



to move a detainee within the facility;

to prevent action that endangers life, health or security; and

to prevent action that disturbs good order, peace or security.

The power may not be used 'to give nourishment or fluids to a detainee'. Further, in exercising the power, an officer must not:

subject a person to greater indignity than the authorised officer reasonably

exceptions to the prohibition on these forms of ill-treatment, no matter who a person is

Complaints mechanism

What the Bill will change

Under proposed section 197BB, the Bill provides a legislative framework to govern complaints about the use of force to the Secretary of the Department of Immigration. This complaint must be in writing, and signed by the complainant. The Secretary is required to provide appropriate assistance to the complainant's formulation of the complaint.

Under proposed section 197BC, the Secretary's investigation will be conducted 'in any way the Secretary thinks appropriate', and the Secretary may choose to refer the complaint to the Ombudsman. According to the Explanatory Memorandum, 'there is no general discretion for the Secretary not to investigate a complaint'.¹⁷ However, as set out in proposed section 197BD of the Bill, the Secretary may decide not to investigate the complaint for a number of reasons, including:

- if a previous and similar complaint has been made by the same person, and is being or will be dealt with;
- 'if the complaint is frivolous, vexatious, misconceived or lacking in substance, or not in good faith';
- the complainant 'does not have sufficient interest in the subject matter'
- if the investigation 'is not justified in all the circumstances';
- if the complaint could be dealt with by the AFP, the Ombudsman, or a state or territory police commissioner .

Comment

On one level, this provides greater certainty about how internal complaints will be dealt with, including mandating that the Secretary act on the complaint and report back to the complainant about its progress. However, the framework does not set out a timeframe for addressing complaints.

Further, under proposed section 197BD the Secretary has a broad discretion *not* to investigate the complaint if he or she is satisfied that 'the investigation, or any further investigation, is not justified in all the circumstances'. One such ground for not investigating a complaint is if the complainant 'does not have sufficient interest in the subject matter of the complaint'. The Explanatory Memorandum notes that 'it would generally be expected that the complainant would be the subject of the authorised officer's exercise of power'.¹⁸ This raises the question as to \$5048005504A635(\$5048005504A635(20

The requirement under proposed section 197BB(2) that the complaint must be in writing, and signed by the complainant, may discourage an asylum seeker from making a complaint out of fear that this could impact negatively on his or her protection claim.¹⁹

The provisions *formalise* a previously informal, and relatively weak, accountability mechanism, but they do not *strengthen* that mechanism. As the Joint Committee noted, even though affected individuals may make a complaint to the Secretary, the Secretary does not have the power to provide any remedy, other than referring the complaint to the Ombudsman or the Commissioner of a police force for investigation.²⁰ These are avenues of complaint already available to individual detainees.

Finally, the Bill may breach article 12 of the Convention against Torture, which requires authorities to ‘proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.’

Bar on proceedings

What the Bill will change

Under proposed section 197BF, proceedings may not be instituted against the Commonwealth (including an authorised officer) in respect of an incident in which the power authorised by this amendment was exercised, and the court determines that this power was exercised ‘in good faith’.

According to the Explanatory Memorandum, ‘the purpose of this amendment is to provide immunity from legal action to the Commonwealth’, except in the High Court under section 75 of the Constitution.²¹

Comment

Proposed section 197BF provides, in effect, legal immunity for authorised officers where they exercised their power to use reasonable force in ‘good faith’. The test of

Similar protections are *not* granted in the other provision of the *Migration Act* that authorises use of force.²³

Since the officer does not have to report any use of force, and is exempt from suit, he