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Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 [provisions]

Liberty Victoria

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations' international human rights instruments, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the provisions of Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 (**the Bill**).
3. The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

Outline

4. We recommend the Bill not be passed. Our principal concerns with the Bill can be summarised as follows:

- No compelling case has been put forward by the Government to justify the proposed amendments and they are entirely unnecessary and disproportionate;
 - The amendments would provide the Minister with an unjustifiably broad personal power to prohibit anything he or she personally wished to specify, including items that pose no specific threat;
 - The expansion of search powers proposed by the Bill fail to recognise the many different forms of immigration detention and circumstances of detainees, and would have a profoundly adverse impact on those that are highly vulnerable people, including refugees and asylum seekers with past experiences of torture and trauma; and
 - The prohibition of communication devices such as mobile phones would unreasonably interfere with basic human rights of immigration detainees, including access to legal representation, freedom of expression and association, as well as inhibiting the ability of vulnerable people to access essential assistance and support, including from mental health professionals, immediate family and religious counsel.
5. Each of these matters is further developed below.
6. We also wish to reiterate our contentions made in our submission to the Committee for its earlier inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [provisions] (**the 2017 Bill**).¹

No compelling case

7. The amendments proposed by the Bill are unnecessary and unwarranted. the Government has failed to make a compelling case for why the amendments are needed.
8. Both the Explanatory Memorandum to the Bill and the Government's Second Reading Speech for the Bill, fail to explain in any clear terms how the current legal framework governing the maintenance of immigration detention facilities is deficient.
9. The policy explanation in the Explanatory Memorandum of why the existing legal frameworks are insufficient is limited to the following:

The existing search and seizure powers in the Migration Act are not sufficient to prevent the misuse of drugs, mobile phones, SIM cards and internet-capable devices or other things that are of concern within the context of immigration detention facilities.² [emphasis added]

10. Similarly, this content in the Second Reading Speech was limited to:

One of the most critical challenges in managing immigration detention is the continuing incursion, distribution and use of illegal drugs and contraband items, and associated criminal activity. Officers of the Australian Border Force (ABF)

¹ Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Liberty Victoria, [Submission No.25](#).

² Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum, Outline, page 3.

cannot fully maintain the safety, security and good order of immigration detention facilities, because legislation does not support them to remove illegal or dangerous items from detention facilities.

[...]

The existing legislative arrangements are inadequate. It is incongruous that an agency mandated to protect Australia's community and borders from the entry of illegal substances is not sufficiently empowered to prevent the entry of illegal substances into facilities that it operates. Such a position poses a risk to the good order, and the safety and security of facilities under the agency's direct control.³ [emphasis added]

11. Since the inception of the Australian government's immigration detention powers, successive governments have utilised the legal framework provided by common law to govern how its officers and contractors maintain the safety and security of immigration detention environments. Accompanying these common law powers are those specified in statute in Division 13 of Part 2 of the *Migration Act 1958* (Cth) (**the Act**), in particular ss 252 to 252G that provide broad search powers targeting people in immigration detention as well as visitors to those facilities. Complementing these powers are the federal, state and territory criminal law frameworks and powers of law enforcement authorities to investigate alleged criminal activities in immigration detention facilities.
12. Crucially, no evidence has been provided by the Government to demonstrate in what way, if any, these existing frameworks are failing. This is concerning as the measures proposed would have a significant impact on the livelihood and wellbeing of immigration detainees. For this reason, a clear and compelling case from the Government is demanded.
13. It is Liberty Victoria's further submission that, in addition to the Government's failure to make a compelling case for why the amendments are necessary, the amendments proposed are disproportionate to the security needs in the immigration detention environment.
14. The amendments proposed by the Bill follow an increasing trend of 'securitisation' of immigration detention in recent years. This trend is consistent with much of the policy rationale detailed in the Explanatory Memorandum and Second Reading Speech, and those for the 2017 Bill.
15. In this regard, The UN Special Rapporteur on Human Rights of Migrants noted the following concern in his April 2017 report on his mission to Australia:

64. Many testified to the increased "securitization" of the immigration detention centres. The arrival of the Australian Border Force and the increased number of foreigners in detention after having served a prison sentence (the "501s") has driven a considerable increase in security control procedures. [...] It was

³ The Hon. Alan Tudge, MP, Minister for Population, Cities and Urban Infrastructure, Second Reading Speech: Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, House of Representatives, 14 May 2020.

readily acknowledged that a "prison culture" had changed the atmosphere of detention centres: a "garrison mind set", as described by a government official.⁴

16. The potential for increasing and normalising the use of searches, including strip searches, is a further move of "securitisation". Further, strip search powers carry the potential for abuse, particularly where there is inadequate oversight. It should be noted that searches may be carried out by "authorised officers", including Serco guards who are not public servants and are not bound by the Australian Public Service Code of Conduct or Values.
17. In our submission, the measures proposed by the Bill would continue and perpetuate this problematic shift. Measures to ensure safety, security and order of detention facilities must be reasonable, adapted and proportionate.

Unjustifiably broad personal power

18. The amendments seek to confer on the Minister of the day an unjustifiably broad personal power to prohibit anything he or she personally wished to ban from immigration detention, including items that pose no specific threat.
19. It is noted that the Second Reading Speech states "[w]hile not introducing a blanket ban on mobile phones in detention, we are proposing to allow the minister to direct officers to seize mobile phones from certain categories of people, while providing officers with the discretion to search for and seize mobile phones in other circumstances". It is our submission that this policy intent is inconsistent with the terms of the amendments proposed by the Bill. The power to specify what items are prohibited is personal to the Minister of the day. Nothing in the Bill prevents the Minister from banning all immigration detainees from possessing mobile phones.
20. The Explanatory Memorandum to the Bill states the purpose of the legislative change is to address the Full Federal Court decision in *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.⁵ This case concerned an appeal by the Minister in respect of orders by a single judge of the Federal Court preventing officers of the Department of Immigration and Border Protection (as it was then called) from seizing detainees' mobile phones pursuant to a blanket Departmental policy prohibiting all immigration detainees from possessing mobile phones.⁶ We submit that this previous government policy and stated rationale of the Bill is strongly demonstrative of the probability that these personal powers of the Minister would be used, at least at some point in the reasonably foreseeable future, to reintroduce the blanket ban on mobile phones and other similar personal items.
21. Such personal powers of the Minister are liable to being exercised by the Minister according to his or her personal or political whim. As detailed in Liberty Victoria's Rights Advocacy Project's report *Playing God: The Immigration Minister's Unrestrained*

⁴ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (April 2017) UN Doc A/HRC/35/25.Add.3.

⁵ Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum, Outline, page 3; Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, Explanatory Memorandum, Outline, page 3

⁶ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263.

*Power*⁷, these personal powers are often characterised by arbitrary, inconsistent and unpredictable outcomes. These decisions lack ordinary standards of transparency and accountability under the rule of law.

Disproportionate impact on vulnerable people

22. The expansion of search powers proposed by the Bill fail to recognise the many different forms of immigration detention and circumstances of detainees, and would have a profoundly adverse impact on those that are highly vulnerable people, including refugees and asylum seekers with past experiences of torture and trauma.
23. The proposed changes are also incorrectly premised on the inference that most people held in immigration detention are hardened criminals with extensive criminal histories. In this regard, the Explanatory Memorandum states:

Immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal, often having entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups.

Evidence indicates that detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff.

24. Similarly, the Second Reading Speech provided:

This government has strengthened section 501 of the Migration Act to better protect the Australian community from non-citizen nationals who commit serious crimes. These changes have allowed the government to cancel the visas of more than 4,600 individuals who have committed criminal offences in Australia.

This action has resulted in a significant increase in the number of detainees with criminal histories in our immigration detention facilities. Today, a large proportion of the detention population are unlawful noncitizens who have criminal histories.

Some of these detainees have a history of child sex offences or violent crimes, including murder and domestic violence. Others have come to immigration detention with significant histories of drug-related offences or proven links to criminal organisations, such as outlaw motorcycle gangs and other organised crime groups. Unfortunately, some of these individuals seek to continue criminal activities and associations while in detention centres.

25. It is our submission that this policy rationale is founded on a misunderstanding of the composition of the immigration detention population.

⁷ Liberty Victoria, Rights Advocacy Project, *Playing God: The Immigration Minister's Unrestrained Power*, 4 May 2017, available at: http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf [accessed 7 June 2020].

26. Statistics published by the Department of Home Affairs' (**the Department**)⁸ relevantly confirm, as at 31 March 2020:

- there were 1,373 people held in locked immigration detention facilities in Australia;
- 750 of the 1,373 (55%) were 'illegal maritime arrivals' or other people not in detention due to a 's 501 visa cancellation';
- 596 of the 1,373 (45%) were people in detention as a consequence of a 's 501 visa cancellation';
- an additional 845 people in immigration detention were residing in community detention under a residence determination made by the Minister; and
- 16 people held in an Alternative Places of Detention (**APOD**).

27. These statistics confirm that the majority (55%) of people held in locked immigration facilities are detained for reasons other than due to a visa cancellation under s 501 (i.e. on character grounds). Further, it is noted that a high number of this cohort (68%) were people who had arrived in Australia by boat seeking asylum (an 'illegal maritime arrival'). People predominantly without a criminal history.

28. In our experience, 'APODs' are generally used by the Department to detain highly vulnerable people with exceptional needs. Some examples of APODs are a school attended by a child in immigration detention and a hospital where a detainee is receiving treatment. The Bill proposes to provide for the greatly expanded search powers, including strip searching, to people held in APODs. This includes highly vulnerable refugees and asylum seekers transferred from regional processing countries for urgent medical treatment. The Explanatory Memorandum confirms it is intended that all persons held in APODs be subject to the new personal search powers provided by this Bill.⁹

29. Statistics published by the Department also confirm that, as at 31 March 2020, a quarter of all people held in locked immigration detention facilities had been detained for more than 730 days (2 years). Critically, no statistics are published by the Department confirming the number of persons who have been detained for longer than this time. However, in our experience, a significant number of detainees are held for longer than 2 years.

⁸ Department of Home Affairs, Immigration Detention and Community Statistics Summary 31 March 2020, available at: <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2020.pdf> [accessed 7 June 2020].

⁹ Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, Explanatory Memorandum, Schedule 1, Item 1 at [40].

30. Clinical research has consistently found that extended periods in locked immigration detention can often have a catastrophic effect on a person's mental health.¹⁰ Liberty Victoria is profoundly concerned about the effect of these amendments on those highly vulnerable detainees, including refugees and asylum seekers with histories of torture and trauma and long-term detainees.

Unreasonable interference

31. Liberty Victoria submits that the prohibition of communication devices such as mobile phones would unreasonably interfere with basic human rights, including access to legal representation, freedom of expression and association. We also contend that depriving people, many of whom we know from our experience are highly vulnerable, of the ability to access essential and immediate assistance and support, including from mental health professionals, risks causing further harm to these people.
32. Depriving people of their own personal means to communicate with loved ones, mental health services and legal representatives has significant implications for those people's wellbeing, access to justice and their health and safety.
33. It is Liberty Victoria's experience that telephone communication using fixed-line (landline) telephones with persons held in immigration detention is highly problematic and unreliable. Outgoing and incoming landline means of communication with detainees also vary greatly between detention centres. These problems are further compounded by English not being the first language for many people in immigration detention, and also of those attempting to make contact with the detainee. It is also our experience that public landline telephones in immigration detention facilities are located in high-traffic public areas, such as computer rooms or recreational areas. When using these means it is often hard to communicate with a detainee, particularly when using a telephone interpreter, due to both background noise and a lack of privacy.
34. It is further submitted that a subsequent ban on personal communication devices would unreasonably interfere with immigration detainees' freedom of expression and association. As reported in the media, immigration detainees have in recent times used mobile phones to participate in peaceful protests¹¹ and document events in which they

¹⁰ UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, 24 April 2017, A/HRC/35/25/Add.3, at [57], available at: <https://www.refworld.org/docid/593a8c924.html> [accessed 7 June 2020]; Amnesty International, Australia: The impact of indefinite detention: the case to change Australia's mandatory detention regime, 30 June 2005, ASA 12/001/2005, available at: <https://www.refworld.org/docid/45b3a41e2.html> [accessed 7 June 2020]; Steel Z, Silove DM, The mental health implications of detaining asylum seekers, The Medical Journal of Australia, 01 Dec 2001, 175(11-12):596-599; Guy J. Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum," Social Science & Medicine, 70 no. 12 (2010); Katy Robjant, Rita Hassan and Cornelius Katona, "Mental health implications of detaining asylum seekers: systematic review," The British journal of psychiatry : the journal of mental science, 194 no. 4 (2009).

¹¹ Human Rights Watch, Coronavirus Poses Added Risks to Australia's Immigration Detainees, 2 April 2020, available at: <https://www.hrw.org/news/2020/04/02/coronavirus-poses-added-risks-australias-immigration-detainees> [accessed 7 June 2020].

claim detention centre staff acted unlawfully¹². Stripping people of the means to continue these peaceful activities is unwarranted and inhibits people's capacity to exercise their fundamental rights and democratic freedoms.

Conclusion

35. We submit that no compelling case has been provided to justify the proposed amendments. No evidence has been provided to demonstrate that the existing legal frameworks are insufficient to manage the safety and security of immigration detention environments.
36. Further, the amendments proposed are disproportionate and would unreasonably interfere with basic human rights of immigration detainees, including access to legal representation, freedom of expression and association. The proposed laws would also have a profoundly adverse impact on those that are highly vulnerable people, including refugees and asylum seekers with past experiences of torture and trauma.
37. For these reasons, Liberty Victoria recommends the Bill not be passed.

JULIAN BURNSIDE AO QC
President, Liberty Victoria

¹² The Guardian Australia, Secret recordings allege excessive force by guards in Australia's detention centres, 25 March 2019, available at: <https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres> [accessed 7 June 2010]