



Australian  
Human Rights  
Commission

# Australian Border Force Amendment (Protected Information) Bill 2017 (Cth)

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO  
THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
LEGISLATION COMMITTEE**

1 September 2017

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## **1 Introduction**

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Australian Border Force Amendment (Protected Information) Bill 2017 (Cth) (the Bill) introduced by the Australian Government.
2. The Commission welcomes the opportunity to provide a submission to this inquiry. The Commission also welcomes the introduction of the Bill, which proposes to narrow the category of information subject to the secrecy provisions and consequent criminal sanctions in s 42 of the *Australian Border Force Act 2015* (Cth) (ABF Act).

## **2 Background and summary**

3. The ABF Act commenced on 1 July 2015 and established the Australian Border Force as a single frontline operational border control and enforcement entity, integrating functions previously performed by the Department of Immigration and Border Protection (Department) and the Australian Customs and Border Protection Service.
4. The current secrecy and disclosure provisions in the ABF Act were adapted from the framework within the now repealed *Customs Administration Act 1985* (Cth) which had governed secrecy and disclosure in the Australian Customs and Border Protection Service.
5. The Commission is concerned that the current blanket secrecy provision in s 42 of the ABF Act unduly restricts freedom of expression, freedom of political communication and the right to take part in public affairs. This is because, subject to limited exceptions, it criminalises the unauthorised disclosure of any information obtained by an officer, contractor or consultant of the Department obtained in the course of their duties. That information may include information that could harm essential public interests such as national security, defence, law enforcement and investigation and public safety. However, the prohibition also extends to disclosing information that would not have an adverse effect on any of these interests and which may in fact be in the public interest to disclose.
6. On 9 September 2016, the Commission wrote to the Attorney-General informing him that the Commission had decided to seek leave to appear as *amicus curiae* in a proceeding brought in the High Court of Australia by Doctors for Refugees Incorporated (Doctors for Refugees). Doctors for Refugees sought to challenge the validity of s 42 of the ABF Act as contrary to the implied freedom of political communication in the Australian Constitution.
7. On 30 September 2016, following the commencement of these proceedings, the Secretary of the Department amended a relevant determination to exclude 'Health Practitioners' from the scope of the secrecy provisions. 'Health Practitioners' is defined broadly to include general practitioners, nurses,

mental health nurses, psychologists, psychiatrists and counsellors among other specialists.<sup>1</sup>

8. Doctors for Refugees remained concerned that the blanket secrecy provisions in s 42 of the ABF Act continued to apply too broadly to non-health professionals, including teachers and social workers, and sought to continue its proceeding.
9. On 9 August 2017, the Australian Government introduced the present Bill.
10. Transparency and accountability in government are central pillars of a healthy democracy. In order to be accountable, the conduct of government must be able to be regularly scrutinised. There are also circumstances where it is critical to keep sensitive government information confidential; for example, in matters relating to intelligence and security information.
11. The effective functioning of government depends on the correct handling of sensitive information by its officers. As part of the spectrum of information handling in the public sector, secrecy laws may serve a legitimate role in generating personal responsibility for the handling of certain kinds of Commonwealth information.<sup>2</sup>
12. If passed, this Bill would ameliorate many of the Commission's concerns about the restrictions on freedom of expression in the ABF Act. When compared to the current law, it strikes a better balance between recognising the need to protect sensitive government information and the importance of allowing legitimate public scrutiny.
13. However, in this submission, the Commission also makes a number of recommendations that advance the Bill's stated objective and enhance the Bill's compatibility with human rights.

### **3 Recommendations**

The Australian Human Rights Commission makes the following recommendations:

#### **Recommendation 1**

The Commission recommends that the Bill be passed with the amendments set out in Recommendations 2 to 8.

#### **Recommendation 2**

The Commission recommends that the proposed definition of '*Immigration and Border Protection information*' in item 1 of the Bill be amended by deleting the

words ‘could reasonably be expected to’ in paragraphs (a) to (e), and replacing them with ‘is reasonably likely to’ in each of those paragraphs

### **Recommendation 3**

The Commission recommends that the proposed definition of ‘*Immigration and Border Protection information*’ in item 1, paragraph (a), of the Bill be amended by deleting the words ‘would or could reasonably be expected to prejudice the security, defence or international relations of Australia’, and replacing them with ‘would or is reasonably likely to damage the security, defence or international relations of Australia’.

### **Recommendation 4**

The Commission recommends that the Bill be amended to define the term ‘security’ by adopting the definition of ‘security’ in the *Australian Security Intelligence Organisation Act 1979* (Cth).

### **Recommendation 5**

The Commission recommends that the Bill be amended to define the term ‘international relations’ by adopting the definition of ‘international relations’ in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

### **Recommendation 6**

The Commission recommends that the proposed definition of ‘*Immigration and Border Protection information*’ in item 1, paragraph (d), of the Bill be amended by inserting ‘and damage the regulatory function of the Department’ after ‘breach of a duty of confidence’.

### **Recommendation 7**

The Commission recommends that paragraph (e) of the proposed definition of ‘*Immigration and Border Protection information*’ in item 1 of the Bill, pertaining to the inclusion of ‘information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person’, be deleted.

### **Recommendation 8**

The Commission recommends that the proposed s 4(5)(a) in item 5 of the Bill, which would deem ‘information that has a security classification’ as being ‘information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia’, be deleted.

## **4 The current law**

14. Part 6 of the ABF Act contains the ‘secrecy and disclosure’ provisions. The main operative section is s 42 which relevantly provides:

## **42 Secrecy**

- (1) A person commits an offence if:
- (a) the person is, or has been, an entrusted person; and
  - (b) the person makes a record of, or discloses, information; and
  - (c) the information is protected information.

15. 'Protected information' is currently defined in the ABF Act to include any 'information that was obtained by a person in the person's capacity as an entrusted person'.<sup>3</sup> There is no requirement that the information have any other distinguishing character. For example, the information could be highly sensitive and confidential or it could be entirely innocuous and administrative. The mere fact that it is obtained in the person's capacity as an 'entrusted person' is enough for it to be considered 'protected information'. If an entrusted person makes a record of protected information or discloses protected information, then (subject to certain narrow exceptions in the ABF Act) they may be liable for imprisonment for up to two years.<sup>4</sup>
16. The definition of 'entrusted person' is defined broadly in the ABF Act and in subsequent determinations made by the Secretary of the Department (Secretary) under the ABF Act. It includes APS employees, customs officers, persons whose services are made available to the Department, as well as persons engaged as consultants or contractors by the Department and their employees.<sup>5</sup> This broad definition of 'entrusted person' extends to many individuals working for the Department, both directly and indirectly.
17. As noted above, in September 2016 the Secretary made a determination under the ABF Act that had the effect of exempting a wide range of health practitioners from the definition of 'entrusted person'.
18. The Commission's primary concern about the current secrecy provisions in s 42 of the ABF Act is that, given the broad nature of the definition of 'entrusted person' and the blanket definition of 'protected information', the ABF Act criminalises the disclosure of information that is not inherently sensitive or inimical to essential public interests. In fact, it criminalises the disclosure of information which may be in the public interest to disclose. This may be considered as impinging disproportionately on freedom of expression and political communication and has the potential to chill legitimate public debate.

## **5 The Bill**

19. The present Bill seeks to:
- repeal the definition of 'protected information' in s 4(1) of the ABF Act and substitute a definition of '*Immigration and Border Protection information*', so that only specific kinds of information are covered by the secrecy and non-disclosure provisions in Part 6 of the ABF Act;

- remove certain requirements regarding the prescribing of bodies to which information may be disclosed, in the name of operational and administrative efficiency;
  - add new permitted purposes for which information that contains personal information can be disclosed under the ABF Act.<sup>6</sup>
20. The Commission's submission only addresses the first of these proposed amendments relating to changing the definition of 'protected information'.
21. If passed, the Bill will have the effect of narrowing the kinds of information that are subject to the secrecy provisions and consequent criminal sanctions of the ABF Act.
22. The Bill creates a new category of information in proposed s 4(1) called '*Immigration and Border Protection information*'. This is defined as information the disclosure of which would or could reasonably be expected to:
- (a) prejudice the security, defence or international relations of Australia;
  - (b) 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) prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
  - (d) found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
  - (e) cause competitive detriment to a person; or
  - (f) information of a kind prescribed in an instrument under subsection (7).
23. Item 5 of the Bill proposes to insert a new s 4(5) into the ABF Act. This subsection would deem information that has a security classification or information that has originated with, or been received from, an intelligence agency as information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia.
24. Item 5 of the Bill also proposes to insert a new s 4(6) into the ABF Act. This subsection would deem information that was provided to the Commonwealth pursuant to a statutory obligation or otherwise by compulsion of law as 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.
25. For the purposes of proposed ss 4(5) and (6) the fault element of the offence is one of recklessness.<sup>7</sup>

26. Additional categories of information are able to be prescribed for protection in a legislative instrument if the Secretary of the Department is satisfied that the disclosure of such information would, or could reasonably be expected to, prejudice the effective working of the Department or otherwise harm the public interest.<sup>8</sup>
27. If passed, the changes in the Bill would have retroactive operation from the commencement of the ABF Act.<sup>9</sup> This means that a person who may have been liable under the former, broader provisions but not under the newer, narrower provisions would no longer be liable to prosecution. There is a strong common law tradition of holding that retrospective criminal laws are inconsistent with the rule of law if they broaden the scope of criminal liability.<sup>10</sup> The Commission commends the Bill's proposal to narrow retroactively the scope of criminal liability in s 42 of the ABF Act as an expression of the policy and legislative intent of the law.<sup>11</sup>
28. Under the Bill, the focus of the inquiry shifts from a simple assessment of whether someone is an 'entrusted person', in which case all of the information that they have obtained in this capacity is protected, to the specific nature of the information and the particular effects of its disclosure. The Commission endorses this overarching policy approach as more likely to enable an appropriate balancing of competing human rights with democratic, national security and other considerations. This submission also identifies areas in the Bill where the Commission suggests that a better balance could be struck between those considerations.

## **6 The purpose of the Bill**

29. The Statement of Compatibility with Human Rights, contained in the Explanatory Memorandum to the Bill, states that:

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.<sup>12</sup>

## **7 Human rights implications**

30. The Statement of Compatibility with Human Rights recognises that the Bill engages articles 17 and 19 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>13</sup> The Commission considers that it also engages article 25 but notes that articles 19 and 25 are interrelated.



## **7.1 Article 17 of the ICCPR**

31. Article 17 of the ICCPR states:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

32. The Department collects and stores highly sensitive information, including information that is of a private and personal nature. Laws relating to the protection and disclosure of such information engage the right to privacy contained in article 17 of the ICCPR.

33. The United Nations Human Rights Committee has stated that the obligations imposed by article 17 of the ICCPR require States to adopt legislative measures to give effect to the prohibition against unlawful or arbitrary interference with the right to privacy.<sup>14</sup> It provides:

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.<sup>15</sup>

34. The *Privacy Act 1988* (Cth) (Privacy Act) is the principal piece of domestic legislation addressing Australia's obligations under article 17 of the ICCPR. It sets out the extent to which an individual is entitled to a right to privacy in Australia and contains the Australian Privacy Principles. The Australian Privacy Principles guide government departments in ensuring the lawful collection, solicitation, storage, security, access, correction, use and disclosure of personal information.<sup>16</sup>

35. The Statement of Compatibility with Human Rights, contained in the Explanatory Memorandum to this Bill, explicitly states that it is intended that the Bill will align with the Privacy Act.<sup>17</sup>

36. From a human rights perspective, the secrecy provisions in the ABF Act can be viewed as a legislative measure intended, at least in part, to protect individuals from unlawful or arbitrary interference with their privacy rights because they impose obligations on those who have access to private information.<sup>18</sup>

37. As discussed below, this legislative measure must be assessed for proportionality and how it interacts with other relevant human rights considerations.

## **7.2 Article 19 of the ICCPR**

38. Article 19 of the ICCPR provides that:

- (1) Everyone shall have the right to hold opinions without interference.

- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
  - (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    - (a) for respect of the rights or reputations of others;
    - (b) for the protection of national security or public order (*ordre public*), or of public health or morals.
39. Importantly, the right to freedom of expression includes both imparting and receiving information. The scope of the conduct protected includes political discourse<sup>19</sup> and commentary on public affairs.<sup>20</sup>
40. The United Nations Human Rights Committee (UNHRC) commented that any restrictions on the right to freedom of expression must be provided for by law, must relate to one of the grounds in article 19(3) and must conform to the tests of necessity and proportionality.<sup>21</sup>
41. One of the grounds in article 19(3) is national security and public order. The UNHCR has said that it is not compatible with paragraph (3) to invoke national security or official secrets laws to suppress or withhold from the public information of legitimate public interest that does not harm national security, or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.<sup>22</sup>
42. In terms of the requirement of proportionality, the UNHRC has provided the following guidance:
- Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.
- The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.<sup>23</sup>
43. Secrecy laws that carry criminal liabilities, such as the one in the present Bill, clearly restrict freedom of expression under article 19 of the ICCPR. Article 19(3) recognises that freedom of speech may be restricted, but only where 'necessary'. The meaning of 'necessary' and other terms used in article 19(3) is elaborated upon in the so-called 'Siracusa Principles', the object of which was to achieve a consistent interpretation and application of the limitation and restriction clauses in the ICCPR.
44. When reference is made to a limitation being 'necessary', it implies that the limitation:

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- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
  - (b) responds to a pressing public or social need;
  - (c) pursues a legitimate aim; and
  - (d) is proportionate to that aim.<sup>24</sup>
45. Further, it is provided that ‘a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation’.<sup>25</sup> Guidance with respect to the meaning of other expressions used in article 19(3) is also set out: namely, ‘public order’, ‘public health’, ‘public morals’ and ‘national security’ is also set out.<sup>26</sup>
46. Applying this approach in the context of the proposed amendment of s 42, it is important to examine if the Bill is proportionate in the sense of being the least restrictive means available to achieve its protective function.
47. In the Commission’s view, the present Bill is more compatible with article 19 of the ICCPR than the current secrecy provision in s 42 of the ABF Act because the Bill narrows criminal liability and uses a more targeted measure to protect essential public interests. Nevertheless, the Commission also proposes further amendments to the Bill with a view to improving further the ABF Act’s compatibility with article 19 of the ICCPR.

### **7.3 Article 25 of the ICCPR**

48. Article 25 of the ICCPR relevantly provides that:
- Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; ...
49. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives are accountable through the electoral process for their exercise of that power.<sup>27</sup> Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives.<sup>28</sup> It is freedom of expression (both in imparting and receiving information) that allows this dialogue to occur. Unduly limiting freedom of expression will impair the rights of citizens to take part in the conduct of public affairs.

### **7.4 Implied freedom of political communication**

50. The freedom of political communication is constitutionally protected under Australian law. That protection is derived by implication, in particular from ss 7 and 24 of the Constitution which provide, respectively, that the Senate and the House of Representatives shall be ‘directly chosen by the people’.<sup>29</sup> The content of the freedom has evolved through a series of High Court cases since

1992. It is now settled that the constitutional protection covers freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors,<sup>30</sup> concerning information that might be relevant to the vote they cast at a referendum, or concerning the conduct of the executive branch of government throughout the life of a federal Parliament.<sup>31</sup>

51. Importantly, the High Court has not recognised a personal right conferred on individuals. Rather, the implication precludes the curtailment of the protected freedom by the exercise of legislative or executive power.<sup>32</sup>

52. From the first cases on the implied freedom of political communication, there has been recognition of the relationship between the said freedom and a government that is open and accountable. In *ACTV v Commonwealth*, Mason CJ said:

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.<sup>33</sup>

53. More recently, in *Unions NSW v New South Wales*, the High Court held that the efficacy of Australia's system of representative and responsible government 'depends upon free communication between all persons and groups in the community', with an elector's judgment on many issues turning 'upon free public discussion, often in the media, of the views of all those interested'.<sup>34</sup>

54. Freedom of political communication has not been held to be absolute under the Australian Constitution. A law that burdens, or impinges on, political communication will be invalid only if one or more of the following conditions cannot be met:

- the law serves a legitimate purpose;
- the law's purpose and the means adopted to achieve that purpose are compatible with Australia's system of representative and responsible government; and
- the law is a proportionate means of achieving its legitimate purpose, in the sense of being reasonably appropriate and adapted to advancing the legitimate purpose.<sup>35</sup>

55. The Department has jurisdiction over the implementation of Commonwealth policy that has been the subject of significant political debate during successive parliaments and federal elections. This includes policy in relation to asylum seekers and refugees, mandatory detention and offshore detention.

56. As such, the Commission is concerned that the current secrecy provision in s 42 of the ABF Act unduly inhibits political communication because it prevents or restricts the disclosure of information even if:
- the information is relevant to political or electoral choices to be made by the Australian public;
  - it would otherwise be reasonable or in the public interest for that information to be disclosed and;
  - it would not harm any essential public interest.

## **8 A harm-based approach to secrecy laws**

57. In 2010, the Australian Law Reform Commission (ALRC) published its final report arising from its inquiry into secrecy laws and open government in Australia.<sup>36</sup> The ALRC's mandate was to conduct an inquiry into the options for ensuring a 'consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government'.<sup>37</sup> It explored many of the same institutional, public policy and human rights issues that arise in the present circumstances.
58. The final report recognised that secrecy laws that expose government employees to criminal liability for the unauthorised disclosure of official information, like those contained in the present Bill, can 'sit uneasily' with open and accountable government.<sup>38</sup>
59. After canvassing international approaches to secrecy laws, and exploring various options for protecting official information, the ALRC formed the view that, subject to a few narrow exceptions, an approach based on harm to essential public interests should underpin the secrecy laws carrying criminal liability in Australia.<sup>39</sup>
60. It found that this approach struck the best balance between protecting sensitive official information and protecting the public interest in open and accountable government.<sup>40</sup>
61. A harm-based approach is also evident in the case of *Bennett v President, Human Rights and Equal Opportunity Commission*.<sup>41</sup> In *Bennett*, Finn J found that a blanket secrecy provision in the Public Service Regulations 1999 (Cth) was inconsistent with the implied freedom of political communication in the Australian Constitution. His Honour held that:

The dimensions of the control it imposes impedes quite unreasonably the possible flow of information to the community – information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government. ...

It is one thing to regulate the disclosure of particular information for legitimate reasons relating to that information and/or to the effects of its disclosure. It is another to adopt the catch-all approach of reg 7(13) which does not purport

either to differentiate between species of information or the consequences of disclosure.<sup>42</sup>

[emphasis added]

62. The ALRC ultimately recommended that the Commonwealth enact a ‘general secrecy offence’ to replace s 70 of the *Crimes Act 1914* (Cth) and to apply to all Commonwealth information and to all present and former Commonwealth officers. It also gave careful consideration to what essential public interests should be protected by it.<sup>43</sup>

63. Following consultation with numerous stakeholders, the ALRC recommended that the Commonwealth enact a ‘general secrecy offence’ in the following terms:

The general secrecy offence should require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

- (a) damage the security, defence or international relations of the Commonwealth;
- (b) prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- (c) endanger the life or physical safety of any person; or
- (d) prejudice the protection of public safety.<sup>44</sup>

64. Paragraphs (a) – (c) in the definition of ‘*Immigration and Border Protection information*’ in item 1 of the present Bill broadly correlate to the essential public interests identified by the ALRC in its final report. They protect information the disclosure of which would or could reasonably be expected to:

- (a) prejudice the security, defence or international relations of Australia;
- (b) 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) prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;

65. Paragraphs (d) – (e) in the definition of ‘*Immigration and Border Protection information*’ in item 1 of the Bill go beyond the recommendations made by the ALRC, extending to information the disclosure of which would or could reasonably be expected to:

- (d) found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
- (e) cause competitive detriment to a person.

## **9 Criminal sanctions for unauthorised disclosure**

66. The unauthorised disclosure of information under s 42 of the ABF Act carries a penalty of up to two years imprisonment.<sup>45</sup>
67. Unlike the imposition of administrative sanctions, such as termination of employment, a reduction in salary or a formal reprimand, criminal sanction is a judicial act that alters a person's legal status.<sup>46</sup> In addition to the deprivation of liberty associated with any period of incarceration, it can have serious ongoing consequences. As noted by the ALRC,<sup>47</sup> a person convicted of certain offences may be:
- ineligible to hold public office;
  - ineligible to manage a corporation, or be a director or principal executive officer of a company;
  - required to disclose the fact of his or her criminal conviction in a number of circumstances, for example, in obtaining a driver's licence or in seeking employment in certain positions; and
  - deported, if he or she is a non-citizen.
68. The Commission acknowledges that criminal penalties have deterrent value and accepts that, in serious cases, they are appropriate. The Department is entrusted with highly sensitive information across numerous portfolios and criminal penalties act as an assurance to the community, both domestic and international, that private information provided to the Australian Government will be adequately protected. However, it is also important to ensure that secrecy provisions carrying criminal sanctions are not overly broad.
69. Given the adverse consequences associated with criminal conviction, the Commission recommends that criminal penalties should only attach to the unauthorised disclosure of official information when it harms, or is reasonably likely to harm, essential public interests. This is consistent with the application of a proportionality analysis as embodied in the Siracusa Principles. It is appropriate for criminal sanctions to attach to intentional conduct reasonably likely to cause harm to others or to the public. Less serious conduct can be addressed by less restrictive measures. For misconduct that is not reasonably likely to harm essential public interests, the Commission considers that the pursuit of administrative or contractual remedies is more appropriate.
70. This position informs the Commission's assessment of the present Bill and the recommendations below.

## **10 'Would or could reasonably be expected to'**

71. If the Bill is passed, the secrecy provisions would apply to information the disclosure of which 'would or could reasonably be expected to' prejudice the categories of information set out in the definition of *'Immigration and Border Protection information'*.

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72. The term ‘would or could reasonably be expected to prejudice’ appears in other federal legislation, such as the *Freedom of Information Act 1982* (Cth) (FOI Act) and has been judicially considered.
73. In *Attorney-General’s Department v Cockcroft*, Bowen CJ and Beaumont J construed the phrase ‘could reasonably be expected to’, stating that the words
- were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous ... It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like ... it is preferable to confine the inquiry to whether the expectation claimed was reasonably based.<sup>48</sup>
74. Accordingly, the relevant expectation must be based on reason, or agreeable to reason, and not fanciful, imaginary or contrived.<sup>49</sup> An expectation of an occurrence that is speculative, conjectural or a mere possibility will not be considered reasonable.<sup>50</sup> However, it is not necessary for the decision maker to be satisfied on the balance of probabilities that the expectation will occur.<sup>51</sup> A possibility of prejudice that is real, significant or material, and based on reasonable grounds, will be sufficient.<sup>52</sup>
75. The term ‘would or could reasonably be expected to’ in the Bill potentially criminalises the unauthorised disclosure of information where there is the reasonable possibility, but not the reasonable likelihood, of prejudice.
76. As discussed above, the Commission considers that, in the absence of any actual or likely harm to public interests, the unauthorised disclosure of Commonwealth information should not be subject to criminal sanction and is more suitably dealt with by way of administrative or contractual remedies.<sup>53</sup> The Commission’s view is that applying criminal sanctions to a broader range of expression would be disproportionate to the aim of preventing harm to relevant public interests.

## **Recommendation 2**

The Commission recommends that the proposed definition of ‘*Immigration and Border Protection information*’ in item 1 of the Bill be amended by deleting the words ‘could reasonably be expected to’ in paragraphs (a) to (e), and replacing them with ‘is reasonably likely to’ in each of those paragraphs.

## **11 ‘Prejudice’ or ‘damage’ to the security, defence or international relations of Australia?**

77. In the proposed ALRC secrecy offence, the unauthorised disclosure of information would attract criminal liability if the disclosure of information did, or was reasonably likely to, or intended to damage the security, defence or international relations of the Commonwealth.



78. Similarly, s 33 of the FOI Act exempts documents from disclosure if the disclosure ‘would, or could reasonably be expected to, cause damage’ to the Commonwealth’s security, defence or international relations.
79. In paragraph (a) of the definition of ‘*Immigration and Border Protection information*’ in item 1 of the present Bill, the unauthorised disclosure of information attracts criminal liability if the disclosure of the information ‘would or could reasonably be expected to prejudice the security, defence or international relations of Australia’.
80. ‘Prejudice’ is not defined in either the ABF Act or the FOI Act. The guidelines to the FOI Act produced by the Office of the Australian Information Commissioner (FOI guidelines) refer to the Macquarie Dictionary definition of prejudice as requiring:
- disadvantage resulting from some judgement or action of another;
  - resulting injury or detriment.<sup>54</sup>
81. The FOI guidelines further clarify that a prejudicial effect is ‘one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes’.<sup>55</sup> The expected outcome does not need to have an impact that is ‘substantial and adverse’.<sup>56</sup>
82. In the Commission’s view, the use of the word ‘prejudice’ in the present Bill, as distinct from ‘damage’, potentially broadens the application of the provision to include disclosures that simply disadvantage, rather than harm or damage, particular public interests in a way that may not be substantial or adverse.
83. Given the Commission’s view that criminal liability should only attach to disclosures that will or are likely to harm essential public interests, the Commission recommends that the present Bill be amended to only criminalise disclosures that would be reasonably likely to ‘damage’ the security, defence or international relations of Australia.

### **Recommendation 3**

The Commission recommends that the proposed definition of ‘*Immigration and Border Protection information*’ in item 1, paragraph (a), of the Bill be amended by deleting the term ‘would or could reasonably be expected to prejudice the security, defence or international relations of Australia’, and replacing it with ‘would or is reasonably likely to damage the security, defence or international relations of Australia’.

## **12 Defining ‘security’ and ‘international relations’**

84. Clarity in the law is always desirable. It is particularly important in the context of criminal law, as a person should be able to assess with reasonable certainty what constitutes criminal conduct before engaging in it.<sup>57</sup> This is made more difficult when operative terms in criminal offences are not well-defined, such as in the present Bill.

## 12.1 Security

85. The term 'security' is not defined in the ABF Act. The concept of 'national security' as it appears in multiple pieces of federal legislation was given careful consideration by the ALRC during its inquiry into secrecy laws and open government in Australia.<sup>58</sup>
86. Ultimately, the ALRC formed the view that including a definition of the term 'security' in its general secrecy offence would assist Commonwealth officers and the courts to understand the scope of the offence.<sup>59</sup> It recommended the definition currently set out in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act). This definition is also consistent with the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
87. Section 4 of the ASIO Act defines 'security' as:
- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
    - (i) espionage;
    - (ii) sabotage;
    - (iii) politically motivated violence;
    - (iv) promotion of communal violence;
    - (v) attacks on Australia's defence system; or
    - (vi) acts of foreign interference;
- whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
  - (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).
88. It further defines 'attacks on Australia's defence system' to mean:
- activities that are intended to, and are likely to, obstruct, hinder or interfere with the performance by the Defence Force of its functions or with the carrying out of other activities by or for the Commonwealth for the purposes of the defence or safety of the Commonwealth.
89. Given the multiple definitions of 'security' appearing in federal legislation, the Commission considers that, for the sake of clarity and consistency, the term 'security' in the ABF Act should be defined by reference to the definition in the ASIO Act. This definition describes in specific terms the activities and interests that offence is designed to protect. It is a definition against which the proportionality of the criminal sanctions attaching to disclosure of information can be properly assessed.

#### **Recommendation 4**

The Commission recommends that the Bill be amended to define the term 'security' by adopting the definition of 'security' in the *Australian Security Intelligence Organisation Act 1979* (Cth).

### **12.2 International relations**

90. The term 'international relations' is also undefined in the ABF Act.
91. The FOI guidelines define 'international relations' as relating to 'the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of information between them'.<sup>60</sup> It is not limited to interactions at the formal diplomatic or ministerial level and extends to the relations of individual federal agencies and their international counterparts.<sup>61</sup>
92. The term 'damage to international relations' can also comprehend intangible or speculative damage, such as the loss of trust and confidence in the Australian government or damage to Australia's reputation.<sup>62</sup> In *Re Maher and Attorney-General's Department*, the AAT found that, although such damage might be difficult to assess, it is still contemplated by the term.<sup>63</sup>
93. While the ALRC ultimately recommended the inclusion of 'international relations' in the list of essential public interests subject to criminal sanction, it initially expressed concern that, given its opaque definition, imposing this liability on Commonwealth officers may be too broad.<sup>64</sup> In an effort to ameliorate this concern it recommended that the term 'international relations' be given the definition provided in s 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth); that is, the 'political, military and economic relations with foreign governments and international organisations'. This would lessen the chance that unauthorised disclosures that merely embarrass the Australian Government, without causing or threatening any real damage, would fall within the scope of the offence.
94. The Commission considers that, for the purpose of the ABF Act, 'international relations' should be given the definition provided in s 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). In this manner, the criminal provision would be limited to unauthorised disclosures that damage, or are reasonably likely to damage, Australia's political, military or economic relations with other countries or international organisations.

#### **Recommendation 5**

The Commission recommends that the Bill be amended to define the term 'international relations' by adopting the definition of 'international relations' in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

### 13 Duty of confidence

95. The Bill includes within the definition of *‘Immigration and Border Protection information’* information the ‘disclosure of which would or could be reasonably expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence’.
96. ‘Duty of confidence’ is defined in item 1 of the Bill to mean ‘any duty or obligation arising under the common law or at equity pursuant to which a person is obliged not to disclose information’.
97. Unlike paragraphs (a) - (c) of the definition of *‘Immigration and Border Protection information’*, there is no requirement that the disclosure of information falling within paragraph (d) have harmful or prejudicial effects.
98. The Commission considers that there must be compelling justification to support secrecy provisions that criminalise the unauthorised disclosure of information that is not reasonably likely to harm essential public interests. This is because, consistent with the proportionality analysis noted above, a legislative measure should represent the least restrictive means available to achieve its protective function. Without additional justification, the inclusion of information that does not harm essential public interests raises the same concerns about disproportionate restrictions on freedom of expression and freedom of political communication as the current s 42 of the ABF Act.
99. Consequently, it is necessary to examine whether information received pursuant to a duty of confidence has a special character warranting its protection beyond the remedies available at general law.
100. The Explanatory Memorandum to the Bill provides that the purpose of including this kind of information
- ... is to recognise that individuals who provide information to the Department on the understanding that it will be kept confidential have a right to expect that it will be protected under Part 6 of the ABF Act. The Department’s ability to function effectively depends on this information and any breakdown of trust between the Department and the client in this context will have adverse repercussions for the Department and the Government generally.<sup>65</sup>
101. It also identifies specific kinds of information that ‘could be covered by this paragraph’,<sup>66</sup> including:
- information that identifies an informant who reports breaches of sponsorship obligations under the Migration Act; and
  - information from a sponsor of an applicant for a partner visa to the effect that they no longer wish to sponsor their partner for the grant of that visa, in the context of family violence.
102. The Explanatory Memorandum makes clear that paragraph (d) has been included to promote community confidence in the Department’s ability to protect confidential information. It states that a ‘lack of client confidence in the

Department's ability to protect confidential information could result in such information being withheld'.<sup>67</sup>

103. Section 45(1) of the FOI Act contains an exemption from the obligation to disclose a document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence. This description adopts similar words to paragraph (d) in the Bill and thus aims to protect confidentiality where that confidentiality would be actionable at common law or in equity.<sup>68</sup> Crucially, unlike the Bill, the FOI Act does *not* criminalise a disclosure that would found an action by a person for breach of confidence.
104. In FOI jurisprudence, it has been established that to found an action for breach of confidence, the following five criteria must be satisfied in relation to the information:
  1. it must be specifically identified;
  2. it must have the necessary quality of confidentiality;
  3. it must have been communicated and received on the basis of a mutual understanding of confidence;
  4. it must have been disclosed or threatened to be disclosed, without authority;
  5. unauthorised disclosure of the information has or will cause detriment.<sup>69</sup>
105. The application of these criteria indicates that not all personal or commercial information will be protected by paragraph (d). 'Duty of confidence' is a specific legal term that provides its own limiting factors.
106. The ALRC considered that material received in confidence should not be protected under its general secrecy offence. It decided that, as s 45 of the FOI Act describes a category of information, rather than an essential public interest, it was not consistent with the harm-based approach to public interests that it had adopted.<sup>70</sup> It recommended that 'information that would found such an action should be dealt with under the general law dealing with a breach of confidence, or under administrative provisions'.<sup>71</sup>
107. There are various contractual, common law and equitable remedies available to injured parties at general law if information is disclosed in breach of a duty of confidence. These include damages and injunctions at common law, as well as compensation, an account of profits, injunctions and declarations at equity.<sup>72</sup> Employees in the public sector may also face disciplinary action if they improperly disclose official information. Under the Privacy Act, individuals are able to complain to the Office of the Australian Information Commissioner if personal information is disclosed by government agencies in breach of the Australian Privacy Principles.
108. In the private sector, criminal sanctions will generally not attach to the unauthorised disclosure of information unless, for instance, another element

such as fraud is involved.<sup>73</sup> As such, it is necessary to examine if the unauthorised disclosure of information released pursuant to a duty of confidence in the public sector should attract heightened sanction, namely the application of the criminal law.

109. The ALRC acknowledged that, in narrow circumstances, it might be appropriate to criminalise the disclosure of personal or commercial information without an explicit requirement to demonstrate harm or the likelihood of harm.<sup>74</sup> This was a response to concerns expressed by many government departments that a harm-based approach would lessen public confidence in their ability to protect personal and commercial information and that, if the public lost confidence in the integrity of the system, it could prejudice the future supply of information.<sup>75</sup>
110. The ALRC considered that, in certain regulatory contexts where agencies require sensitive information to perform their functions, the ability to impose criminal penalties for the unauthorised disclosure of information is necessary to support community confidence in the ability of the government to protect the information.<sup>76</sup> In this manner, harm to private or commercial interests can also be viewed as harm to a public interest, specifically the ability of the regulatory agency to effectively perform its regulatory function. The ALRC accepted that this will particularly be the case where regulators require sensitive information from individuals and entities for matters such as social security, taxation or health.<sup>77</sup>
111. The Commission accepts that some functions of the Department require individuals and companies to provide sensitive information in circumstances where they expect the Department to keep this information confidential. This is reflected in the example given in the Explanatory Memorandum regarding a sponsor wanting to withdraw sponsorship in the context of family violence. Viewed in this manner, paragraph (d) can be read as a specific secrecy offence designed to protect the Department's ability to perform its function regulating Australia's immigration and border protection policy.
112. In the context of agency-specific secrecy laws, the ALRC emphasises that they should not be expressed in broad terms.<sup>78</sup> Instead:

the category of information protected should be narrowly defined, so that the secrecy provisions is not so wide as to cover information that would not harm the regulatory function of the agency.<sup>79</sup>
113. While the Explanatory Memorandum of the Bill identifies loss of public confidence in the Department's ability to protect confidential information as the reason for the inclusion of paragraph (d), this rationale is not reflected in the express terms of the offence provision.
114. To be more consistent with the Bill's stated objective and enhance the Bill's compatibility with human rights, the Commission recommends that paragraph (d) be amended to read:

information the disclosure of which would, or is reasonably likely to, found an action by a person (other than the Commonwealth) for breach of a duty of confidence and damage the regulatory function of the Department.

## **Recommendation 6**

The Commission recommends that the proposed definition of '*Immigration and Border Protection information*' in item 1, paragraph (d), of the Bill be amended by inserting 'and damage the regulatory function of the Department' after 'breach of a duty of confidence'.

## **14 Competitive detriment**

115. Under the Bill, information will be protected '*Immigration and Border Protection information*' if it is information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person.
116. The phrase 'competitive detriment' is not defined in the Bill and does not appear to have been the subject of judicial consideration in case law about relevantly similar provisions.
117. The Explanatory Memorandum to the Bill provides that:

This paragraph is concerned with protecting commercial information that is provided to the Department. This recognises that disclosing such information could cause significant damage to an entity's business interests where the information provides a commercial advantage to a competitor or potential competitor. For example, the unauthorised disclosure of such information may result in competitors of a commercial entity undercutting the service it provides or counterfeiting its product.<sup>80</sup>

118. While acknowledging the importance of protecting confidential commercial information, the Commission considers it is inappropriate to extend criminal liability to the unauthorised disclosure of information that would or could cause 'competitive detriment'.
119. 'Competitive detriment' has the potential to be interpreted very broadly. If the proposed definition of '*Immigration and Border Protection information*' in item 1, paragraph (d), of the Bill is retained, commercial information that has been communicated to the Department in circumstances where disclosure of such information would or could reasonably be expected to found a duty for breach of confidence is already protected.
120. The Commission is not convinced that protecting private entities from 'competitive detriment' is a public interest of the same essential character as national security, defence, law enforcement, public safety or the effective regulatory function of an agency such that the unauthorised disclosure of information relating to it should attract criminal sanctions. As previously noted, civil law is available to address the problem of improper disclosure of commercial information. The remedies available under civil law – such as contractual, common law and equitable remedies – also are more effective at assisting a person who has suffered detriment as a result of this form of improper disclosure.

## **Recommendation 7**

The Commission recommends that paragraph (e) of the proposed definition of *‘Immigration and Border Protection information’* in item 1 of the Bill, pertaining to the inclusion of ‘information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person’, be deleted.

## **15 Deeming provisions**

121. The Bill deems that the following kinds of information are included within the definition of *‘Immigration and Border Protection information’*:
- information that has a security classification;
  - information that has originated with, or was received from, an intelligence agency;
  - information that was provided to the Commonwealth pursuant to a statutory obligation or otherwise by compulsion of law.<sup>81</sup>
122. Accordingly, any information that falls into one of the three categories above would be subject to criminal sanction upon unauthorised disclosure. This applies equally to both innocuous and highly sensitive information.
123. It is not necessary that a person intend to make an unauthorised disclosure under these sections to be guilty of the criminal offence. It will be sufficient if he or she is reckless as to whether or not the information falls into one of these categories.<sup>82</sup>
124. The Commission supports the shift in this Bill away from ‘catch-all’ secrecy provisions and towards provisions that focus attention on the specific nature of the information that requires protection and the specific harms that are likely to result from its disclosure. However, the effect of these deeming provisions is to focus on the form of the information rather than either its content or the likely consequences of disclosure.
125. The Commission has particular concerns about the deeming provision that relates to security classification.

### **15.1 Security classification**

126. The Commonwealth classifies information in accordance with the Australian Government’s Protective Security Policy Framework. This Framework provides a system for identifying official information the disclosure of which could have a business impact level of ‘high’ or above for the government. The *Australian Government information security management guidelines – Australian Government security classification system* (Information security management guidelines) provide guidance on how to identify and classify this official information.<sup>83</sup>



127. There are four levels of security classification, each corresponding to a level of damage to 'the national interest, organisations and individuals' of unauthorised disclosure. These are protected, confidential, secret and top secret.<sup>84</sup>
128. The 'national interest' is defined broadly as a matter which has or could have impact on Australia, including:<sup>85</sup>
- national security
  - international relations
  - law and governance including:
    - inter-state/territory relations
    - law enforcement operations where compromise could hamper or prevent national crime prevention strategies or investigations, or endanger personal safety
  - economic wellbeing
  - heritage or culture.
129. Security classifications do not only attach to information that could be expected to cause damage to national interests. The guidelines provide that they should also be used if disclosure could be expected to cause damage to 'organisations or individuals'. This has the potential to be interpreted expansively by each of the different federal agencies charged with classifying its own information.
130. The PROTECTED security classification is to be used when the compromise of the confidentiality of information could be expected to cause damage to the national interest, organisations or individuals.<sup>86</sup>
131. The CONFIDENTIAL security classification is to be used when the compromise of the confidentiality of information could be expected to cause significant damage to the national interest, organisations or individuals.<sup>87</sup>
132. The SECRET security classification is to be used when compromise of the confidentiality of information could be expected to cause serious damage to the national interest, organisations or individuals.<sup>88</sup>
133. The TOP SECRET security classification requires the highest degree of protection as compromise of the confidentiality of this information could be expected to cause exceptionally grave damage to the national interest.<sup>89</sup>
134. If correctly applied, any information with a security classification should have already been subject to an assessment that the compromise of the information could, at the very least, cause damage to the national interest, organisations or individuals.
135. This may go some way towards alleviating concerns that the deeming provision is overly broad and will capture innocuous information.

136. However, this will only be the case if the information is properly classified in accordance with the guidelines. As drafted, the Bill captures any information that has a security classification, regardless of whether or not the information should have been given a security classification.
137. The guidelines make clear that Government policy is to keep classified information to a minimum and that in no case should information be classified to hide violations of law, inefficiency or administrative error.<sup>90</sup> It is also inappropriate to classify documents to prevent embarrassment, restrain competition or prevent or delay the release of information that does not need protection in the national interest. The guidelines also make clear that information should not be overclassified.
138. However, it is not difficult to contemplate a situation whereby information might inadvertently be misclassified by an agency. Moreover, as already noted, the guidelines allow for the security classification of information that goes beyond damage to the national interest and extends broadly to damage to 'organisations or individuals'.
139. Additionally, the test for whether a document is to be security classified relates to an assessment as to whether it 'could' be expected to cause damage. This assessment of 'could' is not qualified by any requirement that the expectation be reasonable.
140. Recalling the Commission's position that criminal penalties should only attach to the unauthorised disclosure of official information when it would or is reasonably likely to harm essential public interests, it is suggested that the deeming provision as it relates to security classified information is too broad.
141. The Commission considers that the deeming of information with a security classification as requiring protection, without any consideration of the content of the information, whether it has been correctly classified or whether it is, in fact, information the disclosure of which would, or is reasonably likely to, harm essential public interests remains a 'blanket provision' that unduly restricts freedom of expression, political communication and legitimate public scrutiny.
142. The fact that information has a security classification should be a relevant consideration for a decision-maker in determining whether or not the information would, or could reasonably be expected to harm the security, defence or international relations of Australia. However, it should not be the determinative factor.

### **Recommendation 8**

The Commission recommends that the proposed s 4(5)(a) in item 5 of the Bill, which would deem 'information that has a security classification' as being 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia', be deleted.

Australian Human Rights Commission

*Australian Border Force Amendment (Protected Information) Bill 2017, Senate inquiry – September 2017*

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- <sup>1</sup> Secretary, Department of Immigration and Border Protection, *Determination of Immigration and Border Protection Workers – Amendment No. 1*, 30 September 2016.
- <sup>2</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 22.
- <sup>3</sup> *Australian Border Force Act 2015* (Cth), s 4(1).
- <sup>4</sup> *Australian Border Force Act 2015* (Cth), s 42.
- <sup>5</sup> *Australian Border Force Act 2015* (Cth), s 4; Secretary, Department of Immigration and Border Protection, *Determination of Immigration and Border Protection Workers*, 29 June 2015.
- <sup>6</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 2.
- <sup>7</sup> Proposed s 42(1A), item 8, Australian Border Force Amendment (Protected Information) Bill 2017.
- <sup>8</sup> Proposed s 4(7), item 5, Australian Border Force Amendment (Protected Information) Bill 2017.
- <sup>9</sup> Clause 2, Commencement, Australian Border Force Amendment (Protected Information) Bill 2017.
- <sup>10</sup> *PGA v The Queen* (2012) 245 CLR 355, 245.
- <sup>11</sup> Statement of Compatibility with Human Rights, Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 4.
- <sup>12</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 4.
- <sup>13</sup> Statement of Compatibility with Human Rights, Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 5 - 6.
- <sup>14</sup> UN Committee on Human Rights, *General Comment 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), [1].
- <sup>15</sup> UN Committee on Human Rights, *General Comment 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988), [10].
- <sup>16</sup> *Privacy Act 1988* (Cth), Schedule 1.
- <sup>17</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 5.
- <sup>18</sup> Statement of Compatibility with Human Rights, Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 6.
- <sup>19</sup> *Mika Miha v Equatorial Guinea*, Communication No. 414/1990, UN Doc CCPR/C/51/D/414/1990 (10 August 1994). The author of the communication to the Human Rights Committee was arrested and detained solely or primarily because of his membership in, and activities for, a political party in opposition to the regime of President Obiang Nguema. Among other breaches, his arrest constituted an unlawful interference with his right to freedom of expression.
- <sup>20</sup> *Coleman v Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (10 August 2005), [7.3].
- <sup>21</sup> United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011), [22].
- <sup>22</sup> United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011), [30], referring to the Committee's Concluding observations on the Russian Federation, UN Doc CCPR/CO/79/RUS (1 December 2003), [21].
- <sup>23</sup> United Nations Human Rights Committee, General Comment No. 27, *Freedom of movement (article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999), [14]–[15]; cited in General Comment 34 on *Freedom of opinion and expression* at [34] as also applicable to article 19.
- <sup>24</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex, [10].
- <sup>25</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex, [11].
- <sup>26</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex, [22]–[32].
- <sup>27</sup> United Nations Human Rights Committee, *General Comment No. 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996), [7].

- <sup>28</sup> United Nations Human Rights Committee, *General Comment No. 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996), [8].
- <sup>29</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*) at 559.
- <sup>30</sup> *Lange* at 560.
- <sup>31</sup> *Lange* at 561.
- <sup>32</sup> *Lange* at 560.
- <sup>33</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138.
- <sup>34</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530, 551 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
- <sup>35</sup> See *McCloy v New South Wales* (2015) 257 CLR 178 (French CJ, Kiefel, Bell and Keane JJ) for the comprehensive test.
- <sup>36</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
- <sup>37</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 21.
- <sup>38</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 21.
- <sup>39</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 23.
- <sup>40</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 138.
- <sup>41</sup> *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.
- <sup>42</sup> *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, [99].
- <sup>43</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), pp 143-161.
- <sup>44</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 160.
- <sup>45</sup> *Australian Border Force Act 2015* (Cth), s 42.
- <sup>46</sup> R Fox and A Freiberg, 'Sentences Without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297, 300.
- <sup>47</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 113.
- <sup>48</sup> *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97, 106.
- <sup>49</sup> *Re David McKnight and Australian Archives* [1992] AATA 225, [27].
- <sup>50</sup> *Murphy and Treasury Department* (1995) 2 QAR 744, [44], citing *Re B and Brisbane North Regional Heath Authority* (1994) 1 QAR 279, [160].
- <sup>51</sup> *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97, 106.
- <sup>52</sup> *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623, [79].
- <sup>53</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 100.
- <sup>54</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.22].
- <sup>55</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.23].
- <sup>56</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.23].
- <sup>57</sup> *R v Tjanara Goreng Goreng* [2008] ACTSC 74 (18 August 2008), [52].
- <sup>58</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), pp 146-151.
- <sup>59</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 150.
- <sup>60</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act*, [5.36].
- <sup>61</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.36].
- <sup>62</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.37].
- <sup>63</sup> *Re Maher and Attorney-General's Department* (1985) 7 ALD 721, [40].
- <sup>64</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 152.

- <sup>65</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 13.
- <sup>66</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 13.
- <sup>67</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 13.
- <sup>68</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.158], citing *Re Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.
- <sup>69</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.159].
- <sup>70</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 169.
- <sup>71</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 169.
- <sup>72</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2006), p 565.
- <sup>73</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2006), p 176.
- <sup>74</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 302.
- <sup>75</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 298.
- <sup>76</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 301.
- <sup>77</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 301.
- <sup>78</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 302.
- <sup>79</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), p 302.
- <sup>80</sup> Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017 (Cth), p 13.
- <sup>81</sup> Proposed ss 4(5) and 4(6), item 5, Australian Border Force Amendment (Protected Information) Bill 2017.
- <sup>82</sup> Item 8, Australian Border Force Amendment (Protected Information) Bill 2017.
- <sup>83</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015.
- <sup>84</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 8-9.
- <sup>85</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 6.
- <sup>86</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 8.
- <sup>87</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 9.
- <sup>88</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 8.
- <sup>88</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 9.
- <sup>89</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 9.
- <sup>90</sup> Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, amended April 2015, p 5.