



UNSW  
AUSTRALIA



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

1 April 2015

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law at UNSW welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth).

In summary, our assessment of the bill is that:

- it creates a significant risk that Australia's international legal obligations will be violated, including obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT);
- it confers broad, discretionary powers on individual officers, and there are insufficient legislative safeguards to ensure that such powers are exercised responsibly or in accordance with basic human rights standards;
- it does not contain a clear set of criteria about when force may be used, the degree of force that may be used, or how much consideration an officer must give to the consequences of his or her actions when exercising force; and
- it does not provide for a strong accountability mechanism, and limits the right to an effective remedy for individuals whose human rights or freedoms have been violated.

If we can provide further information, please do not hesitate to contact us.

Yours sincerely,

Professor Jane McAdam ([j.mcadam@unsw.edu.au](mailto:j.mcadam@unsw.edu.au))

Director of the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

Associate Professor Gabrielle Appleby ([g.appleby@unsw.edu.au](mailto:g.appleby@unsw.edu.au))

Co-Director, The Judiciary Project, Gilbert + Tobin Centre of Public Law, UNSW

Dr Claire Higgins ([c.higgins@unsw.edu.au](mailto:c.higgins@unsw.edu.au))

Research Associate, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

# 1 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 confers broad, discretionary powers on officers to use force to maintain order in immigration detention facilities. The bill proposes that training and qualification requirements for authorised officers must be set out in writing by the Minister for Immigration and Border Protection ('the Minister'). The bill proposes a legislative framework to govern the making of complaints to the Secretary of the Department of Immigration and Border Protection ('the Secretary'), and provides 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'.

## 2 Use of Force

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

### 2.1 The scope of the power

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'.<sup>1</sup> 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).<sup>2</sup>

---

<sup>1</sup> Proposed s 197BA(4).

We are concerned about the absence of legislative safeguards to:

- (a) constrain *when* ‘reasonable force’ may be used (the ‘triggering events’);
- (b) constrain the *degree of force* that may be used (proportionality);
- (c) ensure that *fundamental human rights* are not violated by the use of force (impacts).

## 2.2 Triggering events

The triggering events set out in proposed section 197BA are ‘ill-defined and extremely broad’.<sup>3</sup> The test for when force may be used is less well-defined than other use of force provisions in the *Migration Act 1958* and other federal and State legislation,<sup>4</sup> 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 Explanatory Memorandum provides no compelling reason as to why a subjective, less well-defined test for when force may be used is appropriate in this context. Indeed, the broad range of instances to which the use of force applies provides a compelling reason as to why the test ought to be confined to cases where the use of force is *objectively* found to be reasonable and necessary in the circumstances.

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’.<sup>5</sup> As the Joint Parliamentary Committee on Human Rights (‘Joint Committee’) observed: ‘There are no additional constraints on the exercise of the power for this purpose, such as a requirement that the person is unreasonably refusing to move or that the officer has first issued a lawful request for the person to move.’<sup>6</sup> It could therefore affect someone who is staging a peaceful sit-in.

Because the concept of ‘good order, peace or security’ is not defined, an officer might reasonably believe a peaceful protest by asylum seekers is a matter that ‘disturbs good order, peace or security’ and use force to disperse those involved. The use of the word ‘or’ requires only one of the three elements to be disturbed, which is necessarily a lower threshold than requiring all three. On any objective human rights law analysis, it would be very unlikely that the use of force could be justified in such circumstances (as discussed under ‘proportionality’ below). An officer who used unreasonable force in such circumstances would be in breach of international human rights standards. Australia would retain responsibility for this as a matter of international law.

---

<sup>2</sup> Proposed s 197BA(5).

<sup>3</sup> Parliamentary Joint Committee on Human Rights, Twentieth Report of the 44<sup>th</sup> Parliament, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 18 March 2015, para 1.72.

<sup>4</sup> 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’.

<sup>5</sup> Proposed s 197BA(2)(e).

<sup>6</sup> Joint Committee, para 1.108.

In Australia, the implied freedom of political communication constitutionally protects the ability of the Australian people to speak about government and political matters. The High Court has found that while non-citizens do not have a right 'to participate in or to be consulted on matters of government', their communications about political matters are indirectly protected.<sup>7</sup> Full discussion of government and political matters requires that the Australian people are able to communicate about the conditions of immigration detention and the demands and protests of those held there. By affecting the ability of immigration detainees to engage in peaceful protest and communication, this provision may impermissibly burden the implied freedom of political communication.

### 2.3 Proportionality

There are two steps involved here. First, the State must show that the use of force is necessary to achieve a legitimate objective, and that there is no reasonable alternative that involves a lesser interference with the protected right. Secondly, the State must show that the force used is necessary, reasonable and proportionate to achieve the legitimate objective.

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.<sup>8</sup> However, as the Joint Committee noted, 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.<sup>9</sup> Moreover, 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.<sup>10</sup>

Restrictions on rights must conform to the strict tests of necessity and proportionality. As the UN Human Rights Committee has explained:

Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>11</sup>

Furthermore, any limitations on the right must be set out clearly and precisely in domestic law.<sup>12</sup> They cannot be vague and non-specific: the law must be 'formulated with sufficient

---

<sup>7</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 328 (Brennan J), see also 336 (Deane J). See further discussion in Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736, 778.

<sup>8</sup> 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.

<sup>9</sup> Joint Committee, para 1.67.

<sup>10</sup> *Ibid.*, para 1.62.

<sup>11</sup> UN Human Rights Committee, General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 6.

<sup>12</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3<sup>rd</sup> edn, Oxford University Press, Oxford, 2013, para 1.83.

precision to enable an individual to regulate his or her conduct accordingly'.<sup>13</sup> The law must not confer unfettered discretion on the officers responsible for carrying it out.<sup>14</sup>

The bill states that in using force, an authorised 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).<sup>15</sup>

The problem here is that the limitations are couched in highly subjective terms: what the officer 'reasonably believes'. There are no objective legislative standards to guide appropriate behaviour. This is in contrast to section 261AE of the *Migration Act* (the only other provision of the Act that authorises use of force, in the carrying out of identification tests). Under that section, force is not authorised unless a number of objective criteria are met, including that 'all reasonable measures to carry out the identification test without the use of force have been exhausted', and that the use of force has been authorised by a senior authorising officer who is satisfied of these conditions.

While it is recognised that some indignity may be involved where a person is subjected to the use of force, it must be proportionate to the legitimate aim that the officer is seeking to achieve. The bill does not contain safeguards to help officers determine this.

The second limitation shows that the bill contemplates the use of very serious force – even that which may result in 'death or serious injury'.<sup>16</sup> This underscores the need for clearly defined legislative safeguards, subject to judicial oversight.

The bill's lack of clear, objective, legislative safeguards setting out precisely when force may be used, and how much force may be used, means that it is possible officers could engage in unlawful killing or acts of torture or cruel, inhuman or degrading treatment or punishment.

For instance, the UN's Standard Minimum Rules for the Treatment of Prisoners state that officers must not use force:

except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.<sup>17</sup>

The bill does not contain such safeguards. The Explanatory Memorandum indicates that policies and procedures are intended to provide these safeguards,<sup>18</sup> but none are provided

---

<sup>13</sup> 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).

<sup>14</sup> UN Human Rights Committee, General Comment No 27, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 13.

<sup>15</sup> Proposed s 197BA(5).

<sup>16</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, para 52.

<sup>17</sup> UN Standard Minimum Rules for the Treatment of Prisoners, UN Doc E/CN.4/1997/7, para 54(1).

<sup>18</sup> Explanatory Memorandum, para 44.

in the legislation itself. Policies and procedures do not provide open, public and enforceable standards.<sup>19</sup> We are therefore very concerned that the bill does not fulfil the necessary requirements in order to justify the interference with detainees' rights.<sup>20</sup>

## 2.4 Human rights impacts

The use of force provision risks breaching a number of human rights, set out briefly below. For a more detailed analysis, we refer to the Committee to the analysis of the Joint Committee.

### i. The right to life (ICCPR, art 6)

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'.<sup>21</sup>

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.<sup>22</sup> 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).

As noted by the Joint Committee: 'In order to effectively meet this obligation, states must have in place adequate legislative and administrative measures to ensure police and the armed forces are adequately trained to prevent arbitrary killings.'<sup>23</sup> It is not clear that such training would be in place for 'authorised officers', as explained further below.

### ii. Torture or cruel, inhuman or degrading treatment or punishment (ICCPR, art 7)

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.<sup>24</sup> This includes acts of physical as well as mental harm. There are no 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. The proportionality analysis described above does not apply to article 7 of the ICCPR because the rights contained in this provision are absolute.

However, proportionality may be relevant to whether the treatment in question itself qualifies as 'cruel, inhuman or degrading treatment or punishment' in the particular context. For instance, if an officer uses force to quell a riot, whether it 'is to be qualified as lawful or excessive, depends on the proportionality of the force applied in a particular situation.'<sup>25</sup> The

---

<sup>19</sup> See similar concerns raised by the Joint Committee, para 1.71; Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/15*, 18 March 2015, p. 23.

<sup>20</sup> See Joint Committee report for more detailed analysis.

<sup>21</sup> Explanatory Memorandum, para 52.

<sup>22</sup> 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', UN Doc A/61/311 (5 September 2006), para 37.

<sup>23</sup> Joint Committee, para 1.59; see also para 1.74.

<sup>24</sup> As the UN Special Rapporteur on Torture has explained, 'torture is an aggravated form of cruel, inhuman or degrading treatment or punishment': Manfred Nowak and Elizabeth McArthur, 'The Distinction between Torture and Cruel, Inhuman or Degrading Treatment' (2006) 16 *Torture* 147, 148.

<sup>25</sup> Nowak and McArthur, p. 149.

use of force must be carefully prescribed by law and be aimed at a lawful purpose (eg to protect others from harm). The degree of force applied must not be excessive, but must be necessary in the particular circumstances to achieve the lawful purpose.

This means that the law enforcement officers must strike a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected. If a thief, for example, has been observed stealing a toothbrush in a supermarket, the use of firearms for the purpose of effecting his or her arrest must be considered as disproportionate. But for the purpose of arresting a person suspected of having committed murder or a terrorist attack, the police may, of course, use firearms if other less intrusive methods have proven non-effective.<sup>26</sup>

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. For instance, in relation to the treatment of detainees at Guantanamo Bay, such factors were said to include ‘cultural sensitivities’ of the individual (for example, being naked in front of the opposite sex), and phobias (such as a personal fear of dogs).<sup>27</sup> 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.<sup>28</sup>

According to the UN Special Rapporteur on Torture, because officers have direct control of individuals in detention, *any* use of physical or mental force against a detainee with the purpose of humiliation will constitute degrading treatment or punishment, and any infliction of severe pain or suffering for a purpose set out in article 1 of the Convention against Torture will amount to torture.<sup>29</sup> This is because ‘the powerlessness of the victim in a situation of detention ... makes him or her so vulnerable to any type of physical or mental pressure.’<sup>30</sup>

The European Court of Human Rights has held that unnecessary force inflicted during arrest or detention may amount to degrading treatment. For instance, it is unlawful to subject a docile detainee to physical force.<sup>31</sup> The bill does not safeguard against this, as noted in relation to peaceful protests. In *Henaf v France*, a 75 year old prisoner was shackled by one ankle to a hospital bed for the duration of the night before undergoing surgery. Two police officers were also there to guard him. The court found that shackling him was disproportionate and unnecessary given the presence of the guards.<sup>32</sup> Similarly, in *Avci v Turkey*, the court held that restraining a person who was in a coma and at risk of dying, and who was also being guarded, was disproportionate.<sup>33</sup>

### iii. Humane conditions in detention (ICCPR, art 10)

Australia must ensure that anyone deprived of his or her liberty is ‘treated with humanity and with respect for the inherent dignity of the person’. These concepts are given meaning and

---

<sup>26</sup> Ibid.

<sup>27</sup> Report of the Chairperson of the Working Group on Arbitrary Detention and others, *Situation of Detainees at Guantanamo Bay*, UN Doc E/CN.4/2006/120 (15 February 2006), para 51.

<sup>28</sup> Joint Committee, para 1.85.

<sup>29</sup> Nowak and McArthur, pp. 147, 151.

<sup>30</sup> Ibid.

<sup>31</sup> *Labita v Italy*, European Court of Human Rights, Application No 26772/95 (6 April 2000).

<sup>32</sup> *Henaf v France*, European Court of Human Rights, Application No 65436/01 (27 November 2003).

<sup>33</sup> *Avci v Turkey*, European Court of Human Rights, Application No 24935/94 (10 July 2001).

content by international human rights law. In addition, international minimum standards have been developed 'to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'.<sup>34</sup> While immigration detainees are not the same as prisoners convicted of criminal offences, these minimum standards are also applicable to others deprived of their liberty (eg '[p]ersons imprisoned for debt and other civil prisoners').<sup>35</sup>

#### iv. Right of peaceful assembly (ICCPR, art 21)

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.<sup>36</sup>

This right may only be limited if restrictions are 'in conformity with the law and ... are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.' To lawfully interfere with the right of freedom of assembly, an officer would need to ensure that all these conditions were met. It is highly unlikely that a peaceful protest would meet the test.

As noted above, there is also a question as to whether this provision would impermissibly burden the constitutional implied freedom of political communication.

#### v. Right to an effective remedy (ICCPR, art 2)

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. Proposed section 197BF provides, in effect, legal immunity for authorised officers where they exercised their power to use reasonable force in 'good faith'. Preventing individuals against whom force is used from bringing proceedings against the officer or the Commonwealth limits the right to an effective remedy.<sup>37</sup> Similar protections are *not* granted in the other provision of the *Migration Act* that authorises use of force.<sup>38</sup>

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*.

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.<sup>39</sup> Similarly, members of the Australian Federal Police Force are not given immunity for torts committed in the performance or purported performance of their duties. In contrast to the proposed provision in the bill, there is no bar on proceedings, but provision is made for the Commonwealth to pay damages ordered

---

<sup>34</sup> UN Standard Minimum Rules for the Treatment of Prisoners, UN Doc E/CN.4/1997/7, para 1.

<sup>35</sup> *Ibid*, para 8(c).

<sup>36</sup> Joint Committee, para 1.109.

<sup>37</sup> See also Joint Committee, para 1.115.

<sup>38</sup> *Migration Act 1958* (Cth) s 261AE.

<sup>39</sup> See Joint Committee, para 1.121.



against the police officer.<sup>40</sup> 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'.<sup>41</sup> 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.

The bill proposes a legislative framework to govern complaints about the use of force to the Secretary of the Department of Immigration. 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'. In relation to this, 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'.<sup>42</sup> 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.

Under proposed section 197BB(2), the complaint must be in writing and signed by the complainant. These requirements may discourage an asylum seeker from making a complaint out of fear that this could impact negatively on his or her protection claim.<sup>43</sup>

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.<sup>44</sup> These are avenues of complaint already available to individual detainees. While the Explanatory Memorandum recognises this, and states that the creation of the avenue of complaint to the Secretary

---

<sup>40</sup> *Australian Federal Police Act 1979* (Cth) s 64B.

<sup>41</sup> *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.

<sup>42</sup> Explanatory Memorandum, para 83.

<sup>43</sup> 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.

<sup>44</sup> 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.

does not remove pre-existing avenues of complaints, this could be made clearer within the legislation through the addition of a legislative note.

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.'

### 3 Training Standards

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'.

It may be accepted, as 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.<sup>45</sup> 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).<sup>46</sup> 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.<sup>47</sup> 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*.

Greater clarity is also required as to how the legislative requirement for authorised officers to meet the training and qualification standards will interact with the private contracts between detention facility operators and the government.<sup>48</sup>

---

<sup>45</sup> Explanatory Memorandum, para 60.

<sup>46</sup> See section 7(1)(b) of that Act.

<sup>47</sup> Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/15*, p. 25.

<sup>48</sup> See further Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 3/15*, pp. 25-26; Joint Committee, para 1.76.