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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

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

The Refugee Advice & Casework Service (**RACS**) is a specialist refugee legal centre that has been assisting people seeking protection in Australia on a not-for-profit basis since 1988. We welcome the opportunity to comment on provisions of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the **Bill**).

RACS recommends that the Bill not be passed. We are concerned that the powers contemplated by the Bill are disproportionate to the issue that the Bill seeks to address. Our submission places particular emphasis on the limitations on communications faced by people in immigration detention, including barriers to legal advice and assistance.

1. The Minister's broad power to determine *prohibited things*

Immigration detention centres in Australia are subject to an existing power of warrantless search and seizure in relation to any item capable of being used to inflict bodily injury or to help a person escape from detention.¹ They are also subject to ordinary state and federal laws. The Bill would introduce into the *Migration Act 1958* (Cth) a new section 251A, establishing a broader Ministerial power to prohibit things in immigration detention facilities that 'might be a risk to the health, safety or security of persons in the facility or to the order of the facility.' This definition would give the Minister a broad power to prohibit broad classes of things which are otherwise lawful.

It is significant that legislative instruments made by the Minister for the purposes of determining new *prohibited things* would not be disallowable by the Senate.² This limit on parliamentary oversight of the Minister's open-ended power to ban and confiscate classes of objects should be of concern to the Committee.

¹ *Migration Act 1958* (Cth) s 252(2)(a).

² *Legislation (Exemptions and Other Matters) Regulation 2015*, reg 10, item 20.

2. The importance of mobile phones for access to legal services in practice

RACS is particularly concerned about the blanket prohibition on mobile phones that is contemplated by the Bill. This would represent statutory entrenchment of a policy that has long applied to *unauthorised maritime arrivals* in immigration detention and which was expanded to other people in detention in 2016. This policy has recently been challenged in the courts.³

RACS has extensive experience of the challenges faced by people in immigration detention in exercising their rights under Australian law, and our ability to provide legal advice and representation is frequently undermined by barriers attributable to the detention environment. The proposed statutory prohibition of mobile phones in detention centres would exacerbate the impact of these barriers. In RACS' view, the Bill fails to balance concerns over particular uses of mobile phones by a small number of people in immigration detention with the overwhelming number of safe, legitimate and important uses for them. The rationale for the Bill also underestimates the difficulties currently faced by people in detention in accessing legal services and the importance of mobile phones in this context.

There is a statutory requirement that people in immigration detention must be given access to facilities for obtaining legal advice on request,⁴ but the ability of detainees to communicate with legal representatives is often frustrated in practice. In RACS' experience:

- Access to communication facilities is inconsistent and often subject to interruptions and delays.
- Landline phones available to people in detention are often located in public areas, undermining the privacy of communications.
- Access to facilities for sending copies of forms or other documents to legal representative (such as fax machines or scanners) is inconsistent.
- Detention facility staff are at times indifferent to facilitating access to legal services or communication facilities.
- Access to computer facilities and internet is used as a behavioural control and is subject to time restrictions in some facilities.

Other professionals who work in the immigration and refugee sector report similar barriers. The Explanatory Memorandum promises that access to communication facilities will be maintained and enhanced but the Bill itself contains no provisions to this effect.⁵ Additional steps that could be taken to improve access to communication facilities would include:

- Expanding access to facilities for private phone calls, available immediately and at all times;
- Ensuring access to scanning facilities; and
- Ensuring access to computer and internet facilities in all centres at all times.

Further, although detainees must be given access to facilities for obtaining legal advice on request, there is no corresponding provision requiring Border Force or detention centre staff to facilitate a lawyer's communication to a client, and no obligation to advise a person's representative when a person in detention is transferred from one detention centre to another. In these situations, mobile phones can repre-

³ *SZSZM v Minister for Immigration & Ors* [2017] FCCA 819 (3 May 2017); *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (17 August 2017).

⁴ Section 256. See also Department of Immigration and Border Protection, *PAM3: Detention Services Manual - Chapter 1 - Legislative and principles overview - Detainee access to legal representation* (accessed 12 October 2017).

⁵ Explanatory Memorandum, [21].

sent an important link between a person in detention and the outside world, and can be crucial for their practical ability to exercise their legal rights.

Importantly, many procedural elements of Australian immigration law are designed to expedite legal processes for people in immigration detention. These periods are devised with the laudable objective of avoiding unnecessary periods of detention. However, where individuals face barriers to accessing legal advice and representation at short notice, brief limitation periods conversely have a prejudicial effect whereby people risk losing their statutory rights or making invalid or incomplete visa applications. For example:

- Where the Department of Immigration requests an applicant for refugee status to explain or provide particular information in the course of a protection visa application, they are required to do so in English within three working days.⁶
- A person who is detained because of a decision to cancel their bridging visa loses any right to merits review of that decision if they fail to apply to the Administrative Appeals Tribunal within two working days.⁷
- Where legal representatives wish to speak to or meet with their clients in immigration detention, they are required to make the request at least one business day in advance.⁸

These timelines fail to take account of the time people in detention require to obtain the assistance they often need in order to engage with legal processes effectively. In RACS' experience unfair outcomes resulting from this problem have become more common since the withdrawal of access to government-funded legal assistance and language services for most people seeking asylum since 2014. A blanket ban on mobile phones would limit all detainees' ability to make immediate, private and confidential communications and can therefore be expected to exacerbate this problem.

Case study: Detention-related barriers to access to justice

Rachel is a 19 year-old woman from Cambodia detained in Villawood Immigration Detention Centre.⁹ Rachel was detained after she was detected living in Australia after the expiry of her visa. There is evidence that if she returns to Cambodia, Rachel faces a risk of being sold into a sex trafficking ring. She had completed the protection visa application form but was unable to lodge it because she could not pay the visa application charge of \$35. She had \$35 in cash but the Migration Regulations require the charge to be paid by credit card or money order. Rachel was at high risk of being removed from Australia, despite her attempts to apply for protection. Rachel contacted RACS using the mobile phone of another detainee.

In providing legal advice to Rachel over the subsequent days and weeks, RACS repeatedly relied on Rachel's access to her friend's mobile phone. Calls to the detention centre often went unanswered. When they were answered, staff repeatedly refused to put through urgent calls. In some cases, the advance notice required for requests for telephone appointments meant that there was no formal way to contact Rachel within the statutory timeframes for her responses to requests from the Department of Immigration relating to her visa application.

⁶ *Migration Regulations 1994* (Cth) reg 2.15. The same period applies to applications for other substantive visas.

⁷ *Migration Regulations 1994* (Cth) reg 4.10(2); *Migration Act 1958* (Cth) s 338(4)(b).

⁸ Department of Immigration and Border Protection, *Visiting an immigration detention facility*, available at <<https://www.border.gov.au/Busi/Comp/Immigration-detention/visiting-a-facility>> (accessed 12 October 2017).

⁹ Names and other identifying information have been changed.

3. Blanket restrictions as a disproportionate response

The Explanatory Memorandum to the Bill and the Minister's second reading speech seek to emphasise the proportion of people in immigration detention who have a criminal record, but it is appropriate to recall that people who are in immigration detention are necessarily people who the criminal justice system does not require to be detained. By definition, people in immigration detention would not be detained but for the fact that they are not Australian citizens.

In this context, the Bill's failure to distinguish between high risk and low risk detainees is of significant concern. The Bill appears to apply blanket prohibitions in order to manage risks that are isolated and individualised. Alternative, less restrictive policies could achieve the objective sought to be achieved by the Bill without the negative impacts raised in our submission. For example, measures that differentiate between low risk and high risk detainees (on the basis of individualised risk assessments) would represent a more proportionate response.

The blanket restrictions proposed are likely to exacerbate health impacts flowing from detention, many of which are associated with social isolation and a lack of connectedness to family, friends and the outside world. The people affected would include a significant number of people with no criminal history but who are experiencing mental ill-health. People seeking asylum, for example, make up a variable but often significant proportion of people in detention. They are statistically far more likely to have experienced trauma and persecution than members of the general community and are especially vulnerable to these impacts.

Further, the search and seizure provisions that would be expanded by the Bill make no distinction between detention facilities and Alternative Places of Detention, such as those used for detention involving children.¹⁰ Importantly, the Bill does not specify any evidentiary requirement triggering the searches, effectively permitting routine, indiscriminate searches of property and persons. Powers of this kind call for robust legal safeguards and external oversight, and are otherwise liable to abuse.

4. Concluding remarks

RACS is concerned that the Bill would give legislative approval to the increasingly punitive character of immigration detention in Australia. In light of the impact that the Bill will have on all people in detention (including its limiting effect on access to justice), legitimate concerns about safety should instead be addressed by measures that are targeted, proportionate and accompanied by necessary safeguards.

Please do not hesitate to contact us for any further information or clarification.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

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¹⁰ The proposed Subsection 251A(3) defines an *immigration detention facility* as either a detention centre established under s 273 or another place determined by the Minister for the purposes of subparagraph (b)(v) of the definition of *immigration detention* in s 5(1).