

## Law Students for Refugees

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

1. We write to express serious concerns about the proposed *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (“the Bill”).
2. Specifically, we are concerned that the Bill gives inadequately trained private contractors unreasonably broad power to use force against individuals in immigration detention facilities. We are further concerned that the Bill authorises the use of deadly force in certain circumstances and that it grants legal immunity to individuals exercising force based on an illusory “good faith” test.
3. The structure of our submission is as follows:
  1. Problems of **generality and definition**;
  2. Problems of **equipment and deadly force**;
  3. Problems of **training and staffing**; and
  4. Problems of **legal immunity**.

#### Generality and definition

4. The Bill does not define its operative terms and leaves a great deal of discretion to individual authorised officers. In particular, ss 197BA(1)(b) and 197BA(2)(f)(ii) provide that force may be used to maintain the “good order” of immigration detention facilities.
5. This offers little help in determining when force is authorised. The Explanatory Memorandum of the Bill states that maintaining “good order” includes using force to prevent “disturbances”.<sup>1</sup> However, the Memorandum also makes clear that the circumstances listed in the Bill are not “exhaustive”

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) [29].

of when force may be used.<sup>2</sup> Therefore, discretion to determine when an immigration detention facility's "good order" is sufficiently threatened to authorise the use of force is left to individual authorised officers.

6. We believe this is a serious cause for concern in light of the issues raised by the training requirements of authorised officers laid out in paragraphs 15–19 below.
7. Further, s 197BA(1) gives authorised officers the power to use force against "any person". The Explanatory Memorandum indicates that this includes visitors to immigration detention facilities or "any other person who is in an immigration detention facility".<sup>3</sup> This is an exceptionally wide framing of the right to use force which conceivably extends that right to family members of detainees, journalists and non-governmental organization staff if an individual authorised officer believes they are disrupting the "good order" of an immigration detention facility.
8. The Bill provides very few restrictions on the use of force, other than whether an authorised officer "reasonably believes" force is necessary. In contrast with State legislation that requires clear warnings be given before force is used<sup>4</sup> or provides that force may only be used where there are "no other reasonable means of control"<sup>5</sup> this is an unacceptably wide power. Authorised officers lack clear legislative guidance over when force is permissible and this increases the likelihood that it could be used unnecessarily or recklessly.

#### Equipment and deadly force

9. Section 197BA(5)(b) of the Bill relevantly states that in exercising force under s 197BA(1) an authorised officer must not  

do anything likely to cause a person grievous bodily harm unless the authorised officer reasonably believes that doing the thing is necessary to protect the life of, or to prevent serious injury to, another person (including the authorised officer).

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<sup>2</sup> Ibid, [34] and [43].

<sup>3</sup> Ibid, [28].

<sup>4</sup> *Corrective Services Act 2006* (QLD) s 143(2)(b).

<sup>5</sup> *Prisons Act 1981* (WA) s 48(1)(b).

The Explanatory Memorandum states that “grievous bodily harm” includes “death”.<sup>6</sup>

10. This section could, therefore, be fairly characterised as authorising deadly force at the discretion of authorised officers. While it is subject to the requirement in s 197BA(1) that an authorised officer believe that the use of force be “reasonably necessary” and the requirement that deadly force only be used to “protect life [...] or [...] prevent serious injury”, it remains legally sanctioned for authorised officers to make life or death decisions and to carry them out personally.
11. The Explanatory Memorandum justifies this provision in two ways. First, it makes reference to a hypothetical situation in which a detainee “is able to obtain a weapon and hold a hostage”.<sup>7</sup> In this situation it claims that an authorised officer may need to use “sufficient reasonable force that causes, or is likely to cause, grievous bodily harm to the detainee”.<sup>8</sup>
12. This example raises serious questions about how authorised officers should be trained and equipped. If the intention of the drafters of the Bill is to equip authorised officers to defuse hostage situations using force up to and including force that may kill a detainee, will authorised officers be issued with firearms? If not, what training in hostage negotiation or other weapons will they be provided?
13. Second, the Explanatory Memorandum states that authorised officers being “reluctant to use reasonable force” in containing a “disturbance”, “could result in the death of a person or people in the immigration detention facility”.<sup>9</sup> Putting aside the troubling fact that the Bill is now making provision for “disturbances” having multiple fatalities, it demands consideration as to what extra training and equipment will be issued to officers in making these life or death decisions as authorised by the Bill,
14. If the intention of the Bill is to issue authorised officers with firearms, it is not appropriate for private security contractors to be handling security in a situation that is this volatile. If the intention of the Bill is not to issue

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<sup>6</sup> Above n 1, [52].

<sup>7</sup> Ibid, [54].

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, [97].

authorised officers with firearms, it is unclear how they should carry out their responsibilities under the Bill to subdue hostage-takers and prevent multiple fatalities during “disturbances”.

#### Training and staffing

15. The scheme of the proposed amendments provide that an officer must not be an authorised officer under s 197BA(1) unless they have satisfied the training and qualification requirements determined by the Minister under s 197BA(7).<sup>10</sup>
16. The Bill does not specify what these training and qualification requirements will be. The Explanatory Memorandum states that it is “likely” that the requirements determined by the Minister will “include the Certificate Level II in Security Operations”.<sup>11</sup> This is consistent with current requirements for working in immigration detention facilities.<sup>12</sup> While it varies depending on the provider, a Certificate II in Security Operations typically takes between 16 and 17 days to obtain.<sup>13</sup>
17. The Bill gives authorised officers similar power as is given to members of the Australian Federal Police (‘AFP’)<sup>14</sup> and state correctional officers to use force.<sup>15</sup> However, the training requirements for correctional services officers are far more rigorous than those of authorised officers under the Bill. In Queensland, correctional officers are required to undertake a 14-week course at the Department of Correctional Services’ Academy.<sup>16</sup> In the Australian Capital Territory, an 11-week course is required.<sup>17</sup> The training requirements for authorised officers are inadequate by comparison.

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<sup>10</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) cl 5.

<sup>11</sup> Above n 1, [61].

<sup>12</sup> Joint Select Committee on Australia’s Immigration Detention Network, *Final Report* (2012) [3.66].

<sup>13</sup> See, for e.g., <<https://www.kangan.edu.au/tafe-courses/certificate-ii-in-security-operations-2392>> and <<http://www.advancetraining.com.au/securitycerII.html>>.

<sup>14</sup> *Australian Federal Police Act 1979* (Cth) s 14B.

<sup>15</sup> See, for e.g., *Correctional Services Act 1982* (SA) s 86 or *Corrective Services Act 2006* (QLD) Part 5.

<sup>16</sup> Government of Western Australia, *Prison Officer* (13 January 2015) Department of Corrective Services <<https://www.correctiveservices.wa.gov.au/careers/opportunities/prison-officer.aspx>>.

<sup>17</sup> Government of the Australian Capital Territory, *Why Become A Correctional Officer?* (29 August 2012) ACT Corrective Services

18. Concerns have also been raised about the quality of staff available to immigration detention services providers. A report by the former Joint Select Committee on Australia's Immigration Detention Network referred explicitly to "Serco's difficulty [in] attracting suitable numbers of qualified staff",<sup>18</sup> and raised concerns over the "adequacy of mental health training received by Serco officers".<sup>19</sup>
19. Based on the above, authorised officers are unlikely to be adequately trained in order to responsibly exercise the use of force under the proposed amendments.

#### Legal immunity

20. Section 197BF(1) of the Bill provides that,

No proceedings may be instituted or continued in any court against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.

Where "Commonwealth" includes "any [...] person acting on the behalf of the Commonwealth".

21. This provision effectively attempts to bar any proceeding,<sup>20</sup> civil or criminal, being brought against an authorised officer for their use of force provided they can show it was done in "good faith". This is greater legal immunity than is given to members of the AFP.<sup>21</sup>
22. Good faith is a common legal test. However, the Bill does not require that good faith be taken into account during court proceedings assessing conduct

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<<http://www.cs.act.gov.au/page/view/3319/title/why-become-a-correctional-officer>>.

<sup>18</sup> Above n 12, [3.43].

<sup>19</sup> Ibid, [3.68].

<sup>20</sup> Section 197BF(3) clarifies that the Bill does not intend to oust the jurisdiction of the High Court under s 75(v) of the Constitution. However, it is difficult to imagine how a complaint based on conduct under the proposed amendments could proceed directly to a claim under the original jurisdiction of the High Court unless the complaint raised a complex legal question. Whether or not the Bill would succeed in its attempt to grant legal immunity to authorised officers it does succeed in greatly curtailing access to the courts for people with complaints based on conduct under the proposed amendments.

<sup>21</sup> On the contrary, s 64B of the *Australian Federal Police Act 1979* (Cth) explicitly makes the Commonwealth a joint tortfeasor in actions brought against AFP officers.

under s 197BA(1). Instead, under the Bill, demonstrating “good faith” is a barrier to instituting court proceedings in the first place.

23. The Explanatory Memorandum makes clear that if an officer is found to have acted in good faith then courts have *no jurisdiction* to review their conduct.<sup>22</sup> Effectively, the Bill makes a lack of good faith a necessary condition for a court to examine the use of force exercised by authorised officers.
24. There is a real likelihood that complaints about conduct under the proposed amendments that have merit will not be heard by a court due to the highly subjective nature of the inquiry of whether an authorised officer acted in good faith. This is seriously detrimental to the rights of those held in immigration detention facilities, especially their access to justice. There is no reason that the determination of good faith should be made a pre-condition of adjudication rather than an element of the inquiry into an authorised officer’s conduct generally.

#### Conclusions

25. We therefore urge Parliamentarians to vote against these amendments on the ground that they give broad powers to ill-equipped and ill-trained security personnel to use extreme and deadly force against a range of individuals (including but not exclusively detainees) with impunity, and without adequate checks and balances.

Sincerely,  
Law Students for Refugees

Contact: Mason McCann, Communications Director,

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<sup>22</sup> Above n 1, [98].