Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015

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The Public Law & Policy Research Unit (PLPRU) contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

1. Introduction: Balance of Power and Accountability

We commend the government for codifying the use of force by authorized personnel in immigration detention centres in legislation. It is incumbent on the State to demonstrate that any use of force against an individual is necessary to achieve a legitimate objective. This requires clear guidelines as to the circumstances in which force can be used. There are two purposes for regulating the use of force that can be used in managing detainees in immigration detention centres. One is to protect employees in immigration detention centres by making it clear the circumstances in which they are authorized to use force and the extent of the force they can use, the other is to protect detainees who are subject to the use of force, by specifying the limits to the use of force and providing avenues for complaint and legal redress when excessive force has been used.

To legislate for the use of force by the State or those representing the State against individuals is an extraordinary power, and must be balanced against the protection of those who are subjected to that force by ensuring there are adequate safeguards around the use of force. As currently formulated, the Bill does not strike the right balance. It confers broad, discretionary powers to use force against detainees in immigration detention centres, while providing immunity from the courts when force has been used in 'good faith'. Although the legislation outlines a complaints mechanism when the use of force is unwarranted or excessive, there is no time frame for addressing complaints, and the Secretary has a broad discretion not to investigate complaints.

The Minister's second reading speech reveals a misunderstanding as to what is to be balanced in determining the extent of force officers ought to be authorized to use in immigration detention centres. The Minister stated:

> 'This provision provides the appropriate balance between protecting authorised officers in the exercise of the power to use reasonable force and ensuring that the power is exercised in good faith.'[1]

This statement suggests the balance is between the use of force and the good faith exercise of that force. 'Good faith' acts as a constraint on the power to use force, albeit an inadequate one as we argue below. What is missing from the Minter's statement is a recognition that the exercise of statutory power has a direct effect on the rights of individuals, and that limits on the power are provided precisely for the protection of those individuals.

The balance to be struck in the legislation is between the protection of immigration detention personnel by providing statutory authority for their use of force, and protection of those at the receiving end of that force, as the Minister recognises later in his second reading speech.[2] A crucial aspect of the regulation of this balance is that there is an independent objective assessment of whether the exercise of power has remained within legal boundaries, a responsibility that is traditionally conferred on the courts.

2. Extent of force that can be used

The Act contemplates the use of a high level of force in some circumstances, including force that results in 'death and serious injury'.[3] The only limitation on the use of force of this extremity is that the immigration officer 'reasonably believed that the force was reasonably necessary'. This test combines objective and subjective elements in the determination of the legitimate use of force. The objective assessment is whether force was 'reasonably necessary'. This requires a rational assessment of the circumstances facing immigration officers in the face of resistance or violence by detainees in immigration detention centres. However, immigration officers are not constrained to using only this level of force. The subjective element broadens the force they can use to what they 'reasonably believe' to be

[1] House of Representatives, Commonwealth Parliament, 25 March 2015, Peter Dutton, Minister for Immigration and Border Protection, 2.
[2] Ibid, 3.
[3] Proposed s 197BA(5).

reasonably necessary. This means that even if force was not reasonably necessary following an objective assessment, the force is still authorized under the Act if the immigration officer reasonably believed that the unreasonable force was necessary. This requires an assessment of the state of mind of the immigration detention officer, and what they apprehended the circumstances to be. If the officer's assessment of the circumstances was mistaken, and even seriously so, it might still be considered that they reasonably believed the excessive use of force to be necessary.

The use of a subjective test to modify the objective test for the use of force is not consistent with the regulation of the use of force in other comparable contexts. The Parliamentary Joint Committee on Human Rights noted that in regulating the use of force in prisons, the objective test of reasonable force (what is reasonably necessary in the circumstances) is used.[4]

Also, the Crimes Act 1914 (Cth) limits the force police officers may use in making an arrest in the following way:

S 3ZC Use of force in making arrest

> (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

A subjective test is introduced in s 3ZC(2) to modify the objective test only 'to protect life or prevent serious injury to another person'.

3. **Circumstances in which force can be used**

The legislation specifies the circumstances in which force can be used in section 197BA (1) and (2). In our submission, the drafting of these sections, particularly s 197BA(1)(b), are too broad, and capture circumstances that should not trigger authority to use force against immigration detainees.

Section 197BA (1) restricts use of force to the protection of 'the life, health or safety of any person'. This is clearly a circumstance in which an officer should be authorised to use reasonable force. Section 197BA (2) outlines specific occasions in which force is authorised, including the protection from harm of persons and property. More problematically, s 197BA(2)(e) authorises the use of force 'to move a detainee within an immigration detention facility'. In our submission, there should be additional requirements before force can be used to move a person, such as those discussed in the Joint Parliamentary Committee on Human Rights report on the Bill, 'that a person is unreasonably refusing to move or that the officer has first issued a lawful request for the person to move'.[5]

[4] Parliamentary Joint Committee on Human Rights, Twentieth Report of the 44th Parliament, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015, 18 March 2015, 20.
[5] Ibid, 27-28, para 1.108.

The circumstance for the use of force that is of most concern arises in s 197BA(1)(b) which authorises 'such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, *to maintain the good order, peace or security of an immigration detention facility*'.

The words 'good order, peace and security' are not defined in the Act. Good order could mean that a detention centre is free from 'public order disturbances' as the Explanatory Memorandum states,[6] or it could mean more broadly, that the centre is in good working order.

This uncertainty in the meaning of 'good order' leaves a potentially wide range of circumstances when force might be authorized, including an extensive range of peaceful and non-threatening activities. For example, officers could deem peaceful protests by detainees as disrupting 'good order'. Even less intrusive actions such as being uncooperative or gathering in thoroughfares such as on walkways or in eating areas could also potentially be interpreted as disrupting the 'good order' of a detention centre.

If good order were interpreted this broadly, it is doubtful that the Statement of Compatibility with Human Rights is correct in observing that s197BA(2)(b) is consistent with the right to freedom of association and peaceful assembly found in Articles 21 and 22 of the *International Covenant on Political and Civil Rights (ICCPR).*[7]

As a general principle, the use of force should only be used as a last resort. Provisions authorising the use of force should use clear and unambiguous language. The Joint Standing Committee on Human Rights noted that the use of force in prison disturbances is often clearly defined in state and territory legislation and limited to 'preventing or quelling a riot or disturbance'[8]. Such clarity is needed in s197BA (1) (b) especially given the minimal statutory safeguards in s197BA (4) and (5) and the subjective assessment criterion in s197BA (1).

The explanatory memorandum and second reading speech indicate that S197BA 1(b) is intended to ensure the officers can respond adequately to public order disturbances such as the Christmas Island riots. To achieve this end, the provision should be redrafted to more directly reflect this intention. We submit that the following would be a more reasonable provision.

S 197BA(1):

> An authorised officer may use such reasonable force against any person or thing, as the authorised officers reasonably believes is necessary to;

[6] Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, [29].
[7] Explanatory Memorandum, Attachment A.
[8] Parliamentary Joint Committee on Human Rights, Twentieth report of the 44th Parliament, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015, 18 March 2015, 19.

> *(b) deter and prevent public order disturbances that affect the life, health and safety of any person in an immigration facility.*

This restricts the authorisation of force to serious public disturbances such as riots. It fulfils the object and purpose of the Bill as expressed in the Explanatory Memorandum whilst ensuring Articles 21 & 22 of the *ICCPR* are not violated.

Another concern about the circumstances in which force can be used is that there is no indication of what steps should be taken before force is used, and no requirement for officers to file reports in respect of the use of force. The Parliamentary Joint Committee on Human Rights identifies that the Bill fails to include 'a number of safeguards that apply to analogous state and territory legislation governing the use of force in prisons.'[9] Indeed, relevant correctional services legislation in various jurisdictions require timely reporting of any incident involving a use of force,[10] and provides objectively assessable lists of criteria or preconditions for a valid use of force.[11] Further, there is no provision setting out a procedure to deal with the immediate aftermath of a use of force, whether in good faith or otherwise. It is left open for authorised officers to plot out the steps to be taken. It is otherwise unknown if the authorised officers ought to, for example, seek medical treatment for the detainee upon whom force was used,[12] or take statements from other detainees or staff in order to clarify what happened for the purposes of a future investigation. It would be advisable for the Bill to adopt a set of guidelines modelled on Regulation 131 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW). The provisions therein set out a clearer and more objective procedure for the use of force, and provide detailed guidance as to when force may be used that is severely lacking at Clause 197BA(2) of the Bill.[13]

It is notable that the Bill omits any references to the use of force in respect of juvenile detainees and thus juvenile detainees are liable to have the same force used against them as would be used against an adult detainee. We submit that the Bill should adopt a model similar to that of the *Young Offenders Regulations 1995* (WA).[14] Division 4 of the Regulations creates strict rules, obligations, and reporting requirements that surround the use of force against juvenile detainees.[15]

4. Training and qualification requirements

Subclause 197BA(6) of the Bill requires officers to meet the training and qualification requirements under Subclause (7) in order to meet the definition of 'authorised officer' under Section 5(1) of the *Migration Act*. The subclause (7) requirements are not stated in the Bill, rather they are to be determined by the Minister at a later date. However, the Explanatory

[9] Ibid 19.
[10] *Corrections Act 1986* (Vic) ss 23(3)-(4); *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 133.
[11] *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 131; *Corrective Services Act 2006* (Qld) s 143; *Prisons Act 1981* (WA) s 48.
[12] See, eg, *Court Security and Custodial Services Regulations 1999* (WA) reg 11(2).
[13] See especially *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 131(4).
[14] See also *Young Offenders Act 1994* (WA) s 11C.
[15] See also *Youth Justice Regulations 2003* (Qld) regs 9D–9E, 17–18.

Memorandum foreshadows that in order gain authorisation, officers will be required to attain a Certificate Level II in Security Operations.[16] To attain the Certificate, a prospective authorised officer must complete 12 units of competency. Mention is also made of ongoing training requirements, though the Explanatory Memorandum does not elaborate any further.[17]

The Bill's supporting documentation makes clear that one of the primary purposes of the Bill is to confer upon authorised officers the same level of discretion, power, and responsibility as police officers.[18] It is logical then that the training and qualifications required of authorised officers should be commensurate with that of police officers, or at least correctional services officers. A Certificate Level II in Security Operations is attainable in less than three weeks from Registered Training Organisations across Australia.[19] In contrast, in order to be qualified as a police officer South Australian recruits must undertake 12 months of Police Academy training followed by 16 months as a Probationary Constable;[20] Victorian recruits spend 33 weeks at Victoria Police Academy followed by 83 weeks of further training;[21] the Federal Police Development Program requires 24 weeks of formal live-in training and then 12 months of on-the-job training;[22] and New South Wales Police's Associate Degree in Policing Practice requires between two and three years to complete.[23] Meanwhile, depending on the jurisdiction, correctional services officers require between seven weeks of pre-service training followed by a two-week on-the-job placement[24] to ten weeks of training coupled with 12 months of probationary employment.[25]

At present, the Bill allows individuals who are trained merely to the standard of 'crowd controllers and security guards'[26] to be appointed as authorised officers. Given the extent of the discretion and responsibility conferred on authorised officers, the Bill's training and qualifications requirements are inadequate.

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[16] Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) [61].
[17] Ibid [62].
[18] Ibid [30]–[33], [97].
[19] Technical Advanced Training, *Certificate II In Security Operations* (1 December 2014) <http://www.advancetraining.com.au/securitycerII.html>;Tactical Training Australia, *Certificate II in Security Operations* (6 February 2015) <http://tacticaltraining.com.au/Download-document/14-Certificate-II-Security-Operations-Licensing-Package.html>; Strategic Training Solutions Pty Ltd, *Certificate II in Security Operations (CPP20212)* <http://www.strategictraining.com.au/certificate-ii-in-security-operations-cpp20212.html>; Intercept Group, *NEWCASTLE – Certificate II in Security Operations CPP20212* <http://www.intercepttraining.com/courses/18/newcastle--certificate-ii-in-security-operations--prelicence>.
[20] South Australia Police, *Your Program,* AchieveMore <http://www.achievemore.com.au/police-officer-careers/your-program/>.
[21] Victoria Police, *Becoming a Police Officer*, PoliceCareer <https://www.policecareer.vic.gov.au/police/about-the-role/becoming-a-police-officer>.
[22] Australian Federal Police, *Recruit Training* <http://www.afp.gov.au/jobs/recruit-training>.
[23] NSW Police Force, *About the course*, NSW Police Recruitment <www.police.nsw.gov.au/recruitment/the_training/associate_degree_in_policing_practice/about_the_course>.
[24] Corrections Victoria, *Training*, Corrections Jobs <http://correctionsjobs.vic.gov.au/prison-officers/training/>.
[25] Tasmania Prison Service, *Correctional Officer Application Information Pack* (17 February 2014) Department of Justice Tasmania 11 <http://www.justice.tas.gov.au/__data/assets/pdf_file/0014/202703/Correctional_Officer_Job_Package_5.pdf>.
[26] Department of Parliamentary Services (Cth), *Bills Digest*, No 86 of 2014-15, 23 March 2015, 14 ('*Bills Digest*').

The Parliamentary Joint Committee on Human Rights states that 'it is not clear … that this level of training … is sufficient to ensure that IDSP (immigration detention service provider) officers exercise the proposed use of force powers compatibly with the right to life.'[27] The Explanatory Memorandum claims that including the qualifications in the *Migration Regulations*[28] would not be 'appropriate' or 'practical'[29] because any provision pertaining to qualifications would apparently have to be amended 'on a regular basis'.[30] However, qualifications standards do not typically have a rapid pace of change, and no evidence is presented in the Explanatory Memorandum to explain why amending the *Migration Regulations* would be too inconvenient, especially given that delegated legislation is far simpler to amend than statute and is designed for the purpose of administrative efficiency.

The Statement of Compatibility with Human Rights mentions that 'IDSP officers responsible for managing the security of immigration detention centres must hold a Certificate Level IV in Security Operations or Technical Security or equivalent and have at least five years of experience in security management.'[31] It is this level of qualification that ought to be required of authorised officers in order that the power to use reasonable force be conferred upon them, potentially with scope to reduce the experience requirement to two years. If officers within IDFs are to be given the power to use force against detainees, the IDSPs, the detainees, and the general public must be confident in the ability of these officers to exercise their discretion responsibly and in a manner compatible with Australia's human rights obligations.

5. Review of the Use of Force in Immigration Detention Centres

a. Complaints mechanism

We commend the Bill for outlining a detailed complaints regime. However, we submit that the regime is deficient in a few key respects. First, the secretary has too broad a discretion not to consider complaints (s197BD). While the Ombudsman/Commissioner of Australian Federal Police/Commissioner or head of the police force of a State or Territory can consider the complaint, they can only do so if the Secretary is satisfied that those bodies could deal with the complaint more effectively (s 197BE). Second, there is no time frame for the consideration of complaints, meaning any complaint risks being sidelined.

b. Judicial review

Under the law as it currently stands, detainees have recourse to the courts to consider whether the force used by the employee of the immigration detention facility was objectively reasonable in the circumstances.[32]

[27] *Bills Digest* 14, quoting *JCHR Report* 20.
[28] *1994* (Cth).
[29] Explanatory Memorandum [60].
[30] Ibid.
[31] Statement of Compatibility, 19.
[32] See Explanatory Memorandum.

Recourse to the courts is normally available to protect individuals from tortious or criminal actions being committed against them. The Bill immunizes migration officers from both criminal and civil liability for their use of force if it was used in 'good faith'. To be clear, the legislation therefore potentially removes from judicial scrutiny the use of force in 'good faith' that caused grievous bodily harm or even death and was not reasonably necessary in the circumstances.

It has been noted that 'good faith' (which is not defined in the *Migration Act*) can be interpreted in many different ways.[33] Sometimes the courts have focused on a person's reasons for their actions, or on their knowledge when an incident occurs. [34] The High Court has held that something more than negligence is required for bad faith. Even if action is negligent or improperly performed, it can still be done in good faith.[35] Conversely, it is notoriously difficult to prove bad faith. Adding to the difficulty of the assessment of good faith is the fact that it is a preliminary consideration to ascertain the jurisdiction of the court. It is unlikely, in this context, that the courts will have the opportunity for a full inquiry into the circumstances that give rise to the question of the good faith in the exercise of force against a detainee.

In addition to immunizing IDSP officers in these circumstances, the legislation provides no recourse against the Commonwealth. Although it is common for state law to provide personal protection from liability for police officers, detainees commonly have recourse to the law to bring an action against the State for unreasonable uses of force against them.

When an IDSP officer uses force in good faith, the only judicial recourse is to the inherent constitutional jurisdiction of the High Court under s 75(v). In the context of a use of force, this inherent jurisdiction is of limited use. It provides only the remedies of prohibition, mandamus and injunction, which are useful for preventing future infringements of the law, but provide no opportunity for the High Court to consider a claim to recover damages for injury caused by an immigration officer's use of force that was not reasonably necessary.

It is interesting to note that the High Court rejected an application of an asylum seeker who escaped from immigration detention in 2003 on the grounds that the correct legal recourse for the asylum seeker was to pursue an action in the courts.

> An alien does not stand outside the protection of the civil or criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort.[36]

[33] *Secretary, Department of Education, Employment, Training and Youth Affairs v Barry Prince* [1997] FCA 1565, [129].
[34] *Electro Optic Systems Pty Ltd v State of New South Wales; West and Anor v State of New South Wales* [2014] ACTCA 45, [622].
[35] *Board of Fire Commissioners of NSW v Ardouin* (1961) 109 CLR 105 [1961] HCA 17, [128].
[36] *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, [21] (Gleeson CJ).

The availability of these remedies was significant for the High Court in rejecting an argument that escape from a detention centre was reasonably necessary given conditions in the centre were so bad. With recourse to the courts effectively removed in relation to the use of force of immigration officers, would the Court be more sympathetic to a claim of the reasonably necessity of escaping from immigration detention?

6. Conclusion

While codifying the use of force in immigration detention facilities is a commendable aim, the current Bill is deficient in a number of respects, in particular, as outlined in this submission, it provides too broad an authorisation for the use of force; inadequate direction on the circumstances force can and cannot be used; inadequate training and qualification requirements for detention centre personnel who are authorised to use force; an inadequate complaints regime; and inadequate oversight by the Courts.

We strongly urge the Committee to request amendments to the Bill so that it strikes the right balance between granting statutory authority for the use of force in immigration detention centres, and protecting those subject to the use of that force.