Human Rights Law Centre

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

Response to Department of Home Affairs and Serco evidence

We set out below responses to the arguments raised by both the Department and Serco.

1. **The Department's comments about how it intends to use the powers is inconsistent with how the Government has already behaved**

   Generic statements about the Government's intentions will not constrain how these powers are actually used once the laws are passed. The Government's previous actions suggest blanket bans of mobile phones will almost certainly be imposed on groups of people. Prior to the *ARJ17* case,[1] Government policy banned all people who arrived by sea seeking protection from having a phone in detention. The *ARJ17* case was only necessary because the Government was planning to roll this policy out to apply to everyone in detention. The Department has not explained why its intention, or the intention of the Minister (which it did not address), has now apparently changed. Indeed, the legislation and explanatory memorandum specifically state that mobile phones may be a prohibited item.

   If the Government does not intend to use the full scope of the powers, then they should be re-drafted to reflect the scope of what the Government believes is actually necessary, and incorporate protections against misuse.

2. **Serco's evidence relief heavily on its risk assessment of people in detention, but its risk assessment method has been discredited by the Australian Human Rights Commission**

   Last year, the Australian Human Rights Commission published a report which found that Serco's risk assessment algorithm was flawed – it did not take into account all relevant information, and was disproportionately influenced by prior offending (including non-violent offending) and minor infractions like swearing. Positive behaviour in detention did not lead to a downgrading of risk level, meaning people were stuck with 'high risk' ratings despite ongoing good behaviour. The AHRC concluded that many people may have risk ratings that do not accurately reflect their objective level of risk.

   Importantly, the AHRC raised concerns that inaccurate risk assessments could result in people being subjected to restrictive measures that are not necessary, reasonable or proportionate in their individual circumstances. The Bill would see those exact concerns realised.

3. **The Government did not accurately reflect the breadth of the current powers that are in place**

   While the Department argues that it does not have sufficient *statutory* powers, it makes almost no mention of the common law power to remove items that pose a danger to health and safety in detention. The Serco 'Pat Searching' manual released by the Department in 2017 includes specific instructions for staff on how to search for drugs. It states, "*Items such as drugs, child pornography and alcohol fall under common law duty of care, by which the department must ensure the safety and well-being of detainees and others in the IDF*."

   In practice, people in detention are searched routinely, sometimes multiple times per day. The Government can and frequently does rely on the common law to seize drugs, alcohol or other

[1] *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

dangerous items that fall outside the scope of the Migration Act. They are not powerless in these situations, as the hypothetical examples in the Department submission would suggest. As the Department told the Committee, "*Currently in relation to common areas in other parts of the detention centre, any search and seizure powers are really based on our common law responsibilities as the occupier and owner and our duty of care."* The Department did not elaborate on whether or how these common law powers are insufficient.

4. **The Government has not made the case for why Serco should play the role of police**

   Border Force and detention staff already work with State, Territory and Federal police to address suspected unlawful activity. This is appropriate. The Government has not explained how working with police is difficult or unsuccessful. The example of the credit card fraud detected and shut down in Villawood Immigration Detention Centre shows that the existing framework operates effectively – the people involved were arrested and charged, and the unlawful items were seized by police. It is unclear how expanded powers for detention staff would have resulted in a different outcome.

   In each of the other examples given by the Department, it would be appropriate for the matter to be referred to police. Otherwise, Serco is left to decide guilt and impose punishment, with even broader search and seizure powers than police have. It should not be left to private contractors to identify Constitutionally protected political communications, or to distinguish false 'criminal accusations' against detention staff from genuine complaints.

   The Department claimed the proposed laws would allow them to prevent crime before it happens. This would require ascribing criminal intent to people for possible future actions, and punishing them in advance by removing access to essential services like mobile phones or the internet.

   If detention staff suspect that drugs are hidden in a centre, police can assess the basis for that belief and conduct a search if appropriate.

   Police cannot arbitrarily confiscate items from people without any reasonable suspicion of wrongdoing. It is entirely inappropriate for private contractors to be permitted to do so.

5. **Serco and the Department's statements that items will only be confiscated if they are being misused are inconsistent with the powers that are being sought**

   Serco says that the Bill would allow items to be seized if they are being used for criminal activity or if they are putting someone's health, safety or security at risk. The Department says people who do not use their mobile phones for criminal activities or to endanger the health, safety and security of others would be able to retain their mobile phones.

   This shows a misunderstanding of the operation of the Bill. There is no requirement whatsoever that an item be used in an inappropriate way before Serco can confiscate the item, either at their complete discretion or compulsorily, if ordered to do so by the Minister. An item can be deemed "prohibited" based on nothing more than the Minister's belief that the item might be used inappropriately by some person at some point in the future. Then, Serco may remove the item from anyone they chose, without any evidence of wrongdoing.

6. **Banning phones for the 'character' cohort is not a solution**

   Imposing bans on cohorts of people, as opposed to the entire detention population, will still have disproportionate impacts. Any cohort approach will not by definition involve an individualised, evidence-based assessment of risk, or any opportunity to contest a decision. Further, prior criminal charges or convictions are an inadequate basis for determining future risk, particularly as people have completed any custodial sentence imposed by the courts. Our legal system justifies custodial sentences on the basis that they have both a deterrent and rehabilitative effect. Those assumptions cannot be reversed at the other end of a sentence.

   Further, people who are detained because of visa cancellations are most in need of access to fast and private communication with lawyers, as the process for contesting cancellations is complex, involves tights deadlines, and has a significant impact on the rest of a person's life.

7. **The Bill would not prevent social media misconduct or escape efforts, but appropriate avenues already exist to address such issues**

   Serco and the Department claim that people in detention have posted damaging information about staff on social media via mobile phones. As both agencies acknowledged, avenues already exist for dealing with conduct which threatens personal safety, including seeking intervention orders through the courts.

   If behaviour continues when an intervention order is in place, it may constitute a criminal offence. By contrast, removing mobile phones is unlikely to resolve the problem - according to the Department, people in detention will retain access to shared computer or internet facilities, which give access to social media sites. In this context it is important to note the numerous reports of assault or excessive use of force by Serco officers against people who are detained, some of which have been filmed and distributed via mobile phones.

   Similarly, in relation to the use of mobile phones to coordinate escape efforts, there is little reason that landline telephones and computer facilities could not equally be used for those purposes.

8. **The Senate's power to disallow one proposed prohibited item from a list of items, may depend on how the Minister drafts the legislative instrument**

   The Senate has the power to partially disallow an instrument by disallowing a *provision* of that instrument. Accordingly, if each item is listed in a different provision, one item could be disallowed. However, if all items are set out in a one provision – such as table – a single item may not be able to be disallowed. We note this point was made by the Law Council of Australia at the hearings.

9. **According to doctors, there will not be a "net improved benefit" to health and safety**

   Serco's view that the restrictive measures in the Bill are justified because of an overall "net benefit" to health and safety in detention is misinformed and gives no consideration to the harmful impacts of the Bill. Although the Committee did not hear evidence from any medical professional, the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatrists, the Royal Australian College of General Practitioners and the Independent Doctors' Network all made submissions to the Committee outlining the harmful health impacts of the Bill. The Bill will do more harm than good to people who are detained.