Immigration Advice and Rights Centre

12 June 2020

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6021
Parliament House
Canberra ACT 2600

BY EMAIL: legcon.sen@aph.gov.au.

Re: *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020*

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in Australian immigration and citizenship law. Our clients have low or nil income, frequently with other disadvantages such as being held in immigration detention, having low level English language skills, disabilities and survivors of family violence.

IARC welcomes the opportunity to comment on the *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (**Bill**). The Bill seeks to amend the *Migration Act* 1958 (Cth) (**Act**) with a view to:

- introducing new s 251A to enable the Minister to determine, by legislative instrument, that a 'thing' is a 'prohibited thing' if the Minister is satisfied that possession of the 'thing' is prohibited by law or might be a risk to the health, safety or security of persons in the facility, or to the order of the facility; and
- broadening existing powers to allow an authorised officer and an officers' assistant, without warrant, to search a detention facility covering all areas including a detainee's

room, personal effects and medical examination areas and to allow the use of detector dogs to conduct these searches.

We consider the Bill to be problematic in many aspects and submit that the Committee should recommend that it not be passed.

Proposed s 251A - searches of detainees - "prohibited thing"

Proposed s 251A would enable the Minister, by legislative instrument, to determine a 'thing' to be prohibited in relation to a detainee or an immigration detention facility if the Minister is satisfied that possession of it is either prohibited by law or where the possession of it might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

The proposed section provides a non-exhaustive list of items that may be determined by the Minister to be a 'prohibited thing' and includes mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet. The Explanatory Memorandum to the Bill and proposed s 251A(3) contemplate that controlled and prescription drugs, medication and health care supplement may also be determined to be prohibited unless they have been prescribed or supplied by an authorised health service provider.

With respect to the detection and retention of items or things that are prohibited by law it is our view that these are functions more appropriately exercised by a State or Federal police agency. We do not see that a reasonable argument for a ban on mobile phones, computers and health care supplements has been adequately made out. The explanatory memorandum to the Bill, for example, states that the ban is necessary because detainees have used mobile phones to plan escapes and to coordinate other offences. The justification for the ban appears deeply flawed in circumstances where the explanatory memorandum also states that detainees will retain access to landline telephones (without monitoring), facsimile and the internet.

The proposed laws are also unnecessary in our view. Section 252 of the *Act* currently provides that detainees and, in certain circumstances, persons who have not been immigration cleared may be searched, without warrant, for the purposes of finding:

- whether they are concealing "*a weapon or other thing capable of being used to inflict bodily injury or to help the person escape from immigration detention*"; and

- "*whether there is hidden on the person, in the clothing or in the property, a document or other thing that is, or may be, evidence for grounds for cancelling the person's visa*".

The *Act* further provides that where a weapon or other thing is discovered an authorised officer may take possession of it and retain it until such time as he/she thinks necessary[1].

It is our view that the proposed ban amounts to collective punishment for the misdeed of a few and represents an unacceptable interference with a detainee's right to privacy and other rights protected under the International Covenant on Civil and Political Rights (**ICCPR**). Some of our concerns are set out below.

Communication with family/friends and emergency services

IARC represents detainees who have children, partners, parents, and other relatives living in the Australian community and, in many cases, overseas. Many of the detainees have not seen their family in years and rely heavily on their mobile phones to maintain relationships. It is our understanding that to use a detention centre facility telephone, detainees require a phone card with adequate credit issued by the centre operator, with international calls being prohibitively expensive. The Explanatory Memorandum to the Bill further identifies that landline phones in a private interview room may not be available after hours. This is problematic as it not only restricts a detainee's ability to communicate with family and lawyers but also, in times of need, with emergency and other services such as Lifeline Australia.

CASE STUDY

Pamela is a detainee and has not seen her children in seven years. She has tried many times to video skype her children using the internet service made available at the detention centre but the internet speed is too slow. Her only method of contacting and seeing her children is by using her mobile phone. She also finds it very difficult to earn credit points to access the landlines for international calls because of her mental illness. Pamela becomes very distressed when speaking with her children and the landlines afford no privacy.

[1] See s 252(4) of the *Act*

Access to legal advice and information

The confiscation of mobile phones/tablets will limit a detainee's ability to access privileged legal advice and information. For example, a confiscated phone/device may have stored legal advice that a detainee would need to refer to during an interview with the Department or a hearing before the Administrative Appeals Tribunal.

The confiscation of a mobile phone would also prevent lawyers/migration agents from being able to contact their clients directly and in a timely manner. Using the Villawood Immigration Detention Centre as an example - there is only one contact phone number provided on the Department's website for the centre which often goes unanswered. It is also not uncommon for the operator to not be able to locate a detainee. While detainees may have access to a landline phone, their lawyers are unlikely to be able to contact them urgently to provide advice, receive instructions or notify them of important and time sensitive developments.

CASE STUDY

Jamal is detained at the Villawood Immigration Detention Centre and does not have a mobile phone. His application for a protection visa is refused and notification of the decision is sent to his migration agent. His migration agent contacts the detention centre and is told Jamal is no longer there. They are not able to provide any further information about Jamal's whereabouts. The migration agent cannot obtain instruction from Jamal to seek review of the decision within the strict seven-day time limit. It later emerges that Jamal has been transferred to a detention centre in another State.

Broadening search powers – the use of dogs

Proposed sections 252BA and 252BB expand existing search powers to allow authorised officers and authorised officers' assistants to search a detention facility covering all areas including a detainee's room, personal effects and medical examination areas and to use detector dogs to conduct these searches.

It is our view that the use of dogs for searches is ineffective and can be intimidating and culturally insensitive for some detainees. A review of the *Police Powers (Drug Detection Dogs) Act* 2001 by the NSW Ombudsman in June 2006[2] raised serious doubts about the accuracy of drug detector dogs and, in turn, the legitimacy of their use by police to determine whether they may reasonably suspect that a person is in possession of a prohibited drug. In our submission, the same concerns exist for using dogs in detention centre facilities.

An authorised officers' assistant

While an authorised officer is defined under section 5 in the *Act* to mean: "*an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision",* there is little guidance provided about who the assistant might be, what training they might have or what background checks they are required to have undertaken. There is insufficient information to allow this aspect of the Bill to be appropriately considered and scrutinised.

It is our view that the Bill is not appropriate or justified in its current form. The limitations placed on the right to privacy and the right against arbitrary interference with one's family and correspondence is not reasonable, necessary or proportionate. The Committee should recommend that it not be passed.

We would welcome the opportunity to expand on our written submissions or address any questions the Committee might have.

Kind regards,

Ali Mojtahedi
Principal Solicitor

[2] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0020/4457/Review-of-the-Police-Powers-Drug-Detection-Dogs-Part-1_October-2006.pdf