2013 – 2014 – 2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (MAINTAINING THE GOOD ORDER OF IMMIGRATION DETENTION FACILITIES) BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP)

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

OUTLINE

The Australian Government is committed to providing safe and secure immigration detention facilities. The demography of immigration detention facilities has changed. Immigration detention facilities now include increasing numbers of high risk detainees, including persons who:

- have had their visa cancelled as a result of failing the 'character test' often due to convictions for drug and other serious criminal offences;
- are a high security risk, such as members of outlaw motorcycle gangs;
- are subject to adverse security assessments; and
- have become unlawful non-citizens as a result of breaching certain visa conditions.

The presence of high risk detainees with behavioural challenges, such as members of outlaw motorcycle gangs, jeopardises the safety, security and peace of our immigration detention facilities and the safety of all persons within those facilities. In fact, public order disturbances have arisen in a number of immigration detention facilities in recent years.

Increasingly, there is a need to provide higher security and more intensive management of these detainees. The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) is necessary to provide authorised officers with the resources to continue to manage the safety, security and peace of our immigration detention facilities.

The Bill amends the *Migration Act 1958* (the Migration Act) to allow an authorised officer to use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to:

- protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- maintain the good order, peace or security of an immigration detention facility.

Without limiting the general power to use reasonable force, the Bill in particular provides that an authorised officer may use such reasonable force as the authorised officer reasonably believes is necessary to:

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

The Bill limits the use of reasonable force to incidents that occur in relation to an ***immigration detention facility***. The Bill amends the Migration Act to define an ***immigration detention facility*** to mean a detention centre established under the Migration Act, or a place approved by the Minister in writing for the purposes of subparagraph (b)(v) of the definition of ***immigration detention*** in subsection 5(1) of the Migration Act.

The Bill inserts provisions that specifically limit the exercise of the power to use reasonable force in an immigration detention facility. The Bill prevents an authorised officer from doing any of the following:

- using reasonable force to administer nourishment or fluids to a detainee in an immigration detention facility; and
- subjecting a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances; and
- doing 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 himself or herself).

The Bill inserts a provision that prevents an officer from being authorised as an authorised officer unless the officer satisfies the training and qualification requirements determined by the Minister in writing. The Bill also requires the Minister to determine those qualifications and that training in writing.

The Bill provides for a statutory complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department of Immigration and Border Protection about the exercise of the powers under new section 197BA to use reasonable force. The Secretary can transfer a complaint to any of the following persons if satisfied that the complaint could be more conveniently or effectively dealt with by them:

- the Ombudsman;
- the Commissioner of the Australian Federal Police; or
- the Commissioner or head (however described) of the police force of a State or Territory.

The complaints mechanism does not restrict a person from making a complaint directly to another agency, including the Ombudsman or a police force.

The Bill inserts a provision that imposes a bar on any action against the Commonwealth (including an authorised officer) in respect of the exercise of the power to use reasonable force in an immigration detention facility if the power was exercised in good faith. The bar is expressly stated not to apply to the High Court's jurisdiction under section 75 of the Constitution.

The Bill also inserts a provision clarifying that the amendments made by the Bill are not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of operating concurrently with the amendments.

FINANCIAL IMPACT STATEMENT

The financial impact of the Bill is low. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.

MIGRATION AMENDMENT (MAINTAINING THE GOOD ORDER OF IMMIGRATION DETENTION FACILITIES) BILL 2015

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. Clause 1 provides that this Act may be cited as the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Act 2015*.

Clause 2 Commencement

2. Subclause 2(1) of the Bill provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

3. Table item 1 provides that sections 1 to 3 and anything in this Act not elsewhere covered by this table commence on the day this Act receives the Royal Assent.

4. Table item 2 provides that Schedule 1 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

5. The note to the table provides that this table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

6. Subclause 2(2) of the Bill provides that any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act. There is currently no information in column 3 of the table.

Clause 3 Schedules

7. This clause provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – AMENDMENTS

Migration Act 1958

Item 1 Subsection 5(1)(note at the end of the definition of *authorised officer*)

8. This item omits "Note" and substitutes "Note 1" at the end of the definition of ***authorised officer*** in subsection 5(1) of Part 1 of the Migration Act.

9. This is a consequential amendment due to item 2 below which inserts a second note at the end of the definition of ***authorised officer***.

Item 2 Subsection 5(1)(at the end of the definition of *authorised officer*)

10. This item adds a new note at the end of the definition of ***authorised officer*** in subsection 5(1) of Part 1 of the Migration Act.

11. New Note 2 provides that an officer must not be authorised for the purposes of section 197BA unless the officer satisfies the training and qualification requirements determined under subsection 197BA(7): see subsection 197BA(6).

12. The note makes it clear that new subsection 197BA(6) inserted by item 5 below, places a restriction upon who can be authorised as an authorised officer. New subsection 197BA(6) of the Migration Act provides that an officer must not be authorised as an authorised officer for the purposes of section 197BA unless the officer satisfies the training and qualification requirements determined under subsection 197BA(7).

13. New subsection 197BA(7) of the Migration Act provides that the Minister must determine, in writing, training and qualification requirements for officers who are to be authorised as authorised officers for the purposes of new section 197BA.

Item 3 Subsection 5(1)

14. This item inserts a definition of ***immigration detention facility*** in subsection 5(1) of Part 1 of the Migration Act. This is a consequential amendment due to item 5 below which inserts new section 197BA in the Migration Act.

15. The new definition provides that ***immigration detention facility*** has the meaning given by subsection 197BA(3). New subsection 197BA(3) of the Migration Act provides that an immigration detention facility is:

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

16. The Bill limits the use of reasonable force to incidents that occur within an immigration detention facility or in relation to an immigration detention facility.

Item 4 At the end of Part 1

17. This item adds new section 12A at the end of Part 1 of the Migration Act.

18. New section 12A of the Migration Act provides that the provisions of the Migration Act and the *Migration Regulations 1994* (the Migration Regulations) that authorise (whether expressly or otherwise) the use of force:

- operate independently of each other; and
- do not limit, or in any way otherwise affect, each other.

19. The purpose of this amendment is to clarify that provisions in the migration legislation that authorise the use of force operate independently of one another and do not limit or affect each other. This is regardless of how those provisions are expressed, that is, whether or not they contain the words "use of force" in the heading to, or the text of, the provision. (The intention is that this provision applies to any provision of the Migration Act and the Migration Regulations that support the use of force, regardless of how that provision is expressed).

20. For example, section 261AE in Division 13AA of Part 2 of the Migration Act explicitly authorises the use of reasonable force to enable an identification test to be carried out, or to prevent the loss, destruction or contamination of any personal identifier or any meaningful identifier derived from the personal identifier.

21. Another examples is section 252 of Division 13 of Part 2 of the Migration Act which deals with searches of persons. Subsection 252(1) of the Migration Act provides that for the purposes set out in subsection 252(2), a person and the person's clothing and any property under the immediate control of the person, may, without warrant, be searched if:

- the person is detained in Australia; or
- the person is a non-citizen who has not been immigration cleared and an authorised officer has reasonable grounds for suspecting that there are reasonable grounds for cancelling the person's visa.

22. Subsection 252(2) of the Migration Act sets out the purposes for which a person, and the person's clothing and any property under the immediate control of the person, may be searched under section 252.

23. Subsection 252(8) of the Migration Act provides that an authorised officer or other person who conducts a search under this section shall not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.

24. Section 252 of the Migration Act does not explicitly state that an authorised officer may exercise reasonable force in the exercise of the powers under that provision. Rather, that section implicitly recognises that authorised officers may use reasonable force by placing limitations on its use. This provision would come within new section 12A even though it does not expressly refer to authorised officers using force.

Item 5 After Division 7A of Part 2

25. This item inserts Division 7B – Immigration detention facilities into Part 2 of the Migration Act, comprising new sections 197BA, 197BB, 197BC, 197BD, 197BE, 197BF and 197BG.

26. New section 197BA of the Migration Act is broadly concerned with the use of reasonable force for the purposes of protecting any person in an immigration detention facility and maintaining the good order, peace and security of that facility.

Subsection 197BA(1)

27. New subsection 197BA(1) of the Migration Act provides that an authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to:

- protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or

- maintain the good order, peace or security of an immigration detention facility.

28. New paragraph 197BA(1)(a) of the Migration Act provides an authorised officer with the power to use such reasonable force against any person or thing that he or she reasonably believes is necessary to protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility. The reference to "any person" in this provision includes a detainee, an employee of the Department of Immigration and Border Protection, a visitor to an immigration detention facility, and any other person who is in an immigration detention facility. The provision has been framed broadly in recognition of the fact that a variety of people could be physically in an immigration detention facility at any one time for a variety of purposes, and that an authorised officer should have the power to use reasonable force against any person in the facility to protect the life, health or safety of that person or any other person, should the need arise.

29. New paragraph 197BA(1)(b) of the Migration Act also provides an authorised officer with the power to use 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 purpose of this limb of the provision is to allow an authorised officer to use reasonable force to deter a public order disturbance or to manage a public order disturbance in an immigration detention facility. The new paragraph is intended to give the immigration detention services provider the capability to prevent a disturbance, such as that which occurred in May 2011 at the Christmas Island Immigration Detention Centre.

30. The need for this amendment is demonstrated by contrasting the treatment of the lawful use of force by police officers to deal with a public order disturbance in an immigration detention facility and that of an employee of the immigration detention service provider in an immigration detention facility who is dealing with the same public order disturbance in the same immigration detention facility.

31. Currently, 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. This is because the use of force is specifically provided for in relevant legislation to which the police officers are subject. That is, a court will determine whether a police officer lawfully used force by focussing on the police officer's personal assessment of the situation.

32. By contrast, 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. In exercising reasonable force to control these public order disturbances and to protect people within immigration detention facilities from harm, employees of the immigration detention services provider have therefore relied on common law powers (which are available to

ordinary citizens). The key implication is that the test of whether a police officer acted lawfully is more subjective than the test that currently applies to the immigration detention services provider. In effect, this means that a court will determine whether a private citizen (in this case, an employee of the immigration detention services provider) lawfully used force by looking at what was objectively reasonable in the circumstances.

33. In this context new paragraph 197BA(1)(b) of the Migration Act gives authorised officers, who are appropriately qualified and trained employees of the immigration detention services provider, the authority to use such reasonable force against a person or thing as he or she reasonably believes is necessary to prevent a public order disturbance from escalating, or to contain such a situation. The test here is a subjective one similar to that which is currently applied to the police.

34. The Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) issued by the Attorney–General's Department contemplates that coercive powers support specific purposes such as search, arrest and investigation purposes. The purposes for which authorised officers may use reasonable force in immigration detention facilities are sufficiently specific to address this requirement in the Guide. The circumstances provided for in the Bill are not intended to be an exhaustive list. Rather, these are intended to illustrate the circumstances in which an authorised officer could consider using reasonable force. For example, in addition to the list of circumstances in which an authorised officer may use reasonable force in new subsection 197BA(2) of the Migration Act, an authorised officer may need to resort to reasonable force to prevent a group of detainees from fighting.

Subsection 197BA(2)

35. New subsection 197BA(2) of the Migration Act provides that without limiting subsection 197BA(1), an authorised officer may use such reasonable force as the authorised officer reasonably believes is necessary under that subsection:

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

36. New paragraphs 197BA(2)(a) and (b) are specifically concerned with permitting an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to protect all people

within an immigration detention facility from harm, including the protection of a detainee from an act of self-harm or a threat of self-harm. This provision gives an authorised officer clear authority to use reasonable force to protect a person from harm in an immigration detention facility. Again, the expression "reasonably necessary" in the provision highlights that the amount of, and the level of, reasonable force required is a matter for the subjective judgement of the authorised officer in the circumstances.

37. New paragraph 197BA(2)(c) of the Migration Act specifically allows an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force that he or she reasonably believes is necessary to prevent a detainee from escaping from an immigration detention facility.

38. "Detainee" is defined in subsection 5(1) of the Migration Act to mean a person "detained". "Detain" is defined in subsection 5(1) of the Migration Act to mean take into immigration detention or keep, or cause to be kept, in immigration detention, and includes taking such action and using such force as are reasonably necessary to do so. This definition extends to persons covered by residence determinations (see section 197AC of the Migration Act).

39. The definition of "detain" in subsection 5(1) of the Migration Act provides for the use of force and may overlap to some extent with new paragraph 197BA(2)(c) of the Migration Act. However, the latter provision is included in new subsection 197BA(2) as an example of a situation in which an authorised officer can use reasonable force, so there is no need to refer to the definition of "detain" in section 5 for this authority. As new section 12A (inserted by item 4 above) makes clear, these powers do not limit or otherwise affect one another.

40. New paragraph 197BA(2)(d) of the Migration Act allows an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to prevent a person from damaging, destroying or interfering with property in an immigration detention facility. This provision recognises that public order disturbances in immigration detention facilities often also result in damage to, and destruction of, property in those facilities, often at considerable cost. The reference to "property" in this provision includes Commonwealth property and the property of detainees and other persons in the facility.

41. New paragraph 197BA(2)(e) of the Migration Act allows an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to move a detainee within an immigration detention facility. This provision recognises the fact that detainees sometimes resist being moved within an immigration detention facility, and that reasonable force is sometimes required to facilitate the move, especially if the detainee needs to be moved for their own safety or for the safety of others.

42. New paragraph 197BA(2)(f) of the Migration Act allows an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to prevent action in an immigration detention facility by any person that endangers the life, health or safety of any person (including the authorised officer) in the facility, or disturbs the good order, peace or security of the facility. This has been included as a situation where reasonable force can be used because it is concerned with using reasonable force to prevent harm to a person in an immigration detention facility or a disturbance arising within the facility.

43. The opening words of new subsection 197BA(2) of the Migration Act make it clear that the examples of the circumstances in which reasonable force may be used by authorised officers

in an immigration detention facility are not exhaustive. That is, an authorised officer may use such reasonable force as he or she reasonably believes is necessary for the purposes in subsection 197BA(1) in other situations. For example, a detainee may have climbed up a tall fence or a building and authorised officers may need to use reasonable force to remove the detainee from what may be a dangerous situation. Authorised officers may also need to use reasonable force to separate two detainees who are fighting.

44. 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.

45. Robust policies and procedures and comprehensive training will be essential components of the governance of the power to use reasonable force in new section 197BA.

Subsection 197BA(3) – Immigration detention facility

46. New subsection 197BA(3) of the Migration Act provides that an ***immigration detention facility*** is:

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

47. ***Immigration detention*** is relevantly defined in subparagraph (b)(v) of the definition in subsection 5(1) of the Migration Act to mean being held by, or on behalf of, an officer in another place approved by the Minister in writing, such as Wickham Point Alternative Place of Detention, or Villawood Immigration Residential Housing.

48. The Bill limits the use of reasonable force in new section 197BA of the Migration Act to incidents in an immigration detention facility. The purpose of this amendment is to clarify what are immigration detention facilities for the purposes of new Division 7B of Part 2 of the Migration Act.

Subsections 197BA(4) and (5) – Limitations on the exercise of power

49. New subsection 197BA(4) of the Migration Act provides that an authorised officer must not exercise the power under subsection 197BA(1) to give nourishment or fluids to a detainee in an immigration detention facility.

50. The purpose of this amendment is to clarify that the power to use reasonable force in new section 197BA of the Migration Act does not extend to giving nourishment or fluids to a detainee. The provision recognises that it is the role of qualified medical practitioners who

can assess an individual's medical needs, rather than that of the immigration detention services provider, to provide medical intervention in an immigration detention facility.

51. New paragraph 197BA(5)(a) of the Migration Act provides that in exercising the power under subsection 197BA(1), an authorised officer must not subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances. This requirement, along with robust policies, procedures and training concerning the use of reasonable force in immigration detention facilities, will promote respect for the inherent dignity of the human person.

52. New paragraph 197BA(5)(b) of the Migration Act provides that in exercising the power under subsection 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). For the purposes of this Bill, grievous bodily harm includes death or serious injury.

53. The purpose of this amendment is to make it clear that the power to use reasonable force in new subsection 197BA(1) of the Migration Act does not extend to causing grievous bodily harm to a person except where the authorised officer reasonably believes that doing so is necessary to protect a person's life or to prevent serious injury to another person (which may include the authorised officer himself or herself). The amendment recognises that there are only very exceptional and extreme circumstances in which the use of force in immigration detention facilities should extend to the infliction of grievous bodily harm.

54. For example, although it is unlikely, a situation could arise where a detainee is able to obtain a weapon and hold a hostage. In this situation an authorised officer may need to use sufficient reasonable force that causes, or is likely to cause, grievous bodily harm to the detainee.

Training and qualification requirements

55. New subsection 197BA(6) of the Migration Act provides that an officer must not be authorised for the purposes of section 197BA unless the officer satisfies the training and qualification requirements determined under subsection 197BA(7).

56. The note to new subsection 197BA(6) of the Migration Act provides that for the authorisation of officers see the definition of ***authorised officer*** in subsection 5(1). A definition of authorised officer is currently provided in subsection 5(1) of the Migration Act. The term ***authorised officer*** when used in a provision of the Migration Act, means an officer authorised in writing by the Minister or the Secretary for the purposes of that provision. This Bill will not change that definition.

57. The purpose of this amendment is to ensure that an officer cannot be authorised as an authorised officer for the purposes of the exercise of the power in new section 197BA of the Migration Act unless the officer has achieved the relevant standard of qualifications and training determined by the Minister in writing.

58. New subsection 197BA(7) of the Migration Act provides that the Minister must determine, in writing, training and qualification requirements for officers who are to be authorised as authorised officers for the purposes of this section.

59. The purpose of this amendment is to make it clear that the Minister is obliged to determine, in writing, the training and qualifications that an officer must undergo in order to be an

authorised officer for the purposes of new Division 7B of Part 2 of the Migration Act. If the Minister does not do so, the provisions in new Division 7B will not operate as there will be no provision to authorise an officer as an authorised officer to exercise the powers under new section 197BA.

60. It is not considered appropriate to list the training and qualifications that officers must undergo to be authorised officers in the Migration Act itself or in the Migration Regulations. This is because the qualifications and training change over time, as does the content of the training. It would not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect these updated training requirements.

61. It is expected that the standard of training and qualifications will be delivered by an accredited nationally registered training organisation. At this time, the qualification and training requirements that are likely to be determined by the Minister in writing for the purposes of new subsection 197BA(7) of the Migration Act include the Certificate Level II in Security Operations. This certificate course includes the units of competency, "CPPSEC2004B – *Respond to security risk situations*" and "CPPSEC2002A – *Follow workplace safety procedures in the security industry*". These units cover the full range of knowledge and skills required for an authorised officer to use reasonable force in an immigration detention facility, including:

- identify security risk situation;
- respond to security risk situation;
- use negotiation techniques to defuse and resolve conflict;
- identify and comply with applicable legal and procedural requirements.

62. It is also intended that the authorised officer will be required to participate in a planned, structured, ongoing training and development programme and submit evidence of having completed this training to the Department of Immigration and Border Protection.

63. New subsection 197BA(8) of the Migration Act provides that a determination under subsection 197BA(7) is not a legislative instrument.

64. The purpose of this amendment is to clarify that if the Minister determines the qualifications and training an officer must undergo in order to be an authorised officer under new subsection 197BA(7) of the Migration Act, that determination is not a legislative instrument. This provision is declaratory of the law and is not intended as an exemption to the *Legislative Instruments Act 2003*, but is included to assist readers in the interpretation of the legislation.

Subsection 197BA(9) – Effect of this section

65. New subsection 197BA(9) of the Migration Act provides that section 197BA does not limit subsection 273(2).

66. The note to new subsection 197BA(9) of the Migration Act provides that subsection 273(2) allows regulations to be made in relation to the operation and regulation of detention centres.

67. Subsection 273(1) of the Migration Act provides that the Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.

68. Subsection 273(2) of the Migration Act provides that the regulations may make provision in relation to the operation and regulation of detention centres.

69. Subsection 273(3) of the Migration Act provides that without limiting the generality of subsection 273(2), regulations under that subsection may deal with the following matters:

- the conduct and supervision of detainees;
- the powers of persons performing functions in connection with the supervision of detainees.

70. The purpose of this amendment is to clarify that the power of authorised officers to use reasonable force in immigration detention facilities in new section 197BA of the Migration Act does not limit the power of the Governor-General in subsection 273(2) of the Migration Act to make regulations in relation to the operation and regulation of detention centres. The intention is to avoid a situation in which the power in subsection 273(2) is interpreted as having no work to do as a result of new section 197BA.

Section 197BB – Complaints

71. New subsection 197BB(1) of the Migration Act provides that a person may complain to the Secretary about an authorised officer's exercise of power under new section 197BA.

72. New subsection 197BB(2) of the Migration Act provides that a complaint must:

- be in writing; and
- be signed by the complainant; and
- describe the matter complained about.

73. New subsection 197BB(3) of the Migration Act provides that the Secretary must provide appropriate assistance to a person who wishes to make a complaint and requires assistance to formulate the complaint. The purpose of subsection 197BB(3) is to require the Secretary to provide assistance if a person indicates that they wish to make a complaint about the exercise of power under new section197BA. The type of assistance that may be appropriate for the Secretary to provide is an interpreter service for those persons who indicate they wish to make a complaint and require assistance to write it.

74. In addition, immigration detention facilities currently have a comprehensive system in place to provide detainees with a variety of assistance and options to raise problems or make complaints regarding their immigration detention. Detainees are provided with information about their rights to make a complaint. As well as having access to the contracted service provider and the Department of Immigration and Border Protection, detainees can also go directly to multiple external bodies to voice their concerns. Detainees are currently given access to the Australian Human Rights Commission, the Red Cross, the office of the Commonwealth Ombudsman, Ministers, police, state welfare agencies, community groups and advocacy groups to make a complaint. Alternatively, the detainee can ask the relevant body or agency to advocate on the detainee's behalf.

75. It is expected that detainees will continue to be able to access these types of external agencies and organisations to raise problems or make complaints. However, obviously the manner and nature of support provided by these agencies and organisations may change over time.

76. New subsection 197BB(4) of the Migration Act provides that the Secretary must notify the complainant in writing of the receipt of the complaint. This new subsection is a procedural measure requiring the Secretary to notify the complainant of receipt of the complaint.

77. The purpose of section 197BB of the Migration Act is to provide a statutory complaints mechanism to give a clear pathway to make a complaint for a person who feels aggrieved by an exercise of powers under new section 197BA. The complaints mechanism does not restrict a person from making a complaint directly to another body or agency such as directly to the State, Territory or Australian Federal Police or the Office of the Commonwealth Ombudsman. An appropriate complaints mechanism is an important accountability measure in relation to the exercise of powers under new section 197BA.

Section 197BC – Investigation of complaints

78. New subsection 197BC(1) of the Migration Act provides that subject to sections 197BD and 197BE, described below, the Secretary must investigate a complaint made under section 197BB. This amendment provides an obligation for the Secretary to investigate a complaint regarding the use of force in an immigration detention facility under new section 197BA.

79. New subsection 197BC(2) of the Migration Act provides that the investigation is to be conducted in any way the Secretary thinks appropriate. This amendment is intended to provide for the investigation to be conducted in any way the Secretary considers appropriate, including the most efficient and effective manner as befits the nature of the complaint under investigation.

80. New subsection 197BC(3) of the Migration Act provides that if, after completing the investigation, the Secretary is satisfied it is appropriate to refer the complaint to the Ombudsman, the Secretary must:

- refer the complaint to the Ombudsman; and
- notify the complainant in writing that the complaint has been so referred; and
- give the Ombudsman any information or documents that relate to the complaint and that are in the Secretary's possession or under the Secretary's control.

81. New subsection 197BC(4) of the Migration Act provides that a complaint referred to the Ombudsman under subsection 197BC(3) is taken to be a complaint to the Ombudsman under the *Ombudsman Act 1976*. The purpose of this amendment is to provide that the Ombudsman has all the usual powers and obligations for dealing with a complaint made under new subsection 197BB(1) as he or she would if the complaint had been made directly to the Ombudsman.

Section 197BD – Secretary may decide not to investigate a complaint

82. New subsection 197BD(1) of the Migration Act provides that the Secretary may decide not to investigate, or not to investigate further, a complaint made under section 197BB, if the Secretary is satisfied that:

- the complainant has previously made the same, or a substantially similar, complaint to the Secretary and the Secretary:
    - has dealt, or is dealing, adequately, with the complaint; or

- has not yet had an adequate opportunity to deal with the complaint; or

- the complaint is frivolous, vexatious, misconceived, lacking in substance or is not made in good faith; or

- the complainant does not have sufficient interest in the subject matter of the complaint; or

- the investigation, or any further investigation, is not justified in all the circumstances.

83. The purpose of new subsection 197BD(1) of the Migration Act is to specify the cases in which the Secretary may decide not to investigate, or decide to discontinue an investigation under section 197BB in certain circumstances. There is no general discretion for the Secretary not to investigate a complaint. The Secretary is only entitled to decide not to investigate or investigate further a complaint where:

- the complainant has previously made the same or a substantially similar complaint and an investigation is unnecessary because it is being dealt with or has been dealt with or there has not yet been an adequate opportunity to deal with the complaint; or

- there is no real substance to the complaint or it is not made in good faith; or

- the complainant does not have sufficient interest in the subject matter of the complaint. It would generally be expected that the complainant would be the subject of an authorised officer's exercise of power under section 197BA; or

- investigation or further investigation is not justified in all the circumstances. An example of where an investigation or further investigation would not be justified is where it does not relate to an authorised officer's exercise of power under new section 197BA of the Migration Act.

84. New subsection 197BD(2) of the Migration Act provides that the Secretary must notify the complainant in writing if the Secretary decides not to investigate the complaint, or not to investigate it further. The notice must include the reasons for the decision. New subsection 197BD(2) is a procedural measure requiring the Secretary to notify the complainant of a decision not to investigate the complaint and the reasons for that decision.

85. Providing for complaints to be dealt with in this manner is considered appropriate because it allows the Secretary to:

- deal with those complaints that are without merit; or

- investigate complaints that may have some basis for proceeding before:

  - making a decision regarding complaints that are on the less serious end of the spectrum; or

  - referring them to the Ombudsman for further independent investigation and decision making if the Secretary is satisfied that it is appropriate to refer the complaint; or

- immediately refer complaints at the more serious end of the spectrum to the Ombudsman, the Commissioner of the Australian Federal Police or the Commissioner or head (however described) of the police force of a State or Territory for independent investigation and decision making (discussed in paragraphs 86-90 below).

Section 197BE – Transfer of complaint

86. New subsection 197BE(1) of the Migration Act provides that if the Secretary is satisfied that a complaint could be more conveniently or effectively dealt with by any of the following persons (the ***transferee***):

- the Ombudsman;
- the Commissioner of the Australian Federal Police; or
- the Commissioner or head (however described) of the police force of a State or Territory;

the Secretary may decide not to investigate the complaint, or not to investigate it further.

87. The Department of Immigration and Border Protection will work with both the Ombudsman's office and the Australian Federal Police to develop guidelines for such referrals.

88. New subsection 197BE(2) of the Migration Act provides that if the Secretary decides as mentioned in subsection 197BE(1), the Secretary must:

- transfer the complaint to the transferee; and
- notify the complainant in writing that the complaint has been so transferred. This new paragraph is a procedural measure requiring the Secretary to notify the complainant of receipt of the transfer of the complaint; and
- give the transferee any information or documents that relate to the complaint and that are in the Secretary's possession or under the Secretary's control.

89. This process will also allow the Secretary to identify any systemic issues, major or minor, that could be improved with policy and procedural changes.

90. New subsection 197BE(3) of the Migration Act provides that a complaint transferred to the Ombudsman under subsection 197BE(2) is taken to be a complaint to the Ombudsman under the *Ombudsman Act 1976*. The purpose of this amendment is to provide that the Ombudsman has all the usual powers and obligations for dealing with a complaint made under new subsection 197BB(1) as he or she would if the complaint had been made directly to the Ombudsman.

Section 197BF – Bar on proceedings relating to immigration detention facilities

91. New subsection 197BF(1) of the Migration Act 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.

92. New subsection 197BF(2) of the Migration Act provides that section 197BF has effect despite anything else in the Migration Act or any other law.

93. New subsection 197BF(3) of the Migration Act provides that nothing in section 197BF is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

94. New subsection 197BF(4) of the Migration Act provides that in section 197BF, ***Commonwealth*** includes:

- an officer of the Commonwealth; and

- any other person acting on behalf of the Commonwealth.

95. The purpose of this amendment is to provide immunity from legal action to the Commonwealth (including an officer of the Commonwealth and any other person acting on behalf of the Commonwealth) except in the High Court under section 75 of the Constitution, in respect of the exercise of power under new section 197BA of the Migration Act, provided the authorised officer exercised the power in good faith.

96. It is not unusual for the Migration Act to specify the jurisdiction and procedures of courts including limiting jurisdiction (refer Part 8 of the Migration Act).

97. In new section 197BF of the Migration Act, the term 'Commonwealth' is intended to include all authorised officers. Employees of the immigration detention services provider will be authorised officers for the purposes of new Division 7B of Part 2 of the Migration Act (subject to new subsection 197BA(6), inserted by item 5). In the event of a disturbance in an immigration detention facility, they may be required to exercise police-like powers, including reasonable force, to protect the life, health or safety of people in the immigration detention facility and maintain the good order, peace or security of that facility. However, in so doing, employees of the immigration detention services provider would not be afforded the same protection against criminal or civil action that police officers have. Without at least some degree of this kind of protection, employees of the immigration detention services provider may be reluctant to use reasonable force to protect a person or to contain a disturbance in an immigration detention facility, even if they are expressly authorised to do so. This could result in the death of a person or people in the immigration detention facility or serious harm to such people, or major destruction of the immigration detention facility itself.

98. New section 197BF of the Migration Act contemplates that employees of the immigration detention services provider, as authorised officers, will only have protection from criminal and civil action in all courts except the High Court if the powers are exercised in good faith. As a threshold question, in deciding if it has jurisdiction the court would need to consider:

- if the action complained about was an exercise of power under new section 197BA; and

- if the authorised officer acted in good faith in the use of force.

If the court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer even if the action complained about was an exercise of power under new section 197BA of the Migration Act. In particular this would not prevent the institution of criminal proceedings against an authorised officer for the use of force which is not authorised by proposed section 197BA and is not in good faith. Proposed section 197BF would also not prevent judicial review by the High Court under section 75(v) of the Constitution. This ensures that excessive and inappropriate force is not condoned and that authorised officers who do not act in good faith in exercising the new powers may face sanctions through proceedings in court.

Section 197BG – Saving of other laws

99. New section 197BG of the Migration Act provides that new Division 7B of Part 2 of the Migration Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of operating concurrently with Division 7B of Part 2 of the Migration Act.

100. The purpose of this amendment is to make it clear that new Division 7B of Part 2 of the Migration Act does not preclude the operation of other laws, whether of the Commonwealth, a State or a Territory, that authorise reasonable use of force. For example, the new Division does not prevent an officer of a State or Territory police force from exercising reasonable force in an immigration detention facility under relevant Commonwealth, State or Territory legislation.

101. This amendment recognises the fact that, in practice, authorised officers (including appropriately qualified and trained employees of the immigration detention services provider) will provide the initial response to prevent or contain a disturbance at an immigration detention facility. If the immigration detention services provider is unable to de-escalate the situation, the police will assume responsibility for controlling the disturbance as soon as possible thereafter. The police will be governed by the law that usually applies to them in their capacity as police officers.

Attachment A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Migration Amendment (***Maintaining the Good Order of Immigration Detention Facilities***) Bill 2015 (the Bill) amends the *Migration Act 1958* (the Act) to clearly articulate that authorised officers are permitted to use such reasonable force as the authorised officer reasonably believes is necessary to protect the life, health or safety of any person in Immigration Detention Facilities (IDFs) and to maintain the good order, peace and security of these facilities.

The Bill confers powers on authorised officers to use such reasonable force as the officer reasonably believes is necessary to protect the life, health or safety of any person in an IDF and to maintain the good order, peace and security of an IDF; and prescribes the circumstances in which reasonable force may, and may not be used (the circumstances in which reasonable force may be used are not exhaustive). The Bill is intended to protect the rights, freedoms and physical safety of all people in an IDF, including detainees.

An authorised officer is an officer authorised in writing by the Minister or the Secretary for the purposes related for specific provisions under the Act.

Governance and Reporting

Authorised officers will be subject to increased governance arrangements to be introduced as risk mitigation measures to the use of reasonable force in IDFs.

In line with established departmental occupational health and safety reporting procedures, any instance of the use of force and/or restraint in an IDF must be reported under section 68 of the *Work Health and Safety Act 2011*.

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.

The Bill will provide for a statutory complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department of Immigration and Border Protection about the exercise of the powers under new section 197BA to use reasonable force. An appropriate complaints mechanism is an important accountability measure in relation to the exercise of powers under new section 197BA.

Training

Authorised officers must meet capability and training standards and hold appropriate qualifications to enable them to lawfully use reasonable force in IDFs. As a nationally Registered Training Organisation, the IDSP provides training on the use of reasonable force to all IDSP officers, which meets the standards as prescribed by the Australian Skills Quality Authority. This training provides the knowledge and skills to allow an officer to respond appropriately to a given situation that strikes an appropriate balance between the safety of people within a detention facility and using force as a last resort. IDSP officers responsible for managing the security of IDFs 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.

IDSP officers responsible for the general security and safety of detainees must hold a Certificate Level II in Security Operations or equivalent or obtain that Certificate within six months of commencement of work in an IDF. The IDSP provides regular reports to the Department of Immigration and Border Protection providing details of the training and accreditations of IDSP personnel.

Departmental training programmes for staff operating in the IDF will be revised to incorporate content that reflects the new legislation. Depending on the roles and responsibilities of the departmental officers, this training will cover relevant legislation and operational procedures necessary to effectively monitor the use of force by employees of the IDSP, to determine operational procedures are followed correctly; and to ensure only employees of the IDSP who are authorised officers and who have successfully completed the relevant training use reasonable force in IDFs.

An authorised officer may use such reasonable force as the authorised officer reasonably believes is necessary to:

- protect a person (including the authorised officer) from harm or a threat of harm; or
- protect a detainee in an IDF from self-harm or a threat of self-harm; or
- prevent the escape of a detainee from an IDF; or
- prevent a person from damaging, destroying or interfering with property in an IDF; or
- move a detainee within an IDF; or
- prevent action in an IDF by any person that endangers the life, health or safety of any person; or disturbs the good order, peace or security of the IDF.

The Bill makes it clear that these circumstances are not exhaustive. Other circumstances in which reasonable force may be used in IDFs will include:

- the provision of a rapid, first response by officers to incidents where there is genuine risk of a public order disturbance, or an actual public order disturbance that may or is posing a threat to people or property in an IDF;
- the provision of a significant physical presence of officers to act as a deterrent to a public order disturbance, or to manage a public order disturbance.

The Bill does not seek to define the expression "reasonable force". Under policy, reasonable force must be no more than that required to ensure the life, health or safety of any person in the facility, be consistent with the seriousness of the incident, be proportional to the level of resistance offered by the person, avoid inflicting injury if possible, and be used only as a measure of last resort.

The amendments in this Bill address issues arising from incidents at a number of IDFs, which highlighted uncertainty, on the part of the IDSP, as to when it may act when confronted with public order disturbances in IDFs and how it may act in relation to the police.

In the absence of provisions in the Act that authorise the use of reasonable force to protect the life, health or safety of a person within an IDF, the IDSP relies on the common law powers, as conferred on ordinary citizens, to exercise reasonable force when necessary to protect their officers and others from harm within an IDF. However, the extent of this authority is limited. Under common law, it is only possible after the event, to say whether the force used was reasonable in the circumstances. That is, reasonable force can only be used to suppress a disturbance where, objectively, it is deemed necessary.

Further, the Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre (the Hawke-Williams Report), conducted by Dr Allan Hawke AC and Ms Helen Williams AO in 2011, recommended the Department more clearly articulate the responsibility of public order management between the Department, the IDSP, the Australian Federal Police and other police forces who may attend an IDF.

The amendments to the Act that would be made by the Bill specifically permit use of reasonable force by authorised officers for certain purposes, including for the purpose of maintaining the good order, peace and security of an IDF. The Bill would thereby remove uncertainty on the part of employees of the IDSP concerning their authority to use reasonable force to prevent or contain disturbances in an IDF.

Human rights implications

Right to life

The right to life under Article 6(1) provides the right not to be deprived of life arbitrarily or unlawfully by a country or its agents.

Section 197BA of the Bill relates to using force, and therefore engages the right to life. Circumstances may arise in the detention context where a degree of force may be necessary, such as where a person in a detention centre threatens to harm him or herself, or others. Paragraph 197BA(5)(b) in particular, engages the right to life, as it provides two exceptions to the prohibition on authorised officers from doing anything likely to cause grievous bodily harm to a person.

Any use of force pursuant to the Bill would be lawful. Additionally, any use of force would not be arbitrary, because it is necessary, reasonable and proportionate in the circumstances. Section 197BA provides that in exercising powers under the Bill, force may only be used where the authorised officer reasonably believes it is necessary in the circumstances.

There are several other safeguards in using force in the exercise of the power under section 197BA of the Bill, which means that any use of force will be proportionate. Pursuant to paragraph 197BA(5)(a), an authorised officer must not subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances. Pursuant to paragraph 197BA(5)(b), an authorised officer must not do anything that is likely to cause grievous bodily harm to, a person, unless the officer believes on reasonable grounds that the doing of that thing is necessary to protect life of, or to prevent serious injury to, another person (including the authorised officer).

The use of force pursuant to the exercise of powers in the Bill is therefore lawful and not arbitrary. Accordingly, the use of force provision is consistent with Australia's human rights obligations in relation to the right to life.

Prohibition on Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Australia has obligations under both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) not to engage in torture and cruel, inhuman or degrading treatment or punishment.

The use of force and circumstances under which it is authorised by the Bill would not amount to torture, cruel, inhuman or degrading treatment or punishment. The Bill only authorises force where it achieves a specific legislative outcome, that is, to protect the life, health or safety of any persons in an IDF and to maintain the good order, peace and security of an IDF.

Further, the intention is that use of force is to be consistent with the seriousness of the incident, proportional to the level of resistance offered by the person/s involved and used only as a measure of last resort. The Bill prescribes limitations on the exercise of the power to use reasonable force, namely:

- an authorised officer must not use force to give nourishment or fluids to a detainee in an IDF; and
- an authorised officer must not subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances;
- an authorised officer must not cause grievous bodily harm to an individual 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 primary aim of the amendments is to protect the life, health or physical safety of any person in an IDF and maintain the good order, peace and security of an IDF.

The Bill will provide for a statutory complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary of the Department of Immigration and Border Protection about the exercise of the powers under new section 197BA to use reasonable force. An appropriate complaints mechanism is an important accountability measure in relation to the exercise of powers under new section 197BA.

The amendments require a complaint to take a particular form. However, the amendments also require the Secretary to provide appropriate assistance to a person who wishes to make a complaint and requires assistance to formulate the complaint. The Secretary will be required to notify the complainant in writing of the receipt of the complaint.

Generally, the Secretary must investigate a complaint. However, the amendments provide for a complaint not to be investigated if the Secretary is satisfied that a complaint could be more conveniently or effectively dealt with by:

- the Ombudsman under the *Ombudsman Act 1976*; or
- the Commissioner of the Australian Federal Police; or
- the Commissioner or head (however described) of the police force of a State or Territory.

The amendments also provide that it is open to the Secretary to decide not to investigate a complaint, in the following circumstances:

- that the complainant has made the same complaint or a substantially similar complaint to the Secretary and the Secretary believes that he or she:
  - has dealt, or is dealing, adequately with the complaint; or
  - has not yet had an adequate opportunity to deal with the complaint; or
- that the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; or
- that the complainant does not have a sufficient interest in the subject matter of the complaint; or
- the investigation, or any further investigation, is not justified in all the circumstances.

This amendment is intended to provide for complaints to be triaged so that complaints that are clearly without merit can be concluded early without investigation and complaints that are clearly of a serious nature can be referred to the Ombudsman or the police for independent investigation.

The amendments provide that an investigation into a complaint will be conducted in any manner that the Secretary thinks appropriate. This amendment is intended to provide for the investigation to be conducted in an efficient and effective manner as befits the nature of the complaint under investigation.

The amendments will also provide that the complainant must be notified of the following:

- receipt of a complaint;
- a decision not to investigate, or not to continue to investigate a complaint;
- a decision to transfer an investigation to the Ombudsman's office; and
- the outcome of an investigation if conducted.

The amendments do not prevent a person from making a complaint directly to the Ombudsman or the police.

The proposed legislative amendments are consistent with Australia's international obligations and as a result do not breach Article 7 of the ICCPR, in that they specifically define the circumstances under which, and the limits on the use of, reasonable force.

Right to security

Article 9 of the ICCPR provides everyone has the right to liberty and security of person. The use of reasonable force against any person in an immigration detention facility engages Australia's obligation to respect the right to security of persons under Article 9 of the ICCPR.

The Department has a responsibility to detainees and other persons in immigration detention facilities to ensure that they are free from harm. The immigration detention network currently holds a number of detainees who present behavioural challenges including:

- an increasing number of people subject to adverse security assessments;
- people who have or are alleged to have committed serious criminal offences;
- others deemed to be of a high security risk.

The network increasingly needs to provide higher security for, and more intensive management of these detainees.

The presence of high risk detainees with behavioural challenges (including members of outlaw motorcycle gangs) has the potential to jeopardise the peace, good order and security of our immigration detention facilities and the safety of all persons within those facilities. In fact, public order disturbances have arisen in a number of immigration detention facilities including riots at the Christmas Island and Villawood Detention Centres. The amendments in the Bill are necessary to deal with the changing nature of detainees held in immigration detention facilities.

In this environment, reasonable force is currently being used in immigration detention facilities in both planned and unplanned circumstances. Planned use of force is currently used with prior approval from the Department of Immigration and Border Protection, for detainees who have a serious or violent criminal history, who have a history of escape, or for whom their individual risk assessment indicates they have potential to pose a high risk to the integrity of the immigration detention programme. Unplanned use of force is in response to unforseen events that place persons or property at risk (an emergency due to a riot or other significant disturbance) and may require the use of instruments of restraint.

For both planned and unplanned use of force there are stringent policies, procedures, guidelines and reporting requirements in place. The policies, procedures, guidelines and reporting requirements guiding the use of force in immigration detention facilities, will be reviewed in consultation with the Australian Federal Police.

Staff at immigration detention facilities currently rely on common law powers as conferred on ordinary citizens to exercise reasonable force in response to an incident that is an actual or apprehended breach of the peace. The scope and extent of the powers under the common law is unclear. The amendments in the Bill provide a clear legislative framework for the use of reasonable force in immigration detention facilities, namely the powers available to authorised officers to use reasonable force and the circumstances under which this force may be used. The amendments in the Bill provide a clear framework prescribing:

- the officers that may use reasonable force must be ‘authorised officers’ within the meaning of the Migration Act;
- the circumstances in which the authorised officer may use reasonable force;
- generally limits the use of reasonable force to incidents in an immigration detention facility;
- limits to the exercise of the power to use reasonable force in an immigration detention facility;
- provisions that prevent the Minister or the Secretary from authorising an officer as an authorised officer unless the officer satisfies the training and qualification requirements determined by the Minister in writing. The Bill also requires the Minister to determine those qualifications and that training in writing.

Certainty regarding the use of reasonable force prescribed in the Act is preferable to provide clarity to officers, other departments and the general public as to the responsibilities and powers of authorised officers. The amendments in the Bill strengthen the current arrangements under which officers exercise use of force and lessens the reliance on the common law defences.

The Department has in place and will continue to have in place policies and procedures regarding the use of force in an immigration detention facility that provide safeguards to ensure that use of reasonable force or restraint will:

- require conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force;
- only be a measure of last resort after negotiations have not resolved the situation;
- only be used for the shortest amount of time possible;
- not include cruel, inhuman or degrading treatment; and
- not be used for the purposes of punishment.

Appropriate training will be a requirement to be authorised as an authorised officer. The training will cover the full range of knowledge and skills required for an authorised officer to use reasonable force in an immigration detention facility, including:

- identify security risk situation;
- respond to security risk situation;
- use negotiation techniques to defuse and resolve conflict;
- identify and comply with applicable legal and procedural requirements.

The proposed legislative amendment is consistent with Australia's international obligations as the amendments are reasonable, necessary and proportionate to achieving the legitimate aim of having immigration detention facilities that protect the life, health or safety of any person in an immigration detention facility or maintain the good order, peace or security of an immigration detention facility.

Right to be treated with humanity and respect for the inherent dignity of the human person

Article 10(1) of the ICCPR provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' It is envisaged that Article 10(1) may be engaged to the extent that force is employed.

The implicit requirement of the Bill is that where reasonable force is required, 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. To the extent that these amendments may limit Article 10(1), the limitations are both reasonable and proportionate to achieving the legitimate objective to protect public order, safety or health, and the rights and freedoms of others.

Right to Peaceful Assembly

Article 21 of the ICCPR provides that the '[r]ight of peaceful assembly shall be recognized'. This right, however, is qualified: "[n]o restrictions may be placed on the exercise of this right other than those *imposed in conformity with the law* and which are necessary in a democratic country in the interests of national security or public safet*y, public order*, the protection of public health or morals or the *protection of the rights and freedoms of others*". (emphasis added)

In relation to the use of reasonable force, the Bill aims to provide legislative support for authorised officers to maintain the good order, peace and security of an IDF. The measures in the Bill do not interfere with the right to 'peaceful' assembly.

The use of reasonable force in the circumstances outlined above clearly fall within the permitted restrictions to Article 21, in particular, to protect persons from an actual or perceived attack or

harm, to prevent any threats to unlawful damage, destruction, or interference with Commonwealth property and protecting all persons from an actual or perceived attack or harm. The measures are defensive in nature and are predicated on any use of force being reasonable and proportionate to the threat and harm and for the purpose of protecting the rights of people and protection of property in an IDF.

Therefore, reasonable force, or the authorised use of the powers under the Bill, would not breach the Article 21 obligations where they are imposed in conformity with the law for reasons of public order or the protection of the rights or freedoms of others.

Freedom of Association

Article 22(1) of the ICCPR provides that '[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' Article 22(2), in similar terms to Article 21 of the ICCPR, provides that '[n]o restrictions may be placed on the exercise of this right *other* than *those which are prescribed by law* and which are necessary in a democratic society in the interests of national security or *public safety, public order* (ordre public), the protection of public health or morals or the *protection of the rights and freedoms of others*.'

As stated in the overview of the Bill, the proposed measures do not limit the right to freedom of association under Article 22 of the ICCPR. Any reasonable use of force is one that falls within the permitted restrictions: 'public safety', 'public order' and 'protections of the rights and freedoms of others'. The measures are reasonable and proportionate, conform to the permitted restrictions in Article 22(1), and principally include the protection of the rights of other people in an IDF.

All persons shall be equal before the courts and tribunals

Article 14 of the ICCPR provides that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' The purpose of the amendment in section 197BF of the Bill (*Bar on proceedings relating to immigration detention facilities*), is to provide immunity from legal action to the Commonwealth (including an officer of the Commonwealth and any other person acting on behalf of the Commonwealth), except in the High Court under section 75 of the Constitution, in respect of the use of reasonable force in immigration detention facilities, provided the authorised officer did so in good faith.

As authorised officers for the purposes of section 197BA, employees of the IDSP may be required to exercise police-like powers to protect the life, health or safety of people in the immigration detention facility and maintain the good order, peace and security of the facility. However, in so doing, they would not be afforded the same protection against criminal or civil action that police officers have.

Under new section 197BF, an authorised officer will only have protection from criminal and civil action if the power to use force was exercised in good faith. Subsection 197BF(3) specifically states that nothing in new section 197BF is intended to affect the jurisdiction of the High Court under section 75 of the Constitution. To decide whether it has jurisdiction, the court would need to consider whether the authorised officer acted in good faith in the use of force. If the court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer. This ensures that excessive and inappropriate force is not condoned and that authorised officers, who act in bad faith in the exercise of the new powers, will face appropriate charges. In particular this would not prevent the institution of criminal

proceedings against an authorised officer for the use of force which is not authorised by proposed section 197BA and is not in good faith. Proposed section 197BF would also not prevent judicial review by the High Court under section 75(v) of the Constitution.

The proposed legislative amendment is consistent with Australia's international obligations as the amendments are reasonable, necessary and proportionate to achieving the legitimate aim of having immigration detention facilities that protect the life, health or safety of any person in an immigration detention facility or maintain the good order, peace or security of an immigration detention facility. The amendments also provide aggrieved persons with a complaints mechanism in respect of the exercise of the power in section 197BA of the Bill. Aggrieved persons could also seek judicial review by the High Court under section 75(v) of the Constitution.

Rights to equality and non-discrimination

Article 2(1) of the ICCPR provides that State parties must guarantee the rights in the Covenant (including Article 14) to all individuals without discrimination on any prohibited ground, including 'other' status. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Article 26 also provides a free-standing bar on discrimination on prohibited grounds, including other status. The other status categories are not fixed, but rather are determined on a case by case basis. By way of example, having a criminal conviction, or being a prisoner, can both constitute 'other' status. There may be a view that being in immigration detention could constitute an other status for the purposes of Articles 2 and 26.

However, the Bill provides an authorised officer with the power to use such reasonable force against 'any person' that he or she reasonably believes is necessary to protect the life, health or safety of any person in an immigration detention facility or maintain the good order, peace or security of an immigration detention facility. The reference to 'any person' in this provision includes a detainee, an employee of the Department of Immigration and Border Protection, a visitor to an immigration detention facility, and any other person who is in an immigration detention facility. The provision has been framed broadly in recognition of the fact that a variety of people could be physically in an immigration detention facility at any one time for a variety of purposes, and that an authorised officer should have the power to use reasonable force against any person in the facility to protect the life, health or safety of any one of them or any other person, should the need arise.

Even if the proposed bar on instituting proceedings could amount to the differential treatment of persons on the basis of their being in immigration detention (in this case, because such a group, in contrast with the general population, would not be able to challenge the use of force against them before the courts) this is consistent with Australia's international obligations because it would constitute legitimate differential treatment and is reasonable in all the circumstances.

Conclusion

The Bill is compatible with human rights in that it limits specific human rights only where necessary as prescribed by law to protect public order, safety or health, and the rights and freedoms of others. These limitations are therefore necessary, reasonable and proportionate.

The Honourable Peter Dutton MP, Minister for Immigration and Border Protection