Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITEE

MIGRATION AMENDMENT (MAINTAINING THE GOOD ORDER OF IMMIGRATION DETENTION FACILITIES) BILL 2015

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and more than 1000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to make a submission to the Senate Committee's inquiry into the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (the Good Order Bill). We are greatly concerned that this Bill, rather than improving the "good order" and safety of Australia's immigration detention facilities, will significantly increase the risk of harm to people in detention. We are also disappointed that the Bill does not address the real problems with Australia's immigration detention system, namely the lack of a time limit on detention, limited oversight of decisions to detain and the ongoing detention of children. In addition to outlining RCOA's concerns about the Bill under review, this submission puts forward a number of suggestions for genuinely improving the operation of Australia's detention system.

1. Lack of clarity regarding limitations of use of force

1.1. RCOA is concerned that the Good Order Bill fails to provide sufficient clarity regarding the level of force authorised officers would be permitted to use against people in detention and the circumstances in which it would be considered acceptable to use force. The Bill fails to include clear definitions of key terms such as "reasonable force" and "good order" and sets very few limitations on the use of force.

1.2. While the Bill does specify that force may be used to "protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility" or "maintain the good order, peace or security of an immigration detention facility", it does not specify the *level* of force which would be considered reasonable in these circumstances. It is not made clear, for example, whether it could be considered acceptable to use the same level of force to prevent property damage as to protect a person's life, health or safety.

1.3. Similarly, provisions of the Bill which permit authorised officers to use force so as maintain "the good order, peace or security" of a detention facility are exceedingly broad, potentially allowing for force to be used inappropriately against people in detention who pose no risk to themselves or others. It is unclear, for example, whether officers would be permitted under these provisions to use force in order to quell a peaceful protest.

1.4. Furthermore, while the Explanatory Memorandum accompanying the Bill states that the Department of Immigration and Border Protection will implement policies and procedures to ensure that force is used as a last resort and for the shortest possible time and must not involve cruel, inhuman or degrading treatment or be used as a punishment, these limitations

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are not included in the Bill itself. RCOA believes that policy measures alone, which can be changed at any time and are not subject to the same accountability mechanisms as legislative provisions, cannot provide an adequate level of protection against unreasonable use of force. We can see no reason why these basic safeguards could not be included to the Bill itself to provide a measure of protection to people in detention.

1.5. RCOA notes that the concerns we have raised above regarding ambiguous terminology and lack of safeguards are shared by the Joint Parliamentary Committee on Human Rights. In its Human Rights Scrutiny Report released on 18 March 2015, the Committee expressed concern that the Bill "appears to lack a number of safeguards" and asserted that "the placing of such safeguards on a policy, rather than a statutory, footing is insufficient to provide a justification for limitations on human rights".[1]

1.6. The Committee went on to note on the safeguards in place for the equivalent state and territory legislation governing the use of force in prisons would normally require that:

- force only be used as a last resort;
- force only be used if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force;
- the infliction of injury be avoided if possible;
- the use of force to protect a person from a threat of harm apply only in the case of an imminent threat;
- the use of force to prevent a person from damaging, destroying or interfering with property be permissible only if the person is in the process of damaging the property or if there is reasonable apprehension of an immediate attack; and
- the use of force be limited to situations where the officer cannot otherwise protect themselves or others from harm.

All of these safeguards are missing from the current provisions of the Good Order Bill.

1.7. One of the few safeguards in the Bill is a legislative provision requiring officers, in exercising powers relating to the use of force, not to subject a person to greater indignity than necessary or cause grievous bodily harm unless necessary to protect someone's life or prevent serious injury. However, the ambiguity of this provision is likely to limit its effectiveness as a safeguard. Rather than being based on an objective test, this provision relies on a subjective assessment – specifically, whether the officer in question "reasonably believes" that the use of force was necessary in the circumstances.

1.8. In relation to this provision, the Joint Parliamentary Committee on Human Rights has noted that legislation governing use of force in prisons "not enable force to be used based on the officer's belief, but apply objective tests such as that force may be used when it is 'reasonably necessary in the circumstances' or that the officer may 'where necessary, use reasonable force'". The Committee went on to argue that "potential breadth of the circumstances in which the powers may be used" could reduce the effectiveness of this safeguard, given that "force may be used in a broad range of circumstances in which the likelihood of grievous bodily harm is less foreseeable."[2]

1.9. RCOA is also concerned that the new powers will apply not only to employees of the Australian Public Service but also to private contractors involved in the management of Australia's immigration detention facilities. The fact that day-to-day operations in detention facilities are largely managed by staff of a private, commercial contractor may reduce opportunities for robust oversight and monitoring of the use of force.

[1] See http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/20_44/20th report.pdf, p. 19.
[2] See http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/20_44/20th report.pdf, p. 20.

1.10. Without sufficient clarity as to when and how force may be used and in the absence of adequate safeguards to prevent unnecessary use of force, RCOA believes that the Bill is likely to significantly increase the risk of harm to people in detention.

2. Use of force against vulnerable and at-risk groups

2.1. RCOA is particularly disturbed by the lack of reference in the Bill regarding the use of force against vulnerable groups such as children, pregnant women, people with disabilities and people experiencing significant mental health issues.

2.2. The consideration of factors such as the age, gender and physical and mental health history of the person in question is of critical importance in determining whether the use of force is necessary or appropriate in a particular case. Without legislative provisions to provide guidance on such considerations, and given that the Bill imposes very few limitations in general on the use of force, there is significant potential for force to be used against vulnerable and at-risk groups in a manner which may seriously compromise their safety, health and wellbeing.

2.3. The forcible transfer of unaccompanied children between compounds at the Christmas Island detention facility in March 2014, as documented in the Australian Human Rights Commission's *Forgotten Children* report, [3] provides an alarming example of the negative outcomes which can result when force is used against vulnerable groups without alternative options being adequately considered. The Australian Human Rights Commission noted that those involved in the forcible transfer appeared to have failed to: consult with MAXimus, the care and welfare provider for the unaccompanied children on Christmas Island; provide interpreters who could communicate with the children in their first language as negotiations were taking place; ensure that a psychologist was present during the transfer; engage a trained negotiator; or make use of a range of de-escalation techniques which may have obviated the need for the use of force.

2.4. In RCOA's view, the failure to adequately consider the unique vulnerabilities of unaccompanied children or the alternative responses which may have been more appropriate in this case appears to have resulted in force being used unnecessarily against these children, causing them considerable distress. In providing evidence to the Australian Human Rights Commission, the managing director of MAXimus stated that "I think force was over-used. Yes I do. I don't think it was necessary. I think that the whole thing could have been handled very differently from the start."[4]

2.5. RCOA believes that the Good Order Bill is likely to foster an environment in which incidents of this kind are more likely to happen. There appear to be no provisions in the Bill which would limit or prevent the use of force or require authorised officers to adopt an alternative response when dealing with vulnerable and at-risk groups. Furthermore, the Bill specifically authorises officers to use force if they believe it to be necessary in order to "move a detainee within an immigration detention facility". Given that the incident outlined above was able to occur under current legislative provisions, we are greatly concerned about the possible outcomes should opportunities for the use of force be expanded without appropriate safeguards being in place.

3. Training for authorised officers

3.1. RCOA is troubled by the limited provisions relating to the training of officers who are authorised to use force in immigration detention facilities. While comparable training provisions for police officers and prison personnel are comprehensive, the relevant provisions of the Good Order Bill require only that the Minister for Immigration determine the training and qualification requirements of an authorised officer.

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[3] See https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf, pp. 160-5.
[4] See https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf, pp. 163.

3.2. The Statement of Compatibility with Human Rights accompanying this Bill notes that detention officers are responsible for general security and safety of detainees and must hold a Certificate Level II in Security Operations or equivalent or obtain this qualification within six months of commencing work. As the Joint Parliamentary Committee on Human Rights notes, this level of training, which is the same as is required by crowd controllers and security guards, is not clearly sufficient to ensure that these officers exercise the proposed use of force powers in a manner which would not endanger the safety, health or wellbeing of people in detention.[5]

4. Oversight and complaints

4.1. Given the breadth and ambiguity of the Bill's provisions and the limited safeguards it contains, robust monitoring mechanisms will be essential to ensuring that force is not used unnecessarily or gratuitously against people in detention facilities. The oversight and complaints mechanisms proposed in the Bill and its Explanatory Memorandum, however, are woefully inadequate in RCOA's view.

4.2. Under the statutory complaints mechanism introduced by this Bill, complaints about the use of force within detention facilities are to be made to the Secretary of the Department of Immigration. RCOA believes there is an inherent conflict of interest in allowing such complaints to be reviewed by the Secretary of the very same Department which is responsible for the management of immigration detention facilities. Furthermore, the Secretary may decide not to investigate a complaint at all in some cases, including where they believe an investigation "is not justified in all the circumstances" – an extremely board provision which could be used to exclude many cases from review. We do not accept that this process offers a fair or impartial mechanism through which people can seek review of the use of force.

4.3. In addition, RCOA is concerned that the proposed complaints mechanism may not result in investigations being conducted fairly and thoroughly or an appropriate remedy being provided in cases where complaints are upheld. Investigations are to be conducted "in any way the Secretary thinks appropriate" – there is no requirement that the Secretary even speak to the complainant – and the ambiguity of the Bill's provisions are such that assessments of whether the use of force was justified in a particular case are likely to come down to individual discretion. Furthermore, the only remedy attached to the complaints process is referral to the Commonwealth Ombudsman, an agency which cannot impose enforceable remedies. Cases may also be transferred to police authorities but their capacity to uphold complaints and impose remedies may be limited by the ambiguities referred to above.

4.4. RCOA is also deeply troubled by provisions of the Bill which impose a bar on any action against the Commonwealth with respect to the use of force in immigration detention facilities, if the power to use force was exercised in good faith. This provision, which again is extremely broad, could serve to limit access to independent judicial review of the use of force in detention in the majority of cases. RCOA can see no justification for limiting access to review in this manner. We reject the assertion put forward in the Explanatory Memorandum that the amendments are necessary to "remove uncertainty" for officers who may be required to use force in detention facilities. If certainty for its employees is genuinely a concern of the Australian Government, a more constructive course of action would be to clarify the broad and ambiguous provisions of this Bill rather than remove opportunities for independent review.

4.5. Finally, while the Bill requires the Secretary to "provide appropriate assistance" to a person who wishes to make a complaint, it is unclear what form this assistance will take – for example, whether assistance will be limited to interpreting services alone or whether legal advice and more comprehensive support with lodging a complaint will be provided or facilitated. There is also a lack of clarity regarding if or how people in detention will be informed of their right to complain to the Secretary regarding the use of force. If measures are not in place to inform people in detention of their rights and provide them with sufficient

[5] See http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/20_44/20th report.pdf, p. 20.

assistance to lodge a complaint, even this very limited form of review could become inaccessible, particularly to vulnerable groups.

5. Lack of justification for the Bill

5.1. RCOA has heard alarming reports from our members and from asylum seekers in detention about the intimidation and fear of violence faced by asylum seekers detained alongside people with a history of violent crime. It is vital that all people in immigration detention system be kept safe and violence should not be tolerated. However, RCOA is not convinced that the new powers introduced by the Good Order Bill will help to achieve this aim.

5.2. RCOA believes that alternative approaches could be adopted to achieve the stated aims of the Bill without placing people in detention at risk or limiting their right to seek review if they feel that they have been mistreated. For example, the use of separate facilities for people who pose a risk to the safety of others or who are facing deportations due to serious criminal convictions would assist in protecting people in detention and staff members from harm without the need for legislative amendments.

5.3. RCOA also wishes to highlight the link between prolonged indefinite detention and incidences in unrest in detention facilities. Past experience in Australia has very clearly demonstrated that holding people in detention indefinitely for long periods of time has a deleterious impact on health and wellbeing, particularly amongst those who have experienced trauma prior to their arrival in Australia. Where the length of detention increases, an increase in cases of self-harm, mental health issues and unrest in detention facilities tends to follow. Indeed, previous incidences of serious unrest in detention facilities – such as occurred at the Christmas Island detention facility in March 2011, at Villawood in April 2011 and in Nauru in July 2013 – have typically been preceded by significant increases in the length of time people are detained.

5.4. The root cause of the problem is not the lack of sufficient powers to respond to unrest when it occurs; it is the nature of Australia's detention policies, which permit prolonged indefinite detention of people who pose no identifiable risk to the community (including children). If the Government is committed to maintaining genuine good order in immigration detention, it must commit to addressing the real problems in Australia's detention system rather than seeking to implement measures which would place people in detention at even greater risk of harm.

6. Addressing the real problems in Australia's detention system

6.1. RCOA has long argued for comprehensive reforms of Australia's detention system to prevent prolonged, indefinite and unnecessary detention. We believe such reforms are essential to protecting the safety and wellbeing of people subject to immigration detention and ensuring that Australia's detention system operates fairly and humanely.

6.2. The central focus of detention reform should be on ensuring the immigration detention is used as a last resort and for the shortest possible time. As a general rule, people should only be subject to immigration detention after having undergone a thorough, individualised and risk-based assessment which has determined that there is a genuine need for detention and no other alternatives are available. When people are subject to detention, clear legislative time limits should apply and a system of regular judicial review should be established to monitor the ongoing need for detention.

6.3. The highest priority in detention reform, however, should be preventing the detention of children. RCOA welcomes the efforts of the Australian Government to release children and their families from closed detention into alternative community-based arrangements. Nonetheless, we believe that policy measures alone are insufficient to protect children from prolonged indefinite detention. It is RCOA's position that children should never be detained in closed facilities. Failing a prohibition on the detention of children, detention should be used as an absolute last resort and for a strictly limited period of time.

6.4. Recent reforms in the United Kingdom offer useful lessons for Australia in reforming its own detention policies. In 2010, the UK Government led by conservative David Cameron committed to ending the detention of children for immigration purposes.[6] The first step in this process was the establishment of time limits on the detention of children and the closure of a number of detention facilities. In 2011, the UK Government created a new process for families in the immigration system, pledging the reforms would "deliver an approach to families that is compassionate and humane, while still maintaining the integrity of our immigration system".[7]

6.5. As the majority of child detention in the UK occurs in the context of return procedures, the processes leading up to return were significantly reformed to as to ensure that detention is used as a last resort. Several options are available to families in relation to their return choices and an independent panel is convened to ensure that health and child welfare considerations are made throughout the process.

6.6. Where detention of children does occur, it is limited to 72 hours at specially designated pre-departure accommodation. In "exceptional cases", detention may be extended to one week but only with authorisation from the relevant Minister. Unaccompanied children may not be detained for more than 24 hours and additional conditions must be met to even to detain an unaccompanied child for this brief period. These policy changes and the commitment to ending child immigration detention were enshrined into law in 2014.[8]

6.7. In addition to reforms focusing specifically on children, the UK is also exploring additional reforms to its detention system more broadly. In March 2015, a cross-party group of MPs released the report of the first parliamentary inquiry into immigration detention in the UK. [9] It found that "detention is currently used disproportionately frequently, resulting in too many instances of detention" and asserted that "the presumption in theory and practice should be in favour of community-based resolutions and against detention". It recommended that a time limit of 28 days on immigration detention should be introduced, that decisions to detain "should be very rare" and that detention should be used "for the shortest possible time and only to effect removal".

6.8. If the UK can act to limit the detention of children and achieve consensus on detention reform amongst a cross-party group of MPs, RCOA can see no reason why Australia cannot do the same. We urge the Australian Government not to proceed with the Good Order Bill and instead focus on addressing the real problems in Australia's detention system, particularly through ending the detention of children.

7. Recommendations

Recommendation 1
RCOA recommends that Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 *not be passed.*

Recommendation 2
If Recommendation 1 is not adopted, RCOA recommends that the Bill be amended as follows:

a) *Introduce clear definition of "reasonable force" (based on an objective test) and "good order" so as to clarify the situations in which force may be used and the level of force which may be used in different circumstances;*
b) *Enshrine the limitations on the use of force as outline in the Explanatory Memorandum as well as additional safeguards in line with comparable state and territory legislation governing the use of force in prisons;*
c) *Introduce a provision prohibiting the use of force against people engaged in a peaceful protest;*
d) *Introduce provisions limiting or prohibiting, as appropriate, the use of force against vulnerable and at-risk groups;*

[6] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf, p. 21
[7] See https://www.gov.uk/government/speeches/deputy-prime-ministers-speech-on-child-detention
[8] See the UK's *Immigration Act 2014* at http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted
[9] See https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf

e) *Amend provisions on training for authorised officers to bring them in line with comparable state and territory legislation relating to training for police officers and prison personnel;*
f) *Amend provisions relating to the complaints process to replace the Secretary of the Department of Immigration with an independent authority and provide for additional remedies in cases where complaints are upheld; and*
g) *Remove section 197BF in its entirety.*

Recommendation 3

RCOA recommends that the Migration Act 1958 *be amended as follows:*

a) *Abolish mandatory immigration detention in favour of a discretionary system under which detention is applied as a last resort and only when strictly necessary;*
b) *Restrict immigration detention to a maximum of 30 days without judicial review and six months overall;*
c) *Establish a system of judicial review of immigration detention longer than 30 days, with subsequent reviews carried out at regular intervals if continued detention is deemed appropriate;*
d) *Codify clear criteria for lawful detention and minimum standards of treatment for people subject to immigration detention, in line with UNHCR's Detention Guidelines;*[10] *and*
e) *Prohibit the detention of children in all closed immigration detention facilities, with community-based support arrangements to be used in place of closed detention.*

Recommendation 4

If Recommendation 3(e) is not adopted, RCOA recommends that the Migration Act 1958 *be amended so as to limit the detention of children to a 72 hours ordinarily and a maximum of seven days with Ministerial approval.*

[10] See http://www.unhcr.org/505b10ee9.html