



## **Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020**

### **Senate Legal and Constitutional Affairs Legislation Committee**

#### **Submission by the Office of the United Nations High Commissioner for Refugees**

**11 June 2020**

#### **I. INTRODUCTION**

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee in respect of its inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (the Bill).
2. While UNHCR acknowledges the importance of maintaining the order of immigration facilities and prohibiting the entry of illegal items to ensure the safety and security of detainees, visitors and staff, detention arrangements should not be punitive nor should facilities accommodating asylum-seekers and refugees operate like prisons or jails.<sup>1</sup> Seeking asylum is not a criminal act. It is a universal human right enshrined in international law.<sup>2</sup> Accordingly, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, be carefully circumscribed and subject to prompt review.<sup>3</sup> Detention should only apply when it pursues a legitimate purpose (such as to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks)<sup>4</sup> and when it has been determined to be both necessary and proportionate in each individual case.<sup>5</sup> UNHCR has ongoing concerns with Australia's legislative and policy framework of mandatory detention, which is inconsistent with many of these principles under international

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<sup>1</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 29, available at: <https://www.refworld.org/docid/503489533b8.html>.

<sup>2</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189; UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606.

<sup>3</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6, available at: <https://www.refworld.org/docid/503489533b8.html>.

<sup>4</sup> UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

<sup>5</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6, available at: <https://www.refworld.org/docid/503489533b8.html>.

law and which has resulted in the prolonged and indefinite detention of asylum-seekers, refugees and stateless persons, some for up to twelve years.<sup>6</sup>

3. The Bill would amend the *Migration Act 1958* (Cth) (the Act) to insert new section 251A and thereby allow the Minister to determine by disallowable legislative instrument that an item is a 'prohibited thing' in relation to a person in detention or to an immigration detention facility. The Bill will enable the Minister to prescribe prohibited illegal things (such as controlled drugs), and also things that might be a risk to the health, safety or security of persons in an immigration detention facility, or to the order of the facility. The Bill provides examples of things that may be determined to be prohibited things, such as mobile phones, SIM cards, computers and other electronic devices. Prohibited things can be searched for and seized without warrant, including through the use of strip searches. The power to conduct searches of facilities (including detainees' rooms and personal effects) without warrant or suspicion that there is a prohibited thing at the facility can also be conducted with the assistance of detector dogs.
4. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers and refugees, including safe, dignified and human rights-compatible treatment.<sup>7</sup> The special circumstances and particular needs of asylum-seekers, refugees and stateless persons (including those at risk of statelessness) in detention must be taken into account when considering the adoption of measures that significantly enhance detention security arrangements that are likely to have a disproportionately adverse impact on such persons. This is particularly the case as Australia's detention facilities are accommodating increasing numbers of psychologically vulnerable persons in need of international protection. As at January 2020, it appears more than half of the detention population in Australia comprised persons of concern under UNHCR's mandate.<sup>8</sup> Many of these are victims of trauma or torture or have diminished mental health as a result of prolonged and indefinite detention.
5. UNHCR is concerned that the proposed measures will permit the unreasonable restriction of the enjoyment of the rights guaranteed to asylum-seekers, refugees and stateless persons and would further weaken the ability of Australian law to ensure the protection of such persons in accordance with relevant international law and standards.

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<sup>6</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-210](#). See also: Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention with respect to Australia, available at: <https://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx>.

<sup>7</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6, available at: <https://www.refworld.org/docid/50348953b8.html>.

<sup>8</sup> Of the 1,432 persons in held detention in January 2020, 475 persons had previously sought asylum by lodging protection visa applications: Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 January 2020, p. 4, available at: <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>; In addition, at this time there were 254 asylum-seekers and refugees, medically evacuated from Papua New Guinea and Nauru in held detention in Australia (these persons are not eligible to apply for a protection visa): Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-125](#).

## II. UNHCR'S AUTHORITY

6. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.<sup>9</sup> As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, inter alia, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.'<sup>10</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,<sup>11</sup> according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).<sup>12</sup>
  
7. In addition to UNHCR's mandated responsibilities for refugees, including those who are stateless pursuant to paragraphs 6(A)(II) of the Statute and Article 1(A)(2) of the Refugee Convention, in accordance with UN General Assembly resolutions 3274 XXIX<sup>13</sup> and 31/36,<sup>14</sup> UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),<sup>15</sup> as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.<sup>16</sup> UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.<sup>17</sup>

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<sup>9</sup> See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

<sup>10</sup> Statute, para. 8(a).

<sup>11</sup> UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>12</sup> UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>13</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

<sup>14</sup> UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

<sup>15</sup> UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

<sup>16</sup> UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

<sup>17</sup> Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection,

8. Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.
9. Although the amendments in the Bill are capable of affecting any 'unlawful non-citizen', UNHCR's submission focuses on their effect on refugees, asylum-seekers and stateless persons (including those at risk of statelessness) in Australia, in light of relevant international legal obligations.

### III. THE NATURE OF THE PROPOSED AMENDMENTS

10. The Act provides that persons suspected of being 'unlawful non-citizens' must be detained and kept in immigration detention until they are removed from Australia or granted a visa.<sup>18</sup> Consequently, provided that there is a process relating to the grant of a visa or to removal (even if removal is not reasonably practicable in the foreseeable future), the continued detention of an 'unlawful non-citizen' is permitted under the Act.
11. The Bill would amend the Act to allow the Minister to determine by disallowable legislative instrument that an item is a 'prohibited thing' in relation to a person in detention (whether or not the person is detained in an immigration detention facility) or in relation to an immigration detention facility, and allow prohibited things to be searched for and seized. Prohibited things may include illegal things or things that the Minister is satisfied might be a risk to the health, safety or security of persons in an immigration detention facility, or to the order of the facility. Examples of items that may be prohibited include mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet.
12. The Bill will allow existing screening, search and seizure powers (including strip searches) to be used in relation to 'prohibited things'. The power to search a person, the person's clothing and any property under their immediate control may be exercised whether or not an officer has any suspicion that the person has a prohibited thing, a weapon, escape aid or visa cancellation evidence.<sup>19</sup> Similarly, the Bill provides that an authorised officer may, without warrant, conduct a

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10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\)](#), October 2017.

<sup>18</sup> *Migration Act 1958* (Cth) ss 189; 196. The term 'unlawful non-citizen' is defined in s 14.

<sup>19</sup> Proposed subsection 252(2).

screening procedure in relation to a detainee whether or not the officer has any suspicion that the person has a prohibited thing, a weapon or escape aid.<sup>20</sup>

13. The Bill also includes a new statutory power to search facilities operated by or on behalf of the Commonwealth, in order to enforce both the existing and proposed prohibitions. Such a search could include accommodation areas, administrative areas, common areas, detainees' rooms, detainees' personal effects, medical examination areas and storage areas. Officers could also make use of detector dogs to conduct searches. Notably, a search may be conducted of a facility whether or not the authorised officer has any suspicion that there is a prohibited thing, a weapon or escape aid at the facility.

#### IV. CONSIDERATION OF INTERNATIONAL LEGAL STANDARDS

14. The fundamental rights to liberty and security of person<sup>21</sup> and freedom of movement<sup>22</sup> are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The Executive Committee of the High Commissioner's Programme (ExCom), of which Australia is a member has addressed on a number of occasions the detention of asylum-seekers.<sup>23</sup> These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.<sup>24</sup>
15. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.<sup>25</sup> Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees

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<sup>20</sup> Proposed subsection 252AA(1A).

<sup>21</sup> See, for example, Articles 3 and 9, UN General Assembly, *Universal Declaration of Human Rights* (UDHR), 10 December 1948, 217 A (III); Article 9, UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>22</sup> See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own.

<sup>23</sup> See, UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) – 1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) – 1998, paras. (cc), (dd) and (ee); and 89 (LI) – 2000, third paragraph, all available at: <http://www.unhcr.org/3d4ab3ff2.html>.

<sup>24</sup> UN Human Rights Committee (HRC), General Comment No. 18: Non-discrimination, 10 November 1989, para. 1, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>; United Nations Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 5, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html>.

<sup>25</sup> Article 31(2) of the 1951 Convention. See also UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention – Revised, Geneva Expert Roundtable, 8-9 November 2001 (UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention), para. 3, available at: <http://www.unhcr.org/419c783f4.pdf>. See, also, UNHCR, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17 (UNHCR Global Consultations: Reception of Asylum-Seekers), available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

lawfully in the territory.<sup>26</sup> Asylum-seekers, including those who have entered the country irregularly but have since entered the asylum procedure, are considered lawfully in the territory for the purposes of benefiting from this provision.<sup>27</sup>

16. These rights taken together – the right to seek asylum, non-penalisation for irregular entry or stay, the rights to liberty and security of person, and freedom of movement and settlement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.
17. Minimal periods in detention or other movement restrictions may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks.<sup>28</sup> At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law.
18. Detention for the sole reason that the person is seeking asylum is not lawful under international law.<sup>29</sup> Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.
19. Further, there is little evidence that detention has a deterrent effect on the irregular entry or stay of asylum-seekers.<sup>30</sup> Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international refugee and human rights law as they are not based on an individual assessment as to the necessity to detain.
20. UNHCR has ongoing concerns with Australia’s legislative and policy framework of mandatory detention, which is inconsistent with the general principle that asylum-seekers, refugees and stateless persons should only be detained on exceptional grounds and that there should be a presumption against detention, unless shown to be necessary according to prescribed criteria.

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<sup>26</sup> Article 26 of the 1951 Convention provides: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.” Article 26 of the 1954 Convention relating to the Status of Stateless Persons provides an identical provision.

<sup>27</sup> UNHCR, “Lawfully Staying” – A Note on Interpretation, 1988, <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR Global Consultations: Reception of Asylum-Seekers, para. 3, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

<sup>28</sup> See, UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) – 1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

<sup>29</sup> Article 31, 1951 Convention; compare also Article 18(1), European Union Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html>.

<sup>30</sup> A. Edwards, Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, page 1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

21. Once identity, health and security risks have been resolved, the purpose of detention has been achieved and such persons should be released from detention. UNHCR is of the view that efforts to resolve the substantive elements of a person's immigration status, namely their need for international refugee protection, is best pursued while the person is in the community and ought to be de-linked from the assessment of risk associated with detention.
22. As UNHCR has set out elsewhere, the security and character requirements which must be satisfied under Australian law in order for a person to be granted a visa (and therefore released from detention) exceed the scope of the limited exception to *non-refoulement* enunciated in article 33(2) of the 1951 Convention and the exclusion provisions in article 1F.<sup>31</sup> These requirements often result in non-citizens being detained (or re-detained), often giving rise to indefinite detention as such persons are unable to return because they are in need of international protection or have no country of nationality and thus are unable to be removed.<sup>32</sup>
23. In circumstances where the purpose of detention is no longer achievable within a reasonable period, UNHCR is firmly of the view that the detainee should be released (by granting some form of visa concomitant with their legal status), or else the continued detention may become arbitrary and indefinite. This would be consistent with the specific incorporation of the principle that detention is a measure of last resort and should be for the shortest practicable time.

#### V. PERSONS IN PROLONGED OR INDEFINITE DETENTION

24. UNHCR appreciates efforts made by the Government to transfer children and vulnerable families out of detention and to make greater use of alternatives to detention for a significant number of asylum-seekers awaiting refugee status determination through the grant of Bridging E visas, which enable holders to remain in Australia lawfully while their substantive visa application is being processed.<sup>33</sup> However, as at January 2020, it appears more than half of the detention population in Australia comprised persons of concern under UNHCR's mandate.<sup>34</sup>
25. Every effort is needed to resolve protracted cases, including through practical steps to assess the necessity of continued detention in conformity with international human rights and refugee law, and to pursue alternatives to

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<sup>31</sup> See UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019*, August 2019, available at: <https://www.unhcr.org/en-au/publications/legal/5d5b85e47/submission-to-the-legal-and-constitutional-affairs-legislation-committee.html>.

<sup>32</sup> Ibid.

<sup>33</sup> As at 31 March 2020, 12,742 asylum-seekers who arrived by sea were residing in the community on Bridging E visas (BVEs): Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 March 2020, p.4, available at: <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>.

<sup>34</sup> Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 January 2020, p. 4; Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-125](#).

detention wherever possible in cases where restrictions on freedom of movement or deprivation of liberty are determined to be necessary. This is particularly so in the current context, as recently observed in UNHCR's submission to the Parliamentary Joint Committee on Human Rights in the context of its scrutiny of federal bills and instruments made in response to the COVID-19 pandemic.<sup>35</sup>

26. UNHCR is deeply concerned that a considerable number of refugees, asylum-seekers and stateless persons in Australia are currently in situations of protracted or indefinite detention. The UN Human Rights Council Working Group on Arbitrary Detention similarly recently expressed alarm at the rising number of cases emanating from Australia concerning the implementation of the Act that are being brought to its attention.<sup>36</sup>
27. According to official data provided by the Department of Home Affairs, of the 1,432 persons in held detention in January 2020,<sup>37</sup> 475 persons had previously sought asylum by lodging protection visa applications.<sup>38</sup> The average period of detention for such persons was 871 days (approximately 2.5 years).<sup>39</sup> However, some asylum-seekers, refugees and stateless persons in Australia have been detained for significantly longer than this average, with some up to twelve years and nearly sixty persons in detention for between six and eight years.<sup>40</sup>
28. Moreover, during this time there were 254 asylum-seekers and refugees medically evacuated from Papua New Guinea and Nauru held in detention in Australia.<sup>41</sup> These persons are statutorily prevented from lodging a valid visa application to regularise their status unless the Minister personally exercises his discretion to enable them to do so.<sup>42</sup> While the Minister has exercised his personal discretion to

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<sup>35</sup> UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees to the Parliamentary Joint Committee on Human Rights, Scrutiny of legislation made in response to the COVID-19 pandemic, 14 May 2020, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny).

<sup>36</sup> Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 23 April–3 May 2019, *Opinion No. 1/2019 concerning Premakumar Subramaniam (Australia)*, available at:

[https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A\\_HRC\\_WGAD\\_2019\\_1.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_1.pdf).

<sup>37</sup> Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 January 2020, p. 4, available at: <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>.

<sup>38</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-222](#). The number of stateless persons in held detention facilities as at 31 December 2019 was 42: Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-210](#).

<sup>39</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-222](#).

<sup>40</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-210](#).

<sup>41</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-125](#).

<sup>42</sup> Where a non-citizen is in the 'migration zone', and does not hold a visa that is in effect, they will be 'unlawful non-citizens' in accordance with s 14 of the *Migration Act* 1958 (Cth). In accordance with paragraph (e) of the definition of 'transitory person' in s 5(1) of the Act, persons taken to a regional processing country will meet the definition of transitory person. Subsection 46B(1) of the Act prevents a transitory person from making a valid application for a visa, for as long as they are an 'unlawful non-



enable an additional 819 to reside in the community under a Residence Determination<sup>43</sup> and a further 148 to reside in the community on Bridging E visas,<sup>44</sup> a significant proportion have been determined to be refugees in need of international protection and yet remain in held detention.

29. Refugees, including those who have entered or are staying irregularly, are legally entitled to the rights and protections attaching to that status as well as to the universal protections afforded by international human rights law. As mentioned previously, these rights taken together – the right to seek asylum, non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that their detention should be a measure of last resort, with liberty being the default position, only applied when necessary in the individual case and for a limited period of time. Of particular concern to UNHCR is that the detention of people in this group does not appear to be based on any individualised assessment of what is a known population for the Government and some have now been re-detained in Australia in excess of three years, despite residing in the community prior to their transfer to Australia.<sup>45</sup> This is in addition to the years already spent in detention in harsh conditions in Nauru and Papua New Guinea.

## VI. THE SPECIAL CIRCUMSTANCES AND NEEDS OF PARTICULARLY VULNERABLE DETAINEES

### *a) The impact of existing screen and search powers*

30. Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may experience psychological illness, trauma, depression, anxiety, and other physical, psychological and emotional consequences. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms. This can be the case even if individuals present no symptoms at the time of detention.<sup>46</sup> Heavily securitized detention environments coupled with enhanced search and seizure powers, in particular those involving strip searches and the use of detector dogs are likely to have significantly adverse consequences for such psychologically vulnerable persons in detention.
31. The impact of long-term detention on the physical and psycho-social well-being of those detained is well-known and documented. It is also demonstrated

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citizen', bridging visa holder or temporary protection visa holder. Transitory persons in detention are thus unable to make a valid visa application unless the subsection 46B(1) bar is lifted by the Minister.

<sup>43</sup> Under s 197AB of the *Migration Act* 1958 (Cth), the Minister has the power to make a residence determination for a person in immigration detention, permitting them to reside in the community at a specified address under specified conditions.

<sup>44</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-123](#).

<sup>45</sup> Senate Legal and Constitutional Affairs Committee, Additional Estimates, 2 March 2020, Department of Home Affairs Portfolio, [Question AE20-125](#).

<sup>46</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 33, available at:

<https://www.refworld.org/docid/503489533b8.html>.

graphically by continued reports of self-harm and suicide in immigration detention facilities across Australia. Unfortunately, these are a disturbing but predictable consequence of Australia's mandatory detention policy and practice.

32. UNHCR has regularly met with persons medically evacuated to Australia from Nauru and Papua New Guinea, many of whom have experienced post-flight trauma and have particular vulnerabilities and medical needs. Many are experiencing heightened levels of anxiety and depression surrounding their situation in Australia, whether as a result of their re-detention, access to medical treatment, duration and conditions of detention, family separation, or uncertainties surrounding processes and timeframes for release and durable solutions.
33. During its regular immigration detention visits, UNHCR has observed first-hand the impact that personal search and screening procedures have on psychologically vulnerable persons. For instance, refugees and asylum-seekers detained in non-facility based places of detention such as hotels, have advised UNHCR that despite the desire for fresh air and natural light, they felt unable to undertake the short daily visits to detention facilities (immigration transit accommodation) for this purpose, due to the search and screening modalities. In particular, the physical handling by security officers, including the patting down as they entered and departed those facilities exacerbated their symptoms and was disincentive enough to not avail themselves of the opportunity to access open space and other facilities.

*b) The importance of connectivity*

34. The refugee experience is in essence one of exclusion and disconnection. Uprooted from their homes, refugees are separated from family members, dislocated from their communities, and without the protection of their governments. Securing protection and solutions for refugees is fundamentally about fostering, and eventually restoring, relationships by connecting refugees to communities, services and opportunities in their country of asylum, and by cultivating an environment in which their rights are protected, and that allows them to flourish and rebuild a vision of a future. This means promoting their inclusion in society - laying the groundwork for the time when they are able to return home or to establish themselves permanently in their country of asylum.
35. Internet and mobile connectivity are increasingly central to this process, and for many asylum-seekers and refugees, they have a similar level of importance as basic needs such as water, food and energy. For many refugees in detention, smartphones are a lifeline and a critical tool, providing an essential means for them to give and receive vital information, communicate with separated family members, communicate with legal representatives and other providers, gain access to essential services, feel safe and secure, and reconnect to the local, national and global communities around them. Most importantly, connectivity can help with self-empowerment and broaden the opportunities for refugees to improve their own lives and pursue a vision of a future when they are eventually released from detention.

36. UNHCR acknowledges the Australian Government's position 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".<sup>47</sup> However, UNHCR remains concerned that these proposed alternatives will not adequately address the shortcomings created by the confiscation of mobile phones and other electronic devices used by asylum-seekers and refugees to maintain connectivity. Practical barriers to communication might likely include: constraints on personal finances resulting in limited access to landline telephones; restricted access to limited technologies potentially resulting in queuing and heightened hostility; difficulties and delays in receiving incoming telephone calls (especially if detention staff are unable to quickly locate individuals, the caller experiences language barriers, the lines are busy or there are restrictions placed on facilities during certain times); fear of surveillance; internet censorship by detaining authorities; and limited privacy leading to self-censorship.<sup>48</sup>
37. Under international human rights law, asylum-seekers, refugees and stateless persons in detention must be treated with humanity and respect for the inherent dignity of the human person.<sup>49</sup> They must not be subjected to arbitrary or unlawful interference with their privacy, family or correspondence.<sup>50</sup> They also have the right to non-discrimination and to freedom of expression including the right to seek, receive and impart information and ideas.<sup>51</sup> In accordance with these legal standards, any search and seizure must be conducted for a legitimate purpose, provided for by law, and be necessary and proportionate to achieve that specific purpose, while ensuring that appropriate procedural safeguards are in place and respected in practice. Moreover, if less intrusive measures or techniques are available to fulfil the purpose, these should be applied instead.

## VII. CONCLUDING REMARKS

38. UNHCR has ongoing concerns with Australia's legislative and policy framework of mandatory detention, which has resulted in increasing numbers of asylum-seekers, refugees and stateless persons being in prolonged and indefinite detention. The impact of long-term detention on the physical and psycho-social well-being of those detained is well-known and documented. It is also demonstrated graphically by continued reports of self-harm and suicide in immigration detention facilities across Australia.

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<sup>47</sup> Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, pp. 2-3, available at:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6559%22>.

<sup>48</sup> UNHCR, *Taking refuge in technology: communication practices in refugee camps and immigration detention*, February 2011, ISSN 1020-7473, available at: <https://www.refworld.org/docid/4d88757f2.html>.

<sup>49</sup> Article 1 UDHR; Articles 9 and 10, ICCPR.

<sup>50</sup> Article 17 ICCPR. Australia also has obligations to afford protection and assistance to the family as the natural and fundamental group unit of society: Article 16 UDHR, Articles 17 and 23, ICCPR; Article 10 *International Covenant on Economic, Social and Cultural Rights*, (16 December 1966), UNTS 993.

<sup>51</sup> Articles 2, 19 and 26, ICCPR.

39. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers and refugees, including safe, dignified and human rights-compatible treatment. The special circumstances and particular needs of asylum-seekers, refugees and stateless persons (including those at risk of statelessness) in detention must be taken into account when considering the adoption of measures that significantly enhance detention security arrangements that are likely to have a disproportionately adverse impact on such persons and the enjoyment of their rights under international refugee and human rights law.
40. UNHCR is concerned that the proposed measures will permit the unreasonable restriction of the enjoyment of the rights guaranteed to asylum-seekers, refugees and stateless persons and would further weaken the ability of Australian law to ensure the protection of such persons in accordance with relevant international law and standards, as outlined above.
41. Accordingly, UNHCR recommends that the Bill not be passed.

United Nations High Commissioner for Refugees  
11 June 2020