

Chapter 1

Introduction

1.1 On 10 August 2017 the Senate referred the provisions of the Australian Border Force Amendment (Protected Information) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 12 September 2017.¹

1.2 The Selection of Bills Committee recommended the bill be referred to the committee, commenting that:

The complex nature of the Australian Border Force Act and the impact the amendments may have [on] protected information warrants further consultation and investigation.²

Background and purpose of the bill

1.3 The aim of this bill is to update and simplify the secrecy and disclosure of information provisions in the *Australian Border Force Act 2015* (the ABF Act) to 'facilitate the evolving work' of the Department of Immigration and Border Protection (DIBP, the department).³ Furthermore, the bill ensures that the ABF Act reflects policy intent in relation to protected information.⁴

1.4 The ABF Act, which commenced on 1 July 2015, is the legislative framework for the operation and administration of the Australian Border Force (ABF). It also addresses matters relating to the whole of DIBP, including secrecy and disclosure of information.

1.5 When the ABF Act was introduced, the secrecy and disclosure provisions at Part 6 were modelled on section 16 of the since-repealed *Customs Administration Act 1985* to reflect the broad functions of DIBP at the time.⁵

1.6 Under the current ABF Act, all information 'that was obtained by a person in the person's capacity as an entrusted person' (i.e. official in ABF, employee or contractor of DIBP) is considered to be 'protected information'.⁶ Subsection 42(1) of the Act makes it an offence for any entrusted person to 'make a record of, or disclose protected information'.

1.7 However there are a number of exemptions in sections 42 to 49 of the Act which permit disclosures, including disclosures:

1 *Journals of the Senate*, No. 51, 10 August 2017, p. 1657.

2 Selection of Bills Committee, *Report No. 8 of 2017*, 10 August 2017, p. 1 and appendix 1.

3 Explanatory Memorandum, pp. 2 and 5.

4 Explanatory Memorandum, p. 5.

5 Explanatory Memorandum, p. 2.

6 *Australian Border Force Act 2015* (ABF Act), ss. 4(1) and 4(4).

- made in the course of employment or service as an entrusted person; if the disclosure is required by law; or if the disclosure is required by a direction or order of a court of tribunal;⁷
- for the purposes of the ABF Act or to make a legislative instrument for the ABF Act; or for the purpose of the *Law Enforcement Integrity Commissioner Act 2006* or regulations under that Act;⁸
- to certain bodies and persons, such to the Australia Federal Police or a State, Territory or Commonwealth Department, in certain permitted circumstances;⁹
- in accordance to agreements with foreign governments, agencies or international organisations, in certain permitted circumstances;¹⁰
- where the person or body affected has consented to that disclosure;¹¹
- where the entrusted person believes that the disclosure is necessary to reduce a threat to life or health;¹² and
- where the information has already been made lawfully available to the public.¹³

1.8 The bill seeks to narrow the types of information for which disclosure would be an offence under section 42. It clarifies that only certain types of information which could cause identifiable harm if disclosed are to be protected under the ABF Act, and that not all information held by the department requires protection from unauthorised disclosure.¹⁴

1.9 Specifically, the bill proposes the following amendments to the ABF Act:

- repeal the definition of 'protected information' in subsection 4(1) of the ABF Act and substitute a definition of 'Immigration and Border Protection information', which outlines specific kinds of information covered by secrecy and disclosure provisions of the Act;
- repeal paragraphs 44(2)(d) and 45(2)(d), thereby removing requirements for bodies to which information can be disclosed and classes of information to be prescribed in the *Australian Border Force (Secrecy and Disclosure) Rule 2015* (ABF Rule); and

7 ABF Act, ss. 42(2).

8 ABF Act, s. 43.

9 ABF Act, s. 44 and 46.

10 ABF Act, s. 45 and 46.

11 ABF Act, s. 47.

12 ABF Act, s. 48.

13 ABF Act, s. 49.

14 Explanatory Memorandum, p. 5.

- add new permitted purposes to the Act for which 'Immigration and Border Protection information' can be disclosed.¹⁵

1.10 All provisions of the bill, except for those repealing paragraphs 44(2)(d) and 45(2)(d) and adding new permitted purposes for disclosure, would be retrospectively applied, backdated to 1 July 2015.¹⁶

Conduct of the inquiry

1.11 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 28 August 2017.¹⁷ The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received 13 submissions, which are listed at appendix 1 of this report.

1.12 The committee held a public hearing on 8 September 2017. A list of witnesses who appeared before the committee is listed at appendix 3, and a Hansard transcript of the hearing is also available on the committee's website.

References to the Hansard transcript

1.13 References to the Committee Hansard are to the Proof Hansard. Page numbers may vary between the proof and the official transcript.

Comments by the Scrutiny of Bills Committee

1.14 In *Scrutiny Digest No. 9 of 2017*, the Senate Scrutiny of Bills Committee noted concerns with aspects of the bill in relation to offences for disclosure of classified information (item 5, proposed subsection 4(5), and item 21) and the use of delegated legislation in prescribing further categories of protected information (item 1, paragraph (f), and item 5, proposed subsection 4(7)).¹⁸

1.15 The Scrutiny of Bills Committee sought the Minister's advice on these matters and received a response, which was published with that committee's comments in *Scrutiny Digest No. 10 of 2017*.¹⁹ The Minister's response has been considered in this committee's examination of the bill.

Financial implications of the proposed measures

1.16 The Explanatory Memorandum includes a statement that the proposed amendments will have no financial impact.²⁰

15 Explanatory Memorandum, p. 2.

16 Explanatory Memorandum, p. 5.

17 The committee's website can be found at www.apb.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

18 Scrutiny of Bills Committee, *Scrutiny Digest No. 9 of 2017*, August 2017, pp. 1–4.

19 Scrutiny of Bills Committee, *Scrutiny Digest No. 10 of 2017*, September 2017, pp. 29–36.

20 Explanatory Memorandum, p. 3.

Compatibility with human rights

1.17 The Explanatory Memorandum states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.²¹ Furthermore, it explains that 'to the extent that this Bill engages human rights, the limitations are reasonable, necessary and proportionate'.²²

Structure of this report

1.18 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, and discusses the support for, and concerns raised by, submitters about the proposed amendments.

Acknowledgements

1.19 The committee thanks all organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.

21 Explanatory Memorandum, p. 4.

22 Explanatory Memorandum, p. 7.