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Ms Sophie Dunstone  
Committee Secretary  
Senate Standing Committees on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Ms Dunstone

### **Inquiry into Australian Border Force Bill 2015**

The Asylum Seeker Resource Centre (ASRC) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the invitation to make a submission to the Inquiry into Australian Border Force Bill 2015 (the Bill).

The ASRC opposes the proposed amendments.

Please find following the ASRC's submission to the Committee. If you have any questions please do not hesitate to contact us

Thank you for the opportunity to participate in this important inquiry.

Kon Karapanagiotidis OAM  
CEO

## **1. Background**

The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-government agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ just 59 staff and rely on over 1000 dedicated volunteers. We deliver services to over 2,000 asylum seekers at any one time.

Our submission is based on 13 years of experience working with asylum seekers.

## **2. Executive Summary**

The ASRC opposes the proposed changes in this Bill. The ASRC is concerned that the Department will be operating simultaneously as a security agency and an agency responsible for refugee status determination.

There is a conflation between persons seeking protection from harm and persons engaged in criminal activities, such as drug or arms smuggling. This Bill seeks to treat both groups as criminals with disregard to our responsibilities under international law to protect people fleeing persecution and not return people to harm.

The ASRC is particularly concerned by the:

- Broad powers for the new role of Australian Border Force Commissioner;
- Broad and unclear powers for Immigration and Border Protection Workers of the new Border Force;
- Secrecy and disclosure provisions;
- Broad powers for the Minister to direct the Commissioner.

**The ASRC recommends that the Bill is opposed in full.**

## **3. Broad powers for the new role of Australian Border Force Commissioner**

The Bill seeks to establish a Commissioner and Australian Border Force (ABF). It is intended that the ABF will be formed within the Department from 1 July 2015.

The Commissioner will have, under the control of the Minister, the control of the operations of the ABF. The Commissioner is to be appointed by the Governor-General for a maximum term of 5 years. The policy intention stated in the Explanatory Memorandum is for the Commissioner to have the same standing as other heads of key national security related agencies, such as the Australian Federal Police Commissioner and the Chief of the Defence Force.

The Explanatory Memorandum states that the ABF will be 'a single, integrated, frontline operational border entity within the Department that is charged with enforcing customs and immigration laws and protecting Australia's borders'.

The Commissioner has power to do all things necessary or convenient in relation to the performance of their duties. The Commissioner and Australian public service employees in the ABF will be able to exercise powers under the *Customs Act 1901*, the *Migration Act 1958*, the *Maritime Powers Act 2013* and 'other Commonwealth laws'.

These are very broad and complex legislative powers. The Bill does not set out the intended purpose of or the powers or duties of the Commissioner or the ABF.

#### 4. Broad and unclear powers of Immigration & Border Protection Workers

The Explanatory Memorandum mentions the role of Immigration and Border Protection Workers:

*Immigration and Border Protection workers will make decisions that affect the safety, rights and freedoms of individuals as well as trade and commerce in Australia. They will hold a privileged place at the border and in the community, with access to secure environments and law enforcement databases. They will also exercise **significant powers** under the Customs Act 1901, Migration Act 1958 and Maritime Powers Act 2012 and other Commonwealth law **such as detention, arrest, boarding a vessel, entry, search, questioning, seizure, use of force and removal from Australia**. The community and government trust Immigration and Border Protection workers to exercise these powers reasonably, lawfully, impartially and professionally.*

The definition of 'Immigration and Border Protection worker' ("IBP worker") is contained in the proposed s 4 and essentially includes any Australian public service employee that provides services for the Department, yet it is clear that they are intended to have vastly broad and coercive powers.

It is concerning that the Department will be operating as a security agency and that people managing asylum seekers both at the Australian border and otherwise will be given powers equivalent or analogous to police powers. The clear policy intention is that asylum seekers be portrayed, seen and treated as criminals; notwithstanding that seeking asylum is a human right.

The ASRC is greatly concerned as to whether there will be fair and proper assessment of people's claims for protection when vessels are boarded and people are questioned at sea.

The Bill enables the strengthening of the Australian Government's use of on-water rapid refugee assessment with no review and oversight, thereby greatly increasing the risk of returning people to countries from which they fled.

##### **Case study – inadequate process on water to determine refugee status**

From interviews with people on boats, the ASRC has received numerous reports of people held below decks with families separated, limited access to food and water, children refused milk, not allowed to bath and restricted access to toilets.

The process to determine the refugee status of asylum seekers on boats has been insufficient. When interviewed to assess their claims for protection, people were taken in groups above deck and put on a satellite phone (with an interpreter). The interviews lasted 20 minutes with continual phone drop-outs. This was the cursory process of determining whether people were refugees.

Women who were interviewed had been subjected to sexual assault and beatings by military officers in their home country. They disclosed these painful details on the phone interview, but their claims were rejected. Subsequent to being returned to their country of origin, they fled again and were granted UNHCR refugee protection.

*Brief, on water decisions in adverse conditions are highly inadequate in terms of accurately determining someone's refugee status, highlighting the need for a proper, open refugee determination process. The Bill will entrench these inadequate processes.*

**a. Training and qualifications of IBP workers**

The Bill contemplates that IBP workers will be subject to certain 'essential qualifications' for performing their duties. The Commissioner and the Secretary will be able to give directions in relation to these. The Bill contemplates that such directions may include those in relation to:

- (a) physical or psychological health or fitness;
- (b) professional or technical qualifications;
- (c) learning and development requirements; and/or
- (d) security clearances.

IBP workers may also need to undergo 'Organisational Suitability Assessments'.

The Explanatory Memorandum, in the statement of compatibility with human rights, contemplates that the psychometric and resilience training that IBP workers may need to undergo would be to ensure that they have the 'emotional and mental disposition suitable for the performance of certain duties'.

No other guidance is provided either in the Bill or in the Explanatory Memorandum as to what training and qualifications IBP workers will need to have, as a minimum, prior to their being able to exercise certain powers against or in relation to asylum seekers. This is particularly concerning given the unique vulnerabilities of asylum seekers and in relation to the exercise by IBP workers of coercive powers. There is also no indication as to whether, for example, IBP workers exercising coercive powers will need to undergo similar training to police officers or others exercising comparable powers.

**b. Compatibility with human rights**

The statement of compatibility relates entirely to the rights of IBP workers. No mention whatsoever is made of the human rights implications of the exercise by IBP workers of their intended powers, some of which will be extremely broad and coercive, against people asylum seekers.

**5. Secrecy and non-disclosure provisions**

The secrecy and disclosure provisions risk further entrenching a lack of information and accountability to the public from the Department of Immigration and Border Protection. A hallmark of an open, democratic society is respect for the freedom of speech.

As discussed above, the Bill does not set out in any detail the powers that will be afforded to IBP workers in relation to asylum seekers. As such, the most concerning aspects of the Bill, as it currently stands, relate to the secrecy and non-disclosure provisions contained in Part 6. Sufficient provisions to protect information currently exist in regards to disclosure and whistleblowing. There is no need for additional mechanisms of non-disclosure.

These provisions will make it an offence for an 'entrusted person' to make a record of, or disclose, information that is 'protected information'. The offence will be punishable by a mandatory sentence of 2 years' imprisonment.<sup>1</sup>

'Entrusted person' includes the Secretary, the Commissioner and any IBP worker. 'Protected information' means any information that was obtained by any of those persons in their capacity as entrusted persons.

These provisions essentially criminalise any whistleblowing by IBP workers in relation to matters that do not fall within the *Law Enforcement Integrity Commissioner Act 2006*, which deals with corruption.

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<sup>1</sup> s 42.

There is a clear and indeed express intention by the government both in the Bill and in the Explanatory Memorandum to ensure that information that may undermine public confidence in the Department or its workers is kept secret from the public.

This is extremely concerning to the extent that key information regarding the treatment of asylum seekers by the Department and IBP workers will be shielded from public scrutiny. These concerns are more pertinent than ever in the current political climate where asylum seekers' rights in Australia are being increasingly narrowed and the government's powers in relation to asylum seekers are becoming increasingly broader and more coercive.

Whistle-blowers play a key role in a democracy in raising breaches of human rights. Whistleblowing involves the disclosure of information in the public interest, typically to expose improper conduct or conduct that involves risk of injury, prejudice or harm. Without whistle-blowers there wouldn't have been an investigation into allegations of sexual abuse on Nauru. The investigation found cases of rape, sexual assault and physical force against women and children in an Australian-run detention centre<sup>2</sup>.

Records or disclosure will be permitted only in very limited circumstances where:

1. the making of the record or disclosure is expressly authorised by the new Act;
2. the making of the record or disclosure is in the course of the entrusted person's employment or service as an entrusted person;
3. the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or
4. the making of the record or disclosure is required by an order or direction of a court or tribunal.

The evidentiary burden on proving the above circumstances will rest on the defendant.

As flagged above, IBP workers may need to undergo 'Organisational Suitability Assessments' as part of their essential qualifications. The Explanatory Memorandum, in the statement of compatibility with human rights, contemplates that this will be to 'screen' individuals that may be less likely to comply with secrecy and non-disclosure requirements.

The secrecy and disclosure provisions risk further entrenching a lack of information and accountability to the public from the Department of Immigration and Border Protection.

## **6. Broad powers for the Minister to direct the Commissioner**

The Minister will have the ability to give written directions to the Commissioner as to the '*policies that should be pursued, or priorities that should be followed*' in relation to the operations of the ABF. The Commissioner will have to comply with all such directions. Non-compliance will be a ground for the suspension or termination of the Commissioner's appointment.

A copy of the Minister's directions will need to be tabled in Parliament within 15 days of their being given, however, these will not be legislative instruments. As such, they will not be subject to the democratic process in the same way that a new law would be.

## **7. Conclusion**

This Bill seeks to create a new Department that combines security and customs with our humanitarian obligations.

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<sup>2</sup> Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre on Nauru available at [http://www.immi.gov.au/about/dept-info/\\_files/review-conditions-circumstances-nauru.pdf](http://www.immi.gov.au/about/dept-info/_files/review-conditions-circumstances-nauru.pdf)

While the consolidation of Australia's border, maritime and customs authorities may seem an efficient approach, it will give substantial responsibility and powers to just a few individuals - the proposed Australian Border Force Commissioner, the Secretary of the Department of Immigration and Border Protection and the Minister of Immigration and Border Protection.

Agency efficiency must be weighed against the concentration of power and the potential for a lack of effective oversight, transparency and accountability given the vast authority and complex legislative responsibility these changes will introduce.

The secrecy and disclosure provisions risk further entrenching a lack of information and accountability to the public from the Department of Immigration and Border Protection.