many detainees are 'low risk', thus providing no genuine basis for punitive measures to be implemented.

1.6 Mr Prince, in evidence stated:

> ...this cohort also includes a significant number of people with no criminal record who are, firstly, refugee applicants, for instance; a percentage of people who have come by boat many, many years ago and have been living in their community for a very long time, quite appropriately and safely, but now for various reasons find themselves in detention. That cohort is also brought up in this bill, and to treat them in a way because of, "There is a murderer in detention" is completely inappropriate.[3]

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1 Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, p. 3.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 13 September 2017, p. 10180.

3 Mr David Prince, Law Council of Australia, *Committee Hansard*, 27 October 2017, p. 4.

1.7 The Australian Greens share the view of the Human Rights Commission that a 'blanket application of restrictive measures' by the designation of 'prohibited items' by the Minister 'to all people in detention, regardless of their individual circumstances, may not be a necessary, reasonable or proportionate response to the identified risks.'[4]

1.8 This bill is indicative of an alarming trend to increase the discretionary powers of the Immigration Minister. The Refugee Advice & Casework Service and Asylum Seeker Resource Centre submitted:

> It is significant that legislative instruments made by the Minister for the purposes of determining new prohibited things would not be disallowable by the Senate. This limit on parliamentary oversight of the Minister's open-ended power to ban and confiscate classes of objects should be of concern to the Committee.[5]
>
> ...Minister's already broad discretionary powers are proposed to be expanded in such a broad and vague manner.[6]

1.9 Many submitters are concerned that this bill will result in a blanket prohibition on mobile phones and sim cards in immigration detention centres. The Explanatory Memorandum suggests that landlines could be used by detainees in the place of mobile phones. However, the evidence provided by a majority of submitters makes it clear landlines are not a satisfactory substitute for mobile phones.

1.10 The Refugee Advice and Casework Service submitted their ability to provide legal advice to detainees was frustrated when those detainees did not have mobile phones, they noted that:

- Access to communication facilities is inconsistent and often subject to interruptions and delays.
- Landline phones available to people in detention are often located in public areas, undermining the privacy of communications.
- Access to facilities for sending copies of forms or other documents to legal representative (such as fax machines or scanners) is inconsistent.
- Detention facility staff are at times indifferent to facilitating access to legal services or communication facilities.
- Access to computer facilities and internet is used as a behavioural control and is subject to time restrictions in some facilities.[7]

1.11 The Law Council of Australia noted that there are inadequate protections in place for detainees in relation to the bill's expansion of search powers.

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4 Australian Human Rights Commission, *Submission 11*, p. 7.

5 Refugee Advice and Casework Service, *Submission 50*, p. 1.

6 Asylum Seeker Resource Centre, *Submission 80*, p. 6.

7 Refugee Advice and Casework Service, *Submission 50*, p. 2.

> There is no requirement for a warrant, nor is there a requirement for the authorised officer to hold a reasonable suspicion that a detainee might be harbouring a prohibited thing. The Bill contains no limitations on how searches are to be carried out, including in respect of how often they are conducted, what time of day they can be carried out, or how many times individuals can be searched.[8]

1.12 The Australian Greens agree with the Combined Refugee Action Group's submission that:

> Refugees, and people who are seeking asylum, held currently in Australia's immigration detention centres should be treated with dignity and respect, rather than as dangerous criminals.[9]

Conclusion:

1.13 The amendments proposed by this bill are disproportionate and may be contrary to Australia's international human rights obligations.

Recommendation 1

1.14 **The Australian Greens recommend that this bill be opposed by the Senate.**

Senator Nick McKim
Australian Greens

8 Law Council of Australia, *Submission 64*, p. 14.

9 Combined Refugee Action Group, *Submission 30*, p. 1.

Appendix 1

Public submissions

1 Federation of Ethnic Communities' Councils of Australia (FECCA) and the Settlement Council of Australia (SCoA)

2 Ms Carmen-Emilia Tudorache

- Supplementary submission

3 Mr Brendan Doyle

4 Ms Jenny Rae

5 Mr Donald John McClintock

6 Ms Tracie Aylmer

7 Ms Jane Healy

8 Ms Maureen Heffernan

9 Ms Sheila Quonoey

10 Mrs Margery Cass

11 Australian Human Rights Commission

12 Ms Gabriel Fuller

13 Mr Gerald Grove-White

14 Mr Andy Jackson

15 Dr Pat Horan

16 Mr Brendan Lewis

17 Mrs Carol Drake

18 Legal Services Commission of South Australia

19 Dr Diane Gosden

20 Mr William Ho

21 Supporting Asylum Seekers Sydney

22 Associate Professor Anne Junor

23 Ms Margaret Hughes

24 Dr Lindsay Quennell

25 Liberty Victoria

26 Rural Australians for refugees

27 Ms Marie Hapke
28 Mrs Faye Quennell
29 Mr Wimalasiri Jayakody
30 Combined Refugee Action Group
31 Ms Cathy Robertson
32 Ms Claudia Graham
33 Mr Damian Collins
34 Australian Lawyers for Human Rights
35 Ms Shira Sebban
36 Dr Andrew Kelly
37 Ms Elizabeth O'Hara
38 Ms Steffi Leedham
39 Mr Douglas Horton
40 Ms Susan Mahar
41 Mrs Lesley Grant
42 Ms Serena Horton
43 Ms Jackie Mayers
44 Department of Immigration and Border Protection
45 Mrs Donna Nichols
46 Mr Max Costello
47 Hunter Asylum Seeker Advocacy
48 Brigidine Asylum Seeker Project
49 Legal Aid New South Wales
50 Refugee Advice & Casework Service (Aust) Inc.
51 Immigration Advice & Rights Centre Inc.
52 Kaldor Centre for International Refugee Law
53 Name Withheld
54 New South Wales Council for Civil Liberties
55 Refugee Council of Australia
56 Mr Gordon Kennard
57 Name Withheld
58 National Justice Project

59 Australian Association of Social Workers
60 Ms Christine Bourke and Mr Michael Chalmers
61 Ms Maryanne Ofner, Biddulph & Salenger Lawyers
62 Amnesty International
63 Name Withheld
64 Law Council of Australia
65 Mr Bob Phelps
66 Dr Graeme and Mrs Susan Swincer
67 Name Withheld
68 Ms Christine Wang, Ms Isobel Blomfield, Ms Sarah Easy, Ms Christine Maibom, Mr Adrian Vipond, Ms Zoe Stojanovic-Hill
69 Refugee and Immigration Legal Centre
70 Mr Forbes Gordon
71 Ms Lynona Hawkins
72 Ms Dorothy Page
73 Mr John Hockney
74 Campaign letter 1
75 Campaign letter 2
76 Campaign letter 3
77 Campaign letter 4
78 Campaign letter 5
79 Castan Centre for Human Rights Law at Monash University
80 Asylum Seeker Resource Centre
81 Blue Mountains Refugee Support Group
82 Confidential

Answers to questions on notice

1. Australian Human Rights Commission - Answer to question on notice (received 3 November 2017).
2. Department of Immigration and Border Protection - Answers to questions on notice (received 6 November 2017).
3. National Justice Project - Answer to question on notice (received 3 November 2017).

4. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
5. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
6. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
7. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
8. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
9. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
10. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
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16. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
17. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
18. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
19. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).
20. Department of Immigration and Border Protection - Answer to written question on notice (received 10 November 2017).

Appendix 2

Public hearing and witnesses

Friday, 27 OCTOBER 2017 - Canberra

Hoang, Mr Khanh, Member, Kaldor Centre for International Refugee Law

McLeod, Ms Fiona SC, President, Law Council of Australia

Morgan, Ms Lucy, Specialist Adviser – Immigration, Australian Human Rights Commission

Newhouse, Adjunct Professor George, Principal Solicitor, National Justice Project

Okhovat, Ms Sahar, Senior Policy Officer, Refugee Council of Australia

Pillai, Dr Sangeetha, Senior Research Associate, Kaldor Centre for International Refugee Law

Power, Mr Paul, Chief Executive Officer, Refugee Council of Australia

Prince, Mr David, Chair, Migration Law Committee, Law Council of Australia

Santow, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

de Veau, Ms Pip, First Assistant Secretary, Legal Division, Department of Immigration and Border Protection

Wilden, Mr David, First Assistant Secretary, Immigration and Citizenship Policy Division, Department of Immigration and Border Protection

Woodford-Smith, Mr Kingsley, Assistant Commissioner, Detention and Onshore Operations Division, Department of Immigration and Border Protection

Wrigley, Ms Katie, Senior Solicitor, Civil Law Division, Government Law Team, Legal Aid New South Wales