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Briefing

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

The ASRC has serious concerns about the Government's proposed *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (Bill).

We believe this is an unnecessary Bill giving broad and unchecked power to authorised officers to use force against people in immigration detention facilities.

The Bill risks giving power for authorised officers to use force with impunity and there appears to be no reasonable basis for these proposed new measures. These changes risk undermining the integrity of authorised officers in detention facilities and promoting a culture of excessive force.

The most concerning aspects of the Bill are:

1. Broad powers for authorised officer's to **use force** against people in immigration detention;

2. A **subjective test** regarding whether an authorised officer lawfully exercised the power to use force, greatly increasing the likelihood that powers can be used arbitrarily or excessively;

3. **Immunity from legal action** except in the High Court, unless such force was not used in good faith, increasing the likelihood that an authorised officer's use of force will go unchecked;

4. There is **no right to an independent review** of the use of force by authorised officers under the proposed complaints mechanism; and

5. The Minister has power and discretion to determine the training and qualification requirements of authorised officers. This means that it is **entirely in the Minister's discretion** to assess, set and enforce minimum training requirements for authorised officers.

Increased powers to use force

The Bill seeks to introduce broad powers for authorised officer's to use force against people in immigration detention. The powers granted under the Bill are extremely broad and almost entirely discretionary in their potential application.[1]

The proposed new measures give authorised officers powers to 'use such reasonable force' against 'any person or thing' as the *authorised officer* 'reasonably believes' is necessary to:

(a) protect the life, health or safety of any person (including the authorised officer) in a facility; or
(b) maintain the 'good order, peace, or security' of a facility.

The scope of the powers is broad and unclear. In particular, it is unclear what is meant by the 'good order, peace or security' of an immigration detention facility. This may encompass a potentially limitless range of situations.

These new powers go beyond existing provisions in the *Migration Act*,[2] which permit the use of force in specific, articulated instances, such as for the carrying out of an identification test[3] or conducting of a search.[4]

A subjective test is an inappropriate evidentiary standard

A subjective test applies regarding whether an authorised officer lawfully exercised the power to use force, greatly increasing the likelihood that powers can be used arbitrarily or excessively, because it's very difficult to prove what someone *subjectively* believed.

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[1] See s 197BA.
[2] For this reason, the new s 197BA may be contrary to the Attorney-General's Department's Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, which contemplates that coercive powers support specific purposes (such as search, arrest and investigation purposes).
[3] s 261AE *Migration Act 1958*.
[4] s 252 *Migration Act 1958*.

This is a difficult and inappropriate evidentiary burden to place on a person in detention that has been subject to the use of force.

It is unclear what level of force may be considered 'reasonable force' in any given situation. The Bill expressly contemplates that grievous bodily harm (*including even death*) may be lawfully caused to a person in detention on the basis of an authorised officer's subjective belief that such force was reasonably necessary.[5]

From an evidentiary perspective, it would seem extremely difficult, if not impossible, for a detainee to prove that an authorised officer *did not* hold a reasonable belief that the force used was necessary. This is likely to be particularly so in instances of heightened risk (such as during peaceful protests or other disturbances), or in instances where no third party witnesses exist.

Immunity from legal action except in rare circumstances

There is immunity from legal action except in the High Court, unless such force was not used in good faith, increasing the likelihood that an authorised officer's use of force will go unchecked.

Whether or not an authorised officer acted in good faith in using force goes to whether they may be held liable for the consequences of such use of force. It is unlikely that a court would see fit to find that an authorised officer did not act in good faith, as again this is a high burden of proof. This essentially means that authorised officers' use of force will go unchecked, except in the limited circumstances where proceedings are able to be brought in the High Court.

No right to independent review of the use of force

There is no right to independent review of the use of force by authorised officers under the proposed complaints mechanism. Complaints can only be made to the Secretary who can decide not to investigate or if they so choose, may do so 'in any way' they think appropriate.

Minister determines training and qualifications

The Minister has power and discretion to determine the training and qualification requirements of authorised officers. While the Minister is obliged to set out in writing the training and qualifications that an officer must undertake in order to be considered an 'authorised officer' for the purposes of the new powers, the new provisions contain no guidance as to what this must entail.

The Bill expressly states that the Minister's determination in this regard is not a legislative instrument.[6] This means that it is entirely in the Minister's discretion to assess, set and enforce minimum training requirements for authorised officers. This is concerning given the breadth of the coercive powers proposing to be granted to authorised officers.

Proposed changes are unnecessary and excessive

There are sufficient powers already contained within the Migration Act for authorised officers. These powers are appropriately specific. These changes are broad and excessive and allow state actors to use force in a broad range of circumstances with virtually no oversight or recourse.

There is copious evidence that the length of detention and lack of information gives rise to unrest in detention facilities. The government should be seeking to address these causes, rather than giving broad and sweeping powers for the use force against powerless people in detention. These changes risk undermining the integrity of authorised officers in detention facilities and promoting a culture of excessive force.

We therefore urge parliamentarians to vote against these amendments on the grounds that authorised officers in detention facilities already have adequate powers to manage incidents. Any broadening of those coercive powers would be excessive, potentially putting vulnerable asylum seekers at risk of harm.

Further Information

For further information or to discuss this briefing, please contact Serina McDuff, Director of Advocacy and Campaigns, on 0451 411 479 or serina.m@asrc.org.au

[5] s 197BA.
[6] s 197BA(8).