7 April 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

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

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS would like to make comments in relation to a number of proposals contained in the *Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015* (the **Bill**) that are relevant to our service, and particularly as they affect asylum seekers in Australia.

A summary of our comments and position is also attached at the beginning of this submission.

RACS would welcome any opportunity to provide further information to the Committee in relation to any aspect of the Bill or this submission.

Sincerely

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Per:

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Summary of comments

RACS is concerned that:

- Officers are authorised to use force under this act without requiring any statutorily defined qualifications or training.

- The purposes for which force may be used in detention centres are excessively broad and poorly defined.

- The standard by which the use of force is judged has been lowered from the standard that applies to ordinary people, to a subjective test like the one applied to police, despite the differences in training and qualifications of police and detention centre officers.

- The express limits on the use of force are narrowly drawn. Furthermore, reasonable limitations on the use of force have been excluded from the Bill, and instead suggested as part of non-enforceable policies and procedures of the Department.

- The Bill restricts how complaints are made about exercises of force in detention centres. This statutory process offers no institutional independence, no legislative safeguards, and no assurances of meaningful investigations.

- The Bill severely limits access to the courts, making it unlikely that abuses of the powers created by the Bill would be subject to any form of accountability.

1. Introduction

1.1. The Bill authorises certain officers to use force in immigration detention facilities under certain circumstances, and places limits on the complaints which may be made about those uses of force. RACS is concerned about the statutory training requirements for an officer being authorised to use force, the expansive circumstances within which officers are allowed to use force, the nature of force that may be authorised, and the limits placed on judicial scrutiny of such exercises of force.

2. Authorised officers

2.1. An officer is authorised to use force under the terms of the Bill if the officer 'satisfies the training and qualification requirements' determined under the proposed section 197BA(7) of the *Migration Act 1958* (Cth) (the **Act**).[1] That provision provides that 'The Minister must determine, in writing, training and qualification requirements for the purposes of this section.'[2] A determination under that provision is not a legislative instrument.[3]

2.2. The proposed section 197BA confers authorisation for these officers to use force in circumstances where ordinary Australian citizens would not have such authorisation. RACS is concerned by the absence of legislative safeguards in relation to such authorisation. Under these provisions, a person could use force despite having insufficient training in the use of force. Training and qualifications are to be determined at the discretion of the Minister, without determining what the Minister should consider or be satisfied of, when drafting such requirements. The legislation does not impose any level of rigour on the training or qualifications, or prescribe what the training should include. As the authorisation of the use of force carries an inescapable risk of abuse, it is important that legislation dealing with such matters be drafted so as to minimise that risk to the greatest extent possible.

3. When force may be used

Inappropriately broad circumstances authorising the use of force

3.1. The proposed section 197BA(1) of the Bill would provide that an authorised officer:

> may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to:
> (a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
> (b) maintain the good order, peace or security of an immigration detention facility.

3.2. Section 197BA(2) provides further examples of when reasonable force may be used:

[1] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015 (Cth) s 197BA(6).
[2] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015 (Cth) s 197BA(7).
[3] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015 (Cth) s 197BA(8).

(a) to protect a person (including the authorised officer) in an immigration detention facility from harm or a threat of harm;
(b) to protect a detainee in an immigration detention facility from self-harm or a threat of self-harm; or
(c) to prevent the escape of a detainee from an immigration detention facility; or
(d) to prevent a person from damaging, destroying or interfering with property in an immigration detention facility; or
(e) to move a detainee within an immigration detention facility; or
(f) to prevent action in an immigration detention facility by any person that:
(i) endangers the life, health or safety of any person (including the authorised officer) in the facility; or
(ii) disturbs the good order, peace or security of the facility.

3.3. These provisions envisage a wide range of circumstances in which authorised officers may use force in detention facilities. In particular, RACS is concerned about provisions that would authorise the use of force in order to maintain the "good order" and "peace" of an immigration detention facility. There is little indication of what these terms will be taken to mean, or what a breach of "good order" might look like. The "good order" of a detention facility might be breached by detainees engaging in peaceful protest, or declining to cooperate with requests from guards that may be regarded as unreasonable.

Lack of protection for vulnerable people

3.4. RACS notes that many detainees at immigration detention facilities suffer from serious mental ill-health, many as a result of their detention and consequently may engage in non-violent and non-destructive behaviour that may be subjectively determined as disturbing the "peace". RACS considers that the use of force is rarely appropriate in responding to non-violent behaviour, though an authorised officer may subjectively consider it necessary to use force.

3.5. RACS also notes that the Bill provides for no exceptions, protections or consideration for children or people with a disability.

3.6. This is particularly problematic for unaccompanied children for whom the Minister is the legal guardian. There is already a significant conflict between the Minister's role as guardian of such children and the Minister's other powers and obligations in the Act. Authorising officers to use force in the maintenance of good order further diminishes the Ministers capacity to provide for the best interests of these children.

3.7. The authorisation of the use of force is a serious matter, and infringes on the most fundamental rights of a person to bodily autonomy. RACS believes that authorisation of such infringements should be carefully defined, with easily understood limits and protections, so that force will only be used when essential.

Inappropriately high levels of force authorised

3.8. RACS notes that the Bill does not define what type or level of force may be used by an officer except to say that it must be a 'reasonable' use of force. The only qualification on the level of 'reasonable force' that can be used by an authorised officer is that the use of force must not be '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 officer)'.[4] RACS is concerned that this does not limit the introduction of weapons and may allow their use if deemed necessary to maintain good behavior.

Unjustifiably lowering the standard for the permissible use of force

3.9. The Explanatory Memorandum of the Bill explains that 'in assessing whether an employee of the immigration detention services provider lawfully used force to contain a disturbance in an immigration detention facility, the courts would consider the common law test of what was objectively reasonable in the circumstances'. However, 'when determining if a police officer lawfully used force to deal with a public order disturbance, the courts would focus on the officer's subjective personal assessment of the situation and what the officer believed, on reasonable grounds, was necessary force to contain the disturbance.' The new test, therefore, is 'a subjective one similar to that which is currently applied to the police.'[5]

3.10 The Explanatory Memorandum of the Bill explains that 'in assessing whether an employee of the immigration detention services provider lawfully used force to contain a disturbance in an immigration detention facility, the courts would consider the common law test of what was objectively reasonable in the circumstances'. However, 'when determining if a police officer lawfully used force to deal with a public order disturbance, the courts would focus on the officer's subjective personal assessment of the situation and what the officer believed, on reasonable grounds, was necessary force to contain the disturbance.' The new test, therefore, is 'a subjective one similar to that which is currently applied to the police.'[6]

3.11 These provisions therefore lower the bar from the existing test for the use of force by employees of immigration detention services, which is the same as for the general public. The Bill lowers the standard to one that approximates the subjective standard used to evaluate the use of force by police. Yet in the case of police, the subjective standard is informed by a level of training and qualifications that is not required from authorised officers under this bill. RACS is concerned that these provisions lower the bar for the lawful use of force by officers at immigration detention facilities, without requiring any corresponding level of expertise or training which might justify this lower standard.

Broad definition of detention facilities

3.12 RACS notes the broad definition of the term ' immigration detention facility' in defined section 197BA:

> (3) An immigration detention facility is:

[4] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015 (Cth) s 197BA(5)(b).
[5] Explanatory Memorandum, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 9.
[6] Explanatory Memorandum, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 9.

(a) a detention centre established under this Act; or
(b) a place approved by the Minister under subparagraph (b)(v) of the definition of immigration detention in subsection 5(1).

3.13 Subsection 5(1) of the Act defines immigration detention to include those under residence determination notices and in community detention as per section 197AC. Those living under such orders are living at a community address as deemed by the Minister, and are clearly accessible by the state police forces when and if a situation arises. RACS is concerned that the increased powers of authorised officers is particularly unnecessary in this scenario.

4 When force may not be used

Inadequate limit of behaviours by authorised officers

4.1. The Bill provides circumstances in which authorised officers are not permitted to use force. Authorised officers 'must not… subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances', or '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).'[7]

4.2. RACS is concerned about both of these provisions. The bill would ban an officer from subjecting a person to 'greater indignity' than the officer 'reasonably believes is necessary in the circumstances'. This seems to envisage officers subjecting people to some level of indignity, and seemingly adopts the assumption that such behaviour may be a reasonable way to achieve the various purposes that permit the use of force. The legislation provides that inflicting indignity on detainees may sometimes be appropriate. If such behaviour may ever be justified, one might expect such behaviour to be judged by the most stringent standards, and include legislative safeguards imposing a heavier burden of proof on those who would behave in such manner. However, the Bill only applies the same sort of subjective test referred to earlier. As noted, it is a lower standard than the currently applicable test to officers in detention facilities.

4.3. The provisions providing against the infliction of 'grievous bodily harm' are also problematic. The Bill does not prohibit acts that cause grievous bodily harm: only behaviour which is 'likely' to do so. RACS is concerned that this tacitly permits behaviour that inflicts grievous bodily harm, but is not considered 'likely' to do so, even if it were considered likely to cause a lesser, but still significant level of suffering.

Non-enforceable policies and procedures

4.4. RACS is also concerned that these constitute the only express legislative restrictions on the use of force by authorised officers in the Bill. The Explanatory Memorandum

[7] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) s 197BA(5).

describes other restrictions which are not provided for in the legislation. In particular, it claims:

> 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.[8]

4.5. RACS regards these policies and procedures as apt and reasonable. However, if the Department of Immigration and Border Protection regards them as safeguards worth having, it is not clear why these safeguards are not among the provisions of the Bill. Instead, they are described as desirable policies. Omitting these policies from the Bill means that if the legislation is passed, these safeguards would not be enforceable, and could be easily changed.

4.6. The Explanatory Memorandum also notes the following:

> 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; including:
>
> - obtaining prior approval from the departmental regional manager for planned use of force;
> - video-recording the entire event when planned use of force is exercised, retain these recordings and making them available to the department on request;
> - providing a written report of an incident involving the use of force for review by the department within four hours of the incident or before the IDSP officer completes their shift, whichever is earlier;
> - placing the report, with any relevant imagery (video recording), on the detainee's file; and
> - recording the details of the incident in the department's compliance case management and detention portal, and forwarding copies to the relevant departmental case manager.[9]

4.7. These are also reasonable mechanisms for providing for scrutiny of exercises of force. Omitting them from the provisions of the Bill means that these mechanisms will not be enforceable, and that there is no legislative guarantee that these procedures will be implemented or followed. If other provisions in the Bill are deemed necessary, RACS recommends the inclusion of such provisions in the text of the Bill in order to codify safeguards and mitigate the potential for abuse of the use of force.

[8] Explanatory Memorandum, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 11.
[9] Explanatory Memorandum, Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 21.

5 Limitations on complaints about excessive uses of force

Statutory limitations

5.1 Proposed sections 197BB-BD provide for the initiation and investigation of statutory complaints about exercises of force under this Bill. In brief, the Bill provides that a person with 'sufficient interest' can make a complaint to the Secretary of the Department of Immigration and Border Protection about a use of force by an authorised officer.[10] The Secretary must provide 'appropriate assistance' to a person who wants to make a complaint and 'requires assistance' in formulating the complaint.[11] The Secretary must investigate valid complaints. However, the 'investigation is to be conducted in any way the Secretary thinks appropriate.' If the Secretary thinks it appropriate, the Secretary may refer the complaint to the police or the Ombudsman.[12]

5.2 The Bill only requires the Secretary to notify the complainant in writing of the receipt of the complaint, and of his or her decision as to whether to investigate the complaint . There is no requirement to provide any documents relating to the decision, the outcome of the complaint, or investigative measures taken. There is also no provision requiring the Secretary to resolve the complaint within a reasonable period of time.

5.3 There are various grounds on which the Secretary 'may decide not to investigate, or not to investigate further' a complaint made under the Bill. For example, the Secretary may decide not to investigate a complaint if the Secretary is satisfied that 'the complaint is frivolous, vexatious, misconceived, lacking in substance'. It is troubling that the legislation envisages that the Secretary can decide 'not to investigate' a complaint on the grounds that it is 'misconceived' or 'lacking in substance'. If the Secretary has not investigated, it is not clear on what grounds such conclusions could reasonably be drawn.

5.4 The Secretary can also decide not to investigate a complaint where 'the complainant does not have sufficient interest in the subject matter of the complaint'.[13] There is no indication of what 'sufficient interest' will be taken to mean. For example, if a detainee or another professional witnesses an inappropriate use of force on another detainee by an authorised officer where the other detainee is not a family member or relative of the witnessing detainee, it is possible that they may be taken as not having sufficient interest in the subject matter of the complaint.

[10] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) ss 197BB(1), 197BD(1)(c).
[11] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 197BB(3).
[12] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 197BC(1)-(3), 197BE(1)
[13] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) 197BD(1)(c).

5.5 RACS is concerned that the legislation provides no guidance or safeguards in relation to investigations of complaints made under the Bill. The Department of Immigration and Border Protection would be asked to investigate itself and those it contracts to provide services. This deprives the process of institutional independence. It is possible that such investigations could be done with proper detachment, with fairness and without bias. However, the investigations envisaged by the Bill do not take any steps towards ensuring such an outcome. Detainees may also be reluctant to make complaints to the Department of Immigration and Border Protection, out of concerns that such complaints may result in negative repercussions. As such, RACS considers it imperative that detainees are able to complain to an independent body vested with the authority to investigate such complaints.

5.6 It is also unsatisfactory that the Secretary determines entirely the nature of all investigations into complaints. There are no procedural requirements that the investigations be fair, thorough, provide natural justice, be unbiased, or possess any transparency. The statutory complaints process envisaged by the Bill is vulnerable to being undermined by the conflicts of interest it creates.

5.7 RACS regards it as important that complaints about the unlawful use of force are investigated fully, with a process that inspires confidence that justice is being done . Unsatisfactory investigations of the use of force risk abuses against detainees occurring with impunity. They also pose the danger of increasing tension and unrest in detention centres. This would not be helpful in achieving the 'peace' and 'good order' that this Bill is purportedly concerned with securing.

Limits on judicial review

5.8 The proposed section 197BF further limits review of exercises of force under this Bill, by limiting when judicial review is available. It 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'.[14] Commonwealth includes officers of the Commonwealth and anyone 'acting on behalf of the Commonwealth.'[15] This 'section has effect despite anything else in this Act or any other law'.[16] However, the High Court still has jurisdiction under s 75 of the Constitution.[17]

5.9 The scheme for judicial review of exercises of force under this Bill is extremely limited. If a person makes a complaint, and the Secretary is satisfied that it is appropriate to refer the complaint to the police, proceedings may be instituted if the

[14] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) s 197BF(1).
[15] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) s 197BF(4).
[16] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) s 197BF(2).
[17] Migration Amendment (Maintaining Good Order of Immigration Detention Facilities) Bill 2015(Cth) s 197BF(3).

power was not exercised in good faith. Proving that an authorised officer acted in bad faith is difficult in general. It would be particularly difficult for an asylum seeker in immigration detention with limited ability to speak or understand English, proving the inner motivations of an officer who physically mistreated her or him.

5.10 Exercises of force may be reviewed by the High Court under the constitutional writs of section 75. These are the writs of mandamus, prohibition and injunction.[18] Whilst it is conceivable that these writs may be applied to protect detainees in detention centres from exercises of force against them, there are considerable practical barriers to access to the High Court. Like the provisions requiring proof that an officer is not acting in good faith, the bar on judicial review is not insurmountable. It is simply very unlikely that such judicial review will actually happen.

5.11 Given the draconian nature of the powers being conferred on authorised officers, the limitation on judicial oversight threatens a lack of accountability in the event of serious abuses. An environment of impunity for such abuses should be regarded with considerable concern, especially given the vulnerability of those upon whom such abuses may be visited. The legal limits of the lawful use of force created by the Bill are of little value, if there is no realistic access to legal recourse when those limits are exceeded.

6. Conclusion

6.1 Many asylum seekers in immigration detention are traumatised and vulnerable. Giving those with power over them vague and loosely defined powers to use force, with limited oversight, poses serious risks to their health, well-being and basic rights. The Bill establishes an inadequate complaints process and limits access to the courts for challenging the misuse of the very powers that the Bill creates. .

6.2 RACS makes the following recommendations:

1. That the Bill is not necessary, as existing powers of the police and officers within detention facilities are extensive and sufficient.

2. If the powers created by the Bill are considered to be required, RACS recommends the following amendments:
    a. The inclusion of a statutory minimum standard of training for all authorised officers.
    b. The revision of the definition of immigration detention facility to only include immigration detention centres and explicitly exclude community detention (residence determination orders).
    c. The inclusion in the text of the Bill of mechanisms to provide for the scrutiny and accountability of any exercises of force, such as those described in the Explanatory Memorandum.

[18] *Australia Constitution Act* s 75(v).

d. The inclusion in the text of the Bill of legislative codifying the policy and procedures relating to the use of force, including reporting procedures.
e. A prohibition on the use of force to degrade, humiliate or punish detainees, and a requirement that force should only be used in exceptional circumstances of last resort.
f. Amending section 197BA – limitations on the exercise of power to introduce protective limits on the use of force upon;
    i. People with a mental illness
    ii. People with a disability
    iii. Children
g. The establishment of an independent body with vested authority to conduct thorough and fair investigations into complaints within a reasonable time, and requirement that the complaints process is conducted by that body.
h. The removal of the limitations on judicial review in relation to the lawfulness of the use of force.

This submission is an example of how community legal centres utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and to prevent some problems from arising altogether. Federal Government changes to Community Legal Services Program funding agreements in mid 2014 restrict policy and law reform that community legal centres can undertake with Federal Government funds. These restrictions have the potential to deprive Government and others from valuable advice and information and reduce efficiency and other improvements in the legal system. For more information please see http://www.communitylawaustralia.org.au/law-reform-and-legal-policy-restrictions/