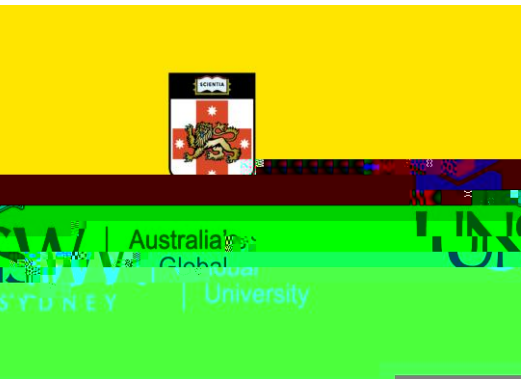


Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY EMAIL

1 September 2017

Dear Committee Secretary

Inquiry into the Australian Border Force Amendment (Protected Information) Bill 2017 ('the Bill')

Thank you for the opportunity to make a submission. We do so in our capacity as members of the Andrew & Renata Kaldor Centre for International Refugee Law. We are solely responsible for the views and content in this submission.

The Explanatory Memorandum makes clear that the Bill seeks to protect certain information from unauthorised disclosure that would harm the national or public interest, while 'meeting the expectations of the Australian community of transparency and accountability within the Australian Government'.[1] We are broadly supportive of this objective. We recognise that the amendments proposed in the Bill represent a lesser encroachment on free speech than the *Australian Border Force Act* ('the *Border Force Act*') in its current form, and we see this as a step in the right direction.

That said, in our view, the drafting of the Bill leaves much to be desired. In particular, more careful and precise drafting would greatly improve the Bill's effectiveness in meeting its stated objective of preserving transparency and accountability while protecting against disclosures likely to harm the national or public interest.

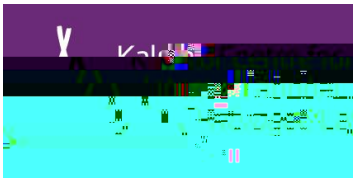
We have three overarching concerns. First, the Bill goes beyond what is proportionate to the aim of preventing harm to the national or public interest. Secondly, if the Bill is passed in its current form, the full range of conduct that gives rise to an offence under the Act will not be

First, some of the categories of information included within the scope of the definition do not have any obvious connection to the protection of national security or the public interest. In its report, *Secrecy Laws and Open Government in Australia*, the Australian Law Reform Commission (ALRC) recommended that the Crimes Act 1914 (Cth) be amended to include a 'general secrecy offence'.[3] The ALRC suggested that such a general secrecy provision—that results in criminal sanction—should only relate to instances where disclosure could harm an 'essential public interest'.[4] The test recommended by the ALRC was whether the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

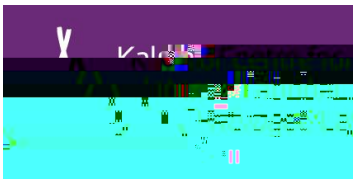
a. damage the security, defence or international relations of the Commonwealth;
b. prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
c. endanger the life or physical safety of any person; or
d. prejudice the protection of public safety.[5]

In our view, the ALRC's list of essential public interests provides a robust framework under which to examine secrecy provisions with respect to the public interest. While we note that there are some similarities between the proposed definition of Immigration and Border Protection Information and the ALRC's essential public interest grounds, the definition proposed is wider in some respects, and as we point to below, lacks justification.

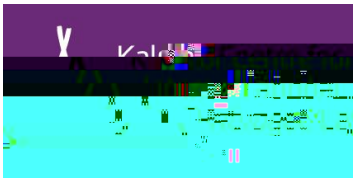
The ALRC also noted that there are instances where more specific secrecy provisions may be necessary. However, specific secrecy offences 'are only warranted where they are necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions'.[6]



paragraph (e), the following: ‘commercially sensitive information received from and about commercial entities, such as names of suppliers, prices paid for goods …’.[8]

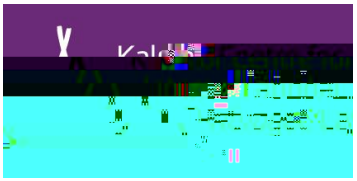


Act covers these categories of persons.[16] This mismatch in coverage means that some, but not all, persons who may work within Australia's immigration system will be covered by the PIDA.



4. Constitutional considerations

If the Bill is passed, the Act will impose fewer restrictions on communication than is currently the case. Nonetheless, for the reasons we outline above, a significant burden on communication about political matters will remain. In light of this, it is our view that the proposed legislation would be open to constitutional challenge on the grounds that it infringes the implied freedom of political communication, and that such a challenge would have reasonable prospects of success.



A more tightly framed offence provision in and of itself does not address concerns about the lack of clarity about what information may be disclosed, or the potential ongoing chilling effect of the secrecy provisions currently included in the *Australian Border Force Act 2015* (Cth).

As discussed above, questions surrounding the disclosure of information can be quite complex and difficult to navigate. Entrusted persons may need to navigate the interaction between separate statutory frameworks as well as how they relate to their professional obligations. Given the nature of information that may be disclosed to them, entrusted persons may have genuine questions about how the law applies to their particular situation. We consider that a proportionate legislative framework alone does not address this uncertainty, or the potential chilling effect it may have.

In addition to the amendments discussed above, the Department of Immigration and Border Protection should prepare detailed guidance material, protocols and training for employees, contractors and consultants. This material should provide practical guidance and useful examples which highlight and clarify:

> the kinds of information and circumstances of disclosure that are prohibited; **and**
>
> the circumstances in which disclosure is permitted, with particular reference to, and clarity around when disclosure is permitted in the public interest, and to whom.

We are of the view that the information should be granular and practical. An example of a useful model is the