



**Castan Centre for Human Rights Law
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Submission to the Senate Legal and Constitutional Affairs Committee

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*. The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

Summary of Submission

The Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the Bill) amends the *Migration Act 1958* (Migration Act) to allow the Minister to determine a thing as prohibited. In the Explanatory Memorandum it is said that the existing search and seizure powers in the Migration Act are not sufficient to manage narcotic drugs, mobile phones, SIM cards or other things that are of concern within the context of immigration detention facilities.

We will be focusing on the confiscation of mobile phones in our submission as we believe this raises privacy and human rights concerns.

General Comments about bans on mobile phones

We are concerned about the blanket/generalised nature of the proposal suggested in the Bill. That is, that it permits the Minister to ban mobile phones in immigration detention in relation to *all detainees* (rather than those individuals who are engaging in prohibited conduct).

In this regard, we endorse the comments made by the Commonwealth Human Rights Commission in its submission to this inquiry, particularly where it states that:

.... blanket application of restrictive measures to all people in detention, regardless of their individual circumstances, may not be a necessary, reasonable or proportionate response to the identified risks.¹

We also agree with the comments of National Justice Project Principal Solicitor, George Newhouse who has represented plaintiffs in litigation in the federal courts in relation to this matter:

¹ Human Rights Commission, Submission 11 at para 23.

“Seeking asylum does not make you a criminal. Mobile phones provide asylum seekers with vital access to the outside world, to loved ones and to advocates – their mental health and their families depend on this. The blanket ban on phones punishes innocent men, women and children and demonstrates the increasing criminalisation by this Government of asylum seekers who have committed no crime.”²

“If the minister is concerned about the criminal use of mobile phones then he needs to separate vulnerable individuals who come to Australia for protection from those alleged criminals.”³

We also raise concerns that the ban has the potential to unreasonably constrain the capacity of detainees to seek legal advice and contact family and friends.

Human Rights Concerns

Freedom of Expression

As set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of opinion and expression provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to *seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

The remit of Article 19, referring to any media of choice, is therefore broad. We would also emphasise that must take a modern-day interpretation of this provision, in light of the central importance of mobile technology and social media.

We note that there are some restrictions listed in Article 19 of the ICCPR but these are circumscribed:

² <http://rac-vic.org/2017/03/19/media-release-federal-court-rules-asylum-seekers-can-keep-mobile-phones-in-detention/>.

³ <https://www.theguardian.com/australia-news/2017/sep/13/peter-dutton-introduces-bill-to-ban-phones-from-immigration-detainees>.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, ***but these shall only be such as are provided by law and are necessary***:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

We make the following points about the Bill in light of this provision:

1. The confiscation of mobile phones from individuals may be necessary to protect national security or public order but should be done on an individual basis with due cause, not via a blanket ban.
2. The EM to the Bill refers to the existence of landline phones and internet access in detention centres. However, media reports have noted that landline phones and internet access in detention centres is very limited and that phones are often out of order.⁴ Therefore we submit that this is not an adequate provision of communication for detainees.
3. The reference to ‘provided by law’ means that detailed criteria should be set down in primary legislation. Here, the proposed bill grants a wide, discretionary power to the Minister to be ‘satisfied’ of risk and that is made by issuance of a ***legislative instrument*** rather than directly under primary legislation.

Proposed Section 251A:

The Minister may, by legislative instrument, determine a thing for the purposes of subsection (1) if the Minister is satisfied that:

- (a) possession of the thing is prohibited by law in a place or places in Australia; or
- (b) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

We emphasise that the current Bill does not appear to meet the principles set out by the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion who has stated that:

All restrictions must be provided for by pre-existing ***statutory laws*** issued by the legislative body of the State;

⁴ <https://www.cnet.com/au/news/how-australia-keeps-refugees-disconnected-refugee-crisis/>

Laws imposing restrictions or limitations must be accessible, concrete, clear and ***unambiguous***, such that they can be understood by everyone and applied to everyone.

We suggest that these terms must be interpreted strictly to refer to primary legislation, not a decision issued by a Minister as a legislative instrument.

In support of our arguments above, we note that the UN Human Rights Council has emphasised the importance of the right to freedom of expression, stating that:

... the exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.⁵

The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has also noted that 'permissible limitations and restrictions must constitute an exception to the rule and must be ***kept to the minimum necessary*** to pursue the legitimate aim of safeguarding other human rights'.⁶

We note, in particular, that the UN Special Rapporteur has specifically mentioned the value of this right to vulnerable populations such as migrants:

In this context, the right to freedom of expression gains added value when it is used to protect groups or minorities in need of particular attention, such as women, children, those living in extreme poverty, minorities, indigenous peoples and ***migrant populations***.⁷

⁵ UN Human Rights Council, Resolution 12/16, Freedom of opinion and expression, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble.
www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16.

⁶ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/66/290, 10 August 2011, para 28.

⁷ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Frank La Rue 2010, UN Doc A/HRC/14/23;
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>.

He notes that:

- This right applies to *non-citizens* living in a State Party;⁸
- That the right offers a means to marginalised groups to access information, assert their rights, and participate public debate to improve their situation;⁹ and
- that access to means of communication, in particular to *electronic communication* should be considered a social and economic right.¹⁰

International practice and jurisprudence

We would also point the Committee to the European Courts of Human Rights case: *Ahmet Yildirim v Turkey*. Here the applicant alleged that the blocking of access to his Internet site, ordered by the national authorities, amounted to an unjustified infringement of his rights under a number of provisions of the European Convention on Human Rights, including Art 10 on freedom of expression. In this case, the Court found that there had been a *violation of the applicant's freedom of expression* enshrined in Article 10. The Court held that the respondent Government did not satisfy the burden of showing that the imposition of such a restraint was justified¹¹ Whilst obviously not binding in Australia, this judgement indicates the importance of electronic communication to freedom of expression.

Further, we point the Committee to a Declaration made in 2005 by the member states of the Council of Europe. That Declaration recognises that 'limited or no access to [information and communication technologies (ICTs)] can deprive individuals of the ability to exercise fully their human rights'. The first chapter of the Declaration states:

"1. The right to freedom of expression, information and communication ... Freedom of expression, information and communication *should be respected in a digital as well as in a non-digital environment*, and should *not* be subject to restrictions other than those provided for in Article 10 of the [Convention], *simply because communication is carried in digital form.*"¹²

⁸ Ibid, para 63: 'the Special Rapporteur recalls that even when individuals are not citizens of the State where they live or happen to be, "a State party is required [...] to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction" (para. 5.1). The Special Rapporteur also reiterates that migrants and migrant communities, regardless of their legal migratory status, are fully entitled to exercise freedom of expression.'

⁹ Ibid, para 62.

¹⁰ Ibid, para 37.

¹¹ ECHR, Case no.3111/10.

¹² Declaration of the Committee of Ministers on Human Rights and The Rule of Law In The Information Society (CM(2005)56 final) 13 May 2005).

We therefore submit that aspect of this Bill require further consideration. In particular, we submit that a *blanket ban* on mobile phones (made pursuant to Ministerial satisfaction in a legislative instrument) is not a reasonable, proportionate or necessary response to security concerns raised by the behaviour of *some individuals* in detention facilities.