

Community and Public Sector Union

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Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

Re: CPSU Submission to the inquiry into the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015

The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to the inquiry into the Australian Border Force Bill 2015 and the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 on behalf of CPSU members. As the key union representing Australian Public Servants in both the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service, our submission draws directly from the knowledge and experience of CPSU members in those agencies.

The CPSU recommends that the Commonwealth Government:

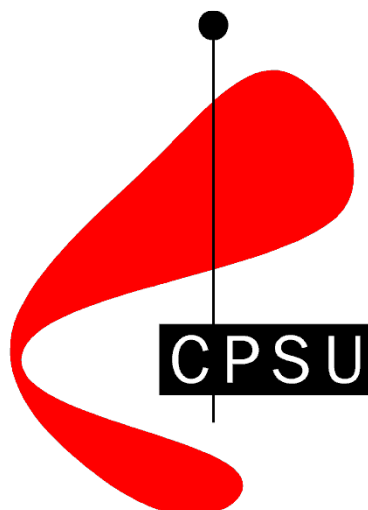
1. Remove section 30 from the ABF Bill
2. Remove section 32 from the ABF Bill
3. Specifically limit drug and alcohol testing to employees working in an operational role in the Australian Border Force and who are in a Use of Force position or involved in the use of plant or machinery.
4. Be more specific about circumstances in which drug and alcohol tests may be used and how the results may be used. Specifically the Bill should exclude prescription medications.
5. Introduce regulations about processes and procedures for drug and alcohol tests that are developed in consultation with employees and the CPSU.
6. Remove subsection 55(5) from the ABF Bill.
7. Be more specific about how and when essential qualifications are to be introduced.

8. Provide clarity that the essential qualification components listed in the Bill will only be introduced in relation to positions and duties where there is a clear and demonstrable need for them.
9. Require the Department to consult closely with employees and the CPSU regarding Departmental policies that deal with the setting and implementation of essential qualifications.

The CPSU thanks the Committee for the opportunity to comment on these issues. Should you wish to discuss this submission any further the contact person is Jonathan Warren,

Yours sincerely

Rupert Evans
CPSU Deputy National President



CPSU (PSU Group) Submission

Australian Border Force Bill 2015

And

Customs and Other Legislation
Amendment (Australian Border Force) Bill
2015

Senate Standing Committee on Legal and Constitutional
Affairs

April 2015

Introduction

The CPSU is the principal union representing workers in the Australian Customs and Border Protection Service (ACBPS) and the Department of Immigration and Border Protection (Immigration), who will become future workers of the Australian Border Force (ABF) and the Department of Immigration and Border Protection post 1 July 2015 (the Department).

The CPSU takes issues of corruption and criminal conduct very seriously and supports efforts to prevent corruption in Commonwealth law enforcement agencies. Corruption and abuse of power not only threatens Australia's national security but it compromises the work and safety of CPSU members who take pride in the work that they do. The CPSU has been, and will continue to, work with Commonwealth agencies to implement strategies which uphold the integrity of these agencies and try to ensure that they are free of corruption and criminal conduct.

The CPSU is concerned about the substantial powers that the *Australian Border Force Bill 2015* (the ABF Bill) and the *Customs and Other Legislation Amendment (Australian Border Force) Bill 2015* (the Customs Bill) give to the Secretary and the Australian Border Force Commissioner. These have the potential to undermine employees' right to privacy, remove their rights to procedural fairness and undermine the level of trust in the workplace.

There is little evidence that many of the measures proposed by the ABF Bill or the Customs Bill would prevent corruption and criminal conduct. Further, the government has provided no information that other, less obtrusive measures that would achieve the same goal have been considered. Finally, the CPSU is concerned that, as proposed, the changes do not provide sufficient safeguards to ensure that these powers are not misused.

The CPSU understands that aspects of both of these Bills are already in application in the ACBPS. Both the ABF Bill and the Customs Bill seek to expand these powers to apply to the 9,000 public servants currently working in Immigration. The CPSU is concerned that this blanket approach is unnecessary, costly and being taken with little to no evidence that there are issues (or indeed the potential) of corruption and criminal behaviour within Immigration.

The concerns raised in this submission, while touching on all aspects of the Inquiry, primarily relate to aspects of the ABF Bill. There are five main areas we seek to address:

- Resignation from the Department
- Termination of employment in the Department for serious misconduct
- Alcohol and Drug Tests
- The setting of essential qualifications
- Mandatory reporting

Resignation from the Department

The ABF bill at section 30 proposes to introduce a new power whereby the Secretary may delay the resignation of an APS employee where the Secretary reasonably believes that the employee has engaged in serious misconduct and is considering a termination of employment, or, the employee is being investigated for serious misconduct.

A similar power already exists and is available to all APS agency heads under the *Australian Public Service Act 1999*, the *Public Service Regulations 1999* and the *Australian Public Service Commissioner's Directions 2013*. These instruments provide that where an APS employee resigns while being investigated, the investigation may continue after they have left and a finding against them may still be made. This provision has been in place since July 2014 and there is evidence that it has been used in the ACBPS.

The only material difference between the already available powers under the APS Act and the proposed powers under the ABF Bill is that currently, no sanction can be applied to the employee as they have already ceased employment.

The effect of the current powers available under the *Australian Public Service Act 1999* is that if an employee is proven to have engaged in serious conduct, they will be extremely unlikely to be employed by the Commonwealth in the future. This is because any potential Commonwealth employer will have access to the finding against the employee.

Under existing powers an employee is also not able to seek movement to another APS agency while there is an ongoing code of conduct investigation occurring unless the Agency Head approves the move.

On the face of the evidence provided by the Commonwealth to date to support the introduction of this power there appears to be no utility whatsoever to its introduction. It merely serves to duplicate existing powers available under the *Australian Public Service Act 1999*. On this basis the CPSU believes section 30 of the ABF Bill should be removed.

Recommendation:

Remove section 30 from the ABF Bill.

Termination of employment for serious misconduct

The ABF Bill proposes to introduce a set of powers which would allow the Secretary to terminate the employment of an employee and issue a declaration that the Secretary believes that the employee engaged in serious misconduct. When the Secretary makes such a declaration, the employee will not have access to the unfair dismissal protections or the termination of employment entitlements under the *Fair Work Act 2009*.

The Secretary may issue a declaration if the Secretary believes on reasonable grounds that the staff member's conduct or behaviour:

- amounts to *serious misconduct* by the APS employee; and

- is having, or is likely to have, a damaging effect on:
 - the professional self-respect or morale of some or all of the APS employees in the Department; or
 - the reputation of the Department with the public, or any section of the public, or with an Australian or overseas government, or with a person or body (however described) to whom the Secretary may authorise disclosure of information.

The ABF Bill defines serious misconduct as:

- corruption, a serious abuse of power, or a serious dereliction of duty, by the worker; or
- any other seriously reprehensible act or behaviour by the worker, whether or not acting, or purporting to act, in the course of his or her duties as an Immigration and Border Protection worker.

There is no evidence that existing termination provisions are inadequate for dealing with corruption or that removing unfair dismissal rights would assist in removing potentially corrupt or criminal employees from the workplace. Rather, the proposed changes would seriously curtail employees' rights to natural justice, without being necessary or effective in combating corruption within the Department.

The CPSU does not believe that these powers should be in place with respect to the ACBPS currently and we cannot see any need or purpose to them being applied in the ABF and the broader Department in the future.

Procedural Fairness

Basic principles of procedural fairness dictate that a person should have the right to be told what they are accused of, given a chance to respond to the allegations and have their response genuinely considered by the decision maker. The ILO Termination of Employment Convention 1982, which Australia has ratified, states:

Article 7 - The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity¹.

However, the only procedural requirement in the ABF Bill is that the Secretary provides the employee with a copy of the declaration within 24 hours of the decision to dismiss the employee. There is no right of consultation or reply, or a requirement for reasons to be given.

The CPSU understands that in cases where corruption is suspected there may be an imperative to remove an employee from the workplace as soon as possible. However, there are currently means to achieve this which preserve an employee's rights to procedural fairness and are in line with the rights provided to all Australians under the *Fair Work Act 2009*. This could include a provision which would allow the Secretary to stand an employee down with or without pay if the Secretary suspects an employee of serious misconduct. Such avenues are currently available to the Department under

¹ International Labour Organisation, *C158 - Termination of Employment Convention 1982*, Article 7

the *Public Service Act*, the current evidence from the ACBPS suggests that current powers are adequate in dealing with corruption issues.

Right to review of the decision

The ABF Bill does not provide any right to internal or independent external review of the decision and it specifically exempts employees dismissed under s32 from access to unfair dismissal remedies under the *Fair Work Act*. Again, this is in breach of Australia's international law obligations. The Termination of Employment Convention states:

Article 8 – [unless authorised by a competent body] A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator².

Without a right of review of the decision, there are no checks and balances on this power to ensure that it is not abused, or used for purposes outside those intended by the ABF Bill.

The ABF Bill states that the general protections provisions in Part 3-1 of the *Fair Work Act* still apply in this situation. However, there is currently an ambiguity as to whether that would offer any protection in a circumstance such as this. In order to establish a general protections claim, an employee must show that an employer has taken adverse action. Section 342(3) of the *Fair Work Act* states that adverse action does not include action that is authorised by or under a law of the Commonwealth. There needs to be some clarification that the termination of employment of an employee under this part of the *Customs Act* does fall into this exemption in section 342(3) of the *Fair Work Act*.

However, even if the general protections were to apply, they would only offer employees protection if there was an ulterior motive for the dismissal such as a discriminatory reason or because the employee has a workplace right. They would not protect an employee who is merely wrongly accused. In addition, seeking relief under the general protections can be a costly and lengthy process. A faster and more accessible review mechanism, such as those employed by state law enforcement jurisdictions would be more appropriate.

Further, the CPSU queries the imperative behind the s32 proposal as there has been no suggestion that exempting Departmental employees from unfair dismissal provisions would achieve a reduction in the incidence of corruption or assist in its investigation or enforcement.

How do s32-type provisions currently operate?

The CPSU notes that provisions equivalent to those proposed by section 32 already exist in the AFP, ACC and the ACBPS. The concerns the CPSU raises in relation to the proposed termination powers regarding ABF and Immigration employees apply similarly for AFP and ACC employees.

² Ibid, Article 8

Corruption is an equally serious concern in relation to State and Territory police forces. Accordingly, the CPSU has considered the terms of legislation regulating police in State and Territory jurisdictions for guidance as to an appropriate model.

The legislation in all other jurisdictions provides a mechanism for a police officer to apply to seek a review of a decision to terminate their employment. The legislation in New South Wales, Western Australia, Northern Territory and Tasmania give police officers access to an unfair dismissal jurisdiction, Victorian legislation gives access to internal review, and the Queensland and South Australia Acts give access to an external Tribunal review. If s30 is enacted, the Commonwealth will be the only jurisdiction to remove all appeal rights for loss of confidence dismissal. For further detail about these state jurisdictions see [Attachment A](#).

Given the strong powers provided to the Secretary by this provision, and the serious consequences for employees, there must be scope for review by a party independent of the Department.

Broad scope of serious misconduct

The definition of serious misconduct proposed in the ABF Bill is too broad and ill defined. It goes beyond corrupt and criminal behaviour to extend to ‘any other seriously reprehensible act or behaviour’ by a worker.

The ABF Bill as currently drafted allows the Secretary to terminate the employment of an employee without following principles of procedural fairness or natural justice. The circumstances in which procedural fairness and natural justice can be denied must be limited to those that are absolutely necessary to prevent corruption or criminal conduct.

It is of even greater concern that these fundamental rights may be removed if the Secretary determines the employee engaged in ‘any other serious or reprehensible act or behaviour’ or their conduct had a damaging effect on “some or all of the APS employees of the Department” or its reputation with “any section of the public”.

The CPSU maintains that there is no necessity or need for the introduction of these draconian powers in the Department and/or the ABF. The existing powers provided by the Australian Public Service Act 1999 are perfectly capable of producing the Commonwealth’s desired outcome if they are used effectively. Further, existing provisions do not limit an individual’s right to procedural fairness or rights under Australian law.

Ultimately, the Commonwealth has not in any way demonstrated, with evidence, the need for the introduction of these powers.

Recommendations:

- Remove section 32 from the ABF Bill.

Drug and alcohol testing

The Bill proposes to extend, through section 34, the drug and alcohol testing regime currently in operation in the ACBPS to the entirety of the Department of Immigration and Border Protection. These provisions will permit an authorised person to require an employee of the Department to undergo alcohol or drug screening tests in certain circumstances including when it is suspected that the employee is under the influence of alcohol, drugs, or where a person is killed or seriously injured.

Proposed section 35 is more general. It would allow an authorised person to provide a written direction for an employee to undergo a drug or alcohol test at any time for any, or no, reason in accordance with the rules.

Section 39 provides for rules to be made which would establish requirements for who may administer the tests, how the tests are administered, how results are collected and analysed and the confidentiality of the results. At this time, no proposed rules have been made available to the CPSU.

In principle, the CPSU does not object to alcohol and drug testing in certain situations. However, the CPSU is concerned that circumstances in which the ABF Bill permits alcohol and drug testing go beyond the stated purposes of the ABF Bill and the behaviour that the ABF Bill is trying to combat:

- The Minister's second reading speech in support of the ABF Bill states that the purpose of these amendments is to 'ensure a safe working environment and increase resistance to corruption'³. However, the proposed subsection 35(1) would permit any employee to be required to undergo a drug or alcohol test at any time regardless of whether or not they were suspected of corruption.
- The CPSU is concerned that wider implementation of drug and alcohol testing could undermine the level of trust between the Department and its employees, thereby potentially risking the exact behaviour the ABF Bill purports to protect against. There is a risk that employees could be unfairly targeted for tests and individuals or groups of employees could be harassed by repeated requests for drug and alcohol tests.
- The CPSU is not convinced that the benefit of alcohol and drug testing employees in administrative roles would justify the cost. Indeed, the imposition of a potentially significant cost is questionable at a time when agencies are under significant budgetary pressure.
- Furthermore, the ABF Bill does not place limits on how the results from the tests may be used and whether results can be used in non-corruption related disciplinary proceedings.
- This is of particular concern given that the definition of prohibited drugs is broad enough to include prescription medication. The Bill defines a prohibited drug as a narcotic as defined in the *Customs Act 1901* ('any border control substance or plant'⁴) or any other substance as defined in the regulations. Although Customs have indicated that this broad definition is only intended to capture those employees who abuse prescription drugs, serious incursions into an employee's privacy may be required to determine whether an employee is abusing a

³ *Australian Border Force Bill 2015, Second Reading Speech* p 4

⁴ *Customs Act 1901*, s 4

prescription drug or not. This would include accessing confidential medical records and asking employees to justify their use of certain medications.

Given all of the above, it is important that the legislation is as specific as possible in setting out the range of situations in which alcohol and drug tests are permitted and how the results may be used. Customs must thoroughly consult with its employees and the CPSU in developing the regulations and implementation of this scheme.

Recommendations:

- The ABF Bill should specifically limit drug and alcohol testing to employees working in an operational role in the Australian Border Force and who are in a Use of Force position or involved in the use of plant or machinery.
- The ABF Bill should be more specific about circumstances in which drug and alcohol tests may be used and how the results may be used. Specifically the Bill should exclude prescription medications.
- Regulations about processes and procedures for drug and alcohol tests are to be developed in consultation with employees and the CPSU.

Reporting of Misconduct

The ABF Bill at subsection 55(5) proposes to confer powers which would enable the Secretary of the Department to issue orders in relation to the reporting of serious misconduct or criminal activity by Immigration and Border Protection workers where it affects, or is likely to affect, the operations, responsibilities or reputation of the Department.

The Explanatory Memorandum to the Bill explains that this provision gives the Secretary the power to compel a worker to give information or answer questions in relation to a matter. The Secretary would also be able to create ongoing obligations for employees to report on the conduct of others as it arises. Proposed subsection 55(10) states that self-incrimination does not excuse a staff member from giving information, thereby removing the right for an individual not to self incriminate.

While subsection 55(11) states that any information given is not admissible in any proceedings, this appears to be confused or watered down by subsection 55(10) which implies the possibility of a penalty and section 40 which leaves open the possibility that there are circumstances in which self incriminating information could be used against an employee.

Proposed subsection 55(7) provides that an employee of the Department must comply with an order to give information. Therefore an employee could undergo disciplinary action in the form of a code of conduct breach for not complying.

The introduction of this requirement signifies a distinct lack of trust by the Commonwealth in its own employees who have, by gaining employment and securing clearances, already demonstrated their level of integrity and trustworthiness. This proposal is both demeaning and offensive to these employees.

An argument has been made by the Department in discussions with the CPSU that these powers are necessary to get around cultural Australian behaviours such as “not dobbing in your mate”. The CPSU rejects this simplistic view, the notion that employees of the Department would not already report suspicions of serious criminal activity such as drug importation is ludicrous.

The deployment of these powers will produce a work environment that is lacking in trust; a poor workplace culture that is likely to drive behaviours that are not conducive to uncovering the very behaviour that this legislation aims to prevent. Efforts to promote teamwork and bonds necessary between workers performing difficult and dangerous duties and their management will be undermined by this requirement. The introduction of these powers will only serve to make potentially criminal or corrupt elements within the Department more secretive and harder to detect by anyone.

Given the lack of clarity around the definition of serious misconduct and the potentially serious ramifications for an employee who has not actually been involved in any wrong doing but for any number of reasons has not reported something, it is the CPSU view that this subsection should be removed.

Recommendation:

- Subsection 55(5) should be removed from the ABF Bill.

Essential Qualifications

The ABF Bill at Section 55(2) and 55(3) allows the Secretary to set and direct that employees must hold essential qualifications related to the duties they perform. Section 55(3) goes on to include that the 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;
- (d) security clearances.

The CPSU does not have an in-principle objection to the introduction of essential qualifications where there is a clearly demonstrated necessity for their introduction. Unfortunately the Commonwealth has not made any attempt to demonstrate the need for the introduction on essential qualifications in the ABF and/or the broader Department.

The work of employees in the both the ABF and the Department is not going to change dramatically post 1 July 2015. ABF officers will continue to do the work of current ACBPS officers and Immigration officers will continue to conduct the work currently done by that Department. If these essential qualifications are not currently required it is hard to see or imagine why they will be needed in the future.

The ABF Bill does not make any limitation on how, where and why essential qualifications including the above components may be set. It is entirely possible that an employee involved in human resources, the majority of whose work is desk bound could be required to hold a physical qualification or face sanctions. The ABF Bill does not preclude this from happening.

As the ABF Bill notes, if an employee is unable to gain or maintain an essential qualification related to their duties, they may have their classification reduced or their employment terminated.

It is important to note that there are already up to 15, 000 employees combined in ACBPS and Immigration who are already successfully conducting their important work in securing our borders and managing our migration system. The notion that they will require new qualifications to continue doing their work post 1 July 2015 is both offensive and unreasonable.

Recommendation:

- The ABF Bill should be more specific about how and when essential qualifications are to be introduced.
- The ABF Bill should provide clarity that the essential qualification components listed in the Bill will only be introduced in relation to positions and duties where there is a clear and demonstrable need for them.
- The Department should consult closely with employees and the CPSU regarding Departmental policies that deal with the setting and implementation of essential qualifications.

ATTACHMENT A

LOSS OF CONFIDENCE DISMISSAL - STATE JURISDICTION APPEAL MECHANISMS

NEW SOUTH WALES

- *Police Act 1990* (NSW), s 191(d)
- Requirement for procedural fairness to be met before removal for loss of confidence
- An offer can apply for review by the NSWIRC on the basis that it is “harsh, unjust, or unreasonable”

VICTORIA

- *Police Regulation Act 1958* (VIC), s 68
- Sets out a process to be followed. Reasons must be given; employee has a right of reply.
- Appeal board can hear appeals, has the power to reinstate or provide compensation.

QUEENSLAND

- *Police Service Administration Act 1990* (QLD), s 7
- Decision reviewable by the Commissioner of Police Service Reviews (appeal board)
- Merit review also available via the Queensland Civil and Administrative Tribunal

WESTERN AUSTRALIA

- *Police Act 1892* (WA), s 33
- Appeal available to the WAIRC on the basis that the decision was “harsh, oppressive or unfair”

NORTHERN TERRITORY

- *Police Administration Act*, s 78
- An investigation must be conducted, subject to a hearing
- Appeal to Disciplinary Appeals Board

SOUTH AUSTRALIA

- *Police Act 1998* (SA)
- Finding can only be made by the Police Disciplinary Tribunal, after a hearing
- Appeal to the administrative division of the District Court

TASMANIA

- *Police Service Act 2004* (TAS)
- Office notified, asked to respond
- Appeal available via the Police Review Board