SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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

Joint Submission of the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service

Contents

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

The Department of Immigration and Border Protection ('the Department') and the Australian Customs and Border Protection Service ('ACBPS') welcome the opportunity to provide a joint submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 ('the Bill'), following the introduction of the Bill into the House of Representatives on 25 February 2015.

Detailed information on the specific provisions within the Bill is included in the Explanatory Memorandum to the Bill. This submission provides additional information to the Bill.

1. Purpose of the Bill

The Government considers that safe and effective immigration detention policies and strong border security measures are not incompatible.

The Bill will confer powers on authorised officers to use such reasonable force against any person to protect the life, health or safety of any person in an Immigration Detention Facility ('IDF') and maintain the peace, good order or security of that facility.

The purpose of this Bill is to strike a balance between:

- maintaining the good order, peace and security of an IDF and the safety of the people within it; with
- the need to ensure that any use of force within that facility is reasonable, proportionate and appropriate.

The Bill is a response to certain recommendations from the *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre* ('the Hawke-Williams Report'), conducted by Dr Allan Hawke AC and Ms Helen Williams AO in 2011. The review recommended the Department articulate more clearly the responsibility for public order management in IDFs between the Department, the Immigration Detention Services Provider ('IDSP') and any attending police services.

The presence of a number of high risk detainees with behavioural challenges in immigration detention has the potential to jeopardise the safety, good order and security of IDFs and the safety of all persons within those facilities. Recently, some detainees have demonstrated a willingness to deliberately disrupt operations at a facility and an unwillingness to follow community standards. Recent high profile escapes, incidents of violence, allegations of abuse and disturbances have highlighted a noticeable shift in risks within the immigration detention environment. As more detainees with poor behaviour and/or criminal intent enter the network, the risk to the peace, good order or security within the immigration detention network has increased. This increased risk poses a threat to the life, health or safety of all in an IDF.

Those detainees who present heightened risks include:

- a number of people subject to adverse security assessments, including a small number who may be open to radicalisation;
- people who have been convicted of drug or other serious criminal offences; and
- others deemed to be of a high security risk, such as members of outlaw motorcycle gangs.

Public order or disruptive disturbances can, and do, escalate rapidly. This escalation has led to significant property damage being caused to facilities and, importantly, serious injury to detainees and staff. Under these circumstances, the ability for an officer to use reasonable force to prevent detainees from causing harm to people or damage to property in an IDF, or from threatening the peace, good order or security of the facility, has been limited.

The threat of a large scale riot or other disturbance escalating out of control is a real possibility in some IDFs. The availability of the local police service to respond to a request for assistance cannot be guaranteed, placing detainees and others within the facility at potential risk of harm should the response to the situation be delayed. This is particularly so in remote locations.

The responsibility for providing good order management during critical incidents is a significant issue for the Department and the IDSP. It is vital that authorised officers have the clear power and authority to take necessary and proportionate measures to restore public order in detention centres. Successive IDSPs providers have expressed reluctance to use reasonable force to protect the life, health or safety of people in IDF to maintain the good order, peace or security of those facilities, in the absence of legislation that specifically authorise them to use such force.

1.1 Reliance on the common law

Without the amendments to the *Migration Act 1958* ('the Act') that are proposed by the Bill, the IDSP will continue to rely on common law. The ongoing reliance on State and Federal police forces to be the "first responders" to critical or major public order disturbances within IDFs carries a number of risks to the safety of detainees, staff and the overall security of the facility.

The Bill will clarify and strengthen the current arrangements under which officers exercise use of reasonable force when dealing with public order disturbances in an IDF. The Bill and its associated procedures and training will provide staff in IDFs with certainty as to when use of reasonable force may be exercised to deal with public order disturbances and general management of the immigration detention environment.

Currently, officers employed by the IDSP have the same common law powers as private citizens to deal with public order disturbances. The common law recognises that any citizen can lawfully take reasonable steps to:

- prevent actual or apprehended breach of the peace;
- perform arrests of suspected offenders in certain circumstances; and
- use reasonable force where they have a reasonable belief that there is a direct threat to the physical safety of themselves or another.

Continued reliance on common law is undesirable as the law varies from jurisdiction to jurisdiction – particularly in relation to use of force in defence of property. It is only possible after the event to say whether the force used was reasonable in the circumstances. In practical terms, this means

employees cannot at the time they act be sure their actions will be seen by the courts as within the law. In assessing whether an employee of the IDSP lawfully used force to contain a disturbance in an IDF, the courts would determine whether that person lawfully used force by looking at what was objectively reasonable in the circumstances. Employees in this work environment require greater protection at law.

Common law principles are problematic for managing large public order disturbances in an immigration detention facility, such as riots. In addition, given the changed demography of an immigration detention facility, from a practical standpoint, the common law powers are not sufficient for the day to day management of an immigration detention environment (such as transporting a detainee within an immigration detention facility) and do not provide the certainty desirable for maintaining a safe and secure facility.

Consistent with the recommendations in the Hawke-Williams Report, the Bill provides clear and specific powers for the use of reasonable force in IDFs. The amendments in the Bill clarify the current powers under the common law for dealing with public order disturbances and management of detainees in immigration detention facilities. The Bill will:

- provide certainty for the use of reasonable force in immigration detention facilities;
- provide certainty for the roles of authorised officers and relevant police forces; and
- allow the courts to focus on the authorised officer's personal assessment of the situation as well as examine objectively whether the force used was reasonable from the perspective of the authorised officer.

2. Content of the Bill

2.1 The need to use reasonable force

The Bill will amend the Act to provide for an authorised officer to use such reasonable force against any person or thing, as the authorised officer reasonably believes is necessary to:

- protect the life, health or safety of any person (including the authorised officer) in an IDF; or
- maintain the good order, peace or security of an IDF.

In practice, this provision could provide for an authorised officer to use reasonable force in the following circumstances:

- isolate incidents and prevent the spread of violence within the facility;
- protect key areas within the facility;
- secure evacuation routes;
- facilitate the safe removal of staff and vulnerable detainees;
- prevent and contain attempts to breach the facility's security perimeters;
- protect evidence that may be handed over to police for investigation;
- protect service provider and emergency services personnel;
- remove non-compliant detainees from defined areas within a facility; and
- remove any detainees who resist lawful directions to cease disruptive behaviour.

2.2 Safeguards on the use of reasonable force

The Department will have in place policies and procedures reflected in the IDSP contract on the use of reasonable force in an IDF. These safeguards will ensure that the use of force:

- will be used only as a measure of last resort;
- must only be used for the shortest amount of time possible;
- must not include cruel, inhuman or degrading treatment; and
- must not be used for the purposes of punishment.

Conflict resolution (negotiation and de-escalation) must be considered and used before the use of force, wherever practicable. In practice, and wherever possible, de-escalating through engagement and negotiation will be the first response to maintain operational safety.

Extensive guidance for authorised officers is contained in policy and procedural documentation to ensure that a broad range of details and scenarios are canvassed in a format that is easily understood and accessed by operational staff. This guidance is also referenced in the IDSP contract.

All policy and procedural guidelines will be contained in the Department's Detention Services Manual and the Detention Operational Procedures. These documents are stored electronically in the Department's centralised departmental instructions system ('CDIS') and in the Department's publicly available online subscription database ('LEGEND'). The IDSP incorporates these policies in their Policy and Procedure Manuals that are also approved by the Department.

Complementary training will be compulsory for authorised officers and is discussed in more detail later.

2.3 Limitations on the exercise of reasonable force

The Bill provides that an authorised officer may use such **reasonable** force against any person or thing, as the authorised officer **reasonably** believes is necessary, in the circumstances specified. So both the use of force must be reasonable and the authorised officer's belief (that it is necessary to use such force) must be reasonable.

The Bill confers specific and limited powers on authorised officers to use reasonable force to protect the life, health and safety of any person in an IDF. The Bill does not provide authorised officers with the same powers afforded police officers. Departmental instructions, policies and procedures will provide extensive guidance and examples of what is considered reasonable.

All planned use of reasonable force in an IDF must be authorised by the Department Regional Manager ('RM'), or in certain circumstances, by the Director, Detention Operations, within an IDF.

When unplanned use of reasonable force is necessary (an immediate response to an incident), the IDSP will notify the Department of the actions taken to resolve the incident and, consistent with contractual requirements, comply with all reporting and post incident review requirements.

The Bill provides that an authorised officer **must not**:

- use reasonable force to administer **nourishment or fluids** to a detainee in an IDF. The Bill recognises that it is the role of qualified medical practitioners who can assess an individual's medical needs;
- subject a person to greater **indignity** than the authorised officer reasonably believes is necessary in the circumstances – this is to ensure that when an authorised officer uses force, it is not only reasonable, but also promotes respect for the inherent dignity of the individual; and
- do anything likely to cause a person **grievous bodily harm** unless the authorised officer reasonably believes that it is necessary to protect the life of, or to prevent serious injury to, another person (including themselves).

There are only very exceptional and extreme circumstances in which the use of force in an IDF should extend to the infliction of grievous bodily harm. For example, although it is unlikely, a situation could arise where a detainee is able to obtain a weapon and hold a hostage. In this situation an authorised officer may need to use sufficient reasonable force that causes, or is likely to cause, grievous bodily harm to the detainee should a physical confrontation be necessary.

2.4 Governance arrangements

Governance arrangements regarding the use of reasonable force in an IDF will be established through consultation with the Australian Federal Police ('AFP') and the Australian Border Force ('ABF') and will include:

- a review of existing policy instructions and administrative arrangements to ensure decisions to use reasonable force are appropriate;
- revising the protocols between the Department, the IDSP, the AFP and State/Territory police services, including memoranda of understanding to reflect the changes proposed in this Bill;
- monitoring specific capability and training standards to ensure that they continue to be the appropriate qualifications to enable authorised officers to use reasonable force within an IDF;
- the use of rigorous incident reporting mechanisms for reporting of all instances where reasonable force is used - all instances where use of reasonable force and/or restraint are applied (including any follow-up action), must be reported to the Department and a post-incident analysis must be undertaken;
- any planned use of reasonable force must involve a risk-management assessment undertaken in accordance with established procedures and approval processes. Following the risk assessment, consultation must occur with relevant health providers to ensure that there are no medical impediments to the planned use of reasonable force.; and
- the detainee must be referred for medical review, as soon as practicable, following the use of reasonable force.

2.5 Reporting and recording requirements

Workers are required under work health and safety law to report all incidents that they are involved in or witness. Any instance of any use of reasonable force or restraint must be reported pursuant to section 28 of the *Work Health and Safety Act 2011*.

In addition, current contractual obligations require the IDSP to:

- gain prior approval from the departmental regional manager for planned use of reasonable force;
- video record the entire event when planned use of reasonable force is applied, retain these recordings in accordance with the *Archives Act 1983* and make them available to the Department within 24 hours of being requested;
- inform the Department immediately (no later than 60 minutes) on becoming aware of an instance of the unplanned use of reasonable force;
- provide a written incident report for review by the Department within six (6) hours of the Department being informed verbally;
- internally audit 100 per cent of such incidents to continuously improve the IDSP's response to incidents; and
- record the incident report in the Department's IT portal.

Note that in addition to all planned use of reasonable force being video recorded digitally, where practicable, unplanned use of force will also be recorded digitally and CCTV recordings will be examined as a matter of course.

2.6 Training and qualification requirements

Authorised officers will meet minimum standards in training and qualification requirements. A person cannot be an authorised officer for the purposes of section 197BA unless he or she satisfies the training and qualification requirements determined by the Minister in writing.

The Department currently expects and has stipulated in the IDSP contract that all officers, who manage security at an IDF, will hold at least a Certificate Level IV in Security Operations or Technical Security or equivalent and will have acquired at least five years of experience in managing security.

For authorised officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent or obtain a Certificate Level II in Security Operations within six months of commencement. The Department requires that:

- the successful completion of the IDSP's mandatory induction training leads to staff being awarded the Certificate II in Security Operations; and
- no officer will be placed in an IDF without this essential qualification.

The Certificate II in Security Operations includes the competency based unit '**CPPSEC2004B – Respond to security risks situations**', the curriculum of which covers the knowledge and skills required for an authorised officer to use reasonable force. Security accreditation must be provided by a Registered Training Organisation and be delivered by a Level IV accredited trainer. The current IDSP is a Registered Training Organisation.

Tier 1 and Tier 2 IDSP officers are also trained in '**CPPSEC2017A – Protect Self and Others using Basic Defensive Techniques'** , which is included as part of the required refresher training. Competency requires demonstration of an ability to:

- apply basic defensive techniques in a security risk situation; and
- use basic lawful defensive techniques to protect the safety of the individual and others.

This training forms part of the licensing requirements for persons engaged in security operations in those States and Territories where these are regulated activities. This training, while not formally equivalent to police training, it is similar to police and corrections training in so far as it includes control holds and other defensive measures, but training in strikes or use of impact tools is not required nor provided.

The IDSP contract requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force. In addition, all authorised officers will attend regular refresher training on the use of reasonable force in IDF, the curriculum of which includes:

- legal responsibilities;
- duty of care and human rights;
- cultural awareness;
- occupational health and safety;
- mental health awareness;
- managing conflict through negotiation; and
- de-escalation techniques.

Any individual who is appointed as an authorised officer for the purposes of the provisions of this Bill must satisfy the minimum training and qualification requirements that will be determined by the Minister. This will apply whether they are contracted staff, departmental staff, or any other person appointed as an authorised officer.

Currently, departmental officers, who are required to manage the IDSP contract, receive training to oversee the IDSP, including the use of reasonable force. Departmental officers must ensure any such use of force is applied strictly in accordance with established policy, procedures and contractual obligations.

The IDSP is contractually required to regularly report to the Department on the officers who are qualified and authorised to use reasonable force. A complete record of all staff having received training in the use of reasonable force, including the use of restraints, is maintained by the IDSP. The IDSP submits reports based on these records to the Department each quarter.

2.7 Overseeing the integrity and management of immigration detention services

On 10 November 2014, the then Minister for Immigration and Border Protection established the Detention Assurance Team ('DAT') within the Department with the intention of strengthening assurance around the integrity and management of immigration detention services. Operating independently, the DAT is designed to:

- provide advice to the Secretary of the Department and the CEO of the Australian Customs and Border Protection Service on assurance around the management and performance of the IDSP;

- undertake investigations and support commissioned inquiries into allegations of incidents in the onshore and offshore detention network, including investigation of inappropriate behaviour by staff of the IDSP;
- monitor recommendations for improvement in detention contractor management processes and provide assurance that they are implemented and their effectiveness reviewed;
- audit the effectiveness of contract and other detention service performance measures;
- ensure the effectiveness of integrity and other risk controls;
- review detention practices for compliance against international conventions, and
- identify trends and emerging issues in detention contract management and recommend strategies for improvement.

Although actions by IDSP officers of a criminal nature, such as allegations of assault, will be the responsibility of the relevant police force to investigate, the DAT may review incidents that are investigated by the police, so as to identify improvements to the departmental and IDSP governance controls.

The Department may, at its absolute discretion, give notice requiring the IDSP to remove any service provider personnel from work in respect of the services provided under contract. The IDSP must promptly arrange for the removal of such personnel and their replacement with personnel acceptable to the Department, at no additional cost to the Department.

2.8 Making a complaint

The Bill will provide for a statutory complaints mechanism. The complaints mechanism will allow a person to make a complaint to the Secretary about an authorised officer's exercise of power under the provisions of this Bill. The proposed new section 197BB of the Bill is predominantly a procedural measure for complaints to the Secretary about an authorised officer's exercise of power under section 197BA.

The Bill will require the Secretary to provide appropriate assistance to a person who wishes to make a complaint and requires assistance to formulate the complaint. Should a person not feel comfortable with this complaints process, they may choose to use an alternative complaint mechanism. For example, detainees can complain directly to the Australian Human Rights Commission, the Red Cross, the office of the Commonwealth Ombudsman, elected representatives, police, state welfare agencies, community groups and advocacy groups or ask that body to advocate on their behalf.

The complainant may also seek the assistance of the relevant police force if he or she considers that the use of force may have been unauthorised and, therefore, criminal.

The Department has a well-established recording, tracking and management process for feedback and complaints, based on the Australian standards for complaint management. A report[1] released by the Commonwealth Ombudsman in October 2014 highlights the Department's approach to complaint management. The following extract from the report emphasises the Department's ongoing commitment to complaints management within a highly complex environment:

> *"The importance of integrating a complaints culture into program delivery continues even when delivery is undertaken by a third party. The following case study uses the Department*

[1] Complaint management by government agencies – An investigation into the management of complaints by Commonwealth and ACT Government http://www.ombudsman.gov.au/reports/investigation/2014.

of Immigration and Border Protection's (DIBP) management of onshore immigration detention facilities as an example of a complex contractual framework that governs a vulnerable population subject to a high degree of government intervention in their day-to-day lives. Because the government is strongly present in the way detainees live, it is important that there is a way for them to effectively complain about government action.

However, DIBP does not itself deliver detention services which may be the subject of complaint. This complexity results in a useful case study to illustrate the risks, challenges, and potential solutions in providing an effective complaint system through contractors, and we have used DIBP as an example in several case studies in this report."

Case Study – fostering culture in a contractor

"DIBP considers that it is important for a contractor to be aware of, and adhere to, the Department's culture and values; in particular, the value that DIBP places on complaints. The DIBP statement on complaints is set out in the Client Feedback Policy, and is a strong statement of commitment to client feedback. Part of ensuring an effective complaints system in this context is aligning the contractor and the agency culture.

In order to emphasise the importance of complaint management, the requirement to have a complaint system is set out in the contract for the provision of detention services. This requirement is monitored under the performance monitoring framework. As well as expressly requiring a complaints system in the contract, DIBP considers that working together in partnership is essential to aligning culture and values, and to successfully deliver the services.

In DIBP's experience, it may also be necessary to assist the contractor with setting up a best practice complaint system in the first instance. DIBP has had many years of operating complex review and complaint systems, and has found it sensible to be proactive and share that expertise in order to ensure that the contractor can then fulfil their obligations under the contract."

2.9 Investigation of a complaint

On receiving a complaint about the use of force in an IDF, the Secretary of the Department will either:

- investigate the complaint (subject to limited circumstances, the Secretary must generally investigate a complaint);
- decide not to investigate the complaint in certain circumstances;
- refer or transfer the complaint to the Commonwealth Ombudsman; or
- transfer the complaint to the Commissioner of the AFP, or the Commissioner or head of the police force of the relevant State or Territory.

2.9.1 Investigation by the Secretary

If the Secretary decides to conduct an investigation into the complaint, it may be conducted in any way the Secretary thinks is appropriate. Subsection 496(2) of the Act permits the Secretary to delegate to another person his power to undertake an investigation. The Secretary will expect such an investigation to be conducted to the highest administrative standards. Without pre-empting any decision of the Secretary, it is likely that such an investigation would be referred, in the first instance, to the DAT for appropriate action.

2.9.2 Decision not investigate

The Secretary may decide not to investigate or continue to investigate a complaint, but only if satisfied that:

- the same or substantially similar complaint has been made already – and it has been dealt with or is still being dealt with;
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;
- the complainant does not have sufficient interest in the subject matter of the complaint – it would be expected that in most cases the complainant is the person who was the subject of the use of force, or a witness; or
- the investigation, or further investigation, is not justified in all the circumstances.

The complainant will be advised in writing of the Secretary's reasons for the decision not to investigate a complaint.

2.9.3 Refer or transfer the complaint to the Commonwealth Ombudsman

The Secretary may elect to refer or transfer the complaint to the Commonwealth Ombudsman.

After completing an investigation into a complaint the Secretary may consider it to be appropriate to refer the matter to the Ombudsman. This may in particular be relevant if there are additional or related issues that have been raised in the complaint, beyond the complainant's concern about the use of force.

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the Ombudsman, the matter may be transferred accordingly. The Ombudsman will then be able to investigate the complaint as if the complaint had been made directly to the Ombudsman. The complainant will be notified in writing if their complaint is referred or transferred.

The Department and the Ombudsman's Office will work closely to develop protocols for these arrangements.

2.9.4 Transfer the complaint to the police

If the Secretary decides that the investigation of a complaint could be more conveniently or effectively dealt with by the relevant police force, the matter may be referred accordingly.

The complainant will be notified in writing if their complaint it transferred.

The Department and the Commissioner of the AFP, or the Commissioner or head of the police force of the relevant State or Territory will work closely to develop protocols for these arrangements.

2.10 Rationale for proposed immunity from civil action

2.10.1 Section 197BF – bar on proceedings relating to immigration detention facilities How does it work?

Proposed new section 197BF is intended to place a partial bar on the institution or continuation of proceedings in any Australian court against the Commonwealth, in relation to the exercise of power under proposed section 197BA, where the power was exercised in good faith. This does not, and is not intended to, bar all possible proceedings against the Commonwealth.

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution. Similarly it is always the case that Federal, State or Territory police may institute a prosecution, for example for assault, notwithstanding this provision – it would be up to the Court to determine whether this provision has any application, depending on the particular circumstances.

Proposed section 197BF of the Migration Act contemplates that the Commonwealth will only have protection from criminal and civil action in all courts except the High Court if the powers are exercised in good faith.

As a threshold question, the court would need to consider the following matters to decide if it has jurisdiction:

- was the action complained about an exercise of power under proposed section 197BA?
- did the authorised officer act in good faith in the use of reasonable force under proposed section 197BA?

If the use of reasonable force was not an exercise of the power under proposed section 197BA, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued.

Similarly, if a court decides that the use of reasonable force was not to:

- protect the life, health or safety of any person (including the authorised officer) in an immigration detention facility; or
- maintain the good order, peace or security of an immigration detention facility;

then it is not captured by the partial bar in proposed section 197BF.

Further, if a 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.

2.10.2 Why is the bar necessary?

The policy intent of the partial bar in proposed section 197BF of the Bill is to provide assurance to authorised officers that they will not be the subject of legal proceedings for undertaking their duties in accordance with law.

Without proposed section 197BF, officers may be reluctant to use reasonable force to protect a person or to contain a disturbance in an IDF. Given the occurrence of public order disturbances in IDFs there is a real risk that this could result in the death or serious harm to a person in an IDF or major destruction of the IDF itself.

In the event of a disturbance in an IDF, authorised officers may be required to exercise powers, including reasonable force, to protect the life, health or safety of people in the IDF.

This is particularly relevant to IDFs that are in remote locations, including Christmas Island, where response times from the State, Territory or Australian Federal police may be prolonged.

In these circumstances authorised officers will be required to provide the first response, including responding pro-actively to prevent or deter incidents and undertaking more sustained management of incidents that threaten physical safety in an immigration detention facility.

It is the Government's view that this amendment strikes the balance between providing assurance to authorised officers that may be required to use reasonable force in certain

circumstances in the exercise of their duties as an employee and the need to ensure that the use of force is reasonable, proportionate and appropriate.

2.10.3 Remedies available to aggrieved persons

The bar on proceedings in proposed section 197BF of the Bill is limited as described above. The bar on proceedings will not result in aggrieved persons being unable to obtain an effective remedy. What an effective remedy is will depend upon the circumstances in each case.

Court proceedings

Proceedings are always available through judicial review by the High Court under section 75(v) of the Constitution and thus also section 39B of the Judiciary Act 1903. Similarly it is always the case that Federal, State or Territory police may institute a prosecution, for example for assault or other criminal conduct, notwithstanding proposed section 197BF of the Bill - it would be up to the Court to determine whether this provision has any application in the particular circumstances.

It is worth noting that the court will have the jurisdiction to consider the threshold issues of:

- whether or not the use of reasonable force was an exercise of power under section 197BA; and
- whether or not the power was exercised in good faith.

In circumstances where the use of reasonable force has been used in a manner that is not an exercise of the power under proposed section 197BA, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. Similarly, in circumstances where the use of reasonable force has been found not to have been exercised in good faith, then it is not captured by the partial bar in proposed section 197BF and court proceedings may be instituted or continued. In such cases it would be a matter for the court to decide upon an appropriate remedy or the Department may settle a claim.

Alternative remedy

In less serious circumstances, where the use of reasonable force has been found to be exercised in good faith and the person has not suffered an injury but there is some other failing, there may be circumstances in which it is appropriate for the Department to provide details to the aggrieved person of any proposed changes to policy or procedure that may result from the incident, as part of the follow up to that incident to demonstrate that a situation or circumstance has been addressed.

3. Comparable Legislation

The authority to apply reasonable force to a person by people who are not law enforcement officers arises in correctional facilities, mental health facilities, aged care facilities and the like. Each has its own set of circumstances to balance. Strict safeguards will apply to use of force in IDFs and will be spelled out in official departmental instructions, policies and procedures.

IDFs are unique in that they are the only large-scale Commonwealth facilities providing a detention environment. Similar provisions to those in this Bill can be found in the legislation of Australian States and Territories that governs other detention environments and deal with similar behavioural challenges as those faced in an IDF. In addition, international jurisdictions also have comparable powers, see:

Immigration and Asylum Act 1999 (UK) – section 146 – Use of force.

Immigration Act 2009 (NZ) – section 328 – Additional powers relating to detention by immigration officer.