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An initiative supported by

National Council of
Churches in Australia

Australian Churches Refugee Taskforce

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

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

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The Australian Churches Refugee Taskforce is an initiative supported by the National Council of Churches in Australia, and the Steering Committee is comprised of 22 leaders who represent nine Christian churches and three ecumenical bodies. The Taskforce has a further 540 Christian entities who are network members. See <http://www.australianchurchesrefugeetaskforce.com.au/about-us/members/>

Summary of recommendations contained in this submission

A. Section 197BA

While the Taskforce remains firmly committed to seeing an end to the practice of indefinite and mandatory detention of asylum seekers, we believe that if this legislation is to be introduced, then the ambiguity around the clause 'good order, peace or security' and the 'use of reasonable force' within an Immigration Detention Facility could be resolved and clarified if additional requirements (analogous to Australian State and Territory legislation governing the use of force in prisons) were adopted.

We therefore respectfully request that Section 197AB of the *Good Order Bill* be amended to include the following legislative protections:

- force should only be used as a last resort and only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force,
- care must be taken to prevent the infliction of injury and to protect the lives of asylum seekers detained within an Immigration Detention Facility at all times,
- the use of force to protect a person from a 'threat of harm' must only apply to an 'imminent' threat, and
- the use of force should be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

Additionally, the Taskforce recommends that the right of the Minister to determine the training and qualification requirements of authorised officers be removed, as the breadth of these powers is simply too great.

Rather, the training and qualification requirements must be legislated and should be analogous to relevant State and Territory guidelines for the training and qualifications of those employed in corrective services.

The Taskforce also recommends the insertion of a provision that ensures private contractors operating Immigration Detention Facilities will be regularly subjected to external and independent monitoring and oversight to ensure that Australia's international human rights obligations are being met.

B. Sections 197BB, 197BC, 197BD & 197 BE

Given the recent and strongly-worded criticism of the Commonwealth Ombudsman over the use of force in immigration detention facilities,¹ the Taskforce strongly recommends that this section of the proposed legislation be amended to include, at the very least, the following:

¹ In September 2011, the Commonwealth Ombudsman, in its submission to the Joint Select Committee on Australia's Immigration Detention Network, noted: "The Ombudsman is also concerned about the use of force in detention centres and suggests that better monitoring and governance is required to ensure consistency, competency and integrity of the reporting of incidents as well as ongoing training to build the capacity for de-escalation of situations which lead to unrest in detention centres," p. 17.

- a legislated requirement for independent oversight mechanisms, analogous to the one operating within New South Wales correctional facilities,²
- assurances that independent organisations such as the Australian Human Rights Commission and the Federal Ombudsman be provided unfettered access to IDFs to ensure a robust monitoring system is in place, and
- the provision and display of appropriate multilingual materials detailing the procedures for lodging complaints, including time limits and appeals procedures, in accordance with the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention.³

C. Section 197BF

The Taskforce recommends that Section 197BF of the proposed legislation be amended to ensure that:

- The Commonwealth is still held responsible for the behaviour and actions of those employed within immigration detention facilities, by removing the statutory immunity provided to them under section 197BF, and
- The ‘good faith’ provision be removed from section 197BF(1), as it places an overly unfair burden of proof on the complainant.

² In NSW, legislation was passed in August 2012, ensuring the appointment of an independent custodial inspector, responsible for inspecting, examining, reviewing and making recommendations on custodial services, including their management by Corrective Services NSW. The Bill provides that reports may include advice and recommendations relating to the efficiency, economy and proper administration of custodial centres and services.

³ UNHCR (1999). “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention,” <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>, accessed 2nd April 2015.

1 | Rationale for this submission

The Australian Churches Refugee Taskforce (the Taskforce) is an initiative of the National Council of Churches in Australia (NCCA) which came together in early 2013. It is comprised of 22 leaders who represent nine Christian churches and three ecumenical bodies. The Taskforce has a further 540 Christian entities who are network members. The Taskforce was established to promote a shared Christian vision of compassion and hospitality for asylum seekers and refugees. The churches and their agencies work together to advocate for just and humane policies.

In 2013, the Taskforce released its position paper on the responsibility owed to refugees and asylum seekers by Churches.⁴ In this paper, the Taskforce outlined its conviction that human beings are created in the image of God and that as bearers of God's image, we are inherently worthwhile and deserving of dignity and respect. This is vital to the Christian story and in understanding God's love for all people. We have a profound link as a human family – God calls us to be God's children through the Son, Jesus Christ. Jesus calls on us to recognise each other as brothers and sisters in his love: 'Just as I have loved you, you also should love one another' (John 13:34).

The call to stand with and care for those who are marginalised, oppressed and persecuted is clearly elucidated in the Scriptures: 'Learn to do good; seek justice, rescue the oppressed, defend the orphan, plead for the widow.' (Isaiah 1:17) and 'Truly I tell you, just as you did it to one of the least of these [those who are hungry, thirsty, a stranger, naked, sick or imprisoned] who are members of my family, you did it to me.' (Matthew 25:40). Since its beginning, the Christian church has sought to extend the love of God to those in need through care and service.

In word and deed, Jesus challenged the systems and structures of society (including religious ones) that forced people to the margins of their communities. He spoke to and ate with people who had been rejected by more 'respectable' members of society. Inspired by Jesus and the prophets, as Church we must seek to fulfil our calling to challenge society's injustice.

The Taskforce believes that as Christians called to love our neighbour, welcome the stranger, challenge unjust systems and offer refuge and care to those who are marginalised and in exile, we have a particular responsibility in our society when it comes to responding to issues related to asylum seekers and refugees.

The *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*⁵ seeks to:

- allows an authorised officer to use reasonable force against any person in immigration to detention, in order to protect the life, health or safety of any person (including the officer) in an immigration detention facility, or maintain the good order, peace or security of an immigration detention facility;

⁴ Poulos, E. (2013). "Why Churches Care About Asylum Seekers," UnitingJustice Australia, <http://www.australianchurchesrefugeetaskforce.com.au/why-churches-care-about-asylum-seekers/>

⁵ Refugee Council of Australia (RCoA). (2015). "Call for genuine good order in immigration detention," RCoA, <http://www.refugeecouncil.org.au/wp-content/uploads/2015/04/1504-GoodOrder-brief.pdf>

- establishes a complaints mechanism which would allow a person to make a complaint to the Secretary of the Department of Immigration and Border Protection about the use of force, rather than have the complaint adjudicated by a court, and
- imposes a bar on any action against the Commonwealth (including an authorised officer) relating to the use of force in an immigration detention facility, if the power to use force was exercised in good faith.

The Taskforce is deeply concerned by the Bill in its current form, particularly potential breaches of:

- The International Covenant on Civil and Political Rights (ICCPR), particularly articles 2, 6(1), 7, 10, 14 and 21,
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- The UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,
- The 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment,
- The 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

As a coalition of Christian churches, the Taskforce seeks to encourage truth and integrity in public discourse, especially that the truth of people's lives be upheld. We advocate for generous, hospitable and compassionate policies because we believe that God's will for society is that every person has the opportunity to flourish and that God's abundant and grace-filled love is offered to every person without distinction.

It is in this spirit and in light of the afore-mentioned international human rights treaties that the Taskforce welcomes the opportunity to provide this submission on the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (hereafter, the *Good Order Bill*).

2 | Use of Reasonable Force

Let mutual love continue. Do not neglect to show hospitality to strangers, for by doing that some have entertained angels without knowing it. Remember those who are in prison, as though you were in prison with them; those who are being tortured, as though you yourselves as being tortured. (Hebrews 13: 1-3)

Under section 197BA of the *Good Order Bill*, broad powers will be introduced to allow an authorised officer to use force against those detained in immigration facilities. The proposed new measures give officers powers to 'use such reasonable force' against 'any person or thing' as the authorised officer 'reasonably believes' is necessary to:

- a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility (IDF); or
- b) maintain the ‘good order, peace, or security’ of an immigration detention facility.

Subsection 197BA(2) sets out a non-exhaustive list of factors as to when force may be used, including:

- to protect a person from harm or from a threat of harm, including self-harm;
- to prevent the escape of a detainee;
- to prevent a person from damaging, destroying or interfering with property;
- to move a detainee within the facility; and
- to prevent action in the facility by any person that endangers life, health or safety or that disturbs the good order, peace or security of the facility.

The Taskforce is deeply concerned by the scope of the proposed powers and believes them to be both ill-defined and excessively broad. In particular, we are troubled by precisely what is meant by the ‘good order, peace or security’ of an immigration detention facility. Without additional clarity around this clause, we are concerned that it may encompass a potentially limitless range of situations.

The Taskforce is additionally concerned by the subjective nature of the assessment related to when to use force within an IDF. Under the proposed legislation, the decision to use force is left to the determination of an authorised officer who believes it is ‘reasonably necessary’, however no definition of “reasonable force” is provided. The lack of transparency around this subjective determination, particularly as it is not guided by a legislative framework, is deeply troubling.⁶

While Minister Dutton drew upon the Independent Review of the Incidents at the Christmas Island Detention Centre and Villawood Detention Centre (the Hawke-Williams report) in his justification for introducing the *Good Order Bill*,⁷ the Taskforce notes that the Hawke-Williams report does not contain any reference to the inadequacy or failings of the common law regarding the use of force within detention facilities. Additionally, it contained no recommendations for the creation of a statutory use of force power for those employed within detention facilities.⁸

While the Taskforce remains firmly committed to seeing an end to the practice of indefinite and mandatory detention of asylum seekers, we believe that if this legislation is to be introduced, then the ambiguity around this clause and the use of force within an IDF could be resolved and clarified if additional requirements (analogous to Australian State and Territory legislation governing the use of force in prisons) were adopted.

⁶ The Explanatory Memorandum accompanying the *Good Order Bill* makes it clear that the definition of “reasonable force” is to be guided by policy rather than legislation, p. 20.

⁷ Dutton, P. (2015). “Second reading speech: Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015,” House of Representatives, *Debates*, 25 February 2015, p. 1, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/ed537be9-743e-4c82-9710-d16b59d9ad54/0005/hansard_frag.pdf;fileType=application%2Fpdf, accessed 1 April 2015.

⁸ Hawke, A. & Williams, H. (2011). “Independent review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre,” 31 August 2011, <http://www.immi.gov.au/media/publications/pdf/2011/independent-review-incident-christmas-island-villawood-full.pdf>, accessed 1 April 2015.

Staff employed by Immigration Detention Services Providers (IDSPs) must only use force within IDFs if such acts may be proven to be necessary, reasonable and proportionate within the circumstances. This requires monitoring by the relevant state and federal bodies, and adequate (and ongoing) training of all staff who engage asylum seekers within IDFs.

We therefore recommend that section 197AB of the *Good Order Bill* be amended to include the following legislative protections:

- Force should only be used as a last resort and only if the purpose sought to be achieved cannot be achieved in a manner not requiring the use of force,
- Care must be taken to prevent the infliction of injury and to protect the lives of asylum seekers detained within an IDF at all times,
- Use of force to protect a person from a 'threat of harm' must only apply to an 'imminent' threat, and
- The use of force should be limited to situations where the officer cannot otherwise protect him or herself or others from harm.

Additionally, the Taskforce recommends that the right of the Minister to determine the training and qualification requirements of authorised officers be removed, as the breadth of these powers is simply too great. Currently, those employed by IDSPs and who are charged with working directly with asylum seekers in a security capacity, must hold a Certificate Level II in Security Operations or equivalent (or obtain this qualification within six months of commencing work). The Taskforce firmly believes that this is an entirely inadequate level of training and qualification for any individual charged with the responsibility to make the type of determinations called for by the *Good Order Bill*.

Rather, the training and qualification requirements must be legislated and should be analogous to relevant State and Territory guidelines for the training and qualifications of those employed in corrective services.

The Taskforce also recommends the insertion of a provision that ensures private contractors operating IDFs will be regularly subjected to external and independent monitoring and oversight to ensure that Australia's international human rights obligations are being met.

The Christian call to justice for those seeking asylum is clear and strong. We are compelled by the message of the Gospels to welcome the stranger to our lands and to stand in solidarity with those who are displaced. The Taskforce does not believe that the unmitigated use of force against asylum seekers within IDFs is an appropriate response to our duty to provide care and comfort to those who come to this land as strangers, seeking safety.

3 | Creation of a Complaints Mechanism

Whoever pursues righteousness and kindness will find life and honour. (Proverbs 21:21)

Section 197BB of the proposed legislation, provides for a statutory complaints mechanism, that will enable complaints to be made to the Secretary of the Department. The investigation of complaints will be at the discretion of the Secretary, who may conduct the investigation "in any way the Secretary thinks appropriate."⁹

⁹ Section 197BC(2)

Additionally, the Secretary may decide not to investigate the complaint on a number of grounds, including the broad ground that the investigation 'is not justified in all the circumstances'. The Secretary may refer the complaint to the Ombudsman, but does not have the power to grant any other remedies. The Ombudsman may then make non-enforceable recommendations to government.

The Taskforce does not believe this provision is adequate, particularly in light of the lack of clarity around the use of 'reasonable force' described above. The existing complaints mechanism for asylum seekers in detention is outlined by the DIBP's Detention Services Manual.

It states, in part:¹⁰

Where a person in immigration detention believes that they have been subjected to force that is excessive, unreasonable or not appropriate, they must be advised of and allowed to access, the full range of complaints handling mechanisms available to all immigration clients, including: the DSP; the Department; the Australian Human Rights Commission; the Commonwealth Ombudsman; the police and legal representation if requested.

The Explanatory Memorandum accompanying the *Good Order Bill* states that the "manner and nature of support provided by these agencies and organisations may change over time," however it is silent on specifics.¹¹ The Taskforce is concerned by this lack of clarity over the important role that independent monitoring organisations play in protecting the rights of those in immigration detention.

Given the recent and strongly-worded criticism of the Commonwealth Ombudsman over the use of force in immigration detention facilities,¹² the Taskforce strongly recommends that this section of the proposed legislation be amended to include, at the very least, the following:

- A legislated requirement for independent oversight mechanisms, analogous to the one operating within New South Wales correctional facilities,¹³
- Assurances that independent organisations such as the Australian Human Rights Commission and the Federal Ombudsman be provided unfettered access to IDFs to ensure a robust monitoring system is in place, and
- The provision and display of appropriate multilingual materials detailing the procedures for lodging complaints, including time limits and appeals procedures, in accordance with the UNHCR Guidelines on

¹⁰ DIBP, "Detention Services Manual, Use of reasonable force in immigration detention," LEGENDcom database, accessed 1 April 2015.

¹¹ p. 12.

¹² In September 2011, the Commonwealth Ombudsman, in its submission to the Joint Select Committee on Australia's Immigration Detention Network, noted: "The Ombudsman is also concerned about the use of force in detention centres and suggests that better monitoring and governance is required to ensure consistency, competency and integrity of the reporting of incidents as well as ongoing training to build the capacity for de-escalation of situations which lead to unrest in detention centres," p. 17.

¹³ In NSW, legislation was passed in August 2012, ensuring the appointment of an independent custodial inspector, responsible for inspecting, examining, reviewing and making recommendations on custodial services, including their management by Corrective Services NSW. The Bill provides that reports may include advice and recommendations relating to the efficiency, economy and proper administration of custodial centres and services.

the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention.¹⁴

4 | Immunity from Legal Action

Justice, and only justice, you shall pursue, so that you may live and occupy the land that the Lord your God is giving you. (Deuteronomy 16:20)

Section 197BF of the proposed legislation provides that no legal proceedings may be instituted against the Commonwealth (including an officer of the Commonwealth and any other person acting on behalf of the Commonwealth), “in relation to an exercise of power under section 197BA if the power was exercised in good faith.”¹⁵

The Explanatory Memorandum accompanying the *Good Order Bill* goes some way to explaining the inclusion of this provision, by stating:¹⁶

In the event of a disturbance in an immigration detention facility, [authorised officers] may be required to exercise police-like powers, including reasonable force, to protect the life, health or safety of people in the immigration detention facility and maintain the good order, peace or security of that facility. However, in so doing, employees of the immigration detention services provider would not be afforded the same protection against criminal or civil action that police officers have. Without at least some degree of this 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, even if they are expressly authorised to do so.

However, the Taskforce notes that while police officers are indeed granted (limited) protection from legal action in the course of their duties, the Commonwealth still remains liable under section 64B of the *Australian Federal Police Act 1979*.¹⁷ We are concerned that the provision of statutory immunity for authorised officers will lessen the care that is taken when exercising judgement around the use of ‘reasonable force’ within immigration detention facilities.

The Taskforce recommends that section 197BF of the proposed legislation be amended to ensure that:

- The Commonwealth is still held responsible for the behaviour and actions of those employed within immigration detention facilities, by removing the statutory immunity provided to them under section 197BF, and
- The ‘good faith’ provision be removed from section 197BF(1), as it places an overly unfair burden of proof on the complainant.

¹⁴ UNHCR (1999). “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention,” <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>, accessed 2nd April 2015.

¹⁵ *Good Order Bill*, section 197BF.

¹⁶ Explanatory Memorandum, p. 16.

¹⁷ Additionally, NSW, Queensland and Victoria have similar legislation that renders the state liable while protecting individual police officers who act in the natural course of their duties.

5 | Conclusion

When an alien resides with you in your land, you shall not oppress the alien. The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt: I am the Lord your God. (Leviticus 19: 33-35)

As a representative body of the Christian churches in Australia, the Taskforce is compelled to seek humane and just policy approaches to the most vulnerable in our society. There is no doubt that those who have been forcibly displaced as a result of a fractured world are in need of our compassion, our care, our protection and our love. Our duty as Christians – our duty as members of the human community – must be to offer the hand of welcome to our brothers and sisters who are seeking asylum. The Taskforce does not believe that the *Good Order Bill* – in its current form – provides for the safety and security of those detained in immigration detention facilities, particularly remote offshore centres such as Manus Island and Nauru which operate without appropriate independent monitoring and oversight. While the Taskforce remains committed to seeing the end of mandatory and indefinite detention, and the closure of offshore detention facilities, we are prepared to engage the Government in a consultative manner to ensure that legislation such as the *Good Order Bill* is, at the very least, in line with our international human rights obligations. We urge the Government to consider the amendments outlined above to ensure that the rights of the vulnerable are protected.

The Taskforce would very much appreciate the opportunity to provide further evidence when the Senate Standing Committee on Legal and Constitutional Affairs hears verbal submissions.

Yours sincerely

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