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

Background

The Bill seeks to amend the *Migration Act 1958* ("**Act**") to introduce new powers for authorised officers to use force in and in relation to immigration detention facilities.

"Authorised officer" is defined in ss 5(1) of the Act.

"Immigration detention facility" ("**IDF**") includes a detention centre established under the Act or a place approved by the Minister under subparagraph (b)(v) of the definition of 'immigration detention' in ss 5(1) of the Act.

Powers to use force

The new s 197BA of the Migration Act gives authorised officers powers to '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 IDF; or
(b) maintain the 'good order, peace, or security' of an IDF.

This may include to:

(a) protect a person (including the authorised officer) from harm or a *threat* of harm;
(b) protect a detainee from self-harm or a threat of self-harm;
(c) prevent the escape of a detainee;
(d) prevent a person from damaging, destroying or interfering with property;
(e) move a detainee within an IDF; or
(f) prevent action endangering the life, health or safety of any person (including the authorised officer) or disturbing the 'good order, peace or security' of the IDF.

In exercising these powers, an authorised officer must not:

(a) subject a person to greater indignity than the *authorised officer* reasonably believes is necessary in the circumstances; or
(b) do anything likely to cause a person grievous bodily harm *unless* the *authorised officer* reasonably believes that doing so is necessary to protect the life of, or to prevent serious injury to, another person (including the authorised officer).

The powers granted by the new s 197BA are extremely broad and almost entirely discretionary in their potential application. Notwithstanding the non-exhaustive list of circumstances in which it may be reasonable for an authorised officer to use force, the powers do not support specific purposes. This means that almost anything could authorise the use of force under the new provisions. In particular, it is unclear what is meant by the 'good order, peace or security' of an IDF. This is particularly concerning given that what is 'good order, peace or security' also falls within the officer's subjective judgment. Force is permitted not only to actually maintain an objectively defined standard of 'good order' (or 'peace' or 'security') of the IDF, but in any circumstance in which the officer 'reasonably believes' it is necessary to maintain *what that officer reasonably believes* to

constitute 'good order' (or 'peace' or 'security'). This may encompass a potentially limitless range of situations, from violent resistance to peaceful assembly and protest. For example, the Explanatory Memorandum refers (at paragraph 29) to the 'deterrence' of disturbances. This seems to contemplate *pre-emptive* use of force in ways that may potentially impinge on rights of free speech and free association. As a matter of statutory interpretation, the inclusion of ss 197BA(4) reinforces this view. That subsection relates to hunger strikes, which are a form of peaceful protest.

By way of comparison, the new powers go well beyond existing provisions in the Migration Act, which permit the use of force in specific, articulated instances such as for the carrying out of an identification test (s 261AE) or conducting of a search (s 252).

By reason of their not being tied to specific purposes, the new s 197BA is also likely to be contrary to the Attorney-General's Department's Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. This guide contemplates that coercive powers support specific purposes (such as search, arrest and investigation purposes). It also makes clear that new coercive powers should be created only in exceptional circumstances, where existing powers do not adequately address an identified law enforcement need. Save for some cursory (and indeed confusing) references in the Explanatory Memorandum to 'high risk detainees', no attempt has been made by the government to identify any exceptional circumstances or law enforcement need. Nor has it made any attempt to clarify why powers currently granted to federal, state or territory police are insufficient to address any such need. The protection of the police is available to authorised officers as they would be to any other citizen. It is unclear why authorised officers themselves need to be granted powers that are akin to police powers (as discussed further below).

It is worryingly arguable that even physical punishment falls within the scope of s 197BA. An authorised officer may 'reasonably believe' that such punishment would be 'necessary' to maintain the 'good order, peace or security' of an IDF. The Explanatory Memorandum mentions policies and procedures which, among other things, apparently preclude the use of force or restraint as punishment. In fact, much of the Statement of Compatibility with Human Rights ("**statement of compatibility**") rests on matters extraneous to the legislation. The government may well voluntarily put in place measures along the way to reduce the likelihood of human rights abuses occurring as a result of the broadened powers, but that is beside the point in assessing whether the proposed laws, as they stand, are compatible with the relevant human rights.

If the government intends that the new powers not be exercised in breach of human rights, the points listed at the top of page 24 of the statement of compatibility and those listed in paragraph 44 of the Explanatory Memorandum should have been included in the Bill. Further, and given that one of the stated aims of the Bill is to provide certainty as to the scope of power to use force, it is unclear why the apparently 'implicit' requirements of the Bill that:

- 'the level of force applied must be no more than what is required to achieve the specific legislative outcome;
- be consistent with the seriousness of the matter;
- be proportionate to the level of resistance being offered by the person;
- be required to ensure the safety of officers, clients and third parties; and
- not be excessive' (statement of compatibility, page 24)

are not included in the Bill themselves. This is in contrast to, for example, s 3ZC of the *Crimes Act 1914* (Cth), which gives Australian Federal Police ("**AFP**") officers the power to use force when making an arrest, and which explicitly provides that 'minimum necessary force or indignity' be effected.

In any case, the 'implicit requirements' outlined in the statement of compatibility are not implicit at all. Instead, the Bill appears to give a clear and consistent explicit direction to authorised officers to use their personal judgment when subjecting IDF detainees to force. The operative effect of the legislation is that authorised officers are essentially permitted to use whatever force they think fit in an almost unlimited variety of circumstances. In this vein, it is unclear what level of force may be considered 'reasonable force' in any given situation. The new s 197BA expressly contemplates that grievous bodily harm (including even death) may be lawfully caused to a detainee on the basis of an authorised officer's subjective belief that such force was reasonably necessary.

Subjective test

As mostly already discussed above, in assessing whether an authorised officer lawfully exercised the new powers, a court would look to the authorised officer's *subjective* beliefs as to whether the use of force was necessary. The Explanatory Memorandum expressly confirms this (at paragraphs 28 to 33 and paragraph 36). The use of this subjective standard greatly increases the risk that these powers may be exercised arbitrarily and/or excessively against detainees. From an evidentiary perspective, it would seem extremely difficult, if not impossible, for a detainee to prove that an authorised officer *did not* hold a reasonable belief that the force used was necessary. This is likely to be particularly so in instances of heightened risk (such as during riots or other disturbances), or in instances where no third party witnesses exist.

Immunity from legal action

The new s 197BF places a bar on proceedings relating to the use of force by authorised officers, except in the High Court of Australia, unless such force was not used in good faith. This is clearly concerning, and severely restricts detainees' access to justice in relation to the use of force against them while they are in detention.

The new section expressly retains the original jurisdiction of the High Court under s 75 of the Constitution. This has been done to ensure that the new laws are constitutionally valid. However, s 75 of the Constitution, which is the basis for the High Court's original jurisdiction in relation to a limited set of circumstances is unlikely to be relevant to the exercise of power under the new s 197BA. It is hard to imagine any circumstance in which someone would anticipate a future breach of s 197BA to be injuncted, or in which there would be a useful judicial review remedy for a past use of force. The most available would be a declaration that the power was exceeded; there would be no scope for damages for compensation.

Moreover, whether or not an authorised officer acted in good faith in using force goes to whether they may be held liable for the consequences of such use of force. As such, and particularly in criminal proceedings, it is extremely unlikely that a court would see fit to find that an authorised officer did not act in good faith at a preliminary stage (that is, in determining jurisdiction). Even if a court were willing to make such a finding at a preliminary stage, the only real way to prove a lack of

good faith is if what objectively occurred is so unreasonable or egregious that it could not possibly have been done in good faith. This essentially means that authorised officers' use of force against detainees will go unchecked, at least judicially, except in the limited circumstances where it is possible and desirable to bring proceedings in the High Court.

The new s 197BF goes beyond what is applicable to the use of force by police officers. While immunity for individual police officers carrying out their duties in good faith may not be uncommon, it is not the norm to exempt the State or the Crown from liability as well. Even if the argument is accepted, as stated in the Explanatory Memorandum, that immunity is necessary so that authorised officers may effectively exercise their powers, it provides no basis for also barring proceedings against the Commonwealth. Any protection from liability for individual authorised officers should be in the form of an indemnity rather than immunity. This would achieve the same purpose of protecting individual authorised officers while still retaining the legal rights of detainees who, as discussed above, are extremely vulnerable to the unlawful use of force against them.

Lastly, a blanket immunity goes against most of the human rights covered in the statement of compatibility, especially those relating to non-discrimination, equality generally and equality before the courts. The only thing the statement of compatibility says about the different treatment for people in IDFs in respect of having the right to challenge the use of force against them in court is the bare conclusion that it 'is consistent with Australia's international obligations because it would constitute legitimate differential treatment and is reasonable in all the circumstances', with no identification of what makes the differentiation legitimate or the circumstances that make it reasonable. The UN Human Rights Committee's finding in *Horvath v Australia* is relevant in this respect. This case found that the then *Police Regulation Act 1958* (Vic) was incompatible with certain human rights because it provided, in some circumstances, no remedy for a person whose rights had been breached by police misconduct.

<u>Complaints mechanism</u>

The new ss 197BB, 197BC, 197BD and 197BE deal with the making and investigation of complaints. These provisions do not allow for the independent review of the use of force by authorised officers.

Complaints may be made to the Secretary about an authorised officer's exercise of power under the new s 197BA. The Secretary may decide not to investigate the complaint where such investigation 'is not justified in all the circumstances'. This wording means that the mandatory language of s 197BC(1) (that 'the Secretary must investigate a complaint made under s 197BB') is effectively meaningless. There would rarely be any scope to review the Secretary's state of satisfaction as to such a broad discretion.

If the Secretary does decide to investigate the complaint, they may do so '*in any way*' they think appropriate.

There is no procedure in the Bill for the merits review of any decision under ss 197BB to 197BE. Judicial review would be available, but only for jurisdictional error, as a decision in the complaints process would be a privative clause decision under s 474 of the *Migration Act*. An application for review would need to be to the Federal Circuit Court. A decision under s 197BC(3) or 197BE to refer or transfer a complaint may not be amenable to judicial review at all, or on grounds other than

natural justice, as such a decision arguably does not affect or determine the complainant's substantive legal rights, as per *Hot Holdings v Creasy*.

Beyond this, the complainant's options would be to go directly to the Human Rights Commission, the Ombudsman or the police.

Authorised officers' training and qualifications

The new ss 197BA(6) provides that an officer must not be authorised for the purposes of s 197BA unless the officer satisfies the training and qualification requirements determined under ss 197BA(7).

While the Minister is obliged to set out in writing the training and qualifications that an officer must undertake in order to be considered an 'authorised officer' for the purposes of the new powers, the new provisions contain no guidance as to what this must entail. The new ss 197BA(8) expressly states that the Minister's determination in this regard is not a legislative instrument. This means that it is entirely in the Minister's discretion to assess, set and enforce minimum training requirements for authorised officers. This is concerning given the breadth of the coercive powers proposing to be granted to authorised officers, as discussed above. The statement in the Explanatory Memorandum that 'it would not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect… updated training requirements' seems a bit implausible given that the *Migration Regulations* are already amended several times a month to deal with changes to the detailed criteria for various visa subclasses.

The Explanatory Memorandum suggests (at paragraph 61) that the required training and qualifications may include a Certificate Level II in Security Operations, which covers 'knowledge and skills required for an authorised officer to identify security risk situations, respond to such situations, use negotiation techniques to defuse and resolve conflict and identify and comply with applicable legal and procedural requirements'. It is concerning that the contemplated training contains no units in relation to, for example, understanding and applying human rights, or understanding and properly dealing with individuals from different cultures or vulnerable or at risk individuals, including individuals with mental health issues.

It is clear that the contemplated powers should only be used by individuals, such as police officers, who have gone through rigorous physical and psychological training and testing. It concerning, for example, that paragraph 54 of the Explanatory Memorandum seeks to justify authorised officers' powers to inflict grievous bodily harm with reference to hostage situations. It is obviously undesirable that an authorised officer with rudimentary security training would take it upon themselves to deal with such a situation. These types of high risk situations should be dealt with by specialist police negotiators and other highly skilled and screened individuals.

Comparison to police officers

Police powers are governed by a variety of Commonwealth, state and territory laws. Section 3ZC(1) of the *Crimes Act 1914* (Cth), which gives AFP officers the power to use force when making an arrest, provides a useful example of the manner in which provisions enabling the use of force by police officers are typically framed.

Under s 3ZC(1), no person (including a police officer) may use more force, or subject a person to greater indignity, than is necessary and reasonable to make an arrest or prevent escape after arrest. Unlike the new powers envisaged in the Bill, the lawful use of force under s 3ZC is assessed according to an objective standard of what was necessary and reasonable in any given circumstances. This is in contrast to s 197BA(5), which states that in exercising the new powers, an authorised officer must not subject a person to greater indignity than *the authorised officer reasonably believes is necessary* in the circumstances.

Section 3ZC(2) does go on to empower AFP officers to use force to inflict grievous bodily harm in limited circumstances, however, it is no broader power than is proposed to be granted to authorised officers under the Bill. Given what will likely be the vast differences in training and testing requirements for AFP officers and authorised officers, as discussed below, it is extremely concerning that authorised officers are essentially being granted police powers.

By way of further example, police officers also have a common law power to use force to prevent a breach of the peace from occurring. When compared to the new powers contemplated by the Bill, however, this power is confined to very limited circumstances. A police officer may use force against a person where they believe that a breach of the peace is occurring or about to occur. 'Breach of peace' has been defined in the case of *R v Howell*, where it was said that, 'There is a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.' Unlike the words 'maintain the good order, peace or security of an [IDF]', this definition of 'breach of peace' limits police officers' common law powers to use force to specific and limited circumstances. Further, the common law makes clear that a police officer may not use force to prevent a breach of the peace unless they hold a reasonable belief that a breach of the peace is *imminent*. In *Forbutt v Blake*, it was said, 'A mere statement by a police constable that he anticipated a breach of the peace is not enough to justify his taking action to prevent it; the facts must be such that he could reasonably anticipate not a remote, but a real, possibility of a breach of the peace.' Again, the Bill provides no such safeguards or requirements to limit the arbitrary use of force by authorised officers.

According to the AFP website, an AFP officer must pass six "gateways" of requirements in order to be able to exercise police powers. Broadly, these are as follows:

1. Gateway 1
    a. Employment suitability testing
2. Gateway 2
    a. Psychometric testing in the form of an Online Cognitive Ability Test
3. Gateway 3
    a. Fitness testing
4. Gateway 4
    a. Interview with a panel of two sworn officers and one unsworn employee
    b. Group discussion
    c. Literacy assessment
    d. Further psychometric testing in the form of a supervised Online Cognitive Ability Test

5. Gateway 5
    a. Medical assessment
    b. Psychological assessment
6. Gateway 6
    a. Security vetting process

There is no indication in the Bill or in the Explanatory Memorandum that this level of training or testing would be required for authorised officers. In particular, there is no requirement in the Bill for authorised officers to receive any level of psychometric or psychological screening. Nor is it likely that this level of training and screening will be subsequently implemented by the Minister as contemplated by the new ss 197BA(7). Even if police officers did have powers as wide as those proposed to be granted to authorised officers, it would be extremely concerning that powers akin to police powers would be able to be exercised by individuals who are clearly and vastly less skilled and vetted than police officers. In this case, what is being proposed is that such individuals be granted powers to use force that go beyond even police powers.

Lastly, the complaints mechanisms in place in relation to the use of force by police officers are much more sophisticated and satisfactory than the complaints mechanisms contemplated by the Bill. As discussed above, there are also much fewer restrictions on bringing court proceedings in relation to the use of force by police officers than there are in relation to the use of force by authorised officers under the new laws.

<u>Comparison to corrective officers</u>

Prison officers' powers to use force are governed by various state and territory laws, regulations and guidelines. Section 143 of the *Corrective Services Act 2006* (Qld), which authorises corrective services officers to use reasonable force in particular circumstances, provides a useful example of the manner in which provisions enabling the use of force by corrective officers are typically framed.

That section provides that a corrective services officer may use force that is reasonably necessary to:

(a) compel compliance with an order given or applying to a prisoner;
(b) restrain a prisoner who is attempting or preparing to commit an offence against an Act or a breach of discipline;
(c) restrain a prisoner who is committing an offence against an Act or a breach of discipline;
(d) compel any person who has been lawfully ordered to leave a corrective services facility, and who refuses to do so, to leave the facility; or
(e) restrain a prisoner who is attempting or preparing to harm themselves or harming themselves.

The corrective services officer may use the force only if:

(a) they reasonably believe that the act or omission permitting the use of force cannot be stopped in another way; and
(b) they give a clear warning of the intention to use force if the act or omission does not stop; and
(c) gives sufficient time for the warning to be observed; and
(d) attempts to use the force in a way that is unlikely to cause death or grievous bodily harm.

Alternative means

The proposed laws imply that responsibility for disruption in IDF rests with detainees. They fail to take into account the traumatic nature of immigration detention and instead seek to allow state actors to use force to further punish already vulnerable detainees, essentially with impunity. The government would do better to take measures to ensure that detainees' human rights are upheld, so as to minimise the likelihood of challenging behaviours by detainees in IDFs.

Other considerations

It is both astonishing and concerning that such expansive powers with such little accountability are being proposed on the foot of a series of reports revealing numerous, extremely serious instances of abuse of what limited powers officers in IDFs already have.