New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

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

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Submission of the New South Wales Council for Civil Liberties to the Legal and Constitutional Affairs Committee of the Senate inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

NSWCCL thanks the Senate Committee for the opportunity to comment on this Bill.

Background

The Villawood Immigration Detention Centre is secured by a private company which provides public services (Serco). In that regard, they have to follow the government rules and apply them to the Centre. Similar arrangements apply at other Immigration Detention Facilities.

Asylum seekers who came by boat were prohibited from accessing mobile phones some time ago, while those who came by plane had access until recently. The prohibition is the subject of a court case brought by The National Justice Project in the Federal Court. In February this year the Court issued a temporary injunction lifting this ban. An appeal concerning the competence of the court to hear the case was overturned, and the case continues.

This Bill appears to be an attempt to pre-empt the Court's finding,

The rules can be arbitrary, demeaning and unfair. Restrictions on what detainees may possess and on what visitors may bring in with them have been the subject of abrupt changes recently.

A new requirement has been placed on visitors to have 100 points of identification a difficult task for refugee families. Many former detainees and members of the families of detainees have only an IMMI, which is worth only 70 points. They do not have drivers' licences, nor other items to make up the other 30 points. Since the identity cards are themselves issued by the Department of Immigration and Border Protection (DIBP), these should be sufficient for entry.

Provisions in the Bill

Items to be prohibited in immigration detention facilities

The Bill provides for the Minister of Immigration and Border Protection to determine by a legislative instrument that a thing is a prohibited thing,

1. if possession of it is prohibited by a law of the Commonwealth or any State or Territory, or

2. if the possession of the thing in an immigration detention facility might be a risk to health, safety or security of persons in the facility, or to the order of the facility.

A note in the bill gives examples of items that might be banned by the latter provision:
mobile phones;
sim cards;

computers and other electronic devices such as tablets;
medications or health care supplements;
and publications or other material that could incite violence, racism or hatred.

Items already prohibited under the existing legislation include weapons, or other things capable of being used to inflict bodily injury or to help a detainee to escape from immigration detention. The Bill would reinforce the power to search for these items as well as those the Minister declares prohibited.

Items that visitors already may not bring in

The Act already allows searches of visitors to immigration facilities of their outer clothing, and of anything they bring in for the detainees. They will be prohibited from bringing in anything the Minister succeeds in prohibiting. The published list at present includes frozen meals, fresh fruit and vegetables, fast food, tinned food, home-cooked meals and take-away meals. Recently, visitors were startled to be told that they could not bring in pens or paper not even forms for applying for legal aid, nor lists of the detainees they had permission to see not even blank sheets of paper!

Problems with these provisions

The wide power to declare items prohibited

The Minister's power to declare items if they are 'a risk…to the order of the facility' is far too wide. Almost anything could be included under this heading if blank sheets of paper can be prohibited, so can absolutely anything.

There is also no way a detainee can challenge the wrongful seizure of his/her possessions. That is of particular concern, given that the Explanatory Memorandum proposes that medications may be confiscated where a detainee may be in possession of medication that has been prescribed for another person.

Food stuffs

The bans here not only have effects on the nutrition and so the health of detainees, they prevent the comfort of eating foods from their own cultures, especially on special days such as Eid el Fitr.

Mobile phones

The Minister's Second Reading Speech, the Bill and the Explanatory Memorandum[2] all make particular mention of mobile phones as items that should be banned. Mobile phones in particular can be an important means for asylum seekers to contact their lawyers and supporters, and to keep

[1] Explanatory Memorandum p 6

[2] Explanatory Memorandum p 2

in touch with their families, who are often in other countries, and may indeed be in dreadful danger.[3] The use of landlines (as the explanatory memorandum proposes) is not at all a satisfactory substitute for the ability to correspond by email, text or live chat. There are nowhere near enough landlines to provide a substitute for mobile phones. The competition for their use is made worse by the difficulty often experienced of making contact when repeated calls get an engaged signal. A detainee may lose the opportunity to contact his/her lawyer or spouse while another is repeatedly failing to make a connection.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) insisted that, in regard of their deprivation of liberty, detained irregular migrants should hold 3 basic rights: the right to have access to a lawyer, to have access to a medical doctor and to be able to inform a relative or third party about the detention measure.

The ban on phones and the new Bill clearly undermine those rights:

- The right of access to a lawyer should include the right to talk to a lawyer in private, as well as to have access to legal advice. The use of landlines does not provide a secure private place to communicate. Nor is it likely to be quick enough to give asylum seekers the access required by the extremely short time limits that are being imposed upon them.

- Notifying a relative about the detention measure is clearly facilitated if migrants are allowed to keep their mobile phones during the detention, or at least have access to them. Also, migrants should have every opportunity to remain in contact with the outside world, which in practice requires access to their mobile phone.

Some detainees have been cut off from their families for several years. In such a case, meaningful contact means the use of apps such as Skype, which permit visual contact. The cruel outcome of banning mobile phones will be that detainees do not get to see what their family members, their children for example, look like, for years.

Worse, in some detention centres, access to landline phones is heavily limited, with access having to be “earned”.

Asylum seekers generally are not criminals. They should not be treated as though they are. Nearly all of them have fled persecution, their lives being in danger were they to return. They are entitled, morally and under international law, to better treatment than we are meting out to them. Many are psychologically fragile because of their pasts. This is, notoriously, made worse by the way they are treated in detention. Mobile phones can provide a measure of support and comfort, the knowledge that others care for them and about them, and thus some protection from mental illness. They could provide a link to an outside world from which they have been cut off.

In view of that, it is not reasonable to prevent all detainees from having access to mobile phones and their associated sim cards, because of the wrong actions of a very few.

[3] A current example is Rohingya in Villawood who are desperate to discover if their relatives have been killed.

Almost anything can be used for good or evil kitchen knives for instance can be used for murder, but that is not a sufficient reason for banning them from households. It is up to the Government to find other ways of preventing the misuse of mobile phones by a very few criminals, rather than preventing these innocent and vulnerable people from having access.[4] There is no sign that the Government has made any effort to do so.

Banning the phones appears to have been a reflexive reaction, (if there is a problem, ban something) not a concerned and thoughtful response. In addition to an excessive tendency to suspect and mistrust asylum seekers, this legislation and the instructions have been motivated in part by the desire to make it as difficult as possible for anyone to assist them, to make it difficult for them to prepare their cases for asylum, and to make their lives in detention as miserable as possible.

If this is indeed the intention, it appears to have been successful. CCL is aware of several detainees who have subsequently been imprisoned, who find to their relief that the conditions they are subjected to are significantly better than those experienced in detention centres.

Recommendation 1:

For the reasons given, NSWCCL cannot support this Bill and recommends its rejection in its entirety.

In recent times, there has been an alarming extension of executive power and limitation in checks and balances, particularly in the area of immigration. This Bill reinforces the Minister's powers to inflict harm. NSWCCL urges the Committee to consider the arguments in favour of beginning to reverse this distressing trend.

Recommendation 2:

NSWCCL recommends that the Committee should carefully consider additional checks and balances on the Minister's excessive powers to inflict harm and alternatives to the onerous restrictions currently imposed.

Strengthening search and seizure powers the use of dogs

The Bill would add to the power of authorised officials to undertake searches of detainees and of visitors a long way beyond the purposes to which such searches are at present permitted. The officials can to retain items seized during searches. In addition to existing powers, which include strip searches of detainees, the officials will be entitled to use dogs. The Bill protects the handler against any misbehaviour by the dogs, and so limits the right of detainees or visitors to compensation.

[4] One obvious at least partial solution is to cease the practice of housing together convicted criminals awaiting deportation and asylum seekers waiting for their applications to be determined.

New South Wales has now extensive experience of the use of sniffer dogs to discover drugs. Police drug dogs are notoriously inaccurate, with figures showing that they wrongly identify people as carrying drugs as many as four out of five times. The number of false positives indicates the unsuitable nature of the practice.

For instance, in 2016, sniffer dogs carried out 67,000 searches on prison visitors, which resulted in 243 being charged and 573 being refused entry.

In June 2006, the NSW Ombusdman reported that: "No drugs were located in almost three-quarters of searches following indications, raising questions about the accuracy of drug detection dogs. This in turn casts doubt on the legitimacy of police relying on the dogs to determine whether they may reasonably suspect that a person is in possession of a prohibited drug." [5]
One can only speculate on the way an asylum seeker will be treated if a sniffer dog identifies the traces of a drug, and no drugs are found; but given the vilification that has been meted out to asylum seekers, it is unlikely to be apologetic and supportive.

Given the ineffectiveness of the sniffer dogs program, the interference with the suspect's body is an unnecessary violation of his/her intimacy and human dignity. Subsequent strip searches would then be intrusive and degrading treatment. Detainees are already in a situation of vulnerability and subject to a sense of embarrassment, powerlessness and inferiority. Introducing sniffer dogs would only increase those feelings and diminish human dignity not to mention that fact that some cultures have particular sensitivities to dogs.

We also fear that drug dogs will discourage visitors. However, visits are a vital way for detainees to maintain family ties and contact with the outside world. Fewer visits will make it even harder for them to reintegrate into society after release.

Recommendation 3:

NSWCCL recommends that dogs should not be able to be used for searches in immigration detention centres.

This submission was prepared by Dr Martin Bibby (Committee member) and Marie-Astrid Mith (Intern) on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Senate Legal and Constitutional Affairs Committee.

Yours sincerely,

[5] Ombudsman's Report, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p.iii.

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