

Australian Border Force Amendment (Protected Information) Bill 2017

Submission to Senate Legal and Constitutional
Affairs Committee

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.



Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to comment on the Australian Border Force Amendment (Protect Information) Bill 2017 (Cth) (the Bill), which seeks to amend the *Australian Border Force Act 2015* (Cth) (ABF Act) and other relevant legislation.
2. We welcome the intention of the Bill to reduce secrecy in Border Force operations generally, while maintaining our position that the remaining secrecy provisions are unnecessary.

Comments on provisions

3. Under the Bill, the proposed term 'Immigration and Border Protection information' (IBP information) would replace 'protected information'. The definition of IBP information is much narrower than protected information under the existing provisions, meaning that the restrictions imposed under the ABF Act would be reduced by this amendment. IBP information is proposed to be defined as:

'information of any of the following kinds that was obtained by a person in the person's capacity as an entrusted person:

(a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;

(b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;



(c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;

(d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;

(e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;

(f) information of a kind prescribed in an instrument under subsection (7).¹

4. The existing legislation makes it an offence, punishable by up to two years in prison, to make a record or disclose protected information: s42(1). The Bill would retain this penalty in relation to the more narrowly defined IBP information.
5. The ALA has been advocating for the removal of the secrecy provisions found in Part 6 of the ABF Act consistently since they were introduced.² We believe that they fundamentally undermine the constitutionally protected right to freedom of political communication, by preventing workers from speaking about what they see at work. They also undermine Australia's international obligations, including in relation to freedom of expression.³ Part 6 also undermines government

² See, for example, Australian Lawyers Alliance, *Untold Damage: workplace health and safety in immigration detention* (2016), <https://www.lawyersalliance.com.au/ourwork/untold-damage>, recommendation 7; ALA submissions to parliamentary inquiries in relation to public interest journalism (2017) <https://www.lawyersalliance.com.au/documents/item/895>; freedom of speech (2016) <https://www.lawyersalliance.com.au/documents/item/748>; and conditions in offshore detention (2016) <https://www.lawyersalliance.com.au/documents/item/710>.

³ *International Covenant on Civil and Political Rights* (1966), article 19. Note that other rights might be infringed depending on the type of speech that were being limited, such as the right to the highest attainable standard of physical and mental health (*International Covenant on Economic, Social and Cultural Rights* (1966), article 12). It could also conceal other infringements of Australia's international obligations, including those under the *Refugee Convention* (1951) to provide refugees



accountability and gives rise to a serious risk to the health and safety of some of the most vulnerable people under Australia's jurisdiction: asylum seekers and refugees detained both offshore, on Manus Island and Nauru, and onshore.⁴

6. As such, any efforts to reduce secrecy under the ABF Act are to be applauded.
7. The ALA remains concerned, however, that any secrecy be mandated beyond that which exists generally in relation to the proposed definition of IBP information. The amendment would not remedy infringements of international law that are currently posed by Part 6, although they are likely to reduce the incidence of such infringements.
8. Any worker for a government department or agency is likely to come across sensitive information, including of a national security or commercial nature. We do not believe the case has ever been made that additional secrecy requirements should be imposed on immigration and border protection workers, over and above those imposed on any other government workers. It is thus left to speculation as to why workers in this Department are subjected to a risk of imprisonment for talking about their work. Such speculation could include the wish on the part of the Department to be able to operate with minimal public scrutiny. If this were the motivation, it would be completely unacceptable in a democracy such as Australia.

with asylum and not to return people to places where they risk persecution, torture, or other forms of ill-treatment (in that regard, see also, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)).

⁴ We acknowledge that medical staff were exempted from these provisions in the latter half of 2016: Department of Immigration and Border Protection, Determination of Immigration and Border Protection Workers, Amendment No. 1, 30 September 2016, <https://www.border.gov.au/AccessandAccountability/Documents/determination-workers-c.pdf>. However we believe that this exemption was not sufficient to ensure that health and safety was protected, given the fact that medical staff rely on working with other professions. Further, non-medical workers could come across health and safety concerns that did not qualify for the exemption provided under the existing ABF Act in relation to health and safety (s48) and thus could be prevented from reporting such concerns as they felt they needed.



9. The ALA believes that the default position for all government actions should be openness. Governments must be accountable for their actions, and for their expenditure of public money. Any secrecy around government activities must be strictly limited to that which is genuinely necessary for national security or public health and safety. Such a balance can be achieved only where secrecy provisions depend upon an actual or potential risk to national security or public health and safety before penalties can be invoked.

Recommendation

10. The ALA supports the passage of this Bill at a minimum. Ultimately, we recommend that all secrecy provisions in the ABF Act be repealed.