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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Submission by Human Rights Watch to the Senate Legal and Constitutional Affairs Legislation Committee on the Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

This submission addresses the proposed amendments to the Migration Act 1958 as set out in the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 regarding confiscation of mobile phones from immigration detainees and an increase in search and seizure powers. Human Rights Watch opposes the proposed amendments as they are overbroad and lack sufficient safeguards to ensure that searches and seizures are lawful and proportionate.

The proposed amendments would allow the minister for home affairs to prohibit, and ‘authorised officers’ (that is Australian Border Force officers and private security guards) and their assistants to confiscate any item that may pose a risk to detainees, immigration staff, visitors or to the order of the facility, including mobile phones, sim cards and internet capable devices, from detainees in Australia’s immigration detention facilities.¹ The minister may also declare blanket bans on items, by issuing binding written directions that make it mandatory for officers to seize items due to ‘a targeted, intelligence-led, risk-based approach.’²

The amendments create a new statutory power which would allow officers and their assistants to search detainee’s rooms and other areas for such items, encroaching upon detainee’s privacy.³ This is a significant broadening of the search and seizure powers, and gives private

² Ibid.
³ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, article 17(1) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”). Australian became a party to the ICCPR in 1980.
security guards and immigration officials police-like powers, to conduct searches on very broad and vague grounds without sufficient oversight, judicial review or complaint mechanisms to address abuses. These search and seizure powers, which are expressly without a warrant, include strip searches⁴ and the use of detector dogs,⁵ risk threatening the privacy, humanity and inherent dignity of detainees.⁶

There are approximately 137³ people currently in immigration detention centers, with more than 150 held in hotels or other alternative places of detention. The explanatory memorandum to this bill says that a large number of immigration detainees have a criminal record, some of whom may be undertaking criminal activity.⁸ While some people are held in detention pending deportation due to negative character assessments;³ hundreds of people without criminal records, who are seeking asylum, refugees transferred from Manus Island and Nauru, and people who have overstayed their visas, are also being detained and would be adversely affected by these measures. Whether a person has previously served a criminal sentence or not, immigration detention is an administrative—not a punitive—measure, and, therefore, is governed by principles of proportionality, which these amendments appear to disregard.

**Broader search and seizure powers**

The minister states that the amendments are necessary to protect the health, safety and security of persons in the facility and to ensure that conduct that could pose a risk to the order of the facility is prevented.¹⁰ However, authorized officers already have search powers to detect and prevent criminal behaviour. Under the Migration Act 1958, authorized officers have the power to search detainees' rooms and to strip search them if they believe detainees have a weapon or object that could cause bodily harm or to facilitate an escape.¹¹

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⁵ Section 252B (4) of the Migration Amendment Bill 2020.
⁶ ICCPR, article 10, states that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’
⁹ Migration Act 1958, section 501.
Currently, police can search immigration detention facilities if there is suspected wrongdoing. For instance, in January 2020, police conducted search and seizure investigations at Villawood Detention Facility where four people were arrested for criminal activity involving fraud.\(^{12}\) In 2018, police investigated an email scam being run from the detention center, and confiscated numerous phones and sim cards.\(^{13}\) While it is appropriate for police to conduct searches in immigration detention facilities, there are insufficient safeguards and oversight mechanisms for Australian Border Force officers and private security contractors to have those powers.

Confiscation of items such as mobile phones

Mobile phones and internet capable devices provide an essential connection to the outside world for detainees. Detainees use mobile phones to connect with family, friends, lawyers, and they also use them to watch films, read books, and to catch up on news in their home countries and outside of the walls of the detention facility.\(^{14}\) According to the Commonwealth Ombudsmen’s report in January 2020, educational, recreational, sporting and cultural activities are essential to support the mental health and well-being of detainees.\(^{15}\) The proposed measures will encroach upon detainee’s privacy,\(^{16}\) freedom of expression,\(^{17}\) and right not to have their correspondence unnecessarily interfered with.\(^{18}\) These amendments may have a chilling effect on detainee’s ability to speak out against potential abuse and will make it harder to hold the government and authorized officers to account.

Many refugees and asylum seekers experience significant psychological distress in detention,\(^{19}\) some have fled traumatic experiences exacerbated by prolonged, indefinite

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\(^{16}\) ICCPR, article 17(1), states that ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’

\(^{17}\) Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), article 19 (‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’).

\(^{18}\) ICCPR, article 17(1) states that ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’

\(^{19}\) Kylil Hedrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann, “Self-harm Among Asylum Seekers in Australian Onshore Immigration Detention: How Incidence Rates Vary by Held Detention Type,” April 30, 2020,
detention in Australia upon arrival. As recently as May 12, 2020, a male refugee attempted suicide at the Mantra Hotel in Melbourne. Rates of self-harm among asylum seekers in detention are more than 200 times the rates of hospital-treated self-harm among the Australian community. The protracted and indefinite nature of immigration detention takes a significant toll on detainees. As of March 2020, the average period of time for people held in Australian detention facilities was 545 days. Of the 1373 detainees, 340 had been in detention for 730 days or more. The cohort of refugees and asylum seekers in Australia’s immigration detention facilities are already a vulnerable group; to take away their lifeline to the outside world, to their friends and family who they have been separated from for many months and years, is cruel and unnecessary.

Kurdish refugee Farhad Bandesh was held on Manus Island in Papua New Guinea for approximately six years, before being evacuated to Australia for medical treatment 10 months ago. He was detained in a Mantra Hotel room for nine months and then detained in the Melbourne Immigration Transit Accommodation (MITA). He told BuzzFeed news:

I use [my mobile phone] to stay in touch with people who support my case, for legal assistance and I also use it to produce art, to record my songs, music, and poetry.... These are things that keep me alive and are so important for my mental health. Without this, hope, care and support is taken away and the suffering this will create is unbearable.

It is also vital for detainees to have immediate access to their lawyers and advocates. Mobile phones are an important tool for documenting mistreatment and ensuring transparency in detention facilities. Iranian refugee Abdullah Moradi Sabz Koohi, who is currently detained in the Kangaroo Point Hotel in Brisbane, told a journalist:


23 Ibid.


I think maybe the phone is so important for us because if we're recording, they can't do something bad to us. If we don't have a recording, or we don't have any witnesses, how can we complain and get them to believe us? They never, ever believe us. They just say for example, Serco says something different.\textsuperscript{26}

The Home Affairs Department has already tried to confiscate detainee's mobile phones and was prevented from doing so in 2017 by the Federal Court. Lawyers brought a class action on behalf of 80 people seeking asylum who would have been adversely affected by this action. The court found that the secretary of home affairs did not have the legislative power to issue a blanket ban on mobile phones.\textsuperscript{27}

Human Rights Watch has documented elsewhere the importance of mobile phones for people in immigration detention centers.\textsuperscript{28} Mobile phones ensure that refugees and migrants can speak to their family, friends, lawyers and seek reliable and current information, especially in places of detention – concerns even greater during the Covid-19 pandemic.

The minister has said that detainees will have reasonable access to landline telephones, facsimile, the internet, postal services and visits in order to maintain contact with their support networks.\textsuperscript{29} Relying on shared computers and phone lines will severely limit the ability to communicate with detainee's family, lawyers and support networks. In some circumstances, detainees are required to book in to use the landlines and detainees may not always have access to a private room to discuss confidential issues with lawyers, advocates, journalists or their family members.\textsuperscript{30} If detainees use shared computers, their use would be monitored by the physical presence of guards\textsuperscript{31} and in some centres, also their search history.\textsuperscript{32} The explanatory memorandum to the bill states that the detainees’ internet use will be monitored in the future, replicating detention facilities on Christmas Island.\textsuperscript{33} Visits by friends and support networks are limited to certain hours of the day and are rarely in private, and because of Covid-19 all visitation rights have been suspended for months.

\textsuperscript{26} Ibid.
\textsuperscript{27} AR17 v Minister for Immigration and Border Protection [2018] FCAFC 98.
\textsuperscript{29} Explanatory Memorandum – Migration Amendment Bill 2020.
\textsuperscript{31} Explanatory Memorandum – Migration Amendment Bill 2020.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
Conclusion

This bill should not proceed. Human Rights Watch opposes attempts to confiscate and ban the use of mobile phones and internet capable devices in immigration detention facilities. Mobile phones are a lifeline for many vulnerable people in detention and provide meaningful and instantaneous connection to family members and lawyers. Mobile phones also add a higher level of transparency and accountability to detention facilities by enabling detainees to record conditions and events. It is inappropriate to increase an authorized officer’s search and seizure powers to that of law enforcement officials as immigration detention facilities are administrative and are not supposed to be punitive. Police already have sufficient search and seizure powers to investigate and prosecute criminal activity in immigration detention facilities, which addresses the concerns held by the minister. There is already limited independent oversight in immigration detention facilities, and to broaden the ministers’ and authorized officers’ powers without giving detainees the ability to meaningfully challenge and review such actions is concerning and creates an unacceptable risk to detainees’ human rights.