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1 November 2017

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600

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

Re: Standing Committee's hearing dated Friday, 27 October 2017 on *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 [Provisions]*

Dear Committee Secretariat and Members,

I am sending you this letter with the hope that I may be able to add to the debate concerning the matter stated above. Further to my earlier submission, and with all due respect, whilst I am not a licensed legal practitioner, nor am I still employed by the Australian government, neither of these facts infringe on my ability to contribute to the peaceful and respectful administration of law in the Australian communities nor am I excused from my responsibility to protect life, wherever possible.

As you may already know, the Immigration Detention Centres and the Alternative Places of Detention (APOD -housing detained minors), are managed on behalf of Department of Immigration and Citizenship (former) by two private corporations: MSS Security and SERCO (an international provider headquartered in UK who specialises in offering penitentiary services). I believe it is important for the members of the Upper House, and the Secretariat, to have the opportunity to hear from the two companies. In addition, Senator Ian Macdonald told, in an honest tone, that he has never visited an Immigration Detention Centre. In 2011, when I was working for Department of Immigration and Citizenship, the Australian former Prime Minister Tony Abbot visited the centre to inform himself, first-hand, on the situation following days-long riots in the centre that have been said to justify, on two occasions, the handing of centre command, in the interest of national defence contingency, to the Emergency/Tactical Response (Riot Police) Unit, uniformed armed forces from all the states and territories. In the same manner, to enable the Senate to perform their parliamentary duties, I recommend you visit at least one remote location centre. This way you can be closer to gaining a full picture.

Budgetary Impact on the Commonwealth

The proposed amendments will bear a tangible cost to the tax payer, and have already done so. They also bear a cost to ancillary non-government organisations, either self-funded or grant funded and a greater intangible cost to the Australian community via loss of morale and the affect of decay of the psyche.

Thus far there is the cost in Full-Time Employee hours incurred by yourselves, the secretariat, the members of the Legal and Constitutional Senate Committee and potentially participating Senators.

In the future, even if the operational costs are absorbed, there will be the added cost in supporting the welfare of the canine workforce.

The Intent of Law - Raison d'être

To my knowledge, the intent of the *Migration Act 1958 (the Act)* is to manage the regular movement of people in and out of Australia's borders. Again, to my knowledge, these borders remain unchanged since 1986, with the exception of changes effected through the Migration Act 1958 - Sect 9:

SECT 9- Certain sea installations to be part of Australia

(1) *For the purposes of this Act, a sea installation that:*

- (a) becomes installed in an adjacent area or in a coastal area after the commencement of this subsection; or*
 - (b) at the commencement of this subsection, is installed in an adjacent area or in a coastal area;*
- shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.*

(2) *A sea installation that is deemed to be part of Australia because of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:*

- (a) the installation is detached from its location for the purpose of being taken to a place outside the outer limits of Australian waters; or*
- (b) after having been detached from its location otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters.*

and via Section 8:

SECT 8 Certain resources installations to be part of Australia

(1) *For the purposes of this Act, a resources installation that:*

- (a) becomes attached to the Australian seabed after the commencement of this subsection; or*
 - (b) at the commencement of this subsection, is attached to the Australian seabed;*
- shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.*

(2) *A resources installation that is deemed to be part of Australia by virtue of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:*

- (a) the installation is detached from the Australian seabed, or from another resources installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits); or*
- (b) after having been detached from the Australian seabed otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits).*

The Act, in addition to adding an unforeseeable flexibility to the geographical delineation of Australian

borders, also assumes upon itself the power of the Executive, via Section 7A:

SECT 7A - Effect on executive power to protect Australia's borders

The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.

Generally, under International Law, any self-governing state bears the right to self-determination. Anything beyond and above this measure has potential to cause distress to other sovereign states with an equal right to self-determination, can potentially place Australian's citizen's interests and safety at risk theoretically risking a war, direct combat or otherwise, with an affected, displeased foreign alliance and unequivocally undermines the powers of the Head of State, namely the Governor-General, via the application of the coup d'état principles, "seizing power which was never expressly given to it in the Constitution"¹, and begs a High Court review or, better still, a Royal Inquiry.

SECT 27 -Division binds the Crown

(1) This Division binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory.

Bearing this in mind, I would like to communicate my distinguished considerations to the Standing Committee; firstly, for recognising the potential impact to the Commonwealth and the rule of law of proposed amendments and the means via which migration law is administered, and, secondly, for ensuring follow-up on same. This is what I, personally, regard as valuable use of residents' tax payer funds.

In addition, via the changes realised, since 2011 a.d., the Migration Act and its associated regulations and policies, have blurred the line between Criminal Code and Civil Code. Please refer to the full text of the Migration Act 1958 for detail on:

DIVISION 2--CIVIL PROCEEDINGS AND CRIMINAL PROCEEDINGS

- 486Z Civil proceedings after criminal proceedings
- 486ZA Criminal proceedings during civil proceedings
- 486ZB Criminal proceedings after civil proceedings
- 486ZC Evidence given in civil proceedings not admissible in criminal proceeding

During the hearing held on Friday, 27 October 2017, the presiding panel members accurately acknowledged this distinction and received confirmation of same from Department of Immigration and Border Protection (the Department). The panel was misled when informed that the Migration Act did not apply criminal penalties. There are far too numerous sections making reference to criminal activity to make mention, so I will make note of the main provision:

¹

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION, August 1993. *Report on the Review of Preservation and Enhancement of Individual's Rights and Freedoms*, Brisbane: Electoral and Administrative Review Commission ISBN 0 7242 5667 9.

<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/1993/4793T2898.pdf>

SECT 4A - Application of the Criminal Code

Chapter 2 of the Criminal Code (except Part 2.5) applies to all offences against this Act.

In majority, the world's governments, successfully applying the principles of democracy passed down to us from French and American Revolutionaries of centuries gone past, and even earlier Greco-Roman literature, define and separate acts prescribed as offences under Civil Code as opposed to Criminal Code. For example, a civil matter relates to an infringement or irreparable damage to Commonwealth owned property such as housing or installations that did not arise out of an Act of God, an accident or negligence; whereas a criminal matter can be the act of selling for-profit unregistered chemical organic or inorganic composites in commercial quantities or manslaughter, the former being able to give effect to the latter. The Migration Act has gone as far as instructing an unqualified body, the Migration Review Tribunal, to perform functions and adjudicate, on behalf of the Judicial Branch of the Australian government, matters of criminal law previously only heard in specialist courtrooms, such as the Magistrates in the state of Victoria, as per the below:

Subsection 271(4) (definition of migration proceedings)

Repeal the definition, substitute:

migration proceedings means:

- (a) proceedings in a court (including criminal proceedings):*
 - (i) under this Act, or in relation to an offence against this Act or a contravention of a civil penalty provision; or*
 - (ii) in relation to a deportation order; or*
- (b) proceedings in the Tribunal for the review of a decision under this Act, including a decision to make a deportation order.*

Note: For offence against this Act, see subsection 5(1).

The act also extends the jurisdiction of the Migration Review Tribunal by introducing the offence of 'civil contravention', defined in the Oxford dictionary as "contravention. noun. An action which offends against a law, treaty, or other ruling" (and we now know that Criminal Code applies, as per Section 4A), whereby:

SECT 486ZD - Ancillary contravention of civil penalty provisions

(1) A person must not:

- (a) attempt to contravene a civil penalty provision; or*
- (b) aid, abet, counsel or procure a contravention of a civil penalty provision; or*
- (c) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or*
- (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or*
- (e) conspire with others to effect a contravention of a civil penalty provision.*

Note: Section 486ZF (which provides that a person's state of mind does not need to be proven in proceedings for a civil penalty order) does not apply in relation to this section.

Civil penalty

(2) A person who contravenes subsection (1) in relation to a civil penalty provision is taken to have contravened the provision.

To me, the afore-named provisions represent a sickening and absolute disrespect of inalienable human right of all living beings, it denies the right to life, it defies the rule of law of other Australian states such as Victoria and its Charter of Human Rights and Responsibilities Act 2006, it's insolent before the

international community and the many commitments made to foreign nations via International Bi-Lateral and Multi-Lateral Treaties causing us, Australian citizens, 'to lose face' before the international community, it attempts to justify a pervasive culture in intimidation and constitutes a failure of law .

The law must be constructed in such way that even the most simple of minds can understand the nature of their offence and be awarded the just opportunity to not commit a crime. When did we become a nation unjustly incarcerating, breeding in-house criminals and inflicting irreparable damage on living beings? I am ashamed of us.

In her reflections, published in the annals entitled Life and Learning, issue number XIV, L.L. Garcia reminds us to not ignore the immateriality of the soul:

"An appeal to conscience, then, has several advantages. (1) Whatever one may make of the origins of conscience, its existence and basic phenomenological features cannot be denied. (2) Taken at face value, conscience witnesses to the transcendence of the person—it approves or condemns, thus presupposing freedom. (3) Conscience recognizes other persons as a boundary of one's freedom—here is one like myself. (4) Personhood calls for an appropriate response, the same response we naturally seek from others—kindness, benevolence, love. (5) The moral imperative arising from conscience is experienced as internal but as arising from an external source; we naturally speak of conscience as a "voice" distinct from our own voice. (6) Unless deliberately silenced, conscience recognizes that life, especially innocent life, must be protected."

Furthermore, as the Committee members aptly acknowledged, this amendment would enable authorized officers, for example MSS security personnel, to conduct searches on individuals who they reasonably suspect may need to show evidence of their migration status. The Community Detention Program is a government initiative that commenced in 2011 as a response to public upheaval in respect to the proposed 'Malaysia Solution', whereby, to bring down the numbers of individuals detained and housed in detention centres and make these individual head count equals the actual number of beds, many were released and placed in the community as holders of bridging visas. This determination was made on the status of individuals in detention marked as 'low risk', consequently they were free to cohabitate with other lawful non-citizens and citizens of Australia within Australia's borders. When I was working at Christmas Island Immigration Detention Centre, the individuals housed in the communal marquee adjacent to the centre were released in the community on Bridging Visa Class E. This class of evidence is valid for 28 calendar days, does not include health or welfare benefits, to my knowledge, but it does allow the holder to work. This class requires the holder to reapply for evidence that he/she is a holder of a Bridging Visa Class E on the 28th day, not before or after, else the non-citizen's status changes to unlawful via the automatic rules set in the mainframe of the immigration computer system.

Keeping in mind this shared knowledge, I present to you the following hypothetical:

As a Victorian, I can purchase a domestic flight ticket and travel from Melbourne to Perth at leisure. When present at Tullamarine Airport, the only photo identification I will be asked for will be my Victorian Driver's License. This will confirm my identity to the airline crew as well as my entitlement to travel between states without a special permit. When in Perth, I decide to venture out at night. I am absent minded and misplace my purse. On the way to my chosen place of accommodation, I walk across government owned land that happens to be protected by MSS security personnel, such as government housing blocks. I think Australia is a safe community and I have never felt unsafe walking alone at night, regardless of the city I found

myself in. I think this is a sentiment many of my generation will share. As I make my way across this land block, which can be an adjoining park, I am asked by security personnel to show evidence of my migration status in Australia. They advise me there has been a spike in unlawful non-citizens around the area and they are conducting an all-inclusive search of the area. I explain to the men that I am from Victoria and, in any case, I don't usually find the need to carry my Australian passport with me when in Australia. They are not convinced I am telling them the truth. They decide that the provisions of section 524(A) apply in this instance, as there is reasonable motive to doubt my lawful non-citizen or citizen status. The reasonable motive is based on prima facie evidence: atypical Australian physical appearance that is not consistent with Anglo-Saxon bone structure, slightly pressured tone and recognizable culturally and linguistically diverse mannerisms. Considering I am in a location at a great geographical distance to my home, I am unable to procure any evidence, nor do I have a close friend or family member to provide statutory evidence that I am known to them. I may also not be aware such legislation exists and is in force, so I may be unwilling to disclose personal information to individuals who are not Australian Police. So where does that leave me and what will happen to me? I think it's a valid question.

Finally, I ask kindly that you consider the intrinsic value and inviolability of all living matter. In his "meditations", Marcus Aurelius reminds us:

"Disgraceful if, in this life where your body does not fail, your soul should fail you first. Think of the whole of existence, of which you are the tiniest part; think of the whole of time, in which you have been assigned a brief and fleeting moment; think of destiny – what fraction of that are you?"

Revere the ultimate power in the universe: this is what makes us of all things and direct all things. But similarly revere the ultimate power in yourself: this is akin to that other power. In you too this is what makes use of all else, and your life is governed by it.

Soon you will have forgotten all things: soon all things will have forgotten you.

It is human nature to love even those who trip and fall. This follows if you reflect at the time that all men are brothers; that they go wrong through ignorance, not intent; that in a short while both you and they will be dead; and, above all, that the man has not harmed you – he has not made your directing mind worse than it was before.

"No soul", says Plato, "likes to be robbed of truth" – and the same holds of justice, moderation, kindness, and all such virtues. Essential that you should keep this constantly in your mind: this will make you more gentle to all. "

With a hopeful heart,

Carmen-Emilia Tudorache.

Bibliography

ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION, August 1993. *Report on the Review of Preservation and Enhancement of Individual's Rights and Freedoms*, Brisbane: Electoral and Administrative Review Commission ISBN 0 7242 5667 9.

AURELIUS, M, 2006. *Meditations*. Penguin Classics, London.

Hobbes, L. 1981. *Leviathan*. Penguin Classics. London.

Grant, S., 2016, *Talking to My Country*, Harper Collins Publishers, Sydney.

Swift, J., 1992, *Gulliver's Travels*, Wordsworth Classics, London.

ed. Dionne Jr, E.J., Reid, J., 2017, *We are the Change We Seek, the Speeches of Barack Obama*, Bloomsbury, New York.

Barris, T., 2009., *Breaking the Silence - Veteran's Untold Stories from the Great War to Afghanistan*, Thomas Allen Publishers, Toronto.

Satre, J. P., 2001, *The Age of Reason*, Penguin Books, London.

Fuller, L. L., 1968, *The Anatomy of Law*, Penguin Books, Victoria.

Robertson QC, R, 1999, *Crimes Against Humanity. The struggle for global justice*. Penguin Books, London.

Ed Bird, C., 1998, *The Stolen Children. Their Story*. Random House Australia, North Sydney.