Whistle-blowing under the Border Force Act: Three months on

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Despite both major political parties agreeing that the Border Force Bill 2015 (introduced into Parliament in February this year) would be dealt with as non-controversial legislation, since its commencement on 1 July 2015, it has proved to be anything but uncontroversial.

Perhaps the most contentious aspect of the Border Force Act (the Act) has proved to be the secrecy provision contained in section 42 of the Act which provides that an ‘entrusted person’ commits an offence if they disclose ‘protected information’. Such an offence is punishable by a maximum two year term of imprisonment. However, there are a number of exceptions that can apply, most notably where the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a state or a territory. It is this exception which effectively incorporates the Public Interest Disclosure Act 2013 that made the Australian Labor Party (ALP) take the view that whistle-blowers would be adequately protected if it supported the passage of the legislation.

Though legal commentators have since analysed the operation of the Act and concluded that persons employed under the Act are indeed able to make disclosures about their concerns if they are disclosed in a manner that complies with the requirements of the Public Interest Disclosure Act, the uncertainty surrounding the potential operation of this provision continues to cause confusion and attract media attention.

Perhaps at the heart of the matter is the perceived absence of adequate independent oversight at Australia’s controversial offshore processing centres in Nauru and Papua New Guinea, which is resulting in some workers feeling a strong moral obligation to disclose information to the media. However, as the Secretary of the Department of Immigration and Border Protection recently explained it is ‘wrong in law and in fact to assert that contractors have an unqualified right of disclosure to the media. Commonwealth law does not recognise such a purported right either by way of attachment to employment within a Commonwealth department or agency or through employment through a contractual relationship of some kind with the Commonwealth’.
The uncertainty surrounding this issue has recently been compounded by the refusal of the Government to provide the United Nations Special Rapporteur on the human rights of migrants, Francois Crépeau, written assurances that no one meeting with him during his official visit to Australia would be at risk of any intimidation or sanctions under the Act. Though the Foreign Minister disputes this is what occurred, the Special Rapporteur nonetheless postponed his visit on 25 September 2015.

It is relevant to note that Special Rapporteurs operate under what is known as the Special Procedures of the United Nations Human Rights Council. This development may therefore be perceived as undermining Australia’s announcement to the United Nations General Assembly on 29 September 2015, that it was standing to be elected to the Human Rights Council for the 2018–2020 term noting that ‘should we be elected, our focus would be on empowering women and girls, strengthening governance and democratic institutions, promoting freedom, freedom of expression, and advancing human rights for all’.

Moreover, last week saw the introduction of the Migration Amendment (Mandatory Reporting) Bill 2015 into Parliament by the ALP. The stated aim of this Bill is to enhance the safety of children in immigration detention by mandating the reporting of child abuse in onshore and offshore detention facilities. Specifically, the Bill requires ‘Immigration and Border Protection workers’ to report any instances of child abuse they observe to the Australian Border Force Commissioner, who would in turn report the abuse to the relevant authorities (such as the AFP, Nauruan Police, State/Territory police).

Though the Shadow Immigration Minister noted in his second reading speech that ‘this Bill ensures there is absolutely no doubt that staff in these facilities have not only the freedom to report abuse but also a legal obligation to do so’, this Bill appears unlikely to achieve that aim for a number of reasons.

Firstly, a person who is engaged as a consultant or contractor to perform services for the Immigration Department is only considered to be an ‘Immigration and Border Protection worker’ if the Minister makes a determination to that effect. Secondly, the reporting obligation will only apply to ‘reportable assaults’ that occur at a ‘place of detention’. Relevantly, ‘a place of detention’ in a regional processing country is where restraint is being exercised over the liberty of a person who has been taken to that country from Australia. The Government of Nauru’s recent announcement that the Nauru Processing Centre is an ‘open centre’ appears to put it outside this definition (there are no children in immigration detention in Papua New Guinea).

It could also be said that this Bill falls well short of recommendation 14 of the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, which was to introduce legislation requiring the mandatory reporting of any reasonably suspected unlawful sexual contact, sexual harassment, unreasonable use of force or other assault perpetrated against asylum seekers at the Regional Processing Centres.
Last week also saw the Australian Greens successfully secure support (with the assistance of ALP Senators, and independents Jacqui Lambie and Glenn Lazarus) for a motion to establish another Senate Committee inquiry into the conditions and treatment of asylum seekers and refugees at the offshore processing centres (amongst other things). The Committee is scheduled to report at the end of 2016. A recent media release by Senator Hanson–Young relevantly notes ‘by setting up this inquiry, we’re simply using the powers of the Parliament to give protection to concerned detention centre workers who feel they need to speak out’.

Tags: asylum refugees immigration