

# Chapter 1

## Introduction

1.1 On 25 February 2015 the Hon Peter Dutton MP, Minister for Immigration and Border Protection, introduced the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the Bill) into the House of Representatives.<sup>1</sup>

1.2 On 5 March 2015, pursuant to a report of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 12 May 2015.<sup>2</sup>

### Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 7 April 2015. Details of the inquiry were also made available on the committee's website ([www.aph.gov.au/senate/legalcon](http://www.aph.gov.au/senate/legalcon)).

1.4 The committee received 187 submissions to the inquiry, including two confidential submissions. The list of submissions received is at Appendix 1. The committee held a public hearing on 16 April 2015 in Sydney. The witnesses who appeared at the public hearing are listed at Appendix 2, and additional information received by the committee at and following the hearing is at Appendix 3.

1.5 The committee thanks all those who assisted with its inquiry.

### Background to the Bill

1.6 In his Second Reading Speech to the House of Representatives on the Bill, Mr Dutton advised that the Bill sought to address uncertainties on the part of immigration service providers about their powers and responsibilities in relation to the use of force, which had arisen following incidents at a number of facilities.<sup>3</sup>

1.7 In the absence of any legislated provisions, staff at immigration detention facilities have until now been governed by the same common law principles as ordinary citizens in relation to the use of reasonable force when necessary for self-defence or the defence of others.

1.8 The minister referred to a report commissioned by the then government in 2011 in response to incidents which had occurred at two detention centres that year. The *Independent Review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, known as the 'Hawke-Williams report', recommended *inter alia* that the Department of Immigration

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1 House of Representatives, *Votes and Proceedings*, No.98, 25 February 2015, p. 1133.

2 *Journals of the Senate*, No.82, 5 March 2015, p. 2257.

3 The Hon Peter Dutton MP, *House of Representatives Hansard*, 25 February 2015, p. 1.

and Border Protection (the department) more clearly articulate the division of responsibility for public order management between the department, the Australian Federal Police (AFP) and immigration detention service providers (IDSP).<sup>4</sup>

1.9 In September 2012 the then government released a report on its implementation of the recommendations of the Hawke-Williams report. In relation to the above recommendation, the government reported that the department, the relevant IDSP (Serco) and law enforcement agencies were working together, along with state and territory police, to formalise and clearly articulate the respective roles and responsibilities of each in relation to public order and incident response.<sup>5</sup>

1.10 Meanwhile, in March 2012 Coalition members of the Joint Select Committee on Australia's Immigration Detention Network had recommended that the government seek advice on amendments to regulations under the *Migration Act 1958* (the Migration Act) 'to clarify the responsibilities and powers of persons who operate detention centres around the limits on their obligations and powers in relation to the use of force, to ensure the good order and control of immigration detention facilities'.<sup>6</sup> In November 2012 the then Labor government accepted that recommendation and undertook to seek advice to determine whether legislative change was needed.<sup>7</sup>

1.11 As part of the context to the Bill, Mr Dutton also outlined a change in the demography of the Australian facilities in recent years. The minister referred to '[t]he presence of high risk detainees with behavioural challenges' as underlining the necessity to protect the security, good order and safety of immigration detention facilities.<sup>8</sup>

1.12 The Explanatory Memorandum described an increasing number of high-risk detainees, including persons who:

- have had their visas cancelled as a result of failing the 'character test' often due to convictions for drug and other serious criminal offences;
- are a high security risk, such as members of outlaw motorcycle gangs;
- are subject to adverse security assessments; and

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4 Allan Hawke and Helen Williams, *Independent Review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre*, 31 August 2011, pp 12, 107.

5 Parliamentary Library, 'Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015', *Bills Digest* No.86 2014-15, 23 March 2015, p. 4.

6 Joint Select Committee on Australia's Immigration Detention Network, *Final Report*, March 2012, p. 226 (Coalition members' and senators' dissenting report).

7 Parliamentary Library, 'Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015', *Bills Digest* No.86 2014-15, 23 March 2015, pp 4-5.

8 The Hon Peter Dutton MP, *House of Representatives Hansard*, 25 February 2015, p. 1.

- have become unlawful non-citizens as a result of breaching certain visa conditions.<sup>9</sup>

1.13 During the committee's inquiry, the department advised that the proportion of persons in immigration detention due to cancellation of their visas had risen from one per cent of detainees in July 2013, to eight per cent in January 2015. At 31 January 2015, 'visa cancelled' detainees numbered 189 out of a total of 2292 persons in immigration detention.<sup>10</sup> At 1 April 2015, 345 immigration detainees were known to have criminal records.<sup>11</sup>

## **Purpose of the Bill**

1.14 The purpose of the Bill, as described by Mr Dutton, is to 'provide a legislative framework for the use of reasonable force within Immigration Detention Facilities in Australia'.<sup>12</sup> The Explanatory Memorandum states that:

The presence of high risk detainees with behavioural challenges, such as members of outlaw motorcycle gangs, jeopardises the safety, security and peace of our immigration detention facilities and the safety of all persons within those facilities. In fact, public order disturbances have arisen in a number of immigration detention facilities in recent years.

Increasingly, there is a need to provide higher security and more intensive management of these detainees. [The Bill] is necessary to provide authorised officers with the resources to continue to manage the safety, security and peace of our immigration detention facilities.<sup>13</sup>

1.15 The Bill would provide a legislated authority for the use by 'authorised officers' in immigration detention facilities of 'reasonable force' against any person or thing to the extent that they reasonably believe necessary to protect a person's life, health or safety; or to maintain the good order, peace or security of the facility. The Bill would apply to immigration facilities within Australia, including Christmas Island. The Bill would require that authorised officers must satisfy training and qualification requirements determined by the minister, and set certain limitations on the use of force. The Bill would set out a statutory complaints mechanism for alleged abuse of the power, and establish a bar on legal proceedings against authorised officers and the Commonwealth in relation to its exercise provided it is done in good faith.

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9 Explanatory Memorandum, p. 1.

10 The full breakdown of the detainee population at 31 January 2015 provided by the department was: 1635 illegal maritime arrivals, 54 illegal arrivals by air, 414 persons who had overstayed their visas, and 189 whose visas had been cancelled. *Committee Hansard*, 16 April 2015, p. 39.

11 Department of Immigration and Border Protection and Australian Customs and Border Protection Service, answer to question on notice (question 13) from the committee's 16 April 2015 public hearing, received 30 April 2015.

12 The Hon Peter Dutton MP, *House of Representatives Hansard*, 25 February 2015, p. 1.

13 Explanatory Memorandum, p. 1.

1.16 Mr Dutton advised parliament that the Bill would resolve uncertainty among immigration service providers about their powers and responsibilities when confronted with 'public order disturbances' in immigration facilities:

The Government considers that safe and effective immigration detention policies and strong border security measures are not incompatible. This legislation strikes an appropriate balance between maintaining the good order of a facility and the safety of the people within it and the need to ensure that the use of force is reasonable, proportionate and appropriate. The Government is maintaining strong border security measures, but is ensuring that all people in Immigration Detention Facilities, including the detainees themselves, are safe from harm.<sup>14</sup>

### **Key provisions of the Bill**

1.17 The Bill seeks to amend the Migration Act. The substantive amendments to the Act are set out in Schedule 1 of the Bill. These are mostly found in Item 5 of the Schedule, which inserts new Division 7B into Part 2 of the Act, comprising new sections 197BA, 197BB, 197BC, 197BD, 197BE, 197BF and 197BG.

#### ***197BA: use of reasonable force by authorised officers***

1.18 Subsection 197BA(1) provides that:

- (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.

1.19 Subsection (2) provides that without limiting the above, such reasonable force may be used to protect a person (including the authorised officer) from harm or a threat of harm; protect a detainee from self-harm or a threat of self-harm; prevent the escape of a detainee; prevent a person from damaging, destroying or interfering with property in an immigration detention facility; move a detainee within a facility; or prevent action by any person that endangers the life, health or safety of any person, or disturbs the good order, peace or security of the facility.

1.20 Subsections (4) and (5) set limitations on the exercise of the above power. Under 197BA(4), an authorised officer must not use the power to give nourishment or fluids to a detainee.

1.21 197BA(5) provides that in exercising the power an authorised person must not:

- (a) subject a person to greater indignity than the authorised person reasonably believes is necessary in the circumstances; or

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14 The Hon Peter Dutton MP, *House of Representatives Hansard*, 25 February 2015, pp 2-3.

- (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).

### ***197BB-BE: complaints***

1.22 Under section 197BB, a person may complain in writing to the secretary (of the Department of Immigration and Border Protection) about an authorised officer's exercise of the 'reasonable force' power. The secretary must provide assistance to the complainant, if required, to make or formalise the complaint.

1.23 Section 197BC requires that the secretary investigate the complaint in any way s/he thinks appropriate. If, after completing the investigation, the secretary is satisfied that it is appropriate to refer the complaint to the Commonwealth Ombudsman, the secretary must do so, at which point the complaint becomes equivalent to a complaint to the ombudsman under the *Ombudsman Act 1976*.

1.24 Under section 197BD, the secretary may decide not to investigate, or to discontinue an investigation, if s/he is satisfied that: the complaint duplicates a complaint already dealt with or waiting to be dealt with; is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; is not made by a person with sufficient interest in the matter; or the investigation is not justified in all the circumstances. The secretary must provide the complainant with written reasons for such a decision.

1.25 Section 197BE allows the secretary to transfer a complaint to the ombudsman, the AFP Commissioner or a head of state or territory police, if the secretary is satisfied that a complaint could be more conveniently or effectively dealt with by one of those persons.

1.26 The Explanatory Memorandum states that the provision for complaint to the secretary is an 'important accountability mechanism' in relation to the powers conferred under the Bill, but that it 'does not restrict a person from making a complaint directly to another body or agency such as directly to the State, Territory or Australian Federal Police or the Office of the Commonwealth Ombudsman'.<sup>15</sup>

### ***197BF: immunity from legal action***

1.27 Subsection 197BF(1) provides that no proceedings may be initiated or continued in any court against the Commonwealth in relation to an exercise of the power under section 197BA, if the power was exercised in good faith. Under subsection 197BF(4), 'Commonwealth' includes an officer of the Commonwealth and 'any other person acting on behalf of the Commonwealth'. The Explanatory Memorandum states that this definition is intended to include all authorised officers.<sup>16</sup>

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<sup>15</sup> Explanatory Memorandum, p. 13.

<sup>16</sup> Explanatory Memorandum, p. 16.

1.28 While subsection (2) gives effect to this section despite any other law, subsection (3) provides that nothing in this section is intended to affect the original jurisdiction of the High Court, as set out in section 75 of the Constitution.

### ***Definitions***

1.29 Items 2 and 3 of Schedule 1 deal with definitions relevant to the operation of the new provisions. Item 2 amends the definition of an 'authorised officer', via reference to new subsections 197BA(6) and (7), to provide that an officer must not be authorised for the purposes of Section 197BA (use of reasonable force) unless the officer satisfies training and qualification requirements determined by the minister in writing. Subsection 197BA(8) provides that such a determination is not a legislative instrument.

1.30 Item 3 inserts a definition of 'immigration detention facility' for the purposes of the Bill, via reference to new provision 197BA(3): it is a detention centre established under the Migration Act, or another place approved by the minister in writing for the purposes of immigration detention. According to the Explanatory Memorandum, this limits the use of reasonable force as set out in the Bill to 'incidents that occur within an immigration detention facility or in relation to an immigration detention facility', and notes that this may include places such as Wickham Point Alternative Place of Detention or Villawood Immigration Residential Housing.<sup>17</sup>

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17 Explanatory Memorandum, pp 4, 9.