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

---

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:

---

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:

---

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]

---

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

---

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