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.

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