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Committee Secretary

Senate Legal and Constitutional Affairs Committee

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

Introduction

The Victorian Foundation for Survivors of Torture (Foundation House) appreciates the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

Foundation House has a particular interest in and knowledge of the issues to which the Bill relates, as many of its clients have been or are in immigration detention.

Foundation House notes that the Government has explained that the measures in the Bill are proposed because there is an increased number of 'high risk' detainees for whom it is necessary to 'provide higher security and more intensive management.'ⁱ One of the groups who are described as 'high risk' is people who are subject to adverse security assessments. Foundation House finds this assertion puzzling and troubling.

Over a number of years, Foundation House has had as clients more than 20 people who are or were subject to adverse security assessments. We are not aware that any of them has ever committed an act which would 'jeopardise the safety, security and peace of our immigration detention facilities and the safety of all persons within those facilities'ⁱⁱ and that additional measures to manage the individuals are necessary. Their well-documented plight is profoundⁱⁱⁱ and is likely be aggravated by being publicly identified as a 'high risk detainees with behavioural challenges' similar to people whose visas have been cancelled because they were convicted of serious criminal offences.^{iv}

Foundation House considers that the Bill raises a number of significant concerns and this submission focuses on three:

- 'reasonable force' is not defined
- the threshold for the use of force by immigration detention service provider officers has been lowered without compelling evidence that such a change is necessary
- the legislation does not mandate rigorous independent monitoring of the use of force and restraints.

We do not suggest that this is a comprehensive analysis of the concerns or necessarily the most significant. Foundation House is aware that others have identified these as well as additional concerns that will no doubt be considered by the Legal and Constitutional Affairs Committee.

Among the published commentaries on the Bill is the report of the Parliamentary Joint Committee on Human Rights which has expressed concern about a range of matters such as the bar on proceedings against the Commonwealth, which limits the right to an effective remedy. Foundation House agrees with general conclusion of the Joint Committee on Human Rights that the proposed measures may not be a proportionate and least restrictive way to achieve their stated objective^v, and that allowing the use of force 'to prevent any action that disturbs the good order, peace or security of the facility...provides an ill-defined and extremely broad authorisation for the use of force by (immigration detention service provider) IDSP officers.'^{vi}

Absence of a definition of 'reasonable force'

The Government's Statement of Compatibility with Human Rights notes that 'the Bill does not seek to define the expression "reasonable force"' but does not give a reason for that omission.

The only limitations on the use of force that are specified in the Bill are that an officer must not:

- give nourishment or fluids to a detainee (197BA(4)), or
- subject a person 'to greater indignity than the officer reasonably believes is necessary in the circumstances' (197BA(5)(a)), or
- 'do anything to cause a person grievous bodily harm.' ((197BA(5)(b)).

The Statement of Compatibility with Human Rights indicates that there is guidance about the meaning of 'reasonable force' in unspecified 'policy' viz:

Under policy, reasonable force must be no more than that required to ensure the life, health or safety of any person in the facility, be consistent with the

seriousness of the incident, be proportional to the level of resistance offered by the person, avoid inflicting injury if possible, and be used only as a measure of last resort.^{vii}

The Explanatory Memorandum to the Bill states that the following limitations will be specified in 'policies and procedures':

The Department of Immigration and Border Protection will have in place policies and procedures regarding the use of reasonable force in an immigration detention facility that provide safeguards to ensure:

- that use of reasonable force or restraint will be used only as a measure of last resort. Conflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable;
- reasonable force must only be used for the shortest amount of time possible;
- reasonable force must not include cruel, inhuman or degrading treatment;
- reasonable force must not be used for the purposes of punishment.^{viii}

By pointing to definitions in 'policies' and 'procedures' the Government effectively acknowledges that it is appropriate to define 'reasonable force' and that definitions it considers to be appropriate are readily available.

In the absence of an authoritative definition in the legislation, the outcome is not the clarity which the Government states the Bill will promote, but inconsistency and uncertainty. For example, as indicated above:

- the Bill prohibits 'grievous bodily harm'
- the Statement of Compatibility with Human Rights states that policy provides that force should 'avoid inflicting injury if possible' and
- the policies and procedures described in the Explanatory Memorandum do not refer to either avoidance of injury or the prohibition of grievous bodily harm.

The Parliamentary Joint Committee on Human Rights concluded that placing 'safeguards on a policy, rather than statutory, footing is insufficient to provide a justification for limitations on human rights'.^{ix} Foundation House agrees.

Foundation House requests the Legal and Constitutional Affairs Committee to recommend that the Bill be amended to include a definition of reasonable force.

Lowering the threshold for the use of force

Immigration detention service provider (IDSP) officers are subject to the common law test in relation to the use of force, that their actions must be *objectively* reasonable in the situation. The Bill proposes to introduce a subjective test, that an officer may use such reasonable force as the officer reasonably believes is necessary.

The Government contends that applying a subjective test in relation to an IDSP officer's use of force equates to the test used to assess a police officer's use of force in controlling public order disturbances.^x The analogy is not persuasive.

A more appropriate comparison is prison officers who work in circumstances similar to immigration detention facilities. Our understanding is that their use of force and restraints is subject to an objective test. For example, in Victoria legislation provides that 'a prison officer may where necessary use reasonable force to compel a prisoner to obey an order given by the prison officer....'^{xi}

Further, police officers receive a significantly higher level of training than that proposed for an IDSP officer to become authorised to use force under the proposed amendments, which is identified in the Explanatory Memorandum as likely to be equivalent to a Certificate Level II in Security Operations (which amounts to 17 days of training).

The Parliamentary Joint Committee on Human Rights has expressed its concern about the adoption of a subjective test for officers who are only required to receive this level of training: '(i)t is not clear to the committee that this level of training, which is the same as is required by crowd controllers and security guards, is sufficient to ensure that IDSP officers exercise the proposed use of force powers compatibly with the right to life.'^{xii}

It is critical to be mindful that the people who are held in immigration detention facilities include a significant number of individuals who are survivors of torture and other traumatic events. While as indicated above, the Government asserts that '(c)onflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable', this is not a legislatively mandated requirement and the capacity of staff to implement it appropriately in the particular circumstances of immigration detention will be seriously constrained by the limited training they are required to undergo.

As the Parliamentary Joint Committee on Human Rights has noted, the risk of an IDSP officer taking action that constitutes degrading treatment under the proposed use of force powers 'is compounded given that what amounts to degrading

treatment depends on all the circumstances of the case (including the particular vulnerabilities of the victim), and that people detained in immigration detention in many cases may be particularly vulnerable (such as persons seeking asylum).^{xiii}

Foundation House requests the Legal and Constitutional Affairs Committee to recommend that the Bill be amended to provide that IDSP officers are only permitted to use force that is reasonable as assessed by an objective test.

Monitoring the use of force and restraints

The Statement of Compatibility with Human Rights asserts that:

Authorised officers will be subject to increased governance arrangements to be introduced as risk mitigation measures to the use of reasonable force in (immigration detention facilities).^{xiv}

It then describes three mechanisms, of which two are current and therefore do not constitute a strengthening of governance arrangements. The only new measure - the 'statutory complaints mechanism' – is likely to be of limited effectiveness as a risk mitigation measure.

The first arrangement is said to be that 'any instance of the use of force and/or restraint in an (immigration detention facility) must be reported under section 68 of the *Work Health and Safety Act 2011*'.^{xv} However that section does not impose such a requirement. Rather, it sets out the powers and functions of health and safety representatives for employees.

The second arrangement is:

Clauses in the contract for the provision of detention services between the Commonwealth and the Immigration Detention Services Provider (IDSP) require the IDSP to apply rigorous governance mechanisms to all instances where reasonable force is used...(examples of the mechanisms are given)^{xvi}

Foundation House contends that the mechanisms governing the use of force and restraints should be a matter of public record and subject to Parliamentary scrutiny, through legislation and/or regulation, not a matter that is negotiated confidentially between the Government and a private company. For example, in NSW it is a regulation which provides that any use of force by a correctional officer on an inmate must be the subject of a report to the general manager, which is to be in writing, specifying the names of all parties involved, the location of the force, the nature of the force and the circumstances requiring its use.^{xvii}

The third arrangement is the establishment of a 'statutory complaints mechanism' which is that a person may complain to the Secretary of the Department of Immigration and Border Protection about an officer's exercise of power under the provisions of the Bill. It is not readily apparent that this new avenue of complaint will constitute a significant additional risk mitigation measure. As the Explanatory Memorandum points out, there is already a 'comprehensive system in place to provide detainees with a variety of assistance and options to raise their problems or make complaints regarding their immigration detention.'^{xviii} They include both 'internal' bodies such as the Department of Immigration and Border Protection and external bodies such as the Commonwealth Ombudsman, the Australian Human Rights Commission and police.

Why would an aggrieved person decide to complain to the Secretary of the Department which is in effect the detaining authority and could be seen as having a major conflict of interest, rather than an external body? As the Joint Committee on Human Rights points out, the investigation of complaints is at the discretion of the Secretary and 'at the conclusion of an investigation the Secretary may refer the complaint to the Ombudsman but does not have the power to grant any other remedies.'^{xix} It concluded:

1.118 The committee does not consider that the complaint mechanism provided by the bill (when considered together with the bar on proceedings against the Commonwealth) meets the obligation to provide an effective remedy.

Foundation House requests the Senate Legal and Constitutional Affairs Committee to recommend that the Bill be amended to ensure that

- the use of force and restraints is effectively monitored and
- there is an effective remedy for breaches.

About the Victorian Foundation for Survivors of Torture

Foundation House has since its establishment in 1987 assisted thousands of survivors of torture and other traumatic experiences, of refugee backgrounds, who have settled in the Australian state of Victoria. We provide counselling and other services to individuals and families; train and support service providers in the health, education and welfare sectors; and conduct and commission research to improve policies, programs and services affecting the health and wellbeing of people of refugee backgrounds.

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Notes

ⁱ Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, page 1.

ⁱⁱ *Ibid* page 1.

ⁱⁱⁱ Victorian Foundation for Survivors of Torture, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry in the Migration Amendment Bill 2013 (Provisions), 20 January 2014.

^{iv} *Ibid* page 1.

^v Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twentieth report of the 44th Parliament*, [1.68].

^{vi} Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twentieth report of the 44th Parliament*, [1.72].

^{vii} Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, p.20.

^{viii} Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, [44].

^{ix} Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twentieth report of the 44th Parliament*, [1.71].

^x Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, [31].

^{xi} S.23(2), *Corrections Act 1986* (Victoria).

^{xii} Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twentieth report of the 44th Parliament*, [1.75].

^{xiii} Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Twentieth report of the 44th Parliament*, [1.85].

^{xiv} Page 18.

^{xv} Page 18.

^{xvi} Page 18. We assume the text is inadvertently incorrect and that the contractual clauses require the provider to apply mechanisms to *all* instances of the use of force and not just where reasonable force is used. We have not sighted the document to confirm this.

^{xvii} Crimes (Administration of Sentences) Regulation 2008 (NSW) s.123.

^{xviii} Paragraph 74.

^{xix} Paragraph 1.117.