



Overreach for new powers must be rejected

Submission to the Inquiry into the Migration Amendment
(Prohibiting Items in Immigration Detention Facilities) Bill 2020

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Human Rights Law Centre

The Human Rights Law Centre acknowledges and pays our deep respects to the traditional custodians of the lands and waters across Australia and we acknowledge that those lands and waters were never ceded. We recognise the ongoing, unrelenting work of Aboriginal and Torres Strait Islander peoples, communities and organisations to demand equality, justice and self-determination and we commit to standing with them in this work.

The Human Rights Law Centre works with people and communities to eliminate inequality and injustice. We use strategic legal action, policy solutions and advocacy to build a fairer, more compassionate Australia.

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1. Summary

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Committee regarding the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (**Bill**). The HRLC works with refugees and people seeking asylum who are held in detention and would be directly impacted by the proposed new laws.
2. Through the Bill, the Australian Government seeks to greatly expand search and seizure powers in immigration detention. The Bill would allow the Minister for Home Affairs (**Minister**) to ban almost any item, and give officers unchecked powers to conduct searches with no basis. Such expansive powers have no place in administrative detention. The Government has provided no justification for why detention staff should be granted broader powers than police, when staff already have powers to maintain order in detention.
3. The extremely broad powers indicate that the Bill is aimed at confiscating mobile phones, rather than a genuine response to any real security issue. The Committee should reject any attempt to silence criticism from people who are detained and to hide the conditions in detention from public view.
4. The Bill must be rejected, for the following key reasons:
 - (a) **Sweeping, unchecked powers with disproportionate impact:** The proposed laws would give the Minister and his officers extensive new powers, with insufficient oversight and no guidance on how they should be exercised. They would also enable the Minister to impose broad, blanket bans of everyday items, without any consideration of individual risks or circumstances.
 - (b) **No justification for expansion of powers:** the Government has not explained why staff in detention centres should take on the role of law enforcement, when existing powers are sufficient to maintain safety.
 - (c) **An attempt to ban mobile phones:** at its heart, the Bill is an attempt to strip mobile phones from people in detention. Banning mobile phones will:
 - (i) reduce transparency and public visibility of conditions and treatment of people in detention;
 - (ii) impact access to justice and restrict communication with lawyers;
 - (iii) cause significant harm to the mental health and wellbeing of people in detention; and
 - (iv) increase the risk of COVID-19 transmission in places which are already high risk.

- (d) **Insufficient parliamentary oversight:** the Senate's power to disallow certain legislative instruments will not be sufficient to mitigate or control the harmful impacts of the Bill.
- (e) **Strip search powers are excessive and unwarranted:** strip searches are degrading and dehumanising procedures that should only be permitted in exceptional circumstances; not for the kind of everyday objects that could be prohibited under the Bill.

Recommendation:

The Bill should not be passed.

2. Sweeping, unchecked powers with disproportionate impact

- 5. The Bill seeks to grant new powers to the Minister and his officers which are inappropriate in two ways.
 - 2.1 No oversight on excessively broad powers given to Minister and authorised officers
 - 6. First, the Bill would give the Minister and authorised officers extensive new powers to restrict the rights of people in immigration detention with little oversight, few limitations and no guidance as to how the powers should be exercised.
 - 7. For the Minister, the Bill would grant a broad discretion to designate items as prohibited things. It would empower the Minister to prohibit any item he thinks might pose a risk to the order of a facility. This is an unacceptably low and vague threshold of risk. In addition to items such as mobile phones, this could extend to innocuous, everyday objects like pens and paper, if the Minister wished to control peaceful demonstrations in detention.
 - 8. The Minister can also issue directions requiring officers to exercise the seizure powers in particular ways. If the Minister issues a direction, officers must follow it. The Minister would be free to implement broad, draconian rules that apply to everyone in detention. Those directions would not be disallowable by the Senate. If an item is prohibited, there is no further opportunity for parliamentary oversight of how the Minister and his officers choose to exercise their far-reaching search and seizure powers.

9. For authorised officers, where the Minister has not issued a binding direction about the seizure of particular items, the Bill would grant complete discretion to determine when to conduct a search, and whether or not to seize items that are found.
10. There is no guidance in the Bill regarding how these decisions are to be made or limitations on when authorised officers should use their new powers. This means that Home Affairs officers, ABF officers, Serco staff and detention health services staff will be able to search for and seize prohibited things without any limitations on when they do so.
11. In particular:
 - (a) There is no requirement that an officer have any reasonable suspicion that a person is in possession of a prohibited thing before conducting a search.
 - (b) There is nothing that prevents an officer from seizing items where no individual risk factors have been identified.
 - (c) There is no avenue for a person to seek merits review of a decision to seize a prohibited thing.
 - (d) There is no limit on the frequency of searches, raising the risk of invasive practices becoming routine.
 - (e) Officers can choose, without limitation, to delegate their powers to search an immigration detention facility (including detainees' rooms and personal effects) to any third party - an "authorised officer's assistant."
12. It is unreasonable and unsafe to give authorised officers – which includes staff of private contractors such as Serco who operate immigration detention centres – these excessively broad and unchecked powers.

2.2 Blanket bans have disproportionate impact

13. Second, contrary to the statements in the Explanatory Memorandum that the amendments will provide for "a targeted, intelligence-led, risk-based approach" to seizures of items, the proposed powers are designed to allow for blanket bans on items that apply regardless of individual circumstances.
14. The Bill is structured to allow for either:
 - (a) complete discretion of authorised officers to search and seize prohibited items, with no guidance or limitations; or
 - (b) broad, blanket bans of everyday items by the Minister.

15. Neither of these approaches incorporate any consideration of individual risks or circumstances. The broad application of highly restrictive measures will lead to unreasonable and disproportionate limitations on the rights of hundreds of individuals.
16. The Bill does not indicate the Government is trying to address specific situations of high risk. If that were the case, any proposed laws would be far more restricted and targeted (although as outlined below, additional powers are unnecessary). Instead, the Bill is drafted to create the power to impose blanket bans on items such as mobile phones, which would affect people who have only ever used their phones for entirely ordinary and legitimate purposes.

"So when we have phones, we kind of feel safe, because they will be afraid of doing something wrong, because actually I can see they have power to do whatever they want. We have zero rights in here, except when we have a phone, we will have a little bit of rights.

Amin Afravi, Iranian refugee, Kangaroo Point APOD

As told to journalist Hannah Ryan¹

3. No justification for expansion of powers

17. While the Explanatory Memorandum presents the Bill as a "law and order" response to suspected incidents of criminal activity and illegal items in detention, the Government has provided no evidence to demonstrate that this expansion of power is necessary or appropriate.
18. The Government already has powers to preserve the safety of staff and people in detention and the effective functioning of detention centres. Under the Migration Act, authorised officers can search for and seize weapons or other things that could be used to inflict bodily injury and things that could be used to help a person escape from detention.
19. Immigration detention is for the administrative purpose of holding a person temporarily until they are granted a visa or depart Australia. It cannot be punitive in nature. Beyond protecting the safety and wellbeing of people who work, visit or are detained in detention centres, there is no reason for detention centre operators and private contractors to assume the role of law enforcement. To the extent that the Government wishes to empower authorised officers with minimal training and oversight to control other illegal items or suspected criminal activity in detention, the Bill is inappropriate.
20. As Minister Tudge has recognised, illegal items and suspected criminal activity are already dealt with by working with State and Federal police authorities. It is the role of police, not detention

¹ Hannah Ryan, 'I WhatsApped refugees to ask why they're so freaked out about the Government taking their phones away', *Buzzfeed News* (20 May 2020), <https://www.buzzfeed.com/hannahryan/refugees-phones-australia-whatsapp-interview>.

centre staff, to investigate suspected criminal conduct, search for illegal items and lay charges in relation to any offences arising from possession of those items. Police powers also have appropriate limitations – it is generally a requirement that police either obtain a warrant, or hold a reasonable suspicion that a person is in possession of illegal or dangerous items, before conducting a search.

21. In addition to working with police, authorised officers can already seize illegal or dangerous items that are found during a search, under the Government's common law duty of care to ensure the safety and wellbeing of people in detention centres.
22. The Government has provided no justification for giving private contractors with limited training broader search and seizure powers than police have in relation to any other person in the community.

4. An attempt to ban mobile phones

23. At its heart, this Bill is an attack on transparency within immigration detention centres by enabling the Government to prohibit mobile phones. Both the Bill and the Explanatory Memorandum specifically state that mobile phones may be prohibited if the Bill becomes law. The Government acknowledges that the Bill addresses a Federal Court decision which struck down a proposed blanket ban on mobile phones in detention.² Prohibiting mobile phones will have the following serious consequences.

4.1 Attack on transparency

24. Access to mobile phones is vital to ensuring some level of public visibility of what happens in immigration detention centres. Since the Federal Court confirmed the Government has no legal basis to ban mobile phones, there has been increased scrutiny of actions in immigration detention centres. Mobile phones have allowed exposure of events like the Biloela family's attempted deportation³ and the alleged use of excessive force by Serco officers.⁴ They have also allowed a refugee, Farhad Bandesh, to appear on national television via video-link from detention.⁵

² The Explanatory Memorandum to the Bill (p 3) states that the Bill addresses the Full Federal Court decision in *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

³ Viki Gerova, 'Waleed Aly: This Is What Deportation Looks Like', *10Daily* (30 August 2019) <https://10daily.com.au/news/australia/a190830hivcg/waleed-aly-this-is-what-deportation-looks-like-20190830>.

⁴ Helen Davidson, 'Secret recordings allege excessive force by guards in Australia's detention centres', *The Guardian* (25 March 2019) <https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres>.

⁵ 'COVID-19: Where to next?' Q&A (ABC, 20 April 2020), see <https://twitter.com/QandA/status/1252206078072197120?s=20>.

25. If the Minister is granted power to prohibit any item which might be a risk to the order of a facility, this would also enable him to prohibit items used in peaceful protest. The Explanatory Memorandum to the previous version of the Bill sought to justify the removal of mobile phones on the basis of “reports that mobile phones have contributed to...efforts to coordinate internal demonstrations to coincide with external protests”, although this reference has been removed from the current Explanatory Memorandum. As well as hiding human rights abuses from public view, such restrictions on political communication would impermissibly limit the right to freedom of expression⁶ and may also be unconstitutional.⁷
26. The Committee should reject any attempt by the Government to hide its actions in immigration detention centres.

“Because when we take photos or videos from the protests, it's so easy for the Australian community know everything about what's happening here, why we are in here...they can connect with us on social media, on Facebook, Twitter or WhatsApp and find out about our situation...”

Abdullah Moradi Sabz Koohi, Iranian refugee, Kangaroo Point APOD
As told to journalist Hannah Ryan

4.2 Restricting access to justice

27. Removing mobile phones will also significantly impede access to justice, making it more difficult for people held in detention to communicate with lawyers and take legal action.
28. As detailed in numerous previous submissions to this Committee,⁸ mobile phones are essential for private, unrestricted and timely communication with lawyers. The Human Rights Law Centre acts for refugees and people seeking asylum who are held both in Australian detention centres and offshore in Nauru and Papua New Guinea. In our experience, mobile phones allow us to speak more frequently with our clients, connect telephone interpreters directly to our calls, obtain instructions in urgent and fast-paced matters, receive photos of injuries or documents from clients, and facilitate the electronic signing of documents.
29. We agree with and reiterate the observations made by other frontline legal organisations, that the alternative communication methods available in detention centres are insufficient and incomparable to mobile phones.

⁶ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 13 of 2017*, 5 December 2017, 73-76.

⁷ As noted by the Andrew and Renata Kaldor Centre for International Refugee Law in their previous submission to this Committee, dated 16 October 2017, in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

⁸ Including from the Refugee Advice and Casework Service, Refugee Legal, the Asylum Seeker Resource Centre, the National Justice Project, the Australian Human Rights Commission, Legal Aid New South Wales and others, in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

4.3 Serious harm to people in detention

30. Banning mobile phones will also have a profoundly negative impact on the mental health and wellbeing of people held in immigration detention.
31. With the average period in detention in Australia in excess of 500 days,⁹ mobile phones are invaluable for maintaining meaningful and regular contact with friends, family members and loved ones. They also support access to external mental health services and protect the privacy of communications with legal representatives, support networks and external scrutiny bodies. The removal of mobile phones would unquestionably be experienced as a punitive measure by people who are already deprived of their liberty, often for protracted periods, and would threaten the right to freedom from arbitrary or unlawful interference with family.¹⁰
32. Without mobile phones, people in detention have no way to speak to family overseas without paying expensive international call rates. They have no conveniently accessible means of video calling their children, keeping up with the news, or staving off boredom with movies, novels or games of their choice or in their own language. At a time when in-person visits to all immigration detention facilities are currently banned due to the COVID-19 risk, this connection to loved ones and recreation is more important than ever.

“My phone is critical. It’s the way I keep in contact with my family, my friends, all of my loved ones. I feel like I am still alive and have hope when we are in contact. It shows me that beyond the fences there is hope.

I use it 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. It keeps me active and collaborating with fellow musicians, writers, artists and producers. These are things that keep me alive and are so important for my mental health.”

Farhad Bandesh, Kurdish refugee, Melbourne Immigration Transit Accommodation
As told to journalist Hannah Ryan

4.4 Increased COVID-19 risk

33. Finally, medical experts have expressed concern about the number of vulnerable people held in crowded immigration detention who are at risk from COVID-19. It is impossible for people in most detention centres to comply with advice about social distancing while sharing bedrooms, bathrooms, dining rooms and common areas. Banning mobile phones would force hundreds of people to share the same phones and computer facilities, thereby increasing the risk of transmission during this global pandemic.

⁹ Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 March 2020, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf>.

¹⁰ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 13 of 2017*, 5 December 2017, 69-73.

5. Insufficient parliamentary oversight

34. The Bill would allow the Minister to designate prohibited items by way of legislative instrument, which would be disallowable by the Senate. However, the Senate's supervisory role is likely to be difficult to exercise and insufficient to mitigate the harmful impacts of the Bill.
35. The Senate will only be able to disallow an instrument in full. It could not disallow the designation of a single item listed in an instrument, or a direction in relation to the application of powers to a particular individual or a particular circumstance. The Minister could group multiple serious items relating to exploitation and illegal activity with more innocuous items like mobile phones in a single instrument.
36. The Senate also has no power to disallow a Ministerial direction that requires an inappropriate or unreasonable exercise of search and seizure powers, such as one that creates a blanket ban on an everyday item.

6. Strip search powers are unwarranted

37. A strip search is an invasive procedure that involves the removal of some or all of a person's clothing in the presence of one or more authorised officers. Currently, officers are only permitted to conduct a strip search if they reasonably suspect a person in detention is hiding a weapon, or another thing capable of inflicting bodily injury or helping a person to escape from detention.¹¹ The Bill would vastly expand this power, to permit strip searches for any item the Minister decides is prohibited.
38. Strip searches are degrading and dehumanising procedures that should only be permitted in exceptional circumstances involving a risk to life or safety. Many people in immigration detention are survivors of torture and trauma, including sexual assault. It is unnecessary and inappropriate to strip search a person for the kind of everyday objects that could be prohibited under the Bill.
39. This expansion of powers would threaten the right to bodily integrity, the right to humane treatment in detention, and the prohibition on torture and cruel, inhuman and degrading treatment.¹² Rather than expanding strip search powers, further protections should be built into the existing legislative regime to prevent misuse of these invasive procedures. Requirements should be introduced for appropriate record keeping, complaints procedures and external, independent monitoring.¹³

¹¹ *Migration Act 1958* (Cth), s 252A.

¹² Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 13 of 2017*, 5 December 2017, 76-86.

¹³ As previously suggested by the Australian Human Rights Commission, Part V, Division 7 of the *Australian Federal Police Act 1979* (Cth) sets out a system of independent oversight by the Commonwealth Ombudsman of certain functions of the Australian Federal Police, which could be adapted to this context.