Legislative brief

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

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This legislative brief sets out the key features of the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015. For a detailed commentary, see the submission by the Andrew & Renata Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law to the Senate Legal and Constitutional Affairs Committee.

Overview

The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 ('the Bill') seeks to amend the *Migration Act 1958* (Cth). The Bill provides for the following:

- the conferral of broad, discretionary powers on officers to use force to maintain order in immigration detention facilities;
- that training and qualification requirements for authorised officers must be set out in writing by the Minister for Immigration and Border Protection ('the Minister');
- a legislative framework to govern the making of complaints to the Secretary of the Department of Immigration and Border Protection ('the Secretary'); and,
- legal immunity for authorised officers, and the Commonwealth, where a court determines that the officer has exercised their power to use force 'in good faith'.

The Bill was introduced into Parliament on 25 February 2015, and passed the House of Representatives on 13 May 2015. Amendments proposed by the Shadow Minister for Immigration, Richard Marles, were defeated. The Bill was referred to the Senate Legal and Constitutional Affairs Committee on 5 March 2015. The Committee tabled its report on 5 June 2015 and recommended that the Bill be passed with minor amendments, although Labor and the Greens authored dissenting reports.

Use of Force

What the Bill will change

The Bill confers broad, discretionary powers on individual officers to use force against people held in immigration detention facilities.

Proposed section 197BA confers a right to use such reasonable force 'as the authorised officer reasonably believes is necessary' to 'protect the life, health or safety of any person' or to 'maintain the good order, peace or security of an immigration detention facility'.

Examples of situations in which force may be used include:

- to protect a person (authorised officer or detainee) from harm, self-harm or the threat of such harm;
- to prevent a detainee from escaping;
- to prevent damage, destruction or interference with property;

- to move a detainee within the facility;
- to prevent action that endangers life, health or security; and
- to prevent action that disturbs good order, peace or security.

The power may not be used 'to give nourishment or fluids to a detainee'. Further, in exercising the power, an officer must not:

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

Comment

The Bill does not contain sufficient safeguards to ensure that such powers are exercised responsibly and in accordance with basic human rights standards. There is a risk that the powers could be used capriciously because the legislation does not contain a clear set of criteria about when force may be used, the degree of force that may be used, and how much consideration an officer must give to the consequences of his or her actions when using that force.

The test for when force may be used is less well-defined in this Bill than other use of force provisions in the *Migration Act 1958* and other federal and State legislation,[1] as it turns on the subjective belief of the officer as to when such force is necessary: an officer may use 'such reasonable force' as the officer 'reasonably believes is necessary'. The subjective nature of the test makes it difficult for those in detention to know when use of force against them is authorised by the provision, reducing the likelihood that inappropriate and unauthorised use of force will be challenged.

The range of instances to which the use of force provision applies is extremely broad and may be used to quash legitimate requests, dissent and protest. For instance, force may be used to 'move a detainee within the facility' if an officer 'reasonably believes [it] is necessary'.[2]

The Minister has stated that the Bill draws on recommendations made in the 2011 Hawke-Williams Report regarding the management of public order disturbances in immigration detention.[3] However, as the Joint Parliamentary Committee on Human Rights ('Joint Committee') and the Australian Human Rights Commission both noted,

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[1] See, for example, *Migration Act 1958* (Cth) s 261AE, 'Use of force in carrying out identification tests'; *Australian Federal Police Act 1979* (Cth) s 14B, 'Use of force in making arrests'; *Customs Act 1901* (Cth) s 219ZJG 'Use of force in relation to detention'; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 230, 'Use of force generally'.

[2] Proposed s 197BA(2)(e).

[3] Minister for Immigration and Border Protection, *Second Reading Speech: Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, Commonwealth Parliamentary Debates, 25 February 2015, p. 1. See further: A. Hawke and H. Williams, *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, 2011.

this report did not refer to the inadequacy of common law regarding the use of force, nor did it recommend creating a statutory use of force power for authorised officers in detention facilities.[4]

The Joint Committee did not accept that, in providing for the use of force, the Bill was addressing 'a pressing or substantial concern' that would justify a limitation on human rights.[5] Restrictions on rights must conform to the strict tests of necessity and proportionality. Furthermore, any limitations must be set out clearly and precisely in domestic law.[6] They cannot be vague and non-specific: the law must be 'formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly'.[7] The law must not confer unfettered discretion on the officers responsible for carrying it out.[8] As the Australian Human Rights Commission noted in its submission to the Senate Committee, 'the kinds of powers proposed to be given to employees of private contractors are powers that are usually reserved to sworn police officers', and 'it is important to acknowledge that these private contractors are not police and that they need to be subject to greater levels of control and accountability'.[9]

The use of force provision risks breaching a number of human rights, set out briefly below.

Under article 6 of the International Covenant on Civil and Political Rights (ICCPR), Australia has an obligation to protect the right to life. This means that government officials must refrain from killing people, and that the State must exercise due diligence in preventing people from being killed by other actors.[10] If an officer kills an individual, it must be shown that it was the only viable option in all the circumstances: that it was necessary, reasonable and proportionate (for example, in self-defence or to defend others). It is quite possible that a person could be killed by an officer's use of force under this Bill. Indeed, this is acknowledged in the Bill's Explanatory Memorandum: 'For the purposes of this Bill, grievous bodily harm includes death or serious injury'.[11]

Under article 7 of the ICCPR, Australia must ensure that it does not allow anyone to be subjected to a real risk of torture or cruel, inhuman or degrading treatment or punishment. This includes acts of physical as well as mental harm. There are no

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[4] Parliamentary Joint Committee on Human Rights, Twentieth Report of the 44th Parliament, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 18 March 2015, para 1.67; Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, 7 April 2015, para 4.15.

[5] Joint Committee, para 1.62.

[6] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd edn, Oxford University Press, Oxford, 2013, para 1.83.

[7] UN Human Rights Committee, General Comment No 34, UN Doc CCPR/C/G/34 (12 September 2011), para 25, referring to *de Groot v Netherlands*, UN Human Rights Committee Communication No CCPR/C/54/D/578/1994 (24 July 1995).

[8] UN Human Rights Committee, General Comment No 27, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 13.

[9] Australian Human Rights Commission, para 2.4.

[10] 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', UN Doc A/61/311 (5 September 2006), para 37.

[11] Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, para 52.

exceptions to the prohibition on these forms of ill-treatment, no matter who a person is or what he or she has done. Such acts are always unlawful under international law.

In determining whether treatment amounts to torture or cruel, inhuman or degrading treatment or punishment, the personal attributes of the affected individual are also relevant – such as his or her age, gender, health, and so on. The Joint Committee noted that asylum seekers in immigration detention may be particularly vulnerable, compounding the risk that the use of force may constitute cruel, inhuman or degrading treatment.[12] The provisions may also result in a violation of Australia's obligation to ensure humane conditions in detention under article 10 of the ICCPR.

As noted above, because the Bill does not define 'good order, peace or security', it is possible that officers might use force to interrupt peaceful protests by asylum seekers. This would limit the right of detainees to peaceful assembly under article 21 of the ICCPR.[13]

For a more detailed analysis, see the Joint Committee report and the submission to the Senate Committee by the Kaldor Centre and the Gilbert+ Tobin Centre of Public Law.

Training Standards

What the Bill will change

Under proposed section 197BA(6), an officer must not be authorised for the purposes of the section 'unless the officer satisfies the training and qualification requirements determined under subsection (7)'. Subsection (7) gives the Immigration Minister power to determine the training and qualification requirements, but subsection (8) states that a determination under (7) 'is not a legislative instrument'.

Comment

The Explanatory Memorandum claims that training and qualifications standards and content change relatively often, and it is therefore appropriate for the training and qualification requirements to be set by the Executive without the need for continuing parliamentary approval.[14] This does not, however, justify the declaration that the determination is not a legislative instrument. The Explanatory Memorandum states that subsection (8) is not intended to exclude the operation of the *Legislative Instruments Act 2003* (Cth).[15] Rather, it is simply 'declaratory of the law'. As the Senate Standing Committee for the Scrutiny of Bills noted, the exact meaning and effect of the provision is unclear.[16] Australia's international obligations to ensure that officers authorised to use the levels of force provided for in the Bill are adequately trained highlights the need for the application of the publicity and legislative scrutiny requirements of the *Legislative Instruments Act*.

[12] Joint Committee, para 1.85.
[13] Joint Committee, para 1.109.
[14] Explanatory Memorandum, para 60.
[15] See section 7(1)(b) of that Act.
[16] Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/15*, p. 25.

Complaints mechanism

What the Bill will change

Under proposed section 197BB, the Bill provides a legislative framework to govern complaints about the use of force to the Secretary of the Department of Immigration. This complaint must be in writing, and signed by the complainant. The Secretary is required to provide appropriate assistance to the complainant's formulation of the complaint.

Under proposed section 197BC, the Secretary's investigation will be conducted 'in any way the Secretary thinks appropriate', and the Secretary may choose to refer the complaint to the Ombudsman. According to the Explanatory Memorandum, 'there is no general discretion for the Secretary not to investigate a complaint'.[17] However, as set out in proposed section 197BD of the Bill, the Secretary may decide not to investigate the complaint for a number of reasons, including:

- if a previous and similar complaint has been made by the same person, and is being or will be dealt with;
- 'if the complaint is frivolous, vexatious, misconceived or lacking in substance, or not in good faith';
- the complainant 'does not have sufficient interest in the subject matter'
- if the investigation 'is not justified in all the circumstances';
- if the complaint could be dealt with by the AFP, the Ombudsman, or a state or territory police commissioner .

Comment

On one level, this provides greater certainty about how internal complaints will be dealt with, including mandating that the Secretary act on the complaint and report back to the complainant about its progress. However, the framework does not set out a timeframe for addressing complaints.

Further, under proposed section 197BD the Secretary has a broad discretion *not* to investigate the complaint if he or she is satisfied that 'the investigation, or any further investigation, is not justified in all the circumstances'. One such ground for not investigating a complaint is if the complainant 'does not have sufficient interest in the subject matter of the complaint'. The Explanatory Memorandum notes that 'it would generally be expected that the complainant would be the subject of the authorised officer's exercise of power'.[18] This raises the question as to how particularly vulnerable detainees would make a complaint. For example, a child detainee, and especially an unaccompanied minor, may be unable or unwilling to lodge a complaint. Similarly, a detainee who is incapacitated by the incident in question, or who is transferred to a Regional Processing Centre following the incident, may be unable to make a complaint.

[17] Explanatory Memorandum, para 83.
[18] Explanatory Memorandum, para 83.

The requirement under proposed section 197BB(2) that the complaint must be in writing, and signed by the complainant, may discourage an asylum seeker from making a complaint out of fear that this could impact negatively on his or her protection claim.[19]

The provisions *formalise* a previously informal, and relatively weak, accountability mechanism, but they do not *strengthen* that mechanism. As the Joint Committee noted, even though affected individuals may make a complaint to the Secretary, the Secretary does not have the power to provide any remedy, other than referring the complaint to the Ombudsman or the Commissioner of a police force for investigation.[20] These are avenues of complaint already available to individual detainees.

Finally, the Bill may breach article 12 of the Convention against Torture, which requires authorities to 'proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.'

Bar on proceedings

What the Bill will change

Under proposed section 197BF, proceedings may not be instituted against the Commonwealth (including an authorised officer) in respect of an incident in which the power authorised by this amendment was exercised, and the court determines that this power was exercised 'in good faith'.

According to the Explanatory Memorandum, 'the purpose of this amendment is to provide immunity from legal action to the Commonwealth', except in the High Court under section 75 of the Constitution.[21]

Comment

Proposed section 197BF provides, in effect, legal immunity for authorised officers where they exercised their power to use reasonable force in 'good faith'. The test of 'good faith' adds a further subjective element, and therefore uncertainty, to determining whether a detainee can seek redress against an officer for using force, because proceedings cannot be brought against an officer who *reasonably believed* that the use of force was necessary, and used such force *in good faith*.

Under article 2(3)(a) of the ICCPR, Australia must ensure that anyone whose human rights or freedoms are violated has an effective remedy. This is not guaranteed by the Bill. Preventing individuals against whom force is used from bringing proceedings against the officer or the Commonwealth limits the right to an effective remedy.[22]

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[19] This was noted as a factor in the *Review into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Final Report ('the Moss Review'), 6 February 2015, para 17.

[20] See analysis of Joint Committee, para 1.117. All that the Ombudsman can do is to make a non-binding recommendation to the government. A reference to the Commissioner of a police force may result in the investigation of that reference, at the discretion of the Commissioner.

[21] Explanatory Memorandum, para 95.

[22] See also Joint Committee, para 1.115.

Similar protections are *not* granted in the other provision of the *Migration Act* that authorises use of force.[23]

Since the officer does not have to report any use of force, and is exempt from suit, he or she is unlikely to be deterred by a fear of retribution for inappropriate acts, which may otherwise help to mitigate these concerns.

The Explanatory Memorandum claims that the provision gives authorised officers the same protections against criminal or civil liability as police officers have. Most state laws provide personal protection from liability to prison officers, but do not *bar* the bringing of proceedings by detainees against the government.[24] Similarly, members of the Australian Federal Police Force are not given immunity for torts committed in the performance or purported performance of their duties; proceedings can be brought and provision is made for the Commonwealth to pay damages ordered against the police officer.[25] Proposed section 197BF provides an unusual and extraordinary level of protection to officers and the government by removing the right of a detainee to any remedy against either the authorised officer or the Commonwealth.

Proposed section 197BF expressly states that it does not affect the jurisdiction of the High Court under section 75 of the Constitution to provide an avenue of judicial review against officers of the Commonwealth. This constitutionally entrenched protection, while important, provides uncertain and limited redress. The High Court has not yet decided whether and in what circumstances independent Commonwealth contractors exercising statutory authority (such as private contractors in immigration detention facilities) are 'officers of the Commonwealth'.[26] Further, the jurisdiction of the High Court under this provision is limited to the judicial review remedies of prohibition, mandamus and injunction, and provides no avenue for tortious claims to recover for damages caused by unreasonable use of force.

Based on a Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 *by Professor Jane McAdam, Associate Professor Gabrielle Appleby and Dr Claire Higgins*

[23] *Migration Act 1958* (Cth) s 261AE.
[24] See Joint Committee, para 1.121.
[25] *Australian Federal Police Act 1979* (Cth) s 64B.
[26] *Plaintiff M61/2010E v Commonwealth* (2010) 234 CLR 319. See also concerns of the Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/15*, p. 29.