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

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

The Refugee Advice & Casework Service (RACS) is a dedicated refugee legal centre and has been assisting people seeking protection in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on the Bill. The provisions in the Bill effectively represent a broadening of the already-extensive provisions relating to certain kinds of migration decisions in the *Migration Act 1958* (Cth), and the expansion of those to the *Australian Citizenship Act 2007* (Cth). Within the reformatting of the *Acts*, there are clear and deliberate efforts to insulate the Minister and other government actors from judicial oversight, and to prevent evidence from being presented to courts and the parties before them.

RACS has read and endorses the submission by the Refugee Council of Australia (RCOA) and seeks only to provide some additional comments based on our experience as practitioners in this area. RACS considers it is vital that lawmakers and other stakeholders understand just how frequently migration and citizenship applicants encounter barriers to information disclosure on national security-related pretexts. In an increasing number of cases, "non-disclosable" information can be essentially determinative of whether a person is granted a vital migration outcome or not. In humanitarian cases, these stakes can boil down to literally life or death; in citizenship matters, they are at a minimum about whether a person will be permitted to "belong" to the Australian community in the fullest sense.

RACS accepts that there is a need for national security considerations in certain migration and citizenship cases, nonetheless, these need to be exercised balancing the rights of individuals. As practitioners in this area, RACS believes that much of the Australian public would be shocked at the enormous shadow cast by expansive laws justified on this basis into areas to which national security appears to have little direct connection. In this regard, we reiterate the RCOA's concerns regarding the fallibility of non-disclosable information. In many cases, RACS has had to guess the content of non-disclosable information and obtain it through other means. In most cases it has not been particularly sensitive – demonstrated by the fact that it has been obtainable through other channels – but the process of acquiring it has caused considerable, unnecessary delay in processing applications. We seek to emphasise that many people seeking asylum not only at risk of return to situations where there are deprived of their liberty and *detained in Australia* throughout this process.

A further concern is that, as practitioners, we have witnessed the use of powers creep into practice for purposes beyond those for which they were created. For instance, it has become standard practice by the Department of Home Affairs in recent years to obtain Austrac records of applicants for Protection visas, showing any money transfers sent and received by them with overseas recipients. Prospective refugees about whom no national security claims whatsoever have been raised are nonetheless routinely required to account for and justify all transactions sent and received from relatives and friends internationally, and in many cases have their applications refused if they cannot do so. The provisions governing Austrac are embedded in the *Anti-Money Laundering and Counter-Terrorism Financing Act*

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2006 (Cth). It can be readily seen from the title of that *Act* that its primary purposes were undoubtedly worthy; but, also, that it is hard to imagine that the public and the Parliament in passing that *Act* intended that it be used for the wholesale interrogation of asylum seekers' family relationships with no connection at all to either alleged money laundering or terrorism. However, sadly, the "mission creep" visible in this expansive use of provisions intended to address transnational criminal and extremist networks is illustrative of the tendency of recent Australian national security legislation to be drafted in overly broad terms with insufficient oversight.

Other such secrecy-related pitfalls abound in RACS daily practice, and have multiplied in recent years. Freedom of Information requests – essential for visa or citizenship applicant to understand the context of their case and respond to Departmental objections – are returned outside statutory deadlines and with broad and sweeping redactions. In several cases where the redacted material is exposed, the information redacted has been inoffensive and often publicly available in other contexts. Visa refusals of vulnerable persons occur on the basis that they are "suspected of being a risk to national security" – but with no way of knowing why they are seen as such a risk, and thus no way to offer an explanation for whatever conduct of theirs has been interpreted as suspicious.

The Department's overly broad use of other secrecy provisions already contained within the *Act* was illustrated by a string of cases regarding non-disclosure certificates provided to the Administrative Appeals Tribunal. These cases revealed that the Department had developed a routine [and unlawful] practice of simply declaring documents could not be disclosed based on no considered or legal justification but because they contained information relating to an "internal working document".[1] This is no basis on which to deny an applicant procedural fairness, or knowledge of the case against him. RACS feels that this illustrates both the tendency of administrative departments to expand the boundaries and use of such legislation where left unchecked, and the importance of robust judicial review mechanisms in preventing such abuses – both of which form good reasons to oppose this Bill in its current form.

To be clear, RACS understands that a small number of extreme cases may warrant particularly careful measures being taken in order to protect the Australian community. However, the centralisation of sole decision-making authority into the person of the Minister, and the stripping away of judicial oversight and accountability, means that the use provisions such as those of this current Bill have inevitably ballooned to operate to strip away procedural fairness from some of the most vulnerable visa and citizenship applicants in the country.

Sarah Dale

Centre Director & Principal Solicitor | Migration Agent

Refugee Advice & Casework Service (RACS)

[1] See, for instance, *MZAFZ v Minister for Immigration* [2016] FCA 1081