



The Australian Border Force Act 2015 imposes a regime of secrecy on anyone who works for or provides a service to the department.

A breach of secrecy by an entrusted person can lead to two years imprisonment.

It's not just whistle blowing that is criminalized. An entrusted person who tells their partner what they did at work that day is committing a criminal offence.

An **entrusted person** is required to keep everything they learn or hear about in their work for the department secret. The class of **entrusted persons** includes:

- Any Employee, consultant or contractor of the department,
- Any Commonwealth, State or Territory public servant including public hospital workers,
- Any Employee of a foreign government; and
- Virtually anyone else

whose services are made available to the Department of Immigration - even if they don't know they are providing the service to the Department.

New Laws Criminalise Recording information and Whistle-blowing

The Australian Border Force Act 2015 (the '**Border Force Act**') commenced operation on 1 July 2015. It places onerous secrecy restrictions on anyone that works for or provides services to Australian Customs, Border Protection or the Department of Immigration (together known as the "**Department**"). It also covers State or Territory or Foreign Government employees. The Act is far-reaching and it may not be clear to some workers, like emergency ward doctors and nurses, that when they are treating asylum seekers they are actually providing services to the Department. Consequently, they will not know that they are subject to the secrecy provisions of the Border Force Act.

The Criminalisation of Whistle-Blowing

The Border Force Act requires that any information which an *entrusted person* obtains at work or as part of their work must be kept secret. If an *entrusted person* discloses *protected information* outside of their work they are committing a crime. The secrecy provisions in the Border Force Act have no time or geographical limit and they cover all current and former *entrusted persons*.

Recording information

The Border Force Act specifically outlaws the recording of any information unless it is required as part of an *entrusted person's* job.

If an *entrusted person* records any information such as video of a riot on Manus Island or if they have photographic evidence about an assault in detention on their iphone or if they keep a personal diary or give a presentation about what goes on in customs, border patrol or immigration detention then they are committing a crime. There is almost **NO** protection in the Border Force Act or the Public Interest Disclosure Act for a person who **records information**. Consequently there is no protection for a journalist who aids and abets the commission of that offence.

There are few meaningful exemptions that permit the recording of protected information and those include:

- the making of a record which is required for work with the Department; or
- the making of a record which is required or authorised by or under a law of the Commonwealth, a State or a Territory; or
- the making of a record which is required by an order or direction of a court or tribunal.

It is clear from the structure of the legislation that recording anything that happens in immigration detention is prohibited, virtually without exception. That means that procuring and screening video recordings like those shown of the Manus Island and Nauru riots could amount to aiding and abetting a criminal act.

Permitted Disclosures under the Border Force Act

An entrusted person can make a disclosure if:

- (a) the disclosure is authorised by the Secretary of the Department; or*
 - (b) the disclosure is required for their work with the department; or*
 - (c) the disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or*
 - (d) the disclosure is required by an order or direction of a court or tribunal; or*
 - (e) the information in the disclosure has already been lawfully made available to the public; or*
 - (f) the disclosure is about a particular person and that person or body and the person or body has consented to it; or*
 - (g) the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual and the disclosure is for the purposes of preventing or lessening that threat*
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Going Public

Under the *Border Force Act* it is illegal to disclose protected information that an **entrusted person** obtains in their work capacity to anyone outside of their work unless it falls within a legal exclusion or is already in the public domain. A list of exclusions under the *Border Force Act* appears in the adjacent breakout box.

The prohibition would extend to discussions with a spouse, family members, friends, journalists, advocates, authorities or professional colleagues about any information related to immigration detention.

The Public Interest Disclosure Act (the Whistle-blower law)

The Whistle-blower law **does not protect the recording of information** at all, however in some circumstances it can protect an individual from being prosecuted for making a **public interest disclosure** (see definition below).

If an individual makes a disclosure that meets that test then the disclosure will be protected from any civil, criminal or administrative liability (including disciplinary action).

What disclosures are protected under the Whistle-blower Act?

Broadly speaking, a **public interest disclosure** is a disclosure of information, by a public official, that is:

- a disclosure **within the government**, to an authorised internal recipient or a supervisor, concerning suspected or probable illegal conduct or other wrongdoing (referred to as "disclosable conduct"); or
- a disclosure to **anybody**, if an internal disclosure of the information has not been adequately dealt with, and if wider disclosure satisfies public interest requirements; or
- a disclosure to **anybody** if there is substantial and imminent danger to health or safety; or
- a disclosure to an **Australian legal practitioner** for purposes connected with the above matters.

Despite its existence since 2013, there is no report of the Whistle-blower Law ever being invoked as a defence to a criminal charge. This may be because it is too complex or that no one has required it or more worryingly because the Whistle-blower Law is so restrictive that it does not provide effective protection to genuine whistle-blowers.

Aiding and Abetting a Criminal Offence – Journalists Beware

Journalists or documentary makers can commit a crime if they aid or abet the recording or disclosure of protected information.

Anyone who assists or encourages a recording or the making of a disclosure of protected information is potentially committing an offence under the Commonwealth Criminal Code which provides that

“A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.”



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Limits to protection under the Whistle-Blower Law.

There are limits to protection under the Whistle-blower Law. That law does not protect:

- disclosures about Government policy or the actions of a Minister that an individual does not agree with;
- disclosures that are, on balance, contrary to the public interest;
- disclosures about certain conduct connected with Courts, Tribunals or intelligence agencies; or
- disclosures that are knowingly false or misleading.

It should be of particular concern to whistle-blowers that conduct is **not** disclosable if it relates only to a policy or proposed policy of the Commonwealth Government or action that has been, is being, or is proposed to be, taken by a Minister with which a person disagrees.

Prerequisites

There are bureaucratic requirements that need to be met before a disclosure can be made public under the Whistle-blower Law. Unless it is a life or death disclosure, there is a need to undertake internal complaints processes before any public disclosure of information occurs, which is likely to substantially delay public disclosure and have a chilling effect.

Under the law, Whistle-blowers have to make complex legal assessments about whether their disclosure has been "*adequately dealt with*" under internal review procedures and they also have to assess whether the disclosure "*is not, on balance, contrary to the public interest*" before they can speak out. Once they go public, disclosure must be limited to the issue which was the subject of the original internal complaint. Too much disclosure is not protected and there is little guidance about where the boundaries lie.

Finally, the Whistle-Blower Law is directed at disclosure of suspected or probable illegal or other wrongdoing. Unless it relates to a matter of life or death, the Act would not normally protect the clinical and ethical consultations about patients that take place between medical practitioners, psychologists or social workers within immigration detention centres and their colleagues or specialists outside the immigration system or the closure of a school in detention or a failure to make sufficient tampons or sanitary napkins available to women.

If a disclosure doesn't fall within the protections in the "Whistle-blower Law" or the exclusions to the Border Force Act an entrusted person may have committed a criminal offence and be subject to up to 2 years imprisonment.

A person who aids and abets the entrusted person to disclose or record protected information is also guilty of an offence under the Commonwealth Criminal Code.

Case Studies: Potential Criminal Acts

Case Study 1

You are a nurse or doctor working in a detention centre. You are at a social gathering where someone says to you that all asylum seekers are not genuine and are economic migrants. Without revealing any identifying details of individuals you relate aspects of stories patients have told you about their experiences in their countries of origin and journey to Australia.

Case Study 3

You are a doctor working in a public hospital who has been managing a patient who is from a detention centre. This is an interesting clinical case and you present the (de-identified) case at a clinical meeting.

Case Study 2

You are a doctor working in a public hospital and have treated a number of asylum seekers who have been admitted for psychiatric treatment. As part of their care you have conducted routine mental health outcome measurements that have been submitted to the state health department. You collate the de-identified data from these cases and write a paper to present at a conference.

Case Study 4

You are a social worker and you record images of a riot in a detention centre on your iphone because you are concerned about your safety and that of the vulnerable men women and children in your care.

Case Study 5

You are a journalist and you ask a social worker on Nauru to film the camp and send the video to you.

Case Study 6

You are a teacher and you tell a new employer that you are looking for employment because the school on Nauru has been closed.

Case Study 8

You are a caseworker and you tell a journalist that women are not provided with sufficient tampons or sanitary napkins in detention.

Case Study 7

You are a social worker and you contact a mentor to discuss an ethical question regarding your work on Manus Island.

Case Study 9

You are a social worker and when a detainee complains to you about their treatment in detention over dinner you say that the same thing has happened to others in detention previously.