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Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

10 July 2020

Dear Committee Secretary,

**Supplementary submission:
Committee inquiry into the Migration Amendment (Prohibiting Items in
Immigration Detention Facilities) Bill 2020**

Thank you for the opportunity to provide evidence at the Committee's public hearing on 3 July. I also very much appreciate the Committee's invitation to provide this supplementary submission, in light of the shortened time available for the session I attended.

In my primary submission to this inquiry, where I recommended that the Bill be rejected in its entirety, I said that no evidence had been provided of specific risks within immigration detention that cannot be managed under existing arrangements. Subsequently, the Department of Home Affairs (DHA) made a submission outlining, for the first time, a number of examples of situations where current powers were said to be inadequate.

In this supplementary submission, I address three matters:

- The claim, advanced by Serco in its submission, that the Bill is justified because '74 per cent of the detainee population are categorised as high or extreme risk individuals';
- The claim that the Bill is necessary in order to fill gaps in the law in the scenarios outlined in the DHA submission; and
- The heightened need to ensure that the risks posed by COVID-19 are minimised, in light of renewed outbreaks of the coronavirus in Victoria, and lockdowns in Melbourne.

1. Serco's assessment that 74% of the detention population are 'high risk individuals' does not in and of itself indicate that the Bill is necessary or proportionate

The measures proposed in the Bill would have a very significant impact on individual rights and liberties. In this context, the government bears the onus of clearly justifying why the Bill is needed, and that it is proportionate. In order to discharge this onus, the government needs to precisely identify the risks that the Bill targets. It also needs to establish that these risks cannot be addressed using the wide range of existing powers that may already be exerted over people in detention. This onus has not been discharged.

The Explanatory Memorandum to the Bill says that ‘immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal’. In Serco’s submission to this inquiry, a figure was put to this claim:

Approximately 14 per cent of people in detention were categorised as high or extreme risk in January 2015, today 74 per cent of the detainee population are categorised as high or extreme-risk individuals (April 2020). A significant number of the detention population have been transferred from a correctional facility.¹

Far more detail about how this internal risk assessment is made, and what risks specifically the 74% figure is comprised of, is needed before this statistic can be drawn on meaningfully. Significantly, during the public hearing on 3 July, the 74% statistic was referred to variously in questions as the percentage of people at high or extreme risk of criminal activity, and the percentage of people who have been dealt with for criminal offences. These statements indicate different things, and illustrate a lack of understanding about what the 74% figure actually refers to. This confusion is easy to appreciate, in light of the lack of transparency about how the 74% figure has been calculated.

It is essential that, if risk statistics are to be used as justification for the bill, it is made clear:

- how these statistics have been arrived at, and
- how the specific measures proposed in the bill are tailored to the specific risks that are present.

At present, neither of these things has been made clear. I encourage the Committee to seek further information about how Serco’s risk figures have been arrived at, so that they can be drawn on responsibly.

2. There is no gap in the law that needs to be filled

The Department of Home Affairs’ submission asserts that existing legislative arrangements are ‘inadequate’,² and lists four hypothetical examples of situations in which detainees are engaged in activity that may be criminal in nature, and the Australian Border Force (ABF) is said to be ‘powerless’ to stop this activity through search and seizure.³ Later in the

¹ Serco, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 2.

² Department of Home Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 3.

³ Ibid, 6.

submission, four more hypothetical examples are given, of similar circumstances, highlighting how, if the Bill is passed, the ABF would be empowered to take search and seizure actions currently unavailable to it.⁴

The Bill proposes to give ABF officials, under the direction of the Minister, extremely broad powers to search and seize items from detainees, in the name of preventing criminal activity. These proposed powers exceed the search and seizure powers currently available to State and Federal police, who bear primary responsibility for dealing with criminal activity throughout the country, and who handle this job effectively.

The fact that the ABF does not currently have the powers proposed in the Bill is not a gap in the law or 'incongruous';⁵ it is thoroughly appropriate. Where there is reason to believe that criminal activity is taking place in detention, State, Territory and Federal police are well-equipped to deal with this, including through the use of search and seizure powers. There is no reason why primary responsibility for the task of investigating crimes in detention should shift from the police to the ABF. This is especially so given that, in its evidence to the Committee, the ABF acknowledged that it has 'good relationships' across its range of law enforcement partners.

Under existing arrangements, where the ABF suspects that criminal activity is occurring in detention, they may contact police. If police believe that there are reasonable grounds to suspect criminal behaviour, they may search for, and seize, evidence. This is how crime is dealt with throughout the community, and the reasons given for why arrangements should be different in detention are weak. The DHA's written submission states that the Bill would 'reduce the ABF's reliance on State and Territory or Federal Police'.⁶ This is wholly inadequate as a justification for the proposed powers. Reliance on law enforcement agencies for the task of law enforcement is ordinary and appropriate. In oral evidence to the Committee, the ABF said that a consequence of relying on police to conduct searches where criminal conduct is suspected places detainees, staff and others at risks to their safety and security. This too is unconvincing. The closed nature of detention, and the significant powers available to the ABF to maintain safety and order within detention facilities suggests that, where criminal activity has taken place, the risk of harm to others in the time it takes for police to exercise their powers is likely to be lower than in the general community. Evidence, and not mere assertion, is required to establish otherwise.

3. Renewed outbreaks of COVID-19 make it all the more important that hygiene and social distancing protocols are adhered to in detention

In my primary submission, I argued that the measures proposed in the Bill would exacerbate the already high risk that COVID-19 poses in the context of immigration detention. That submission was made at a time when the COVID-19 pandemic appeared to be relatively contained throughout Australia, and restrictions had eased considerably. Since then, the

⁴ Ibid, 9.

⁵ Ibid, 4.

⁶ Ibid.

situation has worsened considerably, with Victoria in a state of emergency, Melbourne and surrounds in lockdown, and a real risk that outbreaks have spread to other states and territories.

These developments make it all the more crucial that everything possible is done to protect against the possibility of a COVID-19 outbreak in detention, which is acknowledged to be one of the most high-risk environments for infection.⁷ In this context, requiring detainees to use shared phone and computer facilities, and laying the foundations for increased physical contact between staff and detainees through expanded strip-search powers is irresponsible from a public health perspective, unless it can be demonstrated that these things are absolutely necessary. This clearly has not been demonstrated.

Yours sincerely,

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⁷ Australian Government, Department of Health, 'What you need to know about coronavirus (COVID-19)', <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#who-is-most-at-risk>.