Save the Children

28 August 2017

The Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary

Submission in relation to the Australian Border Force Amendment (Protected Information) Bill 2017

We are writing to share our views on the Australian Border Force Amendment (Protected Information) Bill 2017 ('the Bill') and related legislative frameworks which govern the lawfulness of disclosures made by those who are contracted to provide services to the Federal Government.

Save the Children Australia (SCA) was contracted by the Department of Immigration and Border Protection (DIBP) from August 2013 to October 2015 to provide education, recreation, child protection and welfare services to asylum seekers and refugees in Nauru. In the course of providing these services, SCA and its employees were subject to the Australian Border Force Act (*ABF Act*), as well as other legislation which criminalises certain disclosures by those contracted to government, such as section 70 of the Commonwealth *Crimes Act*.

Save the Children acknowledges that it is appropriate for government to extend confidentiality requirements to organisations contracted to provide services on its behalf. The proper functioning of government requires a careful balance between the maintenance of confidential information on the one hand, and disclosures where the public interest demands it, on the other.

During the course of its service provision on Nauru, Save the Children at all times respected the confidentiality obligations imposed upon it. However, working in that capacity, SCA also faced numerous legal and ethical dilemmas as a result of Australia's secrecy laws, including the *ABF Act*. The impact of these laws in some cases prevented SCA and its staff from disclosing important information, in the public interest, in relation to conditions in which children and their families were being held in Nauru, and individual instances of harm experienced by children.

We are therefore pleased to hear of proposed amendments to the *ABF Act* to allow for the lawful disclosure of information in the public interest in Australia, and have reviewed the Bill to ascertain the extent to which it does so. In summary, Save the Children considers that the Bill is a step in the right direction in decriminalising certain public interest disclosures pertaining to immigration-related operations. However, it introduces some new powers and provisions that could be used in a way that negates its stated purpose of distinguishing between information that does and does not need to be kept secret for legitimate governmental reasons, as detailed below. Furthermore, the amendments anticipated by the Bill are not themselves a panacea to many of our long-standing concerns about overly broad secrecy legislation in Australia and the flaws of our whistleblower legislation.

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We also note, however, that our submission to the Senate Select Committee inquiry into *Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* in April 2015, Save the Children recommended the introduction of a genuine, independent monitoring and reporting mechanism to ensure that the management of offshore immigration facilities is transparent and subject to appropriate public scrutiny.

We maintain the view that, while offshore immigration facilities remain in place, secrecy laws and related whistleblower protections are not necessarily the best legal mechanisms to ensure that an adequate balance is struck between the legitimate protection of confidential information, on the one hand, and the disclosure of matters in the public interest, on the other. It should not be incumbent upon the judgement of individual service provider staff to make this assessment.

Save the Children remains of the view that reporting mechanisms should be in place in both offshore and onshore contexts to enable disclosures to be made by concerned individuals to an independent human rights monitor, appropriately mandated to investigate and report on such disclosures.

Views in relation to the operation of the Bill

We support the Bill to the extent that it proposes that the defined term of 'Protected Information' (which covered any information a DIBP contractor might have obtained in the course of discharging their contractual duties) is replaced with the term 'Immigration and Border Protection information' (IBPI definition), which is significantly narrower on its face. The new definition suggests that the *ABF Act*, if amended, would exclude many examples of public interest information that do not have obvious implications for national security or international relations.

However, there are a number of aspects of the IBPI definition and related provisions that continue to cause us concern.

i. Delegation of power to the Secretary of DIBP

First, and most significantly, the introduction of proposed sub-section (7) to section 4 of the *ABF Act* delegates power to the Secretary of DIBP to prescribe additional categories of information to become part of the IBPI definition, namely 'any information which in the Secretary's judgement the disclosure of which would or could reasonably be expected to:

(a) prejudice the effective working of the DIBP; or

(b) otherwise harm the public interest.'

This is an extremely broad discretion and could effectively be used to prevent the lawful disclosure of a wide range of information, particularly in the highly-controversial context of 'offshore processing'. It is foreseeable that *any* disclosure relating to events or operations in these settings could prejudice the effective working of the Department. For example, service provider criticism of the Department's handling of specific incidents involving children, where the steps taken by the Department to address or remedy the underlying issues have not, in the professional judgement of the service provider, been enough to safeguard the future welling of a child.

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ii. Information which could prejudice international relations

Second, we are concerned about potential overly-broad application of paragraph (a) of the new definition, which effectively criminalises the disclosure of information 'which would or could reasonably be expected to prejudice the security, defence or international relations of Australia'. Again, in the highly-controversial and volatile context of 'offshore processing' one can envisage certain disclosures in the public interest which could well prejudice the international relations of Australia with Papua New Guinea, Nauru or indeed other members of the international community (including those who are critical of Australia's offshore processing policy). For example, a disclosure about an unlawful attack by members of foreign police or security personnel on a refugee or asylum seeker in Nauru or PNG could potentially fall within paragraph (a) this definition. We understand that the scope of this sub-clause would be subject to judicial determination and the onus would be on the government to prove that a particular disclosure meets the criteria of the definition. Yet we are nevertheless concerned by its potentially broad application.

iii. Treatment of 'Classified information'

Third, while it would appear reasonable to include 'classified' information within the category of information that cannot be lawfully disclosed to the public by government employees or contractors, we have concerns about information that would not ordinarily have a security classification being given a security classification in order to bring it within the ambit of the IBPI definition. This concern arises from proposed paragraph (5) of section 4, which deems information within the following categories to fall within paragraph (a) of the IBPI definition:

(a) information that has a security classification;

(b) information that has originated with, or been received from, an intelligence agency.

This concern is pertinent given government attempts in recent years to ensure 'operational secrecy' in relation to a wide range of immigration and border force operations. It is exacerbated by the recent announcement of a plan to create a new Home Affairs Department (within which ASIO, the Australian Federal Police, the Australian Border Force and other key agencies will sit), a multifaceted new Department and one which may be overseen by a person serving concurrently as the Minister for Immigration and Border Protection. It is foreseeable that a blanket security classification could be issued for broad categories of information where its disclosure could lead to criticism of the DIBP policy or otherwise embarrass or discredit the DIBP.

We also have concerns that the proposed addition of section 42(1A) would make it an offence for a person to disclose certain information if the person was reckless as to whether (among other things) information has a security classification. This is concerning because a government contractor may not be aware that certain information has been classified for security purposes by a government agency. It is also unclear what steps the contractor would need to take to satisfy themselves that the information was not subject to a security classification, and thus the proposed amendment to section 42 could have quite a broad chilling effect on public interest disclosures.

iv. Overlap with offences under the Crimes Act

We wish to remind the Committee that the *ABF Act* is not the only Commonwealth law which can operate to criminalise the disclosure of public interest information by government employees, contractors or their employees. In particular, we note that section 70 of the Commonwealth *Crimes Act* also potentially criminalises some public interest disclosures. That section provides a penalty of two years imprisonment for:

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(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, commits an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, commits an offence.

The term 'Commonwealth officer' is defined in broad terms in the *Crimes Act* to include contractors to the Federal government. It is not clear from the Bill that, if an immigration-related disclosure falls outside of the offences created by the *ABF Act* (post amendment), the disclosure will still fall foul of the secrecy provisions in the *Crimes Act*.

v. Federal whistleblower protection laws are not adequate to address these concerns

Finally, we note that Australia's *Public Interest Disclosure Act* (PIDA) is not an adequate response to the concerns of would-be whistleblowers who might fall foul of the *Crimes Act* or the *ABF Act* by making disclosures in the public interest.

The Human Rights Law Centre has summarised the flaws in Australia's whistleblower protection laws:

> *Whistleblowers are not adequately protected in Australian law. While the Public Interest Disclosure Act was a step in the right direction, to receive protection under the legislation, whistleblowers are required to follow strict and complex statutory procedures that create high barriers to people making a disclosure – especially given the potentially harsh criminal consequences if the person gets it wrong.*
>
> *The Act protects Commonwealth officials or contractors from prosecution for breach of secrecy laws if they disclose information about certain types of unlawful, unjust, fraudulent or unsafe conduct. However the protection only applies if:*
>
> - *the information has first been disclosed internally within the relevant agency;*
> - *an internal investigation was either not completed in 90 days, was inadequate or resulted in an inadequate response;*
> - *the disclosure is not, on balance, contrary to the public interest;*
> - *the disclosure is limited to that which is reasonably necessary to identify the conduct; and*
> - *the information isn't "intelligence information" (which is defined very broadly and includes certain law enforcement information) or information about an intelligence agency such as ASIO.*
>
> *Further, the laws potentially allow a minister to stymie disclosure because where a minister is "taking action" in response to an internal disclosure, the response of the internal investigation cannot be considered inadequate, meaning the would-be whistleblower could be indefinitely deprived of protection under the laws.*[1]

[1] Human Rights Law Centre, *Safeguarding Democracy,* (February 2016) p 28 (available at http://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/5812996f1dd4540186f54894/581299ee1dd4540186f55760/1477614062728/HRLC_Report_SafeguardingDemocracy_online.pdf?format=original)

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- **Recommendations:**

1. The Committee should consider making amendments to the Bill to:

- Further qualify the terms of paragraph (a) of the new definition, particularly in its reference to 'international relations' (one option may be to amend paragraph (a) to refer to 'information which directly concerns the security, defence or international relations of Australia');

- Remove sub-section (7) of section 4, so that the Secretary does not have delegated power to expand the scope of the new definition;

- Clarify that if a disclosure is made of 'protected information' (as currently defined) but falls outside of the offences created by the *ABF Act* (after the adoption of the new IBPI definition), the disclosure will not be an offence under section 70 of the *Crimes Act*

- Clarify that if information held by a government contractor is not marked with a security classification, and the contractor has not been informed that the information has been classified, the discloser (being the contractor or its staff) should not be deemed to be reckless as to whether or not it is so classified

2. The Committee should consider whether there are appropriate mechanisms to prevent the spirit of the Bill from being defeated in practice though the use of blanket security classifications, or inappropriate use of security classifications, particularly in the context of DIBP operations. If such mechanisms are absent or inadequate, the new definition should be further qualified to provide safeguards which prevent security classifications being used inappropriately in order to bring certain information within the ambit of the *ABF Act* to discourage disclosures being made in the public interest.

3. The Committee should consider instigating a separate inquiry into the strengths and weaknesses of the *PIDA* and investigate further steps that should be taken to strengthen whistleblower protection in Australia.

We hope that you will consider these recommendations and would be happy to answer any questions you may have in relation to them. Please do not hesitate to contact us should you require any further information.

Kind regards

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