



public interest
ADVOCACY CENTRE

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

10 June 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

1. Introduction

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (**Bill**).

PIAC recommends that the Bill not be passed. The proposed powers to prohibit mobile phones in immigration detention and to enforce bans with invasive search and seizure powers are not supported by evidence. They are likely to have a significant, negative impact on the mental health and wellbeing of people in immigration detention and their ability to access legal assistance and other support.

PIAC emphasises that the Commonwealth government has a non-delegable duty of care to provide reasonable health care to the persons it holds in detention.¹ That duty includes an obligation of reasonable care to avoid harm to the detainee whether that harm be inflicted by a third person or by the detainee himself or herself.²

PIAC's Asylum Seeker Health Rights Project aims to secure humane standards of medical and mental health care for asylum seekers in Australia's onshore immigration detention centres. Since 2016, we have worked with immigration detainees and advocates in respect of physical and mental health issues facing that population. We represent clients in litigation, complaints to various agencies and work on law reform.

Based on our experience and expertise, our submission focuses on the impact of the proposed Bill on the health and wellbeing of asylum seekers in detention.

2. Power to impose a blanket ban on mobile phones in immigration detention

The Bill proposes to insert a new s 251A in the *Migration Act 1958* (Cth), to enable the Minister to determine any item to be a 'prohibited thing' where the Minister is satisfied that the possession or use of the thing 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'. It specifies mobile phones, SIM cards and other internet-capable devices as examples.

It is apparent from the Bill and the Explanatory Memorandum that a primary focus of the Bill is to prohibit mobile phones and internet-capable devices in immigration detention. In 2017, the Australian government introduced a policy banning mobile phones and SIM cards in immigration detention, on the basis that detainees were using mobile phones to organise criminal activities, threaten other detainees, create disturbances and plan escapes. In July 2018, the Federal Court of Australia ruled that the blanket ban was invalid, because it was not authorised by any provision of the *Migration Act*,³ and mobile phones have since been reintroduced into immigration detention facilities.

¹ *AS Minister for Immigration and Border Protection & Anor* [2014] VSC 593.

² *SBEG v Commonwealth of Australia* [2012] FCAFC 189, 19.

³ *ARJ17 v Minister for Immigration and Border Protection* (2018) 250 FCR 446.

The Bill seeks to reverse that ruling. The Explanatory Memorandum states that evidence indicates that detainees are using mobile phones and internet-capable devices for unlawful purposes such as to organise criminal activities, coordinate escapes or threaten staff. It states that the purpose of the amendments is to strengthen the Department of Home Affairs' **(Department)** ability to regulate possessions in immigration detention to ensure that the Department can provide a safe and secure environment for staff, detainees and visitors in an immigration detention facility.

However, there is no evidence of any widespread misuse of mobile phones or internet-capable devices in immigration detention. Nor has the Government demonstrated how banning all detainees from possessing items that do not pose an inherent safety or security risk is necessary to provide a safe and secure detention environment. In fact, the Australian Human Rights Commission recently reported that inappropriate phone use is not commonplace in detention and that any blanket prohibition is not a necessary, reasonable or proportionate response to ensure accountability for the misuse of phones by a small number of individuals.⁴ In instances where there was evidence of a detainee misusing an item, such as a mobile phone, so as to present a safety or security risk, any response should be appropriately targeted to managing the specific risk in the individual circumstances.

The proposed powers to apply and enforce blanket restrictions cannot be justified.

2.1 Impact on mental health

PIAC is concerned about the harmful health consequences of the blanket prohibition of mobile phones contemplated by the Bill, particularly its potential to exacerbate poor mental health already experienced by many asylum seekers in immigration detention.

Mobile phones are an essential means by which many immigration detainees access phone and internet to communicate with family, friends, social networks, advocates and lawyers and to maintain connection with the outside world. In providing for this communication they are the essential means by which detainees stay connected with the community, obtain support and exercise their legal rights. Many organisations have previously highlighted why alternative communication channels in immigration detention – including landline telephones, facsimile machines, computers with internet access, postal services and visits – are not sufficiently reliable, accessible, immediate or private so as to be an adequate substitute for mobile phones.⁵ Mobile phones also provide detainees with an opportunity to maintain digital and photographic contemporaneous notes and record-keeping.

In June 2019, the Australian Human Rights Commission reported that facility staff had acknowledged the benefits of mobile phones since their reintroduction, including the positive impact on mental health of more regular contact with family, friends and others outside detention. It concluded that the reintroduction of mobile phones 'is a net positive, given its significant

⁴ AHRC, *Risk management in immigration detention* (June 2019), 56-7.

⁵ See, eg, the submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 from the Australian Human Rights Commission, the Refugee Advocacy and Casework Service, and Refugee Legal.

benefits for the wellbeing of people in detention and their capacity to maintain contact with people outside detention.’⁶

Conversely, banning mobile phones, which would seriously limit the ability of detainees to have contact and connect with people in the community, would be to the detriment of wellbeing and would have a serious negative impact on mental health. These impacts are especially concerning in light of the mental health concerns currently experienced by asylum seekers in immigration detention.

2.2 Medical advice – Particular mental health vulnerabilities of detained asylum seekers

The Royal Australian and New Zealand College of Psychiatrists has described that asylum seekers in Australian immigration detention are ‘an already traumatised population, many of whom have severe mental health problems and are at increased risk of further depression, anxiety and post-traumatic stress disorder (PTSD).’⁷

Prolonged immigration detention is known to have a significant, negative impact on mental health and there are increasing numbers of asylum seekers who have been detained for increasing periods of time. The Commonwealth Ombudsman has reported that immigration detention in a closed environment for longer than six-months had a significant, negative impact on mental health.⁸ As at 31 January 2020, 475 people detained in immigration detention had previously lodged protection visa applications and the average length of time they had been held in detention was over two years.⁹

2.3 High risk populations

The COVID-19 pandemic has also negatively impacted on the mental health and wellbeing of immigration detainees. All visits to immigration detention facilities ceased on 24 March 2020 due to COVID-19 and there have been restrictions on external excursions for activities outside detention facilities, such as gym visits and medical appointments. Detainees have also been concerned about the heightened risks of contracting COVID-19 in detention environments and overcrowded settings, and the heightened risks of severe or critical illness from COVID-19 because of relevant comorbidities such as hypertension, diabetes and respiratory disease.

Frequent communication with family, friends, advocates and lawyers has been critical to supporting detainee health and wellbeing during this time and mobile phones continue to provide the means for this connection.

PIAC is particularly concerned about the negative impact of the proposed amendments on the health and wellbeing of detained asylum seekers who were transferred to Australia for urgent

⁶ AHRC, *Risk management in immigration detention* (June 2019) 57.

⁷ Royal Australian and New Zealand College of Psychiatrists, ‘Immigration detention centres a significant COVID-19 risk’, 17 April 2020.

⁸ Commonwealth Ombudsman, *Suicide and Self-harm in the Immigration Detention Network* (Report No 2, 2013) 59. See also PIAC, *In Poor Health: Health care in Australian immigration detention* (June 2018) 12.

⁹ 871 days. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Additional estimates 2019-20 – Questions on notice*, AE20-222.

medical treatment from Manus Island and Nauru under the now-repealed Medevac legislation. The Government has stated that as at 31 December 2019, 110 of the 192 asylum seekers transferred to Australia to receive medical treatment were detained in hotels.¹⁰

PIAC has received reports from advocates that, in recent months, they have seen a rise in the level of distress and deterioration in mental health across this group and an increase in self-harm and suicide attempts. Many remain detained in hotels in Melbourne and Brisbane, further to the long periods they were held in immigration detention offshore. Some are still waiting to receive the medical treatment for which they were transferred. This is despite the Australian Human Rights Commission's recommendation in June 2019 that hotels only be used as places of detention in exceptional circumstances for very short periods of time, not least because of their lack of dedicated facilities and restrictions on access to open space.

3. Search and seizure powers

The Bill proposes to significantly expand powers to search detainees and detention facilities and seize a range of items.

Division 13 of the *Migration Act* already authorises officers, without warrant, to conduct screening procedures and searches of detainees, their clothing and property for the purposes of finding out if there is anything hidden on the detainee that is capable of being used as a weapon or escape aid. It also authorises strip searches where an authorised officer suspects on reasonable grounds that such a thing is hidden on a detainee and it is necessary to conduct a strip search to recover it.

The Bill proposes to extend the power to conduct searches, screening procedures and strip searches so that they can be used to find a 'prohibited thing'; to authorise searches and screening procedures whether or not the officer has any suspicion a person has a prohibited thing; and authorise officers to seize anything that has been determined a prohibited thing, any weapon or escape aid, and any document or other thing that is or may be used as evidence for grounds for cancelling the visa of the person being searched. The powers to search detainees apply to detainees both in held detention facilities and community detention under a residence determination.

It also proposes to expand powers for officers to conduct searches for prohibited things in immigration detention centres and immigration transit accommodation facilities – including of detainees' rooms, detainees' personal effects and medical examination areas – whether or not the officer has any suspicion that there is such a thing at the facility and permits detector dogs to be used in searches.

Not only are the search and seizure powers excessive and a disproportionate response to the safety and security risk the Bill seeks to address, but they cannot be justified when regard is had to the potential harmful consequences on the health and wellbeing of detainees.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Additional estimates 2019-20 – Questions on notice*, 2 March 2020, AE20-216 and AE20-217.

PIAC is particularly concerned that the Bill's proposal to extend the power to conduct strip searches to find any item declared to be a 'prohibited thing' risks strip searches – which are highly invasive and can be degrading and distressing – becoming routine practice. Where search and seizure powers are not sufficiently balanced with maintaining the autonomy, privacy and dignity of a detainee, there is increased scope for instances of potentially unlawful conduct to arise.

We are also concerned that the use of detector dogs to search immigration detention facilities, including people's rooms and personal effects, will cause anxiety and distress particularly for detained asylum seekers who have previously experienced torture or other trauma.

4. Conclusion

PIAC recommends that the Bill should not be passed. The proposed amendments are unnecessary to achieve the Bill's stated purpose and could have serious negative impacts on the mental health and wellbeing of people in immigration detention for the reasons outlined above.

The proposed amendments could also have serious negative impacts on the ability of detainees to access legal representation. It presents a significant barrier to lawyers contacting clients quickly and effectively with court updates and obtaining urgent instructions.