The amended secrecy provisions of the Australian Border Force Act

An improvement in protection for refugee whistle-blowers or just another policy blunder?

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In recent times, the Australian government's refugee policy has been the subject of harsh public and academic scrutiny.[1] Offshore processing, mandatory detention and the separation of refugee families, has led to harrowing consequences for those seeking refuge on Australian shores. Australia's refugees have found themselves trapped in a web of abhorrent and punitive measures, but the lived experience of these refugees has been largely hidden from public view.[2] This is somewhat due to refugee whistle-blowers being subject to the secrecy provisions of the *Australian Border Force Act 2015* (Cth) ('*ABFA*') since 2015,[3] imposing stringent conditions on the recording and disclosure of specified information. In 2017, this legislation was amended in an attempt to improve the accountability and transparency of our government,[4] and re-evaluate the ruthless provisions applicable to whistle-blowers. This essay will consider whether the amended legislation has, in form and in substance, improved protection for refugee whistle-blowers, by critically examining both laws within a framework of constitutional validity. Whilst this analysis demonstrates the necessary improvements brought about by the 2017 amendments, the current legislation leaves much to be desired. Therefore, concerns remain in relation to those wishing to speak out about the abject failure that is Australia's callous refugee policies.

I The evolution of the Australian Border Force Act

Part 6 of the *ABFA* commenced on 1 July 2015,[5] and outlines the relevant secrecy and disclosure provisions. Section 42 of the original Act made it an offence, punishable by 2 years' imprisonment, for an 'entrusted person'[6] to '[make] a record of, or [disclose], [protected] information', where 'protected information' was any information obtained by a person in their capacity as an entrusted person.[7] This provision was highly controversial,[8] and scholars and the community alike expressed concerns relating to its breadth and chilling effect on public interest disclosures. Subject to limited exceptions,[9] the law criminalised the unauthorised disclosure of any information obtained by an officer or contractor of the Department of Immigration

and Border Protection ('DIBP') in their course of duty. The law regulated the disclosure of information with the potential to harm essential public interests such as national security, defence and public safety, *as well as* information unlikely to have an adverse effect on such interests – which may have instead been in the public interest to disclose. For example, information about the abhorrent treatment of refugees by Australian government agencies and the living conditions experienced in Australia's mandatory detention centres. Such concerns culminated in the filing of a constitutional challenge to section 42 of the *ABFA* by Doctors for Refugees in 2016, on the basis that the law unduly restricted the implied freedom of political communication.[10] In response to this challenge, the Secretary of the DIBP made a determination,[11] to exclude health practitioners from the application of the secrecy provisions.[12] Doctors for Refugees remained concerned that the blanket provisions applied too broadly to non-health professionals, including teachers, charity personnel and social workers,[13] and sought to continue their proceedings. On 9 August 2017, the Australian Government introduced a Bill,[14] which sought to amend the secrecy provisions, particularly by introducing a new category of information called 'Immigration and Border Protection Information' ('*IBP Information*'),[15] defined as information the disclosure of which would or could reasonably be expected to:[16]

- prejudice the security, defence or international relations of Australia;
- prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
- prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
- found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
- cause competitive detriment to a person; or
- information of a kind prescribed in an instrument under subsection (7).

The amending legislation, incorporating this definition and other changes, formally came into force on 31 October 2017.[17] However, the changes relevant to this essay were enacted retrospectively and thus said to commence on 1 July 2015.

II Framework for constitutional validity

In various decisions the High Court has acknowledged that a freedom of political communication can be implied from the *Constitution*.[18] This freedom is not absolute, but rather acts to fetter the legislative power of the Commonwealth.[19] The *Constitution* necessarily protects the freedom of communication between people concerning government or political matters, to the extent necessary to uphold the accountability and transparency of Australia's representative democracy. Where a law is not compatible with the implied freedom, it will generally be invalid. The test to determine whether a provision impermissibly burdens the freedom has been set out by the High Court in a number of cases,[20] and was most recently amended in the case of *Brown v Tasmania*.[21] A law will be incompatible with the implied freedom of political communication and hence be invalid where it effectively burdens the freedom in its terms, operation or effect; and where its purpose is illegitimate, in the sense that it is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and/or where the law is not reasonably appropriate and adapted to advance that object in a manner that is compatible with the maintenance of the prescribed system of government.[22] This third limb involves a test of proportionality to determine whether the restriction which the provision imposes on the freedom is justified.[23] This involves an inquiry into whether the law is suitable, necessary and adequate in its balance.[24] Both the original s 42 offence and the amended provision, as detailed above, will now be critically examined within this framework.

III A critical examination of the original section 42

In assessing the original s 42 offence against the constitutional validity framework, it is evident that the legislation unjustifiably encroached upon the implied freedom of political communication. By making it an offence,

punishable by 2 years' imprisonment, for an 'entrusted person' to disclose 'protected information', the legislation conceivably burdened the implied freedom of political communication and satisfied the first limb of the test.[25] Exposing the practical effects of government policies, that are arguably morally repugnant or in breach of international obligations, is a form of political expression.[26] Restricting such conduct, as s 42 did, effectively burdened the freedom, where:

> 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 … about governmental matters so as to make an informed choice at elections. [27]

The second limb would also likely have been satisfied. In the absence of an objects provision, it appears that the 'legitimate end' served by the secrecy provisions, was either the protection of national security, or the maintenance of the efficient operation of Australia's border protection activities.[28] These purposes are not directed, nor do they operate, to adversely impinge upon representative government, and thus are compatible with the implied freedom.[29]

Turning to proportionality, it is this third limb of the test that would have inevitably threatened the validity of the original s 42 offence. The use of secrecy provisions in the sensitive context of border force operations is and was warranted at the time; however, the disputable *proportionality* of these provisions raised red flags.[30] The broad scope of the definition of 'protected information' coupled with the expansive class of persons falling within the definition of an 'entrusted person', elucidates the operational overreach of the legislation. In *Bennett v President, Human Rights Equal Opportunity Commission*,[31] a blanket secrecy provision similar to the original s 42 offence,[32] was held to be constitutionally invalid by the Federal Court. Finn J was of the opinion that a catch-all provision, that did not differentiate between the types of information protected or the consequences of disclosure, was disproportionate to the purpose it aimed to achieve. [33] This line of reasoning, alongside the reasoning of the High Court in recent times,[34] suggests that an unqualified prohibition will not be compatible with the freedom.

The government defended the validity of its secrecy offence, referring to the various exceptions in the *Act*.[35] However, as Bevitt posits, these exceptions create an unclear, ineffective and patchwork protective framework for potential whistle-blowers.[36] They fail to ensure that information caught by the secrecy offence that is *not* reasonably likely to harm an essential public interest, can be disclosed without fear of reprisal. For example, s 42(2)(c) of the *ABFA* permits disclosure where it is required or authorised by law. This exception indirectly incorporates and relies on the application of the *Public Interest Disclosure Act* ('*PIDA*'),[37] otherwise known as Australia's whistle-blower legislation.[38] However, this exception also establishes a lacuna in the law, whereby some forms of conduct will be considered offensive under s 42 of the *ABFA* yet fall outside the scope of protection under the *PIDA*,[39] rendering it ineffective to overcome the *ABFA* provisions.[40] Section 48 further permits disclosure where it is necessary to prevent or lessen a serious threat to the life or health of an individual. On its face, this exclusion appears applicable to potential refugee whistle-blowers speaking out about the problematic conditions in Australia's offshore detention centres; however, this exception imposes a high threshold test and places the onus on whistle-blowers to prove that the requisite degree of seriousness has been met.[41]

Using proportionality as a tool of analysis,[42] it is evident that the original s 42 offence was disproportionate, and unjustifiably infringed on the implied freedom of political communication. The scope of the offence was far too broad, and the exceptions too narrow to mitigate the onerous restrictions placed upon DIBP workers.

IV A critical examination of the amended section 42

In assessing the amended offence provision within the constitutional validity framework, it is evident that the legislation still encroaches upon the implied freedom of political communication, however, it does so to a far lesser extent than the original offence. The legislation strikes a more desirable balance between the gravitas of the purpose served by the legislation and the extent of its imposition on the implied freedom of political

Still image from Simon Kurian's documentary, 'Stop the Boats'. Manus Island (Simon Kurian)

communication.[43] Adopting the same analysis as above for the amended secrecy offence, it is similarly likely to satisfy the first and second limbs of the test for compatibility. Again, it is the proportionality limb that sparks the greatest debate.

The amended s 42 is *suitable*, as it is rationally connected to its purpose.[44] The Second Reading Speech sets out the purpose of the amended provisions as being to prevent the unauthorised disclosure of information that could harm the national or public interest.[45] The amended text of the legislation is directly in pursuit of this purpose, as the definition of 'IBP Information' confines offending conduct to that which could potentially harm the public interest.

A burdening measure will only be *necessary* if there is no other reasonably practicable means of achieving the same objective while having a less restrictive effect on the freedom.[46] In the instance of the amended legislation (and its predecessor), it is arguable that s 70 of the *Crimes Act 1914* (Cth) renders the s 42 offence unnecessary as it prohibits:

> [A] Commonwealth officer, [to] [publish] or [communicate] … any fact or document which comes to his or her knowledge, or into his or her passion, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose.[47]

Section 70 has been held to be constitutionally valid,[48] and its jurisdiction overlaps with that of s 42. Whether it does in fact achieve the same object is however debatable, as it is less targeted in its operation than the *ABFA* provisions.[49]

Whether the law is also *adequate in its balance*, requires an in-depth critique of the amended provisions.[50] There is no doubt that the definition of 'IBP Information' narrows the scope of the offence, tailoring it to the recording and/or disclosure of information which could harm the public interest. However, difficulties with the amended provisions remain.

Firstly, the new definition of 'IBP Information' is framed in a manner inconsistent with other Commonwealth secrecy provisions. In its report, *Secrecy Laws and Open Government in Australia*,[51] the ALRC recognised that secrecy laws exposing government employees to criminal liability, like those contained in the amended Act, sit uneasily with the principles of government openness and accountability.[52] Thus, the ALRC recommended that such laws and penalties only be implemented in instances where disclosure could harm an essential public interest,[53] for example where the disclosure of information does, or is reasonably likely 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.[54]

Paragraphs (a)–(c) in the definition of 'IBP Information' broadly correlate to these interests. Paragraph (a) whilst similar, is arguably harsher than necessary in its operation. In the highly controversial and volatile context of offshore processing, one can envisage certain disclosures in the public interest which could well prejudice the international relations of Australia within the international community — particularly those with countries critical of our refugee policies.[55] Absent a definition, damage to international relations, also contemplates intangible or speculative damage, such as the loss of trust or confidence in the Australian government or damage to Australia's reputation. The lower threshold of '*could reasonably be expected to*' in this context also goes against the recommendations of the ALRC,[56] as it potentially criminalises the unauthorised disclosure of information where there is only a reasonable possibility, not a reasonable likelihood of prejudice or damage.[57] Paragraphs (d) and (e) manifestly exceed the ALRC's robust framework. The broad application of paragraphs (d) and (e) lack sufficient justification to impose criminal sanctions. For example, it is unclear how the effect of disclosure on the competitive position of a private entity relates to essential public interest concerns. While it is legitimate to protect against competitive detriment flowing from the disclosure of confidential information, this is typically achieved via the application of civil law and contractual obligations relating to confidentiality.[58] For border protection workers to be held to a more onerous standard than that which applies to other government workers, suggests disproportionality of the law.

Of further relevance are the deeming provisions in s 42(1A) of the *ABFA*, which make it an offence to disclose certain information if the person was reckless as to whether (among other things) the information had a security classification. The law fails to provide an avenue to challenge the appropriateness of a security classification and consider the content of the information, and is unclear as to what steps a person would need to take to satisfy themselves that the information was not subject to such a classification.[59] Section 4(7) of the *ABFA*, also confers the Minister with discretion to prescribe new categories of information as falling within the scope of the offence. This could effectively be used to prevent the lawful disclosure of information, particularly in the highly controversial context of refugee policy. The concerns raised above in relation to the exceptions to the original s 42, also remain relevant.

There is no doubt that the amended legislation is more likely to satisfy the proportionality test, and thus be found to be constitutionally valid. Where potential refugee whistle-blowers were once 'gagged' by the operation of the s 42 offence,[60] the amended legislation has ameliorated many of the concerns held by the individuals and groups at the coalface of Australia's refugee policies. Despite no one actually having been charged with an offence under either iteration of the s 42 offence, the breadth and ambiguity of the legislation, still creates uncertainty, and the aforementioned loose ends of the legislation validates residual concerns as to its constitutional validity.

v Concluding remarks

This essay evinces how the recent amendment to the secrecy provisions of the *ABFA*, has resulted in an improvement to the protection offered to refugee whistle-blowers. The law, whilst refined in its scope, operation and practical effect, is an example of legislative drafting that leaves much to be desired. Where the original s 42 offence was likely invalid on the grounds that it curtailed the implied freedom of political communications, the amended offence too, remains uncertain and in some respects overly broad failing to rule out the possibility of a constitutional challenge. The amended legislation has ameliorated *some* of the concerns its predecessor invoked in relation to information of public interest reaching the public sphere but remains a deterrent for those wishing to speak out about the abject failure that is Australia's draconian refugee policies. ⚖

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References

1 See, eg, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru', *Amnesty International* (Web Page, 20 August 2016) <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>; Waleed Aly, 'Australia's Poisonous Refugee Policy', The New York Times (online, 26 October 2016) < https://www.nytimes.com/2016/10/27/opinion/australias-poisonous-refugee-policy.html>.

2 Thomas Albrecht, 'Australia's Refugee Policy is a Failure. This is Not the Time to Shirk Responsibility', *The Guardian* (online, 2 October 2017) <https://www.theguardian.com/commentisfree/2017/oct/02/our-refugee-policy-is-a-failure-this-is-not-the-time-to-shirk-responsibility>.

3 *Australian Border Force Act 2015* (Cth) ('*ABFA*') pt 6.

4 *Australian Border Force Amendment (Protected Information) Act 2017* (Cth) ('*ABFA 2017 Amendment*').

5 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Australian Border Force Amendment (Protected Information) Bill 2017* (12 September 2017) 1 [1.4].

6 An 'entrusted person' was (and still is) defined in section 4(1) of the *ABFA* (n 3) to include various officials in the Australian Border Force, as well as people who are 'Immigration and Border Protection workers'. That class is broadly defined to include inter alia, people who are engaged as consultants or contractors to perform services for the Department of Immigration and Border Protection, and who are designated in writing by the Secretary of the Department or the Australian Border Force Commissioner: at s 4(1) (definition of 'entrusted person').

7 *ABFA* (n 3) ss 4(1) (definition of 'protected information'), 42(1), as repealed by *Australian Border Force Amendment (Protected Information) Act 2017* (Cth) sch 1 pt 1 ('*First ABFA Compilation*').

8 See, eg, Nicole Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions: Borderline Unconstitutional' (2017) 39(2) *Sydney Law Review* 257; Khanh Hoang, 'Border Force Act Entrenches Secrecy around Australia's Asylum Seeker Regime' *The Conversation* (online, 2 July 2015) <https://theconversation.

com/border-force-act-entrenches-secrecy-around-australias-asylum-seeker-regime-44136>; Ellen Moore, Musood Darwish and Alison Pert, *Submission No 109 to Australian Law Reform Commission, Freedoms Inquiry* (September 2015).

9 First *ABFA Compilation* (n 7) ss 42–9. Subsection 42(2) provides that the offence does not apply if: "(a) the making of the record or disclosure is authorised by ss 43, 44, 45, 47, 48 or 49; or (b) the making of the record or disclosure is in the course of the person's employment or service as an entrusted person; or (c) the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or (d) the making of the record or disclosure is required by an order or direction of a court or tribunal." A defendant bears an evidential burden in relation to a matter listed above, in accordance with s 13.3(3) of the Schedule to the *Criminal Code Act 1995* (Cth). Sections 43, 44, 45, 47, 48 and 49 set out circumstances in which use and disclosure of protected information is permitted, in particular where: the recording or disclosure is for the purposes of the *Australian Border Force Act 2015* (Cth) or the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (s 43); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to certain bodies and persons in Australia, including government agencies and police, for certain purposes (s 44); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to a foreign country, agency or authority of a foreign country, or public international organisation, that has entered into an agreement with the Commonwealth or one of its agencies, for certain purposes (s 45); the disclosure is in accordance with consent given by the person or body to whom the information relates (s 47); an entrusted person reasonably believes it is necessary to prevent or lessen a serious threat to the life or health of an individual (s 48); or the information has already been lawfully made available to the public (s 49).

10 Claudia Fatone, 'Doctors for Refugees', *Fitzroy Legal Centre* (Web Page, 27 July 2016) <https://www.fitzroy-legal.org.au/doctors_for_refugees>; Sarah Whyte and Uma Patel, 'Doctors to Launch High Court Challenge against Detention Secrecy Laws', *ABC News* (online, 27 July 2016) <https://www.abc.net.au/news/2016-07-27/doctors-to-launch-high-court-challenge-against-detention-secrecy/7662836>.

11 *ABFA* (n 3) s 4(f)(iii).

12 *Determination of Immigration and Border Protection Workers 2015* (Cth) para D, as amended by *Determination of Immigration and Border Protection Workers – Amendment No. 1 2016* (Cth).

13 Bianca Hall, 'A Huge Win for Doctors: Turnbull Government Backs Down on Gag Laws for Doctors on Nauru and Manus', *The Sydney Morning Herald* (online, 20 October 2016) <https://www.smh.com.au/politics/federal/a-huge-win-for-doctors-turnbull-government-backs-down-on-gag-laws-for-doctors-on-nauru-and-manus-20161020-gs6ecs.html>.

14 *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth).

15 The new category of 'Immigration and Border Protection information' was to replace the repealed definition of 'protected information' in the original *ABFA* (n 3).

16 *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) sch 1 cl 1.

17 *ABFA 2017 Amendment* (n 4).

18 *Australian Constitution* ss 7, 24. See, eg, Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 ('*Lange v ABC*').

20 Ibid 567; *Coleman v Power* (2004) 220 CLR 1, 51 ('*Coleman v Power*'); McCloy v New South Wales (2015) 257 CLR 178, 193–5 [2] ('*McCloy v NSW*').

21 (2017) 261 CLR 328, 363–4 [104], 375–6 [156], 416 [277], 478 [481] (Keifel CJ, Bell and Keane JJ) ('*Brown v Tasmania*').

22 Ibid 363–4 [104] (Kiefel CJ, Bell J and Keane J), 375–6 [156] (Gageler J), 416 [277] (Nettle J).

23 *McCloy v New South Wales* (n 20) 213 [68] (French CJ, Kiefel, Bell and Keane JJ), 232 [131] (Gageler J).

24 Ibid 194–5 (French CJ, Kiefel, Bell and Keane JJ). See also Brown v Tasmania (n 21) 416–9.

25 Moore, Darwish and Pert (n 8) 8.

26 *Levy v State of Victoria* (1997) 189 CLR 579, 595–6.

27 *Lange v ABC* (n 19) 545.

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, 1204–5 (Peter Dutton, Minister for Immigration and Border Protection); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2017, 7822–3 (Peter Dutton, Minister for Immigration and Border Protection).

29 See *R v Goreng-Goreng* (2008) 2 ACTLR 238, 247 ('*Goreng-Goreng*'). In that case, the Supreme Court of the Australian Capital Territory considered the validity of restrictions on disclosures by public servants. The relevant regulation prohibited the disclosure of information where it was reasonably foreseeable that the disclosure could be prejudicial to the effective working of government. The Court found that upholding the effective working of government was a legitimate end.

30 Bevitt (n 8) 258.

31 (2003) 134 FCR 334 ('*Bennett v HREOC*').

32 For example, the case discussed reg 7(13) of the *Public Service Regulation 1999* (Cth).

33 *Bennett v HREOC* (n 32) 359: 'The dimensions of the control [the law] imposes impedes quite unreasonably the possible flow of information to the community — information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of the executive government'.

34 *Coleman v Power* (n 20) 54 (McHugh J).

35 'Secrecy Provisions of the Australian Border Force Act' (Media Release, Department of Immigration and Border Protection and Australian Border Force, 7 July 2015).

36 Bevitt (n 8) 264.

37 *Public Interest Disclosure Act 2013* (Cth) ('*PIDA*'): the *PIDA* exempts, from civil or criminal sanction, those who make disclosures about disclosable conduct such as maladministration or corruption.

38 Ibid ss 10, 26, 29, 31, 69.

39 For example, the *PIDA* only covers disclosures made by 'public officials' — public servants and their contracted services providers, but does not include consultants and their employees: see *PIDA* (n 38) ss 30, 69. In contrast, the definition of 'immigration and protection worker' under the *ABFA* covers these categories of persons: see s 4. The *PIDA* also generally requires an initial disclosure to be made internally to a superior within a government agency: see *PIDA* (n 38) ss 26, 31. External disclosure can only be made after this, where the individual reasonably believes that the investigation or response was inadequate, and the disclosure is, on balance, not contrary to the public interest, or where there is a substantial or imminent danger to the health and safety of the individual. This is a high threshold for a person to overcome in making a public interest disclosure.

40 Khanh Hoang, 'Of Secrecy and Enforcement: Australian Border Force Act' (2015) 14 *Law Society of New South Wales Journal* 78, 79; Stephanie Szkilnik, 'Secrecy and Disclosure: The Australian Border

Force Act 2015 (Cth) Protecting Our Borders from Free Speech' (2016) 21(1) *Media and Arts Law Review* 64, 72; Councils for Civil Liberties, Submission No 142 to the Australian Law Reform Commission, Freedoms Inquiry (18 October 2015) 21.

41 Moore, Darwish and Pert (n 8) 5. The exception for recording or disclosing information related to the affairs of a person or body if that person has consented to disclosure (*ABFA* (n 3) s 47), may also be particularly relevant for refugee whistle-blowers. Where this could provide an alternate avenue for disclosure, the information to be disclosed must be limited to that individual's personal information. Therefore, information about the widespread health issues and poor conditions in detention centres cannot be disclosed under these exceptions, despite being of significant public and political interest.

42 *Tajjour v New South Wales* (2014) 254 CLR 508, 550.

43 *McCloy v NSW* (n 20) 193–5 [2]; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 90–1.

44 *Unions NSW v New South Wales* (2013) 252 CLR 530, 556–60 [44]-[60] ('*Unions NSW*').

45 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2017, 7821–3 (Peter Dutton, Minister for Immigration and Border Protection); Explanatory Memorandum, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) 4. Both make 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.

46 *Unions NSW* (n 45) 596, [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

47 *Crimes Act 1914* (Cth) s 70(1).This section prohibits a Commonwealth officer from publishing or communicating, except to some person to whom he or she is authorised to publish or communicate, any fact or document which comes to his or her knowledge, or into his or her passion, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, commits an offence. The penalty for this offence is 2 years' imprisonment.

48 *Goreng-Goreng* (n 29) 247.

49 Note that the general guidance for the drafting of secrecy provisions as per the *ALRC's* recommendations, in their report *Secrecy Laws and Open Government in Australia*, explained below also presents an obvious and compelling alternative to the standard adopted in the amended *ABFA Act*.

50 *Brown v Tasmania* (n 21) 464–5 [430].

51 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, 2010).

52 Ibid 44 [2.12].

53 Ibid 13 rec 9–3. For example where the disclosure of information does, or is reasonably likely to: damage the security, defence or international relations of the Commonwealth; prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences; endanger the life or physical safety of any person; or prejudice the protection of public safety.

54 Ibid 9 rec 5–1.

55 Save the Children, Submission No 7 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (28 August 2017) 3. Damage to international relations, also contemplates intangible or speculative damage, such as the loss of trust or confidence in the Australia's government or damage to Australia's reputation.

56 *Australian Law Reform Commission* (n 52) 9 rec 5–1.

57 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190.

58 UNSW Kaldor Centre for International Refugee Law, Submission No 12 to the Senate Legal and Constitutional Affairs Legislation Committee, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (1 September 2017) 3–4.

59 See *ABFA* s 4(5), 42(1A). The deeming of information with a security classification as requiring protection, without any consideration of the content of the information, whether it has been correctly classified or whether it is, in fact, information the disclosure of which would, or is reasonably likely to, harm essential public interests remains a 'blanket provision': see Australian Human Rights Commission, Submission No 13 to the Senate Legal and Constitutional Affairs Legislation Committee, *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth) (1 September 2017) 24–6.

60 Paul Karp and Ben Doherty, 'Australia Should Urgently Improve Whistleblower Protection, UN Expert Says', *The Guardian* (online, 18 October 2016) <https://www.theguardian.com/australia-news/2016/oct/18/australia-should-urgently-improve-whistleblower-protection-un-expert-says>.