Law Council
OF AUSTRALIA

4 May 2015

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

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

Dear Ms Dunstone

QUESTION ON NOTICE: MIGRATION AMENDMENT (MAINTAINING THE GOOD ORDER OF IMMIGRATION DETENTION FACILITIES) BILL 2015 HEARINGS

The Law Council of Australia is pleased to provide the following response to a question on notice from Senator Lines as a result of the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (the Bill) Senate Legal and Constitutional Affairs Committee hearings (the hearings).

The Law Council has been asked to respond to the following question:

THE LAW COUNCIL OF AUSTRALIA

Can the Law Council provide comment on the following evidence given by Ms Philippa de Veau, General Counsel, Department of Immigration and Border Protection at the hearing, regarding the use of "reasonable force":

> *Ms de Veau: Just two matters if I might. There was some useful dialogue this morning around the test that has been articulated for the use of force in 197BA(1). It is important to understand that it is not entirely subjective and, like many of these tests—and they vary from act to act—they generally balance an objective component and a subjective component. So the drafting that has found its way into 197BA(1) has the 'reasonable force' up-front. That is an objective standard. That has to then be matched with a belief by the officer—it has to be a reasonable belief—as to necessity. So a belief that is reasonable is also an objective and subjective test. There were some comments made this morning that that was out of kilter with all of the other comparable legislation. Can I just indicate that there are actually a variety of ways that that has been expressed, particularly as to whether the necessary component is front-ended so that it is only objective. While some examples of that form of drafting were given, there are two that are consistent with the way that we have drafted it. The Western Australian Prisons Act provides for such force as is believed on reasonable grounds to be necessary. That is fairly consistent with what we have drafted.*

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Equally, the Victorian Police use such force that is not disproportionate as believed on reasonable grounds to be necessary. So, again, that is a fairly similar form of drafting.

Again, when it comes to what is excessive, the bill does not in any way authorise excessive force, because excessive force would not be reasonable. What is reasonable is a fairly standard approach for the courts when they consider that. It is well accepted jurisprudence, and reasonableness is looked at objectively and in the specific circumstances. What is reasonable in one circumstance might not be reasonable in another, so it is seen through that lens.

Department of Immigration and Border Protection's (DIBP) evidence puts forward the position that the proposed test is a combined objective and subjective test. Principles of statutory interpretation state that words should be given work to do if it is possible to do so, thus the extra reasonable before "force" arguably introduces a wholly objective test under subsection 197BA(1). However, under 15AB(2)(e) of the *Acts Interpretation Act 1901* any explanatory memorandum relating to the Bill containing the provision is of relevance. Based upon this assessment, the intention would indicate that subsection 197BA(1) is designed as a combined objective and subjective test. Paragraph 33 of the Explanatory Memorandum for the Bill states:

"The test here is a subjective one similar to that which is currently applied to the police"

The Explanatory Memorandum does not state which police provision it is based on. However, based upon the evidence provided by DIBP at the hearings one example was that of the Victorian Police. Section 462A of the *Crimes Act 1958* (Vic) is a combined objective and subjective test, it states:

"A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence."

Additional references in the Explanatory Memorandum affirm the objective and subjective position in reference to subsection 197BA(2). Paragraph 36 of the Explanatory Memorandum states:

"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."

The Law Council's submission agreed with that interpretation of the Bill noting that:

"…the proposed section provides both an objective and subjective upper limit: the objective limit will relate to the requirement that the force be objectively reasonable; and the officer must believe the force to be necessary and his or her belief must also be reasonable."[1]

The use of the additional "reasonable" in subsection 197BA(1) and the form of the drafting creates ambiguity as to the interpretation of the provision, which can only be clarified by further interpretation of the Explanatory Memorandum. Additionally, it could be confusing for immigration detention service providers (IDSPs) as to how it should be interpreted in an immigration detention facility. A more certain approach would be to adopt an objective test as utilised in a number of corrective services Acts and Regulations listed below:

[1] Ibid, p.15.

Examples of an objective test based upon Law Council research
Subsection 9CB(1) *Corrections Act 1986* (Vic) "A person authorised under section 9A(1A) or 9A(1B) to exercise a function or power may, where necessary, use reasonable force to compel a person who is deemed under Part 1A or section 9CAA to be in the custody of the Chief Commissioner of Police to obey an order given by the first-mentioned person in the exercise of that function or power."
Subsection 23(2) *Corrections Act 1986* (Vic) "A prison officer may where necessary use reasonable force to compel a prisoner to obey an order given by the prison officer or by an officer under this section."
Subsection 55E(1) *Corrections Act 1986* (Vic) "An escort officer may, where necessary, use reasonable force to compel a prisoner to obey an order given by the escort officer in the exercise of a function or power."
Section 86 *Correctional Services Act 1982* (SA) "Subject to this Act, an officer or employee of the Department or a police officer employed in a correctional institution may, for the purposes of exercising powers or discharging duties under this Act, use such force against any person as is reasonably necessary in the circumstances of the particular case."
Clause 131(1) *Crimes (Administration of Sentences) Regulation 2014* (NSW) "In dealing with an inmate, a correctional officer may use no more force than is reasonably necessary in the circumstances, and the infliction of injury on the inmate is to be avoided if at all possible."

The Law Council submits that if the Committee recommends passage of the Bill, it is necessary to clarify subsection 197BA(1) to replace the current proposed test with an objective test that requires, 'where necessary, an authorised officer may use reasonable force'.

The Law Council of Australia is willing and able to assist with any further queries the Senate Legal and Constitutional Affairs Committee has on the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*.

Yours sincerely,

Martyn Hagan
SECRETARY-GENERAL