

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

Senator Macdonald asked the following question at the hearing on 16 April 2015:

CHAIR: In the case of the officer who hit the child in its mother's arms, what was his reason for doing that? Was he ever questioned by anyone? Did your investigation show?

Prof. Triggs: Could I take that on notice?

CHAIR: Yes.

The answer to the honourable senator's question is as follows:

The incident referred to in case study 2 of the Commission's submission is described in detail in HREOC Report No. 27 which is available on the Commission's website.

The incident occurred during a riot at the Woomera Immigration Reception and Processing Centre on 29 and 30 March 2002. The Commission found that the 7 year old son, MJ, of detainee Ms KJ was assaulted with a baton by an Australasian Correctional Management (ACM) officer, contrary to his human rights under articles 7 and 10 of the International Covenant on Civil and Political Rights and articles 37(a) and (c) of the Convention on the Rights of the Child. The particular officer was not identified.

The Commission recommended that ACM conduct a full and thorough investigation into the assault and make a referral to police if the officer responsible was identified. The Commission recommended that the Department provide an apology for the breach of MJ's human rights.

ACM was unable to identify the relevant officer. It referred the assault to both the South Australian and Federal Police and formally requested that they both re-open their investigations.

The Department forwarded an apology to the complainant and her son. This was made on a 'without prejudice and with no admission as to liability' basis.

The relevant facts that gave rise to the incident are set out below.

During the riot, Ms KJ and her 7 year old son, MJ, were amongst a group of detainees who left the main area of the compound through a breach in the fence and entered the 'sterile zone' between the internal perimeter fence and the external palisade fence. They proceeded through the sterile zone to where a protest was taking place. As a result of the actions of some protesters outside the centre and some detainees, the external fence was breached and some 45 detainees escaped. Ms KJ and her son made no attempt to escape.

ACM officers in the centre moved detainees including Ms KJ and MJ into the Oscar compound about an hour later, where they spent some time in both a friend's room and the TV room. ACM officers began to enter compounds to do a head count; however some detainees were aggressively non-compliant and continued to damage fences and surveillance cameras. Ms KJ and MJ did not engage in any violent or aggressive behaviour, nor did they damage any property. The unrest and violence continued for a number of hours, and

culminated in a stand-off between ACM officers armed with batons, shields, helmets and gas masks and detainees armed with chairs, rocks and iron sticks. This was occurring outside the room in which Ms KJ, her friend and MJ were sitting. Having discussed the situation with other women and children who were present, the group decided they should try to do something to prevent trouble between the ACM officers and the detainees, believing that the presence of women and children may help to deescalate the situation. The ACM guards ordered them back to their rooms in English; however the women and children chose to remain.

The ACM officers sprayed tear gas on the group, and Ms KJ was struck by tear gas on both sides of her face. Ms KJ was unable to see for a short time as a result of the tear gas. She was holding MJ to her chest and the two of them retreated to the vicinity of the accommodation buildings near the volleyball court. When Ms KJ opened her eyes she saw an ACM officer (who was wearing a gas mask) approach them. He raised his baton and struck MJ once across both legs with a baton. Ms KJ was unable to identify the officer.

Ms KJ and MJ returned to the demountable building in which they had been earlier in the evening. MJ was crying and holding his right leg. He told his mother that he had been hit by the officer and showed her a mark on the shin of his right leg where the baton had struck him.

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

Senator Hanson-Young asked the following question at the hearing on 16 April 2015:

Senator HANSON-YOUNG: How do we deal with the situation we have currently got in detention centres? It feels as though every week we hear another story about the mistreatment of people inside—whether they be men, women or children. We have the various documented cases of the use and abuse of force against individuals. The Commonwealth Ombudsman is investigating a number of cases at the moment in regard to the Maribyrnong detention centre—and, I imagine, other detention centres around the country. Do you have some figures in relation to the cases that the commission has investigated and could you give us the flavour of what they cover? What types of complaints are they—in relation to the interaction between those who are detained and those who are guarding them?

Prof. Triggs: I would have to take on notice the exact number but we do handle a number of complaints.

The answer to the honourable senator's question is as follows:

The Commission has reviewed its records for the last three calendar years. During this period, the Commission received a total of 30 complaints relating to the use of force by staff in immigration detention facilities.

In the period from January 2012 to December 2012, the Commission received 14 complaints relating to the use of force by staff in immigration detention facilities.

In the period from January 2013 to December 2013, the Commission received 3 complaints relating to the use of force by staff in immigration detention facilities.

In the period from January 2014 to December 2014, the Commission received 13 complaints relating to the use of force by staff in immigration detention facilities.

Issues raised in complaints received from January 2012 to December 2014 about the use of force by staff in immigration detention facilities include the following:

- allegations about the use of force when people are taken from living in the community into immigration detention;
- allegations about inappropriate or excessive use of force when officers are escorting people from immigration detention facilities to the airport and removing them from Australia;
- allegations that people in immigration detention have been physically assaulted or physically handled by staff in immigration detention facilities, including claims about being: punched, pushed using the chest and shoulder, slapped in the face, elbowed in the face, handcuffed and dragged into a room, dragged out of bed and pushed to the floor;
- allegations about the use of handcuffs when escorting people to the airport, when transferring people between immigration detention facilities, when escorting people to

medical appointments and for security purposes within immigration detention facilities.

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Senator Hanson-Young asked the following question at the hearing on 16 April 2015:

Senator HANSON-YOUNG: From reading through the government's justifications for this legislation, one of the things that strikes me is the changing demographic within detention centres. They argue that the percentage of compliance clients—that is, those who have been in Australia on various types of visas, committed a crime in whatever way and breached their visa conditions—being held in detention centres is climbing, as opposed to those they are in the detention centre with, who are of course asylum seekers. Do you have a view on the appropriateness of keeping compliance detainees in the same facility as asylum seekers? ... My understanding is that the UNHCR has guidelines in relation to this. Could you have a look at that and give us a comment from the commission's perspective.

Prof. Triggs: We would be very pleased to do that.

The answer to the honourable senator's question is as follows:

The United Nations High Commissioner for Refugees (UNHCR) has emphasised the need to separate asylum seekers from those convicted of crimes and currently serving a term of imprisonment. That is, asylum seekers should not be detained in gaols with prisoners.

These principles are contained in detention guidelines published by UNHCR for the running of immigration detention facilities.¹ Guideline 8 refers to the importance of separating asylum seekers in certain circumstances:

- (iii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population. Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.

...

- (v) In co-sex facilities, men and women should be segregated unless they are within the same family unit. Children should also be separated from adults unless these are relatives. Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative.

In similar terms, the UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers² further emphasises the need to keep asylum-seekers in separate accommodation to convicted criminals:

¹ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. At <http://www.unhcr.org/505b10ee9.html> (viewed 24 April 2015).

The following points in particular should be emphasised: ...

- (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups.

More generally, the International Covenant on Civil and Political Rights provides that people accused of offences should not be detained with convicted people. Article 10(2)(a) says:

Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

Australia has a reservation to this article, to the effect that ‘the principle of segregation is accepted as an objective to be achieved progressively’.

All people currently in immigration detention are subject to administrative detention. That is, none of them are serving a period of imprisonment as a result of a conviction for a crime. However, there can be significant differences in the degree of risk that particular detainees pose to others in detention facilities.

The Commission has long recommended that, instead of requiring the mandatory immigration detention of broad groups of people, a person should only be detained if it is shown to be necessary in their individual case. The Commission’s view is that any detention of asylum seekers should be strictly limited to the period necessary to conduct health, identity and security checks. Once these checks have been performed, asylum seekers should be provided with bridging visas and released from detention while their substantive claims for protection are assessed. Adoption of this process for all asylum seekers would significantly address the issue of inappropriate detention of high risk detainees with vulnerable detainees.

At present, the *Migration Act 1958* (Cth) requires the detention of people who have had their visas cancelled. People who have had their visas cancelled are sometimes referred to as ‘compliance’ cases. In some cases they will be detained pending their removal from Australia. It is important to recognise that there can be significant differences between the risk profile of detainees who have had their visas cancelled. At the high risk end of the spectrum are people who have had their visas cancelled on character grounds following conviction for serious criminal conduct. At the low risk end of the spectrum are people who have had a bridging visa cancelled because they have breached the Code of Behaviour.³ A person could be in breach of the Code of Behaviour for disobeying road rules, for example exceeding the speed limit while driving.

The Commission does not suggest that all ‘compliance’ cases should necessarily be detained together or that they should all necessarily be separated from asylum seekers. Rather, it is important that people in immigration detention are separated based on an assessment of the risk they pose to other detainees. The Committee has heard evidence from the Department of Immigration and Border Protection that there are separate sections in some detention centres where higher risk detainees are placed, for example, the Blaxland compound in Villawood

² UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999. At: <http://www.refworld.org/docid/3c2b3f844.html> (viewed 24 April 2015).

³ Code of Behaviour for Subclass 050 Bridging (General) visa holders. At <http://www.immi.gov.au/forms/Documents/1443.pdf> (viewed 24 April 2015).

Immigration Detention Centre in Sydney.⁴ The Committee has also heard evidence from other witnesses that there has been a failure to separate high risk detainees from vulnerable detainees in centres such as Perth Immigration Detention Centre and Yongah Hill Immigration Detention Centre which has led to serious incidents of violence.⁵

⁴ Senate Legal and Constitutional Affairs Legislation Committee, *Hearing on the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 16 April 2015 (Mr Craig Sommerville, Acting First Assistant Secretary, Status, Resolution and Detention Operations, Department of Immigration and Border Protection), p 38. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Maintaining_Good_Order/Public_Hearings (viewed 24 April 2015).

⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Hearing on the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 16 April 2015 (Ms Victoria Martin-Iverson, Spokesperson, Refugee Rights Action Network), p 22. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Maintaining_Good_Order/Public_Hearings (viewed 24 April 2015).

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

Senator Lines asked the following question at the hearing on 16 April 2015:

Senator LINES: The police force has certain powers—and extreme powers. Security officers do not have any powers but they have training related to security operations outside of detention centres. This new bill allows the use of force. Are there examples from the UK or elsewhere of where detention officers can use force? What I am trying to get at is: where does appropriate training come from? It certainly cannot come from the police, because they are not police officers, and it is not covered by the current security officer training. Are there overseas examples of the sort of training that would be required to make sure that force is not used excessively, that it is only used as an absolute last resort and so on?

Prof. Triggs: There are international standards. Obviously this is a global problem. Through the United Nations system, there are model rules for managing detention centres and for prisoners' rights and treatment. If it would be helpful, we would be very happy to get out those model rules and standards and submit them to you. It would take the discussion in a more positive direction if we could show you the kinds of standards that are being employed internationally.

The answer to the honourable senator's question is as follows:

In 2013, the Commission published 'Human rights standards for immigration detention'.¹ This publication sets out benchmarks for the humane treatment of people in immigration detention, based on internationally accepted human rights standards. These standards are also informed by inspections the Commission has made of facilities and complaints received by the Commission relating to the conditions of immigration detention.

Section 7.2 of the standards specifies that staff should be selected, assessed and trained to ensure they are suitable for employment within an immigration detention facility. The standards recommend that:

Staff are aware of, and receive training on, the standard operating procedures of the facility, (including work health and safety matters), human rights, and relevant codes of conduct (for example, the Australian Public Service code of conduct) or relevant contractual obligations.

There are a number of specific standards which deal with the kind of training which is appropriate for detention centre staff in relation to particular issues.

The standards make reference to international instruments dealing with principles that apply to the training of detention centre staff. They also make reference to applicable provisions of the *Work Health and Safety Act 2011* (Cth), including sections 17-19, 28-29, 35-39 and 46.

¹ Australian Human Rights Commission, *Human Rights standards for immigration detention*, 2012. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention> (viewed 24 April 2015).

The UNHCR Detention Guidelines provide general standards for detention centre staff training. Guideline 8 provides:²

- [48.] Conditions of detention must be humane and dignified. If detained, asylum-seekers are entitled to the following minimum conditions of detention:
- (xvi) All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence, the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention. Staff-detainee ratios need to meet international standards; and codes of conduct should be signed and respected.
 - (xvii) With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.

Guideline 9 specifies that the special circumstances and needs of particular asylum-seekers must be taken into account by detention centre management, including by specific training.

- [59.] All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has published standards by which European countries should operate detention facilities, including prisons, psychiatric establishments and immigration detention centres.³ These standards stress the importance of training of staff members, particularly for those deprived of their liberty as a consequence of being irregular migrants as opposed to convicted criminals. The standards also stress the importance of training of staff involved in deportation, and of those officers dealing with juveniles and women.

Other jurisdictions provide guidelines and standards for the training of officers who manage immigration detention centres. In the UK for example, a number of training specifications are contained in various detention service orders.⁴ In the Detention Centre Operating Standards, the standards relating to the use of force provide that:⁵

- 4. The Centre will use and purchase training for control and restraint techniques from the Prison Service for England and Wales. Advance training should be carried out by the Prison Service training establishments for England and Wales. Basic training may be carried out by

² UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. At <http://www.unhcr.org/505b10ee9.html> (viewed 24 April 2015).

³ CPT, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2015, p 66. At <http://www.unhcr.org/505b10ee9.html> (viewed 24 April 2015).

⁴ UK Visas and Immigration, *Detention Service Orders*, 2015. At <https://www.gov.uk/government/collections/detention-service-orders> (viewed 24 April 2015).

⁵ UK Visas and Immigration detention services, *Detention Centre Operating Standards*, 14 September 2011. At <https://www.gov.uk/government/publications/detention-services-operating-standards-manual> (viewed 24 April 2015).

the Centre's own instructors provided that they have been trained and currently certified by the Prison Service for England and Wales.

5. Use of force must only be applied by members of staff who have undertaken necessary training.

In the US, Immigration and Customs Enforcement are guided by detention standards. The 'use of force' training requirements are contained in an Operations Manual for Performance-Based National Detention Standards.⁶ These guidelines describe the kinds of training in relation to the use of force required for detention facility staff.

⁶ US Immigration and Customs Enforcement, *2011 Operations Manual ICE Performance-Based National Detention Standards*, section 2.15 Use of Force and Restraints. At http://www.ice.gov/doclib/detention-standards/2011/use_of_force_and_restraints.pdf (viewed 24 April 2015).