

13 April 2015



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Senate Legal and Constitutional Affairs Legislation Committee  
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Dear Ms Dunstone

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

Please find attached the Law Council of Australia's submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015.

Yours faithfully

A handwritten signature in black ink, appearing to read "Martyn Hagan".

MARTYN HAGAN  
SECRETARY-GENERAL

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

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## **Senate Legal and Constitutional Affairs Legislation Committee**

**13 April 2015**

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## Table of Contents

<b>Acknowledgement .....</b>	<b>2</b>
<b>Executive Summary .....</b>	<b>3</b>
<b>Introduction .....</b>	<b>5</b>
<b>Alternative means of achieving good order in immigration detention .....</b>	<b>5</b>
No sufficient justification for the proposed use of force .....	6
<b>Key Issues in this Bill .....</b>	<b>10</b>
The appropriateness of the use of force by immigration officials, including immigration detention service providers .....	10
Current use of force in immigration detention .....	10
Use of reasonable force in immigration detention .....	11
Instruments of restraint .....	12
The use of weapons .....	12
Use of force in prisons .....	12
Proposed use of force .....	14
Lack of legislative clarity on the limits of the use of force .....	15
Lack of clarity on training requirements for IDSPs .....	17
Investigation and monitoring of the use of force .....	18
Monitoring the use of force .....	19
The bar on proceedings against the Commonwealth .....	20
Other issues .....	22
Legal representation and advice .....	22
Children and other asylum seekers at risk .....	23
<b>Attachment A: Profile of the Law Council of Australia .....</b>	<b>25</b>

## Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the following Constituent Bodies and Committees in the preparation of this submission:

Law Institute of Victoria

Law Society of New South Wales

National Human Rights Committee

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## Executive Summary

1. The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) aims to address issues arising from incidents at a number of immigration detention facilities (IDFs) which highlighted uncertainty about if and when immigration detention service providers (IDSPs) may act when confronted with public order disturbances in IDFs.
2. The key amendments in this Bill relate to the codification of the use of force by authorised officers, the codification of a complaints mechanism over the use of force, and a statutory bar against bringing proceedings against the Commonwealth in relation to the use of force, unless it can be shown this power was not exercised in good faith.
3. The Law Council supports clarifying the use of force in IDFs, and sees merit in codifying the use of force by immigration officers and IDSPs.
4. However, the Law Council considers that the Bill's proposed amendments depart from the accepted standards of protection for asylum seekers in international and domestic law, key rule of law principles, and procedural fairness guarantees. The proposed changes risk exacerbating existing tensions identified in the Explanatory Memorandum and may disproportionately impact children and other asylum seekers at risk.
5. The Law Council considers that there is insufficient evidence to demonstrate that this Bill is necessary. Even if it can be demonstrated that the Bill is necessary, it may be unjust and disproportionate in meeting its objective because it contains inadequate safeguards against the abuse of the use of reasonable force, and imposes a bar on proceedings except in limited circumstances. The Law Council suggests that there may be more appropriate alternatives to achieving good order in immigration detention than the proposed measures in the Bill. As a result, the Law Council opposes the passage of this Bill.
6. However, if the Committee is minded to recommend the Bill is progressed, the Law Council suggests the following amendments to the Bill:
  - (a) in relation to the use of force provisions at proposed new section 197BA:
    - (i) amend section 197BA(1) to replace the proposed test with an objective test that requires, 'where necessary, an authorised officer may use reasonable force';
    - (ii) prescribe in legislation increased levels of training to accompany the broad use of force in the Bill;
    - (iii) include legislative safeguards on the limits of the use of force, such as those that appear in the New South Wales Regulations or Victorian Act;
    - (iv) define 'reasonable force' in legislation, not policy, and address the following elements:
      - principle of 'last resort': force should be used only if the purpose sought to be achieved can-not be achieved in a manner not requiring the use of force and the level of force used should be the minimum required to deescalate a situation;

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- protection from harm: any threat of harm must be imminent and serious and use of force is the only way to protect the authorised officer or another person; and
  - avoidance of injury: authorised officers must not cause bodily harm to a detainee unless it is necessary to protect the life of, or prevent serious injury to, another person or the authorised officer;
- (v) replace ‘maintain the good order, peace or security’ with ‘prevent a riot or serious disturbance of peace or security’, or include a legislative definition of good order in the *Migration Act 1958* (Cth) analogous to State and Territory legislation governing the use of force in prisons;
- (vi) define ‘indignity’ at subsection 197BA(5)(a);
- (vii) explicitly preclude death at subsection 197BA(5)(b); and
- (viii) amend subsection 197BA(5)(b) to specifically include a reference to death to avoid any uncertainty that may arise;
- (b) require statutory reporting on use of force. Reporting should ideally be to an independent monitoring body, such as the Ombudsman. Statistics on use of force should be included in reports to Parliament;
- (c) provide access to appropriate remedies where complaints about use of force are made out;
- (d) in relation to proposed section 197BF:
- (i) it should not limit proceedings against the Commonwealth and should be amended to bar civil proceedings against authorised officers personally unless they do not act in accordance with the amended proposed section 197BA; and
  - (ii) it should also be amended to clarify that it does not bar criminal prosecutions or proceedings relating to disciplinary action against authorised officers;
- (e) insert provisions relating to accessible judicial review and access to civil law remedies in relation to inappropriate treatment or use of force. Furthermore, policy should require access to legal representation and advice in relation to such situations;
- (f) the use of force in IDFs against children and other vulnerable detainees, such those with a disability, should be specifically excluded; and
- (g) the guardian of an unaccompanied minor is notified as soon as reasonably practicable following the use of force against the minor and in circumstances where the minor may be placed in solitary confinement or subject to other such measures.

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## Introduction

7. The Law Council welcomes the opportunity to provide the following comments to the Senate Committee as part of its inquiry into the provisions of the Bill.
8. The Bill was introduced into the House of Representatives on 25 February 2015. It amends the Migration Act to support the Government's commitment to strong border protection and the establishment of a safe and effective system of immigration detention. The Government's reason for the introduction of the Bill is to address issues arising from incidents at a number of IDFs which highlighted uncertainty, on the part of the IDSPs, as to if and when they may act when confronted with public order disturbances in IDFs.
9. The Bill provides a legislative framework for the use of reasonable force within immigration detention facilities in Australia. Specifically, it provides clear authority for the use of reasonable force in immigration detention in Australia to:
  - protect a person's life, health or safety; or
  - maintain the good order, peace or security of the facility.
10. The Law Council questions the need for this Bill. It considers that there is insufficient evidence to show it is necessary, justified or proportionate to meet its objective. Rather, the Law Council suggests that there may be more appropriate alternatives to achieving good order in immigration detention than the proposed measures in the Bill. For example, it may be possible to hold 'high risk detainees with behavioural challenges, such as members of outlaw motorcycle gangs'<sup>1</sup> in alternative places of detention to those IDFs that house asylum seekers.

## Alternative means of achieving good order in immigration detention

11. The objective of the Bill is to remove uncertainty over the use of force by immigration officials or IDSPs. The Law Council considers that this objective could be achieved by means other than the passage of this Bill.
12. Practical solutions that could be pursued in accordance with procedural fairness guarantees, rule of law principles and Australia's obligations under international law, include:
  - separating asylum seekers in detention awaiting the outcome of their application for a visa from people who have been re-detained on character grounds; and
  - separating high risk detainees, or those convicted of a violent crime, from other detainees.

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<sup>1</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 ('Explanatory Memorandum'), 1, available at: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5415\\_ems\\_ee49724e-c47c-4ac0-aeb6-1eebfe0f6f95/upload\\_pdf/500960.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r5415\\_ems\\_ee49724e-c47c-4ac0-aeb6-1eebfe0f6f95%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5415_ems_ee49724e-c47c-4ac0-aeb6-1eebfe0f6f95/upload_pdf/500960.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r5415_ems_ee49724e-c47c-4ac0-aeb6-1eebfe0f6f95%22).

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13. The Law Council also notes the indisputable evidence, including the findings of the Hawke-Williams Report, that a range of complex reasons including long periods in detention and uncertainty over visa status, create an environment where detainees may cause disturbances.
14. The Law Council therefore considers that most effective way of achieving the Bill's objective would be to address those underlying issues. The Law Council's Asylum Seeker Policy identifies rule of law standards and principles that may assist in addressing such issues, including that:
- detention of asylum seekers only occur as a measure of last resort and there should be a general presumption against the detention of asylum seekers;
  - executive discretion relating to the detention of asylum seekers must be subject to prescribed limits and to judicial review;
  - maximum limits on detention should be established in law to guard against indefinite detention; and
  - decisions to detain or extend detention be subject to procedural safeguards.<sup>2</sup>
15. The Law Council considers that if these underlying issues are not addressed, there is a risk that they will be further exacerbated by the Bill.

*No sufficient justification for the proposed use of force*

16. In his Second Reading Speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, stated that the amendments in the Bill:
- address issues arising from incidents at a number of immigration detention facilities, which highlighted uncertainty, on the part of the immigration detention service providers, as to when it may act when confronted with public order disturbances in immigration detention facilities.*
17. However, the Law Council considers that there is no sufficient justification for conferring on departmental officers or IDSPs a broad, legislative use of force that potentially exceeds that of specially trained law enforcement officers in prisons.
18. Pursuant to Australia's commitment to the *Convention relating to the Status of Refugees*, under Article 31(1) Australia should not impose penalties 'on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.<sup>3</sup>
19. Article 31(2) does allow for some restrictions on movement for refugees, and to that end, administrative detention is permissible. However, as Goodwin-Gill and McAdam note, such detention 'will be equivalent to a penal sanction whenever basic

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<sup>2</sup> As articulated in its Asylum Seeker Policy: Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014) ('LCA Policy'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf), [10].

<sup>3</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention'), art 31(1).

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safeguards are lacking',<sup>4</sup> noting that the key issue is whether sanctions are reasonable and necessary, arbitrary and discriminatory, or a breach of international human rights law.<sup>5</sup>

20. As seen by the Parliamentary Joint Committee on Human Rights (PJCHR)'s assessment of the Bill<sup>6</sup>, State actions towards asylum seekers held in detention will therefore be limited by their human rights obligations, such as the prevention of torture, or cruel, inhuman or degrading treatment.<sup>7</sup>
21. The Law Council also notes that the guidelines on immigration detention produced by the United Nations High Commissioner for Refugees provide that:

*Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population. Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.*<sup>8</sup>

22. The Law Council's own Principles Applying to the Detention of Asylum Seekers<sup>9</sup> also provide that:

- conditions of detention must be humane and dignified;<sup>10</sup> and
- policy and practice in the detention of asylum seekers should be accountable, transparent and subject to independent monitoring.<sup>11</sup>

23. One of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV), considers that there is no pressing need for the proposed use of force for the following reasons:

- (a) The Explanatory Memorandum suggests that the demography of immigration detention centres are changing such that there are more 'high risk' detainees in detention.

The LIV attributes this change, as well as the increase of detainees in immigration detention due to visa cancellation,<sup>12</sup> to the passage of the

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<sup>4</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007), 266. (Goodwin-Gill and McAdam)

<sup>5</sup> Ibid.

<sup>6</sup> Parliamentary Joint Committee on Human Rights, *Twentieth report of the 44th Parliament: Human rights scrutiny report* (18 March 2015) ('PJCHR Report'), available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_inquiries/2015/Twentieth\\_Report\\_of\\_the\\_44th\\_Parliament](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twentieth_Report_of_the_44th_Parliament)

<sup>7</sup> Goodwin-Gill and McAdam, 267.

<sup>8</sup> Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), [48(iii)], available at: <http://www.unhcr.org/505b10ee9.html>.

<sup>9</sup> Law Council of Australia, *Policy Statement: Principles Applying to the Detention of Asylum Seekers*, 22 June 2013, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final\\_PDF\\_18\\_Oct\\_Asylum\\_Seekers\\_Principles.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf).

<sup>10</sup> Ibid [9].

<sup>11</sup> Ibid [11].

<sup>12</sup> Department of Immigration and Border Protection, Immigration Detention and Community Statistics Summary, available at: <http://www.immi.gov.au/About/Pages/detention/about-immigration-detention.aspx?tab=3&heading=immigration-detention-and-community-statistics>. At 28 February 2015, 35 per cent (704) visas were cancelled; at 31 January 2015, 26 per cent (603) visas were cancelled; at 31 December 2014, 21 per cent (571) visas were cancelled; at 30 November 2014, 16 per cent (511) visas were cancelled.

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*Migration Amendment (Character and General Visa Cancellation) Act 2014* and does not accept the premise that visa cancellation detainees are necessarily 'high risk', creating a need for greater use of force. Under this Act, the level of potential 'risk' to the Australian community in the character test was downgraded from a 'significant risk' to 'risk'.<sup>13</sup> In addition, visa cancellation extends beyond character provisions, encompassing, for example, students who have not maintained enrolment and people under new section 116 who are a risk to public health.

The LIV considers that the Government has not put forward evidence that this group as a whole, or individually, pose any additional risk to staff within IDFs.

- (b) The Explanatory Memorandum suggests that public order disturbances occurring at detention centres in recent years is attributable to the presence of high risk detainees.

However, the LIV cites the outcome of the Hawke-Williams Report which found that the disturbances were for a range of complex reasons including severe overcrowding, increased numbers of detainees on negative pathways, lengthy processing delays and uncertainty about visa outcomes.

The LIV notes that similar reasons are cited by the Ombudsman's investigation into suicide and self-harm in the immigration detention network.<sup>14</sup> This report further cites frustration with, and misunderstanding about, immigration processes and decisions and a significant number of detainees facing prolonged detention as impacting on self-harm and suicide rates.

- (c) The objective of the Bill is to remove uncertainty for IDSPs in the use of force in IDFs.

However, the LIV notes that there is no evidence presented that an objective test presents uncertainty compared to a test containing a subjective element (based on a reasonable belief of the officer, as under the Bill).

The LIV considers that, if there is uncertainty about the scope of the common law among ISDPs, this could be addressed through education, policy or contractual conditions. This approach would be consistent with the recommendations of the Hawke-Williams Report.

**Recommendation:**

**There is insufficient evidence to show this Bill is necessary, justified and proportionate to meet its objective. Rather than the passage of the Bill, there may be more appropriate alternatives to achieving good order in immigration detention**

24. In addition to the key issues discussed below, the Law Council also notes and commends the consideration of the Bill by the PJCHR in its 20<sup>th</sup> Report of the 44<sup>th</sup> Parliament. It notes that its Constituent Bodies that considered the Bill, the LIV and

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<sup>13</sup> Now section 501(6)(d) of the *Migration Act 1958* (Cth)

<sup>14</sup> Commonwealth Ombudsman, *Suicide and Self-harm in the Immigration Detention Network* (May 2013), available at: <http://www.immi.gov.au/media/publications/pdf/2013/report-response-suicide-self-harm-idn-130521.pdf>.

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the Law Society of NSW (LSNSW), agree with the PJCHR's conclusions. In particular, the Law Council notes its conclusions that:

- the conferral of power on IDSPs to use force in IDFs on the basis of their reasonable belief under proposed section 197BA has not been shown to be aimed at achieving a legitimate objective or as a necessary and proportionate means of achieving the objective of removing uncertainty about use of force by IDSPs;
- the conferral of power on IDSPs to use force in IDFs under proposed section 197BA:
  - limits the right to life at Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>15</sup> and Article 1 of the Second Optional Protocol to the ICCPR;<sup>16</sup>
  - may be incompatible with the prohibition on degrading treatment under Article 7 of the ICCPR and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);<sup>17</sup>
  - limits the right to humane treatment in detention that appears at Article 10 of the ICCPR;<sup>18</sup>
  - limits the right to freedom of association (noting that the right to freedom of assembly appears at Article 21 of the ICCPR);<sup>19</sup>
- the monitoring of the use of force as a condition of the contract for service provision (as opposed to a legislative requirement), and the bar on criminal proceedings in proposed section 197BF, may limit the obligation under Article 7 of the ICCPR and the CAT to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment;<sup>20</sup> and
- the bar on bringing proceedings against the Commonwealth at proposed section 197BF, including any officer acting for the Commonwealth, limits the right to an effective remedy at Article 2 of the ICCPR.<sup>21</sup>

25. The Law Council, the LIV and the LSNSW oppose the Bill on the basis that there is insufficient evidence to show that the approach taken in the Bill is necessary, justified and proportionate to meet its objective of providing certainty to IDSPs on the use of force.

26. As the LIV notes, to be proportionate, the measures must be the least restrictive of human rights (under the principle of minimal impairment) and powers must be sufficiently circumscribed to protect human rights. Indeed, the LSNSW considers that the aims of the Bill do not appear to be legitimate for the purposes of international

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<sup>15</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR').

<sup>16</sup> PJCHR Report, [1.78]. *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991).

<sup>17</sup> *Ibid* [1.92]. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>18</sup> *Ibid* [1.102].

<sup>19</sup> *Ibid* [1.109].

<sup>20</sup> *Ibid* [1.93].

<sup>21</sup> *Ibid* [1.122].

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human rights law. For example, the authorisation to use force is not sufficiently bounded in order to limit its unreasonable use, including in relation to authorising use of force against children held in IDFs.

27. The PJCHR has considered the use of force and observed that the 2011 Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre (the Hawke-Williams Report),<sup>22</sup> did not consider the common law use of force by immigration officials to be inadequate and did not recommend a statutory power for the use of force.<sup>23</sup> The Explanatory Memorandum notes that the Report:

*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.*<sup>24</sup>

## Key Issues in this Bill

### The appropriateness of the use of force by immigration officials, including immigration detention service providers

#### Current use of force in immigration detention

28. The Explanatory Memorandum to the Bill states (emphasis added):

*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.*

29. While the Bill does not define 'reasonable force', this term appears without definition in the Migration Act, for example at section 261AE in relation to carrying out identification tests. In the immigration detention context, the use of force is guided by the Department of Immigration and Border Protection (the Department)'s *Detention Services Manual*, that provides:

*All use of force and/or restraint should be proportionate to the situation, objectively justifiable and only used as a measure of last resort. What this means is that the officer reasonably believes that there is no other option other than the use of reasonable force and/or restraint. The level of force*

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<sup>22</sup> *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, conducted by Dr Allan Hawke AC and Ms Helen Williams AO (31 August 2011), available at: <http://www.immi.gov.au/media/publications/pdf/2011/independent-review-incidents-christmas-island-villawood-full.pdf>.

<sup>23</sup> PJCHR Report, [1.67].

<sup>24</sup> Explanatory Memorandum, Attachment A: Statement of Compatibility with Human Rights, 20.

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*must be proportionate to the threat being faced and always at the minimum level to achieve legislative outcomes.*<sup>25</sup>

30. Where a person in immigration detention believes they have been subjected to force that is excessive, unreasonable or not appropriate, they must be advised of, and allowed to access, the full range of complaints handling mechanisms available to all immigration clients, including the Ombudsman, the police and legal representation if requested.<sup>26</sup>

*Use of reasonable force in immigration detention*

31. The Manual stipulates the guiding principles and values over the use of force,<sup>27</sup> including that:

- reasonable force<sup>28</sup> and/or restraint<sup>29</sup> should only be used as a measure of last resort;
- the use of force and/or restraint must not include cruel, inhumane or degrading treatment; and
- all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant IDSP operational procedures.<sup>30</sup>

32. The Manual provides that a Departmental officer or IDSP may use an appropriate level of reasonable force and/or restraint that might otherwise constitute an assault, to protect themselves and others, when safety issues arise in conjunction with the performance of their duties. They must possess the necessary knowledge, training, and skills to safely, effectively and lawfully apply reasonable force and/or restraint.<sup>31</sup>

33. Departmental officers or IDSPs must use greater care than would otherwise be required should reasonable force be warranted against a 'person of special consideration', which includes minors and people at risk of self-harm.<sup>32</sup>

34. The Manual provides that the use of force may be used in certain circumstances only, such as where it is necessary to prevent escape, to prevent a person inflicting damage to property, or to collect personal identifiers.<sup>33</sup>

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<sup>25</sup> Department of Immigration and Border Protection, *PAM – Detention Services Manual*, Ch 8 – Safety and Security, 'Use of reasonable force in immigration detention' at [10], accessed at 2 April 2014 ('Detention Services Manual').

<sup>26</sup> *Ibid* [12].

<sup>27</sup> *Ibid* [4]. 'Force' is defined as 'an action, or the perception of action taken to limit or control the movement or freedom of an individual. Force is also action applied against an object to search or gain entry of a property'. 'Excessive force' is defined as 'that force or restraint beyond that which is reasonably necessary in the circumstances'.

<sup>28</sup> *Ibid*. 'Reasonable force' is defined as 'the minimum amount of force, and no more, necessary to achieve legislative outcomes and/or ensure the safety of all persons in immigration detention, staff and property. The use of force is considered to be reasonable if it is objectively justifiable and proportionate to the risk faced. Action that may be used to control a situation will range from non-contact options (for example, physical presence alone), to options involving physical contact'.

<sup>29</sup> *Ibid*. 'Restraint' is defined as '[a]ction that may be used to control a situation will range from non-contact options (for example, physical presence alone) to options that involve physical contact, which may include the application of an approved instrument of restraint'.

<sup>30</sup> *Ibid* [2].

<sup>31</sup> *Ibid* [5].

<sup>32</sup> *Ibid* [6].

<sup>33</sup> *Ibid* [7].

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### *Instruments of restraint*

35. Only items approved by the Secretary of the Department are to be used in an IDF.<sup>34</sup> While there appears to be no information in the Manual about the type of items that have been approved by the Secretary, there are restrictions on the use of instruments of restraint. For example, they must never be applied as a punishment or for discipline.<sup>35</sup> Further, the use of all chemical agents of restraint, including sedatives, tear gas, pepper spray and capsicum spray by officers are prohibited. Law enforcement agencies are not caught by such a restriction and may use other restraints in the lawful execution of their duties and in accordance with any applicable legislation and/or policy, as discussed below.<sup>36</sup>
36. In an emergency situation, the decision to apply an instrument of restraint will be made by the most senior officer present and its use is to be reported to the Department in accordance with normal reporting standards.<sup>37</sup>

### *The use of weapons*

37. The Manual stipulates Guiding Principles that apply to the use of weapons in immigration detention centres, immigration residential housing and immigration transit accommodation.<sup>38</sup>
38. In these facilities, a law enforcement officer (officers of state/territory police services; officers of the Australian Federal Police; military personnel; Customs officers and officers of government law enforcement agencies, including the Australian Security Intelligence Organisation), will enter immigration detention at their discretion, in the event of an emergency situation.<sup>39</sup>
39. In these facilities, law enforcement officers can use weapons such as firearms, batons, tasers, capsicum defensive spray, or other item that they may carry and use in the course of their duties. They are also permitted to keep such weapons at immigration detention facilities for storage purposes, provided that they are securely stored.<sup>40</sup>
40. The Manual stipulates that at no time should a departmental officer or IDSP physically handle the weapons.<sup>41</sup>

### Use of force in prisons

41. Correctional officers are authorised to use force against inmates in certain circumstances. State and Territory legislation largely deals with the legislative and policy framework for using force on inmates. These provisions vary across jurisdictions.
42. In addition, correction services across Australia have developed a set of guidelines and accompanying principles that constitute outcomes or goals to be achieved by

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<sup>34</sup> Ibid [8.1]

<sup>35</sup> Ibid.

<sup>36</sup> Ibid [8.2]

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 'Weapons procedures for IDFs' at [2]. The Manual stipulates that the use of weapons in alternative places of detention and community detention are covered by a different departmental policy.

<sup>39</sup> Ibid [5.3].

<sup>40</sup> Ibid [4.2]-[4.3], see also [6.1].

<sup>41</sup> Ibid [5.2].

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correctional services rather than a set of absolute standards or laws to be enforced. These standards represent a statement of national intent of 'best practice' and community demands at the state and territory level. The *Standard Guidelines for Corrections in Australia* provide the following on the use of force:

*1.60 Force should be only used as a last resort for the minimum period where other means have proved unsuccessful and where not to act would threaten safety, security or the good order of the prison.*

*1.61 A prison officer may, where necessary and in accordance with relevant legislative authority, use reasonable force to compel a prisoner to obey a lawful order given by the prison officer. Where such force is used, the prison officer should report the fact to the manager of the prison and provide the prisoner with the option of a medical examination.*

*1.62 Prison Officers should be given training to enable them to restrain aggressive prisoners. Such training should be ongoing and emphasise techniques that allow aggressive prisoners to be restrained with minimum force.<sup>42</sup>*

43. The Standards also provide for the use of weapons and restraints.
44. In New South Wales, Regulation 131 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) provides that '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'.<sup>43</sup> The Regulation provides that '[t]he nature and extent of the force that may be used in relation to an inmate are to be dictated by circumstances, but must not exceed the force that is necessary for control and protection, having due regard to the personal safety of correctional officers and others.'<sup>44</sup>
45. The Regulation also lists when force may be used, for example, in order to prevent the escape of an inmate; to 'prevent or quell another riot or disturbance'; or 'to avoid an imminent attack on the correctional officer or some other person, but only if there is a reasonable apprehension of an imminent attack'.<sup>45</sup>
46. The Regulation also stipulates the reporting requirements concerning the use of force by a correctional officer, including that the report must be in writing and be signed by each correctional officer involved in the use of force.<sup>46</sup>
47. Across Victoria, there are 11 publicly operated prisons, two privately operated prisons (Fullham Correctional Centre and Port Phillip Prison) and one transition centre (Judy Lazarus Transition Centre), which provide a range of correctional services from maximum security imprisonment to reparation and treatment programs.
48. In Victoria, prison guards of both the public and private prisons are authorised to use force by various provisions depending on the circumstances of the *Corrections Act 1986* (Vic) and *Corrections Regulations 2009* (Vic). Section 9CB of the Corrections Act provides that guards 'may, where necessary, use reasonable force...to obey an

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<sup>42</sup> *Standard Guidelines for Corrections in Australia* (Revised 2012), available at: [http://www.aic.gov.au/media\\_library/aic/research/corrections/standards/aust-stand\\_2012.pdf](http://www.aic.gov.au/media_library/aic/research/corrections/standards/aust-stand_2012.pdf).

<sup>43</sup> At Reg 131(1).

<sup>44</sup> At Reg 131(2).

<sup>45</sup> At Reg 131(4).

<sup>46</sup> At Reg 133.

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order' that is given by the guard in the exercise of the guard's power.<sup>47</sup> There is a legislative requirement to report this use of force.<sup>48</sup> Section 23 of the Corrections Act details when a guard may use force in relation to an order to a prisoner which the guard considers necessary for the security or good order of the prison or the safety or welfare of the prisoner or other people.

49. The Bill fails to meet such standards.

**Recommendation:**

**If the Committee is minded to recommend the passage of the Bill, it is necessary to include legislative safeguards at proposed new section 197BA on the limits of the use of force, such as those that appear in the New South Wales Regulations or Victorian Act**

Proposed use of force

50. The Bill introduces a statutory power at new section 197BA for authorised officers<sup>49</sup> to 'use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary' to:

- protect a person's life, health or safety; or
- maintain the good order, peace or security of the facility.<sup>50</sup>

51. The use of force exercised in an IDF<sup>51</sup> can cover, but is not limited to:

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

52. As the LSNSW observes, and as can be seen by reference to the practice in New South Wales and Victoria, the Bill seeks to provide IDSPs with greater powers in respect of the use of force than are available in State and Territory prisons. It considers that this is particularly concerning as many, if not most people held in IDFs have not in fact been charged with, or convicted of, any criminal offences.

53. As the PJCHR has noted, citing legislation from New South Wales, Victoria, the Australian Capital Territory and Queensland:

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<sup>47</sup> At sub-s (1).

<sup>48</sup> Pursuant to sub-s (2).

<sup>49</sup> See s 5(1): an officer authorised in writing by the Minister or the Secretary for the purposes of that provision.

<sup>50</sup> At s 197BA(1).

<sup>51</sup> Defined at s 197BA(3): a detention centre or place approved by the Minister under sub-s 5(1)(b)(v) of the *Migration Act 1958* (Cth).

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*a number of analogous state and territory laws governing the use of force in prisons do not enable force to be used based on the officer's belief, but apply objective tests such as that force may be used when it is 'reasonably necessary in the circumstances' or that the officer may 'where necessary, use reasonable force'*

54. As noted above, proposed section 197BA(1) of the Bill allows an immigration official to use force where the official 'reasonably believes it is necessary' to do so. The Explanatory Memorandum states that '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'.<sup>52</sup>
55. The Law Council considers that, in making a determination over whether the use of force by a police officer was lawful, 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.
56. The Law Council notes that a situation may therefore exist where an officer decides to use an amount of force that is higher than the officer thinks is necessary, but which is still below what is reasonable in the circumstances. The Law Council considers that this use of force would be unlawful, even if it were objectively reasonable, because the permitted level of force is also restricted by the officer's belief as to what is necessary.
57. The LSNSW queries whether the inclusion of this subjective element in the Bill would permit the use of force in circumstances where, for example, a detainee does not speak English or has a hearing impairment, and is unable to understand a request or an instruction. It considers that it is unclear why it is necessary to codify a low threshold test containing a subjective element.
58. The Law Council and LIV considers that, if the Bill proceeds in its current form, amendments should be made to replace the proposed test with an objective test that requires, 'where necessary, an authorised officer may use reasonable force'. This is analogous to the use of force provisions that empower law enforcement officials to use force. The Law Council considers that such an amendment would provide further clarity over the use of force, in accordance with the objectives of the Bill.

**Recommendation:**

**If the Committee is minded to recommend the passage of the Bill, it is necessary to amend section 197BA(1) to replace the current proposed test with an objective test that requires, 'where necessary, an authorised officer may use reasonable force'**

*Lack of legislative clarity on the limits of the use of force*

59. As the LSNSW observes, while the Bill sets out a non-exhaustive list of situations where an authorised officer may use reasonable force in proposed section 197BA(2), it does not appear to limit the use of force to situations where it is necessary and proportionate.

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<sup>52</sup> Explanatory Memorandum, [31].

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60. As noted above, the Migration Act refers to 'reasonable force' in relation to specific purposes, but a definition of the use of 'reasonable force' does not appear in the Act or Bill. The Explanatory Memorandum states:

*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.*

**Recommendation:**

**If the Committee is minded to recommend the passage of the Bill, it is necessary to define 'reasonable force' in the Act, not policy, and address the following elements:**

- **principle of 'last resort': force should be used only if the purpose sought to be achieved can-not be achieved in a manner not requiring the use of force and the level of force used should be the minimum required to deescalate a situation;**
- **protection from harm: any threat of harm must be imminent and serious and use of force is the only way to protect the authorised officer or another person; and**
- **avoidance of injury: authorised officers must not cause bodily harm to a detainee unless it is necessary to protect the life of, or prevent serious injury to, another person or the authorised officer**

61. The PJCHR has also recognised that the Bill fails to contain safeguards that are currently available in States and Territories where use of force is exercised, such as the use of force applying only to an imminent threat. The PJCHR considers that the articulation of safeguards in policy is 'insufficient to provide a justification for limitations on human rights.'<sup>53</sup>
62. Given the proposed expanded use of force that comes with the Bill, the Law Council considers the policy guidelines available at present in the Manual are insufficient to protect against the risk of its misuse and provide remedies where misuse may occur.
63. The LIV and LSNSW have also noted that 'good order, peace and security' are not defined. As the PJCHR suggests, force could be used to prevent peaceful protests, especially as the power extends to moving detainees within an immigration detention facility. In contrast, the analogous State and Territory legislation governing the use of force in prisons generally limits the use of force to the narrower circumstances of 'preventing or quelling a riot or disturbance.'<sup>54</sup>
64. The Law Council is aware that certain facilities contain areas of solitary confinement, and therefore, the Bill would allow a detainee participating in a peaceful protest to be forcibly removed to solitary confinement. The Law Council considers that it is

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<sup>53</sup> PJCHR Report, [1.71].

<sup>54</sup> Ibid [1.72].

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necessary that the Bill include a legislative definition of ‘good order’ in the Migration Act.

65. The LIV has also stated that new subsection 197BA(5)(a) is so broad as to allow authorised officers to subject detainees to any level of indignity that they reasonably believe is necessary, which could permit inhuman and degrading treatment.<sup>55</sup> The Bill should define the word ‘indignity’ to ensure that actions undertaken may not be contrary to the absolute prohibition against torture, cruel, inhuman and degrading treatment at international law.<sup>56</sup>
66. New subsection 197BA(5)(b) 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). The Explanatory Memorandum notes that, for the purposes of the Bill, grievous bodily harm includes death or serious injury.<sup>57</sup> However, as the PJCHR has noted, the broad use of force proposed in the Bill may limit the effectiveness of safeguards contained therein, such as subsection 197BA(5)(b).
67. The standard at subsection 197BA(5)(b) is arguably the same as that which applies to police. The proposed section does not, however, mention death. The Law Council considers that, arguably, ‘causing a person grievous bodily harm’ would include death and therefore considers that the subsection should be amended to explicitly preclude this. For example, under section 14B of the *Australian Federal Police Act 1979* (Cth) the following test applies for the use of force for arrest: that the officer must not do an act likely to cause death or grievous bodily harm to the person unless the officer believes on reasonable grounds that the doing of the act is necessary to protect life or prevent serious injury to the officer or any other person.

**Recommendation:**

**If the Committee is minded to recommend the passage of the Bill, it necessary to:**

- **replace ‘maintain the good order, peace or security’ at proposed section 197BA, with ‘prevent a riot or serious disturbance of peace or security’, or include a legislative definition of good order in the Migration Act analogous to State and Territory legislation governing the use of force in prisons**
- **define ‘indignity’ at subsection 197BA(5)(a); and**
- **explicitly preclude death at subsection 197BA(5)(b).**

*Lack of clarity on training requirements for IDSPs*

68. Despite this, the Law Council does not consider that immigration officials or IDSPs should possess the range of associated powers that law enforcement officials possess, as it would be inappropriate for IDFs – that hold a range of detainees,

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<sup>55</sup> At s 197BA(5)(a).

<sup>56</sup> ICCPR, art 7.

<sup>57</sup> Explanatory Memorandum, [52].

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including asylum seekers awaiting the outcome of their protection status – to be operated as if they were prisons.

69. The Law Council also considers it inappropriate to require immigration officials and IDSPs to hold the same training qualifications as law enforcement officers who have a strict accountability framework. Despite this, the current training requirements for immigration officials and IDSPs are insufficient to accompany the use of power conferred upon them by the Bill. The LIV is also concerned about the low level of training required for IDSPs, which according to the statement of compatibility, is a Certificate Level II in Security Operations. According to the LIV, this training is the same level as security guards who do not possess a statutory use of force power. Authorised officers must complete this course within six months of commencing work, and are therefore able to use force with no training.
70. The minimal training requirements are particularly concerning given that, under current arrangements, IDSPs are private contractors. The LIV is concerned about the compatibility of the proposed use of force power with the Commonwealth's non-delegable duty of care to detainees<sup>58</sup> and queries whether it is appropriate for private providers to be given such broad reaching use of force powers without adequate oversight by the Commonwealth. It considers that, if the proposed test is retained in the Bill, it will be particularly important to ensure that authorised officers are sufficiently trained on the use of force.
71. The LIV has also noted that IDSPs may be Immigration and Border Protection workers pursuant to section 4(1) of the Australian Border Force Bill 2015 (Cth), also before the Senate Committee for Inquiry and Report. This will mean that private contractors may come within the jurisdiction of the new Australian Border Force Commissioner and the enhanced integrity measures under that Bill. However, it is unclear whether private contractors will be asked to swear oaths or affirmations under that Bill.<sup>59</sup> The LIV does note that directions for essential qualifications<sup>60</sup> could be made by the Australian Border Force Commissioner to raise the training requirements for IDSPs.
72. The Law Council therefore recommends that prescribed levels of training should be increased and ideally set out in legislation.

**Recommendation:**

**If the Committee is minded to recommend the passage of the Bill, it is necessary to prescribe in legislation increased levels of training to accompany the broad use of force in the Bill**

## **Investigation and monitoring of the use of force**

73. The Law Council's Asylum Seeker Policy and its Principles Applying to the Detention of Asylum Seekers which apply rule of law standards to the situation of asylum seekers in detention provide that policy and practice in the detention of asylum

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<sup>58</sup> *SBEG v Secretary, Department of Immigration and Citizenship* [2012] FCAFC 189 at [7].

<sup>59</sup> Pursuant to s 24 of the Australian Border Force Bill 2015 (Cth).

<sup>60</sup> Under s 26 of the Australian Border Force Bill 2015 (Cth).

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seekers is accountable, transparent, and subject to independent monitoring.<sup>61</sup> The Bill fails to meet these standards.

74. Proposed section 197BB introduces a complaints mechanism to the Secretary of the Department about the use of force exercised by an authorised officer. Although proposed section 197BC provides that the Secretary *must* investigate a complaint, there are a range of exceptions to this requirement in proposed sections 197BD (the Secretary may decide against investigating a complaint for various reasons) and 197BE (the Secretary may transfer a complaint). It is unclear whether the Secretary's decision not to investigate a complaint or to refer a complaint will be reviewable in the Administrative Appeals Tribunal or the Refugee Review Tribunal.

*Monitoring the use of force*

75. It should also be noted that the Bill makes no provision for monitoring use of force by authorised officers and does not require reports by authorised officers on use of force under proposed section 197BA. This can be contrasted to analogous powers in prisons, where reports on use of force to obey an order must be reported to the Governor of the prison.<sup>62</sup> Such a requirement currently exists in the Manual<sup>63</sup> and should be codified along with the use of force if the Committee recommends the passage of the Bill.
76. The LSNSW considers that the complaint mechanism proposed for the oversight and investigation of the use of force in IDFs is likely to be ineffective. For example, in respect of referrals to the Ombudsman, even if the Ombudsman investigates a complaint and makes recommendations, these recommendations are not enforceable. Further, the LSNSW queries whether a complainant would have the ability to compel, or even request, that the Australian Federal Police or State and Territory police officers take up the complaint, and what that might achieve, given the bar on proceedings in any court against the Commonwealth.
77. The Law Council, LSNSW and the LIV therefore consider that contractual and governance arrangements provide insufficient oversight and that use of force in immigration detention facilities should be subject to independent review.
78. The PJCHR has also expressed its concern that the Bill fails to adequately enable monitoring and investigation of instances or allegations of cruel, inhuman or degrading practices that may occur in detention when force is used.<sup>64</sup> The Law Council agrees with this position. The PJCHR observes that, in contrast to the statutory independent oversight arrangements that exist in New South Wales and Western Australia, the Bill does not contain any legislative requirement for the independent review of the use of force.<sup>65</sup> Further, reporting requirements under the *Work Health and Safety Act 2011* (Cth) relate only to employees, not detainees.<sup>66</sup> The PJCHR does not consider that safeguards contained in polices and contracts with service providers are 'appropriate or sufficient' under international human rights law.<sup>67</sup>

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<sup>62</sup> See: s 23(3) *Corrections Act 1986* (Vic)

<sup>63</sup> Detention Services Manual, [2].

<sup>64</sup> PJCHR Report [1.86].

<sup>65</sup> *Ibid* [1.87].

<sup>66</sup> *Ibid* [1.88].

<sup>67</sup> *Ibid* [1.89].

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79. Further, the PJCHR has noted that, under the ICCPR, States are obliged to provide an *effective* remedy to people whose human rights under that Convention have been violated.<sup>68</sup> It considers that the proposed complaints mechanism fails to satisfy this obligation.<sup>69</sup>

**Recommendations:**

**The Law Council therefore recommends that, if the Bill proceeds, it should be amended to:**

- **require statutory reporting on use of force. Reporting should ideally be to an independent monitoring body, such as the Ombudsman. Statistics on use of force should be included in reports to Parliament; and**
- **provide access to appropriate remedies where complaints about use of force are made out.**

## **The bar on proceedings against the Commonwealth**

80. The PJCHR has noted that, under the ICCPR, States are obliged to provide an *effective* remedy to people whose human rights under that Convention have been violated.<sup>70</sup> It considers that the proposed complaints mechanism fails to satisfy this obligation.<sup>71</sup>

81. In addition to not providing access to a civil remedy where a complaint has been upheld, proposed section 197BF removes common law rights unless it can be shown that reasonable force was exercised in bad faith and/or if the force is unreasonable. The LIV considers that a decision by the Secretary against investigating a complaint or referring a complaint does not provide an assurance that allegations of cruel, inhuman or degrading practices in detention will be investigated.

82. Proposed section 197BF prevents any person from bringing or continuing proceedings in any court against the Commonwealth, including an officer of the Commonwealth or a person acting on behalf of the Commonwealth, in relation to the use of force, where this power was exercised in good faith.

83. The LIV has raised concern that proposed section 197BF removes judicial oversight of detention centres. As the High Court said in *Behrooz v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*, people in detention centres:

*... [do] not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort.*<sup>72</sup>

84. The LIV considers that the proposed section is likely to make it harder for detainees to bring court proceedings for assault, even where a detainee suffered serious harm.

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<sup>68</sup> Ibid [1.112].

<sup>69</sup> Ibid [1.118].

<sup>70</sup> Ibid [1.112].

<sup>71</sup> Ibid [1.118].

<sup>72</sup> *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; 219 CLR 486; 208 ALR 271; 78 ALJR 1056 (6 August 2004) Gleeson CJ at para [21]. See also [49-53] (McHugh, Gummow and Heydon JJ), [174] (Hayne J), 219 (Callinan J).

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This is because the subjective elements of the use of force power in proposed section 197BA rely primarily on the perception and belief of the authorised officer. The LIV does not consider the requirement for 'good faith' is sufficient guarantee that detainees are not subject to degrading treatment in light of the broad discretionary and subjective nature of the use of force power. Further, the minimal training requirements required for authorised officers may not equip them with an understanding of the scope of 'reasonable belief' and 'good faith' in a legal context. The conduct expected of authorised officers may fall well below what is reasonably required, or what a trained and qualified police or prison officer would do in the circumstances.

85. The LSNSW observes that access to legal representation for asylum seekers has been significantly limited. In these circumstances, the bar on proceedings in all courts except the High Court (and only matters under section 75 of the Constitution) may present an almost insurmountable barrier to judicial review. The LSNSW notes that proposed section 197BF resembles a privative clause, and queries whether it is constitutionally valid.
86. The LSNSW also queries whether the bar on any person bringing proceedings includes a bar against criminal prosecutions, including where serious injury or homicide has occurred. It considers that that this would be a highly anomalous outcome, contrary to fundamental rule of law principles.
87. The ICCPR requires States to provide people whose rights have been violated with an effective remedy. In respect of the bar of proceedings against the Commonwealth, the PJCHR has cited legislation in New South Wales and Victoria that allow law enforcement officers personal immunity, but nevertheless provide that proceedings may be instituted against the State. The Law Council agrees with the PJCHR, that it is unclear why it is necessary to bar proceedings against the Commonwealth when personal immunity could be provided to an immigration official or IDSP.
88. The Law Council notes that this would accord with the State responsibility and laws concerning vicarious liability, insofar as the State is liable for actions of its agents or employees undertaken on behalf of the State in the course of that person's duty. In the law of torts and under statutes creating liability, employers are made liable vicariously for the acts and omissions of their employees occurring within the scope of the employment. There is no need to show that the act or omission is that of the employer, as the act or omission is that of the employee. The employer is simply made liable for another person's fault.<sup>73</sup> The Commonwealth's liability would therefore extend to immigration officials and IDSPs.
89. Furthermore, whilst the good faith defence<sup>74</sup> may be available for police officers, it would not necessarily be appropriate for immigration officials of IDSPs. The Law Council notes that showing bad faith is a very high threshold which involves more than negligence or recklessness, but in effect a dishonest state of mind. Admissions

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<sup>73</sup> *Ford's Principles of Corporations Law* [16.050]. There can be circumstances where a company is vicariously liable for the actions of a person who is not an employee. In *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377, Mr Naidu was a security guard employed by ISS Security Pty Ltd. Mr Naidu's services were made available to Nationwide News Pty Ltd pursuant to a contract between ISS Security and Nationwide News. Mr Naidu was supervised by the Fire and Safety Officer of Nationwide News who engaged in bullying and harassment of Mr Naidu. The court held that because the Fire and Safety Officer was Mr Naidu's supervisor and this was with the consent of ISS Security, then ISS Security became vicariously liable for the actions of the Fire and Safety Officer, even though the Officer was not an employee of ISS Security.

<sup>74</sup> See for example subsection 14D(3) and 14J(5) of the *Australian Federal Police Act 1979* (Cth).

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are generally unattainable, as it would be sufficient for the perpetrator to say 'I thought it was necessary'.

**Recommendations:**

**In relation to proposed section 197BF, the Law Council therefore recommends that:**

- **proposed section 197BF should not limit proceedings against the Commonwealth and should be amended to bar civil proceedings against authorised officers personally unless they do not act in accordance with an amended proposed section 197BA;**
- **proposed section 197BF should also be amended to clarify that it does not bar proceedings relating to criminal prosecutions or disciplinary action against authorised officers.**

## **Other issues**

### Legal representation and advice

90. The Law Council's Asylum Seeker Policy provides that Australia's laws and policies concerning asylum seekers must also adhere to the Rule of Law. In respect of legal representation and advice, the policy states:

- (a) all people seeking protection in Australia must have access to legal assistance, including access to legal advice for matters arising from the application of detention policies, such as advice in respect of criminal matters arising in a detention environment;<sup>75</sup> and
- (b) whilst in detention, asylum seekers should have full, confidential access to a competent and independent legal adviser of their choice to establish and defend their rights.<sup>76</sup>

91. The Law Council notes the importance of ensuring that detainees are aware of how to contact a lawyer, and how they may use the services of a lawyer in order to protect their legal rights. The Law Council has consistently advocated for migration and legal assistance for asylum seekers and refugees in Australia, most recently in the context of withdrawal of funding of the Immigration Advice and Application Assistance Scheme (IAAAS).<sup>77</sup>

92. The Law Council considers that the legal advice provided through IAAAS is a necessary measure to protect and promote the rule of law.

**Recommendation:**

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<sup>75</sup> LCA Policy, [9(c)].

<sup>76</sup> Ibid [10(g)].

<sup>77</sup> See, for example: Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409 -- Law\\_Council\\_concerned\\_by\\_removal\\_of\\_IAAAS\\_Funding.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409 -- Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf). On 31 March 2014, the Government announced the removal of all funding for people arriving in Australia without a valid visa, including arrivals by boat. The Law Council expressed its opposition to this measure, calling for the reinstatement of the funding

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**The Bill should include provisions relating to accessible judicial review and access to civil law remedies in relation to inappropriate treatment or use of force. Furthermore, policy should require access to legal representation and advice in relation to such situations.**

Children and other asylum seekers at risk

93. The Law Council has consistently advocated for the special interests of asylum seekers with particular vulnerabilities, such as unaccompanied minors. In its submission to the Senate Committee on the Guardian for Unaccompanied Children Bill 2014 (Cth),<sup>78</sup> the Law Council stated that the conflict between the Minister's legal duties and powers as both legal guardian of unaccompanied non-citizen children and the officer responsible for determining their visa and detention status, risks falling short of the relevant international standards contained in Conventions to which Australia is party.
94. As the LSNSW has observed, proposed section 197BA(1) permits the use of reasonable force against 'any person or thing.' As drafted, this provision would allow the use of force against children held in IDFs, and the Committee queries the interaction between this proposed provision and the fact that in all actions concerning children, the Minister (as the legal guardian for unaccompanied minors held in IDFs), must consider as a primary consideration the best interests of those children.<sup>79</sup> The LSNSW considers that this example clearly illustrates the disproportionate breadth of the authorisation to use force.
95. It would therefore be appropriate that the guardian of an unaccompanied minor is notified as soon as reasonably practicable following the use of force against the minor and in circumstances where the minor may be placed in solitary confinement or subject to other such measures.
96. The Law Council is also concerned that force, and indeed disproportionate force, could be used against other asylum seekers with particular vulnerabilities, such as asylum seekers who are pregnant or have a disability.
97. Indeed, as the LSNSW has observed, section 197BA(5)(a) countenances situations where an officer may be authorised to subject a person to a degree of indignity, dependent on the circumstances and the officer's belief, which is especially concerning in respect of asylum seekers who are likely to be particularly vulnerable. As noted by the PJCHR, the prohibition against torture, cruel, inhuman and degrading conduct is absolute, meaning that 'such treatment cannot be justified in any circumstance, regardless of the objective sought to be achieved'.<sup>80</sup> This provision therefore allows authorised officers the power to take actions, including actions against vulnerable people, which would constitute degrading conduct, contrary to Australia's obligations as party to the CAT.

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<sup>78</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Guardian for Unaccompanied Children Bill 2014 (Cth)*, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2899\\_-\\_Guardian\\_for\\_Unaccompanied\\_Children\\_Bill.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2899_-_Guardian_for_Unaccompanied_Children_Bill.pdf).

<sup>79</sup> The Minister is the legal guardian for unaccompanied minors under the *Immigration (Guardianship of Children) Act 1946* (Cth). Article 2 of the *Convention on the Rights of the Child* provides that in all actions concerning children, the best interests of the child is a primary consideration.

<sup>80</sup> PJCHR Report, [1.82].

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**Recommendation:**

**The Law Council therefore reiterates its position in its earlier submission that the *Immigration (Guardianship of Children) Act 1946 (Cth)* is amended such that an independent guardian is appointed for unaccompanied minors, and that, if the Senate Committee is minded to recommend the passage of this Bill, that the use of force in IDFs against children and other vulnerable detainees, such those with a disability, should be specifically excluded.**

**The Law Council also recommends that the guardian of an unaccompanied minor is notified as soon as reasonably practicable following the use of force against the minor and in circumstances where the minor may be placed in solitary confinement or subject to other such measures.**

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors. Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart-Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.