Committee Secretary
Senate Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT
2600

11 June 2020

Dear Committee Secretary

We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 [Provisions].*

This Bill should not be passed. It is a Bill which has no valid purpose, as existing powers are more than sufficient for the safe and orderly management of detention centres. Its main purposes are not to address any genuine threat posed by illegal activity in detention centres, but rather to remove detainees' access to devices with internet connectivity, which are their 'life-line' to family, community support, lawyers and medical assistance; and to prevent public scrutiny and accountability for what is occurring within our detention centres. If this Bill is passed, the already dimmed lights in detention centres will go out and be replaced by darkness.

In the current system of immigration detention, which has no statutory framework to protect minimum standards or rights and no meaningful system of oversight, this Bill would give the Minister wide powers to impose 'blanket' prohibition of ordinary items from detainees, including their phones, without any requirement that such prohibitions be limited or targeted to those using such items for unlawful purposes.

The Bill gives police-like powers to 'authorised officers' and to other unnamed 'other persons' to conduct personal searches without any suspicion, to conduct strip searches based on the low legal threshold of 'reasonable suspicion' and allows the use of dogs to conduct searches of detention facilities, including in close proximity to detainees.

Few of the serious human rights concerns raised by Committee members' in their dissenting reports from November 2017 have been addressed in this new version of the Bill, which poses a further major threat to the basic dignity and rights of immigration detainees, many of whom are refugees or people seeking asylum with backgrounds of torture and trauma.

Please feel free to contact me on kon.k@asrc.org.au. We would welcome the opportunity to appear before the Committee.

Karapanagiotidis

Kon Karapanagiotidis OAM
CEO Asylum Seeker Resource Centre

Introduction

The Asylum Seeker Resource Centre

Founded in 2001, the Asylum Seeker Resource Centre (**ASRC**) is a place and part of a movement. We are Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey.

For the past fifteen years, the ASRC's Human Rights Law Program (HRLP) and the Detention Rights Advocacy Program (DRAP) have provided legal assistance and advocacy to refugees and people seeking asylum held in immigration detention in Australia. This includes assisting those held in the closed immigration detention network, namely the Melbourne Immigration Transit Accommodation (MITA), Villawood Detention Centre, Darwin Detention Centre, Yongah Hill Detention Centre, Perth Immigration Detention Centre and the Brisbane Immigration Transit Accommodation (BITA). It also includes assisting those held in Alternative Places of Detention, (APODs) including in hotel accommodation, such as at the Manta Hotel (Preston, Melbourne) and Kangaroo Point (Brisbane).

Our submission is based on our longstanding and comprehensive work with people in immigration detention. Our intensive one-on-one work with more than 50+ immigration detainees at any given time, gives us deep insight into the issues and concerns that detainees face day-to-day and the systemic issues that these raise, including: the mental and physical health impacts of arbitrary and indefinite detention; their experiences of upheaval and harm due to constant transfer between centres causing interruption to family, legal, medical and community supports; the use of force including solitary confinement against those suffering from mental illness or as punishment; the routine and excessive use of shackles and restraints and other force; detainees' lack of access to quality medical treatment; their difficulties in accessing timely legal assistance, other services and supports; and the absence of any statutory framework for minimum standards of detention or meaningful oversight of the operation of immigration detention centres.

Main concerns regarding the Bill

Our main concerns regarding the Bill include:

A. Lack of valid justification for the Bill. Existing laws are sufficient to address safety issues in detention centres. The measures proposed are disproportionate to their stated objectives and to the risks posed in detention centres. The proposed measures involve restrictions on human rights which are not justifiable.
B. The Bill will inflict additional suffering and cruelty upon detainees and prevent public scrutiny of treatment in detention centres. Seizure of personal telephones and other internet-capable devices will remove the primary means by which detainees can maintain family relations, support networks, get access to independent medical assistance, seek urgent legal assistance, and lodge complaints and evidence of their mistreatment or conditions in detention.
C. Ministerial powers to prohibit items are wide and can include commonplace and ordinarily innocuous items, such as telephones and devices with internet connectivity, which are used appropriately by the vast majority of detainees and vital to their ability to stay connected to families and friends, seek medical or legal help, and manage endless boredom.
D. Ministerial directions are not subject to disallowance and can, despite assurances in the Explanatory Memorandum and Second Reading Speech, still be used to impose 'blanket' bans on items, including detainees' telephones. There is no requirement that

confiscation of prohibited items be limited to those suspected of using such items unlawfully or inappropriately.

E. Personal searches can be conducted without any basis for suspicion. This is a licence to harass detainees. Unfettered search powers resulting in constant, intrusive searches of persons and belongings, are likely to provoke frustration and an increase in the use of force in detention centres.
F. Dogs can be used to search facilities, including in the presence of detainees, potentially a terrifying experience, especially to those with histories of torture and trauma.
G. Strip searches can be conducted on the basis of only 'reasonable suspicion'.
H. In any event, these legal thresholds lack meaning in a system where detention authorities and officers are not subject to any effective oversight or accountability measures.
I. Furthermore, most of these intrusive and sensitive powers can be delegated to unnamed 'other persons' as 'assistants', further widening the potential for abuse and loosening any vestige of accountability for implementation of these powers.

Recommendations

1. That this Bill be rejected in its entirety. Amendments cannot cure this Bill's false premises and invalid purposes.
2. That all refugees and people seeking asylum currently held in detention, be immediately released and provided with safe housing and adequate funded support. At minimum, those not considered to be 'high risk' detainees should be separated from those who are, to prevent the impermissible collective punishment of all.
3. That an independent inquiry into immigration detention be established to examine the legality, impact, harm and costs caused by administrative detention, as well as any corruption that has been allowed to settle within the centres, .
4. That a new law be drafted and passed providing for minimum standards of immigration detention, including standards relating to:
    - Use of administrative detention only as a last resort, for the shortest possible time and with a stated maximum duration.
    - Prioritised release of all refugees and people seeking asylum (subject to the above standard), into safe housing with adequate funded support where they can comply with public health advice.
    - Independent and effective oversight and accountability for the management and operation of detention centres, including over the acts of officers and private contractors used for security, health and other services in detention centres.
    - Access to competent and quality medical treatment and legal assistance for all detainees
    - A protected right of detainees to maintain personal telephones and other devices with internet capability, subject to only necessary and proportionate exemption based on proper risk assessment and review.

1. Current context of immigration detention

1.1 COVID-19 impacts

During this COVID-19 pandemic, the hundreds of refugees and people seeking asylum who are held in closed detention centres and Alternative Places of Detention (APODs) across Australia, have been contacting us and expressing their great despair, helplessness and distress.

Despair, at the refusal of the Government to release them from immigration detention, despite detention centres being recognised places of high risk of COVID-19 and many of them having pre-existing health conditions making them more vulnerable to severe infection, and despite them presenting no risk to the community and having compelling grounds for their release, such as being Convention refugees or people seeking asylum with ongoing legal cases.

Helplessness, due to the inadequate risk mitigation measures taken by the Government and their inability to protect themselves from the virus due to the crowded conditions within the centres, the constantly rotating guards and other staff and the impossibility of practicing recommended standards of social distancing and hygiene.

Distress, due to being separated from their families during this stressful and uncertain time, and facing months of additional isolation due to cancellation of all visits to the Centres since late March; all the while fearing the virus may sweep through detention centres and in the worst instance, fearing they may never see their loved ones again.

There has never been a time when access to telephones and other internet-capable devices has proven to be more important than during the community lockdowns necessitated by this pandemic. For those held in immigration detention, who are in constant lockdown, telephones and access to the internet are a 'life-line', for some, literally so.

1.2 Lack of accountability and oversight of immigration detention

In considering this bill, we encourage the Committee to be mindful that, as demonstrated in our case studies, immigration detention centres lack proper governance and usual systems of regulation and accountability. There is no overarching statutory or regulatory framework to ensure that minimum standards are upheld. Detention centres are places where detainees often have frightening experiences, on a protracted or indefinite basis, with no independent reviews or legal means to challenge their continuing detention or meaningful ways to complain about their treatment.

An extensive body of evidence has long demonstrated the great mental and physical harm caused to detainees by such detention. While immigration detention is ostensibly for administrative purposes, anyone who has visited any of our 'immigration transit accommodation' centres, knows that these centres have all, if not more, of the security characteristics and restrictions placed upon detainees and visitors found in regular prisons, but without the same level of accountability.

Alternative Places of Immigration Detention (APODs) are subject to even less accountability and control. Several hotels have been designated as APODs and are currently routinely used to 'warehouse' refugees transferred from Regional Processing Centres in PNG and Nauru to Australia for medical treatment. Many have been confined to cramped hotel rooms for more than 12 months, unable to go outside except for sparse rostered visits to closed detention facilities to exercise. Every person in this group of transferees was pre-screened for character or security issues before they were allowed to enter Australia. This cohort presents no risk to the Australian community. Continued detention of these refugees, many with histories of trauma, is used as collective punishment for them having attempted to exercise their right to seek Australia's protection more than seven years ago. Instead of Australia assessing their claims, they were taken against their will to PNG and Nauru and detained for seven or so years in appalling conditions, resulting in many now suffering from acute and chronic physical and mental illnesses. Following their transfer to Australia for medical treatment, many have never received this

treatment and now find themselves indefinitely detained in overcrowded, unsanitary conditions in hotel prisons in Melbourne and in Brisbane, without any legal remedy and at enormous expense to the Australian tax payer. A much better approach would have been to provide them with medical treatment and release them into the community on bridging visas until durable resettlement options could be secured, at much lower human and economic cost to all concerned.

Against this backdrop, the idea of the legislature giving more power to authorities within this unaccountable legal framework, is deeply disturbing. The potential for abuse is enormous. This power would legalise the confiscation of potentially any ordinary items needed by detainees or which might reduce their suffering (like access to phones and the internet). It would also legalise intrusive personal searches at any time, with no requirement of any suspicion or evidence, and permit strip searches based on minimal legal thresholds. It even permits the use of dogs in searches, including in the presence of, or proximate to, detainees.

While this Bill is purportedly directed at the unlawful activities of detainees, in our submission the Parliament's attention would be better directed to examining and addressing the unaccountable and unlawful nature of Australia's immigration detention regime. We find it extraordinary that during a pandemic and national crisis, when so many people in our country are in need of support and leadership to guide them through this unprecedented and challenging time, that the Government should consider passing this Bill to be a national priority, which would only serve to further violate the dignity and rights of this legally vulnerable population.

2. Impact of removal of personal phones and internet-capable devices

2.1 Silencing real-time, critical 'cries for help'

It is no accident that in recent years all physical visits to detention centres, including professional visits, have become much more cumbersome and difficult to obtain approval for, and to arrange. In this context of isolating detainees from visitors, there is now much greater reliance by lawyers and others on contacting detainees' via their personal phones. Mobile phones have become the primary means for detainees to have private communications to enable them to access or arrange independent medical treatment, legal assistance or to report experiences of mistreatment or abuse. Detainees regularly use their phones to send us photographs of their legal documents, so they can access our legal advice, and photographs or links to other evidence in support of their claims for refugee status. They also send photographs of their medical ailments or injuries, which may be relevant to document for their cases, or may be relevant to complaints regarding their treatment or access to medical care in detention. None of this could be done via landlines and only with great difficulty on centralised computers.

Use of personal mobile phones have often been the only way detainees have been able to seek urgent help in real time, especially in circumstances where they are subject to movement restrictions within the detention centre and unable to freely move to a landline telephone to make a call. This includes situations where detainees call us on their mobile phones when they or others are contemplating or engaged in desperate acts of self-harm; when they are being taken to isolation units; when they are being deported or transferred without notice and fearful that they do not know where they are being taken; when they are being subjected to physical restraints for medical appointments or other use of force; or when they are being denied access to medical assistance.

If this Bill is passed and detainees only have access to centrally located landlines, they will not be able to alert anyone outside of detention in any of the above circumstances, and many of their 'cries for help' will be silenced. We are concerned that this may be the true underlying purpose or reason driving the introduction of this Bill. In the words of our client:

> *We're not criminals, we're detainees. It feels like they don't want the public to know what is really going on in Australian detention centres. If you're going to take phones away when we take videos - they don't want the public to know this is happening in their own backyard.*

Case study 1– Example of why detainees need access to personal mobile telephones

Mustapha, a detained asylum seeker with known pre-existing mental health issues and who had never been charged or convicted of any offence, had been detained for 6 years. In August 2019, after the death of his friend in detention, he reached his breaking point and attempted to harm himself. Five guards forcibly restrained him, kneeling on his chest and breaking his collar bone in several places. IHMS did not immediately provide him with medical treatment for his injuries and so Mustapha called himself an ambulance from his personal mobile phone. When it arrived at the centre, it was then sent away by IHMS staff who assured the paramedics that Mustapha was fine. He then used his phone to call community supporters and us to report that he was in a lot of pain, and was not being provided with medical assessment or care.

Even with our support, it was not until the following day that Mustapha was finally taken to hospital and underwent a CT scan, which confirmed his collar bone had been fractured in several places. Mustapha was not given any information about his medical condition, but was able to take a photograph of the xray indicating that his collar bone was broken. He was discharged to the detention centre with a drip still in his hand, which he then removed himself. He was able to take a photograph of this on his phone also.

Four months after this incident Mustapha's collar bone had still not healed, when he was again forcibly restrained by guards after kicking a rubbish bin when he became frustrated that his request to see the mental health nurse was refused. He suffered further injuries to his collar bone, his elbow and his head. He contacted us immediately after this incident on his mobile phone to report the incident and to seek our help in getting his injuries medically assessed and treated as his complaints of strong pain in his arm were being ignored. While we were on the telephone to him, a guard forcibly seized his phone and our call was ended.

Despite his known mental health vulnerabilities, Mustapha was then put into a solitary confinement cell without breaks for more than 24 hours. We asked that his phone be returned to him and he was then able to call us and other community supporters from his mobile phone. He told us that he was repeatedly calling for help and medical treatment via the isolation cell intercom, being the only way that he could communicate with detention centre staff, but was being ignored. He was able to take photographs on his mobile phone, of the injuries to his head, arm and other bruising on his body.

Having been alerted to Mustapha's situation, we were able to raise and then escalate concerns on his behalf about denial of access to medical treatment and the decision to subject him to solitary confinement without breaks. Even with our intervention and advocacy, it was more than three days before Mustapha was finally taken to hospital, where it was confirmed that his elbow was broken. Despite his injured elbow and collar bone, Mustapha was still subjected to handcuffing and restraints, causing him acute pain.

Complaints about all of these aspects of Mustapha's treatment were lodged with Serco, IHMS, Australian Border Force (ABF) and the Commonwealth Ombudsman, supported by the photographic evidence that Mustapha had been able to secure via his phone. Serco, IHMS and ABF all provided standard responses, denying any breach of their duties. More than six months later, the Commonwealth Ombudsman investigation remains unresolved.

Frustrated by the lack of accountability for what had happened to him, Mustapha directly spoke to the media about his experiences in detention and provided photographs of his injuries, as well as copies of the responses to his complaints. This story was published in The Age on 19 February 2020. https://www.theage.com.au/national/victoria/asylum-seeker-s-bones-broken-in-two-altercations-with-detention-guards-20200127-p53v5o.html

It seems quite some coincidence that after spending more than 6 years in Australia, eight days after this article was published, Mustapha was then deported back to his country of origin.

On the day of his removal, he contacted us at around 7pm on his personal mobile phone, telling us that he had been taken from the detention centre in restraints, forced into a car and that no one would tell him where he was being taken. He was then able to call us back, again on his mobile phone, and inform us that he had been given a paper, which we were able to determine was a removal notice. It was only then that we realised that he was en route to the airport for a flight to his home country. We were able to calm and counsel him, as best we could, and obtain from him his consent to involve UNHCR in monitoring his safe return. We were also able to obtain contact details for his family members so that we could alert them to his imminent arrival, as the Department had not put any of these arrangements in place.

If Mustapha had only had access to a detention centre landline, as is proposed by this Bill, he would have been:

- Unable to access assistance at relevant times when his movement within the detention centre was being constrained.
- Complaints would not have been made to detention authorities in real time when he was in urgent need of medical treatment
- His access to medical treatment would likely have been further delayed.
- His solitary confinement would have been more traumatic and likely longer without access to his phone to stay in touch and enable us to raise our concerns with detention authorities.
- His injuries would not have been photographed or documented.
- His removal would have proceeded without anyone knowing or supporting him, and without any arrangements being in place to ensure his safety was monitored upon his return, and his family informed.

Mustapha's experiences highlight many reasons why detention centre landlines are no substitute for detainees having access to their mobile phones, which are key to the struggle for protection of basic rights of people held in immigration detention.

Case study 2 – How mobile phones help to protect basic human rights

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2.2 Impact on family relationships and mental health of detainees if phones are confiscated

For our detained clients, personal phones are often their only way to regularly connect with their families, lawyers, friends, and to gain access to information about the wider world. We are regularly told by our clients that being able to have regular video calls to talk to their children and spouses, is often the only aspect of their lives which give them hope, especially for those subject to many years of arbitrary and indefinite detention. In the words of one our clients:

> I have a son who I talk to every day and my partner and my family that is everything that I ever cared about. If they take our phone away from us, it's going to break us. The bond that I have with my kid is the main thing. Everything about it will break us if they take our phone away. The phone is the only good thing that we have. I can talk to my son on video and feel like I'm there with him even though I'm not there. This gives me confidence in life that all these things that are happening to me are not too bad after all.

We have another client who has been detained since July 2017. He has an Australian citizen wife and two young children, aged 3 and 5 who live on the other side of the country from where he is detained. He cannot be removed from Australia because he is at risk of persecution in his home country, however he has never been formally recognised as a refugee and his case was last assessed through a non-statutory process back in 2012 and he had been refused the chance of re-assessment since then. He speaks to his partner and children several times a day. He tries to participate in family life, as best he can, by telephone and video calls with his young children. He explains his daily routine and experience of detention, separated from his family and his dependence on his phone:

> My partner calls me first thing in the morning. She always asks me how I am doing, tells me it is a new day, that there is hope for a better future and that I need to look after myself to get through each day. Those phone calls have kept me going in what otherwise would be a completely dreary and depressing existence.
>
> Each afternoon, I skype my kids. My son is still very young so after he talks a bit, then I just watch him doing his usual things, but still I love to see him, hear him, in any way possible. He is my son and I've missed him since he was only four months old. I am his father and even though I am far away and stuck in detention where he cannot visit, our relationship is growing.
>
> I cherish my skype time with my daughter. Each day, she asks me when I am coming home from my holiday and says that she wants me to come home and play with her. I ask her about her pictures, what TV she is watching, her favourite colours and toys. I always remind her to listen to her mother and that I will be home soon to be with her again. Our skype time always ends with 'see you soon' and 'I love you'.
>
> I usually have a call with my partner in the evenings. That is our time. It has been so difficult for her to be caring for our two very young children without me to help her day to day. She has worked so hard to support me through the ordeal of this detention. My relationship with her and my family is what has kept me going each day.
>
> Each day is a challenge and a struggle. I love to see and talk to my children, but it also causes me so much pain as I am constantly reminded of our separation. I know I just have to keep hanging on but I am scared to hope and dream of being back with my family again. That is all I want. To be with them. To be a proper father. To be with my partner. To find a job and support my family. That is what I try to focus on to get me through the darkness.
>
> I recently had the joy and at the same time, the torture, of watching my children open their Christmas

presents, yet again from my phone in a detention centre, rather than being able to kiss and hug them and play with them.

Last Monday it was my daughter's first day of kindergarten. I feel so upset I was not able to walk her there or hear her news on the way home. But at least I got to see her on skype as soon as she came home, and got to hear all the details of her day……

Allowing confiscation of mobile phones will not only be devastating to this detainee and harm his mental health, it will also destroy his Australian citizen family and harm his young children. Detainees' most meaningful experiences of meaning, connection, love and hope are only achievable through use of their mobile phones. This is because mobile phones, as opposed to centralised landlines, provide detainees with the opportunity to speak privately, from their rooms if they wish, to their family members and friends. They can use audio or video calls, the latter being especially important to those detainees with young children. They can talk to their families and others as often as they like and without having to queue up or take their turn with the pressure of others waiting to use the phone within earshot. Those with relatives overseas, can make international calls at low cost. Detention centre landlines, even if there were enough, are no substitute for the level of access, privacy, low cost and quality of communication and relationships that detainees are able to maintain when they have access to their personal mobile phones.

Phones are key to maintaining detainees' mental health. Some detainees use their phones for expressive and creative purposes: making and recording music and writing; creative writing, testimonial writing, all expressions of human creativity and tools to help counter the boredom and hopelessness of their situations. Unlike prisoners who are provided with a wide array of educational programs, vocational training options, work options and rehabilitation programs, immigration detainees face mindless boredom, day in and out. Phones with internet connectivity are also vital to occupying and entertaining detainees, who typically spend many hours a day with nothing to do, making the time lag and it even more difficult for them to remain motivated, well and hopeful. The passage of this Bill would create a massive void, which will not otherwise be filled, leaving detainees with hours of unfilled time and contributing to more rapidly decline of their mental health.

3. No valid justification for the Bill

The Government claims that the additional restrictive powers proposed in this Bill are needed because immigration detention centres are now full of people with criminal backgrounds who are engaging in criminal or other activities that place the management and security of detention centres at risk. It is also claimed that current laws do not provide necessary powers proportionate to the levels of risk now presenting in detention centres. The Government further claims that application of these measures will be targeted to those identified as posing a risk and will not be applied in a blanket fashion, however this assurance is not reflected anywhere in the draft Bill itself.

Each of these rationales or premises are without basis, and require close scrutiny. This is especially given the Government's argument that a trade-off of human rights protections is needed and justified due to the particular risks presented by the changing profile of immigration detainees.

Furthermore, even assuming that the Government's claim that the presence of illegal items, (such as narcotics and weapons), have become a large problem in detention centres, then we would ask, where is the Government's answer to the serious question as to how these items have entered detention centres in the first place? Especially given the already very tight security searches and procedures in place for all visitors and transfers between centres, this problem would is suggestive of either corruption by authorities or other staff working within, or delivering things to detention centres, or at minimum, neglect of external security (perimeter fences or overhead security) at detention facilities. Before moving to impose the 'easy' and oppressive approach of applying restrictive measures *carte*

blanche to detainees, the Government should be required to investigate and explain how it is that any illegal items are entering detention centres. If corruption is the root problem, then addressing this issue should be the Government's urgent priority and starting point, not giving even greater power to those same personnel to apply oppressive measures to detainees.

Finally, rather than going down the path of passing this Bill, there is another much better approach which would address the Government's concerns: release the vast majority of people who should not be held in immigration detention at all, and separate those not considered to be 'high risk' detainees from those who are, to prevent the impermissible collective punishment of all.

3.1 Flaws in Government's claim that powers are needed because immigration detention centres are full of 'high risk' criminal detainees

The Explanatory Memorandum to the Bill provides the rationale that 'beefed search and seizure powers are needed in response to 'higher risk detainees'.

> 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 crime groups.

In our submission, this claim is overstated, just as it was when the first version of this Bill was introduced in 2017. At that time the Government claimed that some "70% of immigration detainees are assessed to be 'high risk' "[1] purportedly justifying the need for restrictive measures that applied across the entire detention network. In response, the Scrutiny of Bills Committee pointed out the inaccuracy of this sweeping statement, highlighting that 'around half the detention population is not made up of high-risk individuals' and noting 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.[2]

This time around, acting Minister for Immigration, Citizenship and Multicultural Affairs, Alan Tudge, has claimed that 'more than 60 per cent of those currently in detention have a criminal history,' [3] seeking to justify the need for this Bill. Again, this statement does not withstand closer scrutiny.

According to the Department's (albeit limited) public information, as at 31 March 2020, less than half (45%) of people detained is due to 's501' character-related visa cancellation.[4] The reality is that the majority of detainees have no criminal background, with some 37% being people seeking asylum detained because they arrived by sea and a further 17% detained due to 'other' reasons, including 'non-immigration cleared' plane arrivals, stateless people who cannot be removed, visa 'over-stayers' and those whose visas have been cancelled for non-criminal reasons, such as breaching conditions, including for working without permission or providing incorrect information in their applications.

It is our submission that people with refugee or displacement backgrounds make up the majority of people held in Australia's immigration detention centres, likely more than 60%, and certainly the vast

[1] Legal and Constitutional Affairs Legislation Committee Report, November 2017, p7.
[2] PJCHR, Human Rights Scrutiny Report 11 of 2017, October 2017, p. 27.
[3] Alan Tudge MP, 'Stronger search and seizure powers for immigration detention' 14 May 2020. accessed at https://minister.homeaffairs.gov.au/alantudge/Pages/stronger-search-seizure-immigration-detention.aspx.
[4] Immigration Detention and Community Statistics Summary, Department of Home Affairs, https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf

majority of long term detainees. Our figure takes into account the total number of immigration detainees who are either: 1. seeking asylum or 2. have been recognised as refugees or 3. are otherwise owed protection obligations, whether they have arrived by sea, plane or transfer from an offshore processing centre, and across all stages of the refugee determination process.[5] We encourage the Committee to request that the Department provide statistics for the total number of immigration detainees who fit into one of these three categories. This is necessary as the data categories used by the Department obscure the true status and profile of those detained.

We also take this opportunity to highlight the protracted nature of their detention, which is without regular review or judicial oversight to assess risks or the need for continued detention. At 31 March 2020, the average period of time for people held in Australian immigration detention facilities was a shocking **545 days.**[6] This is completely out of line with detention periods in all other comparable democracies, which detain people without visas for days, weeks or at most months,[7] but never year after year, with no system of review, as we have here in Australia. While the numbers of people held in detention centres has been reduced in recent years, the average length of their detention has 'blown out' to a very worrying level. We have many clients who have been detained for five or more years and who have experienced torture, trauma or serious human rights abuses. The impact of long term institutionalised detention upon people with these pre-existing vulnerabilities further compounds their suffering, highlighting the wanton cruelty of indefinite mandatory detention. We ask that the Committee keep in mind this demographic of vulnerable immigration detainees when it deliberates on the appropriateness of granting the powers contained in this Bill.

Nor can it be assumed that those detained due to s 501 character cancellations can be automatically considered 'high risk' detainees. This is especially since the visa cancellation amendments of December 2014, which dramatically lowered the threshold for visa cancellation on character grounds and removed key legal protections from the process.[8] We have clients whose protection visas were cancelled under s 501 just on the basis of criminal charges, which were subsequently dropped or where our client was later acquitted of the offence. Others have been convicted of offences but never served a day in prison because they received non-custodial sentences for less serious crimes and were considered no or low risk to the community. Thus the categorisation of 'risk' cannot be neatly equated with the number of people detained due to s501 visa cancellations, and nor can it be assumed that character cancellation decisions have been validly made or justified. Further, nor can it be assumed that those who have completed prison sentences necessarily automatically present a high risk, given that many have undergone rehabilitation programs and been assessed as presenting low risks of recidivism.

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[5] Including court matters and outstanding ministerial requests.

[6] Immigration Detention and Community Statistics Summary, Department of Home Affairs, p 12 accessed at: https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf

[7] For example, Canada's average period of detention is 19.5 days, and cases are independently reviewed within 48 hours, again within 7 days and every subsequent month. Sweden's average detention period is 31 days and it reviews detention within 48 hours, in the UK 65% of people are detained for between 1 and 28 days and less than 1% for more than a year. In France the average period is 12.8 days and the legal maximum period is 90 days. The EU Return Directive sets a maximum period of 6 months with exceptional circumstances required beyond this, and setting an absolute maximum of 18 months.

[8] Amendments to the Migration Act in December 2014 introduced new grounds for failing the character test, as well as a new mandatory cancellation provision under section 501(3A) where people in prison are convicted of certain offences. Changes included:

- Significant reduction in the threshold for visa cancellations, including removal of the need for a 'significant' risk, and on the basis of 'reasonable suspicion';
- Mandatory cancellation which does not permit the consideration of individual circumstances;
- Increase of ministerial powers to cancel visas without proper procedural safeguards in place;
- Significant risk of decisions resulting in indefinite detention (based on a 'reasonable suspicion' that an individual may be subject to a character cancellation).

We encourage the Committee to look beyond the Government's statements and to 'drill down' into close examination of whether there is objective evidence of the Government's claim that immigration detention centres are predominately filled with detainees with criminal backgrounds who pose a 'high risk' to the security and order of the detention centres. We ask for this scrutiny because we are concerned that the state need for this Bill is based on inappropriate and inaccurate depictions of people in detention as violent, disorderly and hardened, unreformed criminals, in order to justify abrogation of detainees' basic civil rights and legal protections.

3.2 Assurance that the Bill will not be applied in a 'blanket' fashion is baseless

This Bill is the Government's 'work around' of the Full Federal Court decision in *ARJ17 v Minister for Immigration and Border Protection*[9] in 2018, which found that existing statutory powers did not give the Secretary power to impose a policy to confiscate detainees' phones, and that even if it did, the exercise of such powers must be 'proportionate' to the risk and take into account 'considerations peculiar to individual detention centres and considerations personal to individual detainees'.[10]

While the Explanatory Memorandum and second reading speech state an intention to ensure that any restrictive measures are targeted to relevant persons, things, places or times, the Bill itself does not require any targeting of measures. Rather, the Bill simply '*allows for*' the Minister to issue directions, which *may* be limited to a specified class of persons, things, facilities. However the Minister can just as easily direct that the measures be applied to all persons, things, or facilities, as a blanket direction.[11] The only limitation upon the Minister is that directions must not be 'inconsistent with the Act or the regulations'. However given that neither the Act nor the regulations require any targeted, proportionate or evidence-based approach to be taken, there are in effect no limits at all.

It also provides little comfort that the Second Reading speech emphasises that officers will be provided with 'training and guidance' in exercising their seizure powers to 'allow for a targeted, intelligence-led, risk-based approach'.[12] With nothing in the Bill to actually prevent the Minister from directing officers to take a 'blanket approach' or to guide them in applying these powers, this assurance lacks any substance. This is especially in light of the volume of complaints we hear from detainees regarding supposedly well-trained detention officers. In addition, it is very worrying that Ministerial directions issued under s 251B(6) cannot be disallowed by the Senate, and therefore cannot be made subject to usual democratic process, despite the high human rights stakes hanging in the balance in this Bill.

3.3 Claim that existing powers are insufficient, is without basis

The Minister's media release of 14 May 2020 claims that 'Under current legislation, officers are not legally able to search for or confiscate dangerous items, such as illicit drugs, child abuse material or extremist material.' This is incorrect. Existing State and Federal laws already allow for each of these examples of items to be confiscated. The *Migration Act 1958* (Cth) (**the Act**) already authorises officers to:

- Search detainees for weapons, things that could aid escape from detention, or evidence to justify visa cancellation
- Conduct strip searches for weapons or things that could help aid escape from detention, where there is reasonable suspicion
- Seize weapons, things that could help to escape from detention, evidence to justify visa cancellation, or other illegal items.

[9] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.
[10] At 109.
[11] See s251B(6) of the Bill.
[12]

State and federal criminal laws already provide powers to search for and confiscate other illegal items, such as illicit drugs, child abuse material or extremist material. In addition, any of these items could be 'evidence to justify visa cancellation' and are therefore already covered by the Migration Act provisions. What is not covered by existing law, for good reason, is the power to conduct personal searches for items which are not illegal, which are not weapons or items that could aid in escape or which would not justify visa cancellation. In other words, this Bill provides for search and confiscation of items that detainees should be allowed to have in detention centres, which is very concerning. There is no gap in laws which this Bill would validly or properly fill.

4. Dissenting Committee Members' previous concerns remain unaddressed

As noted above, the Government attempted unsuccessfully to pass a very similar Bill back in 2017, which was also referred to the Legal and Constitutional Affairs Legislation Committee. The Committee reported to the Senate in November 2017, recommending that the Bill be passed, but with dissenting reports from ALP Senators and Greens Senators. In their dissenting reports, Senators highlighted some key concerns, which as seen below, remain largely unaddressed.

- Concern that the Government had not demonstrated any attempt to address risks in immigration detention centres in less restrictive ways. This remains the case and is unchanged since the Bill was last introduced to the Parliament.

- Concern that the measures in the Bill are disproportionate to the stated risks. In particular, the Bill enabled blanket prohibitions on all detainees regardless of their needs, vulnerabilities, or risk profile. The Bill explicitly allows officers to search detainees for prohibited things, even without the officer having any suspicion or reason to believe they have such an item.

  > 'An authorised officer may, without warrant, search a person, the person's clothing and any property under the immediate control of the person for any thing that may be seized from the person under paragraph (4)(a) or (4A)(a), **whether or not the officer has any suspicion** that the person has such a thing on the person's body, in the person's clothing or in any such property.'

- The Bill still allows officers to strip search based on the low threshold of only 'reasonable grounds' that a person has a prohibited thing, rather than limiting such intrusive searches to 'exceptional circumstances.' In addition, as there are no processes in place to effectively discipline officers even if they breach the 'reasonable grounds' requirement, this 'check' has no effect in practice.

- The Bill still allows the use of detector dogs to search detention facilities including detainees' rooms and personal effects and does not prevent this occurring in the presence of, or proximate to, detainees. Officers using dogs are required to:

  > take all reasonable precautions to prevent the dog touching any person (other than the officer); and (b) keep the dog under control while conducting the search, the use of the dog is not unlawful because of the behaviour of the dog, **including the touching of any person by the dog'**[13]

  This provision indicates an intention to conduct searches of premises, rooms and belongings involving dogs, **in the presence of detainees**. It is concerning that the Bill does not prescribe any standard regarding how close to detainees search dogs are permitted to be, and nor does it prohibit **actual contact between searcher dogs and detainees.** In addition**,** we are concerned that the use of search dogs in detention centres, where, as per our earlier submission, the majority of detainees have refugee or displacement backgrounds, is likely to

[13] s 252BA(5) of the Bill.

trigger very fearful responses in many detainees. This is especially for those with a history of torture and trauma, with cultural backgrounds averse to dogs or those with particular fears of dogs, which are also not uncommon in the general community.

- Furthermore, the Bill contains worrying provisions that some of the search powers, including the power to conduct **strip searches, do not need to be performed by 'authorised officers'** but can be performed by 'other persons' being 'authorised officer's assistants' whose qualifications or backgrounds are not defined. These delegated 'assistants' can then exercise the same powers as the authorised officer.[14] This purported delegation of sensitive search functions is legally questionable and also further reduces scope for accountability and oversight of the powers proposed under this Bill.

- The Bill empowers the Minister to make directions to officers as to how seizures of items can be effected or directed, however these directions **do not need to be linked to any particular risk profile** and do not require that particular categories of detainees be exempt from searches and seizure of prohibited items, with regard to their individual needs or vulnerabilities. Moreover, these **Ministerial directions cannot be disallowed by the Senate**, giving the Minister unchecked power to issue these directions again any group of detainees regarding any items in any facilities.

- The Bill continues to set a very low threshold for the circumstances in which the **Minister may decide to prohibit an item**. Rather than defining which items can be prohibited, the Bill gives the Minister exclusive power to decide that certain items will be 'prohibited things', which can be either (a) something which is already illegal (eg drugs) or (b) anything that the Minister thinks "**might** be a risk to the health, safety or security of persons in the facility, or to the order of the facility". This provision provides very broad powers to the Minister. As noted by the Court in *ARJ17* a broad provision like this can be used to prohibit virtually any item and:

> Conflate [s] a potential nefarious use to which a mobile phone can be put by a person who has hidden it with the ordinary and innocent use of that device as a commonplace feature of modern daily life around the world. A pen or pencil or a bed sheet or belt is also a thing capable of being used to inflict bodily injury, as is virtually every common object that a person in or out of detention may have. The pen or pencil can be used to stab another, the sheet or belt to strangle or trip a person so as to cause injury. Stone age humans used and fashioned stones as weapons. Human ingenuity can convert most everyday objects that have innocent uses into ones capable of inflicting bodily injury or being used to escape from detention.[15]

- Furthermore, the lack of accountability and oversight for exercise of this power, is concerning. The Bill does not require the Minister to justify prohibitions before items are prohibited, and the Minister's determinations would not be subject to administrative review. While the legislative instrument determining something to be a 'prohibited thing' would now be disallowable by the Senate, this is an insufficient means of oversight for several reasons.

  1. It is onerous upon the Senate to constantly oversee the changing lists of prohibited items and not a reliable nor accessible mechanism for ensuring oversight of the prohibited items list.
  2. Such items would continue to be prohibited until they are disallowed, which can often take months depending on the sitting schedule of the Senate.

[14] s 252BB of the Bill.
[15] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 [79].

3. Lists of 'prohibited items' could be 'bundled' together, combining non-controversial prohibited items (such as items which are illegal) with those that are used every day and predominantly for positive purposes, such as mobile phones
4. While the list of items can potentially be disallowed by the Senate, the more crucial power is that enabling the Minister to make directions regarding how officers are directed to exercise seizure powers, and these ministerial directions cannot be disallowed by the Senate.

- The Bill itself, as well as the Explanatory Memorandum and second reading speech all flag that telephones and other devices with internet capability are the real target of this Bill and are very likely to be listed as prohibited items and confiscated from all immigration detainees. There is no requirement that such prohibitions be based on any evidence that their removal is both necessary and proportionate or based on any identified risk.

- While the Explanatory Memorandum and Second Reading Speech both state that detainees will continue to have reasonable access to landline telephones, facsimile, the internet, postal services and visits in order to maintain contact with their family, friends, support networks and legal representatives, t**he Bill itself is notably silent as to any right or entitlement for detainees to have adequate opportunities to communicate with people outside detention.** As noted earlier, there is no statutory framework setting out minimum standards for immigration detention, including standards relating to the right to communicate with people outside of detention. This Bill allows for the possibility of incommunicado detention without legal redress, except for the narrow statutory obligation to provide 'reasonable facilities' for providing legal assistance, under s 256 of the Act. No other forms of communications for detainees have any statutory protection.

- It is little comfort that the Government says that detainees will have access to detention centre telephones and computers. We know from previous experience when personal telephones were banned, just how limited the Department's view is of its obligation to provide accessible and appropriately confidential means of communication, including for legal appointments. We already know with certainty that if only centralised communication facilities are available, this will greatly restrict detainees' access to provision of timely and confidential legal assistance and make it incredibly difficult to communicate with a client with the assistance of a telephone interpreter. Based on our previous experience, this would threaten detainees' statutory right under s 256 of the Migration Act to be afforded with reasonable facilities for making applications and obtaining legal assistance, and the right for that communication to be confidential. Moreover, landline telephones provide no substitute for the opportunity for detainees to maintain ready contact with their children, spouses and other family members using video apps such as facetime or zoom, which would become impossible using centre landlines.

5. Conclusion

Given the lack of any proper legal accountability framework for ensuring minimum standards in detention centres, this Bill will create even more unchecked power and more abuse in our detention centres. Our long experience has been that it is already extremely difficult to hold the Government and the Department's personnel accountable to its duty of care to immigration detainees, made even more challenging by the use of private contractors, Serco and IHMS for the provision of security and health services. This Bill would make an already dire human rights crisis, even more critical. The lack of proportionality and proper targeting of the restrictive measures proposed in this Bill give a clear indication that its main objects are to further isolate and constrict the rights of all detainees as a system of collective punishment within an already unaccountable framework which violates a wide range of civil rights and disproportionately affects asylum seekers and refugees, contrary to Australia's international protection obligations

More specifically, the real target of this Bill is confiscation of mobile phones, which are currently used appropriately by the vast majority of detainees to keep themselves connected to their families, lawyers, doctors, community supporters and to information about the outside world. The prohibition of mobile phones is likely to cause widespread despair in detention centres, and greatly increase the already very high rates of self-harm as a predictable consequence. The spectre of legally sanctioned constant searches without any basis and confiscation of mobile phones is also likely to be seen by detainees as an unjust collective punishment, which it would be. Incidents of 'use of force' and consequent abuses, will likely escalate even higher. The measures provided for in the Bill are very likely to be counterproductive to their stated aims. This submission has provided a detailed catalogue of some of the serious human rights consequences of denying detainees access to their phones. These include the cruel destruction of family life and relationships, further isolation of detainees, even less transparency of conditions and accountability for incidents of abuse in detention centres, less chance to exercise time-sensitive legal rights or gain access to a lawyer and less chance to obtain independent medical assessments.

Beyond preventing further deterioration of rights by recommending that this Bill be rejected in its entirety, we urge the Committee to take up the many concerning issues raised in this submission and to initiate a renewed effort to bring parliamentary accountability and the rule of law back into governance of our detention centres.