



## Refugee Council of Australia

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

### **AUSTRALIAN BORDER FORCE BILL 2015 & CUSTOMS AND OTHER LEGISLATION AMENDMENT (AUSTRALIAN BORDER FORCE) BILL 2015**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and 1,000 individual members. Established in 1981, RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Australian Border Force Bill 2015* and the *Customs and Other Legislation Amendment (Australian Border Force) Bill 2015*. We have a number of concerns relating to provisions of these Bills which may hamper the disclosure of information about wrongdoing, prevent consideration of work health and safety issues and grant inappropriate powers to some staff members. We also have overriding concerns regarding the apparent shift from a facilitation-centred approach to migration, refugee protection and citizenship to an enforcement-centred approach.

#### **1. Restrictions on disclosure of information**

- 1.1. Both of the Bills under review contain provisions which, in RCOA's view, may act to suppress the disclosure of information about wrongdoing by departmental staff members or contractors. While we appreciate that these provisions may not be intended to have this effect, RCOA is concerned that they fail to include sufficient protections for whistleblowers and may thereby suppress the revelation of misconduct rather than acting to prevent it.
- 1.2. For example, the provisions of the *Australian Border Force Bill 2015* which allow for termination of employment for "serious misconduct" do not clearly define the types of conduct which may constitute sufficient grounds for dismissal. It is unclear, for example, whether the disclosure of confidential information which revealed wrongdoing by departmental staff or contractors would be considered tantamount to "serious misconduct". In this case, the employee in question may be acting in the public interest or out of concern for the wellbeing of people under the Department's care, yet could face dismissal on the basis that their conduct represented an "abuse of power" or "dereliction of duty" and had a damaging impact on staff morale or the Department's reputation.
- 1.3. The secrecy provisions of the *Australian Border Force Bill 2015* similarly fail to include clear protections or exemptions for departmental staff or contractors who attempt to reveal wrongdoing. Under these provisions, staff or contractors who are considered "entrusted persons" could face serious criminal penalties for the disclosure of "protected information", which may act to suppress the disclosure of information or evidence revealing serious wrongdoing.
- 1.4. While sections 44 and 45 of the Bill allow for the disclosure of protected information to certain bodies, authorisation by the Secretary is required before a disclosure is permitted. Furthermore,

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the Secretary may also impose conditions on the disclosure. By limiting disclosures to only those authorised by the Secretary, there is a concern that important disclosures may be silenced.

- 1.5. The Secretary will also have a range of broad powers to give directions, which must be complied with by an Immigration and Border Protection worker. These powers seem very broad and are of particular concern. It seems the Secretary or Australian Border Force Commissioner could order an employee not to report certain information, including the misconduct of an employee, and such order must be complied with.
- 1.6. RCOA believes that these provisions should be amended to include clear exemptions for people who are seeking to reveal wrongdoing. We believe such exemptions are critical to ensuring that cases of misconduct and abuse by departmental staff and contractors can be brought to light. While we appreciate that the majority of staff conduct themselves professionally, the nature of the Department's work does create unique risks. When staff are working with vulnerable people in restrictive environments or highly-charged situations (such as in detention centres or during maritime operations), the risks of misconduct or abuse by staff may be amplified.
- 1.7. Whistleblowers have in the past played a significant role in revealing wrongdoing by departmental staff and contractors. The allegations recently investigated by Philip Moss regarding the abuse of women and children detained in the Nauru Offshore Processing Centre, for example, may not have surfaced had it not been for the whistleblowers who sought to reveal information about the allegations. Maintaining opportunities for whistleblowers to act is critical not only to protecting the safety and wellbeing of people under the Department's care but also to ensuring that high standards of professional integrity are upheld. Should the Bill fail to include protections for whistleblowers, it may ironically act to suppress the revelation of information about the very kinds of misconduct that this legislation seeks to prevent.
- 1.8. RCOA also questions whether the new penalties introduced by the Bill are necessary to achieve its stated aims. We find it difficult to believe, for instance, that the *Fair Work Act 2009* would require a person to be reinstated to their position if they had genuinely engaged in serious misconduct. Indeed, the Explanatory Memorandum accompanying the *Australian Border Force Bill 2015* fails to include any specific examples of instances where the *Fair Work Act* would require the reinstatement of a person who had engaged in serious misconduct. In the absence of clear evidence illustrating the inadequacy of current provisions, we believe that the introduction of new penalties which may serve to suppress the revelation of wrongdoing would be misguided.

### **Recommendation 1**

RCOA recommends that:

- a) Provisions of the Australian Border Force Bill 2015 relating to termination of employment for "serious misconduct" without access to a remedy and the disclosure of "protected information" be removed.
- b) If the above recommendation is not adopted, the Bill be amended to include specific exemptions for whistleblowers seeking to expose wrongdoing.

## **2. Suspension of Work Health and Safety Act 2011**

- 2.1. RCOA is concerned by provisions of the *Customs and Other Legislation Amendment (Australian Border Force) Bill 2015* which would permit suspension of specified sections of the *Work Health and Safety Act 2011* in relation Australian Border Force workers. As noted in the Explanatory Memorandum accompanying this Bill, the Act already offers significantly flexibility in responding to the varied work health and safety issues which may arise in a wide range of workplaces. It also expressly provides that nothing in the Act requires a person to take an action or refrain from taking an action which would be prejudicial to Australia's national security or defence. RCOA fails to see why these provisions are insufficient to allow Australian Border Force staff to address potential threats to Australia security arising during the course of their work.

- 2.2. Additionally, the Bill appears to place few restrictions on the types of circumstances in which suspensions of the Act may be applied. We are therefore concerned about the potential implications of these amendments for the conduct of maritime operations involving asylum seekers. In our view, these operations – which typically involve vulnerable people (including children), unseaworthy vessels and significant risks of injury or even loss of life at sea – are conducted in precisely the types of circumstances in which consideration of health and safety is of vital importance. RCOA is greatly concerned that the application of the suspension powers to these kinds of operations could place both asylum seekers and Australian personnel at significant risk of harm.

### **Recommendation 2**

*RCOA recommends that provisions of the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 relating to the suspension of specified provisions of the Work Health and Safety Act 2011 be removed.*

## **3. Criminal law enforcement powers for Department of Immigration**

- 3.1. RCOA has significant reservations regarding provisions of the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 which would designate the Department of Immigration as a criminal law enforcement agency. We believe that extending this designation to the entire Department of Immigration is unnecessary and misguided.
- 3.2. While the designation of the Australian Customs and Border Protection Service as a criminal law enforcement agency may be necessary given this agency's role in policing customs-related offences, the Department of Immigration plays a significantly different role which hitherto has not involved criminal law enforcement. While some sections of the Department of Immigration do have a mandate for enforcing compliance (such as those responsible for managing immigration detention or case resolution), their enforcement role generally relates to administrative rather than criminal provisions. RCOA believes that providing criminal law enforcement powers to staff members who have no experience or training in this area would create significant risks both for the staff members themselves and the people who may be subject to the new enforcement powers.
- 3.3. Additionally, much of the Department of Immigration's work focuses on areas where it would be simply unnecessary, even inappropriate, for the staff involved to be granted criminal law enforcement powers. For instance, RCOA cannot conceive why it would be necessary for staff involved in monitoring global resettlement needs so as to identify priorities for Australia's refugee resettlement program, or those involved in researching country of origin information to assist in the assessment of protection claims, to be granted criminal law enforcement powers.
- 3.4. An alternative to the wholesale designation of the Department of Immigration as a criminal law enforcement agency would be to extend these powers to certain sections of the Department which have an identifiable need for additional powers. If this occurs, the staff to whom the new powers are extended should receive training and support to exercise these powers effectively and responsibly.

### **Recommendation 3**

*RCOA recommends that:*

- a) *Criminal law enforcement powers not be extended to the Department of Immigration.*
- b) *If the above recommendation is not implemented, criminal law enforcement powers be extended only to specified sections of the Department of Immigration which have an identifiable need for these powers and affected staff be provided with relevant training and support.*

## **4. Essential qualifications**

- 4.1. In relation to the setting of essential qualifications for Australian Border Force staff, RCOA suggests that understanding of Australia's international human rights obligations, including our obligations towards people seeking protection, be considered an essential qualification for staff

involved in areas of work where breaches of human rights may occur. We believe that this knowledge is critical to ensuring that Australia is able to uphold its obligations effectively and avoid returning people to danger.

- 4.2. Staff for whom understanding of international human rights obligations is likely to be relevant include those involved in: assessment of protection claims; assessment of applications for offshore refugee and humanitarian visas; management of immigration detention; provision of services and support to asylum seekers living in the community; and maritime operations involving asylum seekers. In RCOA's view, having a sound understanding of Australia's human rights obligations in general and our specific obligations towards refugees would greatly assist these staff members in identifying people in need of protection and assistance, avoiding breaches of human rights and preventing returns to danger. This would not only result in better outcomes for the people whom the Australian Border Force will serve but will also help to foster a culture of professional integrity and accountability.

#### **Recommendation 4**

*RCOA recommends that understanding of Australia's international human rights obligations be considered an essential qualification for Australian Border Force staff involved in areas of work where breaches of human rights may occur, including those relating to refugee protection.*

### **5. Shift from facilitation to enforcement**

- 5.1. RCOA's overriding concern regarding the amalgamation of the Department of Immigration with the Australian Customs and Border Protection Services is the apparent shift away from a facilitation-centred approach to migration, refugee protection and citizenship to an enforcement-centred approach. The creation of the Australian Border Force suggests that enforcement is to become an overarching focus for all areas of the agency, rather than being limited to those sections which have a specific mandate for enforcement. We are particularly concerned about the possible implications of this shift for Australia's Refugee and Humanitarian Program.
- 5.2. The past year has seen a number of dramatic changes in both legislation and policy which have significantly shifted the purpose and focus of the Refugee and Humanitarian Program, especially its onshore protection component. The Australian Government has taken an increasingly militaristic and punitive approach to asylum seeker policy which has substantially increased the risk of harm to asylum seekers, while concurrently reducing communication and transparency in a manner which has hampered close scrutiny of these risks. In addition, recent legislation<sup>1</sup> has made significant changes to Australia's processes for assessing visa applications which have ostensibly aimed to enhance integrity and prevent fraud (despite little or no evidence being presented to suggest that existing processes were open to abuse) but which have instead placed asylum seekers at higher risk of return to danger.
- 5.3. Australia's Refugee and Humanitarian Program should focus first and foremost on the provision of protection and prevention of harm to people fleeing persecution. While RCOA would certainly support genuine efforts to enhance the integrity of our Refugee and Humanitarian Program, the increasingly enforcement-centred approach to asylum policy outlined above has not had this effect. Instead, it has compromised Australia's capacity to provide effective protection to people in need and uphold our international obligations. We believe that the further extension of an enforcement-focused approach to the policies and programs administered by the Department of Immigration could have similarly detrimental impacts on our offshore resettlement program, migration program and citizenship policies. RCOA maintains that a facilitation-focused approach, supported by robust visa assessment processes, is most appropriate for a Department which plays such an important nation-building role.

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<sup>1</sup> Examples include the *Migration Amendment (Protection and Other Measures) Bill 2014*, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload Bill) 2014* and the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*.