



Refugee Council
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION ON AUSTRALIAN BORDER FORCE AMENDMENT (PROTECTED INFORMATION) BILL 2017

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the introduction of this Bill, which largely although belatedly addresses concerns we raised about the Australian Border Force Bill when it was first introduced. We do, however, continue to have concerns about some aspects of the Bill, in particular the provision that enables the Secretary to extend the scope of protected information through a legislative instrument.

1 Narrowing of scope of 'protected information'

1.1 RCOA broadly welcomes this Bill, which seeks to narrow the scope of 'protected information' under the *Australian Border Force Act*. Under that Act, unauthorised disclosure of 'protected information' would be a criminal offence subject to a maximum of two years' imprisonment. This applies not only to government officials but to anyone prescribed to be an 'Immigration and Border Protection worker', including those contracted by the Australian Government and their employees.

1.2 When that Act was first introduced into Parliament, we expressed serious concerns about its failure to include clear exemptions for people seeking to reveal wrongdoing. We noted that whistleblowers have in the past played a significant role in revealing wrongdoing by departmental staff and contractors. As we stated then, maintaining opportunities for whistleblowers to act is critical not only to protecting the safety and wellbeing of people under the Department's care but also to ensuring that high standards of professional integrity are upheld.

1.3 Since then, we have observed that the existence of the secrecy provisions has had a chilling effect in the kinds of disclosures made not only by government officials, but also by those contracted by the Australian Government and their employees. We therefore broadly welcome the introduction of this Bill and its intent. In our view, the Bill clearly does more than merely 'clarify' the government's intention in the *Australian Border Force Act*, as stated in the Explanatory Memorandum.

1.4 We also welcome the fact that the Bill will be retrospective and therefore protect disclosures outside its scope made after the *Australian Border Force Act*, although we note that this will also likely immunise the Department from pending litigation in the High Court challenging the validity of the Act.

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2 Concerns about specific clauses

2.1 We remain concerned, however, about the breadth of some of the clauses in the proposed new definition of 'Immigration and Border Protection information'. In particular, we are concerned about the power of the Secretary to prescribe new kinds of information, if the Secretary is satisfied that such information 'would or could' reasonably be expected to either (a) prejudice the effective working of the Department, or (b) otherwise harm the public interest.²

2.2 It is both inappropriate to give a member of the executive power to define the reach of a criminal offence, and to give such power when there is no clear need for it. The Explanatory Memorandum does not give any reason why this provision is needed.

2.3 As the Commonwealth's own *Guide to Framing Offences* observes:

It is normally desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear to the Parliament and those subject to the offence. This also enables the entirety of the content of an offence to be scrutinised by Parliament.

Offence content should also only be delegated from an Act to an instrument where there is a demonstrated need to do so. ...

Offence content should not be delegated from an Act to a subordinate instrument if it would be more appropriate for that content to receive the full consideration and scrutiny of the Parliament (eg if the content to be delegated is likely to be significant or contentious). The Scrutiny of Bills Committee is likely to be critical of any offence containing an excessive delegation of rule-making power to the executive or unelected public officials.³

2.4 RCOA also observes that the proposed definition also extends in some respects beyond the scope of the general secrecy offence recommended by the Australian Law Reform Commission (ALRC) in its comprehensive review of Commonwealth secrecy laws. The ALRC recommended not criminalising information that, if disclosed, would found an action for a breach of confidence, and information that would affect commercial interests.⁴ RCOA would support further limiting the scope of the proposed definition, in line with the principles set out in the ALRC's report.

Recommendation 1

This Committee should recommend that this Bill be passed, with the following amendments to the definition of 'Immigration and Border Protection information' in :

a) *The removal of the power of the Secretary to prescribe further kinds of information*

The removal of proposed subsections 4(1)(d) and (e), criminalising the disclosure of information founding a breach of confidence or causing competitive detriment to a person.

² Sch 1, item 5, inserting subsection 4(7).

³ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) <<https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>>, [2.3.4].

⁴ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report, No 112, 11 March 2010) <<https://www.alrc.gov.au/publications/report-112>>, ch 5.