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.
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> 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.
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> 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.