



13 November 2015

Professor Rosalind Croucher AM
Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: info@alrc.gov.au; tina.obrien@alrc.gov.au

Dear Professor Croucher

Department of Immigration and Border Protection's submission to the Australian Law Reform Commission's Freedoms Inquiry's Interim Report

The Department of Immigration and Border Protection (the Department) welcomes the Australian Law Reform Commission's (the Commission) Interim Report into its review of Commonwealth legislation and the encroachment of traditional rights, freedoms and privileges (the Freedoms Inquiry).

The Department would like to thank the Commission for the opportunity to contribute to its Inquiry. We note both the submissions put forward to the Commission from stakeholders and proposals recommending further reviews or reforms to legislation within the Immigration and Border Protection portfolio. We write to provide further information in response to those; please see our submission at **Attachment A** to this correspondence. We apologise for the delay in providing this submission.

If you would like any further information regarding the Department's submission or to discuss the issues outlined in this letter, please contact [REDACTED], General Counsel, Legal Division [REDACTED]. We look forward to working together with the Commission on this issue in the future and to reviewing the final report to Government in due course.

Yours sincerely

[REDACTED]

[REDACTED]

Policy Group
Department of Immigration and Border Protection

Attachment A – Department of Immigration and Border Protection’s submission

Chapter 3 - Freedom of Speech

Australian Border Force Act 2015

The department notes that the discussion about the *Australian Border Force Act 2015* (the ABF Act), specifically the alleged discouragement of whistle blowers being able to speak out publicly, makes no reference to the operation of the *Public Interest Disclosure Act 2011* (the PID Act). The discussion is arguably therefore misleading. The PID Act provides protections for officials, including contractors, who wish to make a disclosure in the public interest. The ABF Act does not override the protections of the PID Act.

The department also notes that Part 6 of the ABF Act also broadly operates consistently with section 70 of the *Crimes Act 1914* providing, with the PID Act, the bounds that Parliament has considered is appropriate in managing the restriction on disclosure of information obtained in a person’s work with the right to freedom of speech [paragraphs 3.71 - 3.74].

Chapter 5 - Freedom of Association

Migration Act 1958

The department notes the comments raised with the Commission regarding amendments to provide for the refusal or cancellation of a person’s visa on character grounds as set out in section 501(6) of the *Migration Act 1958* (the Migration Act) [paragraphs 5.90 – 5.96, 5.129, 5.134].

The department submits that care should be taken to accurately reflect the terms of section 501(6)(b) – the requirement is for the Minister to reasonably suspect both that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and that the group, organisation or person has been or is involved in criminal conduct. What is contemplated by the proposal of the ANU Migration Law Program to amend the legislation to provide definitions of ‘association’ and ‘membership’ consistent with *Haneef* should be clarified ([paragraphs [5.96] and [5.134] refer).

Chapter 6 - Freedom of movement

Australian Citizenship Amendment (Allegiance to Australia) Bill 2015

Since the publication of the Commission’s Interim Report, the Bill has been amended and re-introduced to Parliament. The department anticipates that discussion of the Bill will be corrected to reflect the current status of the Bill and its terms [paragraph 6.98 refers].

Chapter 15 - Procedural fairness

Migration Act

The department submits that care needs to be taken to accurately reflect the terms of the various provisions of the Migration Act that deal with the cancellation of a person’s visa; the terms ‘cancel’ and ‘revoke’ are not interchangeable [15.44 – 15.60].

Revocation is the ministerial power that may be exercised following cancellation without natural justice. We also submit that the discussion should accurately reflect the legislative scheme; whilst decisions may be made without the application of the rules of natural justice, a person whose visa has been cancelled without being accorded natural justice is given a right to seek revocation of the Minister’s decision to cancel – see, for example, sections 501C and 133F of the Migration Act (among other provisions).

The department further submits that the terms of section 501(3A) should be accurately reflected – in the second sentence in this paragraph, after ‘a child’ and before ‘the person is serving’ please replace ‘or’ with ‘and’ [paragraph 15.51 refers].

Maritime Powers Act 2013

The department would appreciate if the discussion in these paragraphs [15.73 - 15.78] noted that in *CPCF v MIBP* (2015) 316 ALR 1, a majority of the High Court found that the exercise of the power under section 72(4) of the *Maritime Powers Act* to take CPCF to India was not subject to an obligation that CPCF be heard before that power was exercised: at [53], [54].

Fast track assessment process for Unauthorised Maritime Arrivals

The department would appreciate if the discussion relating to the fast track assessment process is revised to ensure that the process, and in particular the legislative provisions governing the process, are reflected accurately. For example, the report inaccurately describes the cohort of persons who will satisfy the ‘fast track applicant’ definition and therefore be subject to the process [15.46 and 15.61]. The report also inaccurately refers to the process as the ‘fast track application process’ [15.46].

The department would also appreciate if the discussion relating to the referral of decisions to the Immigration Assessment Authority (IAA) is revised to accurately reflect the legislative framework. For example, the report states that the Minister ‘may’ refer ‘all applications’ to the IAA [15.46 and 15.62]; whereas section 473CA of the Migration Act provides that the Minister ‘must’ refer fast track reviewable decisions. Please note that the term ‘fast track reviewable decision’ is defined in section 473BB of the Migration Act.

In addition, the department requests that consideration be given to the relevance of the extract at paragraph 15.70. The department is of the view that this extract is not relevant to the conduct of review by the IAA, given the IAA does not have jurisdiction to review decisions refused on security grounds.

Finally, the department would appreciate if consideration could be given to the currency of the information in the report. For example, where possible, the department requests that references to the Refugee Review Tribunal are revised following the commencement of the *Tribunals Amalgamation Act 2015*.