New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

Migration Amendment (Prohibiting Items in Detention Facilities) Bill 2020

2020

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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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The Council for Civil Liberties (NSWCCL) thanks the Legal and Constitutional Committee (the Committee) for its invitation to make a concerning the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the bill). The bill is a modified version of a bill that was introduced in 2017 (the 2017 bill).

NSWCCL would like to speak further to these arguments when the bill is considered by the Committee.

Recommendations:

This bill should be rejected.

If the bill is to proceed, it should limit the general power to search for and seize things to those which are intrinsically harmful, such as guns, knives and unprescribed narcotics. It should stipulate that items that do not present inherent risks to safety and security should only be prohibited to specified individuals where there is evidence that the person has used or is reasonably likely to use the item in a manner that presents clear risks to safety or security, and where those risks cannot be managed in a less restrictive way.

If the bill is to proceed, dogs should not be able to be used for searches in immigration detention centres.

Features of the Bill.

The bill proposes multiple new provisions relating to the search for prohibited things in immigration detention facilities, and the exercise of powers by authorised officers. The bill proposes to include things such as controlled drugs, as defined in the *Criminal Code Act 1995 (Cth)*, prescription drugs, mobile phones, and other devices capable of accessing the internet as prohibited things for this purpose.

The Minister's powers.

This bill proposes to insert a new section 251A into the Migration Act 1958 (Cth) (the Act), to enable the Minister to determine, by legislative instrument, things to be prohibited in immigration detention centres. The Minister will be empowered to prohibit not only things which it is already illegal to possess 'in a place or places in Australia' (narcotic drugs are referred to in the Explanatory Memorandum), but also other things 'whose possession or use 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'.

Detainees in immigration detention facilities include:

people who arrived by boat to seek asylum;

people who have overstayed their visas;

people subject to adverse security assessments;

people whose visas were cancelled on character grounds under section 501 of the Act

people whose visas have been cancelled on non-character grounds; and

people who were refused entry at an Australian airport.

People who are detained under section 501 are necessarily people whom the criminal justice system does not require to be detained. They would not be detained but for the fact that they are not Australian citizens. They include some who have committed and been punished for serious violent offences such as assault or child sex offenders, some (but not all) of whom may present a risk of violence; but others who present little or no risk. The grounds on which a person's visa can be cancelled are very broad, as the Australian Human Rights Commission noted,[1]and include traffic offences and circumstances where a person has not been convicted or even accused of criminal activity.

It is not reasonable to treat all these people, or even all those whose visas were cancelled under section 501, as equally being a risk to the security of detention centres.

Unlike the parallel proposal in the 2017 bill, the Minister's prohibitions will be subject to disallowance by either House of Parliament.[2] Though this is an important change, it will be poor comfort for any asylum seekers who miss the two day deadline to appeal adverse decisions for lack of access to their lawyers because their phones have been taken away.

Authorised officers and their assistants in the facilities would be permitted (or required if the Minister so determines) to seize such items, and store them pending the release of the detainees, or the elapse of 60 days.[3]

A note in the bill makes it plain that it is intended that mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet will be determined to be prohibited things. The same concerns about such devices also appear in the Explanatory Memorandum[4] (EM).

Because alternatives are possible, and harmless people will be harmed if the bill is passed unaltered, the proposal is neither necessary nor proportionate.

New search powers.

The bill also proposes to provide a legislative basis for searches for things that the Minister has prohibited—searches of the person, clothing and property of the detainees, of their accommodation areas, administrative areas, common areas, detainees' rooms, their personal

[1] In its submission, number 11, on the 2017 bill, section 7. See further discussion below.

[2] This is the effect of subsection 251A(4).

[3] Or longer, if a magistrate so orders or the items might provide evidence in court proceedings. See item 22, and proposed subsections 251B(6) and 252C(2).

[4] Pp. 3 and 7.

effects, medical examination areas and storage areas. Additional search powers would be given, including for the use of dogs. The bill deals separately with ordinary searches, screening procedures and strip searches. No suspicion is needed for the first two.

The bill is a response to the Full Federal Court decision in ARJ17 v Minister for Immigration and Border Protection [2018] FCAFC 98 (ARJ17). That unanimous decision found that a decision by the Secretary of the Department to have mobile phones taken from detainees and the subsequent searches for them were beyond the powers of the Minister and the personnel running the detention centres. Much of the detail of the bill is concerned to address the details of the judicial argument for that decision, and to set the powers to search beyond question.

It is significant, in view of what is said in the Explanatory Memorandum, that the policy then was to seize mobile phones from unauthorised maritime arrival detainees, *but not from other detainees*, and in particular, not from detainees held under section 501 of the act.[5] Yet the claim now, as in 2017, is that the powers are necessary to prevent the latter from dangerous activities.

Mobile phones and other devices.

As Justice Rares remarks in ARJ17, mobile phones are a commonplace feature of modern daily life around the world.[6] He also notes that

'A pen or pencil or a bedsheet 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'. On this point, NSWCCL notes, further, that pencils are not banned in schools, even though students have, on rare occasions and once in Australia, put out other students' eyes with them.

Justice Rares continues. It is, he says 'a fallacy to conflate 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'. Although the original policy was limited to unauthorised maritime arrivals,[7] the Explanatory Memorandum cites the use of phones by former criminals detained on character grounds under section 501 of the Act to conduct illegal activities relating to drugs, maintain criminal enterprises, use of the phones as a commodity of exchange or currency, to coordinate and assist escape attempts, and that phones can be stolen, or used to issue threats or facilitate assaults 'including an attempted contract killing'[8] There is no account of how

[5] Rares J., in ARJ17 §11.

[6] Ibid. at 79.

[7] There was no talk about the danger posed by people who failed the character test then.

[8] EM outline p. 2 and Statement of Compatibility with Human Rights, p. 37. Note that only one such attempt is referenced.

common these activities are. However, if they were common, it is likely that the EM would say so.

NSWCCL argues that the benefit from restricting the capacity of a sub-group of section 501 detainees to facilitate crimes is outweighed by the cost to asylum seekers and other detainees of taking their phones away.

We also argue that even when section 501 detainees are considered separately, the action of taking phones away from all of them is neither necessary nor proportionate.

Recommendation: If the bill is to proceed, it should limit the *general* power to search for and seize things to those which are intrinsically harmful, such as guns, knives and unprescribed narcotics.

Legal support for asylum seekers.

Professional help is essential to navigate Australia's complex migration system. To properly assist detainees, lawyers need access that is not only confidential, but reliable and, very importantly, swift. For example, if the Department requests an applicant for refugee status to explain or provide more information about a protection visa application, they are required to respond *in English* within three working days. If a decision is taken to cancel a bridging visa, an appeal must be made to the Administrative Appeals Tribunal *within two days, or they lose their right of appeal.*

Now the Statement of Compatibility with Human Rights (the Human Rights Statement) tells us that detainees will have freedom of expression, because they have access to landlines, though not necessarily in private rooms, access to the internet (though this is monitored), fax (with staff sending them), and visits from family and friends.[9]

If these remarks are not disingenuous, then they were made by a person with little knowledge of the reality inside detention centres. There are very few landline phones, and they are in high demand. In some centres, access has to be "earned". Where access is through a switchboard, there are sometimes long delays—in some centres, we are informed, staff have repeatedly refused to put through urgent calls. Access to the internet is also limited,[10] and monitoring makes computers unsuitable for discussion with lawyers. The use of fax, as the Human Rights Statement admits, requires a detainee to fill in a form. None of these are suited to confidential, urgent, discussion with a lawyer.

In addition, when asylum seekers are transferred from one detention centre to another, a mobile phone can be crucial for legal representatives to find where they are, to establish connections with them and to arrange for interpreting services. Generally, indeed, calling an interpreter through a switchboard is difficult and time-consuming; while with a mobile phone it is much easier.

[9] Pp. 39f. These remarks are echoed in the EM Introduction (pp. 2f) and at §24.

[10] In one unit of the Broadmeadow facility, for instance, only two computers have been working, shared amongst forty people. There is no privacy.

Confidentiality matters too. The phones are often in public areas. Conversations need to be out of the hearing of detention centre guards, who are often hostile, and of other detainees, who may scorn or persecute their fellow detainees when they hear them talk about themselves.[11] Detainees may also be reluctant to use landline phones or to talk freely on them because of the possibility that their calls may be monitored.

The removal of mobile phones would thus be an indirect denial of access to legal representation or to courts, and thus contrary to the UN Convention Relating to the Status of Refugees article 16.

It would also make it difficult or impossible for detainees to talk confidentially to monitoring bodies such as the Federal Ombudsman, the Human Rights Commission, or the Red Cross. There is a real risk of discriminatory treatment of detainees who are known to have complained to such bodies; and fear of such treatment may inhibit complaints, even when the fear is unjustified.

For asylum seeker detainees to be treated justly, fairly and in accordance with their legal rights, there is no serious alternative at present but for them to possess mobile phones.

Support for detainees by family and friends. Support for children.

Mobile phones are a vital means for detained asylum seekers to keep in touch with their families, friends and other supporters. This is particularly important now, with COVID-19 restrictions preventing people from visiting them. Their families may be in other countries, and may be in dreadful danger—from the virus, but also of persecution and murder.[12] Detainees in such cases are desperate for news.

The Federal Government already obstructs access to immigration detention centres through a range of legal and practical barriers—geographic isolation, statutory secrecy regimes, and until recently, inconsistent, obstructive and arbitrary rules regarding visitors.

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. Investigations have found that rates of mental health conditions in the immigration detention population in Australia are extremely high, ranging from clinically significant depression to anxiety, sleep disorders, post-traumatic stress disorder and suicidal ideation.[13] This is, notoriously, made worse by the way they are treated in detention.

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[11] An asylum seeker may need to be questioned about rape or torture, sexual orientation, or other sensitive issues.

[12] A good example is the Rohingya in Villawood, who are desperate to discover whether their relatives have been killed.

[13] See for instance Newman L, Proctor N, Dudley M (2013) Seeking asylum in Australia: immigration detention, human rights and mental health care. *Australasian Psychiatry* 21: 315–20, and von Werthern, M. at al., The Impact of Immigration Detention on Mental Health: A Systematic Review, BMC Psychiatry 18, 382 (2018).

Mobile phones can provide a source of support and comfort, the knowledge that others care about them, and thus some protection from mental illness, in the face of the tedium, uncertainty, fear and anguish that are the conditions of their lives in detention. But talking about highly personal matters with family and loved ones in an open setting where landlines are located is extremely difficult.

Some asylum seekers have young children, who are in the community. These children should, for their own sakes, have ready and flexible access to their fathers. This requires time, and a lack of pressure from other detainees for access to a computer. The fathers, too, benefit from the interaction.

In view of those personal needs, and the requirements of quick access to their lawyers, 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. It is up to the Government to find other ways to prevent the misuse of mobile phones by a very few criminals, rather than preventing innocent people from having access.[14] There is no sign that the Government has made any effort to do so.

Banning mobile 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, the instructions that preceded this legislation made life miserable for many detainees. NSWCCL is aware of several who have subsequently been imprisoned, who find to their relief that the conditions to which they were then subjected were significantly better than those experienced in detention centres.

The EM and the Human Rights Statement tell us that 'an authorised officer's decision to seize a mobile phone or a SIM card…from a detainee would be made taking into account a range of considerations, including, but not limited to, the existence of police recommendations or relevant court orders, and whether the detainee is a registered sex offender or has a history of child sex offences.' However, since under subsection 251B(6) the Minister can require all mobile phones and SIM cards to be seized from all detainees (*and this has already been tried*), and under subsection 252(4C) authorised officers must then seize them all, this assurance is empty.

Recommendation: For the reasons given then, this bill should be rejected.

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 far beyond the ways in which such searches are at present permitted. The officials would be able 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.

[14] One solution would be to house those persons who really do constitute a risk of violence—a subset of those whose visas have been cancelled under section 501 of the Act—in separate accommodation. The possibility of doing this is one reason why the bill is disproportionate and unnecessary.

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 Ombudsman 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."

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. As the Refugee Council of Australia pointed out in its submission concerning the 2017 Bill, 'the use of dogs is highly inappropriate in a place where people with a history of trauma, torture and mental health issues are deprived of their liberty. For many people, seeing those dogs during these search processes can bring to mind memories of police raids in countries of origin. In many cultures, [moreover,] it is not acceptable to continue to use items that were touched by a dog, something that is inevitable if they were to be used in a room search'.[15]

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.

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.[16]

Recommendation: Dogs should not be able to be used for searches in immigration detention centres.

People whose visas were cancelled under section 501 of the Act, and other detainees.

The bill applies to all people in immigration detention—to people who arrived by boat to seek asylum, people who have overstayed their visas, people whose visas have been cancelled on grounds other than their character, and people who were refused entry at an airport and so on. A few of those people may be a risk to security, but most are not.

Under section 501 of the Act, the Minister can cancel a visa or refuse to grant one on character grounds. A key rationale given for the new bill is that such people are likely to pose a significant risk to facility security and the safety of others.

[15] Refugee Council of Australia, Submission concerning the 2017 bill 55, §3.6

[16] This argument of course supposes that the Covid-2 virus will recede to the point where visits again become possible, and not a severe danger to detainees and their guards.

As we noted above, there is a wide variety of grounds on which a visa may be denied or cancelled under section 501 of the Act. Many are detained after having served their sentences in prison; some have been given a good behaviour bond instead of a prison sentence; some have been charged but are on bail (the courts thus finding that they are *not* a danger to the community); some whose visas have been cancelled for crimes committed years earlier, and have been released from prison and lived in the community without reoffending for years.[17] Some have committed non-violent crimes, such as traffic offences, or receiving stolen goods. A person can have their visa cancelled under subsection 501(6b) without their having committed any crime at all, on the basis of suspected association with a person, group or organisation suspected of criminal conduct. Under subsection 501(6d), a visa may be cancelled on the basis that the holder *may engage in criminal conduct in the future!*

Even amongst those who have committed violent crimes or drug offences, some will have been reformed—that is, after all, a prime function of the corrections systems. Given that the recidivism rate for violent offenders is less than 50%, it is likely that fewer than half of those who have had visas cancelled for such crimes are a danger.

Treating those who were convicted and sentenced for violent crimes all as one group, and banning everyday items such as mobile phones for all of them, is overkill—contrary to the assertions of the Human Rights Statement, it is not a proportionate response. Treating all those who are in detention after their sentences for any crime at all are completed as a single group is even more obviously unreasonable. Applying a blanket restriction to all detainees is unnecessary, cruel, will damage their mental health, and leads to serious injustice.

Recommendation: If the bill is to proceed, it should be amended to stipulate that items that do not present inherent risks to safety and security should only be prohibited to specified individuals where there is evidence that the person has used or is reasonably likely to use the item in a manner that presents clear risks to safety or security, and where those risks cannot be managed in a less restrictive way.

Abuse of rights.

One useful function of the possession of mobile phones for all classes of detainees is to get word out about abuses of their rights. In a situation where they are often treated as though they were undergoing punishment, rather than simply being held for administrative purposes, there is always the possibility of mistreatment by guards. Mobile phones can record such incidents, providing evidence for supervising authorities such as the Commonwealth Ombudsman and the Human Rights Commission. This would allow the Australian community, too, to discover the dark secrets of detention.

Another function is linking internal protests (which detainees are entitled to make, at the very least in accordance with their right to freedom of political communication) with those occurring outside the centres—a perfectly proper way of obtaining publicity. The

[17] See the submission of the Australian Human Rights Commission on the 2017 bill (Submission 11) §§22-27 on this. Even shoplifting or graffiti carry penalties of twelve months or more—though penalties of that size are rarely given.

Explanatory Memorandum to the 2017 bill makes one reason for the new powers that there have been 'efforts to coordinate internal demonstrations to coincide with external protests.' NSWCCL fears that the suppression of these functions may still be one of the motivations for the introduction of the bill.

Summary of recommendations

This bill should be rejected.

If the bill is to proceed, it should limit the general power to search for and seize things to those which are intrinsically harmful, such as guns, knives and unprescribed narcotics. It should stipulate that items that do not present inherent risks to safety and security should only be prohibited to specified individuals where there is evidence that the person has used or is reasonably likely to use the item in a manner that presents clear risks to safety or security, and where those risks cannot be managed in a less restrictive way.

If the bill is to proceed, dogs should not be able to be used for searches in immigration detention centres.

This submission was prepared Martin Bibby on behalf of the New South Wales Council for Civil Liberties.

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