QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Committee Secretary
Legal and Constitutional Affairs Legislation Committee

By email: legcon.sen@aph.gov.au

Re: Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Maintaining Good Order of Immigration Detention Centres) Bill 2015

Please accept this submission on behalf of the Queensland Council for Civil Liberties ("QCCL") in relation to the *Migration Amendment (Maintaining Good Order of Immigration Detention Centres) Bill 2015* (Cth) ("the Bill") to amend the *Migration Act 1958* (Cth).

Clear expression of standard of behaviour and threshold for use of force

1. The QCCL submits that the Bill subjects immigration detainees to a vague standard of behaviour which must be upheld with the consequence of force being used against them if they do not comply. The particular phrases of concern are "maintain the good order, peace or security"[1] and "prevent action in an immigration detention facility by any person that...disturbs the good order, peace or security of the facility".[2]

2. This language provides an unclear standard of behaviour for detainees, which may have the implication of detainees unnecessarily self-restricting their behaviour in fear of force being used against them.

3. This language also provides a vague threshold for use of force for the authorised officers, with two main possible consequences. Firstly, officers may feel entitled to excessive force due to the lack of clear restriction, resulting in more regular and capricious use of force. Secondly, the broad permission to use force and absence of meaningful restriction may result in a lack of redress available to detainees or others against whom force may be used: seeking discipline or prosecution of an officer for their excessive use of force may not be viable in circumstances where there is such a broad permission to use power.

4. The QCCL therefore submits that there should be clearer definition of what constitutes good order, or more specific enumeration of standards of behaviour for detention facilities.

5. The Statement of Compatibility within the Explanatory Memorandum of the Bill states:

> *The Bill does not seek to define the expression 'reasonable force'. Under policy, reasonable force must be no more than that required to ensure the life, health or safety of any person in the facility, be consistent with the seriousness of the incident, be proportional to the level of resistance offered by the person, avoid inflicting injury if possible, and be used only as a measure of last resort.*

[1] *Migration Amendment (Maintaining Good Order of Immigration Detention Centres) Bill* 2015, s197BA(1)(b)
[2] *Migration Amendment (Maintaining Good Order of Immigration Detention Centres) Bill* 2015, s197BA(2)(f)(ii)

6. Ensuring the life, health or safety of any person only in the facility seems to be a vastly higher standard than "maintaining good order, peace and security" in the words of the proposed s197BA(1). The latter may extend to an 'unsettling action or activity',[3] which conceivably could consist of peaceful protest action disruptive to a daily schedule, or to peaceful assembly. Intention for the infringement of such rights[4] should be expressed in clear language in the interest of the person effective and also to protect the legal position of the person exercising the power.[5]

7. If the aforementioned paragraph of the Explanatory Memorandum is an accurate reflection of legislative intention, the words of the Bill permitting the use of force should be restricted to circumstances only where required to ensure life, health or safety, and not merely in the maintenance of order.

8. If the aforementioned phrase is not an accurate reflection of legislative intention, and parliament wishes to permit force at the substantially lower threshold of maintaining order, the Statement of Compatibility with Human Rights within the Explanatory Memorandum should be modified to accurately reflect this intention and correctly assess the human rights implications of such use of force.

Use of force as a last resort

9. Given the position of the Federal Government that the characterisation of immigration detention facilities as prisons is inaccurate,[6] and further noting the particular vulnerability of some detention centre detainees as compared to the wider community, the QCCL submits that enacted protections against the use of force should be at least equal to or more stringent than the enacted protections afforded to prisoners in our criminal justice system. Reference will be made to the *Corrective Services Act 2006* (Qld) s143, which pertains to the use of force against prisoners in Queensland and has a suite of limitations on its use.

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[3] In *Tien v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405 at 418-419, Goldberg J considered the meaning of "good order of the Australian community". One iteration of disturbance of such good order was 'unsettling public action or activity'. The analysis of the words in that context was clearly informed by the context of the broader Australian community: there is an obvious nexus between the concept of an act affecting the 'Australian community' and a 'public' act. The Bill seeks to regulate good order in a more limited context: in an immigration detention facility only rather than the broader community. Therefore it would be reasonable to import the *Tien* formulation but without the word 'public'.

[4] The right to peaceful assembly: Article 20(1) *Universal Declaration of Human Rights*, Article 21 *International Covenant on Civil and Political Rights.*

[5] Per *Coco v The Queen*, legislative intention to allow infringement of rights (i.e. police entering private property and placing a listening device) must be expressed in clear language, otherwise may result in jurisidictional error not subject to a privative clause limiting the jurisdiction of courts. This means that action taken under the unclear permission may become subject to judicial review.

[6] Australian Human Rights Commission National Inquiry into Children in Immigration Detention, transcript of Canberra Public Hearing, 22 August 2014 (Martin Bowles, Secretary of the Department of Immigration and Border Protection) pp29-30.

10. The use of physical force against a person should be considered, particularly in light of the potential abridgement of human rights against cruelty and degradation, to be an option of last resort. The existing benchmark in the Bill is whether force is used under circumstances where the officer "reasonably believes the use of force is necessary". One relevant factor in assessing this may be whether other options for the resolution of the matter were employed or considered. However the more stringent position against the use of force would be reflected in mandating that force may be used only once more peaceful means of resolving the issue have either been exhausted or are inappropriate in the circumstances due to the imminent risk of physical harm to the detainee, authorised officer, or another person, as is the existing position in Queensland prisons.

11. The "last resort" protection in the *Corrective Services Act 2006* (Qld) is in the following terms: "The corrective services officer may use the force only if the officer reasonably believes the act or omission permitting the use of force cannot be stopped in another way."[7] This provision does not apply where there is risk of physical injury to a person.[8] Even in this limited form, this statutory protection offers a greater assurance that other methods of de-escalating the issue be considered, applied or exhausted. Further protections may include:

    a. that the risk of harm must be "imminent"; and
    b. the requirement that peaceful methods of de-escalation be actively employed and exhausted, rather than reasonably believed to prove ineffective.

12. The explanatory memorandum of the Bill provides the intention for the use of force "only as a measure of last resort". Given the potential human rights implications,[9] this legislative intention warrants mandatory expression in the clear words of the legislation.

Mandatory reporting

13. The QCCL submits that a mandatory system of reporting complaints made to the Secretary pursuant to s197BB is a possible option that should be explored to increase transparency and identification of any potential systematic abuse of the force provisions. Periodical reports may be tabled before a relevant committee of parliament, for example the Parliamentary Joint Committee on Human Rights on the Ombudsman, to examine complaints made, possible human rights infringements, and relevant improvements to the law to protect detainees. Reports may detail the general substance of complaints made, general circumstances of use of force (even if not alleged to be excessive), findings of investigations, and courses of action taken by the Secretary in response to excessive uses of force.

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[7] 143(2)(a) *Corrective Services Act 2006* (Qld)
[8] 143(3) *Corrective Services Act 2006* (Qld)
[9] Right against torture or cruel, inhuman or degrading treatment or punishment: Article 5 *Universal Declaration of Human Rights*, Article 7 *International Covenant on Civil and Political Rights*.

Action on the basis of an investigation

14. The QCCL notes and expresses concern that the Bill does not mandate any course of action to be taken if through an investigation it is found that an authorised officer did use excessive force. Possible courses of action may include removal from the facility, disciplinary action, or further education and training. The legislation may not provide what specific action must be taken, but it is submitted that the Bill includes insufficient avenues for redress if there may be an investigation but it is not mandated that action is taken by the Secretary or otherwise on the basis of a positive finding of use of excessive force.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
7 April 2015