

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

Submission in response to the ALRC’s Interim Report 127

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**Introduction**

This submission does not address each section of the Australian Law Reform Commission’s Interim Report 127 (“the Interim Report”), but expresses concerns regarding one Commonwealth Act in particular – the *Australian Border Force Act 2015* (Cth) (“the Act”). We consider that the strict secrecy provisions in the Act encroach on traditional rights and freedoms, and in particular, the freedom of speech.

**Freedom of speech**

**International Law**

Freedom of expression is protected under international law. Under Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), “[e]veryone shall have the right to freedom of expression” including “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers”.[[2]](#footnote-2) However, this right may be subject to certain restrictions – those that are provided by law and are necessary for the “protection of national security or of public order … public health or morals.”[[3]](#footnote-3)

Australia is a party to the ICCPR, but the ICCPR is not directly incorporated into Australian law.[[4]](#footnote-4) Although international instruments cannot be invoked to “override clear and valid provisions of Australian national law”,[[5]](#footnote-5) Australia still has a commitment to upholding freedom of expression, and it is well established that where statutes are ambiguous the courts should favour a construction which accords with Australia’s international obligations.[[6]](#footnote-6)

We submit that the Act goes beyond any exceptions to Article 19 of the ICCPR and thus unjustifiably limits free speech, in violation of international law and the traditional right of freedom of expression in Australia. We also consider that the Act breaches other international rights and freedoms such as those under the *Convention on the Rights of the Child*.

***Australian Border Force Act 2015* (Cth)**

The Act came into force on 1 July 2015, and contains strict secrecy provisions. As outlined in the Interim Report, s.42 of the Act makes it an offence for an “entrusted person” to make a record of, or disclose, any “protected information”, punishable by up to 2 years’ imprisonment.[[7]](#footnote-7) An entrusted person is defined to mean the Secretary of the Department, the Australian Border Force Commissioner, or an Immigration and Border Protection worker.[[8]](#footnote-8) An Immigration and Border Protection worker (“IBP worker”) is in turn defined broadly to include employees of the Department, specified contractors and consultants of the Department, and public servants who make their services available to the Department.[[9]](#footnote-9) “Protected information” is defined to mean information obtained by an entrusted person in their capacity as an entrusted person, and includes information obtained in the course of performing duties, functions or exercising powers under a law of the Commonwealth in any capacity.[[10]](#footnote-10)

We submit that Part 6 of the Act unjustifiably encroaches on free speech, violating both international law and the Constitutionally implied freedom of political communication. This submission will focus primarily on the effect of the Act on disclosure of information relating to immigration detention centres.

**Breach of international law – ICCPR**

It is clear that by imposing criminal sanctions on entrusted persons who record or disclose certain information obtained in their capacity as entrusted persons, the Act interferes with the freedom to seek, receive and impart information as protected by the ICCPR. However as explained in the Interim Report, this freedom is not absolute, and must be balanced against legitimate objectives. The ICCPR permits certain restrictions on freedom of speech, including any restrictions that are necessary and proportionate for respect of the rights or reputations of others, or for the protection of national security or public order.[[11]](#footnote-11) Thus, the question is whether the interference with freedom of speech established by the Act is justified as being necessary and proportionate for achieving a legitimate objective.

**Necessary and proportionate?**

It is arguable that the secrecy provisions of the Act are not necessary for the protection of national security or public order, or for protecting rights and reputations. The Act broadly prohibits the disclosure and recording of *any* information an employee of the Department or other entrusted person obtains during the course of performing duties or functions under *any* Commonwealth law in *any* capacity, unless the disclosure falls within one of the limited exceptions. This means that the Act catches not just a wide range of information obtained by IBP workers during the course of their work, but *any* information at all.

It is difficult to see how all “protected information” as defined by the Act – that is, including any information at all, obtained by an IBP worker in the course of his or her work – has the potential to damage national security or public order, and thus why such a broad restriction is “necessary”. The United Nations Economic and Social Council (ECOSOC) has stated that national security may be invoked to justify limitations to ICCPR rights only when “taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force”.[[12]](#footnote-12) It should be noted that the criterion is damage to national security, not to the national interest – despite a tendency in political discourse to conflate the two.

As noted in the Interim Report, “public order” in the ICCPR has been defined as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”, and is not likely to be engaged where the purpose of the secrecy provision is “simply to ensure the efficient conduct of government business or to enforce general duties of loyalty and fidelity on employees”.[[13]](#footnote-13) Likewise, as suggested in the Interim Report, ECOSOC insists that a limitation to human rights grounded on protection of the “reputation” of others should not be used to “protect the state and its officials from public opinion or criticism”.[[14]](#footnote-14)

Although the Explanatory Memorandum to the *Australian Border Force Bill 2015* (Cth) suggested the provisions “are necessary to provide assurances … that information provided to the Department will be appropriately protected”,[[15]](#footnote-15) the blanket restriction on the disclosure of information is not linked to any specified “harm” to an identified essential public interest.[[16]](#footnote-16) Arguably, disclosures relating to circumstances in immigration detention centres have nothing to do with national security, and a blanket ban such as in Part 6 of the Act is not necessary other than to protect illegitimate interests such as shielding the Australian government from criticism regarding its treatment of asylum-seekers. As stated by ECOSOC, a State responsible for systematic violation of human rights (as is arguably occurring in Australian immigration detention centres) “shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation”.[[17]](#footnote-17)

**Criminal sanctions without a public interest disclosure exception**

Even if it is accepted that the Act is protecting legitimate national security or public order interests, the imposition of criminal sanctions (of to up to two years’ imprisonment) is arguably unnecessary and disproportionate to protecting any potential legitimate objective. To avoid attracting criminal sanction for an unauthorised disclosure under the Act, an entrusted person must point to one of the limited exceptions in s.42. These exceptions include where the disclosure is authorised or required by law (s.42(2)(c)), made in the course of the entrusted person’s employment (s.42(2)(b)), where the information has already been made available to the public (s.49) or where the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual and the purpose of the disclosure is to prevent or lessen that threat (s.48). There is no public interest disclosure exception.

Although medical staff may be protected under the s.48 exception, the onus of proof is on the entrusted person to show not only that the threat to the life or health of an individual is serious, but also that disclosure is necessaryto prevent or lessen that serious threat. These provisions have attracted substantial criticism from medical staff and legal advocates who fear that these onerous secrecy provisions, along with broader powers of dismissal, “may discourage legitimate whistle-blowers from speaking out publicly”.[[18]](#footnote-18)

**Uncertain protection under the *Public Interest Disclosure Act 2013***

Although the “authorised by law” exception in s.42(2)(c) may allow whistleblowers to make disclosures under the *Public Interest Disclosure Act 2013* (Cth) (“PIDA”), it is debatable to what extent the PIDAwill actually assist them. Under s.26 of the PIDA, the IBP worker must first report their concerns internally, and can only then disclose them to outside parties if they believe on reasonable grounds that the investigation into or response to their concerns was inadequate or a required investigation was delayed.[[19]](#footnote-19) Furthermore, the disclosure must not be contrary to the “public interest”,[[20]](#footnote-20) a term not directly defined in the PIDA, and must not disclose more information than is reasonably necessary to identify instances of disclosable conduct.[[21]](#footnote-21) Even for emergency disclosures, the discloser must show reasonable grounds for believing there is a “substantial and imminent danger to health or safety”, show “exceptional circumstances” justifying failure to make an internal disclosure, and must still be confident the disclosure is no greater than is necessary.[[22]](#footnote-22) Such limitations may act as strong disincentives for IBP workers to make disclosures relating to breaches of human rights in detention centres, for fear of conviction and imprisonment if unprotected by the PIDA.

There are other qualifications that may act as barriers to whistleblowers disclosing information regarding detention centres. Under the PIDA, disclosers must not make public any “sensitive law enforcement information”, and this is defined to include information that is “reasonably likely to prejudice Australia’s law enforcement interests” including Australia’s interest in “avoiding disruption to national and international efforts relating to law enforcement”.[[23]](#footnote-23) With the current focus on international cooperation in preventing people-smuggling, the government could argue that these provisions apply to preclude the disclosure of any information relating to detention conditions.

Additionally, under the PIDA s.26(2A), a response to a disclosure investigation is not to be regarded as inadequate to the extent that the response involves action that has been, is being or is to be taken by a Minister. Thus, however effective or ineffective such Ministerial action is likely to be in responding to the concerns that were disclosed internally, external disclosure is prohibited.[[24]](#footnote-24)

Given the limited scope of the PIDA in protecting whistleblowers, it could be argued that there are no sufficient public interest exceptions that would justify a blanket restriction on free speech under the Act. Even if disclosure may not inevitably result in imprisonment, whistleblowers may refrain from making disclosures for fear of not meeting the relevant tests for an exception or protection under the PIDA.

**Unjustifiable breach of ICCPR freedom of speech**

Given these concerns, we submit that Part 6 of the Australian Border Force Act is not justified by any exceptions to Article 19(2) of the ICCPR, leaving Australia in breach of its international obligation to protect freedom of expression. As shown, the “protected information” is not linked to any “harm” to an identified essential public interest, and the absence of a public interest exception leaves whistleblowers vulnerable to the imposition of criminal sanctions for speaking out against conditions in immigration detention centres. As stated in the Preamble to the Universal Declaration of Human Rights, “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”. If Australia is to ensure its legislation remains in line with international standards, this Act should be amended to define the scope of unlawful disclosures and ensure that adequate protective measures are afforded to those who seek to shine a light on potential instances of abuse or human rights violations in immigration detention centres.

**Convention on the Rights of the Child**

The potential degradation of the freedom of expression enshrined in the ICCPR resulting from the operation of the Act has further implications for Australia’s obligations under the *Convention on the Rights of the Child*[[25]](#footnote-25) (CROC). As outlined above, without domestic incorporation, international obligations cannot be a direct source of legal obligation under Australian law.[[26]](#footnote-26) However, the ratification of treaties may signify a “positive statement by the executive government of the country” that it will “act in accordance with the Convention” and may create a “legitimate expectation that administrative-decision makers will act in conformity with the convention.”[[27]](#footnote-27)

CROC establishes that “[i]n all actions concerning children … the best interests of the child shall be a primary consideration.”[[28]](#footnote-28) Although CROC imposes obligations on State parties to ensure that the detention of children is utilised “only as a measure of last resort and for the shortest appropriate period of time,”[[29]](#footnote-29) the potentially indefinite detention of asylum-seekers, many of whom are children, is currently part of Australian government policy. As currently drafted, the Act prohibits the disclosure by an IBP worker of any information at all concerning children in detention. This does not exactly encourage Australian compliance with its obligations under CROC.

The need to take into account broader international obligations enshrining rights and freedoms which are not considered traditional rights and freedoms according to the Interim Report was noted by the Castan Centre for Human Rights Law in its submission to the ALRC.[[30]](#footnote-30) We agree that the scope of the Commission’s inquiry should be expanded to take account of relevant human rights obligations under other treaties to which Australia is a party.

**Implied freedom of political communication under the Australian Constitution**

The High Court of Australia has recognised an implied freedom of political communication in the *Australian Constitution.*[[31]](#footnote-31)This freedom is grounded on sections 7 and 24 of the Constitution and “reinforced by sections concerning responsible government” and has been held to act as a restriction on the legislative power of the Commonwealth.[[32]](#footnote-32) However, as outlined in the Interim Report, this freedom is not absolute, as it only protects communication about government or political matters, and is “limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*”.[[33]](#footnote-33)We submit that the secrecy provisions in the Act infringe the constitutionally implied freedom of political communication.

In determining whether an Act has breached this implied freedom, the modern approach is to apply the two-step test formulated in *Coleman v Power*:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
2. If so, is the law able to be regarded as reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government?[[34]](#footnote-34)

By making it an offence in for an “entrusted person” to disclose “protected information”, punishable by imprisonment for two years,[[35]](#footnote-35) it is arguable that the first limb of the test in *Coleman v Power* has been satisfied. Despite the existence of exceptions in ss.42(2), 43, 44, 45, 47 and 49, the operation and effect of the Act is to silence at least one source of criticism of government policies pertaining to immigration detention: any entrusted persons who in their working capacity come across any objectionable conduct or content which could be the basis for legitimate criticism of government policy will be forced to risk imprisonment by disclosure of such information.

Bringing to light the effects of government policy which could be regarded as morally repugnant or a breach of international obligations is a form of political expression. This restriction on communication means that voters may not be informed of the true effects of government actions. The operation of ss. 7 and 24 of the Constitution relating to representative government would be seriously stifled as:

“Representative government requires there to be a free flow of information to enable the community to be informed about the performance of their representatives and to communicate with each other and their representative about governmental matters so as to make an informed choice at elections.”[[36]](#footnote-36)

Hence it is strongly arguable that by curbing the expression of information and opinions that could be used to criticise government policy, the exercise of a “free and informed”[[37]](#footnote-37) choice of the electors is impaired, satisfying the first limb of the *Coleman v Power*.

Turning to the second limb in *Coleman v Power*, if it is assumed that the “legitimate end” served by the secrecy provisions of the Act is the protection of national security or public order, it might be argued that a blanket ban on disclosure of all “protected information” can be seen to be furthering that end. We submit however that, for the reasons given above in relation to the right of freedom of expression, the necessary element of proportionality is lacking,[[38]](#footnote-38) and that the provisions are by no means “reasonably appropriate” to serve that end. The disproportionality is further indicated by (unheeded) calls previously made in relation to the Bill for the Act, recommending that a “public interest disclosure” exception be made in relation to the secrecy provisions.[[39]](#footnote-39)

We submit that there is serious doubt about whether the secrecy provisions are “compatible with the maintenance of the system of representative and responsible government.”[[40]](#footnote-40) As discussed above, the Act has the potential to impede the disclosure of political information which would assist voters in making rationally informed choices about the policies of the current government.

**Conclusion**

UNESCO has stated that protecting freedom of expression is an “essential condition for democracy, development and human dignity”.[[41]](#footnote-41) In Australia, freedom of speech has been characterised as one of the “fundamental values protected by the common law”[[42]](#footnote-42) and as “the freedom par excellence; for without it, no other freedom could survive”.[[43]](#footnote-43) We are deeply concerned that the *Australian Border Force Act* unjustifiably impinges on this fundamental freedom, shielding the executive government from accountability regarding treatment of refugees and threatening whistleblowers into silence. Serious consideration should be given to the urgent need for reforming these secrecy provisions.

1. Sydney Centre for International Law, Faculty of Law, University of Sydney. The views expressed in this submission are those of the authors personally. [↑](#footnote-ref-1)
2. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art.19(2). [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. The ICCPR is scheduled to the *Australian Human Rights Commission Act 1986* (Cth). [↑](#footnote-ref-4)
5. *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). [↑](#footnote-ref-5)
6. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ). [↑](#footnote-ref-6)
7. *Australian Border Force Act 2015* (Cth) s.42. [↑](#footnote-ref-7)
8. Ibid. s.4 [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. ICCPR art.19(3); Human Rights Committee, *General Comment No. 34*, note 4, para 22. [↑](#footnote-ref-11)
12. United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, Annex (1985) cl. 29 (“ECOSOC, Siracusa Principles”). [↑](#footnote-ref-12)
13. Interim Report paras. 3.172, 3.173; ECOSOC, Siracusa Principles cl. 22. [↑](#footnote-ref-13)
14. ECOSOC, Siracusa Principles cl. 37. [↑](#footnote-ref-14)
15. Explanatory Memorandum to the *Australian Border Force Bill 2015* (Cth), 14. [↑](#footnote-ref-15)
16. Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No.112 (2009), recs 8 – 1, 8 – 2. [↑](#footnote-ref-16)
17. ECOSOC, Siracusa Principles cl. 32. [↑](#footnote-ref-17)
18. Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 and the Australian Border Force Bill 2015*, 2015, 13. [↑](#footnote-ref-18)
19. *Public Interest Disclosure Act 2013* (Cth), s.26(1)(c) item 2. [↑](#footnote-ref-19)
20. Ibid*.* s.26(1)(c) item 2(e). [↑](#footnote-ref-20)
21. Ibid*.* item 2(f). [↑](#footnote-ref-21)
22. Ibid*.* item 3. [↑](#footnote-ref-22)
23. Ibid*.* ss.41(1)(g), 41(2)(b). [↑](#footnote-ref-23)
24. Ibid*.*s.26(1)(c). [↑](#footnote-ref-24)
25. *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by the General Assembly 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). [↑](#footnote-ref-25)
26. *Minister of State Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The reasoning in *Teoh* was strongly criticised by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, but as that criticism was *obiter*, strictly *Teoh* remains good law. [↑](#footnote-ref-26)
27. *Minister of State Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. [↑](#footnote-ref-27)
28. *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by the General Assembly 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art.3. [↑](#footnote-ref-28)
29. Ibid. art. 37(b). [↑](#footnote-ref-29)
30. Monash University Castan Centre for Human Rights Law, Submission No 18 to Australian Law Reform Commission, *Traditional Freedoms – Encroachments by Commonwealth Laws* (IP 46), February 2015. [↑](#footnote-ref-30)
31. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1 [↑](#footnote-ref-31)
32. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 710. [↑](#footnote-ref-32)
33. Ibid. 561. [↑](#footnote-ref-33)
34. *Coleman v Power* (2004) 220 CLR 1, 2. [↑](#footnote-ref-34)
35. *Australian Border Force Act 2015* (Cth) s.42(1). [↑](#footnote-ref-35)
36. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 545. [↑](#footnote-ref-36)
37. Ibid*.* 560. [↑](#footnote-ref-37)
38. *Coleman v Power* (2004) 220 CLR 1, 5. [↑](#footnote-ref-38)
39. Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry*

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

*Australian Border Force Bill 2015*, 2015, 13. [↑](#footnote-ref-39)
40. *Coleman v Power* (2004) 220 CLR 1, 50. [↑](#footnote-ref-40)
41. “Introducing UNESCO”, http://en.unesco.org/about-us/introducing-unesco. [↑](#footnote-ref-41)
42. *Nationwide News v Wills* (1992) 177 CLR 1, 31. [↑](#footnote-ref-42)
43. Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113. [↑](#footnote-ref-43)