15 JUNE 2020

MIGRATION AMENDMENT (PROHIBITING ITEMS IN IMMIGRATION DETENTION FACILITIES) BILL 2020

Submission to the Legal and Constitutional Affairs Committee

VISA
CANCELLATIONS
WORKING GROUP

ABOUT **THE VISA CANCELLATIONS WORKING GROUP**

The Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellations and migration more generally. The Working Group has twice been invited to give evidence before Senate Committee Inquiries since its establishment in 2018.

Its membership includes multiple LIV Accredited Specialists in Immigration Law, and is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including :

- Abode Migration;
- Amnesty International;
- Asylum Seeker Resource Centre;
- Australian Human Rights Commission;
- AUM Lawyers;
- Brigidine Asylum Seekers Project;
- Carina Ford Immigration Lawyers;
- Clothier Anderson Immigration Lawyers;
- Darebin Community Legal Centre;
- Erskine Rodan & Associates;
- Estrin Saul Lawyers and Migration Specialists;
- FCG Legal;
- Fitzroy Legal Service;
- Federation of Ethnic Communities Councils of Australia Inc;
- Flemington Kensington Community Legal Centre;
- Foundation House;
- Immigration Advice and Rights Centre;
- Jesuit Refugee Service (JRS) Australia;
- Justice Connect;
- Kah Lawyers;
- Monash University;
- Multicultural Development Australia;
- MYAN Australia;
- NSW Council for Civil Liberties;
- Peter McMullin Centre on Statelessness;
- Refugee Legal;
- Refugee Advice & Casework Service;
- Russell Kennedy;
- Salvos Legal;
- Slater & Gordon;
- Tasmanian Refugee Legal Service;
- The Australian Human Rights Commission;
- The Kaldor Centre;
- The Law Institute of Victoria;
- The Refugee Council of Australia;
- The Settlement Council of Australia;
- The University of Melbourne;
- Victoria Legal Aid, and
- Welcome Lawyers.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Working Group recommends the Bill be **rejected in its entirety** for reasons including the following:

- The Bill **impermissibly infracts individual rights and the rule of law**, allowing for the **arbitrary, warrantless body search of immigration detainees without requiring reasonable suspicion** that the person has a prohibited item.

- There is no definition of *'prohibited thing,'* nor indication of what evidence the Minister may require before determining that a 'thing' poses a risk to safety or order of a detention facility. **This ambiguity is unacceptable**, particularly given the license it affords.

- The Bill **dramatically increases the existing opacity** regarding conditions in Australian immigration detention.

- The Bill does not enhance the powers to prevent unlawful activity in immigration detention, as it is intended to do. **Those powers already exist**.

- The Bill risks **causing severe harm to people in detention and to their families, friends and communities**.

- The Bill sets a **troubling precedent for removal of rights**, including the rights to privacy, freedom of speech, and freedom from interference with family.

- The Bill, in reducing access to representation, information and advice for people in detention, is likely to **negatively affect the integrity and quality of decision-making** in an already fraught space.

- The Bill fails to protect **vulnerable individuals**, including minors, Aboriginal and Torres Strait Islanders, those with mental illness, and those from refugee or asylum seeker backgrounds. Indeed, it is likely to increase the harm to those cohorts. It is likely to be incompatible with Australia's international obligations.

INTRODUCTION

1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention) Bill 2020 (**the Bill**).

2. The Working Group has made submissions regarding the character and detention frameworks in the past. Particularly relevant now are our concerns regarding unnecessary waste of resources, opacity, and divisive rhetoric. We urge the Committee to increase protections for the rule of law in the character framework. The Working Group considers that lawful, consistent, informed, apolitical, and proportionate decision-making is critical in this area.

3. Broadly summarised, the Bill introduces new measures to govern immigration detention facilities (IDFs) and other places of detention, by way of:
    a. Ministerial designation, by legislative instrument, of items as 'prohibited things';
    b. Extension of existing search and seizure powers under the *Migration Act 1958* (Cth) (**the Act**) to extend to 'prohibited things,' even where a thing is invisible to the officer conducting the search, where a thing is not concealed, and where an officer has no suspicion the person has such a thing, and
    c. Broad-ranging powers to conduct search and seizure operations, in relation to individual detainees, or entire detention facilities.

4. For the reasons set out herein, the Working Group **recommends that the Bill be rejected in its entirety**.

5. The Working Group considers **that the Bill does not and cannot achieve its intended purpose**, that it is unacceptably unclear, and that it **unjustifiably harms individuals** and **increases opacity** of our detention system.

6. Broad powers to prevent unlawful activity in detention are already available under existing frameworks, including the criminal jurisdiction. Section 252 of the Act already provides for the warrantless search of detainees and their property. Section 252G already provides for screening procedures for visitors to immigration detention.

7. The justifications contained in the Explanatory Memorandum are not borne out in the legislation as drafted, and do not sufficiently make the case for the legislation. Given the seriousness of the subject matter – personal liberties and conditions in detention – any amendments to the regime must be manifestly justified, and approached with caution. Any amendments which infringe up on the rights of people in detention, if they are to infringe on those rights, must do so in a proportionate and reasonable manner. The amendments proposed in the Bill are not just unwarranted, they are a disproportionate response and are not in any way justified.

8. It is critical that there be no mischaracterising of the plain purpose of this Bill. It is clear from the Explanatory Memorandum—which focuses heavily on mobile phones, SIM cards, and articles with internet connectivity, and which makes clear it is a response to Full Court authority—that it intends to take away any items that allow detainees to connect and communicate.

9. The Explanatory Memorandum's other key topic is moot: items such as drugs, weapons and child exploitation material are already illegal. As is the case for the general population, action can be taken to hold to account those in possession of such articles or undertaking such actions. Surely, in a controlled environment such as immigration detention, this is straightforward and there is no evidence that existing laws fall short in providing authorised officers with necessary powers.

10. The Working Group is also concerned that the Bill appears to be a product of dysfunctional detention and visa cancellation regimes. It is true that the 'changing nature' of detention includes more people detained because of visa cancellations. However, the extraordinary periods of time those people must wait for determination of their case is entirely within the control of the Department of Home Affairs, and more broadly (with respect to Administrative Appeals Tribunal and court processes) the Australian government. It does not appear that any other measures to improve these issues have been considered: rather, the Bill leaps straight to remarkable infractions of personal liberties.

11. Reducing oversight of government officers, at a time where that oversight is uncovering serious abuses across the globe, is also unacceptable. Transparency and accountability are facilitated by people having access to recording and communicating equipment. People's ability to document the conduct of officials should be valued and protected as an important check by those with nothing to fear.

12. The Working Group cautions against criminalising people in detention, as this Bill does. Where a detainee has a criminal past, the criminal jurisdiction has dealt with their offending. A person who returns to the community after criminal custody is not subject to a different set of laws from their community members. They should not be excluded from communicating with family, friends, legal representatives and the outside world. They must not form a separate class within Australian society.

13. The Working Group also seeks to correct the misleading statement that people in detention with criminal histories are awaiting removal. Many have legitimate processes on foot, including protection visa applications and review processes for cancellation. Between 1 July 2018 and 20 June 2019, the Department of Home Affairs itself decided to revoke 234 mandatory visa cancellations out of 580.[1] These figures also underscore that not all people whose visas have been cancelled under s 501 can be classified as 'high risk'. Many have minimal criminal histories (and some have no criminal histories), have rehabilitated, or have not offended for decades. Of those that were not revoked, the Administrative Appeals Tribunal might later set aside those decisions. Proper legal process must be respected.

14. It is intuitive also that removal of individual freedoms will cause distress and unrest, and is likely to exacerbate the very problems of which the Explanatory Memorandum complains.

[1] Department of Home Affairs, 'Key visa cancellation statistics', 31 March 2020.

15. At present, over 67,000 people have signed a Change.org petition opposing this Bill.[2] It is out of step with community expectations and has not been justified. The infringements are concerning in the extreme.

16. This all occurs in the context of a system with no effective oversight or accountability mechanisms.

17. The Bill may also have the effect of increasing visa cancellations, allowing searches for the new category of 'visa cancellation evidence', presumably of people in questioning detention or in immigration clearance. This is heavy-handed and unnecessary given the already-robust cancellation regime.

18. Any future modifications to the detention framework, it is submitted, must:

- Enhance timeliness and integrity of outcomes for detained individuals;
- Increase the clarity of the law and processes for affected individuals;
- Protect public resources;
- Ensure access to legal advice for unrepresented parties, and ensure ongoing access for those who are represented;
- Ensure that any changes affecting rights are accompanied by additional resourcing for downstream services that will likely be impacted, in particular the legal assistance sector and decision-making bodies;
- Protect the right of people in detention to possess communication devices;
- Enshrine effective oversight and accountability measures to regulate immigration detention conditions;
- Introduce maximum periods for detention and appropriate mechanisms for detention review;
- Ensure that any changes affecting rights correctly consider the seriousness of such infringements by ensuring amendments are, firstly, necessary, and, secondly, proportionate to the risk purportedly being addressed, and
- Ensure that vulnerable groups like minors, Aboriginal and Torres Strait Islander peoples, refugees and people seeking asylum, women, survivors or sexual assault and people suffering post trauma issues are adequately protected.

RECOMMENDATIONS

1. The Working Group recommends the Bill be rejected.

2. The Working Group calls for an Inquiry into the detention and cancellation regimes to increase transparency and integrity in this space.

[2] Change.org, available at https://www.change.org/p/dial-it-down-dutton-don-t-take-away-asylum-seekers-phones?recruiter=10315954&utm_source=share_petition&utm_medium=twitter&utm_campaign=psf_combo_share_initial&utm_term=psf_combo_share_abi&recruited_by_id=99808580-cfb8-012f-0aed-404060e72abb.

CONTEXT – DETENTION AND CANCELLATION

19. Any consideration of the character and detention regimes must have regard to the context in which cancellation and detention occurs.

LEGISLATIVE AND POLICY FRAMEWORK

Legislation

20. The detention of unlawful non-citizens is required by s 189 of the Act. 'Unlawful non-citizen' is defined at s 14 of the Act. IDFs are established under s273 of the Act. Subsection 273(2) permits regulations to make provisions in relation to the operation and regulation of detention centres. 'Immigration detention' – considerably broader than IDFs – is defined at s 5 of the Act.

21. This Bill is not limited in its application to people in IDFs, but to all people who are detained. The definition at s 5 of the Act is broad and includes "being in the company of, and restrained by… an officer" or being held by an officer "in another place approved by the Minister in writing". This includes people in community detention living in residential houses and apartments, schools and hospitals, and in questioning detention under s 192(1) of the Act.

22. Section 252 of the Act already provides for:

    - warrantless search of detainees and their property to ascertain whether the person has:
        - a weapon or other thing capable of inflicting bodily injury or to help escape;
    - the detention of a person for the purpose of the search;
    - the seizure of the 'weapon, document or other thing'.

23. Section 252A already provides for warrantless strip searches on the same grounds, if a reasonable suspicion exists that a person has an item as described above.

24. Section 252G already provides for screening procedures for visitors to immigration detention.

25. Section 252C allows for possession of and retention of articles found during a screening process or strip search.

26. Section 197G of the Act already creates an offence for manufacture, possession, use or distribution of a weapon in detention, punishable by imprisonment for five years. Weapon is there defined as 'a thing made or adapted for use for inflicting bodily injury' or 'a thing where the detainee who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury'.

27. A detainee's ability to access legal representation, should they choose to do so, is enshrined in the Act. The onus is very much on the detained person, however, to request that access under s 256 of the Act. Noting that many detainees are vulnerable, lacking financial resources, and without English capability, it is already onerous for them to take the step of seeking legal advice. The Working Group believes that existing obstacles to

access resources and communication that arise within the detention framework make access unnecessarily and inappropriately difficult.

28. Despite s 256, s 193 of the Act limits obligations to certain non-citizens in immigration detention, including disavowal of any obligation to provide an application form for a visa, give access to advice, or give opportunity to apply for a visa.

Policy

29. The Detention Services Manual (**DSM**) is a policy document guiding the operation of immigration detention centres. It used to be publicly available; however, after the previous Bill was introduced, it was reclassified as 'For Official Use Only'. This is obviously of concern and indicative of the increasing opacity surrounding immigration detention.

30. When last publicly available, in a chapter entitled 'Items not permitted in immigration detention', it set out prohibited (illegal), excluded and controlled items. The DSM stated "Items permitted in all IDFs are those that are not detrimental to the health or safety of any person in the facility or to the good order and security of the facility", and was specified to include things like clothing and "MP players without recording or internet capabilities".

31. The Working Group infers that the same classification applies. Anecdotally, items held by individuals in detention are routinely confiscated, as will be discussed below.

EFFECT ON INDIVIDUALS, FAMILIES AND COMMUNITIES

32. The statistics on immigration detention released by the Department show that, as at 31 March 2020, 41.5% of people in detention have been detained for a year, and 24.8 for over two years.[3] Of the 1,373 people in IDFs, 512 had arrived by boat, indicating that they were seeking asylum and 110 were visa overstayers. Of the 623 detained because of s 501 visa cancellations, many have been deemed to be refugees or of requiring Australia's protection: in the Working Group's experience, alarming numbers of protection visas are cancelled under s 501 powers.

33. Detention is an extremely difficult place to be. Unlike criminal custody, there is no clear end date. There is no access to education. Detainees are subject to myriad rules and are often relocated to remote locations. Detainees' families often suffer mental health complications as a result of separation from their loved one in detention. Detainees cannot see their children, cannot visit their parents' graves, cannot be there for important life events like hospitalisations, weddings and funerals.

34. Any visa holder, regardless of whether the visa is temporary or permanent, regardless of how long they have lived in Australia, family ties to Australia, and regardless of age, refugee background, or mental impairment, can be subject to cancellation. Any visa applicant can be subject to visa refusal. Moreover, the character framework is legally complex and can be overwhelming and hard to navigate.

35. Generally, people who have their visa cancelled or refused (if onshore) will be subject to immigration detention and possible forcible removal. Their detention may continue for

[3] Department of Home Affairs, 'Immigration Detention and Community Statistics Summary', 31 March 2020.

many years, even indefinitely, in poor conditions. If Australia owes *non-refoulement* obligations in respect of the person (e.g. because they are owed protection obligations, they cannot be removed, and so they must remain in detention. Often, people subject to cancellation or refusal (for example, of a Resident Return (subclass 155) visa) have lived in Australia for most of their lives and have extensive family ties here and no significant ties anywhere else. Often, they are vulnerable due to age, health, or lack of education. Often, there is an enormous impact on their families and communities, including descent into poverty and children or those with health issues being left without carers. The person will also generally be prohibited from applying for a further visa, with the exception, in certain circumstances, of a protection visa, which may also later be refused on character grounds.

36. In the Working Group's experience, people of pension age who have lived in Australia since before they were five, and who have children and grandchildren in this country, are subject to visa cancellation. People who have been found to be refugees undergo visa cancellation or refusal. Children, who have never been tried as adults, undergo visa cancellation or refusal. Mothers with histories of shoplifting and drug possession undergo visa cancellation or refusal. People with extraordinary histories of trauma undergo visa cancellation or refusal. People with disabilities impairing their ability to understand their circumstances undergo visa cancellation or refusal. It is an issue which often affects the most vulnerable people in our community.

37. It also deeply affects Australian families of those who are subject to visa cancellation or visa refusal as a child can be without a parent, child or partner. It is the Working Group's experience that many people in detention have young children. Under the Convention on the Rights of the Child, those children's interests must be a primary consideration in decision-making.

COMPLEXITY

38. Access to legal advice and assistance is critical for people in detention, particularly those affected by visa cancellation or refusal.

39. Understanding and exercising existing rights can be extremely hard, particularly for vulnerable persons, such as children, those with mental health or other capacity issues, and those with limited English skills (including refugees).

40. The system regulating what you can and cannot do once you are detained are also complex. You might be subject to an urgent removal pathway. You have just two business days to lodge a visa application (other than a protection visa and in some cases a bridging visa) upon your detention. It is the Working Group's overwhelming experience that people in detention do not understand, or are not given, advice from officers when they are detained as is mandated under ss 194 and 195 of the Act. It is the Working Group's overwhelming experience that people in detention are often advised that they have no option but to depart Australia. They feel immense pressure and fear.

41. An application for a protection visa is 33 pages long and in English.

42. The character framework is extremely complex and may subject the individual to strict deadlines which can be difficult to determine or adhere to for a range of reasons. A person may entirely lose their right to review if they do not comply with strict and complex timelines.

43. At **Annexure A**, we include a flowchart that demonstrates the complexity of just one of the provisions, s.501(2), which governs situations where a person is first considered to fail the character test, and then the discretion to cancel is enlivened. A Notice of Intention to Consider Cancellation (**NOICC**) is then sent to the person, inviting them to comment and providing Direction 79 for their reference, at 33 pages without the other annexures. Timeframes for response vary significantly depending on the stage of the matter.

LACK OF CERTAINTY AND CLARITY IN THE PROPOSED LAW

44. It is the Working Group's submission that the Bill is unacceptably broad in what it may prohibit. Fundamentally, it is unacceptable to make allowance for almost any item to be banned at any time. This is particularly the case because detainees are vulnerable and require significant support in navigating a complex administrative system.

45. The Bill allows for the Minister to determine an item to be prohibited if possession or use of that thing, if, amongst other things, "might be a risk to the health, safety or security of persons in the facility, or to the order of the facility." The Bill sets out examples of what might fall within this category, including mobile phones, SIM cards, electronic devices, medications or health care supplements (other than medications prescribed by approved parties).

46. The Explanatory Memorandum provides altogether different examples, including narcotic drugs and child pornography. As noted above, possession of these items is already illegal, and searches for such items is already permitted by law.

47. An endless variety of items may fall within the rubric of 'prohibited items,' particularly given that such items may be specified based on perceived risk to the 'order' of detention facilities, where the concept of 'order' or 'risk' is nowhere defined. The provision does not require any standard by which the Minister is required to consider whether something might be a risk. The Minister's power is not conditioned on any nexus between prohibiting the item in question and actually addressing the risk the Minister has identified, which, we note above, may not in fact be a risk which should properly allow the prohibition of that item.

48. It is foreseeable under the Bill that a musical instrument played by a detainee may be listed as a 'prohibited item' and confiscated, if the noise generated disturbed staff in the centre. It is conceivable that writing instruments or paints used to transcribe messages by detainees to the public might be confiscated, to prevent possible future disruption to the centre.

49. This should worry any citizen of this country. Fundamental infringement of the freedoms of a group in the community must concern us all.

50. Certainty is a critical requirement of the law: we must permit those subject to the law to regulate their conduct with certainty and to protect from arbitrary application, preferring maximum predictability of official behaviour. This Bill undermines that principle by failing to define key concepts and by leaving definitions open to abuses. For example, the vesting of power in an officer to determine whether to confiscate a prohibited item, and

the nebulous and changing nature of what is to be prohibited, lead to confusion and potential abuse.

51. Any law that risks unfair application and enforcement risks breaching the rule of law, which is a fundamental Australian value and enshrined in the very oath aspiring migrants must take.[4]

52. There is no acceptable explanation regarding the necessity of expanding the already broad search and seizure powers that exist under the Act, designed to preserve the security of immigration detention facilities. It is both inappropriate and unnecessary to expand the powers that already exist under the Act. No case to the contrary has been made by the Bill nor the materials accompanying it.

53. The Working Group cautions against the expansion of powers to authorities or those responsible for administering such powers. Existing powers are more than sufficient.

Lack of supporting information regarding criminal activity in detention

54. The Explanatory Memorandum states that 'detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff' and that '[t]here is evidence of illicit substance use and trafficking in immigration detention facilities to a degree that presents a serious health and safety risk to detainees'. It states:

> *The existing search and seizure powers in the Migration Act are not sufficient to prevent the misuse of drugs, mobile phones, SIM cards and internet-capable devices or other things that are of concern within the context of immigration detention facilities*.

55. These are all unsupported assertions. The Department of Home Affairs must provide statistics regarding how many people are convicted of criminal offending in immigration detention, the nature of those offences, and whether those convicted were represented. Further, the Department of Home Affairs has also failed to indicate how extant broad discretionary powers are insufficient for the effective policing of these alleged issues.

56. The fact that such statistics and details have not already been provided indicates the data does not support the Bill. The Bill and extrinsic materials outline no proportionate need for the actions suggested.

57. It is also completely insufficient that an item be 'of concern' to be designated as prohibited. This is undefined and allows for unacceptably subjective and therefore arbitrary decision making.

58. As noted above, s 197G of the Act already creates an offence separate from that in the criminal jurisdiction for manufacture, possession, use or distribution of a weapon in detention. The Working Group has searched case law databases for instances where

[4] Department of Home Affairs, 'Australian values', 17 March 2020, available at https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values#:~:text=Australian%20society%20values%20respect%20for,need%20and%20pursuit%20of%20the.

this provision was used and found zero. Clearly, there are powers relating to weapons, and it appears that there is nonetheless not a weapons problem.

59. Neither the Explanatory Memorandum nor Parliamentary statements provide any evidence for the 'increased risk environment' said to exist in immigration detention. There is no evidence of criminal offences or other disruptive activities occurring at a higher rate in the detention network. Given the extreme nature of the changes proposed, this is plainly unacceptable.

Lack of supporting information regarding the Department providing reasonable access to communication

60. The Explanatory Memorandum states 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 support networks and legal representatives'.

61. Based on its own direct experiences, the Working Group does not consider that the facilities existing presently allow reasonable access. To the contrary, all evidence indicates that they restrict communication significantly.

62. For example, we understand that in one Melbourne Immigration Transit Accommodation compound there are 7 landline phones between 60 people, all of which are located in the computer activities area, which is noisy and not conducive to communication, let alone providing a safe space to engage in confidential communications.

63. Even legal representatives have immense difficulties communicating with detainees through the channels facilitated in detention. Often, faxes are not sent or delivered. Critical mail is sent from detention too late, as a consequence arriving outside strict legislative timeframes. Telephone appointments at IDFs take inordinate amounts of time to set up and regularly fall through. Urgent calls must be taken on landlines in the public areas of the detention centre offering no privacy, and urgent calls are often not facilitated by detention staff.

64. The Department of Home Affairs must provide information regarding how many telephones, scanners, printers and computers are available in each facility or APOD, whether they are in private areas, and conditions for access, including cost to the detainee. Further, in current circumstances where visits to IDFs are not allowed, we note that there limited or no access to video-conferencing facilities for detainees. Such conferencing and other crucial communication is facilitated via mobile phones.

65. The Department of Home Affairs must provide information regarding postal and facsimile service access, including cost to detainees and controls implemented to ensure timely delivery.

66. Until there is the Department can provide information that reasonable access to communication facilities can and is regularly being provided, there is no reason to believe better facilities will be in place if this Bill is passed.

Case Study – Barriers to Accessing Assistance while Detained – *EFX17*

The circumstances of the appellant in *EFX17 v Minister for Immigration and Border Protection* [2019] FCAFC 230 (***EFX17***) highlight the profound difficulties and impediments faced by vulnerable persons in navigating complex legal matters while detained. While the case concerned the circumstances in the prison network, in the experience of member of the Working Group, the obstacles faced by persons in immigration detention are equivalent if not greater than those faced in prisons.

The appellant in *EFX17* was an Afghan national of Hazara ethnicity, who had arrived in Australia by boat and was subsequently granted a Protection (Subclass 866) visa on 16 December 2009, based on harm suffered in his home country at the hands of the Taliban.[1] On 19 December 2016, the appellant was sentenced to serve a sentence of imprisonment of seven years which, taking into account his pre-sentence detention, expired on 13 August 2021.[1] The Court accepted that, throughout his sentence, the appellant had been engaged with the Prison Mental Health Service.[1]

On 3 January 2017, a delegate of the Minister for Home Affairs (the **delegate**) concluded that there were grounds for mandatory cancellation of EFX17's visa under s 501(3A) of the *Act* and wrote to him accordingly.[1] The delegate emailed that correspondence to the Department of Correctional Services, instructing the relevant officer to hand the correspondence to EFX17, and seek his signed acknowledgment of receipt.[1] The delegate's correspondence included 86 pages of supporting information in relation to the visa cancellation and information on how the visa holder might seek revocation of the decision under s 501CA, within 28 days – all in English.[1] On 4 January 2017, prison officers met with EFX17, handed him the delegate's correspondence and returned signed acknowledgement to the delegate. On 6 January 2017, when EFX17 spoke with lawyers at the Prisoners Legal Service, he was unable to recall whether he had received any correspondence from the Department of Home Affairs.[1] Without understanding the relevance of the delegate's correspondence of 3 January, EFX17 did not seek revocation of the cancellation decision within 28 days.

In his leading judgment, Greenwood J, with whom Rares J agreed,[1] found that the Minister, through his delegate, had failed to validly invite the appellant to seek revocation of the cancellation of his visa, for the following reasons:[1]

> *The circumstances that suggest that the appellant was simply not capable of comprehending the suite of documents handed to him at the Correctional Facility on 4 January 2017 (notwithstanding the virtue of his signature having been secured on the Acknowledgment Form) are these:*
>
> *(1) The appellant is illiterate in the sense that he is unable to either read or write in his native tongue, Hazaragi.*
> *(2) Consistent with that position, the appellant did not receive any schooling in Afghanistan or Iran apparently as a function of having been raised in a poor farming community in Ghazni Province and having later worked as a shepherd and child labourer in Iran.*
> *(3) He has never learnt to read or write in English.*
> *(4) He was taught how to sign his name when in immigration detention in Christmas Island in 2009. He has, however, participated in an introductory English language course focused on basic conversational English.*
> *(5) Historically, the appellant has been a "client" (patient) of the Prison Mental Health Service since August 2014 having suffered from a schizophrenic illness (which Dr Schramm described in his report of 27 June 2017 as then currently under reasonable control with regular antipsychotic medication).*

> (6) *There seems to be little doubt that the appellant's schizophrenic condition is at least in part attributable to traumatic events affecting him and his family at the hands of Taliban soldiers.*
>
> (7) *The IOMS case notes for 4 January 2017 (see [111] of these reasons) note that although the appellant advised that he can understand English while talking, he cannot read or write well. The subsequent case note for 4 January 2017 notes that the appellant has limited English language abilities and expressed concern with reading and understanding the deportation documentation provided to him during the interview. Moreover, the case notes recognise that the appellant requested assistance from another prisoner and from the PLS as he had limited external support in the community. In addition, it seems that the appellant asked for a "special phone call" to be made and sought permission to receive assistance from another prisoner in the Correctional Facility. There is no suggestion that any assistance was available in the form of a special phone call or access to the other prisoner as requested. There is no suggestion in the case notes that an interpreter was available to explain the burden of the documents given to him and for which he duly signed on the acknowledgement page: see [112] of these reasons.*
>
> (8) *On 6 January 2017 and 2 February 2017, a representative of the PLS spoke to the appellant using a Hazaragi interpreter. Although the appellant was asked on both occasions whether he had received any correspondence or documents from the Department, he told the PLS representative through the interpreter that he had not received any such material. These responses from the appellant on these dates suggest that the appellant had no comprehension or understanding of the fact that he had been given a suite of material by a Correctional Services Officer (which seems to be A Ryan) which constituted documents or correspondence from the Department or any division, section or group within the Department whether part of the "Pipeline Management Unit" or the "National Character Consideration Centre" or the "Character Assessment and Cancellations Branch" of the "Community Protection Division of the "Visa and Citizenship Services Group" of the Department of Immigration and Border Protection.*

The circumstances of EFX17 are by no means exceptional. People in immigration detention often suffer multiple vulnerabilities and are without access to legal representation.

It is imperative that those detained have unimpeded access to legal representation and that no further barriers on such access be imposed. As is seen from the case study of EFX17, barriers to legal representation have enormous flow on effects – both for those detained and in terms of the proper administration of migration laws.

Other issues

67. The restrictions regarding medication are unjustified. What is meant by 'authorised health service provider' must be clarified: a person in detention should be able to have a prescription from a registered medical practitioner outside detention; they should be permitted to manage their health by taking legal supplements. It is unclear why health supplements should be banned.

DISPROPORTIONATE HARM A RESULT OF THE PROPOSED LAW

68. The Working Group considers that the Bill risks severely impacting the human dignity of people in detention.

69. Reducing human dignity and expression is apt to erode the already-strained mental health of people in detention and those close to them. Many of these people will one day be released into the community. Medical or psychological issues may follow them for a protracted period.

70. The proposed changes may contravene detainees' rights under Articles 9, 10, 13, 14, 17 and 19 of the International Covenant on Civil and Political Rights, one of the seven core human rights treaties to which Australia is a signatory. They impair access to review and infringe on individual dignity and freedoms.

Mobile phones and other articles of communication

71. The Working Group considers there is no reasonable justification for depriving any detainees of mobile telephones and articles of communication. As noted above, concerns about unlawful activities can be resolved simply with recourse to existing powers. Detention must not have a disproportionate impact on a detainee's human rights, including freedom of association or freedom of expression.

72. There are many times a person in detention needs access to a mobile phone or other articles of communication:

    a. To discuss private and sensitive matters with family and representatives.

    b. To urgently call for help, for example when contemplating self-harm.

    c. For psychological and health support from professionals, family members and friends.

    d. For access to counselling sessions with specialised trauma informed practitioners. We note that specialised mental health care is often not available to detainees, and where specialised care may be available, it is not available with adequate consistency. This is particularly important in current circumstances where detainees are refused access to face to face counselling sessions with their usual practitioners.

    e. To maintain connection with their children and families, and to assist those families at times of need.

    f. To provide important documents to others, for example signed application forms, where there is a perception of unreliability of procedures in detention.

    g. When they are facing forcible removal. In one instance, IDF staff refused to pass on correspondence from and to a person's legal representative regarding court proceedings, isolating him from all outside correspondence.

    h. When they are facing an early-morning, forcible, without-notice transfer to another facility (often remote), people in detention are routinely denied the opportunity to call a representative or family member, and often have their mobile phones confiscated. These transfers occur even where hearings are scheduled or where vulnerable family reside in a particular state. Often, detainees who are transferred are unable to contact family members for over twenty-four hours, and they may not have their personal effects transferred,

including family photographs and personal items. Such transfers, particularly where no access to mobile phones is permitted, limit detainees' access to legal representation and to the support required to properly pursue their legal rights. These transfers contravene s 256 of the Act.

i. To document their experiences.

j. To ensure accountability.

k. For creative purposes (particularly where tools are confiscated), or to fill their time where few activities are available.

73. The Working Group strongly refuses the suggestion that there are already adequate facilities for communication provided in detention.

74. The limited numbers of landlines and computers lead to distress and lack of access. Queues form for the landlines, limiting privacy and freedom to disclose.

75. Detainees are also required to pay for access to telephones, often under a complex 'points' system. This is obviously ripe for unacceptable denial of access.

76. Access to facilities for sending documents is limited. It is the Working Group's experience that faxes are sometimes not sent or delivered, and delay is common where timeframes are critical.

77. Access to computer facilities and internet is used as a control and is subject to some restrictions. The Explanatory Memorandum refers to conditions of use for the internet. Internet limitations already prevent 'retrospective search of websites' and key words used to access what is defined as 'inappropriate material'. The Working Group considers that substantiation is needed regarding these limitations.

78. Further denying detainees reasonable access to communication contravenes international norms for protecting anyone deprived of their liberty. These include Principles 18 and 19 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* [5] and, notably, the *Standard Minimum Rules for the Treatment of Prisoners*, Rules 37 and 38.[6] It bears repeating that immigration detention is not prison and failing to uphold standards created for punitive detention criminalises and punishes individuals held in immigration detention.

79. Notably in Victorian criminal law, searching a person under arrest requires the officer to weigh up the potential impact of the search to the person's dignity against the utility of finding and preserving evidence (Director of Public Prosecutions v Tupper (2018) 55 VR, 720 [37]). Individuals in detention are not under arrest and they have already had their access to items limited while in detention. Any search and seizure is likely to be an affront to an individual's dignity—especially where dogs are used and/or the individual searched has limited English—yet this proposed legislation fails to take this into account.

[5] Adopted by the United Nations General Assembly resolution 43/173 of 9 December 1988, available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx.

[6] Adopted by the First United United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx.

Search and seize powers

80. The Working Group is particularly alarmed at the suggestion that searches should be permissible where no reasonable suspicion exists regarding the existence of a prohibited thing. This is a shocking derogation and must not be permitted.

81. Such search and seize powers are apt to terrorise detainees and are ripe for abuse. Again, justification is completely lacking.

82. The Working Group also objects to searches conducted with the use of a dog, particularly where such searches are not invalidated by contact between a person and a dog. People in detention often have backgrounds of trauma, or have other vulnerabilities. Again, the appropriate bodies to conduct such searches already exist, including the Australian Federal Police as well as state police. Extraordinary powers such as these must not be given to other bodies.

83. The Working Group also notes that these powers relate not just to detention facilities, but to people detained in hospitals, schools, and residences. It is unacceptable that officers could visit such locations and, without suspicion let alone reasonable suspicion, conduct body searches.

84. The Working Group also notes that its members have reported highly problematic body search practices occurring within detention.

Screening procedures

85. Entry to immigration detention was already extremely difficult prior to the present health crisis. Visits are entirely banned during the COVID-19 crisis, weighing extremely heavily on people in detention and those close to them.

86. Personal visitors to immigration detention must lodge an application five business days before the proposed visit date. They must include 100 points of ID in their application. Their applications can be refused for a variety of reasons. In limited circumstances, a shorter application timeframe is permitted at the discretion of the Department,[7] but in the Working Group's experience such exemptions are rare, and that families of detainees often find the process so intimidating that they do not undertake it. This procedure inhibits important personal visits and should be revised.

87. The same application timeframe of five business days prior to visit is also required for health professionals,[8] again impairing urgent visits and interventions where mental health or self-harm is involved. A third-party health professional must provide their titles and specialise role, evidence of employment, the name of the organisation being represented, specify the purpose of the visit, and include evidence that an authorised representative of the detainee requested the visit. Whilst contractors in detention provide mental health services, people in detention often do not trust those services or feel inhibited from using them due to confidentiality concerns. They also have little choice about what treatment they receive – many of our clients report immense distress at medication injections.

[7] Australian Border Force, 'Immigration Detention in Australia – Types of visitor', 17 March 2020, available at https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/visit-detention/types-of-visitors.
[8] Australian Border Force, 'Immigration Detention in Australia – Types of visitor', 17 March 2020, available at https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/visit-detention/types-of-visitors.

88. Presently, a person about to enter a facility can be screened for items that might endanger safety or disrupt order or security arrangements. It is difficult to see why this purportedly doesn't include things that may facilitate criminal activities. Anything not included in the existing definition is not appropriate to restrict.

89. The screening system is also inadequate to ensure connection. Recently, female visitors to MITA were told that if their underwire bras set off the metal detectors, they would be refused entry.[9] Anecdotally in the Working Group's experience, these hurdles deter visitors to IDFs, an existing further restriction on detainees' contact with the outside world.

Restricted access to advice and assistance and ability to prepare

90. The process of making arrangements to speak with or visit a client in detention is already opaque, lengthy and difficult. It would be made even more so with the passing of this Bill.

In-person visits

91. There are numerous restrictions to visiting a person in an IDF for legal representatives. These restrictions contrast unfavourably with the ability of legal representatives to visit clients in criminal custody. For a legal professional to visit a person in criminal detention, no appointment is needed where that visit is during allocated hours and (in Victoria) the prisoner has listed the legal representative on their approved visitors 'list'. In fact, because of this, a prisoner has greater autonomy of who enters than a detainee.

92. For immigration detention, legal representatives must apply one business day prior to their visit. They must provide evidence of their employment, proof that they are engaged not just as an advisor, but as a representative, a written statement that they are employed by a law firm, and a signed authority to act for the person in detention. Obviously, this inhibits the provision of legal advice to the vulnerable (particularly those with mental health issues) and unrepresented.[10]

93. Requests by legal representatives to bring in laptops to immigration detention consultations must also be approved in advance. Legal representatives are not permitted to take their mobile phones into detention. This prevents use of the internet, which is often integral, and, again, the justification for this restriction is not discernible. Professional visitors, including lawyers, must remove belts and shoes to enter.

94. Once entry is secured, there is often a lack of privacy. During the expansion of facilities at MITA, legal representatives have often been denied private spaces to meet with their clients.

95. The process of arranging for a third party such as a psychologist to visit a detainee is even more difficult. Often, such visits are obstructed. The detained person might need access to such services.

[9] Hall, B., and Holt, R., Detention centre visitors say they've been given a bizarre bra warning', Sydney Morning Herald, 12 July 2019, available at https://www.smh.com.au/national/detention-centre-visitors-say-they-ve-been-given-a-bizarre-bra-warning-20190712-p526qu.html.
[10] Australian Border Force, 'Immigration Detention in Australia – Types of visitor', 17 March 2020, available at https://www.abf.gov.au/about-us/what-we-do/border-protection/immigration-detention/visit-detention/types-of-visitors.

96. Aside from the difficulty of visiting a facility, it is often the case that a client is transferred away from their family and representation to a remote location. There, there is little to no possibility of a visit.

Telephone appointments

97. There is often a perception that telephone or email communication is monitored and not private, restricting important disclosure.

98. To assist someone with their migration situation, lawyers need to speak to people about confidential and sensitive issues, for example accounts of rape and torture, and also about information which the person perceives may place them at risk in detention, including information related to their sexuality or gender identity. Landlines provided in immigration detention are not generally private. Many people will be reluctant to disclose sensitive and personal information, including simply about how they are feeling, using these facilities. Similarly, talking about highly personal matters with family and loved ones in an open setting is extremely difficult and indeed inappropriate.

99. Interpreters are often required. It is very difficult to call through to the Centre with an interpreter. Delays in being connected with your client, which are common, are not only disadvantageous to preparation of their case, but are costly.

100. Detainees are routinely not told who the call is from or even that it is scheduled. They become aware of who is on the phone only when picking up the call. They instruct they are not even sure whether it is a call from the Department. This inhibits their ability to prepare for appointments.

101. There are very few locations which are able to facilitate video conferences, which are important when a client is located remotely and where sensitive issues need to be discussed. There are numerous reports of video conferences approved by ABF failing to proceed due to apparent technical difficulties. Video conferences, when they do proceed, are subject to time lags and are of poor quality.

Other issues

102. Clients' access to important materials is also restricted. They must prepare complex cases while in detention, often involving very sensitive and private material. Without mobile phones, their ability to prepare and gather evidence will be severely limited.

103. The Working Group believes that the Bill makes access to legal representation and support significantly more difficult, with serious consequences likely to follow.

104. In the Working Group's experience, access to clients through mobile phones remains the most appropriate way to contact clients quickly.

Current restriction of items in immigration detention

105. The Explanatory Memorandum also seeks to justify the removal of articles of communication because they are being used 'to aid the movement of contraband'. 'Contraband' is not defined in any legislation, and so it is unclear what this refers to. This must be clarified.

106. In the Working Group's experience, all of the following articles have been deemed contraband: hair dye, shopping bags, chewing gum, Panadol, fruit, tea bags, coins, Vegemite, a pencil sharpener, sunglasses, a button-up shirt, vinegar, cigarettes, makeup and key rings.

107. The fact that these have been deemed controlled items presenting a risk to the health, privacy or safety or individuals, or the security and good order of the facility is very concerning. It indicates either that the conditions in detention are so grievous that people are trying to self-harm with any object, or that the relevant officers are exercising their powers in an egregious manner. Either interpretation means that oversight must be preserved and enhanced.

108. If it is proposed to prohibit items, there must be sufficient clarity about what items are to be prohibited and why. A blanket permission to seek to prohibit, often vesting immense discretion in individual officers, is not appropriate.

109. By way of comparison, dependent on the prison in Victoria, visitors may bring personal items and clothes for prisoners; a maximum of $140 AUD cash each month; money for one-off purchases such as a computer for study is allowed. Regulations differ based on the security of the prison.

REDUCTION OF OVERSIGHT

110. There can be no dispute that mobile phones are lifelines for people in detention. They also benefit the global community, bringing to light information that would not otherwise be known.

111. The previous Bill was accompanied by the justification that mobile phones have contributed to "efforts to coordinate internal demonstrations to coincide with external protests". Those drafting the extraneous materials have wisely avoided this same expression; however, it is abundantly clear that suppression of communication from inside detention centres is sought.

112. Regardless of the Committee's position regarding these particular cases, the transparency that has resulted from mobile phone usage is to be commended:

    a. Behrooz Bouchani, a man detained for over four years on Manus Island, wrote his book, 'No Friend but the Mountains', text by text on a mobile phone. He told Australian Story that he "didn't feel safe to write it on paper".[11]
    b. The film of Biloela Tamil family's removal to Christmas Island attracted considerable attention to the Department's practices.[12]

113. Global events have underscored the importance of communication and documentation in preventing abuses of power by government authorities. It was a recording of the police

[11] McDermott, Q., Behrouz Boochani's mission to change offshore detention laws using a smuggled mobile phone', Australian Story, 17 July 2019, available at https://www.abc.net.au/news/2019-04-01/behrouz-boochani-how-refugee-challenged-system-with-words/10799884.
[12] Jones, A., 'Alan Jones slams 'shameful' attempts to deport asylum seeker family', 2GB, 30 August 2019, available at https://www.2gb.com/alan-jones-slams-shameful-attempts-to-deport-asylum-seeker-family/.

detaining and killing George Floyd that brought brutality to global attention.[13] Officers who shoved a 75-year-old protester were suspended because of footage.[14] The men who shot Ahmaud Arbery were only charged after video footage taken by a citizen was released.[15] It was a citizen mobile phone recording of the shooting of Walter Scott by a police officer that led to that officer facing repercussions.[16] It was the bystander filming of the beating of Rodney King that led to global outrage regarding police brutality in the 1990s.[17]

114. In Australia, it was smartphone videos that captured the potentially illegal body-strip search of a homeless Aboriginal man[18] and officers engaging in serious misconduct by racially abusing two Afghan women at a traffic stop in 2019.[19] Further, an officer was filmed arresting an Indigenous Australian teen, leading to outcry and comments by NSW Premier Gladys Berejiklian that 'we still have a long way to go in our country'.[20]

115. Such access to documentation should be valued and protected as an important check by those with nothing to fear. The public have a right to be informed about what is occurring in Australian immigration detention. The public expectation is for acceptable standards of process and acceptable standard of treatment of people in immigration detention.

LACK OF PROTECTIONS FOR VULNERABLE PERSONS

116. It is unacceptable to remove mobile phones from those with mental illness, acquired brain injuries, and other capacity limitations including trauma backgrounds.

117. It is also unacceptable to subject those persons to warrantless, without-suspicion body searches.

118. We also note that people with vulnerabilities are most in need of legal assistance. Removal of articles of communication disproportionately impairs their ability to access assistance, and given the complexity of the regime, the consequences for them will be serious.

119. The Bill also is enforceable against those in the community with a Residence Determination. As at 31 March 2020, there were 284 children so detained. There are

[13] Nevett, J., 'George Floyd: The personal cost of filming police brutality', BBC News, 11 June 2020, available at https://www.bbc.com/news/world-us-canada-52942519.
[14] ABC News, 'Buffalo police officers charged with assault for shoving a 75-year-old protester', 9 June 2020, available at https://www.abc.net.au/news/2020-06-07/buffalo-police-officers-arraigned-protest-george-floyd/12330068.
[15] Fausset and Rojas, 'Man Who Filmed the Arbery Killing Faces Calls for Arrest', New York Times, 18 May 2020, available at https://www.nytimes.com/2020/05/18/us/ahmaud-arbery-william-bryan.html.
[16] Caprehart, J., 'Feidin Santana, hero of North Charleston', Washington Post, 10 April 2015, available at https://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/09/feidin-santana-hero-of-north-charleston/.
[17] Nevett, J., 'George Floyd: The personal cost of filming police brutality', BBC News, 11 June 2020, available at https://www.bbc.com/news/world-us-canada-52942519.
[18] Freyer, Smith, and Latimore, 'Aggressive Police Upending Aboriginal Lives,' NITV, 20 February 2019, available at https://www.sbs.com.au/nitv/article/2019/02/20/aggressive-police-upending-aboriginal-lives1.
[19] McGowan, M. 'Police officers abused Afghan women in Sydney traffic stop, watchdog finds,' Guardian, 31 October 2019, available at https://www.theguardian.com/australia-news/2019/oct/31/police-officers-abused-afghan-women-in-sydney-traffic-stop-watchdog-finds.
[20] Thomas, S., 'NSW police officer in viral Indigenous teen arrest video should be charged, family says', ABC News, 4 June 2020, available at https://www.abc.net.au/news/2020-06-03/nsw-police-officer-in-indigenous-arrest-video-family-speaks/12316226.

also children detained on Christmas Island and at the Brisbane ITA.[21] They will be severely impacted by a ban on articles of communication, which restrict vital comfort, allow connection with family, and provide oversight.

CONDITIONS IN DETENTION

120. The Working Group notes with concern the conditions in Australia's immigration detention facilities, the management of which this Bill concerns.

121. Asylum seekers in detention are 200 times more likely to commit self-harm than Australians,[22] noting that takes into account only those reported incidents.

122. By way of example, at Melbourne Immigration Transit Accommodation, the following recent events have occurred:

    a. A 23-year-old Afghan man **died** at MITA, after his medication was allegedly ceased.[23] Another detainee, seeing paramedics treating the man, collapsed, and was hospitalised two days later.[24]
    b. Days later, an Afghan asylum seeker was taken to hospital after trying to set himself on fire.[25]
    c. On 22 July 2019, an Iraqi asylum seeker was hospitalised after sewing his lips together.[26]
    d. In January 2019, hundreds of detainees went on a hunger strike in protest against their living conditions.[27]
    e. A two-year-old girl had four teeth surgically removed and another four treated on Thursday after they began to rot during her time in detention. She may not grow front teeth until the age of 7.[28]
    f. Another two-year-old girl was forced to wait over seven hours to be taken to hospital after receiving a head injury.[29]

[21] Department of Home Affairs, 'Key visa cancellation statistics', 14 June 2020.
[22] Walden, M., Asylum seekers in detention 200 times more likely to commit self-harm than Australians, research finds', ABC News, 14 October 2019, available at https://www.abc.net.au/news/2019-10-14/asylum-seekers-in-detention-200-more-likely-to-commit-self-harm/11600148.
[23] Davidson, H., 'Afghan man dies at Melbourne immigration detention centre', Guardian Australia, 13 July 2019, available at https://www.theguardian.com/australia-news/2019/jul/13/afghan-man-dies-at-melbourne-immigration-detention-centre.
[24] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[25] Baker, N., 'Asylum seeker tries to set himself on fire at Melbourne detention facility', SBS News, 16 July 2019, available at https://www.sbs.com.au/news/asylum-seeker-tries-to-set-himself-on-fire-at-melbourne-detention-facility.
[26] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[27] 'Hundreds go on hunger strike at Melbourne detention centre', SBS News, 9 January 2019, available at https://www.sbs.com.au/news/hundreds-go-on-hunger-strike-at-melbourne-detention-centre.
[28] Truu, M., 'Two-year-old in immigration detention forced to have rotting teeth surgically removed', SBS News, 26 July 2019, available at https://www.sbs.com.au/news/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed.
[29] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.

g. A lawyer for a family of detainees was forced to call an ambulance for a 15-month-old girl suffering influenza, after complaints were ignored by staff;[30]
h. In 2019, the Australian Human Rights Commission – a government body – reported concerns that the use of restraints may not be necessary, reasonable and proportionate in all circumstances and limited space and privacy at the centre,[31] evidencing a system of severe restrictions infringing on personal liberty.
i. Reports of increasing violence by guards are not uncommon.[32]

123. The Australian Human Rights Commission (**the AHRC**) has recently published a report on risk assessment practices in onshore detention facilities[33]. The AHRC considers that the methods being currently used to manage risks in detention 'can limit the enjoyment of human rights, in a manner that is not necessary, reasonable and proportionate'. In particular, the ACHR expresses concern in relation to the following issues:

- *Inaccurate risk assessments may result in people in detention being subject to restrictions that are not warranted in their individual circumstances.*
- *The use of restraints during escort outside detention facilities has become routine, and may in some cases be disproportionate to the risk of absconding.*
- *Conditions in high-security accommodation compounds and single separation units are typically harsh, restrictive and prison-like.*
- *Restrictions relating to excursions, personal items and external visits are applied on a blanket basis, regardless of whether they are necessary in a person's individual circumstances.*
- *Australia's system of mandatory immigration detention—combined with Ministerial guidelines that preclude the consideration of community alternatives to detention for certain groups—continues to result in people being detained when there is no valid justification for their ongoing detention under international law.*[34]

124. In the same report, the AHRC noted that the average length of detention of people has increased and 'has stood at over 400 days since mid-2015'.[35] Indeed, since November 2018, the average number of days a person was detained has remained around 500, a remarkable figure.[36] This escalation is most concerning. By impairing communication,

[30] Razak, Iskhandar, 'Asylum seeker's baby rushed from Melbourne immigration detention centre to hospital with flu', ABC News, 17 July 2019, available at https://www.abc.net.au/news/2019-07-16/melbourne-immigration-detention-baby-rushed-to-hospital-with-flu/11314074.
[31] 'Risk management in immigration detention', Australian Human Rights Commission, 2019, available at https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf.
[32] See, for example, https://www.news.com.au/video/id-5348771529001-6032415068001/detainee-accuses-broadmeadows-detention-centre-guards-of-violence.
[33] Australian Human Rights Commission, *Risk management in immigration detention (2019)*, 18 June 2019, available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019 (AHRC Report 2019)
[34] AHRC Report 2019, *Commissioners Foreword,* available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/risk-management-immigration-detention-2019
[35] AHRC Report 2019, p. 68
[36] Department of Home Affairs, 'Key visa cancellation statistics', 31 March 2020.

the mental and physical health of people held in immigration detention will deteriorate further as they are held for longer periods for conduct that ordinary Australians would not consider warrants the deprivation of a person's liberty, and their access to family and home.

125. Any provisions further restricting conditions in detention must be properly enumerated, proportionate and justified.

CURRENT DETENTION CONTEXT: COVID-19

126. The Working Group is concerned at the introduction of the Bill in the context of already-existing measures related to the management of COVID-19 in detention centres. Our concerns are twofold, namely:
    a. The restrictive measures proposed by the Bill – including wide-ranging search and seizure powers - will be introduced in the context of ongoing restriction of detainees' liberty to manage the COVID-19 crisis; and
    b. The invasive search and seizure measures introduced by the Bill are incompatible with 'social distancing' measures presently in place throughout the detention network, and which remain necessary for containment of the heightened risk to detainees of COVID-19.

127. The risk of COVID-19 transmission amongst the detention population is now a matter of international note. The World Health Organisation's interim guidelines relating to management of COVID-19 in detention settings states as follows:[37]

> *People deprived of their liberty, such as people in prisons and other places of detention,1 are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time. Moreover, experience shows that prisons, jails and similar settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons. Prison health is therefore widely considered as public health.*

128. It is also now widely accepted that appropriate management of COVID-19 in prison and detention settings is key to the overall national management of the virus. In May 2020, public health journal The Lancet published a study describing detention settings as a 'hot spot' for COVID-19 transmission and circulation, leading to increased community transmission.[38] In a joint statement published in May 2020, the heads of five United Nations bodies urged member states to adopt a particularly careful approach to the management of detained populations:[39]

> *Acknowledging that the risk of introducing COVID-19 into prisons or other places of detention varies from country to country, we emphasize the need to*

[37] WHO, *Preparedness, prevention and control of covid-19 in prisons and other places of detention* (March 2020) p 1.
[38] Talha Burki, 'Prisons are 'in no way equipped' to deal with COVID-19' (2020) 10234 (395) *The Lancet* 1411.
[39] UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings, 13 May 2020, available at https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings.

minimize the occurrence of the disease in these settings and to guarantee that adequate preventive measures are in place to ensure a gender-responsive approach and preventing large outbreaks of COVID-19. We equally emphasize the need to establish an up-to-date coordination system that brings together health and justice sectors, keeps prison staff well-informed and guarantees that all human rights in these settings are respected.

129. The unique risks posed to people in prisons and detention facilities has led, in other jurisdictions, to controlled release of prisoners and detainees into the population, in order to reduce the overall sizer of the detained population. For instance, in the United Kingdom, authorities committed to the release of 4000 prisoners in response to the crisis.[40] 54,000 prisoners were released in Iran, and 45,000 in Turkey.[41]

130. No such steps have been taken in Australia. Here, the management of the COVID-19 pandemic has rested entirely on preventative measures adopted inside the detention network.

131. The provision of appropriate health care to people in immigration detention is the responsibility of the Commonwealth. The Working Group is aware that, in late March 2020, both the Department and its detention service provider, SERCO, introduced guidelines to manage the spread of the COVID-19 in IDCs and alternative places of detention (APODs). These measures involved the immediate cessation of external visits and leisure activities, staggered mealtimes, and restricted or distanced social interaction. Detainees suspected of or exposed to COVID-19 infection are managed primarily through isolation within IDCs, in compounds usually used for behavioural management.

132. The current measures are likely to persist into the foreseeable future, as COVID-19 transmission is likely to occur in Australia by 'waves.'[42] It is also probable that ongoing measures will be required even post-COVID-19 to prevent future crises, and also that similar health crises may occur in the future. The measures are strict and are likely to have had a significant impact on the mental health of the detained population. Recent research regarding the psychological impact of quarantine[43] suggests that people who have been required to quarantine or self-isolate during past pandemics or health crises have experienced adverse mental health outcomes, including post-traumatic stress. A large body of research[44] has previously identified the adverse mental health impacts of prolonged immigration detention specifically, particularly in the context of people who are refugees or seeking asylum.

---

[40] Jamie Grierson, 'Almost 2000 tags bought for UK COVID-19 prisoner releases remain unused' 15 May 2020 *The Guardian* available at https://www.theguardian.com/world/2020/may/15/only-55-of-2000-tags-bought-for-uk-covid-19-prisoner-release-used.

[41] Francis Pakes, 'Why Swathes of Prisoners are being released in the world's most punitive states' 20 April 2020 *The Conversation* available https://theconversation.com/coronavirus-why-swathes-of-prisoners-are-being-released-in-the-worlds-most-punitive-states-136563.

[42] Alicia Nally, 'Will Australia have a Second Wave of Coronavirus Infections, and what would cause it?' 20 May 2020 *ABC News* available https://www.abc.net.au/news/2020-05-14/will-australia-have-a-second-wave-of-coronavirus-infections/12234496.

[43] Samantha K Brooks et al, 'The psychological impact of quarantine and how to reduce it: rapid review of the evidence' (2020) 395 *The Lancet* 912-20.

[44] See, for example, M von Werthern et al, 'The impact of immigration detention on mental health: a systematic review' (2018) 18 *BMC Psychiatry* 382; G J Coffey et al, 'The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum' (2010) 70 *Social Science & Medicine* 2070; Louise K Newman, Michael Dudley and Zachary Steel, 'Asylum, Detention, and Mental Health in Australia' (2008) 27 *Refugee Survey Quarterly* 110.

133. In this context, it would be unconscionable to introduce restrictive powers which would further curtail detainees' liberty and ability to communicate with their families and representatives, which is already constrained. It would also be unconscionable to require that any communication with the outside must occur, as noted earlier, in crowded common areas where one landline is used amongst 60 people or more.

134. Furthermore, neither the terms of the Bill, nor the explanatory materials, make any attempt to reconcile the broad new search and seizure powers with the strict social distancing protocols in operation within IDCs. Given that the risk of COVID-19 transmission in IDCs arises primarily from guards and other staff entering from the community, the Working Group understands that guards are under strict instruction to maintain at least 1.5 metres' distance from detainees and their property at all times. Guards are further instructed not to make physical contact with detainees or their property unless under exceptional circumstances.

135. Such necessary protocols are irreconcilable with the broad search and seizure powers mandated by the Bill. How would guards conduct personal or strip searches in a manner compliant with social distancing protocols? How could the Minister be assured that an 'assigned person' delegated to carry out search and seizure operations did so in a manner cognisant of social distancing protocol?

136. These questions highlight the fact that the Commonwealth has made no attempt to weigh the necessity of the Bill against the imperative of maintaining COVID-related public health measures in the centres. The powers enacted by the Bill may serve to undermine the Commonwealth duty or care in relation to the health and safety of the detained population, as the COVID-19 crisis, and any future health events, unfolds.

AVAILABLE AVENUES TO ADDRESS CONCERNS

137. As noted above, the Working Group is concerned both by the lack of justification behind the statements that more strict management of IDFs is required, and the lack of consideration of other measures were those concerns justified.

138. The issues with the cancellation and detention systems need addressing. The dysfunction, delay, and opacity are serious and ongoing causes for concern.

139. The number of people with criminal histories, and of all people, in detention is a matter easily addressed by increasing resourcing to make decisions on these cases, noting again that many people detained return to the community. It would also be improved by ensuring detainees have access to legal advice and representation, for example through duty services or funding for service providers.

140. The Department can also improve its practices to make its decision-making sounder and more comprehensive. For example, over numerous years, the majority of decision-makers declined to consider as relevant to cancellation a person's claims to fear harm on return to a country, purporting to defer consideration unless that person makes a protection visa application. Not only is this unlawful, as courts including the Full Court of

the Federal Court have recently found,[45] it is highly inefficient, exposing people to detention throughout two processes (including appeal rights) instead of one and leading to an incomplete decision regarding visa cancellation. All of a person's representations regarding cancellation ought to be fully and properly considered, leading to reduced periods in detention and increased integrity of decision-making.

141. Alternatives to detention can also be looked at for low-risk detainees. Numerous options are available.

142. Given the inordinate costs currently associated with detention – for example, $6.1 million spent flying detainees around Australia, and $26.8 million reopening North West Point Immigration Detention Centre for one family[46] – it behoves legislators to consider alternatives to shorten detention and make processing efficient, rather than to infract on individual rights.

143. The Working Group calls for an inquiry into the cancellation framework and its outcomes.

USE OF ASSISTANTS

144. The Working Group opposes the authorisation of 'assistants' to carry out search and seizure operations in tandem with authorised officers. In the context of the broad and nebulous powers provided for by the Bill, the delegation of powers to 'assistants' creates the serious risk of abuse and miscarriage of those powers and harm to detainees.

145. As set out above, the search and seizure powers in immigration detention, already provided for under the *Act,* lack an important check which ordinarily exists in relation to such powers; namely, a warrant authorised and supervised by a Court. As further discussed, the expansion of the already broad powers of search and seizure to extend to an undefined series of 'prohibited things' gives an untenably broad ambit to those powers. The implications for detainees' safety and liberty are seriously, particularly in the current public health context.

146. Proposed s 252BB allows for the appointment of 'assistants' to carry out search operations with authorised officers. Unlike the officers chiefly responsible for the search, 'assistants' need not be authorised by the Minister, but rather may be appointed by the authorised officer depending on that person's view of what is 'necessary and reasonable' in the circumstances. Nothing in the Bill or explanatory materials sets out the required qualifications or training to be received by 'assistants.' Nor is there any mention of how the identity of such 'assistants' is to be recorded, as a measure of accountability, in the case of future complaint or reporting by detainees in relation to search or seizure.

OTHER

147. As noted above, this Bill may place Australia in breach of its international obligations, particularly under the ICCPR.

[45] *Minister for Home Affairs v Omar* [2019] FCAFC 188; *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96.
[46] Wainwright, R., ''People are crying and begging': the human cost of forced relocations in immigration detention', The Conversation, 2 March 2020, available at https://theconversation.com/people-are-crying-and-begging-the-human-cost-of-forced-relocations-in-immigration-detention-132193.

148. The Working Group notes that instruments determining what items are to be prohibited are disallowable under this Bill. Ministerial directions, however, regarding how prohibition is to be implemented are not. This creates even greater uncertainty and indeed a 'back door' to implementation of problematic practices.

149. The Working Group recommends that the Detention Services Manual be made public, as it was until 2018.

150. The Working Group notes that the inclusion of s 252B(j) as a protection is meaningless where no suspicion that a person has a prohibited thing is required.

CONCLUSION

151. Restricting private communication will likely increase mental and physical health complications, not only for people in detention but for their families and friends. This is likely to lead to complex health complications, self-harm, and even death. It severely impacts the children of people in detention.

152. The consequence of a lack of access to legal advice is reduced quality of decision-making and inappropriate outcomes.

153. The consequence of increased opacity is the potential for abuses of power to go unchecked. There may be increases in violence and human rights abuses.

154. The consequence of banning items for certain 'classes' of people (for example, people with a criminal history) risks creating a hierarchy of rights, and 'ghettoisation' of sections of our community. It is unacceptable for us to ban mobile phones for people with criminal histories in the community – it is unacceptable to do so in detention.

155. The Bill and its accompanying material raise more questions than it answers. There is no adequate definition of 'prohibited thing,' nor indication of what evidence the Minister may require before determining that a 'thing' poses a risk to safety or order of a detention facility. This ambiguity is unacceptable, given that the designation of a 'prohibited thing' gives license to broad personal and general search and seizure powers within the detention network

156. No adequate justification is given for the Bill. It lacks content, proportionality and clarity. Insofar as the Bill purports to address possession of narcotic, child pornography and weapons, both State and Federal laws are already adequate to that task. Existing provisions of the Act already permit searches without warrant for the detection of weapons.[47] No new law needs to be created for these purposes. Any move to prohibit items in detention, an already fraught and restricted environment, must be properly articulated.

157. It seems, then, that the primary purpose of the Bill is restriction of communication.

[47] The Act, s 252.

158. The Bill will address a very vulnerable cohort of people navigating a complex and time-sensitive legal area. Access to legal representation and support must not be compromised.

159. Even if it could be said that there are benefits to essentially banning mobile telephones, those must be weighed against the benefits of allowing those items.

160. The weight of the issues raised in these submissions mean that the Bill is apt to affect Australia's international reputation as a desired destination and as a humane society.

161. The Working Group welcomes the opportunity to consult further on a confidential basis. If you would like to discuss any of these matters further, please contact Hannah Dickinson, the Chair of the Working Group, by email at workinggroup@visacancellations.org.

ANNEXURE A
Section 501(2)
Discretionary cancellation by delegate or Minister with natural justice