



Australian Border Force Bills 2015

Senate Legal and Constitutional Affairs Committee

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Acknowledgement

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Executive Summary

1. The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs' Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 (the Customs ABF Bill) and the Australian Border Force Bill 2015 (the ABF Bill).
2. The combined effect of the two Bills is to merge the Department of Immigration and Border Protection (DIBP) with the Australian Customs Service and Border Protection (ACBPS) into a new Immigration and Border Protection Department (IBP Department). The Australian Border Force (ABF) will also be created as the Department's operational enforcement arm.
3. While there are justified policy reasons for ACBPS operations to come under the portfolio responsibilities of the Department of Immigration, a range of areas currently falling within the responsibility of DIBP, such as tourist visas, student visas, business immigration and humanitarian programs, are not primarily aimed at protecting Australians from national security threats or serious crime.
4. The Law Council considers that there are problematic aspects of the:
 - expansion of operational powers to the IBP Department, particularly in relation to controlled operations; assumed identities and witness identity protection; integrity testing; access to stored communications warrants and the *Proceeds of Crime Act 2002* (Cth) (POCA); and
 - ABF Bill, including provisions that deal with secrecy and disclosure; the setting of essential qualifications; and termination of employment.
5. The Law Council's key recommendations include that:
 - (a) The controlled operations scheme of Part 1AB and the assumed identities and witness protection schemes of the *Crimes Act 1914* (Cth) should only confer powers on the ABF and not the broader IBP Department;
 - (b) The integrity testing scheme of the Crimes Act should only apply to staff of the ABF, not APS employees of the IBP Department who are not also part of the ABF;
 - (c) Only the ABF and not the broader IBP Department should be able to obtain a stored communications warrant;
 - (d) Only authorised officers of the ABF should be able to apply for a freezing order under the POCA;
 - (e) The ABF Bill should be amended to include a public interest disclosure exception to the secrecy provisions;
 - (f) The secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest;
 - (g) A privacy impact assessment be conducted of the secrecy provisions;

- (h) The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with the agency's obligations under the *Privacy Act 1988* (Cth); and
- (i) In providing directions on essential qualifications for performing duties, the Secretary makes specific reference to the Department's obligations under the *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).
- (j) Part 4 of the ABF Bill should only apply to ABF staff and not employees of the broader IBP Department.

Introduction

- 6. The ABF Bill establishes the statutory office and role of the Australian Border Force (ABF) Commissioner and provides for the exercise of powers and obligations of the commissioner and ABF employees.
- 7. The Customs ABF Bill repeals the *Customs Administration Act 1985* (Cth) to abolish the ACBPS and the statutory office of the Chief Executive Officer of Customs. It also amends the: *Migration Act 1958* (Cth) to enable the ABF Commissioner to exercise certain powers; and the *Work Health and Safety Act 2011* (Cth) to enable the Commissioner to make a declaration that restricts or modifies the application of specified provisions.
- 8. Consideration of the Bill should be taken together with the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 and the Migration Amendment (Maintaining the Good order of Immigration Detention Facilities) Bill 2015 as well as the complexity of Australia's immigration laws, in light of ongoing demand for temporary and permanent entry to Australia.
- 9. The new IBP Department focus will include immigration and citizenship, refugee and humanitarian programs, trade and customs, offshore maritime security and revenue collection. The ABF as the IBP Department's operational enforcement arm will have a significant role in delivering on national security, law enforcement and security priorities.
- 10. The ABF will operate under the Strategic Border Command to counter threats ahead of the border, employ sophisticated risk assessments through visa programs, and work with international partners.
- 11. Staff performing operational functions in the ACBPS and DIBP will move into the ABF.
- 12. DIBP staff will transfer into the ABF if they work in:
 - (a) Immigration compliance;
 - (b) Enforcement;
 - (c) Detention services; and
 - (d) Other operational areas.
- 13. The ABF Commissioner will have significant powers concurrently held by the Secretary of the Department and the same standing as other heads of key national

security related agencies, as for example, the Commissioner of the Australian Federal Police (AFP) or the Chief of the Australian Defence Force.

14. As the Minister of Immigration and Border Protection, Mr Dutton stated in the Second Reading Speech to the House of Representatives in respect of the Bills on 25 February 2015:

Australia's border is a national asset that defines the space within which our democratic and sovereign nation state can prosper... it supports strong national security by interdicting prohibited goods and people who seek to do us harm.

15. The challenge is to maintain the safety and security of our nation and effective border management, while also ensuring that the fundamental rights and privileges that we enjoy as a democracy are safeguarded.

Expansion of operational powers to IBP Department

16. The Customs ABF Bill extends to the IBP Department, powers normally limited to an operational agency, and in this case, powers currently conferred on ACBPS. These powers may be necessary for ACBPS and the proposed ABF to conduct its work in enforcing Australia's sovereignty at the border through the application of Australia's tax, criminal and immigration laws.

17. However, extending these powers to the broader IBP Department dealing with such matters as tourist visas, student visas, business immigration and humanitarian programs appears unnecessary. It is not clear why extraordinary powers granted to operational agencies, currently including the ACBPS, need to be extended to a government department that deals with a range of non-operational issues, such as policy, regulatory and corporate functions. Under the Bill this includes the areas of:

- controlled operations under the *Crimes Act 1914* (Cth) (Crimes Act);
- assumed identities under the Crimes Act;
- integrity testing under the Crimes Act;
- access to stored communications warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act); and
- applications for freezing orders under the *Proceeds of Crime Act 2002* (Cth) (POCA).

18. The extension of powers, particularly where it involves increased Executive power and/or encroachments on rights and liberties, should be demonstrated to be necessary, reasonable and proportionate. In a number of instances, the extension of powers to the broader IBP Department does not appear to meet these requirements.

19. The Explanatory Memorandum to the Customs ABF Bill notes:

The special role the Department plays as an immigration and border protection agency with responsibilities for authorising the movement of travellers and goods across Australia's border, managing the stay in Australia and in some cases departure from Australia of non-citizens is valuable and therefore attracts a

heightened integrity risk. While some of these functions will be exclusively undertaken by the part of the Department known as the ABF, others will be delivered or supported by other parts of the Department.

Additionally, immigration and border protection workers will, where relevant to the performance of their duties, have access to sensitive information and engage in close working relationships with other law enforcement agencies. The consequences of any corruption in the Department, including in the part of the department known as the ABF, would pose a significant threat to the integrity of the border and Australia's national security.¹

20. However, staff of the Attorney-General's Department closely support operational law enforcement and security agencies such as the AFP, the Australian Security and Intelligence Organisation and the Australian Crime Commission (ACC). They also have access to sensitive information and engage in close working relationships with these agencies. Arguably, their role, like staff of the proposed IBP Department that fall outside of the ABF, is valuable and may also attract a heightened integrity risk. Nonetheless, they do not have the powers or obligations proposed to be extended to non-operational APS employees of the IBP Department.
21. It may be that in practice it is the intention to only confer powers and obligations on certain officers of the ABF. If this is the case, the Bill should be amended to expressly provide such controls, which would help ensure the law is readily known and available, and certain and clear.²

Controlled operations

22. Under the controlled operations scheme of Part 1AB of the Crimes Act, law enforcement officers and participants who engage in unlawful conduct during a controlled operation are protected from criminal responsibility and indemnified from civil liability.
23. Currently, an officer of the ACBPS may apply for an authority to conduct a controlled operation on behalf of Customs.³ Any Customs officers involved in a controlled operation are exempt from criminal liability and indemnified from civil liability.⁴
24. The Bill would result in an expansion of the type of people who may:
- (a) receive an exemption for criminal or civil liability; and
 - (b) apply to an authorising officer for an authority to conduct a controlled operation on behalf of the law enforcement agency.
25. The ABF Bill's Crimes Act amendments will extend protection from criminal responsibility and indemnity from civil liability to, for example the Secretary of the IBP Department; or an APS employee in the IBP Department.⁵ This extension is not

¹ Explanatory Memorandum to the Customs ABF Bill 2015, 3.

² Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 1, 2.

³ Sections 15GC and 3 of the *Crimes Act 1914* (Cth).

⁴ *Ibid*, sections 15HA and 15HB.

⁵ Item 28 of Schedule 5 of the Customs ABF Bill inserts this new definition of 'officer of Customs' into subsection 3(1) of the Crimes Act, which has the meaning given by subsection 4(1) of the Customs Act. Item 13 of Schedule 1 of the Customs ABF Bill repeals the current definition of 'Officer of Customs' in subsection 4(1) of the Customs Act. Item 14 replaces this definition with a definition of 'officer of Customs' as indicated.

accompanied by any clear justification in either the Explanatory Memorandum or the Second Reading speech.

26. The controlled operations provisions of the Crimes Act confer extraordinary powers on authorising officers to license certain persons such as police and civilian informants to commit otherwise unlawful acts. Controlled operations should therefore be subject to strict limitations and their use confined to the investigations of the most serious crimes.
27. This means that persons who can apply for a controlled operation and those who may be immune from unlawful conduct should be sufficiently justified and necessary.
28. It is not immediately apparent why a non-operational government department should be granted such powers even where it may be appropriate to confer such powers on the operational ABF.
29. Further, the *Criminal Code Act 1995* (Cth) amendments in the Customs ABF Bill⁶ demonstrate that it is possible to limit the impact of provisions, despite the merger of the ACBPS and the DIBP, to officers who are in the ABF.

Recommendation:

- **The controlled operations scheme of Part 1AB of the Crimes Act should only confer powers on the ABF and not the broader IBP Department.**

Assumed identities and witness identity protection

30. An assumed identity is a false identity used by law enforcement officers, intelligence officers and authorised civilians for the purposes of investigating an offence, gathering intelligence or for other security activities. Part 1AC of the Crimes Act contains provisions which regulate the authorisation, creation and use of assumed identities.
31. It currently provides a statutory scheme for Commonwealth law enforcement agencies, including the ACBPS, to acquire and use assumed identities in the investigation of Commonwealth offences.
32. Under Part IAC, the head of each participating agency and persons within those agencies prescribed to be authorised persons may authorise the acquisition of assumed identities. The latter must also be authorised in writing by the head of the agency.
33. Part IACA of the Crimes Act sets out the circumstances in which the chief officer of a law enforcement agency may give a witness identity protection certificate for an operative in relation to a proceeding.
34. As in the case of controlled operations, the Law Council is concerned about these powers being transferred to the broader IBP Department dealing with non-operational matters and extending beyond the ABF.

⁶ Item 59 of Schedule 5 of the Customs ABF Bill will amend Part 7.8 of the Criminal Code make it a criminal offence to cause harm to, and impersonate and obstruct, Commonwealth public officials.

35. As with the controlled operation scheme under the Crimes Act, the assumed identity and witness protection schemes grant extraordinary powers to law enforcement agencies.
36. It has not been demonstrated as to why the ability to confer such extraordinary powers on a non-operational arm of a government department is necessary and justified. The Law Council notes that other Government agencies such as the Attorney-General's Department, which works closely with operational agencies such as the AFP and ASIO in the protection of Australia's security, are not granted such powers.

Recommendation:

- **The assumed identities and witness protection schemes of the Crimes Act should only confer powers on the ABF and not the broader IBP Department.**

Integrity testing

37. Existing integrity testing provisions in the Crimes Act are proposed to be extended to IBP Department employees. The Explanatory Memorandum to the Customs ABF Bill notes that:

The extension of integrity testing will provide an important tool to enable the detection of corruption and misconduct and, in so doing, ensures the Australian community can have confidence in the integrity of the Australian border.⁷

38. Integrity tests under the Crimes Act are operations designed to test whether a public official of a law enforcement agency will respond to a simulated or controlled situation in a manner that is illegal or would contravene an agency's standard of integrity. Targeted integrity testing under the Crimes Act is currently available to be conducted on staff members of the AFP, ACC and the ACBPS.
39. Targeted integrity testing was introduced into the Crimes Act in 2012 by the *Law Enforcement Integrity Legislation Amendment Act 2012* (Cth). The Explanatory Memorandum accompanying the Bill noted that the scheme:

*...will introduce a range of measures to increase the resistance of **Commonwealth law enforcement agencies** to corruption and to enhance the range of tools available to **law enforcement agencies** to respond to suspected corruption.⁸ [emphasis added]*

40. Further the Explanatory Memorandum noted that:

Only staff members of the ACC, AFP and Customs and Border Protection will be subject to integrity testing. These are officers of key law enforcement agencies who are expected to maintain a high standard of integrity. Corruption within these agencies can have a significant detrimental effect on their ability to enforce the law...

⁷ Explanatory Memorandum to the Customs ABF Bill 2015, 72.

⁸ Explanatory Memorandum to the Law Enforcement Integrity Legislation Amendment Bill 2012, 2.

*Law enforcement officers are generally well versed in surveillance methods and so corrupt conduct in law enforcement agencies can be hard to detect. The introduction of integrity testing will provide another tool to advance the detection of corruption and misconduct in these officers.*⁹

41. Integrity testing is a particularly intrusive measure as it allows the use of surveillance of staff of these agencies and collecting, using, storing and sharing of personal data relating to these staff.
42. For example, integrity testing may permit the use of other covert investigative powers such as surveillance devices. The *Surveillances Device Act 2004* (Cth) (the SD Act) currently allows the ACC, AFP and Australian Commission for Law Enforcement Integrity (ACLEI) to apply for a warrant to use surveillance devices, including optical, listening, data and tracking devices for the purposes of integrity testing a staff member of a target agency under the Crimes Act. A target agency is currently defined under subsection 6(1) of the SD Act to include the AFP, the ACC or ACBPS.
43. The Bill proposes to amend this so that the IBP Department will be a target agency with the effect that a surveillance device warrant may be obtained in certain circumstances for the purposes of integrity testing any APS employee of the IBP Department.¹⁰
44. The objectives of the integrity testing scheme of the Crimes Act are designed to prevent corruption and misconduct in Commonwealth operational law enforcement agency staff. Accordingly, the Law Council does not consider it appropriate to extend such intrusive testing techniques to APS employees of the IBP Department that do not engage in law enforcement functions. It notes that currently DIBP staff, while they may work closely with ACBPS officers, are not subjected to such testing.

Recommendation:

- **The integrity testing scheme of the Crimes Act should only apply to staff of the ABF, not APS employees of the IBP Department who are not also part of the ABF. Consequential amendments to the SD Act should therefore also be limited to the ABF.**

Access to stored communications warrants

45. The TIA Act currently provides that stored communications may be accessed by enforcement agencies under a stored communications warrant to investigate a 'serious contravention' of the law.
46. The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* amended the TIA Act to provide that only criminal law-enforcement agencies are able to access stored communications. Criminal law-enforcement agencies were deliberately limited under the legislation to ensure that only *criminal law enforcement agencies* with a demonstrated need for such information had access to stored communications warrants.¹¹

⁹ Ibid, 5.

¹⁰ See for example Item 150 of Schedule 5 of the Customs ABF Bill 2015.

¹¹ Explanatory Memorandum to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015, 4.

47. The Attorney-General's Department in its submissions before the Parliamentary Joint Committee of Intelligence and Security (PJCIS) noted in relation to the legislation that:

*Only agencies that have a **demonstrated need to access the content of stored communications**, and are subject to appropriate privacy and oversight arrangements, **should be eligible to do so...***

These amendments also recognise the greater privacy sensitivity of stored communications as compared to telecommunications data. Unlike telecommunications data, stored communications reveal the content and the substance of a person's communications with others.¹²

48. The PJCIS concluded that:

Given the intrusive nature of warrants that authorise access to stored communications, the Committee considers that the range of agencies able to obtain such warrants needs to be carefully circumscribed to ensure that access to stored communications is limited to agencies with appropriate functions and which are subject to appropriate safeguards.¹³

49. The PJCIS also considered that only agencies that investigate serious contraventions should have access to stored communications warrants.¹⁴

50. Under the Customs ABF Bill it is proposed that the integrated IBF Department will gain the status as a 'criminal law enforcement agency'. The Explanatory Memorandum notes that:

This will enable the continued operation capability of key activities currently performed by the ACBPS, which will in the future be undertaken within the integrated Department.¹⁵

51. However, the ABF, as the IBP Department's operational enforcement arm, will be the area of the Department responsible for delivering on national security, law enforcement and security priorities.

52. Given the intrusive nature of stored communications warrants and their ability to reveal sensitive personal information, the Law Council considers that it is inappropriate to permit the broader IBP Department, rather than just the ABF, access to stored communications warrants, unless there is a demonstrated need to do so. Upon the available evidence in the Explanatory Memorandum and Second Reading Speech, the Law Council considers that the broader IBP Department is not a criminal law enforcement agency. Currently the Department of Immigration does not have access to stored communications warrants.

¹² Attorney-General's Department, *Submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, Submission 27, 48.

¹³ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 27 February 2015, 192.

¹⁴ A serious contravention is defined in section 5E of the *Telecommunications (Interception and Access) Act 1979* (Cth), which includes offences punishable by three years imprisonment or a significant fine.

¹⁵ Explanatory Memorandum to the Customs ABF Bill 2015, 95.

Recommendation:

- **Only the ABF and not the broader IBP Department should be able to obtain a stored communications warrant.**

Proceeds of Crime Act

53. The POCA provides for a Commonwealth statutory scheme to confiscate the proceeds of crime. Chapter 2 of the POCA provides for several types of orders that can be made in relation to proceeds of crime matters, including freezing orders and restraining orders.

54. Freezing orders can be made by a magistrate, and limit withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts. Restraining orders may be issued by a court, and prohibit the disposal of, or dealing, with property. Subsequent to a restraining order being issued there is the potential for a court to order a confiscation order.

55. Currently under the POCA an officer of Customs authorised by the CEO may apply for a freezing order where there are reasonable grounds to suspect that funds in the account are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concerns or is wholly or partly an instrument of a serious offence.¹⁶ The magistrate must then make the freezing order if satisfied that there is a risk that the balance of the account will be reduced.¹⁷

56. The granting of a freezing order is a low threshold which leaves the court with minimal discretion to refuse to make such an order once the requirements of section 15B of the POCA have been met.

57. The effect of the application of an officer for a freezing order is therefore potentially very powerful with the ability to produce serious consequences on an individual's financial state of affairs. Freezing orders suspend a person's right to deal with his or her property without:

- The need to establish beyond reasonable doubt that the person whose property is subject to the order has committed an offence; and
- The affected party being heard.

58. Given the insufficient judicial discretion to avoid unduly harsh freezing orders, the Law Council considers that the officers authorised to make a freezing order application should be limited to those with a demonstrated need to do so in the law enforcement context. It has not been shown that such a demonstrated need exists for APS employees within the broader IBP Department.

¹⁶ Subsection 15B(1) of the POCA.

¹⁷ An application for a freezing order: must be accompanied by an affidavit by the authorised officer, which currently includes an authorised Customs officer (section 15C of the POCA); can be made by telephone, fax or other electronic means in an urgent case or if delay would occur if an application were made in person which would frustrate the effectiveness of the order (section 15D of the POCA); and may be extended by an application by an authorised officer, which currently includes an authorised Customs officer (section 15P of the POCA).

Recommendation:

- **Only authorised officers of the ABF should be able to apply for a freezing order under the POCA.**

ABF Bill

Secrecy and disclosure

59. Part 6 of the ABF Bill makes it an offence to record or disclose information obtained by a person in their capacity as an entrusted person. An 'entrusted person' is the secretary, the ABF Commissioner and all staff of IBP Department. A breach of this provision would be punishable by imprisonment of up to two years. The definition of protected information is quite broad and encompasses any information obtained by an Immigration and Border Protection Department worker (IBP worker) in his/her capacity as an IBP worker.

60. Unauthorised disclosure is only permissible if it is 'necessary to prevent or lessen a serious threat to the life or health of an individual' and the disclosure is 'for the purposes of preventing or lessening that threat' (clause 48). The Law Council notes that this exemption has a very narrow scope.

61. The Explanatory Memorandum to the ABF Bill notes that:

These provisions are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected... The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated.¹⁸

62. Currently, the ACBPS is subject to secrecy provisions as contained in section 16 of the Customs Administration Act. It is proposed to extend an altered version of these provisions to apply to employees of the IBP Department.¹⁹

63. The Law Council considers that there must be some balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure, for reasons including national security, defence, international relations, and privacy considerations.

64. However, criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government.²⁰ In this regard, the Law Council supports several recommendations made by the ALRC inquiry into Secrecy Laws and Open Government in Australia²¹, including that there be:

¹⁸ Explanatory Memorandum to the ABF Bill, 14.

¹⁹ The definition of 'entrusted person' under section 4 of the Border Force Bill includes an Immigration and Border Protection Worker.

²⁰ Law Council of Australia, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, 27 February 2009, [3-4].

²¹ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

- (a) A new criminal offence of general application to the disclosure of Commonwealth information by Commonwealth officers²²;
- (b) The amendment and consolidation of existing Commonwealth secrecy laws²³; and
- (c) The repeal of unnecessary or unjustifiable Commonwealth secrecy laws²⁴.

65. In the absence of a criminal offence of general application and a consolidation of secrecy laws, there are a number of recommendations from the ALRC's report and recommendations made by the Office of the Privacy Commissioner, which should be addressed by the proposed secrecy provisions in the ABF Bill.
66. For example, the Law Council is concerned that the heightened secrecy provisions, as well as the broader powers to dismiss staff and contractors, may discourage legitimate whistle-blowers from speaking out publicly. - To aid transparency, there should, as noted by the ALRC, be a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest.²⁵
67. The secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.²⁶ Such an element would address concerns about the broad scope of criminal secrecy provisions, which may capture disclosure of information that is already in the public domain or is otherwise innocuous.²⁷ Where no harm is likely, the ALRC considered that other responses to the unauthorised disclosure of Commonwealth information are appropriate—including the imposition of administrative sanctions or the pursuit of contractual or general law remedies.²⁸
68. The exception that permits disclosure with consent in section 47 of the Bill should also be reconsidered. Section 47 sets out that an entrusted person may disclose protected information that relates to the affairs of a person or body if the person or body has consented to the disclosure; and the disclosure is in accordance with that consent. However, the ALRC sees this kind of disclosure of Commonwealth information as not being appropriate in all circumstances, noting that it may be sensitive for other reasons—for example, it may be personal information about one individual that is relevant to an ongoing investigation into the criminal activities of another individual.²⁹
69. A privacy impact assessment (PIA) should be conducted of the secrecy provisions. While the secrecy provisions in the ABF Bill are not “new” (being largely a replication of section 16 of the Customs Administration Act) the extension of the provisions to an APS employee in the IBP Department and an ‘immigration and border protection worker’³⁰ warrants fresh reconsideration. The ALRC has suggested that a PIA should

²² Ibid, 141 [4.168]

²³ Ibid, 23

²⁴ Ibid; see also Law Council of Australia, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, 27 February 2009, 4 [10].

²⁵ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255 [7.120].

²⁶ Ibid, 12.

²⁷ Law Council of Australia, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, 27 February 2009, 5 [18].

²⁸ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 249, [8.6].

²⁹ Ibid.

be prepared when a secrecy provision is proposed that may have a significant impact on the handling of personal information.

70. The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with the agency's obligations under the *Privacy Act 1988* (Cth).³¹ Currently, section 51 of the ABF Bill, entitled 'Interaction with Privacy Act' only sets out that the making of a record and the disclosure of protected information containing personal information are taken to be acts authorised by the ABF Bill.

Recommendations:

- (a) **The ABF Bill should be amended to include a public interest disclosure exception to the secrecy provisions.**
- (b) **The secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.**
- (c) **The exception that permits disclosure with consent in section 47 of the Bill should be reconsidered.**
- (d) **A privacy impact assessment be conducted of the secrecy provisions.**
- (e) **The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with the agency's obligations under the *Privacy Act 1988* (Cth).¹**

Setting of essential qualifications

71. Proposed subsection 55(2) enables the Secretary to issue a direction to set and vary the essential qualifications for Immigration and Border Protection workers for performing their duties. Proposed subsection 55(3) lists the components of essential qualifications. These components are broadly phrased, encompassing:

- physical or psychological health or fitness;
- professional or technical qualifications;
- learning and development requirements; and
- security clearances.

72. How the components listed above are interpreted will depend on the directions from the Secretary, potentially in the form of an administrative circular or a memo to staff. The Explanatory Memorandum states that any essential qualification will be applied consistently with the *Disability Discrimination Act 1992* (Cth) and will only refer to those qualifications required in the performance of their duties. Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) requires that laws shall

³¹ Office of the Privacy Commissioner, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, August 2009, [9].

prohibit any discrimination and guarantee equal and effective protection on any ground. The Law Council emphasises that the Secretary must be aware that when making directions they are consistent with relevant obligations not just under the *Disability Discrimination Act 1992* (Cth), but also the *Age Discrimination Act 2004* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth), which form part of Australia's domestic implementation of Article 26 in prohibiting discrimination.

Recommendation:

- **The Law Council recommends that in providing directions on essential qualifications for performing duties through a memo, administrative circular or some other form of communication, the Secretary makes specific reference to the Department's obligations under the *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth), *Australian Human Rights Commission Act 1986* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).**

Termination of employment

73. The Law Council recommends that section 32 of the Bill should only apply ABF staff rather than IBP Department employees more broadly. The section proposes that if the Secretary or the ABF Commissioner reasonably believes that an IBP Department employee's conduct or behaviour amounts to serious misconduct then a declaration may be made to that effect. Specifically, the Law Council is concerned about the exclusion of the *Fair Work Act 2009* (Cth) (except for Part 3-1 and Division 9 of Part 3-3) in the case of such a declaration made by the Secretary or the ABF Commissioner. Proposed subsection 32(5) may not be consistent with the principles of Article 2(3) of the ICCPR, in that it is a limitation on the right to an effective remedy.

74. The Explanatory Memorandum notes the rationale for the amendment as follows:

*It is appropriate that such measures be applicable to all employees in the integrated Department, given the expanded law enforcement role, and that the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers.*³²

75. The section 32 power may be reasonable in its application to operational ABF staff as it is similar to the powers of the Australian Federal Police Commissioner and the CEO of the ACC of their respective workforces. However, there are many typical APS roles within the broader IBP Department with no apparent justification for excluding them from Fair Work Act remedies available to other APS employees.

76. Section 32 permits the Secretary of the Department to abrogate the existing right of a current APS employee of the Department to challenge the fairness of a decision to dismiss them for misconduct.

77. The Explanatory Memorandum provides the following reasoning for removing a right that otherwise applies to all APS employees:

³² Explanatory Memorandum to the ABF Bill, [161].

The Fair Work Act currently applies to all dismissals of APS employees employed under the Public Service Act and provides protection where the dismissal was harsh, unjust or unreasonable. While these protections are appropriate in most circumstances, in instances of serious misconduct, including corrupt conduct, the application of the Fair Work Act can impact on the ability of the Secretary to both quickly and decisively remove an APS employee from the Department. For example, a review of the dismissal that results in the person having to be reinstated may send a mixed signal to the community or workforce about the tolerance of serious misconduct within the Department.³³

78. Currently there is the potential for the Fair Work Commission to find a decision to dismiss for misconduct was wrong and to rectify that by reinstating the employee or ordering that they receive compensation. That will occur where the misconduct is found not to have occurred, where it occurred but in circumstances where it was unreasonable to dismiss (the person had a reasonable excuse), or where dismissal in all the circumstances was too harsh an outcome.
79. It is not clear why the Explanatory Memorandum asserts the potential to challenge a decision impacts on the ability of the Secretary of a Department to act both quickly and decisively to dismiss an employee for misconduct. The unfair dismissal provisions of the Fair Work Act do not include a power to injunct an employer to prevent a threatened dismissal.
80. An assumption underpinning the provision is that the employee in question has in fact committed misconduct and that the misconduct is serious enough to justify dismissal. Where that is the case the Fair Work Commission would not overturn the decision. However there are cases where the decision-maker is shown ultimately to have acted on incorrect information. That can occur, for example, in respect of whistle-blowers who then find themselves the subject of misconduct allegations.
81. It is difficult to accept the proposition that the community or workforce would receive a 'mixed signal' if an employee is reinstated because an independent Commission found that they should not have been dismissed (for example, because the misconduct did not in fact take place).
82. It is also noted that there is no appeal mechanism created in lieu of the right to take unfair dismissal proceedings.
83. Further, the section has broad application, not limited to those who are conducting border protection duties or who have been required to swear an oath or affirmation pursuant to clause 24 of the Bill. It would extend, it would appear, to junior clerks of the Department. It is difficult to see why they should be treated differently from any other APS employee.
84. The Law Council notes that the written declaration does not impact legal rights provided by other legislation or the common law and the declaration is still reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
85. Nonetheless, the effect of a declaration by a Secretary or the ABF Commissioner that an employee has engaged in serious misconduct could have far reaching ramifications, even if the dismissal was subsequently rescinded. For example, an employee may have difficulty in obtaining work in another APS agency having already received such a declaration. The requirement in proposed subsection 32(7) that the

³³ Explanatory Memorandum to the Australian Border Force Bill 2015, 11.

Secretary and ABF Commissioner must also provide the Minister with a written report containing details of the declaration makes the consequences and knowledge of the declaration potentially even more significant.

Recommendation:

- **Part 4 of the ABF Bill should only apply to ABF staff and not employees of the broader IBP Department.**

Asylum seekers

86. The Law Council's constituent body, the Law Institute of Victoria (LIV) has noted that the broad-ranging powers in the ABF Bill and Customs ABF Bill, which will make the IBP Department a law enforcement body. Many of these powers may be appropriate for those officers undertaking customs duties, but may not be appropriate when applied to dealings that involve the detention of asylum seekers.
87. The LIV have noted that focus on law enforcement apparent in these Bills furthers the language of 'illegality' used in relation to asylum seekers, which is not supported by international treaties. A specific concern regarding the new IBP Department, as noted by the LIV, is the approach and appearance of the officers handling protection visa caseloads. The culture and language of law enforcement has the significant risk of re-traumatizing an already vulnerable cohort. Many refugee applicants have been persecuted and harassed by authorities in their home country, and the approach of the Department both at first point of contact with the Australian government and later during the processing stages, is critical in ensuring sensitive handling and facilitating disclosure.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.