Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Committee: *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*

1 Introduction – Refugee Legal

1.1 Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 29 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection (**DIBP**) Immigration's Advice and Application Assistance Scheme (**IAAAS**) and a member of the peak DIBP-NGO Dialogue and the DIBP Protection Process Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submissions

2.1 Refugee Legal recommends that the *Migration Act 1958* (**the Act**) not be amended in the way proposed by the Bill. We submit that the amendments would constitute an unjustified expansion of the powers of the Minister and of officers, further diminishing the fair, human and dignified treatment of persons in immigration detention.

2.2 We hold the following principal concerns with the amendments proposed by the Bill:

a) The proposed amendments are unnecessary and the purported policy justification is inadequate, continuing a trend of inappropriate "securitisation" of immigration detention;

b) The amendments would provide the Minister with an unjustifiably broad personal power to prohibit items, lacking adequate oversight;

c) Prohibiting the use of mobile phones by all detainees is a disproportionate measure

[1] Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

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which would have significant adverse impacts on the ability of persons in immigration detention to contact their legal representatives, family and other supports; and

d) 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.

2.3 Each of these matters are developed below.

3 Character cancellations and the 'securitisation' of detention

3.1 In our submission, the policy rationale put forward as justification for the measures in the Bill is inadequate, and fails to acknowledge the range of people held in immigration detention. The Minister's second reading speech placed the proposed amendments in the context of the changes to s 501 of the Act and consequent increase in visa cancellations on character grounds:

> *[W]e have strengthened section 501 of the Migration Act to better protect the Australian community from foreign nationals who commit serious crimes…*
>
> *This means that 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.*
>
> *These criminals often have serious behavioural issues and pose a critical threat to the health, safety, security and order of the detention network.*[2]

3.2 The Explanatory Memorandum to the Bill likewise states:

> *The profile of the detainee caseload across the immigration detention network has changed significantly over the past two years. 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]

3.3 We acknowledge that this shift may have presented issues for the management of the security and safety of immigration detention facilities. However, there remains a diverse range of people in immigration detention. It is essential that the amendments proposed by the Bill are considered with an understanding of the range of people who the changes would affect. This includes a large proportion of people who do not present a security or safety risk, and are often vulnerable, including asylum seekers and refugees with a history of torture and trauma.

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[2] Parliament of Australia, House of Representatives, Hansard: Bills, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, 13 September 2017.
[3] Explanatory Memorandum, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017,* p 2 ('Explanatory Memorandum').

3.4 The Department's detention statistics for 31 August 2017 reflect that of 1,259 people in immigration detention, 468 were on the basis of s 501 visa cancellations; 332 were "illegal maritime arrivals"; and 459 were categorised as "other", including people refused immigration clearance at the airport, people who had overstayed their visa and people who had their visa cancelled on other grounds.[4]

3.5 In relation to unauthorised maritime arrivals in the detention population, the Minister stated in his second reading speech that "this cohort is complex and includes people with criminal histories or other security concerns which present a risk to the Australian community".[5] However, there are a significant number of people who are in detention for reasons unrelated to criminal histories or security concerns. The framework for the grant of bridging visas to unauthorised maritime arrivals is complex, and it is not uncommon for a person's bridging visa to expire and not be renewed by the Department, with that person unable to make an application for another bridging visa of their own initiative.[6] The person is then liable to be detained as an unlawful non-citizen.[7] Refugee Legal is aware of people who have been re-detained in such circumstances, due to officers failing to understand correctly the status of their ongoing protection matters. It should further be noted in this context that the Act contains broad powers allowing cancellation of bridging visas, including where a person has been charged with a criminal offence.[8] We are aware of cases where people have been detained on the basis of charges against them, where those charges are subsequently dropped, yet the person remains in immigration detention.

3.6 Further, it should be understood that not all people in the s 501 cancellation cohort have committed serious offences or present a risk to security or safety. The mandatory character cancellation provisions introduced in 2014[9] are harsh in their operation. Under s 501(3A) of the Act, the Minister must cancel a visa where the person does not pass the character test because they have a "substantial criminal record", and the person is serving a full-time custodial sentence for an offence against Australian law. A person has a "substantial criminal record" for the purposes of the character test if the person *inter alia* has been sentenced to a term of imprisonment of 12 months or more, or has been sentenced to two or more terms of imprisonment totalling 12 months or more.[10] Where sentences are served concurrently, the whole of each term is counted separately in calculating the total.[11] Wholly or partially suspended sentences are also included.[12] This means that a person may have their visa mandatorily cancelled for relatively minor offences, or on the basis of offences committed many years beforehand if they serve even a brief further term of imprisonment. Where a person's visa is cancelled under s 501(3A), the person may apply for revocation of the cancellation decision pursuant to s 501CA. This is frequently a lengthy process, contributing to the high number of people

[4] Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (31 August 2017) p 4, 7, https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-august-2017.pdf.
[5] Parliament of Australia, House of representatives, Hansard: Bills, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, 13 September 2017.
[6] See *Migration Act 1958* s 46A, 72; *Migration Regulations 1994* r 2.07, sch 1 item 1305.
[7] *Migration Act 1958* s 189.
[8] See *Migration Act 1958* s 116.
[9] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).
[10] *Migration Act 1958* s 501(7)(c),(d).
[11] *Migration Act 1958* s 501(7A).
[12] *Te v Minister for Immigration and Ethnic Affairs* (1999) 88 FCR 264.

in immigration detention following s 501 cancellations. It would be wrong to assume that all persons in this cohort present risks to the safety or order of immigration detention facilities. We note that all persons in immigration detention after s 501 cancellations have been transferred only after completing their term of imprisonment, of the duration determined to be appropriate by the criminal justice system.

3.7 In our submission, it is not justifiable to impose restrictive measures on all persons in immigration detention, without an objective assessment of the risk they present. The UN Special Rapporteur on Human Rights of Migrants noted the following concern in his April 2017 report on his mission to Australia:

> *64. Many testified to the increased "securitization" of the immigration detention centres. The arrival of the Australian Border Force and the increased number of foreigners in detention after having served a prison sentence (the "501s") has driven a considerable increase in security control procedures. […] It was readily acknowledged that a "prison culture" had changed the atmosphere of detention centres: a "garrison mind set", as described by a government official*.[13]

3.8 In our submission, the measures proposed by the Bill would continue and perpetuate this problematic shift. Immigration detention is a form of administrative detention; it is not criminal imprisonment. Detention must not be punitive.[14] Measures to ensure safety, security and order of detention facilities must be reasonable and adapted in this context.

4 Minister's personal powers

4.1 The Bill proposes to insert s 251A into the Act, providing the Minister with the power to determine a "prohibited thing" in relation to a person in detention. The Minister may determine a thing to be a "prohibited thing" if the Minister is satisfied that possession of the thing is prohibited by law in a place or places in Australia; or 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.

4.2 In our submission, this would provide the Minister with an unjustifiably broad personal power to prohibit items. The Minister need only be satisfied that the thing "might" be a risk, a very low threshold. Further, the inclusion of risk "to the order of the facility" is a vague and ill-defined criterion. The provision as drafted lacks sufficient clear connection to the avoidance of risks to safety and security. Accordingly, it goes well beyond its purported justification.

4.3 We are further concerned that the proposed amendments would provide the Minister with further personal powers affecting the rights and interests of asylum seekers and migrants. The new power would allow for already restrictive conditions in immigration detention to be further restricted on the personal decision of the Minister of the day, with limited oversight. Further items beyond those noted in the Bill could be prohibited on the Minister's whim. This risk must again be considered in the current context of moves to "securitise" detention, which recently saw new rules that visitors could not bring home-

[13] UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (April 2017) UN Doc A/HRC/35/25.Add.3.
[14] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

cooked food to detainees. The proposed provision allows the scope for entirely innocuous personal items to be determined as prohibited, on the Minister's choice. The determination of "prohibited items" then founds the power for searches, including strip searches, which are significantly invasive.

4.4 The Explanatory Memorandum states: "This 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".[15] However, the breadth of the powers afforded would allow draconian measures beyond what is justifiable, without adequate accountability. A determination by the Minister is made by legislative instrument, and is not disallowable.[16] Accordingly there is no affordance for even that limited oversight by the Senate.

4.5 In our submission, the proposed amendments constitute an unwarranted and inappropriate expansion of the personal powers of the Minister. Such proposals have featured in a number of Bills recently, notably the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017.* This is a highly concerning trend. Refugee Legal has consistently opposed such measures, as constituting a threat to accountable governance and the rule of law.[17] In our submission, Parliament should be extremely reticent to grant the Minister further expansive personal powers, particularly where no compelling case has been made to justify them.

5 Prohibiting mobile phones

5.1 The Bill provides for an explanatory note to s 251A, stating that "examples of things that might be considered to pose a risk" include mobile phones, SIM cards, computers, and medications or health care supplements. The Explanatory Memorandum likewise indicates that a primary focus of the Bill is to prohibit the possession of mobile phones by persons in immigration detention. It states that "detainees are using mobile phones to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats".[18]

5.2 Refugee Legal submits that a blanket prohibition on the use of mobile phones in immigration detention is not necessary or justified. There are less restrictive measures available for addressing the concerns elaborated in the Explanatory Memorandum, on the basis of an individualised assessment of the risk posed by a particular person.

5.3 Prohibiting mobile phones restricts the ability of persons in immigration detention to access legal advice. The Explanatory Memorandum states that the Department "will ensure that communication avenues are maintained and enhanced" and that "Detainees and legal representatives remain able to schedule telephone interviews ahead of time if they require access to a desk or private space".[19] However, it is Refugee Legal's experience that there can be significant barriers to timely and reliable communication with clients in immigration detention. The policies, procedures and accessibility vary

[15] Explanatory Memorandum, p 6.
[16] *Legislation (Exemptions and Other Matters) Regulation 2015*, r 10, item 20.
[17] See Refugee Legal, Submission to the Senate Legal and Constitutional Affairs Committee, *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017.*
[18] Explanatory Memorandum, p 2.
[19] Explanatory Memorandum, p 7.

between detention centres. Telephone appointments in a private area generally require a period of notice, eg 24 hours, which is not always possible with urgent matters. Quick contact between legal representatives and clients is often required to meet short statutory deadlines, which are particularly restricted for persons in immigration detention. The time difference with Christmas Island (currently 4 hours) is a further barrier, which is exacerbated as access to the private phone rooms is not permitted from 12pm to 2pm. Telephones in public areas of the detention centre are not appropriate for discussing legal matters, frequently involving sensitive or personal subject matter.

5.4 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. Access to mobile phones is of immense importance in ensuring that persons in immigration detention are able to maintain communication with their legal representatives, and have reasonable access to legal assistance to prepare for their legal matters.

5.5 Mobile phones are also important for maintaining contact with family and other support people in the community. Phone contact is of particular importance for people detained in remote detention centres, including Christmas Island and Yongah Hill IDC, where in-person visits are limited by practical constraints of distance and cost. There are many detainees in remote detention who have children in Australia. Flexible communication with children is an important issue, engaging consideration of the best interests of the child. The time differences make communication difficult, and calls will often need to be made at unusual times at the remote location.

5.6 The alternative measures noted in the Explanatory Memorandum, of access to landline telephones, facsimile and the internet, are not adequate substitutes. Access to mobile phones supports wellbeing for detainees who could privately access emotional supports at all hours; where times outside of business hours can be the most vulnerable. It should further be noted that periods of detention are often protracted – as at 31 August 2017, there were 276 people who had been in immigration for more than two years. The average length of time for people held in detention facilities was 445 days.[20] In this context, the ability to have ready access to the support of friends, and to be able to speak with them in private without navigating administrative or practical barriers, is of crucial importance for maintaining family relationships and mental health. There are also some refugees and asylum seekers who have been in immigration detention for a number of years and the ability to communicate with family in Australia and overseas, and support persons, has been critical for their mental health and general wellbeing.

6 Extension of search powers

6.1 The Bill proposes to extend the existing search and seizure powers in the Act, to encompass prohibited items. We hold concern with the extension of the powers in the

[20] Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (31 August 2017) p 11 https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-august-2017.pdf

Act in such a way, where the power to determine prohibited items engaging these powers is broad and unjustified.

6.2 In particular, it should be noted that the power to conduct a strip search in s 252A of the Act would apply in relation to prohibited items. We hold concern that such a highly invasive procedure could be carried out in this context. While noting the requirements for the conduct of strip searches provided in the Act, the extension of the availability of this measure in relation to immigration detainees is of concern. It carries the potential for increasing and normalising the use of such searches, a further move of "securitisation" of detention facilities. Strip searches carry the potential for abuse, particularly where there is inadequate oversight. It should be noted that searches may be carried out by "authorised officers", including Serco guards who are not public servants and are not bound by the APS Code of Conduct or Values.

6.3 The Bill also proposes to insert a new power to search an immigration detention facility (s 252BA). The provision would allow an authorised officer to conduct a search without warrant of an immigration detention facility operated by or on behalf of the Commonwealth, including of accommodation areas, detainees' rooms and detainees' personal effects. A search may be conducted to "find out whether any of the following are at the facility": a weapon or other thing capable of being used to inflict bodily injury or to help a detainee to escape from immigration detention; or a prohibited thing.

6.4 The proposed power is not conditioned on an officer having a reasonable suspicion of the presence of such an item. 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. The Explanatory Memorandum does not provide justification for this additional power, except to state that: "Currently common law is relied on to search for prohibited items in areas within an immigration detention facility, including detainee accommodation and common areas, to ensure the safety and security of detainees, departmental staff, contractors and other persons".[21] There is nothing to explain the Department's current interpretation of scope of these powers, or why they are believed to be insufficient and requiring a statutory response.

6.5 The Bill also proposed to add a new definition of "immigration detention facility", to which the search power would apply (s 251A). The definition includes a detention centre established under s 273 of the Act; or another place approved by the Minister in writing for the purposes of subparagraph (b)(v) of the definition of "immigration detention" in s 5(1). This encompasses Alternative Places of Detention (APODs). It should be noted that APODs are not used to detain people with s 501 cancellations. Given that concerns about this cohort have been relied on as the primary purported justification for the amendments in the Bill, the proposed new search power would appear to be unjustifiably wide in its reach.

6.6 The proposed amendments would further provide for the use of detector dogs, in relation to searches of immigration detention facilities (s 252BA) and screening procedures (s 252AA). This represents a further measure of "securitisation" of immigration detention, moving immigration detention further towards a prison environment.

[21] Explanatory Memorandum, p 14.

6.7 Such measures are not appropriate to immigration detention. We emphasise that there are a significant number of refugees and asylum seekers in immigration detention. Many have experienced past mistreatment and torture from the authorities or security officials in their home country. It is not difficult to foresee the particular fear and adverse impact that invasive measures in immigration detention, including searches of their room or person by officers, would have on this group of people. Our clients have not infrequently reported such treatment under the current detention regime, causing them acute distress. These practices should not be further authorised and entrenched by the amendments proposed by the Bill.

7 Conclusion

7.1 Refugee Legal holds deep concern with the continuing moves to "securitise" immigration detention reflected in the Bill, and with the proposal to provide the Minister with further broad personal powers. The amendments proposed by the Bill would constitute a regressive step in the fair, dignified and humane treatment of people in immigration detention in keeping with international human rights standards. There are more appropriate and adapted options available to address the security and safety concerns put forward as the purported justification for the amendments.

7.2 For these reasons, we submit that the Bill should not be passed.

Refugee Legal

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