



Australian  
Human Rights  
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
SUBMISSION TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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## **1 Introduction**

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) (Bill) introduced by the Australian Government.

## **2 Summary**

2. The Commission agrees that it is necessary to clarify the scope of the power given to ‘authorised officers’ within immigration detention facilities, many of whom will be employees of private contractors providing immigration detention services, to use force against detainees.
3. The particular environment of immigration detention means that the use of force may occasionally be necessary.
4. In setting out the scope of the authority to use force, it will also be necessary to clearly define the limits on the use of force. The kinds of powers proposed to be given to employees of private contractors are powers that are usually reserved to sworn police officers. In determining the limits on the use of force it is important to acknowledge that these private contractors are not police and that they need to be subject to greater levels of control and accountability.
5. In particular, the threshold for the use of force should be based on objective criteria of necessity and reasonableness. The limits on the use of force should be contained in the Act rather than in policies and procedures. Specific limits should be included when force is proposed to be used to move detainees within an immigration detention facility and when force is proposed to be used in relation to minors.
6. Further, if private contractors use excessive force, both the contractors and the Commonwealth should be legally accountable.
7. These principles inform the recommendations made by the Commission in this submission.

## **3 Recommendations**

8. The Australian Human Rights Commission makes the following recommendations.

### **Recommendation 1**

The Commission recommends that the opening words of s 197BA(1) be amended to read:

An authorised officer may use such force against any person or thing as is necessary and reasonable to: ...

## Recommendation 2

The Commission recommends that the opening words of s 197BA(5) be amended to read:

In exercising the power under subsection (1), an authorised officer must not:

- (a) subject a person to greater indignity than is necessary and reasonable in the circumstances; ...

## Recommendation 3

The Commission recommends that the Committee seek clarification from the Government as to whether it intends to authorise employees of contracted detention service providers to use lethal force and, if so, what controls and limits will be put in place to ensure that the right to life is adequately protected.

## Recommendation 4

The Commission recommends that a new subsection be added after s 197BA(5) in the following form:

In exercising the power under subsection (1), an authorised officer must:

- (a) use force or restraint only as a measure of last resort in light of available alternatives including negotiation and de-escalation;
- (b) use force only for the shortest amount of time necessary;
- (c) not use force in a way that amounts to cruel, inhuman or degrading treatment;
- (d) not use force in a way that amounts to punishment;
- (e) not use excessive force.

**Excessive force** is force beyond that which is reasonably necessary in the circumstances of any particular incident including:

- any force when none is needed
- more force than is needed
- any force or level of force continuing after the necessity for it has ended
- knowingly wrongful use of force.

## Recommendation 5

The Commission recommends that a new subsection be added after s 197BA(2) which clarifies that if an officer intends to use force in order to move a detainee within an immigration detention facility, this must be preceded by a request to the detainee to move (with the assistance of an interpreter if required), a reasonable opportunity being given to the detainee to

move voluntarily, and all reasonable alternatives to the use of force being exhausted prior to force being used to move a detainee.

### **Recommendation 6**

The Commission recommends that new provisions be added after s 197BA(5) dealing with the limitations on the use of force in relation to children. The amendments in this recommendation assume that the amendments in recommendation 4 (dealing with limitations more generally) have been accepted. The new provisions should provide that an authorised officer must not exercise the power under subsection (1) to use force in relation to a minor unless:

- all alternatives to the use of force including negotiation and de-escalation techniques have been attempted and have failed;
- where possible, the proposed use of force has been raised with the minor's parent or guardian and the parent or guardian has been given sufficient opportunity to both speak with the minor and to make submissions to the authorised officer about the use of force;
- authorisation for the particular use of force has been sought and obtained from the director of the facility;
- where it is not possible to discuss the proposed use of force with the minor's parent or guardian in advance, force is only used where there is an unacceptable risk of escape or immediate harm to the child or others.

### **Recommendation 7**

The Commission recommends that:

(a) Section 197BF(1) be amended to read:

No proceedings may be instituted or continued in any court against an authorised officer in relation to an exercise of power under section 197BA if the power was exercised in good faith and the use of force did not exceed what was authorised by that section.

(b) Section 197BF(4) be deleted.

### **Recommendation 8**

The Commission recommends that a new subsection be added after s 197BB(4) in the following form:

The Secretary must notify the Ombudsman in writing of the receipt of the complaint.

## **Recommendation 9**

The Commission recommends that the Commonwealth Ombudsman be given the power and necessary resources to review the administration of the Secretary's investigation of complaints under s 197BC as required and to report to Parliament on an annual basis about the comprehensiveness and adequacy of the processes used by the Secretary.

## **4 Background to the amendments**

### **4.1 Clarification of the role of Serco**

9. Since November 1997, the provision of detention services has been outsourced by the Department of Immigration and Border Protection and its predecessors (the department) to private organisations.<sup>1</sup> At present, the detention service provider is Serco Australia Pty Ltd (Serco). It appears that officers authorised for the purposes of s 197BA will be predominantly, if not solely, officers of Serco.
10. Serco has responsibilities for security in immigration detention centres pursuant to its contract with the department. At the time of the Hawke-Williams Report, section 2.2.4 of the Statement of Work in this contract provided that Serco 'must deliver structured Security Services in each Centre that are consistent with Immigration Detention, enable the Service Provider to manage routine events in the Centre and respond promptly and flexibly to any Incident'.<sup>2</sup>
11. The Hawke-Williams Report dealt with riots at Christmas Island Immigration Detention Centre in March 2011 and Villawood Immigration Detention Centre in April 2011. In relation to the incident on Christmas Island, order was restored after control of the incident was handed over to the Australian Federal Police (AFP). The incident at Villawood required participation by officers from both the AFP and the New South Wales Police Force.
12. In his second reading speech for the Bill, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, said that the proposed amendments arose from the incidents which were the subject of the Hawke-Williams Report. In particular, the Minister drew attention to recommendation 15 which was in the following terms:

It is recommended that DIAC articulate more clearly the responsibility of public order management so that an agreed position is established with DIAC, Serco, the AFP and other police forces.<sup>3</sup>
13. The amendments proposed in this Bill are aimed at providing Serco with 'the tools needed to provide the first line of response and ensure the operation of the immigration detention network remains viable' when faced with public order disturbances in immigration detention facilities.<sup>4</sup>
14. In making its recommendations about the respective scope of responsibility to use force in the context of a critical incident, the Hawke-Williams Report drew

a distinction between the kinds of roles to be performed by police and the kinds of roles to be performed by private contractors. It said that given the inherent risks involved, 'the issue of legislative authority and appropriate controls is an important one'. In particular:

For critical incidents, the AFP or State and Territory police are best placed to fulfil this role, depending on the jurisdiction of the incident. For less critical incidents, Serco also has a role, but both the dividing line between the two, and the contractual responsibilities on Serco for providing good order capability, require clarification.<sup>5</sup>

15. The Hawke-Williams Report did not say that it was necessary that Serco be given greater powers to use force.

16. Following the Hawke-Williams Report, there was a Joint Select Committee Inquiry into Australia's Immigration Detention Network. Serco made a submission to this inquiry in which it said:

There are currently, and appropriately, strict limits on the obligations and powers of private sector detention centre operators in relation to the management and control of detention centres, particularly regarding the use of force in the context of responding to riots and other serious disturbances. Serco believes that additional clarity is required to ensure that the precise limits on those obligations and powers are well understood. The Act does not directly address this matter. No regulations or other legislative instruments have been implemented to govern the responsibilities and powers of persons who operate detention centres. As a consequence, there is insufficient clarity for detention centre operators around the limits on their obligations and powers in relation to use of force, to ensure the good order and control of immigration detention facilities.<sup>6</sup>

17. Serco recommended that the scope of its own role could be clarified in two ways.

18. First, Serco recommended that regulations be made under s 273 of the Migration Act setting out the powers and limits on the obligations of 'authorised officers' to use force in immigration detention facilities. The present Bill seeks to do this, albeit in the body of the Migration Act rather than by way of regulation.

19. Secondly, Serco recommended the implementation of final and binding interagency co-operation and communication protocols between Serco, the department, the AFP and relevant state or territory local police. This was also the subject of a number of recommendations in the Hawke-Williams Report (see in particular recommendations 2-5). These recommendations were agreed to by the Government<sup>7</sup> and steps were taken towards implementing them.<sup>8</sup>

#### **4.2 Principles when granting coercive powers to private contractors**

20. The powers granted to authorised officers under s 197BA are coercive powers of the most serious kind, authorising the use of force.

21. The Attorney-General's Department has produced *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* to assist officers in Australian Government departments to frame criminal offences, infringement notices, and enforcement provisions that are intended to become part of Commonwealth law.<sup>9</sup> This guide contains principles that should be applied when developing new coercive powers. These principles include the following:
- a. new coercive powers should contain equivalent limitations and safeguards to those in the *Crimes Act 1914* (Cth) (Crimes Act);<sup>10</sup>
  - b. coercive powers should generally be contained in an Act, rather than in subordinate legislation;<sup>11</sup>
  - c. if persons other than police officers are granted coercive powers under Commonwealth legislation, there must be proper accountability for the exercise of those powers.<sup>12</sup>

## 5 Relevant human rights

### 5.1 General

22. From the perspective of the people who may be subjected to the use of force in proposed s 197BA, the most relevant human right to be considered is the right in article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>13</sup> which provides that:
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
23. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons. The article recognises that people deprived of their liberty are a particularly vulnerable group who are entitled to special protection. However, establishing a breach of article 10 requires something more than the mere fact of deprivation of liberty.<sup>14</sup>
24. The content of article 10(1) has been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- a. the *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules);<sup>15</sup> and
  - b. the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).<sup>16</sup>
25. The United Nations Human Rights Committee has invited States Parties to indicate in their reports the extent to which they are applying the Standard Minimum Rules and the Body of Principles.<sup>17</sup> At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.<sup>18</sup>



26. Rule 54(1) of the Standard Minimum Rules provides:

Officers of the institutions shall not, in their relations with the prisoners, 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.

27. This rule provides limits on the circumstances in which force may be used, and limits the use of force in those circumstances to what is necessary.
28. Clearly a person's treatment in detention should not contravene the prohibition in article 7 of the ICCPR on torture or cruel, inhuman or degrading treatment or punishment. This prohibition is absolute and non-derogable.
29. In the case of *Wilson v Philippines*, the United Nations Human Rights Committee found a breach of article 7 of the ICCPR where a prisoner was treated violently in detention:

The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7.<sup>19</sup>

30. States have a responsibility to ensure that the rights guaranteed in articles 7 and 10 of the ICCPR are accorded to detainees in privately run detention facilities.<sup>20</sup>
31. In some cases, the Commission has found that complaints made by detainees in immigration detention about the use of force by detention service providers amounted to a breach of their human rights.

### **Case study 1**

A detainee was grabbed by the throat by an officer of GSL (Australia) Pty Ltd, the then detention service provider at Villawood Immigration Detention Centre, and had his head forced back against a wall. The officer then used force to subject the detainee to an unauthorised strip search. The Commission found that this conduct was in breach of articles 7 and 10 of the ICCPR.<sup>21</sup>

32. As the Government acknowledges in the Bill's Statement of Compatibility with Human Rights, because the Bill relates to using force it also potentially engages the right to life in article 6(1) of the ICCPR. This article provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

## **5.2 Rights of children**

33. There are equivalent rights accorded to children under the *Convention on the Rights of the Child* (CRC).<sup>22</sup> However, it is important to bear in mind that children are entitled to special protection give their greater vulnerability to a breach of their rights. Additional care should be taken when considering authorisation for the use of force against children.
34. The wording in article 10(1) of the ICCPR is replicated in article 37(c) of the CRC, which provides that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.
35. Similarly, the wording in article 7 of the ICCPR is replicated in article 37(a) of the CRC.
36. Further, article 19 provides:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
37. The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (JDL Rules) provide some guidance on the use of force within a detention environment.<sup>23</sup> The use of force on children should only be used in exceptional circumstances, where all other 'control methods' have been exhausted and failed. Use of force should not cause humiliation or degradation and should be used only for the shortest possible period of time. Any use of force should be used only under the order of the director of the facility and be subject to higher review.<sup>24</sup>
38. The United Nations Committee on the Rights of the Child has said that restraint or force can be used on a child only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted.<sup>25</sup>
39. The Commission has found that complaints made on behalf of children about the use of force by detention service providers amounted to a breach of their human rights.

### **Case study 2**

A seven year old boy detained at Woomera Immigration Reception and Processing Centre was struck across the legs with a baton by an officer of Australasian Correctional Management Pty Ltd, the then detention services provider there. This occurred during a riot at the centre and while the boy was being carried by his mother. The Commission found that the act of striking the child with a baton was in breach of articles 37(a) and (c) of the CRC and articles 7 and 10 of the ICCPR.<sup>26</sup>

### **Case study 3**

A twelve year old boy detained at Woomera Immigration Reception and Processing Centre sustained a slight lump to the right side of his head and complained of pain to his face and wrists after being forcibly transferred by Australasian Correctional Management officers from Woomera Immigration Detention Centre to Baxter Immigration Detention Centre. The Commission found that the use of force against the child was more than strictly necessary in the circumstances and, accordingly, constituted a breach of article 10(1) of the ICCPR.<sup>27</sup>

## **6 Threshold for the use of force**

### **6.1 Statutory requirement of necessity**

40. The first aspect of the Bill to consider is the threshold for the use of force. The Commission is concerned that the threshold given to Serco officers will be lower than the threshold that applies to sworn officers of the AFP when they are exercising powers under the Crimes Act.
41. The threshold for the use of force when making an arrest under the Crimes Act is set out in s 3ZC. The whole section provides:
- (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.
  - (2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:
    - (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or

- (b) if the person is attempting to escape arrest by fleeing—do such a thing unless:
    - (i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and
    - (ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.
- 42. A substantially similar provision is contained in s 14B of the *Australian Federal Police Act 1979* (Cth) (AFP Act). Note also the directions in relation to the use of force contained in the Commissioner’s Order on operational safety, referred to as CO3, made under ss 37 and 38 of the AFP Act.<sup>28</sup> AFP officers must comply with those orders.<sup>29</sup>
- 43. The test in s 3ZC(1) of the Crimes Act is an objective one. The use of force in making an arrest must be no more than is ‘necessary and reasonable’ in the circumstances. (Note that section 7.1 below deals with the equivalent provision in the Bill to the limitation in s 3ZC(2).) The objective test in s 3ZC(1) is consistent with the test for the use of force in other parts of the Crimes Act.
- 44. For example, under the Crimes Act the use of force must be no more than is ‘necessary and reasonable’ when: executing a warrant (s 3G), searching a conveyance without a warrant in emergency situations (s 3U(d)), stopping and searching a person (s 3UD(4)), entering premises without a warrant in emergency situations (s 3UEA(6)), entering premises under a warrant to arrest a person (s 3ZB(1) and (2)), conducting a strip search at a police station (s 3ZH(7)), taking fingerprints, recordings, samples of handwriting or photographs (s 3ZJ(4)), carrying out a prescribed age determination procedure (s 3ZQI) and executing a delayed notification search warrant (s 3ZZCD(1)).
- 45. In a similar way, the thresholds for the use of force that are currently found in the *Migration Act 1958* (Cth) (Migration Act) are based on objective criteria. For example, in a number of contexts the Migration Act provides that the use of force be:
  - a. ‘reasonably necessary’<sup>30</sup>
  - b. ‘necessary and reasonable’<sup>31</sup>
  - c. ‘necessary’<sup>32</sup> or
  - d. ‘such reasonable force as is necessary’.<sup>33</sup>
- 46. In each of these contexts, there is an objective requirement that the force used must have been necessary (or reasonably necessary).

47. An objective requirement of necessity would also be consistent with departmental policy. Chapter 8 of the department's Detention Services Manual sets out the department's policy which allows for the use of reasonable force in immigration detention. The Manual provides that:

Reasonable force is 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.<sup>34</sup>

48. The Bill proposes to introduce a hybrid test for determining whether the use of force is appropriate. Section 197BA(1) provides:

- (1) An authorised officer may use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary, to:
- (a) protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
  - (b) maintain the good order, peace or security of an immigration detention facility.

49. The section permits an authorised officer to use 'such reasonable force ... as the authorised officer reasonably believes is necessary'. This includes both objective elements and a subjective element.
50. One objective element is that the force used must be 'reasonable'. Whether or not the force used exceeds this threshold is a question of fact.
51. The subjective element is that the authorised officer must believe that the use of force is necessary. What an officer believes to be necessary is subjective. The belief must be based on reasonable grounds.
52. As noted above, the Guidelines issued by the Attorney-General's Department provide that new coercive powers should contain equivalent limitations and safeguards to those in the Crimes Act. In the Commission's view, employees of private detention service providers should not be given a greater discretion to use force than sworn police officers are given when they are exercising powers granted under the Crimes Act. Accordingly, there should be an objective limit of necessity and reasonableness to the power to use force.

### **Recommendation 1**

53. The Commission recommends that the opening words of s 197BA(1) be amended to read:

An authorised officer may use such force against any person or thing as is necessary and reasonable to: ...

## **6.2 Powers of prison guards to use force**

54. Immigration detention is administrative detention and differs in character from imprisonment for an offence.
55. Nevertheless, when considering the appropriate threshold and limits on the use of force in immigration detention facilities, it is useful to consider the restrictions placed on correctional officers when using force against inmates of prisons. For the purposes of this submission, the Commission has limited its consideration to the situation in New South Wales.
56. Section 79(s) of the *Crimes (Administration of Sentences) Act 1999* (NSW) permits the making of regulations with respect to the circumstances in which a correctional officer may use force against an inmate. Such regulations are contained in the *Crimes (Administration of Sentences) Regulation 2014*. They establish an objective test of what is 'reasonably necessary in the circumstances'. The regulations also set out with greater specificity than proposed s 197BA(1) the situations in which a correctional officer may have recourse to the use of force.
57. Regulation 131 provides:

### **131 Use of force in dealing with inmates**

- (1) In dealing with an inmate, a correctional officer may use no more force than is reasonably necessary in the circumstances, and the infliction of injury on the inmate is to be avoided if at all possible.
- (2) The 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.
- (3) If an inmate is satisfactorily restrained, the only force that may be used against the inmate is the force that is necessary to maintain that restraint.
- (4) Subject to subclauses (1)-(3), a correctional officer may have recourse to force for the following purposes:
  - (a) to search, if necessary, an inmate or to seize a dangerous or harmful article,
  - (b) to prevent the escape of an inmate,
  - (c) to prevent an unlawful attempt to enter a correctional centre by force or to free an inmate,
  - (d) to defend himself or herself if attacked or threatened with attack, but only if the officer cannot otherwise protect himself or herself from harm,
  - (e) to protect other persons (including correctional officers, departmental officers, inmates and members of the public) from

- attack or harm, but only if there are no other immediate or apparent means available for their protection,
- (f) 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,
  - (g) to prevent an inmate from injuring himself or herself,
  - (h) to ensure compliance with a proper order, or maintenance of discipline, but only if an inmate is failing to co-operate with a lawful correctional centre requirement in a way that cannot otherwise be adequately controlled,
  - (i) to move inmates who decline or refuse to move from one location to another in accordance with a lawful order,
  - (j) to achieve the control of inmates acting defiantly,
  - (k) to avoid imminent violent or destructive behaviour by inmates,
  - (l) to restrain violence directed towards the correctional officer or other persons by an uncontrollable or disturbed inmate,
  - (m) to prevent or quell a riot or other disturbance,
  - (n) to deal with any other situation that has a degree of seriousness comparable to that of the situations referred to in paragraphs (a)-(m).
- (5) Subclause (4) does not limit the operation of any law with respect to the force that may be used to effect an arrest.

### **6.3 Police powers in relation to public order disturbances**

58. The Government says that when courts are determining if a police officer used force to deal with a public order disturbance, '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>35</sup>
59. In the case of AFP officers exercising statutory powers to deal with public order disturbances, this appears to be a reference to the powers granted to police in the specific circumstances described in the *Public Order (Protection of Persons and Property) Act 1971* (Cth) (Public Order Act). Section 8 of that Act allows an officer at the rank of sergeant or above to give a direction to a group of people to disperse. In order for the power to make such a direction to arise:
- a. there must be an assembly of 12 people or more;
  - b. the police officer must reasonably apprehend that the assembly will be (or is being) carried on in a manner involving unlawful physical violence to persons or unlawful damage to property.

60. If those criteria are satisfied, the police officer may give an oral direction to the group to disburse. Once that direction has been given, and after the expiry of 15 minutes, if there is still an assembly of more than 12 persons then those persons still assembled without a reasonable excuse have committed an offence.
61. Section 8(4) deals with the power of the AFP to disburse such assemblies. It provides:
- (4) For the purpose of:
    - (a) dispersing an assembly in respect of which a direction has been given under this section; or
    - (b) dispersing or suppressing an assembly to which paragraph (1)(b) applies (whether or not a direction has been given under this section in respect of the assembly);
- it is lawful for a person to use **such force as he or she believes, on reasonable grounds, to be necessary** for that purpose and is reasonably proportioned to the danger which he or she believes, on reasonable grounds, is to be apprehended from the continuance of the assembly.
- (emphasis added)
62. This appears to be the subjective test referred to by the Government.
63. None of the criteria described in the Public Order Act as prerequisites to the use of force are present in the proposed Bill. Instead, the Bill proposes to give power to immigration detention service providers to use force in a wide range of circumstances, not limited to public order disturbances. These include circumstances where the authorised officer reasonably believes it is necessary to ‘maintain the good order, peace or security of an immigration detention facility’. These words are capable of encompassing a very wide range of circumstances. For example, the Government suggests that it would allow the use of force where a person has climbed up a fence.<sup>36</sup>
64. Given the breadth of circumstances in which the power in proposed s 197BA could be used, and the differences between private immigration detention contractors and sworn police officers, the Commission considers that an objective test of necessity and reasonableness remains appropriate.

## **7 Limitations on the use of force**

### **7.1 Statutory limitations**

65. The Bill proposes two limitations on the use of force in s 197BA(4) and (5).
66. The first of those limitations provides that an officer must not use force to give nourishment or fluids to a detainee. The Explanatory Memorandum says that this provision recognises that it is the role of qualified medical practitioners,



who can assess an individual's needs, to provide medical intervention.<sup>37</sup> The Commission agrees that this limitation is appropriate.

67. The second of those limitations is in two parts and provides that:
- (5) In exercising the power under subsection (1), an authorised officer must not:
    - (a) subject a person to greater indignity than the authorised officer reasonably believes is necessary in the circumstances;
    - (b) 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).
68. The limitation in s 197BA(5)(a) again contains a subjective test which would provide greater scope for an authorised officer to use force than is provided to sworn officers of the AFP when they are exercising powers under the Crimes Act. As set out in paragraph 41 above, when a person is exercising the power of arrest, s 3ZC(1) provides that he or she must not subject the person being arrested to greater indignity than is necessary and reasonable to make the arrest. That is an objective test.
69. The limitation in s 197BA(5)(b) contains a hybrid test which is equivalent to s 3ZC(2)(a) of the Crimes Act set out in paragraph 41 above. The Commission considers that this broader test is appropriate in the narrow category of cases where force is required to protect the life of, or prevent serious injury to, another person.
70. As noted above, the Guidelines issued by the Attorney-General's Department provide that new coercive powers should contain equivalent limitations and safeguards to those in the Crimes Act. In the Commission's view, employees of private detention service providers should not be given a greater discretion to use force than sworn police officers are given when they are exercising powers granted under the Crimes Act. Accordingly, the Commission recommends that an objective test be inserted into s 197BA(5)(a).

## **Recommendation 2**

71. The Commission recommends that the opening words of s 197BA(5) be amended to read:

In exercising the power under subsection (1), an authorised officer must not:

- (a) subject a person to greater indignity than is necessary and reasonable in the circumstances; ...

## **7.2 Right to life**

72. Paragraph 197BA(5)(b) prohibits an authorised officer doing anything likely to cause grievous bodily harm, but provides an exception to this if the authorised

officer reasonably believes that doing the thing is necessary to protect the life of, or prevent serious injury to another person.

73. It appears that this provision has been modeled on s 3ZC(2)(a) of the Crimes Act set out in paragraph 41 above. However, unlike that provision, s 197BA(5)(b) does not provide that an authorised officer may do something that will cause death.
74. It appears that this omission is intended to mean that contracted employees of detention service providers are not authorised to use lethal force. The Government's Statement of Compatibility with Human Rights is unclear on this point, merely noting that the right to life is engaged and that if the degree of force used is necessary, reasonable and proportionate then it will not be arbitrary.<sup>38</sup> (Note that this comment in the Explanatory Memorandum appears to accept that the relevant standard is an objective one.)
75. It is foreseeable that an action which is likely to cause grievous bodily harm may in fact lead to death.
76. The Commission is concerned by the possibility that the Bill grants to employees of private contractors the power to use a level of force which could result in death, without sufficient safeguards and accountability mechanisms.
77. The right to life in article 6(1) creates an obligation on the part of the State to take positive steps to protect life.<sup>39</sup> A particular duty is owed to persons in detention, because the act of detaining a person impairs or removes that person's ability to protect themselves from threats to their physical safety. In *Barbato v Uruguay* the UN Human Rights Committee recognized that the State has a duty under article 6(1) to take adequate measures to protect the life of a prisoner, including against acts of violence, while in custody.<sup>40</sup>
78. The UN Human Rights Committee also said that:

The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.<sup>41</sup>
79. The Government notes that the qualification and training requirement to be given to authorised officers is likely to include the Certificate Level II in Security Operations, which includes levels of competency dealing with responding to security risk situations and following workplace safety procedures in the security industry.<sup>42</sup> The Commission has serious concerns about whether this level of training is sufficient to authorise officers to use lethal force.

### **Recommendation 3**

80. The Commission recommends that the Committee seek clarification from the Government as to whether it intends to authorise employees of contracted detention service providers to use lethal force and, if so, what controls and limits will be put in place to ensure that the right to life is adequately protected.

### **7.3 Non-statutory limitations**

81. Many of the most significant limitations on the use of force are referred to in the Explanatory Memorandum as matters that the department will include in policies and procedures. Paragraph 44 of the Explanatory Memorandum provides that these policies and procedures will ensure:
- that use of reasonable force or restraint will be used only as a measure of last resort. Conflict resolution (negotiation and de-escalation) will be required to be considered and used before the use of force, wherever practicable
  - reasonable force must only be used for the shortest amount of time possible
  - reasonable force must not include cruel, inhuman or degrading treatment
  - reasonable force must not be used for the purposes of punishment.
82. The department's Detention Services Manual currently provides the following 'guiding principles and values' in relation to the 'application of reasonable use of force and/or restraint in the immigration detention environment':
- conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
  - reasonable force and/or restraint should only be used as a measure of last resort
  - reasonable force and/or restraint may be used to prevent the person in immigration detention inflicting self-injury, injury to others, escaping or destruction of property
  - reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary. If the management of a person in immigration detention can be achieved by other means, force must not be used
  - the use of force and/or restraint must not include cruel, inhumane or degrading treatments
  - the use of force and/or restraint must not be used for the purposes of punishment
  - the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
  - the use of excessive force on a person may constitute an assault
  - all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant DSP operational procedures.<sup>43</sup>
83. The Commission considers that many of these principles are important limitations on the use of force. Such limitations are necessary to ensure that the use of force complies with Australia's human rights obligations. They

should be included in the Act rather than being left to unenforceable departmental policies and procedures.

84. The Migration Act already contains prohibitions on the conduct of identification tests (and the use of force to conduct such tests) in a cruel, inhuman or degrading way.<sup>44</sup>
85. Giving these limitations legislative force would also be consistent with the guidelines issued by the Attorney-General's Department. As noted above, these guidelines provide that coercive powers should generally be contained in an Act, rather than in subordinate legislation (or, by extension, in non-legislative policies and procedures).
86. Similarly, giving these limitations legislative force would provide a level of enforceability similar to the orders that are binding on the AFP. As noted above, the Commissioner of the AFP has the power to issue orders with respect to the general administration of, and the control of the operations of, the AFP.<sup>45</sup> AFP officers must comply with those orders.<sup>46</sup>
87. One of the orders made by the Commissioner is the Commissioner's Order on operational safety, referred to as CO3. It provides the following in relation to the use of force:<sup>47</sup>
  - 5.1 Any use of force against another person by an AFP appointee in the course of their duties must be in accordance with this Order.
  - 5.2 Using reasonable force underpins all AFP conflict management strategies, training and the AFP's use of force model.
  - 5.3 Appointees may use force in the course of their duties for a range of purposes, including:
    - defending himself or herself or another person
    - protecting property from unlawful appropriation, damage or interference
    - preventing criminal trespass to any land or premises
    - effecting an arrest
    - where authorised by a law.
  - 5.4 The principles of negotiation and conflict de-escalation are always emphasised as the first consideration prior to using physical force. The AFP considers the safety of AFP appointees and members of the public to be of paramount importance.
  - 5.5 Excessive force is force beyond that which is considered reasonably necessary in the circumstances of any particular incident including:
    - any force when none is needed
    - more force than is needed

- any force or level of force continuing after the necessity for it has ended
- knowingly wrongful use of force.

...

5.10 When effecting an arrest, an AFP appointee must not:

- use more force than is reasonable and necessary to make the arrest or prevent escape of the person after arrest
- do anything likely to cause death or serious injury unless it is reasonably necessary to protect themselves or others from death or serious injury.

88. It will still be necessary for immigration detention service providers to have detailed policies and procedures that deal with the use of force. These policies and procedures should properly contain details about how authorisations for the planned use of force are to be sought and obtained, who is authorised to use force and the training requirements for those persons; how the use of force is to be carried out in practice (including the use of instruments to restrain persons); how recording of the use of force is to be conducted (for example hand held video recording and CCTV); how reporting of the use of force is to be conducted; and the support (including medical assessment) to be offered to persons after force has been used against them.
89. However, limits on the power to use force should be contained in the legislation itself and not left to policies and procedures. This ensures that the limits are set by Parliament and that those exercising the power to use force are accountable if they exceed these limits.

#### **Recommendation 4**

90. The Commission recommends that a new subsection be added after s 197BA(5) in the following form:

In exercising the power under subsection (1), an authorised officer must:

- (a) use force or restraint only as a measure of last resort in light of available alternatives including negotiation and de-escalation;
- (b) use force only for the shortest amount of time necessary;
- (c) not use force in a way that amounts to cruel, inhuman or degrading treatment;
- (d) not use force in a way that amounts to punishment;
- (e) not use excessive force.

**Excessive force** is force beyond that which is reasonably necessary in the circumstances of any particular incident including:

- any force when none is needed

- more force than is needed
- any force or level of force continuing after the necessity for it has ended
- knowingly wrongful use of force.

## 8 Use of force for moving detainees

91. A non-exhaustive list of examples of situations in which force may be used is set out in s 197BA(2). Some of these examples involve situations where an authorised officer may need to react quickly in order to protect a person or property or to prevent an escape.
92. However, s 197BA(2)(e) does not fall into this category. That subsection allows the use of force to move a detainee within an immigration detention facility. The Commission expects that in the vast majority of cases it will not be necessary to use force in order to move a detainee within an immigration detention facility.
93. The Commission has previously raised concerns about the decision to use force to move children in immigration detention facilities.

### Case study 4

The Commission considered complaints from a number of unaccompanied children on Christmas Island that Serco officers had used force against them when they moved them from a compound known as 'Charlie' to another compound known as 'Bravo' on 24 March 2014. The incident is described in the Commission's report *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*.<sup>48</sup>

The Commission found that the decision to seek approval for the use force was made quickly and that alternatives to the use of force were not adequately considered. The organisation providing care and welfare services to the unaccompanied children was not consulted prior to authorisation for the use of force being sought. A range of de-escalation techniques such as discussion, negotiation or verbal persuasion could have been used more effectively. No interpreter was used during the brief period of negotiation with the children.

The Commission accordingly found that the decision to approve the use of force to transfer the unaccompanied children breached article 37(c) of the CRC.

94. In light of incidents of this nature, the Commission considers that the legislation should more clearly set out preconditions for the use of force where it is proposed to be used to move people within immigration detention facilities.

95. Further, the use of force to move a detainee may unreasonably interfere with the right of detainees under article 21 of the ICCPR to peaceful assembly. This concern is heightened given the broad range of circumstances in which the power to use force is proposed to be given, extending to ‘maintaining the good order’ of immigration detention facilities.

### **Recommendation 5**

96. The Commission recommends that a new subsection be added after s 197BA(2) which clarifies that if an officer intends to use force in order to move a detainee within an immigration detention facility, this must be preceded by a request to the detainee to move (with the assistance of an interpreter if required), a reasonable opportunity being given to the detainee to move voluntarily, and all reasonable alternatives to the use of force being exhausted prior to force being used to move a detainee.
97. Similar safeguards exist in the Migration Act, for example in relation to the use of force in carrying out identification tests (s 261AE).

## **9 Use of force on children**

98. Under the Government’s current policy settings, children may be kept in immigration detention facilities, although the Migration Act provides that ‘a minor shall only be detained as a measure of last resort’.<sup>49</sup>
99. It is appropriate for legislation permitting detention service providers to use force against ‘any person’ in immigration detention facilities to acknowledge that particular issues arise when it is proposed to use force on children.
100. Such legislative acknowledgment would be consistent with the policy of the department and Serco. Serco’s policy and procedure manual dealing with *Working with Minors*, says:

The Centre Manager and CSOs will ensure that the use of force or restraint devices should only be applied to minors in exceptional circumstances and in strict accordance with the *Migration Act 1958*. Refer to the *Use of Force – Control and Restraint PPM* for further information.

A minor is deemed by DIAC as a person of special consideration and so Serco staff will use greater care than would otherwise be required should reasonable force be warranted and approved.<sup>50</sup>

101. Chapter 8 of the Department’s Detention Services Manual sets out the department’s policy regarding the use of reasonable force in immigration detention. In that chapter the department notes that minors are vulnerable ‘persons of special consideration’, and requires that:

Officers must use greater care than would otherwise be required should reasonable force be warranted against a person of special consideration.<sup>51</sup>

102. As noted above, the JDL Rules provide that the use of force on children should only be used in exceptional circumstances, where all other ‘control methods’ have been exhausted and failed. Use of force should not cause

humiliation or degradation and should be used only for the shortest possible period of time. Any use of force should be used only under the order of the director of the facility and be subject to higher review.

103. Similarly, the Juvenile Justice Standards published by the Australasian Juvenile Justice Administrators provide:

Force or instruments of restraint are only used on a child or young person in response to an unacceptable risk of escape or immediate harm to themselves or others, and/or in accordance with legislation and are used for the shortest possible period of time.<sup>52</sup>

104. When considering the use of force on children in immigration detention, it should be borne in mind that these are children who have not been charged with any offence. It is more likely that unaccompanied children will be at risk of having force used against them.
105. In the incident on Christmas Island discussed in Case Study 4 above, a key deficiency identified by the Commission in the planned use of force was that the organisation providing care and welfare services to unaccompanied children was not consulted prior to authorisation for the use of force being sought.

### **Recommendation 6**

106. The Commission recommends that new provisions be added after s 197BA(5) dealing with the limitations on the use of force in relation to children. The amendments in this recommendation assume that the amendments in recommendation 4 (dealing with limitations more generally) have been accepted. The new provisions should provide that an authorised officer must not exercise the power under subsection (1) to use force in relation to a minor unless:
- all alternatives to the use of force including negotiation and de-escalation techniques have been attempted and have failed;
  - where possible, the proposed use of force has been raised with the minor's parent or guardian and the parent or guardian has been given sufficient opportunity to both speak with the minor and to make submissions to the authorised officer about the use of force;
  - authorisation for the particular use of force has been sought and obtained from the director of the facility;
  - where it is not possible to discuss the proposed use of force with the minor's parent or guardian in advance, force is only used where there is an unacceptable risk of escape or immediate harm to the child or others.



## 10 Bar on proceedings

### 10.1 Summary

107. It is appropriate for immigration detention service providers to be authorised to use force where this is necessary and where the force used is reasonable in the circumstances.
108. The Commission agrees that if a person is authorised to use force then it is appropriate to provide that person with an immunity from civil or criminal proceedings, provided that the person was acting within the scope of what was authorised and was acting in good faith.
109. As noted above, Serco has recognised that there need to be strict limits on the obligations and powers of private sector detention centre operators in relation to the management and control of detention centres, particularly regarding the use of force.<sup>53</sup> These limits must be effective.
110. The ICCPR places an obligation on States Parties to provide an effective remedy to persons whose human rights are violated.<sup>54</sup> The UN Human Rights Committee has stated that in order to ensure that individuals have accessible and effective remedies, the ICCPR places on States Parties a 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.<sup>55</sup>
111. Following an effective investigation into allegations of breaches, article 2(3) of the ICCPR places an obligation on States Parties to prosecute those suspected of involvement in the breaches. The UN Human Rights Committee has stated that:
- Where the investigations ... reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.<sup>56</sup>
112. In the Commission's view, it is not appropriate for either immigration detention service providers or the Commonwealth to be given an immunity if an authorised officer's use of force is excessive. As set out above in the CO3 order that relates to the AFP, excessive force is force beyond that which is considered reasonably necessary in the circumstances of any particular incident including:
- any force when none is needed
  - more force than is needed
  - any force or level of force continuing after the necessity for it has ended
  - knowingly wrongful use of force.
113. The department in its Detention Services Manual defines 'excessive force' as 'force or restraint beyond that which is reasonably necessary in the

circumstances'.<sup>57</sup> The Manual provides that 'the excessive use of force and/or restraint is unlawful and must not occur in any circumstances' and that 'the use of excessive force on a person may constitute an assault'.<sup>58</sup>

114. Proposed s 197BF contains an immunity which prevents any criminal or civil proceedings being taken against an authorised officer (or any civil proceedings being taken against the Commonwealth) in relation to the use of force by an authorised officer under s 197BA, provided the power to use force was exercised in good faith.
115. Subsection 197BF(3) provides that the section is not intended to affect the jurisdiction of the High Court under s 75 of the Constitution. This does no more than recognise the limitations on privative clauses in general. The jurisdiction of the High Court under s 75 of the Constitution cannot be removed by statute.
116. In the Commission's view, s 197BF(1) does not currently make it sufficiently clear that there are two criteria to be satisfied in order for the immunity to be obtained:
  - a. the use of force by the authorised officer must not exceed what is authorised by s 197BA; and
  - b. the power to use of force must be exercised in good faith.
117. In order to ensure that the first of those criteria is made explicit, the Commission recommends an amendment to s 197BF.
118. Further, there does not appear to be any justification for providing a separate immunity to the Commonwealth. The justification given by the Government for providing an immunity to authorised officers is to remove any reluctance they may have to using reasonable force to the extent they are authorised to do so.<sup>59</sup> There does not appear to be any justification for providing an immunity that extends beyond the authorised officers who are exercising the relevant power.
119. The Commission notes that the Commonwealth is responsible for torts committed by AFP officers. Section 64B(1) of the AFP Act provides:

The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties as such a member or a protective service officer in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment, and shall, in respect of such a tort, be treated for all purposes as a joint tortfeasor with the member or the protective service officer.
120. Accordingly the Commission recommends an appropriate amendment to s 197BF(1) and that s 197BF(4) be deleted.

## **Recommendation 7**

121. The Commission recommends that:

(a) Section 197BF(1) be amended to read:

No proceedings may be instituted or continued in any court against an authorised officer in relation to an exercise of power under section 197BA if the power was exercised in good faith and the use of force did not exceed what was authorised by that section.

(b) Section 197BF(4) be deleted.

## **10.2 Ambiguity in the Explanatory Memorandum**

122. The Commission considers that this amendment is necessary because both s 197BF(1) and the Explanatory Memorandum are unclear about how the bar on proceedings will operate in practice.

123. The Explanatory Memorandum focuses on the requirement that the use of force must be exercised in good faith, but gives insufficient consideration to the requirement that the use of force must not be excessive.

124. Relevantly, the Explanatory Memorandum states:

Under new section 197BF, an authorised officer will only have protection from criminal and civil action if the power to use force was exercised in good faith. ... To decide whether it has jurisdiction, the court would need to consider whether the authorised officer acted in good faith in the use of force. If the court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer. This ensures that excessive and inappropriate force is not condoned and that authorised officers, who act in bad faith in the exercise of the new powers, will face appropriate charges. In particular, this would not prevent the institution of criminal proceedings against an authorised officer for the use of force which is not authorised by proposed section 197BA and is not in good faith.

125. Within this passage, it appears that there is an intention to achieve the result that 'excessive and inappropriate force is not condoned'. The Commission agrees that this should be the aim of the section.

126. However, the language in the rest of the paragraph is loose. For example, in determining the initial jurisdictional question, the Explanatory Memorandum says: 'If the court decides that the authorised officer did not act in good faith, the court would have jurisdiction to consider the action brought against the authorised officer'. What should be made clear is that the court would also have jurisdiction to consider the action if the degree of force used was excessive or inappropriate, regardless of whether or not the officer acted in good faith.

127. Similarly, the final sentence in the extract above provides that the section 'would not prevent the institution of criminal proceedings against an authorised

officer for the use of force which is not authorised by proposed section 197BA and is not in good faith'. What should be made clear is that if the degree of force used was excessive or inappropriate then criminal proceedings should be able to be instituted even if the power was exercised in good faith.

### **10.3 Immunity for use of force elsewhere in the Migration Act**

128. The amendment proposed by the Commission is consistent with the way in which similarly immunities in relation to the use of force are provided for in other parts of the Migration Act.
129. For example:
- a. immunity for the use of force in boarding and searching certain aircraft is available 'if the officer or person who took the action acted in good faith **and** used no more force than was authorised',<sup>60</sup>
  - b. a person authorised to conduct a search of a person on certain ships and aircraft has an immunity 'if the person acts in good faith **and** does not contravene' the requirement that the person 'must not use more force, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search',<sup>61</sup>
  - c. a person who, at the request of an authorised officer, assists in conducting a strip search of a detainee held in immigration detention at a prison or remand centre has an immunity 'if the person acts in good faith **and** does not contravene' a number of requirements including that the strip search 'must not be conducted with greater force than is reasonably necessary'.<sup>62</sup>

### **10.4 'Good faith' insufficient**

130. It would be unduly prohibitive to have to demonstrate a breach of good faith in order to bring proceedings in relation to the exercise of power under s 197BF, if the use of force was excessive.
131. Justice Gyles in the Federal Court has said that 'bad faith cannot be constituted by recklessness in the sense of negligence, no matter how gross the negligence'.<sup>63</sup> Bad faith requires proof of the actual state of mind of a defendant.<sup>64</sup> It will often be crucial to establish that the person acted dishonestly and in order to achieve some end which was not provided for by the statute.<sup>65</sup>
132. The ability of a detainee to prove the state of mind of an employee of an immigration detention service provider in circumstances where excessive force was used will be extremely limited.

## 11 Investigation of complaints about the use of force

133. The Attorney-General's Department has emphasised that if persons other than police officers are granted coercive powers under Commonwealth legislation, there must be proper accountability for the exercise of those powers.<sup>66</sup>
134. This requirement is not satisfied by provision for internal review of complaints in proposed ss 197BB-197BE. The proposed internal review is unstructured and broad discretions are given not to conduct a review. In particular:
- a. an investigation is to be conducted in any way the Secretary thinks appropriate;<sup>67</sup>
  - b. the Secretary may decide not to investigate a complaint if the Secretary is satisfied that the investigation 'is not justified in all the circumstances';<sup>68</sup>
  - c. there is no time frame within which the Secretary is required to decide whether or not to investigate a complaint;
  - d. if the Secretary decides not to investigate a complaint for any of the reasons in s 197BD(1), this decision is a 'privative clause decision' and is therefore not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>69</sup>
135. The internal review provides few additional substantive rights for those who are subject to the use of force.
136. The Commission considers that any internal review of complaints about the use of force under s 197BA should be subject to at least the same degree of independent oversight as use of force by the AFP.
137. The AFP has an internal system for investigating complaints about 'AFP conduct issues' and 'AFP practice issues'. An AFP conduct issue is an issue of whether an AFP appointee has engaged in conduct that contravenes the AFP professional standards or engaged in corrupt conduct.<sup>70</sup> There are four categories of conduct in increasing levels of seriousness. Category 3 conduct:<sup>71</sup>
- a. is serious misconduct by an AFP appointee; or
  - b. raises the question whether termination action should be taken in relation to an AFP appointee; or
  - c. involves a breach of the criminal law, or serious neglect of duty, by an AFP appointee.
138. Complaints of excessive use of force are investigated as category 3 conduct.<sup>72</sup>
139. The AFP is required to establish a specialised unit to investigate complaints of category 3 conduct issues and corruption issues (category 4).<sup>73</sup> This unit is called AFP Professional Standards. The head of that unit must notify the Ombudsman when the AFP receives a complaint about category 3 conduct.<sup>74</sup>

140. The Ombudsman has powers under Part V, Division 7 of the AFP Act to inspect the records of AFP conduct issues for the purpose of reviewing the administration of the AFP's internal review processes for dealing with complaints.<sup>75</sup> The Ombudsman must conduct an annual review and prepare a report about the comprehensiveness and adequacy of these internal processes.<sup>76</sup> This report is tabled in Parliament. The Ombudsman may also conduct ad hoc reviews at any time.<sup>77</sup>
141. The Commission recommends that at least an equivalent degree of oversight be provided of the internal review process conducted by the Secretary to investigate complaints of breaches of s 197BA.

### **Recommendation 8**

142. The Commission recommends that a new subsection be added after s 197BB(4) in the following form:

The Secretary must notify the Ombudsman in writing of the receipt of the complaint.

### **Recommendation 9**

143. The Commission recommends that the Commonwealth Ombudsman be given the power and necessary resources to review the administration of the Secretary's investigation of complaints under s 197BC as required and to report to Parliament on an annual basis about the comprehensiveness and adequacy of the processes used by the Secretary.

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<sup>1</sup> Allen Hawke and Helen Williams, *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, 31 August 2011 (Hawke-Williams Report), p 79. At <https://www.immi.gov.au/media/publications/independent-review-incident.htm> (viewed 18 March 2015).

<sup>2</sup> Hawke-Williams Report, p 81.

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, p 1 (The Hon Peter Dutton MP, Minister for Immigration and Border Protection).

<sup>4</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, p 1 (The Hon Peter Dutton MP, Minister for Immigration and Border Protection).

<sup>5</sup> Hawke-Williams Report, pp 104-105.

<sup>6</sup> Serco, *Submission by Serco Australia to the Joint Select Committee on Australia's Immigration Detention Centre Network*, August 2011. At <http://www.aph.gov.au/DocumentStore.ashx?id=a7f17e25-d2e4-41e4-8b97-9d4de18ce98c> (viewed 18 March 2015).

<sup>7</sup> Minister for Immigration and Citizenship, *Response to the Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, 2011. At <https://www.immi.gov.au/media/publications/pdf/2011/response-independent-review-incident-christmas-island-and-villawood-full.pdf> (viewed 18 March 2015).

<sup>8</sup> Department of Immigration and Citizenship, *Report on the Implementation of the Recommendations of the Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and the Villawood Immigration Detention Centre*, September 2012, pp 6-7. At <https://www.immi.gov.au/media/publications/pdf/2012/report-implementation-independent-review-incident-christmas-island-villawood.pdf> (viewed 18 March 2015).

- <sup>9</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) (AGD Guide), see in particular *Ch 7 – Coercive Powers Generally* and *Ch 10 – Other Types of Coercive Powers*. At <http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (viewed 18 March 2015).
- <sup>10</sup> AGD Guide, p 69.
- <sup>11</sup> AGD Guide, p 73.
- <sup>12</sup> AGD Guide, p 74.
- <sup>13</sup> ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).
- <sup>14</sup> UN Human Rights Committee, *Jensen v Australia*, Communication No. 762/1997, UN Doc CCPR/C/71/D/762/1997 (2001) at [6.2].
- <sup>15</sup> The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1. At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx> (viewed 18 March 2015).
- <sup>16</sup> The Body of Principles were adopted by the UN General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988). At <http://www.un.org/documents/ga/res/43/a43r173.htm> (viewed 18 March 2015).
- <sup>17</sup> UN Human Rights Committee, *General Comment 21 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty)* (10 April 1992) at [5].
- <sup>18</sup> UN Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3]; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3]. See also, UN Human Rights Committee, *Concluding Observations on the United States*, UN Doc A/50/40 (3 October 1995) at [285] and [299].
- <sup>19</sup> UN Human Rights Committee, *Wilson v Philippines*, Communication No. 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003) at [7.3].
- <sup>20</sup> UN Human Rights Committee, *Cabal and Bertran v Australia*, Communication No. 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (2003) at [7.2].
- <sup>21</sup> Australian Human Rights Commission, *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention* [2006] AusHRC 35. At <http://www.humanrights.gov.au/publications/hreoc-report-no-35> (viewed 18 March 2015).
- <sup>22</sup> CRC, opened for signature 20 November 1989, [1991] ATS 4 (entered into force generally on 2 September 1990; entered into force for Australia on 16 January 1991).
- <sup>23</sup> The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* were adopted by the UN General Assembly in resolution 45/113 of 14 December 1990, UN Doc A/RES/45/113 (1990), Annex. At <http://www.un.org/documents/ga/res/45/a45r113.htm> (viewed 18 March 2015).
- <sup>24</sup> JDL Rules, rule 64.
- <sup>25</sup> UN Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice* (25 April 2007), UN Doc CRC/C/GC/10 at [89]. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en) (viewed 24 March 2015).
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- <sup>27</sup> Australian Human Rights Commission, *Yousefi family v Commonwealth* [2011] AusHRC 46. At <http://www.humanrights.gov.au/publications/aushrc-46-yousefi-family-v-commonwealth-australia> (viewed 27 March 2015).
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- <sup>29</sup> AFP Act, s 40.

- <sup>30</sup> Migration Act, s 5(1) definition of ‘detain’ and s 252B(1)(k).
- <sup>31</sup> Migration Act, ss 198AD(3)(d), 198B(2)(d), 245F(10), 268CH and 487J.
- <sup>32</sup> Migration Act, s 249(1).
- <sup>33</sup> Migration Act, s 251(8).
- <sup>34</sup> Department of Immigration and Border Protection, *Procedures Advice Manual 3: Detention Services Manual: Chapter 8 – Safety and security: Use of reasonable force in immigration detention*, section 4.
- <sup>35</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), at [29].
- <sup>36</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), at [43].
- <sup>37</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), at [50].
- <sup>38</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), Attachment A: Statement of Compatibility with Human Rights, pp 20-21.
- <sup>39</sup> Human Rights Committee, *General Comment 6, Article 6: The Right to Life* (1982), UN Doc HRI/GEN/1/Rev.1 at 6 (1994), [5]. At <http://www.refworld.org/docid/45388400a.html> (viewed 30 March 2015).
- <sup>40</sup> UN Human Rights Committee, *Barbato v Uruguay*, Communication No. 84/1981, UN Doc CCPR/C/OP/ at 112 (1990), paras [9.2] and [10(a)]. At [http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/124\\_uruguay84\\_vws](http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/node/4/filename/124_uruguay84_vws) (viewed 30 March 2015). See also P H van Kempen, ‘Positive Obligations to Ensure the Human Rights of Prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR and the AfChHPR’ in P J P Tak and M Jendly (eds), *Prisoners Policy and Prisoners Rights: Protection of Fundamental Rights of Prisoners in International and Domestic Law* (2008), p 26.
- <sup>41</sup> Human Rights Committee, *General Comment 6, Article 6: The Right to Life* (1982), UN Doc HRI/GEN/1/Rev.1 at 6 (1994), [3].
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- <sup>43</sup> Department of Immigration and Border Protection, *Procedures Advice Manual 3: Detention Services Manual: Chapter 8 – Safety and security: Use of reasonable force in immigration detention*, section 2.
- <sup>44</sup> Migration Act, ss 258F and 261AF.
- <sup>45</sup> AFP Act, ss 37 and 38.
- <sup>46</sup> AFP Act, s 40.
- <sup>47</sup> A copy of CO3 dated 1 June 2012 is available on the AFP’s website. Australian Federal Police, *The AFP Commissioner’s Order on operational safety (CO3)* (1 June 2012). At <http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/ips/publication-list/afp%20commissioners%20order%20on%20operational%20safety%20co3.pdf> (viewed 20 March 2015).
- <sup>48</sup> Australian Human Rights Commission, *The Forgotten Children*, National Inquiry into Children in Immigration Detention (2014), pp 160-165. At <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children> (viewed 18 March 2015).
- <sup>49</sup> Migration Act, s 4AA.
- <sup>50</sup> Serco, *Working with Minors policy and procedure manual*, pp 17-18, Attachment 9 to Serco’s Submission to the Joint Select Committee on Australia’s Immigration Detention Centre Network, August 2011. At <http://www.aph.gov.au/DocumentStore.ashx?id=62e51324-ff0a-4002-90b7-7fb8e46f0b7a> (viewed 23 March 2015).
- <sup>51</sup> Department of Immigration and Border Protection, *Procedures Advice Manual 3: Detention Services Manual: Chapter 8 – Safety and security: Use of reasonable force in immigration detention*, section 6.
- <sup>52</sup> Australasian Juvenile Justice Administrators, *Juvenile Justice Standards 2009*. At <http://sharepoint.ajja.org.au/Home/default.aspx> (viewed 7 April 2015). The AJJA is a sub-group of the Children, Youth and Community Services Policy Research Working Group which is a standing committee of the Standing Council on Community and Disability Services Advisory Council.



- <sup>53</sup> Serco, *Submission by Serco Australia to the Joint Select Committee on Australia's Immigration Detention Centre Network*, August 2011, p 37.
- <sup>54</sup> ICCPR, 1966, art 2(3).
- <sup>55</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para [15]. At <http://www.refworld.org/docid/478b26ae2.html> (viewed 26 March 2015).
- <sup>56</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para [18]. At <http://www.refworld.org/docid/478b26ae2.html> (viewed 26 March 2015).
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- <sup>58</sup> Department of Immigration and Border Protection, *Procedures Advice Manual 3: Detention Services Manual: Chapter 8 – Safety and security: Use of reasonable force in immigration detention*, section 2.
- <sup>59</sup> Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), at [97].
- <sup>60</sup> Migration Act, s 245F(9B).
- <sup>61</sup> Migration Act, ss 245FA(6) and (7). See also Migration Act, ss 252(7) and (8) which are in substantially the same terms.
- <sup>62</sup> Migration Act, ss 252B(1)(k) and (6).
- <sup>63</sup> *NKAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210.
- <sup>64</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v NAOS of 2002* [2003] FCAFC 142 at [19]-[22].
- <sup>65</sup> *SBAP v Refugee Review Tribunal* [2002] FCA 590 at [49] (Heerey J).
- <sup>66</sup> AGD Guide, p 74.
- <sup>67</sup> Bill, s 197BC(2).
- <sup>68</sup> Bill, s 197BD(1)(d).
- <sup>69</sup> Migration Act, s 474(2); *Administrative Decisions (Judicial Review) Act 1977* (Cth), Sch 1, cl (da).
- <sup>70</sup> AFP Act, s 40RH(1).
- <sup>71</sup> AFP Act, s 40RP.
- <sup>72</sup> Commonwealth Ombudsman, *Report on the Commonwealth Ombudsman's activities under Part V of the Australian Federal Police Act 1979 for the period 1 July 2013 to 30 June 2014* (February 2015), p 5. At [http://www.ombudsman.gov.au/files/activities\\_under\\_part\\_v\\_08.pdf](http://www.ombudsman.gov.au/files/activities_under_part_v_08.pdf) (viewed 30 March 2015).
- <sup>73</sup> AFP Act, s 40RD.
- <sup>74</sup> AFP Act, s 40TM.
- <sup>75</sup> AFP Act, s 40XA(2).
- <sup>76</sup> AFP Act, s 40XD.
- <sup>77</sup> AFP Act, s 40XB.