AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

7 April 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

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

Australian Lawyers for Human Rights ("ALHR") thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill* 2015 ("Bill").

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights law in Australia.

Contents

Summary of ALHR's position

ALHR is strongly opposed to this Bill and recommends that it be rejected in its entirety. The Bill gives private security officers the power to use force against people, including children, in immigration detention facilities that is greater than the force allowed in analogous State and Territory prison legislation. ALHR notes that most people in immigration detention facilities have not been convicted of, or even charged with, any offence. If the Bill is to pass, we submit that it requires substantial amendment as in its present form it is likely to fundamentally encroach on a number of human rights including the right to life; the non-derogable right against torture, cruel, inhuman and degrading conduct; the right to humane treatment in detention and the right to effective remedy.

This submission will focus on key deficiencies in the Bill, in relation to the scope of the powers of an authorised officer to use reasonable force against the detainees in prescribed situations; the lack of statutory safeguards around the use of force; and the lack of transparency and adequacy of the investigation and complaints procedures, in particular, the bar on proceedings in all courts except the High Court.

General Comments on the Bill

(1) Not necessary or proportionate

In ALHR's view, this Bill is neither necessary nor proportionate to its purported aims. The proposed changes to legislation potentially place detainees at greater risk of being subject to unnecessary and violent force by giving inappropriate power to inadequately trained officers. We note that in its *Twentieth Report of the 44th Parliament* ("Twentieth Report"), the Parliamentary Joint Human Rights Committee ("PJHRC") states that the

statement of human rights compatibility attached to the Explanatory Memorandum ("EM") "does not provide a sufficiently reasoned and evidence-based explanation of how the measures support a legitimate objective for the purposes of international human rights law" (par 1.62). In order "to be capable of justifying a proposed limitation of human rights" says the PJHRC, "a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient" (par 1.62). The PJHRC goes on to say that the objective of removing uncertainty for employees of an immigration detention service provider concerning their authority to use force does not address a pressing or substantial concern (par 1.66). ALHR agrees with this position and submits that the Government has not made its case for the necessity of this Bill.

(2) Key concepts undefined

A key area of concern with this Bill is that fundamental concepts are left undefined. The Bill sets out that "reasonable force" may be used to "maintain the good order, peace or security of an immigration detention facility", but fails to define the terms "reasonable force" or "good order". The circumstances in which it would be acceptable to use force against detainees are not clearly set out in the Bill. For example, a detainee or detainees may not be threatening the security of the detention facility and may be acting peacefully in assembling together or even in a non-violent protest, but the officer may nonetheless subjectively regard the conduct not to be consistent with "the good order" of the detention facility.

(3) Officers placed 'above' the law despite inadequate training

The EM argues that giving officers the power to use reasonable force enables the officers to deter or manage a public order disturbance. However, in the Bill's present form, it appears that as long as they act in good faith, officers could use even deadly force to disrupt a peaceful protest, without criminal prosecution. Effectively, the Bill places detainees at risk of being subjected to unnecessary force which may, in fact, escalate the likelihood of harm being caused to those detainees.

This risk is also increased because the test set out in the Bill for using reasonable force will no longer be an objective test (as it previously was when employees of detention facilities had to rely on their common law powers as ordinary citizens), but will contain a subjective element akin to the test that is applied to the police when police officers exercise their powers to use reasonable force.

It is of great concern to ALHR that private security officers will be provided with such broad authority to use force. The PJHRC notes that the authority to use force provided by this Bill is broader than that authorized in many analogous State and Territory prisons (par 1.72), despite private security officers being likely to receive substantially less training than police in relation to such a difficult and important decision as to the

amount of force to use in any context. Federal police have to undergo training for 24 weeks initially and then undertake 12 months on the job training.[1] The NSW State police have to undergo training for a minimum of 1 2/3 years.[2] In comparison, a Certificate II in Security Operations (which will likely be the minimum training and qualification required for authorised officers to whom this legislation will apply) takes only 17 days to complete.[3] Such private officers clearly do not have the training or expertise necessary to make informed and crucial decisions about the amount of force to be used. We submit that this analysis strongly suggests that the Bill's authorisation of use of force is disproportionate.

(4) Lack of safeguards in the legislation

We share the concerns of the PJHRC as to whether the powers in the Bill, as currently drafted, are appropriately circumscribed. While it is said that safeguards around the use of force are to be included in policies and contracts with immigration detention service providers, these are not included in the legislation and it is submitted that this omission is serious and inappropriate. For example, it is not a legislative requirement that force only be used as a measure of last resort.

(5) Breach of Human Rights

The Bill contravenes obligations that Australia has voluntarily assumed and are contained in international human rights treaties ratified by Australia including: the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* ("Refugee Convention") and the *International Covenant on Civil and Political Rights* ("ICCPR"). In particular, it does not provide sufficient safeguards to avoid contravention of:

(1) the right to life protected by article 6(1) of the ICCPR;

(2) the prohibition against torture, cruel, inhuman or degrading treatment or punishment contained in article 7 of the ICCPR and the Convention against Torture;

(3) the right to freedom of assembly remedy protected by article 21 of the ICCPR;

(4) the right to humane treatment in detention protected by article 10 of the ICCPR;

(5) the right to an effective remedy protected by article 2 of the ICCPR.

How this Bill may potentially contravene Australia's international obligations pursuant to the *Refugee Convention* and the ICCPR and the gravity of these potential contraventions are explained below in the context of the key areas of the Bill that give

[1] See http://www.afp.gov.au/jobs/recruit-training
[2] See http://www.police.nsw.gov.au/recruitment/the_training/associate_degree_in_policing_practice/about_the_course
[3] See http://www.ausafe.com.au/page_4.html

rise to concern.

Principles to be followed in analysing the Bill

We submit that legislation which proposes to encroach on any human right should (as contemplated in *Guidance Notes 1 and 2* (December 2014) and the *Guide to Human Rights* (March 2014) issued by the PJHRC and *Rule of Law Principles*, a Policy Statement of the Law Council of Australia (March 2011)[4]):

(1) Be clear, accessible and precise so that people know the legal consequences of the limitations or the circumstances under which authorities may restrict the right or freedom;

(2) Be in pursuit of a legitimate objective;

(3) Be necessary in pursuit of that objective;

(4) Have a rational connection to the objective to be achieved;

(5) Apply to all people equally and not discriminate on arbitrary or irrational grounds;

(6) Be proportionate to the objective being sought (taking into consideration whether there are other less restrictive ways to achieve the aim, the impact of the legislation upon human rights, whether affected groups are particularly vulnerable, whether the merits of individual cases can be taken into account)[5];

(7) Contain effective and transparent safeguards or controls (including as to monitoring and access to review, public trial, no limitations on judicial discretion or information available to legal representatives, notification to persons affected by the legislation);

(8) Not be disproportionately severe (eg not involve reverse burden offences and/or strict liability offence);

(9) Not be retrogressive in terms of diminishing any existing rights or accepted norms, including international human rights norms;

(10) Only permit proportionate subordinate legislation (in particular, not subordinate legislation that creates new offences or confers new powers on executive agencies);

(11) Be transparent so that decisions made under the laws are open to scrutiny; and

(12) Enshrine accountability by specifying to whom the decision-maker is accountable, by what process, according to what standards and involving what effects.

---

[4] See also "Legislative Standards', 3 Sept 2013, accessed 16 Feb 2015 at http://www.lawcouncil.asn.au/lawcouncil/index.php/legislative-standards

[5] In our view, adherence to international human rights law and standards is also an indicator of proportionality.

If any of these standards or principles is not met we submit that, to that extent, the interference or encroachment is not justified.

Proposed section 197BA - Maintaining the good order etc of immigration detention facilities

ALHR has serious concerns about Division 7B of the Bill which vests an 'authorised officer' ("officer") with the power to use reasonable force against "any person or thing," where such reasonable force is believed by the officer to be necessary for the protection of the "life, health or safety of any person in an immigration detention facility; or to maintain the good order, peace or security of an immigration detention facility".[6] ALHR agrees with the concerns expressed by the PJHRC (par 1.72) that the breadth of these powers is disproportionate and that reasonable force should only be able to be used in preventing or quelling a riot or disturbance, or some similarly immediate danger. To allow force to be used to maintain 'peace' or 'good order' is also likely to chill any possible right of detainees to freedom of assembly (par 1.103 and following), contrary to article 21 of the ICCPR.

The Bill prescribes a non-exhaustive list of situations in which the officer can be reasonably expected to exercise reasonable force. The Bill does place limitations on the powers to use reasonable force, even where the officer believes using force is justifiably exercised, including:

- to not subject to a person to greater indignity than the authorised officer reasonably believes is necessary...; and
- to not do anything likely to cause a person grievous bodily harm unless the authorised officer reasonably believes that doing the thing is necessary...[7]

However, as the PJHRC points out (par 1.83 and ff and par 1.101 ff), the Bill thereby does contemplate that some indignity and some harm may be permitted against detainees, dependent on the circumstances and the officer's reasonable belief, potentially amounting to inhumane treatment and perhaps to torture, contrary to articles 7 and 10 of the ICCPR and the *Convention against Torture*. ALHR notes that the prohibition on torture and cruel, inhuman and degrading treatment is an absolute one.

The Bill then prescribes that an officer must not be authorised unless the officer satisfies training and qualification requirements determined by the Minister from time to time.[8]

ALHR agrees with the concerns expressed by the PJHRC (par 1.69 ff) that:

- numerous safeguards that apply to analogous State and Territory legislation

[6] See proposed section 197BA(1) of the Bill.
[7] See proposed section 197BA(5) of the Bill. See also proposed section 197BA(4) relating to providing nourishment or fluids.
[8] See proposed section 197BA(6) of the Bill.

governing the use of force in prisons have not been included in relation to section 197BA; and

- (in par 1.89) that for safeguards to be defined extra-legally by policy or contracts with the authorised officers' employers is unsatisfactory and does not justify such disproportionate restrictions on human rights.

The underlying purpose of the Bill, as expressed in section 197BA, appears to be directed towards the management of situations which may require the use of force rather than the prevention of such situations from arising or escalating.

The EM explains that an officer may use "negotiation tactics to defuse and resolve conflict", and that "the use of reasonable force or restraint will be used only as a measure of last resort". ALHR takes the strong view that this should be the predominant approach in resolving conflicts that may arise. However,

- the use of force as a last resort is not enshrined in the Bill;
- neither the Bill nor the EM addresses the necessity of providing the officers with training as to how to minimise the use of force. As the PJHRC points out, training is required under international human rights law to be given by the State to the officers in order to minimise the chance that the use of force will result in the loss of life (par 1.74);
- it is unclear how negotiation and de-escalation tactics should be used in the context of officers and detainees likely speaking different languages, or, for example, if detainees have disabilities including learning, cognitive, visual or hearing impairments.

In addition to training of officers, ALHR submits that detainees should made aware of their rights through comprehensive training, especially where there is a real risk of situations which may escalate to the point where an officer must use his or her discretion to determine whether to subject a detainee to an indignity or to cause grievous bodily harm.

ALHR is of the view that it is imperative that such training and provision of educative materials be provided and in the respective native languages of the detainees. Furthermore, any disability, learning or cognitive impairment, or any other difficulty, which may make a detainee unable to adequately comprehend their rights, must be taken into account.

We submit that it is appropriate that:

- such information and training be provided on a continuous basis and cater for the requirements of each individual detainee, especially children;
- the understanding of each detainee as to their rights be measured and evaluated on a continuous basis;

- the training and qualifications of each officer also be continually monitored and evaluated and updated where required;
- the input of detainees into the training standards be permitted and responses provided.

As the Bill allows the use of force against "any person or thing," it appears to allow the use of force against children in detention. ALHR strongly opposes the inclusion of children within the authorization to use force. In ALHR's view, children should not even been detained, except for very brief periods to allow for health and other checks. Children are especially vulnerable, and fall into the category of persons who are unlikely to be able to adequately comprehend, and thereby defend, their rights. It is not clear to us how the provisions permitting the use of force against children in detention would be consistent with the Minister's obligations as legal guardian of unaccompanied minors in detention.

ALHR also stresses the importance of permitting detainees, including children, a participative right to engage with and provide their views on the training standards for the officers, and on any part of the process as may affect them.

ALHR agrees with the conclusion of the PJHRC that section 197BA, if not amended, could limit detainees' right to life (par 1.78), contrary to article 6(1) of the ICCPR. It is also likely to offend the requirement that actions involving children be taken in their best interests, as required by the *Convention on the Rights of the Child*.

Recommendations

1. That, if the Bill not be rejected in its entirety, it be amended to at least include the safeguards that apply under analogous State and Territory legislation governing the use of force in prisons, as described by the PJHRC (par 1.69), and to define 'reasonable force' and 'good order' in the light of necessary and proportionate requirements which do not infringe the human rights of detainees;
2. That the Bill be amended to exclude the use of force against children;
3. That the Bill be amended to require the provision of appropriate and accessible information and training to both officers and detainees in relation to authorised officers' powers to use reasonable force in order to minimise the chance that the use of force will result in the loss of life. That such information and training also include the extent of the powers that may be used against detainees and that non - verbal means of defusing conflict be required to be included in the informaton so that officers and detainees have means by which to communicate with one another.

Proposed section 197BB - Complaints

ALHR is concerned that the complaints process under the Bill is essentially limited to the discretion of the Minister and his Department, contrary to article 2 of the ICCPR which requires States to ensure access to an effective remedy for violations of human rights, as noted by PJHRC (par 1.112 and ff).

ALHR notes that under the complaints process as described in the EM, the detainees will have access to interpreter services, and will be provided with information about their rights to make a complaint to the Secretary or a host of other agencies as they wish. The detainees are also able to ask for support in advocating their case from another body or agency or advocacy group. However these procedures are not fully enshrined in the Bill and do not appear to reflect current Departmental practice.

Section 197BB requires a complainant to make a complaint in writing, to be signed by the complainant and to include details of the matter described.[9] Neither the Bill nor the EM address the situation where a detainee may be not able to read or write, whether in their native tongue or in English, where their spectacles have been taken from them so they are not able to see the paper, or where a child may be not be able to formulate a complaint or not be legally able to sign (due to not having the capacity to sign legal documentation). All of these things may impact on the right of the detainees to natural justice as they may restrict their right to have their case heard. This is despite the understanding that the Secretary may be able to provide services to the detainees to enable them to have their oral complaint transcribed.

The right of the detainee to have their matter addressed orally should not be impeded, especially where the Bill and the EM are silent on there being a real likelihood that a refugee may not be able to read or write, and especially in the case of detainees from environments with high scale, long term conflicts, or high levels of poverty. If the detainee cannot read their complaint, then this is not procedurally fair. The proposed legislative amendments also do not address whether the rules of evidence will apply in making such complaints.

The EM states that:

> ...immigration detention facilities currently have a comprehensive system in place to provide detainees with a variety of assistance and options to raise problems or make complaints regarding their immigration detention.

While it is presumed that detainees are not prevented from making complaints to other bodies or agencies, including the police and State welfare agencies, community groups and advocacy groups, nor from asking the relevant body or agency to advocate on their behalf, there is considerable doubt whether in practice detainees who are asylum-seekers are able to access such assistance.

[9] See proposed section 197BB(1) of the Bill.

ALHR recommends that information be provided on the remedies and/or damages that can be obtained, if this was not already envisaged. Detainees should be made aware of what can be done by each agency/group in the event of a complaint and how they can be contacted. Children should be provided with an independent adviser and support person in any complaints process, and must be made aware of who their adviser and support persons are.

ALHR also seeks insight and/or assurance into:

- the availability of counselling/victim trauma support services for detainees, which we strongly submit should be provided where needed; and
- whether there will be a Victim's Compensation Fund that detainees can claim from. If so, it is submitted that reference to this Fund needs to be inserted into the text of the Act.

Finally, ALHR supports the introduction of provisions for independent oversight (as recommended by the PJHRC at par 1.87) of the activities of authorised officers in privately-run detention facilities, analogous to oversight that applies in normal State and Territory prisons.

Recommendations

That, if the Bill is not rejected in its entirety, it be amended, in addition to the recommendations suggested under the previous headings, to:

1. require independent oversight of the activities of authorised officers in privately-run detention facilities, analogous to oversight in normal prisons;
2. improve the complaints process under the Bill, which is essentially limited to the discretion of the Minister and his Department, contrary to article 2 of the ICCPR which requires States to ensure access to an effective remedy for violations of human rights (see par 1.112 and ff);
3. enable complaints to be made orally. A sound recording can be provided to the officer or officers against whom the complaint is made, to satisfy natural justice so that they may know the case being put against them. The detainee should also receive a copy;
4. require that children be provided with an independent adviser and support person in any complaints process, and that they be made aware of the identity of their adviser and support persons;
5. Require that detainees are made aware of the powers of each agency, body, group etc to whom they may make a complaint so that they are informed to direct their complaint to the organisation that may be most helpful in obtaining the redress they seek;

6. include statutory provision for a Victim's Compensation Fund from which a detainee can claim.

Proposed sections 197BC and 197BD - Investigation of complaints

ALHR is concerned that the discretion of the Secretary, in conducting investigative proceedings in any way the Secretary thinks is appropriate, is too broad. Detainees should have the right to know how their complaint will be investigated, and the grounds by which the Secretary will make his or her decision as to whether or not to refer the complaint to the Ombudsman.

The EM sets out what must happen in the event where planned force is used. The approval, video recording of the force and written report of the incident are all to be placed within a detainee's file. In these circumstances, the Secretary should provide the detainee's file to the detainee. In circumstances where the force used was unplanned, the written report of the officer or officers should be provided to the detainee.

All parties should be entitled to have the opportunity to respond to the case being made out against them, in accordance with natural justice. The detainee should receive written reasons from the Secretary which addresses their evidence and the evidence of the officer or officers against whom a complaint is made and an explanation for why a complaint is being referred or not.[10] This will help to ensure transparency and fairness of process.

ALHR is also concerned about the lack of clarity and enforceability in the description of referral to the Ombudsman. The remedies that the Ombudsman can order are not clear, apart from "suggesting ways that the problem can be resolved",[11] and are also not enforceable.

The referral of the matter to an agency which can only make suggestions does not appropriately respond to the seriousness of using force against a detainee, whether or not the force is claimed to be reasonable and justified. Where the Secretary chooses to refer a matter to the Ombudsman and not to the Commissioner of the AFP or Commissioner or head of the police force of a State or Territory, reasons for this should also be provided. [12]

We note also that the Secretary is able to decline to investigate a complaint under proposed section 197BD. This decision does not appear to be reviewable and we submit that this result is inconsistent with the principles of natural justice, and limits the right to an effective remedy.

[10] See proposed section 197BD of the Bill.
[11] See http://www.ombudsman.gov.au/pages/making-a-complaint/what-you-can-expect-from-us/
[12] See proposed section 197BE of the Bill.

Recommendations

That, if the Bill is not rejected in its entirety, in addition to the recommendations suggested under the previous headings, that it be amended to require independent oversight, and to require:

1. that parameters are included for the exercise of the Secretary's investigative powers;
2. that a non-exhaustive list of grounds be provided for the exercise of the Secretary's discretion in referring/not referring a matter;
3. that all Parties be provided with the grounds on which a complaint is being made/refuted and given the opportunity to respond;
4. that the Secretary must provide written reasons for their decision;
5. that the appropriateness of referring such serious matters to the Ombudsman be evaluated and reasons provided to evidence that alternatives were considered;
6. that the Secretary's decisions be reviewable, for example by the Administrative Appeals Tribunal.

Proposed section 197BF - Bar on proceedings

ALHR is very concerned that there is a bar on proceedings being instituted or continued in a court, in relation to an exercise of power under section 197BA, if that power was exercised in good faith.[13] Proposed s 197BF appears to provide effective immunity against any officer of the Commonwealth and any person acting on behalf of the Commonwealth. The PJHRC notes (par 1.121) that this immunity against prosecution is broader than that afforded in analogous State and Territory prison laws as the relevant state laws that give protection against personal liability to prison guards provide a more limited bar to proceedings.

In our view, this proposed section is inconsistent with the rule of law, as it undermines the separation of the executive and the judicial arms. The proposed section is also inconsistent with principles of natural justice, in relation to the right to be heard and to fairness of process. In its present form, the Bill would appear to exclude criminal prosecutions even if the use of force results in serious injury or death, as long as good faith can be shown.

This would effectively create a legal vacuum in immigration detention facilities, and would clearly be an unacceptable outcome in our democracy.

ALHR acknowledges that the bar on instituting or continuing proceedings does not extend to the jurisdiction of the High Court.[14] However, ALHR queries the

[13] See proposed section 197BF(1) of the Bill.
[14] See proposed section 197BF(3) of the Bill.

constitutional validity of proposed section 197BF, which resembles a privative clause. Further, in practical terms, the wisdom of reserving these matters for Australia's highest court is questionable when such cases may be more expediently dealt with in the lower courts.

In respect of the right to effective remedy, we note that article 16(1) of the *Refugee Convention* states that "a refugee shall have free access to the courts of law on the territory of all contracting States".

Article 16(2) further states that:

> a refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance...

Article 9(4) of the ICCPR also states that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 9 (5) then states that:

> Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

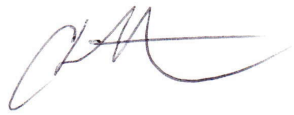
This Bill severely curtails the right to effective remedy, which the PJHRC notes is an inherent ICCPR right (par 1.116). In ALHR's view, where a detainee has been deprived of their liberty through the use of force, even if such use would not likely constitute an arrest and the detainee is already in detention, any limitations on their liberty should nonetheless be subject to judicial scrutiny, should the detainee elect to institute or continue proceedings before a court.

Recommendations

That, if the Bill is not rejected in its entirety, in addition to the recommendations suggested under the previous headings, proposed subsection 197BF of the Bill be removed.

If you would like to discuss any aspect of this submission, please contact Claire Hammerton, ALHR Refugee Sub-Committee Coordinator, by email at: refugees@alhr.org.au.

Yours faithfully,



Claire Hammerton

Refugee Sub-Committee Coordinator

Australian Lawyers for Human Rights