Senate agitates for immigration detention reform

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When the apparently uncontroversial Migration and Maritime Powers Amendment Bill (No.1) 2015 was introduced into Parliament in September 2015, the Minister for Immigration and Border Protection, Peter Dutton noted that the Bill would simply strengthen and clarify the legal framework so that the Migration Act 1958 (the Act) would be interpreted consistently with the original policy intention. Though the Minister probably would have been expecting the Opposition to support the omnibus Bill, he may not have envisaged they would also support the suite of amendments moved by the Australian Greens. Though the Government took the view that the amendments, which secured passage in the Senate last week, were unnecessary and went beyond the scope of the Bill, their significance should not be overlooked.

The first of the amendments significantly strengthens section 4AA of the Act, which currently reads ‘the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort’. This provision was inserted into the Act ten years ago by the Howard-lead Coalition Government at the instigation of Liberal Party ‘moderates’ led by Petro Georgiou. As noted by Prime Minister Howard, ‘the objective of these amendments is to ensure that families with children in detention will be placed in the community, under community detention arrangements’. However, there are currently 112 children residing at various types of immigration detention facilities in Australia.

The Senate agreed that the principle would be given practical effect by mandating that the Minister make a determination, as soon as practicable, but in any case within 30 days, that a minor is to reside at a specified place, instead of being detained in ‘immigration detention’. However, the maximum 30 day time frame does not apply to a minor’s family or guardian (which could present complications) and the obligation does not extend offshore to the close to 100 asylum seeker children currently residing in Nauru.

The amendments would provide that the Minister is precluded from making such a determination if ASIO has issued an adverse security assessment or where the living conditions at the alternative place are not higher than the place where the minor would otherwise be detained. The Minister would have discretion not to make a determination in
circumstances where this would be in the best interests of the child, in the public interest or where ASIO had issued an adverse security assessment in respect of a member of the minor’s family and the family unit did not want to be separated.

The second amendment to secure passage in the Senate saw the creation of an offence for failure to report a ‘reportable assault’, punishable with a maximum pecuniary penalty of $10,800. A ‘reportable assault’ would be broadly defined in the Act to include: unlawful sexual contact; sexual harassment; unreasonable use of force; and any other assault. The mandatory obligation to report an assault would apply onshore as well as in Australia’s offshore processing facilities in PNG and Nauru and the obligation would extend to employees, contractors, sub-contractors and so forth. This amendment implements recommendation 14 of the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru (the Nauru inquiry), tabled in August 2015 and strengthens the Opposition’s Migration Amendment (Mandatory Reporting) Bill 2015 (introduced in October 2015), as discussed previously.

The third and fourth amendments are aimed at increasing the transparency and accountability of immigration detention facilities both in Australia and in regional processing countries. Proposed section 197AK of the Act would provide that journalists must not be refused entry to immigration detention facilities unless there are reasonable ground for refusal (which would need to be publicly disclosed). This amendment implements recommendation 5 of the Nauru inquiry. Journalists granted access to facilities would be required to take all reasonable steps to ensure that the privacy of detainees is protected and that their identity is not revealed in subsequently published material. However, there are no penalties in the Act for failing to do so. This may prove problematic, as highlighted recently by ABC’s Media Watch. The Opposition supported this measure on the basis of public disclosure and accountability, arguing that Australians are entitled to know how Australian-funded facilities are being operated. Not too surprisingly, ten years ago the Opposition similarly argued that media representatives should be given independent access to people in detention centres.

The fourth amendment provides that a person may disclose or use ‘protected immigration detention facility information’ (information or a document that was obtained in the course of their employment and which relates to a detention facility) if the person reasonably believes that the disclosure or use would be in the public interest. A person who used or disclosed such information would expressly not be liable in law for having done so (including any disciplinary action). While the Opposition maintains that the Australian Border Force Act 2015 does not prevent staff and contractors in detention facilities from speaking publicly about conditions in offshore processing centres, they nonetheless supported this amendment on the basis that it would ‘make it absolutely clear that disclosures in the public interest are lawful and protected’.

If the Senate and House of Representatives are unable to reach agreement as to the Bill’s final form, the Government may have no option but to abandon the Bill. Though it may be some time before the outcome is known, these amendments signal a growing dissatisfaction
by the Opposition and the Senate cross benches with the way in which the Government is managing its detention arrangements in Australia and abroad.

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