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Senate Legal and Constitutional Affairs Legislation Committee
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By email: legcon.sen@aph.gov.au

10 April 2015

Dear Secretary,

Submission on the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth)

The purpose and likely outcomes of the Bill

The Federal Government's Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 proposes an extremely concerning increase in powers of authorised officers of immigration detention facilities.

Firstly, the need for this Bill is entirely unclear. The Minister for Immigration stated in his Second Reading Speech for the Bill that the amendments were required due to "uncertainty on the part of immigration detention service providers as to when it [sic] may act when confronted with public order disturbances in immigration detention facilities". This is a policy problem regarding the Federal Government's contracting, training, and management of those service providers, and we submit that simply passing legislation to give use of force powers to private contractors is an inappropriate and illogical solution.

The Minister also quoted the Hawke-Williams report recommendation that the Department of Immigration and Border Protection more clearly articulate the responsibility of public order management between the Department of Immigration and Border Protection, the immigration detention service provider, the Australian Federal Police and other police forces who may attend an immigration detention facility. That has not been achieved by this Bill.

It is by no means clear that the Bill is consistent with Australia's human rights obligations, as asserted in the Explanatory Memorandum, particularly in light of the UN Special Rapporteur on Torture's recent statements:

> The government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the regional processing

centre, has violated the right of the asylum seekers including children to be free from torture or cruel, inhuman or degrading treatment.

Legalising the use of force within these institutions at the hands of facility employees is very likely to result in further escalating violence and tension. We note that the trial of G4S guard Louie Efi and Salvation Army employee Joseph Kaluvia for the murder of Reza Barati on Manus Island is yet to be heard. The Minister asserted in his Second Reading Speech that this Bill would only apply to onshore immigration detention facilities, but it is unclear what would prevent the provisions applying to anywhere deemed by the Minister as an "immigration detention facility", whether offshore or onshore. Either way, the same issues arise.[1]

Specific provisions

It is problematic that an "authorised official" is already defined under s5(1) of the *Migration Act 1958* as any officer authorised in writing by the Minister or the Secretary. We note the requirement in proposed subsection 197BA(6) of training and qualification requirements before an official can use force as proposed in this Bill, but the requirements are at the sole discretion of the Minister. This is an unacceptable devolution of the coercive power of the State to a nebulous group of privately contracted detention centre employees who are simply appointed by the Minister.

We note the training and qualification requirements are specifically not contained in a legislative instrument such as would be subject to the oversight of Parliament (subsection (8)). There is therefore no guarantee that officials would be sufficiently trained. Police officers in all jurisdictions receive substantial training, within a developed institutional framework, from experienced trainers, with probationary periods and supervision, yet police are well documented to use force improperly, leading to assault, injury and death. The consequences of more amateur, para-police officials exercising coercive force could be expected to be as or more detrimental to the safety and dignity of detainees.

The Bill further lacks accountability because the power to deem any place to be an "immigration detention facility" is solely in the hands of the Minister (proposed subsection (3)).

The Minister rightly observed in his Second Reading Speech that at present immigration officials have no greater powers than the common law powers of ordinary citizens, and we submit that unless and until sufficient training, safeguards and oversight are put in place to check the power of private contractors who hold near complete power over detainees, they ought to have no greater power.

Under the Bill, the use of force would be allowed under new s197BA(1)(a) to protect the life, health or safety of any person. The use of force under s197BA(1)(b), to maintain the good order, peace or security of an immigration detention facility, is drafted unacceptably broadly. "Good order" is not defined and could conceivably include a wide spectrum of evils to be prevented – from riots to untidiness or a deviation from schedule. There is a serious risk this would include the use of force to quash peaceful protest, with the justification that the "good order" of the facility was threatened. It

[1] Though we note that individuals could still be prosecuted in Nauru or PNG, given the facilities are managed by the Australian government recourse must be maintained by the Australian legal system.

is unclear what the phrase "good order" adds to the phrase "peace or security" of an immigration detention facility that could possibly justify the use of violence.

The category of scenarios where use of force would be allowed appears to be further broadened by subsection s197BA(2) which is specifically not intended to limit subsection (1).

Subsection (2)(a), "to protect a person… from harm or a threat of harm" is presumably meant to allow self-defence or defence of another, which is already lawful for any person. Yet the consequences of protecting a person from a "threat of harm" would extend to using force on a person who was doing no more than making idle threats from a physically separated area. To the extent that this provision is not redundant, it is unnecessarily heavy handed.

Similarly, subsection (2)(e) "to move a detainee within an immigration detention facility" is unacceptably broad – for example, it would include arbitrary movement at the discretion of an official.

Subsection (2)(f) appears to repeat subsection (1) and is therefore redundant.

It is noted per subsection (4) that subsection (1) is not intended to include the use of force to give nourishment or fluids to a detainee, but we suggest that the provision could be better drafted to make clear that use of force powers are contained only in subsection (1) and not separately in subsection (2). The present drafting leaves open the interpretation of subsection (2) powers being additional to the subsection (1) powers, and so the effect of (4) could be limited.

Subsection (5)(b) is also redundant as it appears to unnecessarily duplicate (and complicate) the law of self-defence or defence of another as is extant in the common law, State laws, and s10.4 of the *Criminal Code Act 1995* (Cth).

<u>Oversight and complaints mechanism</u>

This office remains deeply concerned at the human rights abuses now well documented within immigration detention facilities, and anticipates that expanding the powers of immigration centre officials is only likely to lead to further abuse in an already cruel and degrading system.

It is unconscionable that State-authorised use of force under the proposed Bill would be immune from proceedings against the Commonwealth in Australian courts (proposed s197BF). It is unclear whether the term "proceedings" is restricted to civil claims or would include criminal prosecutions. The State and Federal police do not benefit from such blanket immunity, and nor should they.

Further, the phrase "if the power was exercised in good faith" is without any framework for determination. It is within the realms of possibility that an assertion could be made by an official that he or she was acting "in good faith", and that that in itself would stymie proper investigation. Further, it is very difficult to prove that a person was not acting in good faith, and it is unclear what public policy would justify the departure from the general law and a higher threshold for litigation than applies to other people in Australia.

No impartial observer could have any confidence in the proposed internal complaints system as a safeguard for persons subject to mandatory detention who are not only extremely vulnerable, but very often have limited access to legal representation and information regarding their rights.

Further, the complaints regime proposed in this Bill is subject to so much discretion on the part of the Secretary that there could be no faith in its efficacy.

Finally, we note with genuine distress the lack of restriction on use of force in this Bill as against children, the most vulnerable of the detainees.

Regards,

David Shoebridge
Greens NSW MP and Justice Spokesperson