Civil Liberties Australia **CLA** ***Submission***

MIGRATION AMENDMENT (MAINTAINING THE GOOD ORDER OF IMMIGRATION DETENTION FACILITIES) BILL 2015

… to be known in common parlance as the:

Refugee Riot Act 2015,

an Act which would give government employees and contractors effectively a virtually unrestricted licence to inflict serious injury and indignity on detainees, limit the detainees' right to freedom of assembly and bar them from accessing courts to seek justice for inhumane or unreasonable treatment…among other deleterious provisions.

Numbered clauses are from the Explanatory Memorandum.

Civil Liberties Australia believes this pernicious bill is a danger to the rule of law in Australia and to the concept that Australians are bound by the customary, common and statutory criminal law of the nation, international human rights law and common bounds of decency. The bill creates carte blanche exemption for any government or contractor employee who uses force provided he/she believes the force used was "reasonable" and it was "reasonably necessary" to use force.

This double use of the word "reasonable" effectively removes virtually any realistic chance of anyone being convicted of inappropriate action under this legislation. Indeed, not only does CLA says this, the Bill itself says the same thing, according to the Explanatory Memorandum (EM):

"Any use of force pursuant to this Bill would be lawful".

Putting the EM words another way, government and contractor employees could get away with murder by deciding in their own "subjective judgement" that the force was "reasonable" and was "reasonably necessary". Note: it is their judgement, not the judgement of a court, a jury, or even of a reasonable person, which permits them to take whatever action they decide is "appropriate" without fear of punishment, as the EM clearly states, under this proposed law.

Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies, forces and the corporate sector to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

We work to help keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Australians' civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all.

Civil Liberties Australia comments in detail on EM clauses:

EM clause:

30. The need for this amendment is demonstrated by contrasting the treatment of the lawful use of force by police officers to deal with a public order disturbance in an immigration detention facility and that of an employee of the immigration detention service provider in an immigration detention facility who is dealing with the same public order disturbance in the same immigration detention facility.

Civil Liberties Australia says:
Police officers are employed and designated specifically to maintain law and order. Employees of government refugee contractors are in no way comparable, in that they do not possess the months and months of specific training, detailed knowledge of common and statutory law, clear and precise controls on their activities under the law, mechanisms for internal and external review which include regular reporting, and a trained and experienced command structure who provide day-to-day supervision and control of their activities. The standards of contractor training to be met under this bill are no higher than those of nightclub bouncers.

Subsection 197BA(2)

- to protect a detainee in an immigration detention facility from self-harm or a threat of self-harm; or

- to prevent action in an immigration detention facility by any person that:

    - endangers the life, health or safety of any person (including the authorised officer) in the facility; or

    - disturbs the good order, peace or security of the facility.

CLA says:
Could the Minister, the Department and the legislative drafter please explain precisely how a government employee or the employee of a contractor will "protect a detainee from the threat of self-harm"? Are they to be psychiatrists who can get into the minds of detainees, and change their thinking? If not, how will this particular aspect of "protection" be achieved? This appears to be simply a clause to put people in straightjackets if they look like getting publicity for civil disobedience.

36. New paragraphs 197BA(2)(a) and (b) are specifically concerned with permitting an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to protect all people within an immigration detention facility from harm, including the protection of a detainee from an act of self-harm or a threat of self-harm. This provision gives an authorised officer clear authority to use reasonable force to protect a person from harm in an immigration detention facility. Again, the expression "reasonably necessary" in the provision highlights that the amount of, and the level of, reasonable force required is a matter for the subjective judgement of the authorised officer in the circumstances.

CLA says:
Not only does this give employees of private companies inappropriate powers, it also allows those employees of a private companies (and government employees) to decide – in their "subjective judgement" – what reasonable force is. This is total abrogation of Australian government responsibility for fair, reasonable and humane treatment of people within the control of the government. It also flouts Australian criminal law. The Australian Parliament would be derelict in its duty if it allowed this clause, and others like it in this bill, to stand.

38. "Detainee" is defined in subsection 5(1) of the Migration Act to mean a person "detained". "Detain" is defined in subsection 5(1) of the Migration Act to mean take into immigration detention or keep, or cause to be kept, in immigration detention, and includes taking such action and using such force as are reasonably necessary to do so. This definition extends to persons covered by residence determinations (see section 197AC of the Migration Act).

CLA says:
This power allows government employees and employees of government contractors to exercise any force they – in their sole "subjective judgement" – deem to be appropriate anywhere in Australia, while in the process of taking someone into immigration detention. Does the government intend this power to extend to detention facitlities beyond Australia?

41. New paragraph 197BA(2)(e) of the Migration Act allows an authorised officer, including an employee of the immigration detention services provider, to use such reasonable force as he or she reasonably believes is necessary to move a detainee within an immigration detention facility. This provision recognises the fact that detainees sometimes resist being moved within an immigration detention facility, and that reasonable force is sometimes required to facilitate the move…

CLA asks:
Will contractors be authorised to use stun guns or cattle prods? Will the Minister please spell out what weapons and "aids" are useable under the "reasonable force" provisions? Later in the EM, it clearly envisages that deaths may occur in detention centres as a result of provision of this particular legislation: as that is so, would the Minister please spell out ways in which he/she thinks the deaths might occur?

Subsections 197BA(4) and (5) – Limitations on the exercise of power

49. New subsection 197BA(4) of the Migration Act provides that an authorised officer must not exercise the power under subsection 197BA(1) to give nourishment or fluids to a detainee in an immigration detention facility.

50. The purpose of this amendment is to clarify that the power to use reasonable force in new section 197BA of the Migration Act does not extend to giving nourishment or fluids to a detainee. The provision recognises that it is the role of qualified medical practitioners who can assess an individual's medical needs, rather than that of the immigration detention services provider, to provide medical intervention in an immigration detention facility.

CLA says:
Under the above provision, an authorised officer is not permitted to force-feed a detainee: that must be done by a qualified medical practitioner (QMP). However, an authorised officer is not prevented from assisting a QMP by using the officer's self-defined and -judged "reasonable force". Would the Minister please clarify that such coercive force may not be used by anyone in relation to providing, or help to provide, "medical intervention".

52. New paragraph 197BA(5)(b) of the Migration Act provides that in exercising the power under subsection 197BA(1), an authorised officer must not 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). For the purposes of this Bill, grievous bodily harm includes death or serious injury.

CLA says:
Turning the same wording into active voice, this provision permits "authorised officers", who can be employees of government contractors (and possibly sub-contractors) to kill or seriously maim solely on the officer's "reasonable belief". This is an extraordinarily low standard of provenance for such excessive powers. Also, the bill indicates there is no mechanism for curial review if the "reasonable" is decided by the employee in his/her "subjective judgement". The government should be ashamed that it is proposing such a clause in relation to people in the government's care.

60. It is not considered appropriate to list the training and qualifications that officers must undergo to be authorised officers in the Migration Act itself or in the Migration Regulations. This is because the qualifications and training change over time, as does the content of the training. It would not be practical to amend the Migration Act or the Migration Regulations on a regular basis to reflect these updated training requirements.

CLA says:
Rubbish! Government uses regulations to solve this problem constantly (see EM 66 in this very Bill). With no standards established as to training or qualifications, the Migration Riot Act may, over time, permit people to be certified meeting no specifically relevant standards whatsoever.

61. It is expected that the standard of training and qualifications will be delivered by an accredited nationally registered training organisation. At this time, the qualification and training requirements that are likely to be determined by the Minister in writing for the purposes of new subsection 197BA(7) of the Migration Act include the Certificate Level II in Security Operations. This certificate course includes the units of competency, "CPPSEC2004B –

Respond to security risk situations" and "CPPSEC2002A – *Follow workplace safety procedures in the security industry*". These units cover the full range of knowledge and skills required for an authorised officer to use reasonable force in an immigration detention facility, including:

- identify security risk situation;
- respond to security risk situation;
- use negotiation techniques to defuse and resolve conflict;
- identify and comply with applicable legal and procedural requirements.

CLA says:
The Certificate II in Security Operations is described by security experts CLA has consulted as "the minimum required for licensing in most Australian jurisdictions". It is by no means an appropriate or sufficient training qualification for granting of wholesale powers over life and injury to detention facility guards. If it is assumed that the private corporation guards would need to be licensed in the State or Territory where the security master licence is recorded, it should be noted that not all states have such a requirement. The applicable Australia standard – AS4421 Guards and Patrols – covers mainly office buildings and similar sites: there is no standard covering the type of work the Refugee Riot Act guards will be required to undertake…reinforcing CLA's comment that they will be engaged in specialist operations usually and rightly the province of trained, qualified, experienced police and prison guards (who are subject to more rigorous legislative standards than contained in the putative Refugee Riot Act).

In terms of security guard licensing, there is not a specific license category for what will basically be jailers – crowd controller/bodyguard (eg, sporting events or outside nightclubs) is about the closest. In other words, the Australian government is proposing to give people trained to nighclub bouncer standards the right of life or death over refugee detainees on the say-so (the "subjective judgment") of the "nightclub bouncers".

The government should employ fully trained and qualified jailers rather than seek to evade direct accountability by outsourcing core detention operations to the private sector. Outsourcing has proven (eg, Manus Island) to be mostly about blame and finger pointing, lining the pockets of private sector firms for a worse and more costly result than the public sector could deliver if the government still invested in meaningful staff development.

The main duties of security guards should be primarily to ''observe and report'' by patrols and by operating security monitoring equipment, rather than laying hands on fractious detainees. If they will be, in fact, required to do such police-like application of force duties they should ideally be trained in the use of force continuum (verbal judo right up to deadly force, in training and development as undergone by police) and related control measures.

Australian government equivalent federal security licensing requirements, such as for aviation and maritime security identification cards, demand that candidates must provide three forms of ID and a police records check…for a much lesser range of powers of inflicting "grievous bodily harm" in their own "selective judgement". The EM makes no mention of what standard of identity and background checking will be required of the people whom the government intends to hand over such sweeping, poorly accountable powers to. The government should precisely define what security vetting is required for government or contract employees under this regime.

Standards references:
http://asial.com.au/Resource-Centre/Security-licensing
http://asial.com.au/Resource-Centre/Security-licensing/Who-needs-a-security-licence

Section 197BF – Bar on proceedings relating to immigration detention facilities

91. New subsection 197BF(1) of the Migration Act provides that no proceedings may be instituted or continued in any court against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.

92. New subsection 197BF(2) of the Migration Act provides that section 197BF has effect despite anything else in the Migration Act or any other law.

92. New subsection 197BF(3) of the Migration Act provides that nothing in section 197BF is intended to affect the jurisdiction of the High Court under section 75 of the Constitution

93. New subsection 197BF(4) of the Migration Act provides that in section 197BF, ***Commonwealth*** includes:

- an officer of the Commonwealth; and
- any other person acting on behalf of the Commonwealth.

CLA says:
This is a carte blanche card (like a 'Never Go To Jail" card). A contractor or an employee simply has to say: "I acted in good faith and what I thought was a reasonable manner in my subjective belief" and no-one is allowed to sue. Victims can't sue contractors or the department: people who can reasonably expect to be subjected to the rule of law in Australia are having their common law rights entirely abrogated. Criminally, the victims might be dead or maimed, and the Crown has no rights to convict a guard who self-assesses as having acted in the way the guard believed was appropriate.

97 says:

… In the event of a disturbance in an immigration detention facility, they may be required to exercise police-like powers, including reasonable force, to protect the life,

health or safety of people in the immigration detention facility and maintain the good order, peace or security of that facility. However, in so doing, employees of the immigration detention services provider would not be afforded the same protection against criminal or civil action that police officers have. Without at least some degree of this kind of protection, employees of the immigration detention services provider may be reluctant to use reasonable force to protect a person or to contain a disturbance in an immigration detention facility, even if they are expressly authorised to do so. This could result in the death of a person or people in the immigration detention facility or serious harm to such people, or major destruction of the immigration detention facility itself.

CLA says:
But equally, having the carte blanche card to never be held accountable in a court of law for using force is MORE likely to encourage the employees of a contractor to use force which "could result in the death of a person of people" or "serious harm to such people". What is argued on one hand is precisely the same argument on the other hand.

The only way to get justice would be to go directly to the High Court, under Mandamus, prohibition or injunction. This is a quite extraordinary bar to jump over: if permitted to stand, this provision will become a commonplace in new government legislation aimed at avoiding government responsibility for the actions of government employees and contractors in diverse circumstances. For example, it is easy to imagine the same clausal construction being used in a government program like pink batts installation, should that occur in future: no-once would ever be held accountable, in practical terms, under such clauses.

s 75 (v) Australian Constitution:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

Attachment A to the EM is the…

Statement of Compatibility with Human Rights.

p20, last paragraph:

"**Any use of force** pursuant to the Bill **would be lawful**. " (bold, underline, added).

CLA says:
This statement immediately negates any possible compatibility with human rights. The statement acknowledges that the Bill gives people powers which are beyond the law (ultra vires) of Australia. That is, authorised officers can kill or maim solely on their own say-so, or "reasonable belief":

> "an authorised officer may use such reasonable force as the authorised officer reasonably believes is necessary…".

This is a licence to kill and maim detainees without any consequences due to the operation of two "reasonable/reasonably" provisions in the proposed law, coupled with "subjective judgement".

We also note that the licence is conferred on the authorised officer merely to prevent damage to – or even interference with – property, or simply to "move a detainee". The provisions as to property and moving people are equated in the Bill with "preventing action…that endangers the life…of any person". These are not commensurate or proportionate considerations.

It is a complete nonsense to say, as is said on p21, that "safeguards…mean(s) that any use of force will be proportionate". This is not a guarantee the Australian government is in a position to give. As such, the Bill is not human rights compatible.

p26:

CLA says:

The minister has signed the following statement:

> **Conclusion**
>
> The Bill is compatible with human rights in that it limits specific human rights only where necessary as prescribed by law to protect public order, safety or health, and the rights and freedoms of others. These limitations are therefore necessary, reasonable and proportionate.
>
> **The Honourable Peter Dutton MP, Minister for Immigration and Border Protection**

CLA says:

In so doing, Minister Dutton has signed off on the statement that: *"Any use of force pursuant to the Bill would be lawful"*. The Minister – a police officer for a decade, CLA understands – has therefore signed a document to certify that a Bill purporting to give "authorised officers", who can be employees of a contractor, a licence to inflict grievous bodily harm, including up to death, and to maim, on their own subjective say-so, is compatible with human rights. The Minister appears to believe a licence to kill and maim, without consequence and solely on what the officer "reasonably believes", is in accord with the law of Australia or the human rights protections which people in Australia or under Australia's effective control are entitled to.

The Parliament should not allow this Bill to pass without major revision, and without re-submitting it for extensive community consultation after it has been revised.

The Bill and its Explanatory Memorandum, as well the statement of human rights compatibility, shows every sign of being prepared with undue haste and with little thought as to the potential downstream consequences.

The fact that the Minister has signed off on the 'human rights compatibility' statement demonstrates that the Minister is not sufficiently intellectually competent to understand the law and/or English expression…or that the Minister has not read and comprehended what he has signed. It is beyond belief that anyone in a position of Ministerial responsibility who has read and comprehended what is authorised under this Bill could endorse it.

Civil Liberties Australia notes that the Human Rights Committee of Parliament has been scathing in its assessment of this Bill, in particular in relation to:

- the Bill does not meet right to life requirements of international human rights law;
- the Bill, as drafted, appears to allow degrading treatment of detainees;
- The Bill tries to legislate away obligations to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment;
- The Bill limits the right to human treatment in detention, and appears not to provide for suitable training or monitoring of employees using force;
- The Bill limits detainees rights to freedom of peaceful assembly; and
- The Bill limits the rights of an effective remedy if unreasonable force is used, in that detainees are prevented from reasonable access to the courts or other appropriate tribunals.

– Human Rights Committee, Twentieth Report of the 44th Parliament, pp 15-31.

1.78 The committee considers that the conferral of power on IDSP officers to use force in immigration detention facilities on the basis of their reasonable belief engages and limits the right to life. As set out above, the statement of compatibility has not, for the purposes of international human rights law, established that the measure is aimed at achieving a legitimate objective and, if so, whether it may be regarded as a proportionate means of achieving that objective. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to

• whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern;

• whether there is a rational connection between the limitation and that objective; and

• whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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