

28 August 2017

Committee Secretary
Senate Legal and Constitutional Affairs Committee

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Dear Committee Secretary

Australian Border Force Amendment (Protected Information) Bill 2017

The Refugee Advice & Casework Service (**RACS**) is a specialist refugee legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the Australian Border Force Amendment (Protected Information) Bill 2017 (the **Bill**), which would amend the *Australian Border Force Act 2015* (Cth) (the **ABF Act**).

RACS supports the proposed amendments to the secrecy provisions in the ABF Act. While it may be preferable to abolish the offence in section 42 of the ABF Act, the proposed amendments would bring a greater degree of transparency to the immigration detention system. The secrecy provisions in their current form extend far beyond any justification based on protecting confidential personal information or legitimate government interests.¹ Although the Bill does not dispel all concerns in relation to the criminalisation of the disclosure of information in the public interest, the amendments would provide a measure of reassurance to employees, consultants and contractors working within the detention centre environment, and reduce the potential for human rights abuses and other breaches of law.

Under the existing section 42 of the ABF Act, and subject to limited exceptions, a person who discloses information obtained in the person's capacity as an entrusted person may be liable to two years' imprisonment. By removing the catch-all definition of 'protected information' from the secrecy provisions, and introducing a narrower definition of 'Immigration and Border Protection information', the Bill recognises that not all information obtained within the detention centre environment requires protection. The Bill is therefore a move toward more open and accountable government. The new definition limits the secrecy provisions to only cover information the disclosure of which would or could have certain effects specified in paragraphs (a) to (f) of the new definition.

Refugees and asylum seekers in immigration detention include some of the most vulnerable people in Australia. In many cases they are survivors of torture or trauma and must navigate the legal system in a language other than their own. Further, prolonged detention has been found to contribute substantially to the risk of ongoing depression, post-

¹ Nicola Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions – Borderline Unconstitutional' [2017] *Sydney Law Review* 12.

traumatic stress disorder and mental ill-health in refugees. These vulnerabilities increase the risk of detainees falling victim to human rights abuses or suffering in a closed environment, away from the public eye. In addition, people in detention face legal and practical obstacles to raising complaints relating to their detention. In this context, potential whistle-blowers (including teachers, security guards, doctors, lawyers, cooks, cleaners and other workers) can play an important role in reducing the potential for abuses of power.

It is unfortunate that the secrecy provisions of the ABF Act were passed in their existing form despite significant public concern, and that the present amendments appear to be motivated by the likely success of a challenge to their constitutional validity in the High Court. The government previously stated that the existing secrecy provisions would not prevent the reporting of genuine concerns about detention centre conditions,² but the blanket definition of 'protected information' is unambiguous. Even if unintended, it has propagated fear and uncertainty among people who work at immigration detention centres,³ and while an exemption was made for doctors last year, the provisions have had the practical impact of stifling the reporting of human rights abuses and other breaches of law. By substituting 'protected information' with 'Immigration and Border Protection Information', the Bill decriminalises the disclosure of a range of information that may be crucial for avoiding harm.

RACS also welcomes the retrospective application of the Bill, which ensures that those who have made disclosures in the past cannot be prosecuted under the existing secrecy provisions.

It should be noted, however, that even with the passage of the Bill, the ABF Act will continue to have a chilling effect on disclosures that may in fact be in the public interest. Uncertainty will surround elements of the new definition, such as whether a particular disclosure "would or could reasonably be expected to cause competitive detriment" or "prejudice ... the international relations of Australia." As the relevant provisions of the ABF Act apply to people who have worked in Australia's regional processing centres in other countries (the site of some of the most egregious examples of abuse in detention), the latter provision may continue to prevent disclosures which, in light of their gravity, are in the public interest.

The proposed amendments represent be a small step towards repairing public confidence, locally and internationally, in the Australian government's treatment of asylum seekers. Amendments that operate to alleviate constraints on the communication of information that shines light on abuses or other breaches of law should be supported.

RACS supports the Bill and recommends that it be passed.

Please do not hesitate to contact us for further information or clarification.

Sincerely

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² Department of Immigration and Border Protection, 'Secrecy Provisions of the *Australian Border Force Act*' (Media Release, 1 July 2015) <<http://www.minister.border.gov.au/peterdutton/2015/Pages/Inaccurate-media-statements-on-abf-act.aspx>>.

³ Young Liberty for Law Reform, 'Operation secret borders: what we don't know, can hurt us', 27 April 2016, <<https://libertyvictoria.org.au/sites/default/files/LV-YLLR-Whistleblowers-ReportFINAL-COPY-April16.pdf>>.

