The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 [Provisions]

June 2015

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Recommendation 1

3.6 The committee recommends, subject to Recommendations 2, 3 and 4, that the Bill be passed.

Recommendation 2

3.10 The committee recommends that the Commonwealth Ombudsman's suggestion that the Bill's operation should extend to cover 'situations where detainees are in transit between facilities and in other locations' be given further serious consideration by the government.

Recommendation 3

3.11 The committee recommends that the Explanatory Memorandum clarify the extent of the use of force under section 197BA:

- **that reasonable force must only be used as a measure of last resort. Conflict resolution (negotiation and de-escalation) must be considered and used, wherever practicable, before force is employed;**
- **that reasonable force must be used for the shortest amount of time possible;**
- **that reasonable force must not include cruel, inhuman or degrading treatment; and**
- **that force must not be used for the purposes of punishment.**

Recommendation 4

3.14 The committee recommends that the government remove the word 'not' from subsection 197BA(8) of the Bill, in order to provide that a ministerial determination made under subsection (7) is a legislative instrument.

Chapter 1

Introduction

1.1 On 25 February 2015 the Hon Peter Dutton MP, Minister for Immigration and Border Protection, introduced the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) into the House of Representatives.[1]

1.2 On 5 March 2015, pursuant to a report of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 12 May 2015.[2]

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 7 April 2015. Details of the inquiry were also made available on the committee's website (www.aph.gov.au/senate_legalcon).

1.4 The committee received 187 submissions to the inquiry, including two confidential submissions. The list of submissions received is at Appendix 1. The committee held a public hearing on 16 April 2015 in Sydney. The witnesses who appeared at the public hearing are listed at Appendix 2, and additional information received by the committee at and following the hearing is at Appendix 3.

1.5 The committee thanks all those who assisted with its inquiry.

Background to the Bill

1.6 In his Second Reading Speech to the House of Representatives on the Bill, Mr Dutton advised that the Bill sought to address uncertainties on the part of immigration service providers about their powers and responsibilities in relation to the use of force, which had arisen following incidents at a number of facilities.[3]

1.7 In the absence of any legislated provisions, staff at immigration detention facilities have until now been governed by the same common law principles as ordinary citizens in relation to the use of reasonable force when necessary for self-defence or the defence of others.

1.8 The minister referred to a report commissioned by the then government in 2011 in response to incidents which had occurred at two detention centres that year. The *Independent Review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, known as the 'Hawke-Williams report', recommended *inter alia* that the Department of Immigration

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1 House of Representatives, *Votes and Proceedings*, No.98, 25 February 2015, p. 1133.

2 *Journals of the Senate*, No.82, 5 March 2015, p. 2257.

3 The Hon Peter Dutton MP, *House of Representatives Hansard*, 25 February 2015, p. 1.

and Border Protection (the department) more clearly articulate the division of responsibility for public order management between the department, the Australian Federal Police (AFP) and immigration detention service providers (IDSP).[4]

1.9 In September 2012 the then government released a report on its implementation of the recommendations of the Hawke-Williams report. In relation to the above recommendation, the government reported that the department, the relevant IDSP (Serco) and law enforcement agencies were working together, along with state and territory police, to formalise and clearly articulate the respective roles and responsibilities of each in relation to public order and incident response.[5]

1.10 Meanwhile, in March 2012 Coalition members of the Joint Select Committee on Australia's Immigration Detention Network had recommended that the government seek advice on amendments to regulations under the *Migration Act 1958* (the Migration Act) 'to clarify the responsibilities and powers of persons who operate detention centres around the limits on their obligations and powers in relation to the use of force, to ensure the good order and control of immigration detention facilities'.[6] In November 2012 the then Labor government accepted that recommendation and undertook to seek advice to determine whether legislative change was needed.[7]

1.11 As part of the context to the Bill, Mr Dutton also outlined a change in the demography of the Australian facilities in recent years. The minister referred to '[t]he presence of high risk detainees with behavioural challenges' as underlining the necessity to protect the security, good order and safety of immigration detention facilities.[8]

1.12 The Explanatory Memorandum described an increasing number of high-risk detainees, including persons who:

- have had their visas cancelled as a result of failing the 'character test' often due to convictions for drug and other serious criminal offences;
- are a high security risk, such as members of outlaw motorcycle gangs;
- are subject to adverse security assessments; and

4 Allan Hawke and Helen Williams, *Independent Review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre,* 31 August 2011, pp 12, 107.

5 Parliamentary Library, 'Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015', *Bills Digest* No.86 2014-15, 23 March 2015, p. 4.

6 Joint Select Committee on Australia's Immigration Detention Network, *Final Report,* March 2012, p. 226 (Coalition members' and senators' dissenting report).

7 Parliamentary Library, 'Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015', *Bills Digest* No.86 2014-15, 23 March 2015, pp 4-5.

8 The Hon Peter Dutton MP, *House of Representatives Hansard,* 25 February 2015, p. 1.

- have become unlawful non-citizens as a result of breaching certain visa conditions.[9]

1.13 During the committee's inquiry, the department advised that the proportion of persons in immigration detention due to cancellation of their visas had risen from one per cent of detainees in July 2013, to eight per cent in January 2015. At 31 January 2015, 'visa cancelled' detainees numbered 189 out of a total of 2292 persons in immigration detention.[10] At 1 April 2015, 345 immigration detainees were known to have criminal records.[11]

Purpose of the Bill

1.14 The purpose of the Bill, as described by Mr Dutton, is to 'provide a legislative framework for the use of reasonable force within Immigration Detention Facilities in Australia'.[12] The Explanatory Memorandum states that:

> The presence of high risk detainees with behavioural challenges, such as members of outlaw motorcycle gangs, jeopardises the safety, security and peace of our immigration detention facilities and the safety of all persons within those facilities. In fact, public order disturbances have arisen in a number of immigration detention facilities in recent years.
>
> Increasingly, there is a need to provide higher security and more intensive management of these detainees. [The Bill] is necessary to provide authorised officers with the resources to continue to manage the safety, security and peace of our immigration detention facilities.[13]

1.15 The Bill would provide a legislated authority for the use by 'authorised officers' in immigration detention facilities of 'reasonable force' against any person or thing to the extent that they reasonably believe necessary to protect a person's life, health or safety; or to maintain the good order, peace or security of the facility. The Bill would apply to immigration facilities within Australia, including Christmas Island. The Bill would require that authorised officers must satisfy training and qualification requirements determined by the minister, and set certain limitations on the use of force. The Bill would set out a statutory complaints mechanism for alleged abuse of the power, and establish a bar on legal proceedings against authorised officers and the Commonwealth in relation to its exercise provided it is done in good faith.

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9 Explanatory Memorandum, p. 1.

10 The full breakdown of the detainee population at 31 January 2015 provided by the department was: 1635 illegal maritime arrivals, 54 illegal arrivals by air, 414 persons who had overstayed their visas, and 189 whose visas had been cancelled. *Committee Hansard,* 16 April 2015, p. 39.

11 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 13) from the committee's 16 April 2015 public hearing, received 30 April 2015.

12 The Hon Peter Dutton MP, *House of Representatives Hansard,* 25 February 2015, p. 1.

13 Explanatory Memorandum, p. 1.

1.16 Mr Dutton advised parliament that the Bill would resolve uncertainty among immigration service providers about their powers and responsibilities when confronted with 'public order disturbances' in immigration facilities:

> The Government considers that safe and effective immigration detention policies and strong border security measures are not incompatible. This legislation strikes an appropriate balance between maintaining the good order of a facility and the safety of the people within it and the need to ensure that the use of force is reasonable, proportionate and appropriate. The Government is maintaining strong border security measures, but is ensuring that all people in Immigration Detention Facilities, including the detainees themselves, are safe from harm.[14]

Key provisions of the Bill

1.17 The Bill seeks to amend the Migration Act. The substantive amendments to the Act are set out in Schedule 1 of the Bill. These are mostly found in Item 5 of the Schedule, which inserts new Division 7B into Part 2 of the Act, comprising new sections 197BA, 197BB, 197BC, 197BD, 197BE, 197BF and 197BG.

197BA: use of reasonable force by authorised officers

1.18 Subsection 197BA(1) provides that:

> (1) An authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to:
>
> (a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
>
> (b) maintain the good order, peace or security of an immigration detention facility.

1.19 Subsection (2) provides that without limiting the above, such reasonable force may be used to protect a person (including the authorised officer) from harm or a threat of harm; protect a detainee from self-harm or a threat of self-harm; prevent the escape of a detainee; prevent a person from damaging, destroying or interfering with property in an immigration detention facility; move a detainee within a facility; or prevent action by any person that endangers the life, health or safety of any person, or disturbs the good order, peace or security of the facility.

1.20 Subsections (4) and (5) set limitations on the exercise of the above power. Under 197BA(4), an authorised officer must not use the power to give nourishment or fluids to a detainee.

1.21 197BA(5) provides that in exercising the power an authorised person must not:

> (a) subject a person to greater indignity than the authorised person reasonably believes is necessary in the circumstances; or

14 The Hon Peter Dutton MP, *House of Representatives Hansard,* 25 February 2015, pp 2-3.

(b) do anything likely to cause a person grievous bodily harm unless the authorised officer reasonably believes that doing the thing is necessary to protect the life of, or to prevent serious injury to, another person (including the authorised officer).

197BB-BE: complaints

1.22 Under section 197BB, a person may complain in writing to the secretary (of the Department of Immigration and Border Protection) about an authorised officer's exercise of the 'reasonable force' power. The secretary must provide assistance to the complainant, if required, to make or formalise the complaint.

1.23 Section 197BC requires that the secretary investigate the complaint in any way s/he thinks appropriate. If, after completing the investigation, the secretary is satisfied that it is appropriate to refer the complaint to the Commonwealth Ombudsman, the secretary must do so, at which point the complaint becomes equivalent to a complaint to the ombudsman under the *Ombudsman Act 1976.*

1.24 Under section 197BD, the secretary may decide not to investigate, or to discontinue an investigation, if s/he is satisfied that: the complaint duplicates a complaint already dealt with or waiting to be dealt with; is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; is not made by a person with sufficient interest in the matter; or the investigation is not justified in all the circumstances. The secretary must provide the complainant with written reasons for such a decision.

1.25 Section 197BE allows the secretary to transfer a complaint to the ombudsman, the AFP Commissioner or a head of state or territory police, if the secretary is satisfied that a complaint could be more conveniently or effectively dealt with by one of those persons.

1.26 The Explanatory Memorandum states that the provision for complaint to the secretary is an 'important accountability mechanism' in relation to the powers conferred under the Bill, but that it 'does not restrict a person from making a complaint directly to another body or agency such as directly to the State, Territory or Australian Federal Police or the Office of the Commonwealth Ombudsman'.[15]

197BF: immunity from legal action

1.27 Subsection 197BF(1) provides that no proceedings may be initiated or continued in any court against the Commonwealth in relation to an exercise of the power under section 197BA, if the power was exercised in good faith. Under subsection 197BF(4), 'Commonwealth' includes an officer of the Commonwealth and 'any other person acting on behalf of the Commonwealth'. The Explanatory Memorandum states that this definition is intended to include all authorised officers.[16]

15 Explanatory Memorandum, p. 13.

16 Explanatory Memorandum, p. 16.

1.28 While subsection (2) gives effect to this section despite any other law, subsection (3) provides that nothing in this section is intended to affect the original jurisdiction of the High Court, as set out in section 75 of the Constitution.

Definitions

1.29 Items 2 and 3 of Schedule 1 deal with definitions relevant to the operation of the new provisions. Item 2 amends the definition of an 'authorised officer', via reference to new subsections 197BA(6) and (7), to provide that an officer must not be authorised for the purposes of Section 197BA (use of reasonable force) unless the officer satisfies training and qualification requirements determined by the minister in writing. Subsection 197BA(8) provides that such a determination is not a legislative instrument.

1.30 Item 3 inserts a definition of 'immigration detention facility' for the purposes of the Bill, via reference to new provision 197BA(3): it is a detention centre established under the Migration Act, or another place approved by the minister in writing for the purposes of immigration detention. According to the Explanatory Memorandum, this limits the use of reasonable force as set out in the Bill to 'incidents that occur within an immigration detention facility or in relation to an immigration detention facility', and notes that this may include places such as Wickham Point Alternative Place of Detention or Villawood Immigration Residential Housing.[17]

17 Explanatory Memorandum, pp 4, 9.

Chapter 2

Key issues

2.1 This chapter canvasses human rights issues raised by two parliamentary scrutiny committees in relation to the Bill, and the key issues raised in submissions and evidence given to this committee.

Issues raised by parliamentary scrutiny committees

2.2 The Bill was examined by two parliamentary scrutiny committees: the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) and the Parliamentary Joint Committee on Human Rights (PJCHR). Both committees reported on the Bill on 18 March 2015:[1] the report of the Scrutiny of Bills committee was tabled in the Senate the same day,[2] while the report of the PJCHR was tabled on 19 March.[3]

The Scrutiny of Bills committee report

2.3 The Scrutiny of Bills committee assessed that the Bill may give rise to concern about undue trespass on personal rights and liberties, because the use of force powers are framed in very broad terms. The committee asked the minister to provide a more detailed justification for the necessity and appropriateness of the powers conferred by the Bill, as well as advice as to whether there were other examples of administrative forms of detention in which similar powers were given to detaining officers.

2.4 The committee also sought advice from the minister on various other points including why limits on the use of force were confined to policy rather than being included in the Bill, the sufficiency of the proposed training and qualification requirements for authorised officers, and the rationale for the proposed immunities from criminal and civil action.

2.5 The minister responded to the committee's comments in a letter dated 14 April 2015. The minister's response, and the committee's further comments upon consideration of it, were published by the committee in its report of 13 May 2015.[4]

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1 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.3 of 2015*, 18 March 2015; Parliamentary Joint Committee on Human Rights, *Twentieth report of the 44th Parliament*, 18 March 2015.

2 *Journals of the Senate*, No.85, 18 March 2015, p. 2326.

3 *Journals of the Senate*, No.86, 19 March 2015, p. 2349.

4 Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2015, pp 355-383, and attachment (minister's letter). Tabled per *Journals of the Senate*, no. 93, 13 May 2015, p. 2589.

The PJCHR report

2.6 In its report, the PJCHR identified several human rights engaged and potentially limited by the Bill, including the right to life; the prohibition against torture, cruel, inhumane or degrading treatment; the right to humane treatment in detention; the right to freedom of assembly and the right to an effective remedy. The committee considered that the government had not provided sufficient explanation of how the Bill supported a legitimate objective (a 'pressing or substantial concern', rather than just a desirable or convenient outcome) which would justify limiting such human rights under international law.[5] The committee also considered that a lack of legislative safeguards around the use of force, and the introduction of subjective elements into the test for the lawful use of force, may render the powers conferred by the Bill disproportionate to the achievement of its objectives.

2.7 The PJCHR expressed concern about other issues including the arrangements for monitoring the use of force, the adequacy of the training requirements for authorised officers, and the proposed bar on criminal proceedings.

2.8 The PJCHR sought further advice and clarification from the minister in relation to each of the above points. At the time of this report, no response from the minister had been made available.

Issues raised during this inquiry

2.9 In submissions and evidence to this committee's inquiry, a broad range of issues was raised. A number of submissions referred to and endorsed the concerns raised by the PJCHR about the Bill, while related and broader matters were also put before the committee.

Necessity of additional powers

2.10 Some argued that the Bill was entirely unnecessary. Australian Lawyers for Human Rights (ALHR), for example, expressed the view that:

> there is no reasonable justification for introducing legislation that widens the scope to use force. Currently under the common law…private security officers may use force when the use of that force is objectively necessary. The case, in our view, has not been made out as to why the common law position is inadequate....[6]

2.11 The union representing employees of immigration detention service providers, United Voice, saw the Bill as an attempt by the government to shift responsibility to contractors for maintaining order in detention centres 'when these workplaces are already under resourced, subject to inadequate training and increasingly more problematic due to the mix of detainees'.[7] United Voice expressed the view that 'an [immigration detention facility] is a Commonwealth facility where individuals are

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5 Parliamentary Joint Committee on Human Rights, *Twentieth report of the 44th Parliament*, 18 March 2015, p. 17.

6 Ms Claire Hammerton, *Committee Hansard*, 16 April 2015, p. 11.

7 United Voice, *Submission* 137, p. 2.

deprived of their freedom and the principal responsibility for maintaining security should remain with the Commonwealth'.[8]

2.12 Other organisations and experts acknowledged that there had been a call for greater clarity for detention centre staff in relation to their powers to use reasonable force, and welcomed the attempt by the government to address that issue. Concern was widely expressed, however, that the Bill went beyond what was required in creating broad new use of force powers which, in their view, resulted in less rather than more clarity for the persons concerned.

2.13 President of the Australian Human Rights Commission (AHRC), Professor Gillian Triggs, told the committee that:

> …Serco as a company were not asking for what they got; they were simply asking for clarity. They were not asking for a greater right to use more force or for anything else; they were simply saying, 'When we are in these situations of disturbances, and possibly before the Australian Federal Police arrive, we want to know what our role is and what the limits are on that force. We have a right to know that.' They are in a dangerous situation sometimes, and they need to know what they can properly do. For example, if they are given instruction to remove children from one detention camp to another but the children do not want to go, how do they deal with that. They have a right to know that. It is a very sensitive and difficult situation and they have a right to have that information. So it is clarity they asked for—and we think, oddly, it is clarity they do not have in this bill.[9]

2.14 Serco declined the committee's invitations to make a submission and to give evidence at its public hearing. In response to a question from the committee, the Department of Immigration and Border Protection (the department) advised that 'Serco is supportive of the Good Order Bill and have expressed no particular concern in relation to this Bill'.[10]

2.15 The committee received a submission from International Health and Medical Services (IHMS), which has been contracted to provide health care to immigration detainees in Australia since 2003. In relation to the use of force, IHMS stated that '[i]n the majority of cases the common law right of self-defence has been sufficient to meet our needs', but described its experience of an increase in violent and aggressive behaviour within some immigration detention facilities, and said it therefore supported the Bill's 'provision of resources to authorised officers to enable them to manage the safety, security and peace of the immigration detention facilities'.[11]

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8 United Voice, *Submission* 137, p. 2.

9 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 7.

10 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 35) from the committee's 16 April 2015 public hearing, received 30 April 2015.

11 International Health and Medical Services, *Submission* 12.

Scope of the power

2.16 The scope of the use of force power given to officers under the Bill gave rise to commentary and criticism from submitters and witnesses to the inquiry. Dr Gabrielle Appleby, Associate Professor at the Gilbert and Tobin Centre of Public Law, UNSW, told the committee that:

> …these powers and the protections provided to the officers who use them are extraordinary. Any powers authorising the use of force raise concerns about whether the intrusion into the human rights of those against whom force is used—including the right to life, the protection against torture and inhuman or degrading treatment or punishment—is justified and proportionate. The ill-defined and broad nature of the powers in this bill make these concerns particularly acute. Further, they are exercised not by qualified police officers but by government contractors. The explanatory memorandum claims that the bill brings the powers of these officers into line with the powers of other officers in detention facilities. This is not correct; these powers go further.[12]

2.17 While supporting the attempt to clarify the law on the use of force in immigration detention facilities, the Law Council of Australia (LCA) expressed the view that:

> as currently drafted, the bill is, in our view, not just and proportionate in meeting its objectives. Greater protection against abuse of the use of force is required in order to achieve the bill being proportionate.[13]

2.18 The fundamental principles upon which the department has developed the policy framework for the use of force are articulated in the safeguards explained at paragraph 44 of the Bill's Explanatory Memorandum. These safeguards are:

- that use of reasonable force or restraint will be used only as a measure of last resort. Conflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable;
- reasonable force must only be used for the shortest amount of time possible;
- reasonable force must not include cruel, inhuman or degrading treatment; and
- reasonable force must not be used for the purposes of punishment.

Purposes for which force may be used

2.19 The purposes for which an authorised officer may use force under the Bill extend beyond protecting the life, health and safety of a person, to include maintaining the 'good order, peace and security' of an immigration detention facility. This second category of purposes raised concern among some submitters, particularly given that 'good order' is not defined in the Bill.

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12 Dr Gabrielle Appleby, *Committee Hansard*, 16 April 2015, p. 12.

13 Mr Matthew Dunn, *Committee Hansard*, 16 April 2015, p. 13.

2.20 The Public Law & Policy Research Unit at the University of Adelaide submitted that:

> The words 'good order, peace and security' are not defined in the Act. Good order could mean that a detention centre is free from 'public order disturbances' as the Explanatory Memorandum states, or it could mean more broadly, that the centre is in good working order.
>
> This uncertainty in the meaning of 'good order' leaves a potentially wide range of circumstances when force might be authorized, including an extensive range of peaceful and non-threatening activities, For example, officers could deem peaceful protests by detainees as disrupting 'good order'. Even less intrusive actions such as being uncooperative or gathering in thoroughfares such as on walkways or in eating areas could also potentially be interpreted as disrupting the 'good order' of a detention centre.[14]

2.21 Similarly, the Conference of Leaders of Religious Institutes NSW queried whether peaceful protests or verbal arguments would disturb the 'good order' of a detention centre.[15] Amnesty International argued that '[i]t is conceivable that an authorised officer could exercise force against a detainee who has simply raised their voice, on the grounds that they were preventing a disturbance to the good order of the facility'.[16]

2.22 Concern about the broad opening for the use of force provided by the purposes laid out in the Bill, and particularly its undefined reference to 'good order', was amplified for many submitters by the lack of counteracting objective limits and safeguards on the powers conferred by the Bill.

Subjective and objective tests for 'reasonable force'

2.23 Subsection 197BA(1) provides that in exercising the powers given under the Bill, an authorised officer may use 'such reasonable force…as the authorised officer reasonably believes is necessary'. The subjective element of this test was the cause of discussion and debate in submissions, and at the committee's public hearing.

2.24 Many individual submitters saw danger in the subjective element of the test of reasonableness. One stated that:

> by handing judgement over to the officers' on-the-spot decision making process in a high tension scenario, rather than providing them with clear boundaries on what the state deems acceptable and unacceptable, we are being unfair to both the officers and those who may be subjected to inappropriate force.[17]

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14 Public Law & Policy Research Unit, University of Adelaide, *Submission* 37, p. 4.

15 Conference of Leaders of Religious Institutes NSW, *Submission* 19, p. 1.

16 Amnesty International Australia, *Submission* 98, p. 6.

17 *Submission* 82, name withheld.

2.25 A number of submissions received compared the Bill against tests for the use of reasonable force in comparable legislation, particularly that governing the use of force by police and prison officers in various jurisdictions, and expressed the view that the power in this Bill was much more broadly defined.

2.26 Professor Triggs described the problem as:

> a slippage in the language, by comparison with the Crimes Act and police powers – for example, the Australian Federal Police – which places a greater emphasis, for the contractor, on subjective views of what is 'reasonable'. We would suggest that the language needs to be significantly tightened up so that it is both reasonable and necessary as an objective test. We find it curious that the powers of a contract officer should be rather more loosely described and constrained than the very well established powers under the Crimes Act and for the Australian Federal Police.[18]

2.27 The LCA believed that the drafting of proposed section 197BA was open to ambiguity on its subjective and objective elements, and recommended that it would be better replaced by a purely objective test.

> The Law Council submits that if the Committee recommends passage of the Bill, it is necessary to clarify subsection 197BA(1) to replace the current proposed test with an objective test that requires, "where necessary, an authorised officer may use reasonable force".[19]

2.28 The department clarified that the proposed test in s197BA of the Bill is not a purely subjective one:

> The test in proposed section 197BA of the Good Order Bill contains a subjective element, but is most accurately described as a hybrid test. Proposed section 197BA of the Good Order Bill requires the force used to be reasonable force[;] this is an objective test based on the facts in the particular circumstance. Proposed section 197BA also contains a subjective element which requires the authorised officer to reasonably believe the force is necessary.[20]

2.29 At the committee's public hearing the General Counsel to the Department of Immigration and Border Protection addressed the issue of the 'hybrid' test and its consistency with comparable legislation:

> There was some useful dialogue this morning around the test that has been articulated for the use of force in 197BA(1). It is important to understand that it is not entirely subjective and, like many of these tests—and they vary from act to act—they generally balance an objective component and a subjective component. So the drafting that has found its way into 197BA(1)

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18 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 3.

19 Law Council of Australia, answer to question on notice from the committee's 16 April 2015 public hearing, received 4 May 2015.

20 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 2) from the committee's 16 April 2015 public hearing, received 30 April 2015.

> has the 'reasonable force' up-front. That is an objective standard. That has to then be matched with a belief by the officer—it has to be a reasonable belief—as to necessity. So a belief that is reasonable is also an objective and subjective test. There were some comments made this morning that that was out of kilter with all of the other comparable legislation. Can I just indicate that there are actually a variety of ways that that has been expressed, particularly as to whether the necessary component is front-ended so that it is only objective. While some examples of that form of drafting were given, there are two that are consistent with the way that we have drafted it. The Western Australian Prisons Act provides for such force as is believed on reasonable grounds to be necessary. That is fairly consistent with what we have drafted. Equally, the Victorian Police use such force that is not disproportionate as believed on reasonable grounds to be necessary. So, again, that is a fairly similar form of drafting.[21]

2.30 The department subsequently provided the committee with an extensive list of use of force provisions in comparable legislation relating to policing, prisons and other detention situations in Australian and overseas jurisdictions.[22] While there are some differences from the test used in the present Bill, the department observed that '[i]mmigration detention facilities are unique and operate in a much narrower context than that of the Australian Federal Police', and reiterated that the department 'believes the drafting of the Good Order Bill is appropriate for immigration detention facilities'.[23]

2.31 The department also drew the committee's attention to the government's commitment to implement robust risk mitigation and governance controls over the management of detention facilities and the exercise of the new powers, including in the context of the new Australian Border Force to be established within the department from 1 July 2015. Deputy Chief Executive Officer of the Australian Customs and Border Protection Service, Mr Michael Outram, representing the department, advised the committee that:

> we will be putting in place additional rigorous governance and management—for example, there will be a uniform[ed] superintendent from the Australian Border Force present at the detention centres not only to ensure that the service provider obeys and sticks to the requirements of the contract, but also to assist us in relation to identifying any problems of corruption, inappropriate behaviour, criminal offences and so on so that they are followed through upon, including complaints from detainees.[24]

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21 Ms Philippa de Veau, *Committee Hansard*, 16 April 2015, p. 50.

22 See Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 3) from the committee's 16 April 2015 public hearing, received 30 April 2015, Attachment A.

23 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 3) from the committee's 16 April 2015 public hearing, received 30 April 2015.

24 *Committee Hansard*, 16 April 2015, p. 36.

2.32 Mr Outram stated that the Border Force superintendents will be recruited against specific qualifications for the role, and will 'adopt the same standards for the use of force as the Australian Federal Police'.[25]

Limitations on the use of force

2.33 The issue of limitations on the use of force was raised by a number of submitters.

2.34 In its submission, Amnesty International made reference to international guidelines which establish accepted parameters on the use of force.[26]

2.35 Uniting Justice referred to guidelines issued by the Human Rights Law Centre along with the UN Basic Principles in relation to defining and confining 'reasonable force', which both recommended a human rights-based approach to the use of force and the necessity that force be avoided wherever possible, and that where necessary, the use of force must be proportionate and accountable.[27]

2.36 Witnesses acknowledged the department's advice that widely-accepted limitations on the use of force were already contained in its detention centre manual. The Explanatory Memorandum confirmed that in addition to the limitations on the use of force contained in subsection 197BA(5) of the Bill, the department would have policies and procedures in place to ensure that:

- reasonable force will only be used as a measure of last resort, following efforts to resolve conflict by negotiation and de-escalation, where practicable;
- reasonable force must be used for the shortest amount of time possible;
- reasonable force must not include cruel, inhuman or degrading treatment; and
- force must not be used for the purpose of punishment.[28]

2.37 Submissions received by the committee suggested that such factors be enshrined in the legislation itself, not relegated to policy. ALHR told the committee that '[p]olicy, in our view, is not a sufficient safeguard'.[29]

2.38 It was pointed out that including more defined limitations on the use of force in the legislation would not only improve the enforceability and accountability of such standards, but would assist authorised officers and their employers by providing greater clarity and certainty against which to determine whether and when the use of force may be appropriate.[30]

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25 *Committee Hansard*, 16 April 2015, pp 36, 47-48.

26 Amnesty International Australia, *Submission* 98, p. 2 and footnote 1.

27 Uniting Justice, *Submission* 96, p. 4.

28 Explanatory Memorandum, p. 9.

29 Ms Claire Hammerton, *Committee Hansard*, 16 April 2015, p. 11.

30 *Committee Hansard*, 16 April 2015, p. 16.

2.39 Responding to the committee's query on this point, the department reiterated its view that its existing policy framework was sufficient:

> The Department of Immigration and Border Protection will have in place policies and procedures, which will include extensive coverage of the limitations on the use of reasonable force within immigration detention facilities. Policies and procedures will be regularly reviewed and amended by the department to ensure that authorised officers understand and have access to up to date supporting material.[31]

Where the power can be used: definition of immigration detention facilities

2.40 Some witnesses, such as the Refugee Advisory Casework Service (RACS) and the Australian Churches Refugee Taskforce (ACRT), expressed concern about the locational coverage of the Bill, querying in particular whether its definition of 'immigration detention facilities' would extend to community detention.[32] The potential application of the Bill's use of force powers in community detention scenarios was of concern to refugee advocacy groups in particular.

2.41 The Commonwealth Ombudsman recommended on the other hand that the Bill's operation should be extended to cover 'situations where detainees are in transit between facilities and in other locations that are not considered to be alternative places of detention such as medical facilities', as use of force may be necessary in such locations, and the provisions governing service providers' use of force should be consistent across all situations.[33]

2.42 The department advised the committee at its public hearing that as presently drafted the Bill would not apply to community detention. It noted that the Bill and the Migration Act allowed the minister to approve the inclusion of additional locations within the definition of 'immigration detention' in future, but that at present community detention was not included within that definition.[34] The department subsequently confirmed its assessment that the Bill does not extend to community detention, because this is covered by a separate 'residence determination' procedure under the Act, which does not fall within the definition referred to in the Bill.[35]

Training and qualifications of 'authorised persons'

2.43 The issue of training staff in immigration detention facilities was emphasised by submitters and witnesses to the inquiry who argued that the training of Serco

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31 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 7) from the committee's 16 April 2015 public hearing, received 30 April 2015.

32 *Committee Hansard*, 16 April 2015, pp 21, 25.

33 Commonwealth Ombudsman, *Submission* 6, p. 1.

34 Ms Philippa de Veau, *Committee Hansard*, 16 April 2015, p. 40.

35 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 26) from the committee's 16 April 2015 public hearing, received 30 April 2015, pp 1-2.

employees needed to be both more comprehensive and broader than that proposed, when the conferral of very broad use of force powers was being contemplated.

2.44 The Public Law & Policy Research Unit at the University of Adelaide contrasted the training required of detention centre staff with that given to police and correctional officers:

> A Certificate Level II in Security Operations is attainable in less than three weeks from Registered Training Organisations across Australia. In contrast, in order to be qualified as a police officer South Australian recruits must undertake 12 months of Police Academy training followed by 16 months as a Probationary Constable; Victorian recruits spend 33 weeks at Victoria Police Academy followed by 83 weeks of further training; the Federal Police Development Program requires 24 weeks of formal live-in training and then 12 months of on-the-job training; and New South Wales Police's Associate Degree in Policing Practice requires between two and three years to complete. Meanwhile, depending on the jurisdiction, correctional services officers require between seven weeks of pre-service training followed by a two-week on-the-job placement to ten weeks of training coupled with 12 months of probationary employment.
>
> At present, the Bill allows individuals who are trained merely to the standard of "crowd controllers and security guards" to be appointed as authorised officers. Given the extent of the discretion and responsibility conferred on authorised officers, the Bill's training and qualifications requirements are inadequate.[36]

2.45 ACRT proposed that the training requirement for authorised officers should be akin to that required in the same jurisdiction for corrective services officers, citing as an example New South Wales, where prison officers were required to complete a nine-week full time training course as well as passing medical and psychological assessments prior to commencing employment.[37] ACRT also emphasised that it was not just training but assessment that was crucial, and urged that measures be put in place to assess and assure the competence and suitability of proposed staff prior to their commencing employment in detention centres.[38]

2.46 Submitters raised the need for training of detention centre staff to have a much broader focus than just security, encompassing understanding of cultural and gender issues and of vulnerable people including the traumatised and mentally ill, with an emphasis on non-violent approaches to conflict resolution.

2.47 The AHRC subsequently provided the committee with an outline of various international guidelines, as well as training standards employed in other jurisdictions, for employees in immigration detention facilities. The AHRC referred to the UN High

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36 Public Law & Policy Research Unit, University of Adelaide, *Submission* 37, p. 6 (footnotes excised).

37 Ms Misha Coleman, *Committee Hansard*, 16 April 2015, p. 25.

38 Ms Misha Coleman, *Committee Hansard*, 16 April 2015, p. 32.

Commissioner for Refugees' 2012 Detention Guidelines, which require at Guideline 8 that:

> (xvi) All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence, the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention.[39]

2.48 At the committee's public hearing there was also discussion about who should deliver the necessary training for authorised officers working in the detention centre environment. Dr Appleby from UNSW proposed that:

> who should be offering the training is not those people who have experience in training persons who are not authorised to use force but those institutions which have a large amount of experience in training officers who have been previously authorised to use force, whether that is the Federal Police or there are other officers such as Customs officers who have been authorised. They may be able to tap into those training institutions.[40]

2.49 The AHRC advised that under the United Kingdom's Detention Centre Operating Standards, detention centre staff receive training relating to the use of force either from the Prison Service for England and Wales, or by private trainers trained and certified by the Prison Service.[41]

2.50 Legal experts pointed out the provision in the Bill that the ministerial determination of the necessary training and qualifications for authorised persons was not to be a legislative instrument. This meant that it could be changed at any time without the process for parliamentary review and potential disallowance applicable to legislative determinations.[42] Some proposed that an avenue for parliamentary scrutiny be provided by making the determination a legislative instrument, while others argued that the training and qualifications should be set out in the legislation itself.

2.51 Queries were also raised about the relationship between the training requirements and the existing contract between the government and Serco for provision of services in immigration detention facilities, which was signed in December 2014. The question was raised as to whether the minister would be able to amend training and qualification requirements as envisaged under the Bill, without renegotiating the government's contract with Serco.

2.52 United Voice offered its view that:

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39 UN High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,* 2012, cited in Australian Human Rights Commission, Answer to question on notice (question 2) from the 16 April 2015 public hearing, received 27 April 2015, p. 2.

40 Dr Gabrielle Appleby, *Committee Hansard,* 16 April 2015, p. 17.

41 Australian Human Rights Commission, Answer to question on notice (question 2) from the 16 April 2015 public hearing, received 27 April 2015, pp 2-3.

42 *Committee Hansard*, 16 April 2015, pp 13-14.

> The current contractual relationship with Serco is fixed for the next 5 years and the only logical conclusion is the Minister will have to make a determination that is consistent with the Commonwealth's current contract with Serco.[43]

2.53 In response to the various issues raised around training and qualifications for authorised officers, the department confirmed that the current contract required that staff working in an immigration detention facility obtain a Certificate II in security operations within the first six months of commencing employment. Detention facility managers must hold a Certificate IV plus at least five years' experience.[44] The department submitted that 'while not formally equivalent to police training, [this] is similar to police and corrections training', except for the absence of training in strikes and use of impact weapons.[45]

2.54 The department further advised that candidates for employment by Serco as detention services officers were presently required to undergo a number of checks and examinations before being offered the role, including a telephone interview; psychometric testing; identity, police and working with children checks; and employment references. Once employed, their Certificate II training comprised five weeks' 'intensive training' which included courses in:

- professional boundaries;
- bullying, harassment and intimidation;
- cultural awareness;
- mental health awareness;
- managing conflict through negotiation;
- working with families and minors;
- the Migration Act and associated legislation; and
- duty of care to persons in immigration detention.

2.55 Personnel also underwent annual refresher training and police checks, as well as regular working with children checks as legally required. Other *ad hoc* 'toolbox talks' were also provided regularly to staff across the detention centre network.[46]

2.56 The department stated that in future 'we expect authorised officers will meet (at least) the same or equivalent qualification',[47] and that training would continue to be

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43 United Voice, *Submission* 137, p. 3.

44 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Submission* 28, p. 7.

45 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Submission* 28, p. 8.

46 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 17) from the committee's 16 April 2015 public hearing, received 30 April 2015, pp 1-2.

developed and delivered in consultation between the department and Serco, which was a registered training provider.[48]

2.57 The department advised that in addition to these minimum standards, authorised officers would be required to attend regular training covering issues such as legal responsibilities, duty of care and human rights, cultural awareness, mental health and managing conflict through negotiation and de-escalation.[49] Mr Outram reassured the committee that the contract between the government and Serco dealt with not only training standards but also 'the duty of care, human rights, cultural awareness and those sorts of things'.[50]

2.58 The department said that Serco's recruitment and training processes 'are kept under constant review to ensure better practice and to minimise the risk of employing staff who would be unsuitable for the role'. The department advised that these processes had improved over time, in consultation with the department, noting for example that Serco was currently introducing an annual refresher training session on mental health for all employees who had contact with detainees.[51]

The departmental complaints mechanism

2.59 A number of submitters commented on the statutory complaints mechanism established under the Bill. ALHR asserted that providing the secretary with a non-reviewable discretion not to investigate a complaint may be contrary to the right to an effective remedy under Article 2 of the International Covenant on Civil and Political Rights (ICCPR).[52] Others argued that it was, at minimum, inappropriate to designate the department to investigate potential abuses by its own contractors, urging that an independent complaints mechanism be provided for instead.

2.60 It was noted, by the department and others, that the statutory mechanism proposed in the Bill was intended to supplement rather than replace existing avenues for complaint, and that its existence did not prevent detainees lodging complaints of abuse with other bodies including the police or the ombudsman.[53] While this was not understood by many submitters, some who recognised the situation nevertheless argued that the departmental mechanism warranted greater independent scrutiny, and

47 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 29) from the committee's 16 April 2015 public hearing, received 30 April 2015.

48 Mr Michael Outram, *Committee Hansard*, 16 April 2015, p. 46.

49 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Submission* 28, p. 8.

50 *Committee Hansard*, 16 April 2015, p. 43.

51 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 17) from the committee's 16 April 2015 public hearing, received 30 April 2015, pp 1-2.

52 Claire Hammerton, *Committee Hansard*, 16 April 2015, p. 11.

53 Explanatory Memorandum, p. 13.

that particular care must be taken to ensure that detainees were aware of the full range of complaints options open to them.

2.61 The Law Council also observed that neither the proposed departmental mechanism nor an investigation by the ombudsman was able to yield any enforceable remedy to the complainant, and recommended that the Bill provide for appropriate access to remedies where complaints were made out.[54]

2.62 The AHRC welcomed the requirement in the Bill that the department ('the Secretary') provide assistance to persons wishing to use the complaints mechanism, noting that this should include 'assistance to know what their rights are', including the availability of other complaints mechanisms. 'Indeed, if that were to be spelled out, we would see that as a significant advance'.[55]

2.63 United Voice, on the other hand, expressed concern that there was no corresponding provision for assistance or support to be provided to the authorised officer subject to a complaint, citing its concerns about cases in which allegedly false complaints had resulted in the termination of staff by Serco and the department, without fair process being observed.[56]

2.64 The department advised the committee that it had well-established mechanisms for recording, tracking and management of complaints, which had been positively assessed by the Commonwealth Ombudsman in 2014, and that the secretary would expect investigations 'to be conducted to the highest administrative standards', most likely through the department's newly-established Detention Assurance Team.[57]

Immunities from court action

2.65 The proposed immunity for Commonwealth officers (including authorised officers), and the Commonwealth itself, from legal action in relation to the exercise of the use of force powers conferred by the Bill, was of concern to submitters.

2.66 In this part of the Bill, the subjective test again gave rise to uncertainty and concern. Legal experts giving evidence to the committee assessed that the provision may be read as providing immunity for any action conducted in good faith, even one outside the scope of the power conferred by the Bill.[58]

2.67 The Senate Scrutiny of Bills committee had also observed that '[b]ad faith, so considered, is a very difficult allegation to prove. It is doubtful that showing that use

54 Law Council of Australia, *Submission* 30, p. 20.

55 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 8.

56 United Voice, *Submission* 137, pp 3-4 and attachments.

57 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, *Submission* 28, pp 10-11.

58 See *Committee Hansard*, 16 April 2015, p. 18.

of force was disproportionate (even grossly disproportionate) would amount to bad faith'.[59]

2.68 In response, the department sought to clarify that the proposed test was composed of two parts, in which it must be proven not only that the action was done in good faith, but that the action was objectively within the scope of the power conferred on the authorised officer by section 197BA. The department stated that:

> The test in proposed section 197BF does not contain a 'bad faith' element. An absence of good faith is not the same as bad faith… 'Good faith requires more than the absence of bad faith. It requires a conscientious approach to the exercise of power' (see Applicant WAFV of 2002 v Refugee Review Tribunal [2003] FCA 16 at para 52).
>
> The term 'good faith' is not defined in the Good Order Bill. As such 'good faith' will be given its ordinary meaning. The Macquarie dictionary defines 'good faith' as honesty of purpose or sincerity of declaration…
>
> The concept of good faith has been the subject of some case law in Australia…
>
> On this basis, for actions of an authorised officer to be exercised in good faith, it does not appear that it will be merely enough for an authorised officer to use reasonable force honestly (subjective test) it must also be exercised with due diligence (objective test).[60]

2.69 The department further advised that:

> Courts will have the jurisdiction to consider the threshold issues of:
>
> • if the use of reasonable force was an exercise of power under section 197BA; and
>
> • if the power was exercised in good faith.
>
> If the use of reasonable force was not an exercise of the power under proposed section 197BA then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. That is to say, if the force used was 'excessive' in a criminal sense, unreasonable force or the authorised officer did not reasonably belief *[sic]* the use of the force was necessary then the conduct would not be captured by the bar in proposed section 197BF.[61]

2.70 Another question which exercised many of the legal and human rights submitters to the inquiry was that of the scope of the proposed immunity, bearing in

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59 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.3 of 2015*, 18 March 2015, p. 27.

60 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 11) from the committee's 16 April 2015 public hearing, received 30 April 2015.

61 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 8) from the committee's 16 April 2015 public hearing, received 30 April 2015, p. 1.

mind that the actions in contemplation under the Bill related to the use of force against detainees.

2.71 Mr Matthew Dunn of the LCA advised the committee that it was not uncommon in administrative legislation to provide public servants or the Commonwealth with indemnity for any negligent actions done in the exercise of the relevant administrative power, provided the action was done in good faith. Mr Dunn observed, however, that '[t]hat is a very different context, of course, to a tortious assault'.[62]

2.72 Further to this, the LCA also recommended that the law needed to specify that the bar on proceedings only applied to civil and not criminal proceedings, as this was not clear in the provision, and an immunity from prosecution for criminal offences 'would be a highly anomalous outcome, contrary to fundamental rule of law principles'.[63]

2.73 The department confirmed at the committee's public hearing and in response to written questions, that the bar on proceedings in the Bill would not provide immunity from criminal charges, because these would be by definition outside the scope of the power conferred by the Bill.

> Any person, including police officers, who commits a criminal offence with use of force is subject to criminal sanction. Therefore, a person who unnecessarily, unreasonably or disproportionally uses force under the Good Order Bill that leads to serious injury of another person may be subject to criminal sanctions.[64]

Immunity of the Commonwealth

2.74 Beyond the bar on proceedings against individual officers, many submitters queried the extension of immunity to the Commonwealth itself. The PJCHR had raised this issue in its report on the Bill, saying '[i]t is unclear to the committee why it is necessary to bar proceedings against the Commonwealth as a whole if the intention of the provision is to provide personal immunity to the authorised officer'.[65]

2.75 Dr Appleby from UNSW advised that '[o]ther statutes conferring power to use reasonable force provide for personal protections or indemnities for the officers but not the complete immunity we see in this bill'.[66] The AHRC argued that the

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62 Mr Matthew Dunn, *Committee Hansard*, 16 April 2015, p. 17.

63 Law Council of Australia, *Submission* 30, pp 21-22.

64 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 11) from the committee's 16 April 2015 public hearing, received 30 April 2015.

65 Parliamentary Joint Committee on Human Rights, *Twentieth report of the 44th Parliament*, 18 March 2015, p. 30.

66 Dr Gabrielle Appleby, *Committee Hansard*, 16 April 2015, p.12.

Commonwealth 'should remain liable on the usual principles of tort law where excessive force is employed'.[67]

2.76 When queried on the rationale for immunity of the Commonwealth, the department advised that the relevant provisions in the Bill were modelled on existing subsection 245F(9B) of the Migration Act, which provides a similarly-framed immunity in relation to the powers of officers to move persons on and off ships or aircraft, and sections 49AA and 49AB, which establish bars on legal proceedings in relation to unauthorised maritime arrivals and transitory persons.[68]

2.77 The department added that:

> Proposed new section 197BF is only a partial bar. The Commonwealth will always be liable for review by the High Court under section 75(v) of the Constitution. Similarly it is always the case that Federal, State or Territory police may institute a prosecution, for example for assault, notwithstanding this provision – it would be up to the Court to determine whether this provision has any application in the particular circumstances.
>
> Proposed section 197BF of the Migration Act contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the powers are exercised under section 197BA and exercised in good faith.[69]

High Court action

2.78 The retention of recourse to the High Court under s75 of the Constitution was regarded by submitters to constitute only a limited mitigation of the above concerns. It was noted that the remedies under s75(v) were limited to mandamus, prohibition or injunction, thus not providing any ability for the court to impose any penalty upon an offender, or order compensation for a victim, even if a complaint were upheld.

2.79 Moreover, Dr Appleby from UNSW advised the committee that the High Court had not yet ruled on the question of whether the guarantee of judicial review under s75(v) of the constitution extended to contractors. Thus it could not be assumed that the use of force by authorised officers under the Bill would be open to High Court review.[70]

2.80 The department advised in relation to the jurisdiction of the High Court that:

> Section 75(v) of the Constitution provides for remedy in mandamus, prohibition or injunction. This is increased by section 75(iii) which

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67 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 2.

68 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 8) from the committee's 16 April 2015 public hearing, received 30 April 2015, p. 1.

69 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 8) from the committee's 16 April 2015 public hearing, received 30 April 2015, p. 1.

70 Dr Gabrielle Appleby, *Committee Hansard*, 16 April 2015, p.12.

> provides for the original jurisdiction of the High Court in all matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party'. Section 75(iii) does not impose limits on the remedies available to the High Court.[71]

2.81 The department also noted that the High Court held power under the *Judiciary Act 1903* to remit Commonwealth criminal matters to a state Supreme Court.[72]

Dealing with 'high risk' detainees

2.82 The government's analysis of an environment of increased violence and threat in immigration detention facilities, principally due to an increased proportion of 'high-risk' detainees, was echoed by the evidence of submitters and witnesses who worked in detention facilities or with asylum seekers and refugees.

2.83 The Refugee Rights Action Network (RRAN) told the committee about its observation of the changing environment in detention centres due to the increased proportion of detainees known as '501s': that is, persons detained under s501 of the Migration Act due to the refusal or cancellation of their visas on character grounds.[73]

2.84 Citing its experience of working with detainees in the Yongah Hill detention centre, the Coalition for Asylum Seekers, Refugees and Detainees (CARAD) also expressed strong concern about the changing culture and conditions in the centre caused by the increasing proportion of persons detained under section 501 and their integration with the asylum seeker population.[74]

2.85 These and other submitters saw the separation of high-risk offenders and those with criminal records from asylum seekers and other detainees as the key to resolving this problem, rather than increased powers to use force against detainees in a mixed environment. The ASRC regarded mixing the two groups of detainees as 'inappropriate and unsafe'.[75]

2.86 The department advised that while its overall objective was to create a more compliant environment in detention facilities for all detainees, the department and Serco did undertake risk assessments of all incoming detainees and seek to ensure that dangerous detainees were not placed with persons seen to be low risk.[76]

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71 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 10) from the committee's 16 April 2015 public hearing, received 30 April 2015.

72 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 10) from the committee's 16 April 2015 public hearing, received 30 April 2015.

73 Ms Victoria Martin-Iverson, *Committee Hansard*, 16 April 2015, p. 22.

74 Coalition for Asylum Seekers, Refugees and Detainees Inc, *Submission* 7, p. 3.

75 Asylum Seeker Resource Centre, *Submission* 26, p. 6.

76 *Committee Hansard*, 16 April 2015, pp 37-38.

Children and vulnerable detainees

2.87 A number of submitters expressed particular concern about the impact the Bill may have on vulnerable people in detention, such as children.

2.88 UNICEF Australia expressed its concern that the Bill did not specifically reference children and 'does not provide guidance or allow for consideration of the unique vulnerability of children in places of immigration detention'. UNICEF indicated that appropriate measures in the Bill to protect children should include safeguards against unnecessary, disproportionate or unreasonable use of force, requirements for skilling security personnel specifically in relation to children, and an adequate complaints and review mechanism.[77] UNICEF offered a number of specific recommendations in that regard.

2.89 The AHRC referred to its own recent report on children in detention, stating that:

> Children are, of course, especially vulnerable. The commission's report on the impact of prolonged detention on children documents the use of force and, indeed, provides some rather graphic pictures of where that force has been used. It is important that all alternatives to the use of force, including negotiation and de-escalation techniques, have been attempted before force is considered.[78]

2.90 The Public Law & Policy Research Unit at the University of Adelaide recommended that the Bill adopt a model similar to Western Australia's *Young Offenders Regulations* 1995, and similar Queensland regulations, which set 'strict rules, obligations and reporting requirements' in relation to the use of force against juvenile detainees.[79]

2.91 Several submissions went further, proposing that the government consider the implementation of similar legislative and policy reforms to those adopted in the United Kingdom in 2014, to end the practice of child immigration detention.[80]

2.92 Reflecting on the governance arrangements to be put in place by the Australian Border Force for the supervision of immigration detention facilities, the department indicated that '[w]e could consider implementing additional safeguards in relation to vulnerable people including children'.[81]

2.93 During the course of the inquiry attention was also drawn to the government's current efforts to remove children from immigration detention to the greatest extent possible. While the number of children in immigration detention peaked at almost 2000 in mid-2013 and remained over 1000 at the end of that year, the number had

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77 UNICEF Australia, *Submission* 97, p. 4.

78 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 2.

79 Public Law and Policy Research Unit, University of Adelaide, *Submission* 37, p. 5.

80 See http://www.parliament.uk/business/publications/research/briefing-papers/SN05591/ending-child-immigration-detention

81 Mr Michael Outram, *Committee Hansard*, 16 April 2015, p. 36.

been steadily reduced throughout 2014.[82] The department advised the committee that as of 16 April 2015 there remained 115 illegal maritime arrival (IMA) children and 10 non-IMA children in immigration detention in Australia.[83]

Issues outside the scope of the Bill

2.94 The committee's inquiry gave rise to a large number of submissions protesting the government's present immigration and asylum seeker policies more generally, and particularly rejecting the detention of asylum seekers and refugees. While the committee regarded these issues as beyond the scope of the Bill, some refugee advocates and their supporters disagreed, arguing that placing asylum seekers in the community rather than immigration detention, improving conditions in detention centres, as well as increasing information and reducing waiting times related to application processes, would all be more effective ways to manage unrest in immigration detention facilities than increased use of force powers.

82 Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 December 2014, p. 8.

83 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 25) from the committee's 16 April 2015 public hearing, received 30 April 2015.

Chapter 3

Committee view and recommendations

3.1 The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 has been drafted in response to real and pressing issues facing service providers in Australia's immigration detention facilities. The need for persons working in detention centres to have greater clarity about their powers to manage disturbances and maintain good order and safety has been noted since at least 2011. The more recent change in the demographic profile of the detainee population, with increasing risk of disturbances and violent incidents, makes the case for this legislation now a matter of some urgency.

3.2 The committee is grateful for the large number of submissions that it received to the inquiry, many of them thoughtful and detailed. It has considered the various concerns raised, most of which are discussed in chapter 2.

3.3 The committee notes the government's mandate to deliver border protection policy settings that reflect the best interests of the Australian people, and that the good order and operational efficiency of detention facilities is manifestly essential to this goal. As the department reiterated during the inquiry, '[w]hat we are trying to achieve is the maintenance of standards of safety and security within detention centres that people are entitled to and enjoy within the broader community'.[1]

3.4 The committee does not regard it as sufficient to leave service provider staff in detention facilities to manage disturbances and violence without any protection beyond the limited defensive powers provided under the common law. The Bill establishes a clear authority, drawing upon comparative legislation and tailored to the particular circumstances of immigration detention, for service providers in detention facilities to exercise the powers necessary to protect themselves and others, and to maintain an environment of security and safety for all who reside and work there.

3.5 The committee believes that this legislation is necessary and appropriate, and should proceed.

Recommendation 1

3.6 The committee recommends, subject to Recommendations 2, 3 and 4, that the Bill be passed.

3.7 The committee is cognisant of the questions raised during the inquiry around the tests both for the exercise of the use of force power under section 197BA, and the application of the bar on proceedings proposed in section 197BF. The committee regards the existence of objective tests for the reasonableness of the use of force as imperative to ensuring that the Bill is proportionate to meet its objectives, and welcomes the department's clear and repeated assurance that the Bill does not make the threshold for acceptable use of force a purely subjective matter.

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1 Mr Michael Outram, *Committee Hansard*, 16 April 2015, p. 35.

3.8 The committee notes some genuine concerns that the use of force powers clarified by the Bill should remain consistent with Australia's customary international obligations, and should operate within a framework of transparency and accountability such that the Australian public would reasonably expect.

3.9 The committee urges the government to ask the department to elaborate on its evidence, provided to the committee's public hearing on 16 April 2015, that the department could consider implementing safeguards to specifically address the circumstances of vulnerable persons and children.

Recommendation 2

3.10 The committee recommends that the Commonwealth Ombudsman's suggestion that the Bill's operation should extend to cover 'situations where detainees are in transit between facilities and in other locations' be given further serious consideration by the government.

Recommendation 3

3.11 The committee recommends that the Explanatory Memorandum clarify the extent of the use of force under section 197BA:

- **that reasonable force must only be used as a measure of last resort. Conflict resolution (negotiation and de-escalation) must be considered and used, wherever practicable, before force is employed;**
- **that reasonable force must be used for the shortest amount of time possible;**
- **that reasonable force must not include cruel, inhuman or degrading treatment; and**
- **that force must not be used for the purposes of punishment.**

3.12 The committee was concerned to satisfy itself that the training and qualifications required of authorised officers vested with this power are adequate to ensure its responsible use. On this point the committee welcomes the department's detailed advice and assurances as to the training that would be provided to all service provider staff, and the department's commitment to monitor the standards applied. The committee also welcomes the protections provided to detention centre employees and contractors under the scheme contemplated by the Bill.

3.13 The committee understands the rationale for providing a discretion to the minister to review and amend the training and qualification requirements from time to time, bearing in mind the importance of maintaining appropriate standards and responding to changing needs. Nevertheless, as proposed during the inquiry, it would give comfort to both the committee and the broader community if those standards were publicly reported and accountable. A simple mechanism to achieve this would be to classify ministerial determinations in this area as legislative instruments, thereby ensuring publication and parliamentary scrutiny of any proposed changes.

Recommendation 4

3.14 The committee recommends that the government remove the word 'not' from subsection 197BA(8) of the Bill, in order to provide that a ministerial determination made under subsection (7) is a legislative instrument.

Senator the Hon Ian Macdonald
Chair

Labor Senators' dissenting report

Key issues

1.1 Labor Senators oppose the passage of the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) in its current form.

1.2 The Bill is its current form creates ambiguity in respect of what constitutes 'reasonableness' and fails to provide, or to increase, clarity for officers at detention centres.

1.3 The Bill in its current form contains a bar to legal proceedings that is unwarranted and inappropriate.

1.4 Labor Senators also hold concerns as to the training provided to and required of detention centre officers in relation to the use of force, and far below the standard expected by and of prison officers and police officers.

Legislating the use of force

1.5 The statement of compatibility references The Hawke-Williams Report, cited in support of the need to allow an authorised officer to use reasonable force and for that authority to be clear and objective. This report was an Independent Review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre. However the Parliamentary Joint Committee on Human Rights in assessing the Bill stated:

> Further, the committee notes that the Hawke-Williams Report, which is cited in support of the stated objective of the measure, does not contain any reference to the inadequacy of the common law regarding the use of force and did not recommend creating a statutory use of force power for employees of an IDSP. Rather, it focused on ensuring appropriate arrangements to clarify the respective roles and responsibilities of managing security between the department, the IDSP and the police; and recommended a protocol be developed to support the hand-over of incidents to the police and consideration be given whether the contract with the IDSP needed to be amended. The committee therefore does not consider that the report provides evidence in support of the measure as addressing a substantial or pressing concern.[1]

1.6 Labor Senators believe the Bill should aim to provide clarity as to the use of force for authorised officers, rather than blanket authorisation for the use of force.

1.7 The Australian Human Rights Commission makes nine recommendations which it believes are necessary to provide clearly defined limits on the use of force, and to ensure that the use of force is based on objective criteria of necessity and

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1 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, *Twentieth report of the 44th Parliament*, 18 March 2015, p. 18.

reasonableness. Labor Senators assert that such defined limits should be contained in the *Migration Act 1958* (the Act) to achieve an objective test of necessity and reasonableness currently lacking.

1.8 Similarly, Labor Senators recognise the submission of the Law Council of Australia, who also saw merit in codifying the use of force by immigration officers and Immigration Detention Service Providers (IDSPs), but considered:

> … that the Bill's proposed amendments depart from the accepted standards of protection for asylum seekers in international and domestic law, key rule of law principles and procedural fairness guarantees.[2]

1.9 The Law Council also suggests a number of amendments to the Bill, similar to the Human Rights Commission, regarding an objective test, training, safeguards, and the definition of reasonable force which, if legislated, would improve objectivity around the use of force. The Law Council also further outlined its recommendations with regard to this matter in its answer to a question on notice, as below:

> The use of the additional "reasonable" in subsection 197BA(1) and the form of the drafting creates ambiguity as to the interpretation of the provision, which can only be clarified by further interpretation of the Explanatory Memorandum. Additionally, it could be confusing for immigration detention service providers (IDSPs) as to how it should be interpreted in an immigration detention facility. A more certain approach would be to adopt an objective test as utilised in a number of corrective services Acts and Regulations listed below…
>
> Subsection 9CB(1) Corrections Act 1986 (Vic)
>
> "A person authorised under section 9A(1A) or 9A(1B) to exercise a function or power may, where necessary, use reasonable force to compel a person who is deemed under Part 1A or section 9CAA to be in the custody of the Chief Commissioner of Police to obey an order given by the first-mentioned person in the exercise of that function or power."
>
> Subsection 23(2) Corrections Act 1986 (Vic)
>
> "A prison officer may where necessary use reasonable force to compel a prisoner to obey an order given by the prison officer or by an officer under this section."
>
> Subsection 55E(1) Corrections Act 1986 (Vic)
>
> "An escort officer may, where necessary, use reasonable force to compel a prisoner to obey an order given by the escort officer in the exercise of a function or power."
>
> Section 86 Correctional Services Act 1982 (SA)
>
> "Subject to this Act, an officer or employee of the Department or a police officer employed in a correctional institution may, for the purposes of exercising powers or discharging duties under this Act, use such force

2 Law Council of Australia, *Submission* 30, p. 3.

> against any person as is reasonably necessary in the circumstances of the particular case."
>
> Clause 131(1) Crimes (Administration of Sentences) Regulation 2014 (NSW)
>
> "In dealing with an inmate, a correctional officer may use no more force than is reasonably necessary in the circumstances, and the infliction of injury on the inmate is to be avoided if at all possible."[3]

1.10 Labor Senators as such recommend that the Senate consider the amendments to the Bill outlined in the submissions from the Human Rights Commission and the Law Council to achieve an objective test on the use of force by immigration officers and Immigration Detention Service Providers.

Bar to legal proceedings

1.11 The Bill contains, in proposed section 197BF, a bar on legal proceedings.

Concern about the absence of a clear rationale

1.12 The Bills Digest states, in relation to proposed section 197BF:

> Though the Minister's second reading speech does not identify a clear rationale for the immunity, the Explanatory Memorandum clarifies that 'without at least some degree of this kind of protection, employees of the immigration detention services provider may be reluctant to use reasonable force to protect a person or to contain a disturbance in an immigration detention facility'. No further information is provided in the Bill's accompanying materials to substantiate or elaborate upon this claim.[4]

1.13 Labor Senators continue to hold significant reservations about the lack of a clear rationale for the bar on proceedings.

1.14 Though there are other provisions of state and federal legislation that authorise the use of force (i.e. provisions that are similar in effect to proposed section 197BA), Labor Senators are aware of very few other provisions similar in form or effect to proposed section 197BF.[5]

1.15 Without limiting the preceding comment, it is noted that Labor Senators are unaware of any examples of provisions of state or territory legislation which allow excessive force to be used without sanction provided that bad faith cannot be used against that user of excess force.

1.16 In this respect, Associate Professor Gabrielle Appleby told the committee:

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3 Law Council of Australia, answer to question on notice following the committee's public hearing of 16 April 2015, received 4 May 2015, pp 2-3.

4 Parliamentary Library, 'Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015', *Bills Digest* No.86 2014-15, 23 March 2015, p. 14.

5 Section 75 Of The *Maritime Powers Act 2013* (Cth) is a similar provision to proposed section 197BF, as was the now repealed section 185(3AB) of the *Customs Act 1901*, but these provisions are (and were) exceptional.

> …there is no justification for such an unusual protection provision in the context of immigration detention. Other statutes conferring power to use reasonable force provide for personal protections or indemnities for the officers but not the complete immunity we see in this bill.[6]

Concern about how the bar would work

1.17 Repealed subsection 185(3AB) of the *Customs Act 1901* prevented proceedings from being instituted or continued where the person who had taken the action 'acted in good faith and used no more force than was authorised in subsection (3B)'.

1.18 That (now repealed) provision seems to have had the effect that to rely on the provision to put an end to legal proceedings, the person who had exercised the force had to meet both requirements:

- the requirement of good faith; **and**
- the requirement that the force was no more than was authorised under the provision conferring the power to use force.

1.19 Yet proposed subsection 197BF(1) provides:

> (1) No proceedings may be instituted or continued in any court against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.

1.20 It is unclear why proposed subsection 197BF(1), unlike the analogous (albeit now repealed) provision referred to above, does not explicitly require that for a person to rely on section 197BF, they must have used no more force than was authorised under new section 197BA.

1.21 The Australian Human Rights Commission submission made this point at paragraphs 116 and 117. The Commission's submission stated:

> 116. In the Commission's view, s 197BF(1) does not currently make it sufficiently clear that there are two criteria to be satisfied in order for the immunity to be obtained:
>
> a. the use of force by the authorised officer must not exceed what is authorised by s 197BA; and
>
> b. the power to use of force must be exercised in good faith.
>
> 117. In order to ensure that the first of those criteria is made explicit, the Commission recommends an amendment to s 197BF.[7]

1.22 Associate Professor Appleby, and the Hon Mr Stephen Charles QC, also raised concerns about the possible interpretation of section 197BF:

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6 Dr Gabrielle Appleby, Associate Professor, Gilbert & Tobin Centre of Public Law, UNSW, *Committee Hansard*, 16 April 2015, p. 12. Emphasis added.

7 Australian Human Rights Commission, *Submission* 25, p. 26.

> **Senator LINES**: Do you think—again in relation to 197BF—that, in order to rely on the proposed section 197BF, a person would have to prove that they used no more force than was authorised under proposed section 197BA?
>
> **Dr Appleby**: I think this is one of the provisions where there is not clarity. I think there are two ways of interpreting the provision. One is that the force has to be authorised otherwise within the bill, and another interpretation is: even if the force exceeds that which is authorised, provided that it was used in good faith. Certainly, when I initially read the provision, my interpretation was that it was the latter—that, provided that good faith could be shown, and it is very difficult to show bad faith, then the bar on proceedings would apply. As you have heard today, that is a cause for serious concern.
>
> **Senator LINES**: And that is your view, Mr Charles?
>
> **Mr Charles**: Yes, it is. I agree entirely…[8]

1.23 Professor Triggs of the Human Rights Commission added, in her oral evidence:

> …Australia is of course bound by the International Covenant on Civil and Political Rights, which requires a remedy for those whose rights have been violated. If the use of force is excessive, the person responsible should be accountable before the courts. The bill's proposed section 197BF gives immunity to contract guards, even if the force used is excessive, so long as that force is used in good faith. I think we all understand that it is almost impossible to demonstrate bad faith.
>
> I strongly urge that this proposal be revisited to ensure that immunity from prosecution be available only when the force used is within the statutory power and is not excessive based on an objective, not a hybrid or subjective, standard…[9]

1.24 Given the foregoing, this provision is of significant concern to Labor Senators.

Concern about the proposed separate immunity for the Commonwealth

1.25 As the Human Rights Commission states in its submission:

> Further, there does not appear to be any justification for providing a separate immunity to the Commonwealth. The justification given by the Government for providing an immunity to authorised officers is to remove any reluctance they may have to using reasonable force to the extent they are authorised to do so. There does not appear to be any justification for providing an immunity that extends beyond the authorised officers who are exercising the relevant power.[10]

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8 *Committee Hansard*, 16 April 2015, p. 18.

9 Professor Gillian Triggs, *Committee Hansard*, 16 April 2015, p. 2.

10 Australian Human Rights Commission, *Submission* 25, p. 26.

1.26 Again, this issue is of significant concern for Labor Senators.

Existing claims

1.27 Labor Senators are concerned that the proposed section 197BF, in its current form, would operate retrospectively, in that it would create a bar to existing claims.

1.28 Labor Senators do not believe that it is appropriate for this Bill, if passed, to deprive people of existing legal rights to make claims.

Training for authorised officers

1.29 A number of witnesses raised the issue of training for 'authorised officers'. The Bill inserts a provision that prevents an officer from being confirmed as an authorised officer unless the officer satisfies the training and qualification requirements determined by the minister in writing. The Bill also requires the minister to determine those qualifications and that training in writing.

1.30 In its evidence the Department of Immigration and Border Protection was not able to clarify the exact nature of the training, and officers of the department seemed to be at odds with what was currently required, what would be required into the future and how or who would deliver additional training, whether or not it would be competency based and how the curriculum for this additional training would be written and developed.[11]

1.31 Current officers are required to undertake a Certificate II in Security Operations. This certificate is required for security officers who undertake roles in the community, mainly around securing premises.

1.32 Labor Senators believe that this certificate represents inadequate training under the current arrangements and certainly inadequate for officers who under this Bill will be 'authorised to use force'.

1.33 When questioned, the department was unable to clearly state how the minister's requirements would be conveyed to a private contractor managing detention centres. The department suggested it may form part of the contractual arrangements and conceded that this contract would be unlikely to be available for public scrutiny because of 'commercial in confidence' arrangements.

> **Senator LINES:** What was not clear this morning was that sometimes these matters are in regulation; sometimes they are disallowable instruments. It seems that what the explanatory memorandum is saying is that it is neither of those things. So will it be a letter or will it be part of the contractual arrangements with a contractor? My first question is: where will it be?
>
> **Ms de Veau:** For the minister to make a determination, he will need to make a decision. That decision will need to be recorded. For it to have any impact and effectiveness it will need to be communicated.[12]

11 *Committee Hansard*, 16 April 2015, pp 45-46.

12 *Committee Hansard*, 16 April 2015, pp 42-43.

1.34 In further evidence Mr Outram indicated to the inquiry that the training required by the minister would be outlined in the contract between the government and the provider.

> **Mr Outram:** It would be dealt with through the contract.
>
> **Senator LINES:** So it would be put into the contract?
>
> **Mr Outram:** Absolutely.[13]

1.35 In answers to questions on notice, the department has stated that the contract will not be publicly available.[14] This means the training component associated with the use of force will not be subject to public scrutiny nor is there any transparency or parliamentary oversight.

1.36 In relation to the department's submission as to whether or not the training outlined in the submission was about current or future training, in evidence before the committee the department indicated it was both, and yet in questions on notice it then informed the inquiry that that was a typographical error. This of course changes the whole intent of the department's submission in relation to training and so we now have no evidence before the inquiry on what will be required and how it will be delivered.

> The third paragraph under section 2.6 'Training and Qualifications' of the Department's submission to the Committee contains a typographical error. The word 'authorised' should be replaced with 'current' so that the paragraph reads as follows:
>
> > 'For current officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent…'[15]

1.37 The committee majority raises concerns in the report with regard to officer training, but asserts that the department clarified this issue in its evidence. This is simply not the case.

1.38 The department attempted to clarify the use of force, the objective test and used the example of WA prison officers and Victoria Police:

> Just two matters if I might. There was some useful dialogue this morning around the test that has been articulated for the use of force in 197BA(1). It is important to understand that it is not entirely subjective and, like many of these tests—and they vary from act to act—they generally balance an objective component and a subjective component. So the drafting that has found its way into 197BA(1) has the 'reasonable force' up-front. That is an

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13 *Committee Hansard*, 16 April 2015, p. 43.

14 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice no. 27 following the committee's public hearing of 16 April 2015, received 30 April 2015.

15 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice no. 29 following the committee's public hearing of 16 April 2015, received 30 April 2015, p. 1.

> objective standard. That has to then be matched with a belief by the officer—it has to be a reasonable belief—as to necessity. So a belief that is reasonable is also an objective and subjective test. There were some comments made this morning that that was out of kilter with all of the other comparable legislation. Can I just indicate that there are actually a variety of ways that that has been expressed, particularly as to whether the necessary component is front-ended so that it is only objective. While some examples of that form of drafting were given, there are two that are consistent with the way that we have drafted it. The Western Australian Prisons Act provides for such force as is believed on reasonable grounds to be necessary. That is fairly consistent with what we have drafted. Equally, the Victorian Police use such force that is not disproportionate as believed on reasonable grounds to be necessary. So, again, that is a fairly similar form of drafting.[16]

1.39 Labor Senators also expressed dire concerns over the lack of appropriate training for officers who would possess these powers should the Bill be passed. The matrix below sets out the training requirements for WA Prison Officers and Victoria Police against the future training requirements for officers authorised to use force in detention centres:

Position	**Prison Officer (WA)**	**Police Officer (Vic)**	**Detention Centre Security - 1**[17]	**Detention Centre Security - 2**[18]
Qualification	Certificate III in Correctional Practice (Custodial)	Diploma of Public Safety	Certificate II in Security Operations	Certificate II in Security Operations
Course Type	Department's Academy in Bentley	Victoria Police Academy	Perth Security Training Academy	Varies
Intensive Training Period	14 Weeks full time	33 weeks full time	12 days	2 days
Ongoing On the Job Training/Probationary	6 month on-the-job probationary period	83 weeks	Unknown	Unknown
Total Training Period	9 months	2 years, 3 months	Unknown	Unknown

1.40 As evidenced by the table above, a Certificate II in security operations able to be obtained over a weekend is vastly inferior to what is required to be a WA Prison Officer or a Victoria Police Officer.

16 Ms Philippa de Veau, *Committee Hansard*, 16 April 2015, p. 50.

17 http://perthsecuritytraining.com.au/

18 http://www.prosystem.com.au/certificate-ii-in-security-operations-cpp20212---partial-cpp30411.html

Recommendation 1

1.41 Whilst Labor Senators note that the committee majority recommends that the Explanatory Memorandum clarify the extent of the use of force under section 197BA, we believe that the concerns of the committee must be addressed in legislation.

1.42 As such, Labor Senators recommend that this Bill not be passed in its current form and recommend that amendments in line with those outlined by the Australian Human Rights Commission and the Law Council of Australia be proposed as part of an amended Bill, with particular focus on achieving an objective test on the use of force by immigration officers and Immigration Detention Service Providers.

Senator Catryna Bilyk
Senator for Tasmania

Senator Sue Lines
Senator for Western Australia

Dissenting report by the Australian Greens

Introduction

1.1 The Senate inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 revealed a deluge of concerns from the community, human rights advocates and legal experts. This Bill confers excessive immunities and powers upon authorised officers without adequate safeguards. The government has not been able to ensure asylum seekers are treated appropriately inside detention centres as matters stand; since only 23 February 2015 there have been 15 sexual assaults in the detention network, two involving children and 259 assaults of a non-sexual nature, 11 involving children. There have also been numerous well-publicised incidents of guards beating asylum seekers in Manus Island and Nauru.

1.2 We also know that there have been at least a dozen requests by the media for access to detention centres in the current financial year and that all 12 of these requests have been refused by the department. In addition, the *Border Force Act 2015* now means that any staff who dare speak out over abuse can be jailed for two years. Detention centre staff are also subject to strict confidentiality clauses in their contracts. Given this extreme level of secrecy, there is no way we can trust that those employed will be able to use their increased powers responsibly.

1.3 The Australian Greens acknowledge the great concern raised by members of the community and experts in the sector, and for the reasons outlined below, do not support the passage of this Bill.

Excessive and unjustified powers

1.4 The amendments proposed by this Bill state in subsections 197BA(1) and (2) that force may be used whenever officers believe the force is 'reasonably necessary'. This is a low standard and relies upon an authorised officer's subjective belief. Prison guards and Australian Federal Police are subject to a stricter objective standard.

1.5 The breadth of circumstances in which force may be exercised is also too wide. Using force to 'maintain good order' may be interpreted generously, particularly in combination with the proposed subjective test. These measures also remove the right to peaceful protest from detainees because force may be used to move them within the detention centre.

1.6 Further, the proposed authorised level of force breaches the principles on legislating coercive powers for non-police officers developed by the Attorney-General's Department in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

No safeguards restricting use of force

1.7 This Bill authorises force without any safeguards such as employing the use of force only as a last resort or avoiding injury wherever possible. While departmental policy manuals may include some such safeguards, they are too important not to be enshrined in statute.

1.8 Of particular concern is how these changes will affect vulnerable groups, including women, children and people with a disability. This Bill does not contain any protections or exceptions for interactions with vulnerable individuals.

No limit to the extent of force

1.9 Under this Bill there is no limit to the extent of force permissible. As a consequence, these amendments sanction lethal force, if exercised in 'good faith'.

1.10 Additionally, in its submission the Refugee Advice and Casework Service noted its concern that the Bill 'does not limit the introduction of weapons and may allow their use if deemed necessary to maintain good behaviour'.[1]

1.11 The use of weapons and lethal force should be explicitly ruled out by the legislation.

Mixing criminals with asylum seekers

1.12 The government has acknowledged that the rise in the number of disturbances in immigration detention facilities is due to the increased number of criminals housed in the centres. This is a problem of the government's own making and asylum seekers should not be subjected to measures aimed at criminals convicted of serious offences.

1.13 However, the majority of people who will be subject to these changes are asylum seekers, the bulk of whom are subsequently found to be genuine refugees. Detention with criminals is cruel and unfair for asylum seekers, and in clear contravention of UNHCR guidelines. The simplest, most humane and most effective way to maintain order in detention centres is to remove convicted criminals from them. Alternatively, the Government could cease subjecting asylum seekers to prolonged, indefinite detention.

Insufficient training

1.14 The proposed amendments in subsections 197BA(6) and (7) permit the minister to determine the level of qualifications needed by officers to use force. Such determinations would not be legislative instruments and therefore would not be disallowable by Parliament.[2]

1.15 The Explanatory Memorandum indicates that the government intends for the required qualification to be Certificate Level II in Security Operations. This qualification is the bare minimum required of doormen or bouncers in NSW, Victoria and WA. In Queensland, this qualification would not be sufficient for a bouncer.

1.16 Further, the Certificate II takes a mere 16 days to complete. In contrast, prison guards receive a minimum of 10-14 weeks of instruction, followed by a further six months of training on the job. The training requirements for police officers are even more stringent. Yet, under this Bill the government is effectively sanctioning officers

1 Refugee Advice and Casework Service, *Submission* 20, p. 5.

2 Subsection 197BA(8).

with less training to use any amount of force they see fit in response to virtually any situation they deem warranted, without imposing legislative safeguards.

1.17 In light of some attitudes expressed in social media by guards employed by DIBP contractors, this insufficient level of training is particularly concerning. Further, immigration detention facility officers have a history of employing excessive force. For example, the Asylum Seeker Resource Centre records numerous serious incidents when officers have abused their existing power and employed excessive force.[3]

Insufficient oversight

1.18 The proposed complaints mechanisms in sections 197BB-197BE are grossly inadequate given this Bill will permit officers to exercise power disproportionate to their level of training. These sections, whereby complaints can be made to the Secretary, who has discretion as to whether or not to investigate, also do not oblige the Secretary to act following any investigations conducted.

1.19 Clearly, there is a lack of independence and no clear path requiring the implementation of changes identified on review. While complaints may still be made to the Ombudsman or the Australian Human Rights Commission, these bodies only have recommendatory powers and possess limited resources.

1.20 Further, access to these bodies is limited for asylum seekers, particularly given the recent removal of the Immigration Advice and Application Assistance Scheme (IAAAS) and the new regime limiting access and visiting protocols for advocates in Maribyrnong Detention Centre. The Bill mandates that the Secretary provide assistance to complainants under the oversight procedures within this Bill, but no such assistance is required for external bodies' complaint mechanisms.

1.21 An independent and stand-alone body with the resources to investigate allegations of excessive use of force and the power to discipline officers and direct changes in the protocols should be established.

Excessive and unjustified immunities

1.22 The amendments proposed by this Bill in section 197BF confer complete immunity from legal action against both the Commonwealth and those acting on its behalf where the use of force has been 'exercised in good faith'. This amendment is inappropriate, particularly given that the Commonwealth does not have this immunity in relation to the actions of Australian Federal Police officers.

1.23 As noted by the Law Council of Australia in its submission:

> [S]howing bad faith is a very high threshold which involves more than negligence or recklessness, but in effect a dishonest mind. Admissions are generally unattainable, as it would be sufficient for the perpetrator to say 'I thought it was necessary'.[4]

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3 Asylum Seeker Resource Centre, *Submission* 26, pp 3-5.

4 Law Council of Australia, *Submission* 30, pp 21-22.

1.24 This unacceptably high threshold is at odds with the use of force being a measure of last resort.

Media access

1.25 Currently journalists are not permitted to access detention centres and the department is under no obligation to provide reasons for refusing access. Allowing journalists into detention centres has no bearing on national security. This lack of transparency and accountability is unacceptable in a liberal democracy like Australia.

Conclusion

1.26 This Bill confers disproportionate and excessive powers on unqualified guards without sufficient restrictions on the use of force or allowing for adequate oversight. There are other more proportionate responses that would clarify the extent to which immigration detention centre officers may employ force.

1.27 This Bill also carries with it the very real likelihood of guards abusing these unchecked powers and heaping further misery upon asylum seekers.

1.28 The Australian Greens acknowledge the legal experts' and the community's grave concerns regarding the implications of this Bill and for the reasons stated above, do not support the passage of this Bill.

1.29 Giving unfettered powers to untrained guards to treat vulnerable people however they want under a culture of secrecy and silence will inevitably lead to people's rights being abused. The government has done nothing to earn the trust of the public or the Parliament to show that these powers are needed or will be managed properly.

Recommendation 1

1.30 The Australian Greens recommend that the Senate reject the Bill.

Recommendation 2

1.31 The Australian Greens recommend that the *Migration Act 1958* be amended to allow media access to detention centres and to require the department to publish reasons for rejecting reasonable requests for access.

Senator Sarah Hanson-Young
Senator for South Australia

Appendix 1

Public submissions

1 Ms Danieka Montague

2 Ms Kath Magarey

3 Geelong Interchurch Social Justice Network

4 Justine Donohue

5 Ms Carolyn Elliott

6 Commonwealth Ombudsman

7 Coalition for Asylum Seekers, Refugees and Detainees Inc. (CARAD)

8 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW

9 Combined Refugee Action Group

10 Law Students for Refugees

11 Sophia's Spring Uniting Church

12 International Health and Medical Services

13 Australian Psychological Society

14 Australian Churches Refugee Taskforce

15 Australian Lawyers for Human Rights

16 Marrickville Multicultural Committee

17 Queensland Council for Civil Liberties

18 Loreto Sisters Australia & South East Asia

19 Conference of Leaders of Religious Institutes NSW

20 Refugee Advice & Casework Service (RACS)

21 Refugee Rights Action Network

22 Dominicans for Justice Group Sydney

23 Rajan Venkataraman

24 The Hon Stephen Charles QC

25 Australian Human Rights Commission

26 Asylum Seeker Resource Centre (ASRC)

27 Refugee Council of Australia

28 Department of Immigration and Border Protection and Australian Customs and Border Protection Service

29 Mr John Gorham

30 Law Council of Australia

31 Darwin Asylum Seeker Support and Advocacy Network Inc

32 Ms Jenny Rae

33 Rural Australians for Refugees Queanbeyan Inc

34 Union for Progressive judaism

35 Ballarat Catholic Diocese Social Justice Commission

36 Victorian Foundation for Survivors of Torture

37 Public Law & Policy Research Unit, University of Adelaide

38 ChilOut

39 Mr Robert Leicester

40 Mr David Shoebridge MLC

41 Ms Nikki Boer

42 Ms Megan Dennis

43 Ms Jan Barson

44 Ms Nerine Mills

45 Arbie Pattiselanno

46 Mr Steve Druitt

47 Name Withheld

48 Mrs Janet Depiazzi

49 Name Withheld

50 Mrs Sarah McDonald

51 Mr Murray Head

52 Mrs Elizabeth Chase

53 Miss Madeline Fountain

54 Ms Jennifer Miles

55 Name Withheld

56 Dr Peter Barker

57 Mr Peter Sainsbury

58 Mr David Graham

59 Mr Stephen Cadusch

60 Dr Brendan Doyle

61 Name Withheld

62 Ms Marie Rosewarne

63 Ms Catherine Greenhill

64 Ms Jan Govett

65 Mr George Winston

66 Mrs Jean Winston

67 Ms Bronwyn Carnegie

68 Mr Kane Furness

69 Mr Campbell Sinclair

70 Ms Christabel Carvolth

71 Ms Claire Hurren

72 Mr Greg Defina

73 Ms Robyn Gray

74 Mr Gowtum Purmanund

75 Ms Brenna Thomson

76 Mrs Tania Breed

77 Mr Christopher Wardle

78 Ms Ellen Siffleet

79 Mrs Joanne de ROOY

80 Mrs Lara Smigielski

81 Mr Fred Batterton

82 Name Withheld

83 Associate Professor Susanne Gannon

84 Mr Daniel Payne

85 Dr Trish Richardson

86 Mr John Englezos

87 Ms Robyn Clothier

88 Ms Leah Scholes

89 Ms Veronica Waugh

90 Mr Paul Daley

91 Ms Alison Murdoch

92 Dr Judy Scott

93 Ms Fiona Gillespie-Cook

94 Mr Michael Mullen

95 Mr George Rosier

96 UnitingJustice Australia

97 UNICEF Australia

98 Amnesty International

99 Catholic Women's League Australia

100 Ms Jeni Wills

101 Ms Ellen Siffleet

102 Yanoula Fouras

103 Ms Hayley Quach

104 Mr Andrew Dine

105 Ms Catharine Clements

106 Ms Julia Shearsby

107 Ms Jocelyn Richardson

108 Mr James Stronell

109 Ms Jane Touzeau

110 Mr Chris Hughes

111 Ms Jennifer Kieran

112 Mr Joseph Castley

113 Ms Emma Corcoran

114 Lorien Vecellio

115 Ms Marianna Brungs

116 Ms Julie Martin

117 Mr W And Mrs L Cusworth

118 Ms Jeanne Rudd

119 The Hunter Presbytery of the Uniting Church Social Justice Committee

120 Ms Sue Kelly

121 Civil Liberties Australia

122 Ms Pamela Curr and Sr Bridget Arthur

123 Doctors for Refugees and the Asylum-Seekers Interest Group

124 Refugee and Immigration Legal Centre

125 Adrienne Buffini

126 Dr Juliet Donald

127 Ms Matha Ansara

128 Ms Janet Grevillea

129 Ms Dianne Tavakoli

130 Mr John Chapman

131 Ms Margaret Fallon

132 Humanist Society of Victoria Inc

133 Mr Doug Frewer

134 Changing the Tide

135 Ms Alice Dudgeon

136 Name Withheld

137 United Voice

138 Ms Alyce Graham

139 Mr Shayne Chester

140 Mr Stuart Heath

141 Ms Ruby Rosenfield

142 Mr Paul Heath

143 Mr Steve Denenberg

144 Ms Joy Carvolth

145 Ms Marie Feigl

146 Ms Rosemary Purtill

147 Mr Powell Heuer and Ms Denise Krause

148 Mr Peter Jenner

149 Ms Genevieve Lloyd

150 Mr Robin Friday

151 Mr Jeff Siegel

152 Mr Stratos Pavlis

153 Mr Daniel Grayson

154 Mrs Sally Thompson

155 Ms Kristy Collins

156 Ms Kelly Fiedler

157 Ms Charlotte Lynch

158 Ms Pamela Jacobs

159 Ms Briana Charles

160 Name Withheld

161 Mr Peter Morris

162 Mr Ian Harvey

163 Cherry Johnson

164 Mr John Greenwell

165 Ms Elizabeth Smart

166 Solway Nutting

167 Ms Diane Parker

168 Ms Sarah Harris

169 Ms Andrina Mitchell

170 Ms Emma West

171 Ms Lisa Mortimore

172 Ms Vanessa Elwell-Gavins

173 Ms Christie Rimes

174 Anne and Bill Byrne

175 Mrs Robin Gibson

176 Ms Deborah Harris

177 Ms Alice Palmer

178 Mr Fred Chaney

179 Ms Andrea Callaghan

180 Mr Geoff Allshorn

181 Mr Adam Whybrew

182 Mr Geoff Taylor

183 Ms Rebecca Pearce

184 Dr Elissa Sutherland

185 Confidential

186 Confidential

187 Name Withheld

Appendix 2

Public hearings and witnesses

Thursday, 16 April 2015—Sydney

APPLEBY, Dr Gabrielle, Associate Professor, Gilbert and Tobin Centre of Public Law, and Andrew and Renata Kaldor Centre for International Refugee Law

CHARLES, the Hon. Stephen, QC, Private capacity

COLEMAN, Ms Misha, Executive Officer, Australian Churches Refugee Taskforce

CURR, Ms Pamela, Detention Rights Advocate, Asylum Seeker Resource Centre

DALE, Ms Sarah, Solicitor, Refugee Advice and Casework Service

de VEAU, Ms Philippa, General Counsel, Department of Immigration and Border Protection

DUNN, Mr Matthew, Director of Policy, Law Council of Australia

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

HAMMERTON, Ms Claire, ALHR National Committee Member and Refugee Sub-Committee Coordinator, Australian Lawyers for Human Rights

JEGASOTHY, Reverend John, Board Member, Australian Churches Refugee Taskforce

KNACKSTREDT, Miss Nicola, Policy Lawyer, Human Rights, Law Council of Australia

MARTIN-IVERSON, Ms Victoria, Spokesperson, Refugee Rights Action Network

OUTRAM Mr Michael James, Deputy Chief Executive Officer, Border Operations, Australian Customs and Border Protection Service

POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia

SOMMERVILLE, Mr Craig, Acting First Assistant Secretary, Status, Resolution and Detention Operations, Department of Immigration and Border Protection

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Sydney—Thursday 16 April 2015

1 Australian Human Rights Commission - responses to questions taken on notice at a public hearing on 16 April 2015 (received 27 April 2015)

2 Department of Immigration and Border Protection – responses to questions taken on notice at a public hearing on 16 April 2015 (received 30 April 2015)

3 Law Council of Australia - response to a question taken on notice at a public hearing on 16 April 2015 (received 4 May 2015)

4 Department of Immigration and Border Protection – response to a question taken on notice at a public hearing on 16 April 2015 (received 11 May 2015)