RILC Refugee & Immigration Legal Centre Inc

Submission to the Senate Legal and Constitutional Affairs Committee: *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*

1 Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre (**RILC**) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 26 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration's Advice and Application Assistance Scheme (**IAAAS**). RILC has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a 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**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submission

2.1 We recommend the *Migration Act 1958* (**the Act**) not be amended in the way proposed by the Bill. In our view, the proposed amendments are unnecessary and disproportionate to the stated policy objective.

2.2 RILC has witnessed, over many years, changes to the demographics of immigration detention including, currently, those resulting from the changes made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* to the visa cancellation framework. We are strongly supportive of legislative and policy reforms aimed at improving the safety and welfare of people detained in immigration detention centers (**IDCs**). However, for the reasons outlined below, we consider the amendments proposed by the Bill to be excessive and completely unwarranted.

2.3 We have identified the following five areas of principal concern.

- **The proposed powers are too broad, highly subjective and lack essential safeguards.** The proposed power would permit individuals working in IDCs, the majority of whom would not be government employees, to use *any* level of reasonable force that they *personally* consider necessary, without any regard to whether that level of force, or any level of physical force at all, would be considered objectively reasonable by an ordinary person in the same circumstances.
- **These changes are not only unnecessary but they would create a statutory framework liable to abuse.** The current common law governing the use of reasonable force in IDCs is not only adequate, but it is also more appropriate and better suited to the IDC environment.

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

No compelling case has been made for the need for the proposed changes, nor any compelling analysis as to why the common law is inadequate.

- **Persons in immigration detention will be denied access to the most basic and fundamental legal remedies.** The proposed immunity for authorised officers and the Commonwealth, and bar on legal proceedings for people affected, will remove the application of well-established mechanisms for independent scrutiny and accountability under the rule of law for those administering the powers and will also prevent vulnerable people from exercising their basic and fundamental legal rights.
- **The administrative complaints mechanism does not provide adequate assistance or solutions.** The proposed administrative complaints mechanism fails to offer practical remedies for aggrieved persons who are genuine victims of an abuse of the proposed reasonable force power.
- **The proposed powers are inconsistent with Australia's international human rights obligations.** The provisions, as drafted, risk violating Australia's obligations under international human rights treaties.

3 Reasonable force

3.1 Currently, officers and staff at immigration detention centers hold powers conferred on them under common law to exercise reasonable force when it is necessary to protect themselves and others from harm or threat of harm. The authority to use reasonable force is determined by reference to whether it is objectively reasonable in the circumstances. In practice, what is objectively reasonable is determined by asking whether an 'ordinary' or 'reasonable' person, placed in a similar situation would employ that particular level of force in those particular circumstances.

3.2 The amendments proposed by the Bill seek to replace these common law objective powers with a new statutory power in section 197BA of the Act. More specifically, new subsection 197BA(1) would provide an 'authorised officer' with the authority to use *any* level of reasonable force that they personally consider reasonably necessary to:

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

3.3 New subsection 197BA(2) provides a *non-exhaustive* list of examples of circumstances where an authorised officer may decide to employ such reasonable force as he or she personally believes to be necessary. Importantly, this list does not limit in any way other circumstances where an officer may use reasonable force, nor the degree of force he or she may inflict on a detainee. The power to use force is open-ended and limited only by reference to the personal, and thus subjective, judgement of an assigned officer, without reference to any other objectively defined or externally imposed limits.

3.4 RILC submits for the following reasons that this reasonable force power will create a legal and operational framework far more liable to abuse by IDC employees and contractors, and may ultimately lead to people held in IDCs unnecessarily suffering humiliation and/or serious physical injury:

- the scope of circumstances in which physical force can be used is too broad;
- the scope of the level of physical force that can be used against another person is open-ended and ill-defined;
- whether a situation permits the use of physical force, and what degree of physical force can be used, is to be determined according to the personal opinion of the relevant authorised officer without any requirement that it be objectively reasonable (that is, without consideration by that officer of whether a reasonably minded ordinary person in those circumstances would also act in that way with that level of force or even to use physical force at all);
- the proposed prerequisite qualifications and training for a person to be an authorised officer for this purpose are inconsistent with the breadth of the complex and subjective powers afforded to them;
- it is highly inappropriate for non-government employees to be delegated these broad and subjective administrative powers which enable them to use any degree of physical force they personally consider necessary against persons held in immigration detention by the Commonwealth; and
- the general immunity afforded to authorised officers and to the Commonwealth will increase the likelihood that this power will be subject to abuse.

3.5 The proposed amendments represent a radical deviation from fundamental principles under the rule of life which, inter alia, require that the law be ascertainable and protective of fundamental rights, including the security of persons and property, and that government, its officials and agents are accountable under the law.

3.6 Further details regarding our specific concerns with the power conferred by proposed section 197BA are as follows:

3.7 **Scope of power**

3.7.1 RILC is profoundly concerned with the breadth of the proposed reasonable force powers. We are particularly concerned with the second limb, "maintain the good order, peace or security of an immigration detention facility". We note that this could be relied upon in any number of circumstances where that use of force may be entirely disproportionate to the issue at hand. We are equally concerned that the level of force which can be used by authorised officers is unrestricted and without any statutory safeguards.

3.7.2 The terms 'good order', 'peace' and 'security' are not proposed to be defined and, together with the highly subjective nature of the power (discussed further below), the meaning of these terms would be solely determined by the personal opinion of relevant authorised officer. For example, an authorised officer may, in good faith, consider that the use of physical force (which might include physical beatings) to punish an individual is necessary to maintain the 'good order', 'peace' and/or 'security' of the IDC (and this would arguably fall within the broad ambit of the authority created by proposed section 197BA).

3.7.3 In our opinion, this excessively broad and highly subjective power to use any level of

reasonable force officers think necessary will not only lead to arbitrary applications but also has the scope for violent and humiliating treatment of people in detention.

3.7.4 There have been reports in the past of IDC officers (Serco) using excessive and inappropriate levels of physical force against detainees. Relevantly, in September 2011, the Commonwealth Ombudsman provided a submission to the Joint Select Committee on Australia's Immigration Detention Network in which it reported:

> *Our office is **concerned about the level of complaints** which involve instances in which situations have been escalated by an officer's response and when **unnecessary use of force** is evident.*
>
> *[…]*
>
> *The Ombudsman has investigated complaints and matters arising from detention reviews and visits to detention centres which have raised serious concerns about the consistency, competency and integrity of incident reporting within the detention network.*
>
> *Incident reports relating to allegation of assaults examined by the Ombudsman have contained inaccuracies and omission of material crucial to any investigation of the incident. Competent and consistent descriptions of circumstances and actions taken including use of force have been lacking. Witness statements from detainees are not regularly taken.*
>
> *Our investigations, some of which are not finalised, have identified preliminary concerns with the processes for investigation of **unreasonable use of force by Serco officers** towards detainees. The issues include a lack of concern, or action to demonstrate concern, for the victim of unreasonable force and the effect that this has on the person's welfare as well as others who have witnessed the incident. The length of time to finalise investigations, the lack of interim contact with the victim, the extent to which monitoring and interest in the matters of the investigation are taken by the Department are also factors.*
>
> *Although the Department has advised our office that Serco are required to report all alleged assaults to the police for investigation, our complaints suggest that detainees are told by some Serco officers that it is the responsibility of the detainee to report a matter to the police.*
>
> *[…]*
>
> *Our office is aware **through its interviews with detainees that incidents of unreasonable use of force or perceived unreasonable use of force**, and subsequent failure to adequately resolve those matters are issues which increase tension and unrest within the detention network. They **may also be indications of a failure in the duty of care responsibilities** of Serco and the Department.*[2] [emphasis added]

3.7.5 We submit that the proposed amendments will not only fail to address these serious allegations, but they will in fact create a legal and operational framework facilitating and authorising such abuse.

3.8 Subjective nature

[2] Commonwealth Ombudsman, Submission to the Joint Select Committee on Australia's Immigration Detention Network, September 2011 – available at: http://www.ombudsman.gov.au/files/Joint_Select_Committee_on_Australias_Immigration_Detention_Network_September_2011.pdf [accessed 07/04/2015]

3.8.1 We contend that the proposed test is unprecedented in that it would permit an authorised officer to use *any* level of physical force that they personally believe is necessary to maintain the good order, peace or security or protect a person's safety.

3.8.2 The proposed subjective test represents a significant departure from the current common law authority which requires the specific level of force to be objectively necessary in the particular circumstances (as determined by asking whether an average reasonably minded person in a similar situation would employ that particular level of force in those particular circumstances). The amendments proposed by the Bill would authorise officers and staff in IDCs to employ *any* level of force they personally believe to be necessary, irrespective of whether an average reasonably minded person in those circumstances would consider that degree of force to be entirely excessive, unnecessarily violent and unacceptable.

3.8.3 This level of subjective discretion is unprecedented in comparative statutory contexts such as those governing corrections officers in prisons and mental health treatment facilities. In this regard, we also refer to the following finding of the Parliamentary Joint Committee on Human Rights in its report on the Bill:

> *a number of analogous state and territory laws governing the use of force in prisons do not enable force to be used based on the officer's belief, but apply objective tests such as that force may be used when it is 'reasonably necessary in the circumstances' or that the officer may 'where necessary, use reasonable force'.*[3]

3.8.4 The Explanatory Memorandum accompanying the Bill refers to powers conferred by statute on police officers as a policy rationale for the subjective nature of the reasonable force power. The scope and extent of these powers is acknowledged in the Explanatory Memorandum accompanying the Bill where these proposed powers are described as "police-like powers".[4] However, in our view this comparison must be made by reference to the vastly different training and qualifications that police officers undergo and the strict codes of conduct and integrity protocols they are subject to. We also note that police officers are government employees whereas the proposed amendments seek to delegate the reasonable force power to private individuals (which we understand would currently include persons contracted by Serco). As detailed further below, we also note that the training and qualification requirements proposed for a person to be authorised to use reasonable force are comparatively minimal and disproportionate to the powers they hold.

3.9 Lack of safeguards

3.9.1 RILC is very concerned with the absence of critical statutory safeguards for the exercising of the reasonable force power. We are further concerned that the combination of very limited statutory safeguards with the very broad and highly subjective nature of the power, will further contribute to its potential abuse, and ultimately, people in IDCs being unnecessarily seriously harmed.

3.9.2 No limitations are expressly provided for in the proposed amendments, other than what the

[3] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Twentieth report of the 44th Parliament, 18 March 2015, at [1.73] – available at: http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/20_44/20th%20report.pdf [accessed 06/04/2015]
[4] At p25

relevant officer personally believes is reasonable and the limited and subjective constraints in proposed subsection 197BA(5). It is also clear from the wording of proposed subsection 197BA(2), a provision providing a non-exhaustive list of examples of instances where such force may be permitted, that it is not intended to operate in any way to limit other circumstances in which authorised officers can employ reasonable force, or the level of force that can be used.

3.9.3 We note this absence of critical legislative safeguards can be contrasted with the current provisions in the Act governing the use of force by Departmental officers when carrying out identification tests.[5] These provisions expressly prohibit (the use of force by Departmental officers unless each of the three conditions are met:

- the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; *and*
- all reasonable measures to carry out the identification test without the use of force have been exhausted; *and*
- use of force in carrying out the identification test has been authorised by a senior authorising officer who is reasonably satisfied that:
    - the non-citizen required to provide the personal identifier in question has refused to allow the identification test to be carried out; *and*
    - all reasonable measures to carry out the identification test without the use of force have been exhausted.

3.9.4 RILC notes that these statutory safeguards are made even more essential by the serious degree and types of force that the provisions authorise and contemplate. For example, proposed 197BA(5)(b) 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). We note that the Explanatory Memorandum states in this regard that "[f]or the purposes of this Bill, grievous bodily harm includes *death or serious injury*" [emphasis added].[6]

3.9.5 RILC considers it absolutely essential that any power to employ physical force be subject to the express statutory limitations including, but not limited to: the use of force only be used as a last resort; the infliction of physical injury should be avoided unless critically necessary; the use of physical force to protect property must be considered much less warranted than that to protect a person's physical safety; the use of force be limited to situations where the officer cannot otherwise protect him or herself or others from harm; force should be used only if the purpose cannot be achieved in any other reasonable way; and force must not be used to punish a person for an act done or for which they are suspected to have done.

3.9.6 Both the accompanying Explanatory Memorandum and the Minister's Second Reading Speech indicate that this legislative void is intended to be filled through policy guidelines

[5] See: section 261AE
[6] Explanatory Memorandum, at [52].

(referred to as 'risk mitigation measures' and 'governance controls'). RILC considers the use of non-binding government policy instructions to govern the use of such a broad and highly subjective reasonable force power, including by non-government employees, to be totally inappropriate. As emphasised by The Parliamentary Joint Committee on Human Rights[7] and Senate Standing Committee for the Scrutiny of Bills,[8] policies and procedures do not provide open, public and enforceable standards.

3.9.7 We also note that specifying these safeguards in policy as opposed to law may lead to absurd circumstances where authorised officers (such as Serco employees) purportedly act lawfully and within the terms and conditions of employment, despite their actions falling far beyond the scope of the government's policy intent for when reasonable force may be used or the degree of force to be used.

3.10 Authorised officer

3.10.1 The proposed legislation and accompanying documents (including the Explanatory Memorandum and Second Reading Speech) refer to those persons delegated as authorised officers being both government and non-government employees. It is also reasonably clear from these documents that the overwhelming majority of them will be Serco employees and contractors. RILC is profoundly concerned with this proposed delegation of an essentially unrestricted administrative power to inflict physical force (including lethal force) on another individual, to private individuals not employed by a government authority. We note that this, coupled with the general civil and criminal immunity, will significantly limit the Commonwealth's capacity to oversee the use (and importantly, abuse) of these powers. In this regard, we also refer to the following recent findings of the Senate Standing Committee for the Scrutiny of Bills:

> *The committee has previously expressed its reticence about the conferral of coercive entry and search powers on non-government employees (see Twelfth Report of 2006, at p. 294). The Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011, at p. 74) explains that government employees are subject to a range of accountability mechanisms by virtue of their employment. Although the Ombudsman would have jurisdiction to investigate complaints about the use of force, not all accountability legislation would apply. For example the Public Service Act 1999 would not be applicable, and the extent of any judicial review is unclear (this issue is discussed below).*
>
> ***The principle that coercive powers should generally only be conferred on government employees applies with even greater force to powers which authorise the use of force against persons**. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the Guide to the Framing of Commonwealth Offences, Infringement Notices and Enforcement Powers indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given*

[7] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Twentieth report of the 44th Parliament, 18 March 2015, at [1.71] – available at: http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/20_44/20th%20report.pdf [accessed 06/04/2015]

[8] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No.3 of 2015, 18 March 2015, at p,23 – available at: http://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2015/word/d03.docx [accessed 07/04/2015]

> *relate to the need to appoint technical specialists in the collection of certain sorts of information.* ***The application of this basis for an exception to the general principle that coercive powers be limited to government employees appears to be of no application to the use of force for the purposes outlined in the bill.***[9] [emphasis added]

3.10.2 Proposed subsection 197BA(7) provides that the Minister must specify in writing the training and qualification requirements for officers and staff in immigration detention centers to be deemed an 'authorised officer'. Although no such instrument has been prepared by the Minister, the Explanatory Memorandum states in this regard:

> *[…] 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*** *[…]*[10] [emphasis added]

3.10.3 RILC understands that a Certificate Level II in Security Operations is currently the minimum pre-requisite qualification to obtain entry level licensing in crowd control and security guard. The Commonwealth Department of Education and Training's MySkills website currently advises that a Certificate Level II in Security Operations corresponds with one occupation: Security Officer.[11] This government department then describes the corresponding duties and responsibilities of a Security Officer as follows:

> *Security Officers protect people and property. As security workers, they carry out* ***basic guarding duties*** *such as patrolling, monitoring security systems, static or mobile emergency response including alarms, issuing security passes to visitors, or providing site access.* [emphasis added]

3.10.4 We submit that this relatively basic pre-requisite qualification is entirely inconsistent with the broad scope and highly subjective nature of the reasonable force power proposed by section 197BA particularly given that the officers are working with people who are living in locked mandatory detention.

3.10.5 We also contend that, due to the complexity, breadth and subjective nature of the reasonable force power, it is highly inappropriate for the minimum qualification and training requirements to be specified by the Minister in an instrument exempt from parliamentary scrutiny (and disallowance).

3.11 Policy rationale

3.11.1 The primary policy objectives for the amendments proposed by the Bill have been stated as follows:

- provide persons working in immigration detention facilities with the tools they need to protect the life, health or safety of any person, and to maintain the good order, peace or security within an immigration facility;[12]

- remove uncertainty for employees of an Immigration Detention Services Provider (IDSP)

[9] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No.3 of 2015, 18 March 2015 – available at: http://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2015/word/d03.docx [accessed 07/04/2015]
[10] At [61]
[11] See: https://www.myskills.gov.au/courses/details?Code=CPP20212 [accessed 06/04/2015]
[12] See: Second Reading Speech, p1; and Explanatory Memorandum, p20

concerning their authority to use reasonable force;[13] and

- address issues arising from incidents at a number of immigration detention facilities, which highlighted uncertainty, on the part of the immigration detention service providers, as to when it may act when confronted with public order disturbances in immigration detention facilities - and that uncertainty had previously been the subject of the government commissioned report: *Independent review of the incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre* (**the Hawke-Williams report**);[14]

3.11.2 RILC is concerned with the lack of detail regarding why the current objective common law reasonable force test is not sufficient and why a subjective and much broader authority is demanded. There is a conspicuous lack of evidence and analysis as to why the objective reasonable force test is regarded as being insufficient. We note that no explanation has been offered as to why such a broad and subjective power to use violent force is fundamentally necessary to resolve this uncertainty among detention centre staff. RILC is also concerned that the accompanying policy documents provide no evidence of instances where the common law objective requirement has been uncertain in its application nor what the consequences of any such instances were for the staff and people concerned.

3.11.3 We also note that much of the identified policy rationale refers to the findings of the Hawke-Williams Report. Specifically, the findings of this report are referenced in support of the objective of the broad and subjective proposed reasonable force power. However, RILC has been unable to ascertain any reference in that report to the current common law of the reasonable force test being deficient in any way. Instead, this government commissioned report recommended that the Department better ensure that the respective roles and responsibilities in managing security be clarified between the Department, IDCs and the police. The Hawke-Williams Report ultimately recommended a protocol be developed to support the hand-over of security-related incidents to the police and consideration be given whether the detention centre management contract with Serco needed to be amended. Given this, we submit that the Hawke-Williams Report cannot be relied upon in support of the policy or operational need for the proposed amendments.

3.11.4 Following the above, we submit that there has been no compelling practical or policy requirement to necessitate such a radically subjective and broad power authorising the infliction of serious physical force on another person.

4 Denial of legal remedies

4.1 The amendments proposed by the Bill also seek to limit the ability of people in immigration detention to apply to the courts in respect of the exercising of the reasonable force power against them. This bar on legal proceedings applies both in respect of action against the authorised officer and that against the Commonwealth.

4.2 RILC is profoundly concerned with this amendment as it would bar scrutiny and access to relief by the courts in all circumstances unless it can be shown that the authorised officer was

[13] See: Explanatory Memorandum, p20
[14] See: Second Reading Speech, p1; and Explanatory Memorandum, p20

not acting in good faith. This exclusion is significant as it would apply irrespective of whether the relevant officer(s) acted unlawfully outside the scope of their powers conferred by s.197BA. For example, under this amendment, people in detention who may have suffered serious personal injury as a consequence of negligence or recklessness by an authorised officer, or due to an officer unknowingly acting outside his or her reasonable force power, may be precluded from access to relief (including compensation) from the courts in respect of both the officer personally and the Commonwealth.

4.3 We note that proposed subsection 197BF(3) expressly provides that nothing in section 197BF is intended to affect the jurisdiction of the High Court under section 75 of the Constitution. The Explanatory Memorandum states that this amendment "ensures that excessive and inappropriate force is not condoned and that authorised officers who do not act in good faith in exercising the new powers may face sanctions through proceedings in court".[15] However, in this regard, we refer the Committee to the notable judicial uncertainty regarding whether actions of contractors of the Commonwealth (such as Serco employees) fall within this jurisdiction of the High Court.[16] In this regard, we submit that, because the overwhelming majority of authorised officers will not be officers of the Commonwealth, persons affected may be barred from all legal avenues of redress.

4.4 We note that, even where it may appear that an authorised officer may have not acted in good faith, for a court to establish this as proven fact, the threshold is significantly high. We also refer to the following observations of The Senate Scrutiny of Bills Committee in this regard:

> *Although it can be accepted that criminal and civil liability may attach to the unlawful exercise of force if it is exercised in bad faith, given the scope and extent of the powers conferred, the conferral of powers of officers who are not government employees, and the absence of any statutory remedies (as part of the complaints mechanism) for the wrongful use of force, it may be questioned whether immunity should be granted against prosecution and civil action merely on the basis of a requirement of 'good faith'. In the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker.* ***Bad faith, so considered, is a very difficult allegation to prove****. It is doubtful that showing that use of force was disproportionate (even grossly disproportionate) would amount to bad faith.*
>
> *The committee has considered the argument that police-like powers should be afforded the same protection against criminal or civil action that police officers have, however further justification is required as* ***authorised officers are not sworn police officers who are subject to additional lines of legal and political accountability****.*[17] [emphasis added]

4.5 RILC is also very concerned that by providing authorised officers with this broad personal immunity, they may be less diligent when making their own subjective assessments on when, and what degree of physical force to employ in a particular situation.

---

[15] See: [98]
[16] For example: *Board of Fire Commissioners of New South Wales v Ardouin* [1961] HCA 71; *R v Murray and Cormie; ex parte the Commonwealth* (1916) 22 CLR 437; *Broadbent v Medical Board of Queensland* (2011) 195 FCR 438; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
[17] Senate Standing Committee for the Scrutiny of Bills, Alert Digest No.3 of 2015, 18 March 2015 – available at: http://www.aph.gov.au/~/media/Committees/Senate/committee/scrutiny/alerts/2015/word/d03.docx [accessed 06/04/2015]

4.6 The accompanying Explanatory Memorandum states the policy intent of this amendment is to afford the same protection against criminal or civil action that police officers have.[18] However, we note that, those state and territory laws providing protection against liability for prison guards using force (which we consider to be a more analogous context than police officers) provide personal immunity to the prison guard but not to the government authorities. The Explanatory Memorandum and Second Reading Speech do not give any reason why this immunity must also extend to the Commonwealth as a whole if the intention of the provision is to provide personal immunity to the authorised officer.

5 Complaints mechanism

5.1 Proposed section 197BB provides that a person may make a complaint to the Secretary of the Department of Immigration and Border Protection about an authorised officer's exercise of power under section 197BA. New section 197BC provides that the Secretary *may* investigate that complaint in *any way he or she considers appropriate* and provides a further discretion to refer the complaint to the Ombudsman if *they consider it appropriate to do so*.

5.2 RILC is seriously concerned about the lack of certainty and transparency for complainants and the lack of impartiality of investigations under the proposed regime. In particular, we note that the provisions do not provide any assurance about what the Secretary's investigation would involve, or on what grounds the Secretary might choose to exercise the discretion to refer the matter to the Ombudsman. We also note that the Ombudsman has recommendatory powers only. That both the investigation and referral discretions are vested with the Department, the same government agency responsible for the matters which the complaint would relate to, again represents a fundamental deviation from the long established principles of independent scrutiny of decisions made by, or on behalf of government and again, no compelling case has been made out as to why people held in mandatory detention should be deprived of an impartial investigation into their complaints, particularly when the complaints are about the infliction of physical force.

5.3 RILC is also seriously concerned that the provisions provide no certainty as to the remedies available if a complaint is acted upon and then the relevant wrong-doing established. Neither the provisions themselves, nor the accompanying Explanatory Memorandum, refer to the intended remedies and outcomes for the person concerned or the relevant authorised officer if the complaint is subsequently found to be meritorious (if any). In this regard, without certainty as to complaint outcomes and remedies, we submit that this mechanism cannot in any terms be described "an important accountability measure"[19] in the context of the reasonable force power.

6 International obligations

6.1 As a signatory to a number of international human rights instruments[20], Australia has obligations under international law to adhere to the terms of these agreements. In this regard, we wish to refer to the recent findings of The Parliamentary Joint Committee on Human

[18] See: [97]
[19] Explanatory Memorandum, p19
[20] Including (but not limited to): International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and International Covenant on Economic, Social and Cultural Rights.

Rights[21] which found that the amendments proposed by the Bill engaged and limited a number of international human rights. Most relevantly that Committee found:

- The use of force provisions in the Bill as currently drafted are insufficiently circumscribed and risk empowering an authorised officer to use force against detainees in a way that may be incompatible with the prohibition on degrading treatment;[22]

- The statement of compatibility[23] has not, for the purposes of the right to life and 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;[24]

- the use of force provisions limit the right to humane treatment in detention and the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law;[25]

- the basis for monitoring the use of force provisions and the bar on criminal proceedings may limit the obligation to investigate and prosecute acts of torture, cruel, inhuman or degrading treatment;[26] and

- the bar on legal proceedings relating to the use of force in immigration detention facilities limits the right to an effective remedy and the government's statement of compatibility does not address the limitation on the right to an effective remedy.[27]

7 Conclusion

7.1 In our submission, no evidence has been given, nor compelling case made out, to justify the proposed radical removal of well-established legal safeguards against potential abuse of power by government employees, contractors or agents. In addition, no evidence has been given, nor compelling case made out, to justify the removal of rights of personal redress for people injured as a result of the infliction of physical force by government employees, contractors or agents. The proposed amendments represent a fundamental deviation from the most basic principles of the rule of law, with the potential for people in detention to be subject to physical injury and even death without any redress, and with little or no independent scrutiny of the actions of those who inflict the harm. The proposed amendments are unacceptable.

7.2 We recommend that the Bill not be passed.

Refugee and Immigration Legal Centre Inc.

13 April 2015

[21] Twentieth Report of the 44th Parliament, tabled in Parliament on 18 March 2015
[22] At [1.92] of that report.
[23] At Attachment A to the Explanatory Memorandum
[24] At [1.78] of that report.
[25] At [1.102] of that report.
[26] At [1.93] of that report.
[27] At [1.122] of that report.