

Refugee Legal:

Submission to the Senate Legal and Constitutional Affairs Committee: *Australian Border Force Amendment (Protected Information) Bill 2017*

1 Introduction – Refugee Legal

- 1.1 Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.¹ Since its inception over 28 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.
- 1.2 Refugee Legal 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 (**DIBP**) Immigration’s Advice and Application Assistance Scheme (**IAAAS**) and a member of the peak DIBP-NGO Dialogue and the DIBP Protection Process Reference Group. Refugee Legal 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 Committee Inquiry into the *Australian Border Force Amendment (Protected Information) Bill 2017 (the Bill)*. The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Overview

- 2.1 Refugee Legal holds qualified support for the amendments to the *Australian Border Force Act 2015 (the Act)* proposed by the Bill. The amendments would largely confine the secrecy and disclosure provisions contained in Part 6 of the Act to a more appropriate scope that purports to balance the public interest in protecting certain government information with the public interest in open and accountable government.
- 2.2 However, we hold strong concerns with the proposal to provide the Secretary with the power to prescribe by legislative instrument additional kinds of information that engage the secrecy provisions. This constitutes an inappropriate and unwarranted delegation of legislative power, providing a public servant with the personal discretion to dictate the scope of a criminal offence provision. Furthermore, the inclusion of this provision is entirely unnecessary and would undermine the clarity and certainty otherwise provided by the Bill in respect to the disclosure of information, with the consequence that the provisions would continue to have a “chilling effect” on freedom of expression and

¹ Refugee Legal (Refugee and Immigration Legal Centre) 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. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

disclosure of information in the public interest, for which they have been justifiably criticised.

- 2.3 Accordingly, we recommend that the Bill be passed, subject to the removal of proposed paragraph (f) of the definition of “Immigration and Border Protection information” and subsection 4(7).

3 The proposed amendments to the secrecy provisions

- 3.1 The secrecy provisions in Part 6 of the Act came into effect on 1 July 2015. Section 42 of the Act makes it an offence for an “entrusted person” to make a record of or disclose “protected information”. The offence carries a penalty of two years imprisonment.
- 3.2 “Protected information” is currently defined as information that was obtained in the person’s capacity as an entrusted person.² “Entrusted person” is defined as including an “Immigration and Border Protection Worker”, which in turn is defined to include an employee of the Department, other government employees, or a person engaged as a consultant or contractor to perform services for the Department who is specified in a determination. For this purpose, the *Determination of Immigration and Border Protection Worker* dated 29 June 2015 (**the Determination**) specified persons who are engaged as consultants or contractors who are either performing services “in-house” in the Department, meaning they are physically located in premises that are owned, managed, controlled, leased, contracted by or operated by the Department; or who require non-public access to departmental assets. Notably, this encompasses persons who provide services in immigration detention centres.
- 3.3 There are a number of exceptions to the offence set out in s 42(2). These include where the record or disclosure is in the course of a person’s employment or service as an entrusted person; is required or authorised by law (incorporating the protections of the *Public Interest Disclosure Act 2013*); or is authorised by a provision in Part 6 of the Act.
- 3.4 The secrecy offence currently contained in the Act is broad-reaching. It has been criticised for having a “chilling effect” on those seeking to speak publicly about conditions in immigration detention centres – in particular, conditions which may be harmful to the physical or psychological health of persons detained or in breach of duties of care or human rights obligations. In September 2015, the UN special rapporteur on the human rights of migrants, Francois Crepeau, postponed his visit to Australia on the basis that the legislation operated to discourage people from disclosing information relevant to his mandate, and so prevented him from fully and freely carrying out his duties as special rapporteur.³
- 3.5 In response to a High Court challenge to the constitutionality of the provisions filed by Doctors for Refugees, the Determination was amended on 30 September 2016 to exclude health practitioners.⁴ However, other contractors providing services in

² *Australian Border Force Act 2015* (Cth), s 4.

³ UN OHCHR, ‘Migrants / Human rights: Official visit to Australia postponed due to protection concerns’ (25 September 2015), <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>.

⁴ *Determination of Immigration and Border Protection Worker – Amendment No. 1*, 30 September 2016.

detention, including social workers and teachers, currently remain within the scope of the Determination.

- 3.6 From our substantial experience in the area, it is Refugee Legal's view that the present secrecy provisions are unjustifiably broad, and have the effect of silencing legitimate public discussion of government activities and actions, particularly in relation to immigration detention. The exceptions to the offence are insufficient in their coverage and unclear in operation, such that they do not provide certainty to persons seeking to disclose information in the public interest. This kind of uncertainty creates a "chilling effect" because people cannot be certain whether a particular disclosure would constitute an offence.
- 3.7 We welcome the acknowledgement in the Explanatory Memorandum to the Bill of the need to balance the public interest in the protection of certain information, with the public interest in open and accountable government:

This Bill seeks to balance the need to protect certain information, where appropriate, against the Australian Government's commitment to open government. This Bill clarifies the policy and legislative intent, which is to protect certain information from unauthorised disclosure to prevent harm to national and public interests, while meeting the expectations of the Australian community of transparency and accountability within the Australian Government. This balance is needed to appropriately manage information disclosures and preserve public confidence in government.⁵

- 3.8 The Bill proposes to replace the term "protected information" with the new term "Immigration and Border Protection information", which is defined as follows:

information of any of the following kinds that was obtained by a person in the person's capacity as an entrusted person:

- (a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;*
- (b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;*
- (c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;*
- (d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;*
- (e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;*
- (f) information of a kind prescribed in an instrument under subsection (7).*

- 3.9 The proposed definition largely reflects the recommendation of the Australian Law Reform Commission in its 2009 Report, *Secrecy Laws and Open Government in*

⁵ Explanatory Memorandum, p 4.

Australia.⁶ The ALRC recommended that “unauthorised disclosures are only criminalised in circumstances where the disclosure causes, or is likely or intended to cause, harm to an essential public interest.”⁷ By limiting the types of information covered by the secrecy offence provision in this way, we consider that the proposed amendments represent a welcome – if not well overdue – recognition of respect for open government and freedom of communication, and away from a culture of secrecy in the immigration and border protection context.

3.10 However, while generally supporting the amendments, we hold significant concern with the final limb of the proposed definition.

4 Delegation of power to the Secretary

4.1 The Bill proposes to provide the Secretary of the Department with power to prescribe additional kinds of information to be “Immigration and Border Protection information”. Proposed s 4(7) states:

(7) The Secretary may, by legislative instrument, prescribe a kind of information for the purposes of paragraph (f) of the definition of Immigration and Border Protection information in subsection (1) if the Secretary is satisfied that disclosure of the information would or could reasonably be expected to:

(a) prejudice the effective working of the Department; or

(b) otherwise harm the public interest.

4.2 In our submission, this provision constitutes an inappropriate and profoundly concerning delegation of legislative power to the Secretary of the Department. The inclusion of the provision is unjustified, and would undermine the otherwise positive effect of the Bill in providing a certain, clear and principled scope to the secrecy provisions.

4.3 It is critical to note that section 42 specifies a *criminal offence* carrying a penalty of two years imprisonment. The proposed amendment would provide the Secretary – a public servant – with the personal power to expand the scope of a criminal offence. This is a matter that should properly be defined by the legislature. For the Secretary to be handed such power is an inappropriate and disturbing deferral by the legislature.

4.4 The Explanatory Memorandum notes that a legislative instrument made by the Secretary is disallowable and so subject to Parliamentary scrutiny. However, the possibility for disallowance is substantially different to the process of scrutiny and debate that exists in the passing of primary legislation by Parliament. The existence of the possibility of disallowance is not a sufficient answer to the concern about the inappropriate delegation of legislative power. Additionally, a legislative instrument has legal effect from the time it is made until such time as it is disallowed.⁸ This is clearly not appropriate in a context where the legislative instrument operates to expose persons to criminal liability.

⁶ Australian Law Reform Commission (ALRC), *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), Recommendation 5-1.

⁷ *Ibid* [2.83].

⁸ *Legislative Instruments Act 2003* (Cth), s 45.

- 4.5 The Explanatory Memorandum provides the following purported justification for the provision:

*New kinds of information, not already covered by the above definition of Immigration and Border Protection information, that require protection could be identified and need to be disclosed by the Department. Such information may require protection more quickly than an amendment to the ABF Act would permit. The new power in subsection 4(7) is necessary to enable the Secretary to act swiftly to protect information that is not covered by one of the other limbs of the definition from disclosure.*⁹

- 4.6 This is not a principled or supportable justification for the provision. The Bill is otherwise proposing a principled framework for the types of information requiring protection through the secrecy offence, on the basis of the identification of “essential public interests” as explained above. This balances the types of information that require protection through the threat of criminal sanction, with the public interest in open government and the right to freedom of expression. The criteria that the Secretary be satisfied that the disclosure would or could reasonably be expected to prejudice the effective working of the Department, or otherwise harm the public interest, are broad and ill-defined. It would undercut the principled basis of the amendments if the Secretary is provided with the power to add further kinds of information to the scope of the offence in this way.
- 4.7 Further, the suggestion that other types of information may become identified and require swift protection, is hypothetical and has not been sufficiently explained or justified. In this respect, it is notable that the amendments in the Bill have been drafted in light of the Act having been in effect for over two years, and address issues that have become apparent in its practical operation. This is reflected, for example, in the repeal of ss 44(2)(d) and 45(2)(d) on the basis of the Department’s experience that they “are difficult and cumbersome to administer without necessarily providing any additional level of protection against the disclosure of protected information”.¹⁰ It is our submission that the other five proposed aspects of the definition are sufficient to address the government’s stated policy intent, involving “balancing of the competing interests of transparent, open and accountable government with the necessary interest of protecting information from disclosure which would lead to identifiable harm.”¹¹
- 4.8 The inclusion of s 4(7) would mean that the definition of “Immigration and Border Protection information” could be changed instantly. For an “entrusted person” to be sure they are not committing an offence, they would then be tasked with identifying any legislative instruments in force at the time they seek to make the relevant disclosure. Evidently, it would remain extremely difficult for persons seeking to disclose information in the public interest to be confident about whether their actions are lawful.
- 4.9 In our submission, the inclusion of the provision would undermine the clarity that would otherwise be afforded by the amendments, with the result that the secrecy provisions may continue to have a “chilling effect” on freedom of expression and disclosure of information in the public interest. As outlined above, a strong criticism of the existing

⁹ Explanatory Memorandum, p 16.

¹⁰ Explanatory Memorandum, p 3.

¹¹ Explanatory Memorandum, p 2.

provisions is that the ambiguity and uncertainty in the exceptions to the offence lead to potential whistleblowers being too fearful to speak out in fear of exposing themselves to serious criminal penalties, even where that disclosure may in fact be authorised. If the amendments are to meet their stated intent of balancing competing public interests, it is imperative that they are clear and discernible in their scope.

5 Conclusion

- 5.1 Refugee Legal welcomes the proposed amendment of the secrecy offence in the Act to a more confined and principled scope. However, we consider that the inclusion of paragraph (f) of the definition of “Immigration and Border Protection information” and the corresponding power in s 4(7) undermine the positive effect of the Bill and represent an unjustified and disturbing delegation of power to the Secretary.
- 5.2 For these reasons, we submit that the Bill should be passed, subject to the removal of those provisions.

Refugee Legal

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Defending the rights
of refugees.

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