

The Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the Australian Border Force Bill 2015

Introduction

I am a former employee of Save the Children Australia, and worked as a senior secondary teacher in the school in the Nauru Regional Processing Centre. The following submission is my own.

I thank the Committee for the opportunity to make this submission to its Inquiry into the Australian Border Force Bill 2015. I recognize that many individuals, organisations and statutory bodies have greater expertise in this area, and that there may be areas and intricacies of the Bill that I do not fully understand. Any errors of interpretation are my own.

My submission is concerned primarily with the impact of this proposed Bill on the provision of services to asylum seekers in mandatory detention, whether in processing centres in Australia, in offshore/regional processing centres or in other forms of community or alternative places of detention

I wish to raise my concerns about the potential impact on civil society and human rights organisations and their employees within the proposed Bill, vis-à-vis the merging of Australia's border control functions, the proposed definitions of Immigration and Border Protection workers, the increased ability for the ABF to give directions to such organisations and employees, the penalties for failing to follow directions, and the penalties for disclosure of protected information.

Background

It is my understanding that the Commission of Audit recommended the merging of the border control functions of the Department of Immigration and Border Protection (DIBP) and the Australian Customs and Border Protection Service (Customs) into a 'single, integrated border agency'.¹ The Government adopted the recommendation and made the decision 'to integrate Department and the ACBPS into a single Department of State.'²

In a research paper for the 2014-15 Budget Review³, Cat Barker, Senior Researcher at Parliamentary Library, stated that:

The Commission's recommendation rested on two grounds—that the consolidation 'has the potential to generate significant savings' and would provide the 'optimal structure' to pursue a more effective approach to border protection through 'a series of integrated activities both beyond and within the border.'⁴ The Minister for Immigration and Border Protection announced on 9 May 2014 that the Government would adopt the Commission's recommendation and

¹ National Commission of Audit, *Towards responsible Government: phase one* February 2014, pp. 207–8, accessed 15 May 2014, in C Barker, 'Australian Border Force', *Budget review 2014–15*, Research paper series 2013–14, Parliamentary Library, Canberra, 2014, accessed 29 March 2015.

² Explanatory Memorandum, Australian Border Force Bill 2015, accessed 1 April 2015.

³ C Barker, 'Australian Border Force', *Budget review 2014–15*, Research paper series 2013–14, Parliamentary Library, Canberra, 2014, accessed 29 March 2015.

⁴ *Towards responsible Government: phase one*, op cit.

establish the Australian Border Force (ABF) from 1 July 2015. Echoing the Commission, he stated that it would be 'a reform measure, not simply a savings measure'.⁵

Ms. Barker also stated that:

Creation of a single Australian border agency was previously rejected by the 2008 Review of Homeland and Border Security. Only the summary and conclusions of the report are publicly available, so it is not possible to compare the ABF with any particular model that may have been considered. However, the document notes that the temptation to create new organisations or merge existing ones to address evolving security threats carries several risks. *One such risk is that other service delivery, policy, program and regulatory functions of some of the agencies concerned could be jeopardized by restructuring them around their security roles.*⁶ Given the Minister's emphasis on the ABF as a national security agency, and the breadth of the roles and functions of both DIBP and Customs, this is particularly relevant.⁷ More specifically, the review stated '[r]ather than bringing key border functions together in a "single border agency", a whole-of-government strategic planning framework would better suit Australia'.⁸ [Emphasis added].

As outlined below, I believe that the creation of a single Agency under the proposed Bill presents a significant risk to, and will jeopardise the critical program functions of, agencies and employees contracted to deliver services to asylum seekers.

Ms. Barker also noted the Minister's acknowledgement of successes and failures of similar reforms overseas, and the need to monitor any reforms in Australia:

The Minister stated that the Government had studied the successes and failures of similar reforms overseas, particularly in the UK and the US, and that the ABF is 'a hybrid of the current UK Home Office model'.⁹ The model proposed does resemble what the UK now has in place, where its Border Force, previously part of the troubled UK Border Agency, became a 'law enforcement command' within the Home Office in 2012.¹⁰ The move came after the Independent Chief Inspector of the UKBA found that border controls had been relaxed at

⁵ S Morrison (Minister for Immigration and Border Protection), *A new force protecting Australia's borders: address to the Lowy Institute for International Policy*, Sydney. Media release, 9 May 2014, accessed 15 May 2014, in C Barker, 'Australian Border Force', *Budget review 2014–15*, Research paper series 2013–14, Parliamentary Library, Canberra, 2014, accessed 29 March 2015.

⁶ R Smith, *Report of the Review of Homeland and Border Security: summary and conclusions*, Australian Government, 4 December 2008, accessed 15 May 2014 in *Australian Border Force*, op. cit.

⁷ See further C Berg, *Beware the Border Force Fetish*, The Drum, Australian Broadcasting Corporation, 14 May 2014, accessed 15 May 2014. Only one of DIBP's three outcomes is focused on border protection, while only one of Customs' three programmes is focused on enforcement: Portfolio budget statements, op. cit., pp. 21, 95–6, in *Australian Border Force*, op. cit.

⁸ *Report of the Review of Homeland and Border Security*, op. cit.

⁹ *A new force*, op. cit. in *Australian Border Force*, op. cit.

¹⁰ UK Home Office, 'Border Force', UK Home Office website, accessed 15 May 2014 in *Australian Border Force*, op. cit.

¹¹ Independent Chief Inspector of the UK Border Agency, *An investigation into border security checks*, UK Home Office, February 2012, accessed 15 May 2014 in *Australian Border Force*, op. cit.

Heathrow and other ports without ministerial permission.¹¹ However, two more recent reports have highlighted continuing problems with the Border Force, with one concluding that the move was 'expected to strengthen its capability. But there is little evidence, some 18 months later, of progress in tackling the legacy issues'.¹² It will be important that the Government continues to heed the lessons from overseas reforms, as well as giving due weight to Australia's particular circumstances, as this measure is implemented over the coming years.¹³

This Inquiry is a valuable opportunity to review again the lessons mentioned above, against the proposed Bill.

Concerns about the proposed Bill

Definitions

The Bill proposes, under Section 4 (1) Definitions, that:

Immigration and Border Protection worker means:

- (a) an APS employee in the Department; or
- (b) a person covered by paragraph (d), (e) or (f) of the definition of ***officer of Customs*** in subsection 4(1) of the *Customs Act 1901* ; or
- (c) a person covered by paragraph (f) or (g) of the definition of ***officer*** in subsection 5(1) of the *Migration Act 1958* ; or
- (d) a person who is:
 - (i) an employee of an Agency (within the meaning of the *Public Service Act 1999*) ; or
 - (ii) an officer or employee of a State or Territory; or
 - (iii) an officer or employee of an agency or authority of the Commonwealth, a State or a Territory; or
 - (iv) an officer or employee of the government of a foreign country, an officer or employee of an agency or authority of a foreign country or an officer or employee of a public international organisation;
and whose services are made available to the Department; or
- (e) a person who is:
 - (i) engaged as a consultant or contractor to perform services for the Department; and
 - (ii) specified in a determination under subsection 5(1); or
- (f) a person who is:
 - (i) engaged or employed by a person to whom paragraph (e) or this paragraph applies; and
 - (ii) performing services for the Department in connection with that engagement or employment; and
 - (iii) specified in a determination under subsection 5(2).

The Bill proposes, under Section 5 Consultants and Contractors etc., that:

- (1) The Secretary or the Australian Border Force Commissioner may, by written determination, specify a person for the purposes of subparagraph (e)(ii) of the definition of ***Immigration and Border Protection worker*** in subsection 4(1).
Other persons
- (2) The Secretary or the Australian Border Force Commissioner may, by written determination, specify a person for the purposes of subparagraph (f)(iii) of the definition of ***Immigration and Border Protection worker*** in subsection 4(1).
Determinations are not legislative instruments
- (3) A determination under this section is not a legislative instrument.

¹² Comptroller and Auditor General, *The Border Force: securing the border*, National Audit Office, 4 September 2013, accessed 15 May 2014; House of Commons Public Accounts Committee, *The Border Force: securing the border*, House of Commons, 2 December 2013, p. 3, accessed 15 May 2014 in *Australian Border Force*, op. cit.

¹³ *Australian Border Force*, op. cit.

The Explanatory Memorandum to the Bill further states:

The term IBP worker is a key term of this Bill because it defines the range of workers who perform functions for or provide services to the Department. It is intended to capture APS employees of the Department as well as those persons outside the Department who exercise powers under Acts administered by the Department, such as officers from other Government agencies, *as well as contractors or consultants that perform services for the Department from time to time*. This definition is important as provisions within this Bill enable the Secretary and ABF Commissioner to give directions to IBP workers and establish obligations and requirements for IBP workers. The definition has been developed to cover the range of persons who exercise powers relating to immigration, customs and border protection functions and person who have access to sensitive information, systems and premises of the Department. [Emphasis added].

It is my understanding that employees of an agency such as Save the Children Australia, as well as the organisation itself, or any contractor to the proposed ABF who does or will provide services to asylum seekers, would be covered by the definitions of the proposed Bill, as per Section 4 (1) (e) (i) and (ii) and Section 5 of the proposed Bill. I believe that there are significant implications of concern in this coverage / definition, as outlined further below.

Delegation and Directions

The Bill proposes, under Section 25 Delegation, that:

- (1) The Australian Border Force Commissioner may, by writing, delegate any of his or her functions or powers under a law of the Commonwealth to the following:
 - (a) the Secretary;
 - (b) a person who is covered by paragraph (a) of the definition of ***Immigration and Border Protection worker*** in subsection 4(1) and who is in the Australian Border Force;
 - (c) a person who is covered by paragraph (b), (c), (d), (e) or (f) of that definition and whose services are made available to, or who is performing services for, the Australian Border Force.
- (2) However, subsection (1) does not apply in relation to:
 - (a) section 30 (resignation in anticipation of termination of employment); or
 - (b) section 32 (termination of employment for serious misconduct).
Directions to delegates
- (3) An Immigration and Border Protection worker must, in performing functions or exercising powers under a delegation under subsection (1), comply with any written directions of the Australian Border Force Commissioner.
Subdelegation by Secretary
- (4) If the Secretary is delegated functions or powers under subsection (1), the Secretary may, by writing, delegate any of those functions or powers to any Immigration and Border Protection worker.
- (5) An Immigration and Border Protection worker must, in performing functions or exercising powers under a delegation under subsection (4), comply with any written directions of the Secretary.
- (6) The Secretary must not give directions under subsection (5) in relation to particular functions or powers that are inconsistent with any directions given under subsection (3) in relation to those functions or powers.
- (7) A function that is performed or a power that is exercised by an Immigration and Border Protection worker under a delegation under subsection (4) is taken, for the purposes of the law referred to in subsection (1), to have been performed or exercised by the Australian Border Force Commissioner.

The Bill also proposes, under Section 26, that:

- (1) The Australian Border Force Commissioner may, by writing, give directions to the following persons in connection with the administration and control of the operations of the Australian Border Force:
 - (a) a person who is covered by paragraph (a) of the definition of ***Immigration and Border Protection worker*** in subsection 4(1) and who is in the Australian Border Force;
 - (b) a person who is covered by paragraph (b), (c), (d), (e) or (f) of that definition and

whose services are made available to, or who is performing services for, the Australian Border Force.

Essential qualifications

- (2) Without limiting subsection (1), directions under that subsection may relate to the essential qualifications for persons mentioned in paragraph (1)(a) or (b) for performing their duties.

Note 1: See section 23 of the *Public Service Act 1999* for the reduction in the classification of an APS employee in the Department if the employee lacks, or has lost, an essential qualification for performing his or her duties.

Note 2: See section 29 of the *Public Service Act 1999* for the termination of the employment of an APS employee in the Department if the employee lacks, or has lost, an essential qualification for performing his or her duties.

- (3) Without limiting subsection (2), essential qualifications may have one or more of the following components:

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

Reporting of serious misconduct or criminal activity

- (4) Without limiting subsection (1), directions under that subsection may relate to the reporting by persons mentioned in paragraph (1)(a) or (b) of the following:

- (a) serious misconduct by such a person;
- (b) criminal activity involving such a person; where the serious misconduct or criminal activity affects, or is likely to affect, the operations, responsibilities or reputation of the Department.

Compliance with directions

- (5) A person mentioned in paragraph (1)(a) or (b) must comply with a direction under this section.

Note 1: See subsection 13(4) and sections 15, 28 and 29 of the *Public Service Act 1999* for the consequences of an APS employee in the Department not complying with subsection (5) of this section.

Note 2: See section 57 of this Act for the termination of a person's engagement as a consultant or contractor, or for the arranging of a person to cease to perform services for the Department, if the person does not comply with subsection (5) of this section.

Directions are not legislative instruments

- (6) A direction under this section is not a legislative instrument.

No limit on other powers to give directions

- (7) This section does not limit any other power of the Australian Border Force Commissioner to give directions to any person.

Neither of these sections does appear to provide for employees of agencies working with asylum seekers, who could be defined as Immigration and Border Protection staff as per Sections 4 and 5, with the ability to refuse to comply with directions.

I believe the proposed provisions of Sections 4, 5, 25 and 26 are of significant concern for contractors or agencies who are working to provide services to asylum seekers, in that if a conflict arose between an ABF directive and individual conscience, organisational code of conduct or duty of care, the employee or organisation appears would compelled to follow the ABF direction, or be subject to termination of employment.

Secrecy and disclosure provisions

The Bill proposes, under Section 41, that:

An entrusted person must not make a record of or disclose protected information unless the making of the record or disclosure is authorised by a provision of this Part, is in the course of the person's employment or service as an entrusted person or is required or authorised by law

or by an order or direction of a court or tribunal.

The Bill proposes, under Section 42 Secrecy, that:

- (1) A person commits an offence if:
 - (a) the person is, or has been, an entrusted person; and
 - (b) the person makes a record of, or discloses, information; and
 - (c) the information is protected information.
Penalty: Imprisonment for 2 years.
Exception
- (2) Subsection (1) does not apply if:
 - (a) the making of the record or disclosure is authorised by section 43, 44, 45, 47, 48 or 49;
or
 - (b) the making of the record or disclosure is in the course of the person's employment or service as an entrusted person; or
 - (c) 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
 - (d) the making of the record or disclosure is required by an order or direction of a court or tribunal.
Note: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).
Geographical jurisdiction
- (3) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to an offence against subsection (1).

The Explanatory Memorandum states that:

This Bill contains provisions making 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, ABF Commissioner and an IBP worker. There is a penalty of imprisonment for two years for breach of this provision. The Bill provides exceptions (authorized disclosure) in defined circumstances, including where a record or disclosure is in the course of employment, is required by another law, or a court or tribunal, or where authorized by the secretary (with or without conditions).

In my experience, employees of agencies contracted by DIBP to work in regional processing centres are already bound by strict confidentiality agreements, as well as numerous codes of conduct and centre guidelines. Failure to comply with the terms of such agreements, codes of conducts and guidelines can be against *The Privacy Act 1988* or *The Crimes Act 1914*.

The provisions for additional definitions about, and penalties concerning disclosure of, protected information seems both unnecessary, worrying and unduly restrictive for employees of agencies working with asylum seekers, particularly in light of the recent Moss Review and AHRC Report into children in detention. I sincerely hope that the Committee considers whether the new provisions for secrecy are necessary and if so, whether exceptions to these new provisions, outlined in Section 42(2), are robust enough to enable employees to raise concerns should a conflict of conscience or professional duty of care arise.

Conclusion

For the reasons outlined above, I thank the Committee for its consideration of my concerns about the need for, and implications of, the proposed Bill and its impact on the provision of services for asylum seekers.