Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600

BY EMAIL

1 September 2017

Dear Committee Secretary

Inquiry into the Australian Border Force Amendment (Protected Information) Bill 2017 ('the Bill')

Thank you for the opportunity to make a submission. We do so in our capacity as members of the Andrew & Renata Kaldor Centre for International Refugee Law. We are solely responsible for the views and content in this submission.

The Explanatory Memorandum makes clear that the Bill seeks to protect certain information from unauthorised disclosure that would harm the national or public interest, while 'meeting the expectations of the Australian community of transparency and accountability within the Australian Government'.[1] We are broadly supportive of this objective. We recognise that the amendments proposed in the Bill represent a lesser encroachment on free speech than the *Australian Border Force Act* ('the *Border Force Act*') in its current form, and we see this as a step in the right direction.

That said, in our view, the drafting of the Bill leaves much to be desired. In particular, more careful and precise drafting would greatly improve the Bill's effectiveness in meeting its stated objective of preserving transparency and accountability while protecting against disclosures likely to harm the national or public interest.

We have three overarching concerns. First, the Bill goes beyond what is proportionate to the aim of preventing harm to the national or public interest. Secondly, if the Bill is passed in its current form, the full range of conduct that gives rise to an offence under the Act will not be

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[1] Explanatory Memorandum, Australian Border Force Amendment (Protected Information) Bill 2017, 4. (Explanatory Memorandum)

readily discernible from the face of the legislation. Finally, these two factors, combined with the fact that committing conduct constituting an offence under the Act carries a penalty of two years' imprisonment, are likely to have a chilling effect on the disclosure of any information pertaining to immigration and border control by those that qualify as 'entrusted persons'. This chilling effect is likely to apply even where disclosure of the information in question would not, in fact, constitute an offence.

If the Bill is passed in its current form, questions about the constitutional validity of the Act will, in our view, remain open. Moreover, while the resultant Act will certainly be an improvement on the *Border Force Act* as currently drafted, it will still fail to strike the appropriate balance between protecting the national and public interest and preserving transparency and government accountability.

We outline our concerns, and some suggestions for how they might be addressed, below.

1. The Bill goes beyond what is proportionate to achieving its stated goal

The Explanatory Memorandum states that the 'policy and legislative intent' that underpins both the changes proposed in the Bill as well as the Act generally is to:

> protect certain information from unauthorised disclosure to prevent harm to national and public interests, while meeting the expectations of the Australian community of transparency and accountability within the Australian Government.[2]

Proposed amendments to s 4(1) replace the existing definition of 'protected information' with a new, narrower definition of 'Immigration and Border Protection Information'. There are six kinds of Immigration and Border Protection Information. Disclosure of any of these kinds of material constitutes an offence under s 42 of the Act, subject to exceptions. Penalty for breach of this offence is 2 years imprisonment.

While the proposed change is said to *narrow* the circumstances in which disclosure of information is criminalised under the Act, the definition of Immigration and Border Protection Information is still very broad. Accordingly, if the amendments in the Bill are accepted, the Act will still criminalise the disclosure of a broad range of information in a broad range of circumstances.

No principled case has been made in the Explanatory Memorandum, the Second Reading Speech or the Bill itself for how criminalising disclosure of each of the six types of Immigration and Border Protection Information strikes an appropriate balance between the preservation of national security and the public interest, and the maintenance of transparency and government accountability.

In our view there are two ways in which the Bill's definition of Immigration and Border Protection Information goes beyond what is proportionate to the object of preventing harm to national and public interests.

a. Some types of Immigration and Border Protection Information have no clear connection to protecting national security or the public interest

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[2] Ibid.

First, some of the categories of information included within the scope of the definition do not have any obvious connection to the protection of national security or the public interest. In its report, *Secrecy Laws and Open Government in Australia*, the Australian Law Reform Commission (ALRC) recommended that the Crimes Act 1914 (Cth) be amended to include a 'general secrecy offence'.[3] The ALRC suggested that such a general secrecy provision—that results in criminal sanction—should only relate to instances where disclosure could harm an 'essential public interest'.[4] The test recommended by the ALRC was whether the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

a. damage the security, defence or international relations of the Commonwealth;
b. prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
c. endanger the life or physical safety of any person; or
d. prejudice the protection of public safety.[5]

In our view, the ALRC's list of essential public interests provides a robust framework under which to examine secrecy provisions with respect to the public interest. While we note that there are some similarities between the proposed definition of Immigration and Border Protection Information and the ALRC's essential public interest grounds, the definition proposed is wider in some respects, and as we point to below, lacks justification.

The ALRC also noted that there are instances where more specific secrecy provisions may be necessary. However, specific secrecy offences 'are only warranted where they are necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions'.[6] Here, we are concerned that the case has not been made on proportionality grounds in relation to some aspects of Immigration and Border Protection Information.

We express particular concern with respect to paragraph (e) of the definition, which states that information obtained by an entrusted person will be Immigration and Border Protection Information if its disclosure 'would or could reasonably be expected to cause competitive detriment to a person'. It is not clear how the effect of disclosure on the competitive position of a market participant relates to national security or public interest concerns. The Explanatory Memorandum does not clarify this, noting only that 'disclosing such information could cause significant damage to an entity's business interests where the information provides a competitive advantage to a competitor or potential competitor'.[7] The Explanatory Memorandum includes as examples of the kinds of information that may be covered by

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3 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* ALRC Report 112 (2010) rec 5-1 (ALRC Secrecy Report).

4 Ibid, 23.

5 ALRC Secrecy Report, rec 5-1.

6 Ibid, rec 8-1.

7 Explanatory Memorandum, 13.

paragraph (e), the following: 'commercially sensitive information received from and about commercial entities, such as names of suppliers, prices paid for goods …'.[8]

While it is legitimate to protect against competitive detriment that might flow from the disclosure of confidential information, this is typically achieved through a combination of the application of the general law, contractual obligations relating to confidentiality and requirements for persons entrusted with confidential information to sign a confidentiality undertaking. No clear case has been made for why the protection of national security and the public interest require that Immigration and Border Protection workers be held to a different, and far more onerous, standard than that which applies to other government workers. In particular, no justification has been made for why national security or the public interest demand that *criminal* penalties should attach to disclosure in this context, in contrast to the civil and contractual consequences that typically apply.

The lack of any clear connection between the inclusion of paragraph (e) in the definition of Immigration and Border Protection Information and the national security and public interest protection purposes underpinning the Bill indicates in and of itself that paragraph (e) is not proportionate to these purposes.

Similar arguments apply with respect to paragraph (d), which states that information obtained by an entrusted person will be Immigration and Border Protection Information if its disclosure 'would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence'. The Explanatory Memorandum states that this category is included to recognise that '[l]ack of client confidence in the Department's ability to protect confidential information could result in such information being withheld'.[9]

The ALRC noted that disclosure of information that would found a third party action for a breach of confidence

> should be dealt with under the general law dealing with breach of confidence, or under administrative provisions. [Such provisions] describe a category of information, rather than a public interest, and should not be included in the general criminal offence.[10]

(b) The proposed categories of Immigration and Border Protection Information are generally overbroad

Secondly, each of the proposed categories of Immigration and Border Protection Information is drafted so as to include a very broad range of information. For example, it appears that the disclosure of information about matters such as the conditions of detention centres in Nauru or on Manus Island could fall within the category of information that 'would or could reasonably be expected to prejudice … [the] international relations of Australia' under paragraph (a). The Explanatory Memorandum does not assist in this regard. While it

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8 Ibid.

9 Explanatory Memorandum, 12.

10 ALRC Secrecy Report [5.110]

includes examples of the kinds of information that fall squarely within paragraph (a), it provides no guidance on the outer limits or scope of the definition.[11]

Additionally, the Bill adopts a lower threshold for determining whether particular information qualifies as Immigration and Border Protection Information than the threshold recommended by the ALRC in its Secrecy inquiry for the designation of disclosure offences penalised by criminal sanction. As noted above, the ALRC recommended that, in order to ensure that such offences only apply where disclosure would harm an 'essential public interest'. Disclosure should generally only attract criminal sanction where it has actually harmed, is reasonably likely to harm, or was intended to harm a designated 'essential public interest'.[12] By contrast, the categories of Immigration and Border Protection Information designated in paragraphs (a)-(e) capture information where disclosure 'would or could reasonably be expected to' produce specified effects.

No justification has been provided for why the weaker threshold employed in the Bill has been selected. We suggest that the higher threshold recommended by the ALRC in this context would more appropriately confine the circumstances in which disclosure attracts criminal liability.

2. The operation of the changes proposed in the Bill lacks sufficient clarity

The scope and content of the disclosure offences that the Bill purports to create is not readily discernible on the face of the Bill. This is a symptom of the breadth with which the various categories of Immigration and Border Protection Information are defined, in the proposed amendments to s 4, and of the fact that the Secretary of the Department of Immigration and Border Protection is given the power to prescribe new categories of Immigration and Border Protection Information by legislative instrument.

While the proposed amendments do not affect a person's ability to make disclosures that are 'required or authorised by or under a law of a Commonwealth, State or Territory'[13], there is significant uncertainty about whether disclosure is authorised under public disclosure legislation. One may argue that any public interest like disclosures not caught by exemptions in the *Border Force Act* may be covered by the *Public Interest Disclosure Act 2013* (Cth) (PIDA).[14] However, we wish to reiterate that the relationship between the secrecy provisions of the *Border Force Act* and the PIDA, and the process required for public interest disclosure under the PIDA itself, is not straightforward to navigate for the layperson who is seeking to make a public disclosure.

First, the PIDA only covers disclosures made by 'public officials': public servants and their contracted service providers but does not include consultants and their employees.[15] In contrast, the definition of 'immigration and border protection worker' under the *Border Force*

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11 Ibid, 11.

12 ALRC Secrecy Report, rec 5-1.

13 *Australian Border Force Act 2015* (Cth) s 42(2)(c).

14 In broad terms, the PIDA exempts certain persons from criminal and civil sanctions who make disclosure of 'disclosable conduct' in accordance with the procedures set out under the Act.

15 *Public Interest Disclosure Act 2013* (Cth) s 69 for definition of 'public official'.

Act covers these categories of persons.[16] This mismatch in coverage means that some, but not all, persons who may work within Australia's immigration system will be covered by the PIDA.

Second, the PIDA requires that a person first report disclosable conduct to a superior within a government agency.[17] Disclosure outside of government can only occur after internal disclosure and where the person believes that the investigation or response was inadequate, and that disclosure, on balance, is not contrary to the public interest.[18] Further the PIDA states that a response is not inadequate in relation to a matter in which the Minister has taken, or proposes to take action.[19] Nor can a person disclose matters only because he or she disagrees with the action taken or proposed to be taken by a Minister.[20] There are also 'emergency disclosure' provisions that allow public disclosure where there is a "substantial and imminent danger" to the health and safety of individuals.[21] These are significant barriers for a person to overcome in making a public interest disclosure.[22]

Third, the PIDA exempts any disclosure that is a defined as 'sensitive law enforcement information'. This is widely defined as information which, if disclosed, is 'reasonably likely to prejudice Australia's law enforcement interests'.[23] Given that the Australian Border Force is a quasi law enforcement agency, it is arguable that much of its work could be said to involve law enforcement interests. As such, this would mean that the PIDA is ineffective in relation to information obtained by an entrusted person working for the Australian Border Force.

Given the complexities involved in navigating both the *Border Force Act* and PIDA, it is imperative that any amendment to the current secrecy provisions be drafted in the clearest possible manner. Without sufficient clarity, our concern is that potential whistleblowers will not be able discern whether they would be protected in making a public interest disclosure, either under the *Border Force Act* or under PIDA.

3. If the proposed changes are passed there is likely to continue to be a chilling effect on disclosure of information pertaining to immigration and border protection

Our third concern derives from the two issues outlined above. The breadth of the Bill's proposed coverage, combined with the lack of clarity about what conduct would constitute an offence and the fact that infringement may give rise to prosecution and, in the event of a conviction, imprisonment, is likely to have a chilling effect on the disclosure of any information pertaining to immigration and border control by those that qualify as 'entrusted persons'. This chilling effect is likely to apply even where disclosure of the information in question would not, in fact, give rise to an offence.

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16 See *Australian Border Force Act 2015* (Cth) s 4 for the definition of immigration and border protection worker'.

17 See *Public Interest Disclosure Act 2013* (Cth) for the meaning of 'public interest disclosure'.

18 Ibid.

19 Ibid, s 26(2A).

20 Ibid s 31.

21 Ibid s 26.

22 See, eg, Khanh Hoang, 'Of Secrecy and Enforcement: Australian Border Force Act 2015 (Cth)'(2015) 14, Law Society Journal of New South Wales 78

23 *Public Interest Disclosure Act 2013* (Cth) s 41(2).

4. Constitutional considerations

If the Bill is passed, the Act will impose fewer restrictions on communication than is currently the case. Nonetheless, for the reasons we outline above, a significant burden on communication about political matters will remain. In light of this, it is our view that the proposed legislation would be open to constitutional challenge on the grounds that it infringes the implied freedom of political communication, and that such a challenge would have reasonable prospects of success.

In *McCloy v NSW*,[24] the High Court held that a law that imposes a burden on freedom of communication about government and political matters, will not infringe the freedom of political communication, provided the purpose of the law and the means adopted to achieve that purpose are compatible with the maintenance of the constitutionally prescribed system of representative government. This is assessed via a proportionality analysis that examines three considerations:

- Suitability (whether the law has a rational connection to its purpose),
- Necessity (whether there is an obvious and compelling alternative that has a less restrictive effect on the freedom), and
- Adequacy in its balance (whether the importance of the purpose served by the impugned provision outweighs the restriction imposed on the freedom)

The proportionality concerns we outline above suggest that this proposed legislation would not pass this test. As noted, aspects of the definition of Immigration and Border Protection Information lack any rational connection to the Bill's stated purpose of protecting national security and the public interest. Moreover, the general guidance for the drafting of secrecy offences in the ALRC's Secrecy Report represents an obvious and compelling alternative to the standard adopted in the Bill which would have a less restrictive effect on the freedom.

5. Suggested resolutions

a. Amendments to the Bill

We consider that the proposed definition of Immigration and Border Protection Information in s 4(1) requires further refinement and consideration. Amendments to the Bill should be drafted in accordance with the guidance provided in the ALRC's Secrecy Report. For the reasons described above, the definition provides neither clarity nor an established link to the stated objectives of the Bill. We consider that a revised definition should comply with the following principles. Secrecy provisions should:

- establish clear and consistent standards and aim to achieve essential public interests;
- only be invoked where there is a 'specific reason for giving certain information special protection'; and
- only impose criminal sanctions where necessary.

(b) Policy guidance

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[24] [2015] HCA 34

A more tightly framed offence provision in and of itself does not address concerns about the lack of clarity about what information may be disclosed, or the potential ongoing chilling effect of the secrecy provisions currently included in the *Australian Border Force Act 2015* (Cth).

As discussed above, questions surrounding the disclosure of information can be quite complex and difficult to navigate. Entrusted persons may need to navigate the interaction between separate statutory frameworks as well as how they relate to their professional obligations. Given the nature of information that may be disclosed to them, entrusted persons may have genuine questions about how the law applies to their particular situation. We consider that a proportionate legislative framework alone does not address this uncertainty, or the potential chilling effect it may have.

In addition to the amendments discussed above, the Department of Immigration and Border Protection should prepare detailed guidance material, protocols and training for employees, contractors and consultants. This material should provide practical guidance and useful examples which highlight and clarify:

- the kinds of information and circumstances of disclosure that are prohibited; **and**
- the circumstances in which disclosure is permitted, with particular reference to, and clarity around when disclosure is permitted in the public interest, and to whom.

We are of the view that the information should be granular and practical. An example of a useful model is the Guide to Social Security Law prepared by the Department of Social Services.[25] It provides guidance to Centrelink decision makers about social security law and policy. It is drafted in plain English, provides practical examples, and direct, easy to understand guidance about the application of the law to common scenarios

Yours sincerely,

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[25] Department of Social Services, *Guide to Social Security Law* <www.guides.dss.gov.au>