VISA
CANCELLATIONS
WORKING GROUP

SUBMISSION:
***MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING INFORMATION PROVISIONS) BILL* 2020**

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1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission in response to the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020* (**the Bill**).

2. The Working Group has made submissions regarding proposed amendments to Australia's migration legislation in the past. Particularly relevant now are our concerns that the proposed Bill departs from fundamental principles of the rule of law, including that restrictions on rights be limited and knowable and that discretion can only be exercised within strict legal parameters. The Working Group considers the Bill to undermine basic procedural fairness and has the potential to seriously contravene Australia's *non-refoulement* obligations under international law.

3. In brief, the Working Group submits that:

    - The definition of what constitutes 'protected information' under the Bill **lacks sufficient clarity** and thus provides considerable **undue discretion** to Minister for Home Affairs and the Executive;
    - Applicants or Australian citizens may be precluded from reviewing adverse information, thereby **denying** those individuals **natural justice** in their own matter;
    - If the applicant or Australian citizen is represented, her/his legal representative may also be precluded from having access to certain 'confidential' or 'protected information', thereby **denying** the applicant or Australian citizen **proper legal representation**;
    - The denial of natural justice and representation is **disproportionate** to the Bill's stated purpose because visa cancellation and citizenship cessation **inalterably effect** an individual's life, sometimes placing it at **extreme risk**, and inability to challenge adverse information may result in **indefinite detention**; and
    - Courts will be **unnecessarily burdened** by having to make swift and complex decisions as to whether such 'protected information' should be disclosed to the substantive parties to a matter.

4. For these reasons, the Working Group **strongly recommends** the Bill **be rejected**.

LACK OF CLARITY AND UNDUE DISCRETION TO THE EXECUTIVE

5. The proposed Bill will apply to any information that is '*communicated to an authorised Commonwealth officer by a gazetted agency on condition that it be treated as confidential information*'[1] and as such, becomes 'Protected Information.'

6. There is no explicit definition of the types of information that may constitute 'confidential' for this purpose; the only requirement being that it is communicated by a 'gazetted agency'.

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[1] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52A(2)(1)(a).

The definition of gazetted agency is broad in its application, while the process of gazetting an agency lacks wider scrutiny.[2]

7. The Bill provides that this 'Protected Information' provided from such 'gazetted agencies' may be withheld from the individuals it addresses—despite potentially being used in decisions against them. While the court may *imply* a presumption that information *will be disclosed* unless the information meets a criterion listed in s 503C(5), no presumption is explicitly provided in this Bill.

8. This lack of clarity provides undue discretion to the Executive—here, to the Department of Home Affairs and the Minister himself. While the Bill provides for judicial oversight, judicial oversight should be *in addition to*, not supplementary for, narrowly defined criteria for which information should not be disclosed. For example, the Bill describes what courts must take into account in making an order to prohibit disclosure based on 'real risk of damaging the public interest,' but does not clarify what *decision-makers,* prior to the court, must consider in seeking to prevent its disclosure.

9. Furthermore, it appears that the judicial oversight only be triggered when an individual has the ability or the resources to challenge a decision by the Minister or his delegates in court. This is because the Explanatory Memorandum indicates the purpose of this Bill is to:

   > [R]espond[] to the High Court of Australia… decision in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (*Graham* and *Te Puia*). In that decision, the High Court held that the Minister cannot be prevented from being required to divulge certain information to the High Court… or to the Federal Court of Australia… in order to review a purported exercise of power by the Minister to refuse or cancel a visa on character grounds, or revoke or set aside such a decision, under sections 501, 501A, 501B and 501C of the Migration Act.[3]

   As will be discussed below, individuals facing visa cancellation already face significant hurdles to challenging a decision made by the Minister or his delegates. Bringing a case to court requires resources and representation that many facing cancellation do not have.

10. The Working Group submits the greater discretion provided to the Minister and the Department of Home Affairs is 'undue' because the Government has provided no indication that further withholding or protecting information is needed.

11. The Explanatory Memorandum states that:

   > [T]he Bill encourages law enforcement agencies to continue to provide confidential information to the Department and the Minister to make fully informed decisions in the refusal or cancellation of visas or citizenship on character grounds to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. It does so by protecting from disclosure, confidential information that is critical to assessing the criminal background or associations of non-citizens in character-related decision-making.[4]

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[2] Migration Act *1958*, s 503A(9).
[3] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 2.
[4] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 46.

12. There is no information in the Explanatory Memorandum to indicate that law enforcement agencies were withholding any information from the Department of Home Affairs for fear of disclosure in the first place.

13. The Explanatory Memorandum continues:

> [T]he current framework which protects against the harmful disclosure of confidential information (which is designed to protect national security related information) does not adequately capture the type of confidential information which is critical to character-related decision-making, such as a person's criminal background or associations. The Bill upholds the protection of confidential information regarding individuals who pose an unacceptable risk to the Australian community and who consequently have their citizenship refused or revoked, or a visa refused or cancelled.[5]

14. By making reference to the 'current framework,' the Explanatory Memorandum likely refers to information-sharing between the Department of Home Affairs and agencies such as the Australian Security Intelligence Organisation (**ASIO**). Thus, the Bill seeks to *expand* information collection from domestic law enforcement agencies such as the police. 'Protected information' that regards 'an a person's criminal background or associations' will already be known to an applicant, and therefore is not information that needs protection. If the information is known and does not need protection, it should be disclosable. 'Protected information' regarding a person's criminal background or associations that is not already known to the applicant and is credible and serious should be prosecuted, at which point the individual would have the opportunity to face this information in court. If the 'protected information' regarding an person's criminal background or associations is not credible or serious enough to be prosecuted, this suggests that such information is either not credible or not relevant to the individual to be assessed in their matters relating to visas or citizenship.

DENIAL OF NATURAL JUSTICE AND REPRESENTATION

15. The proposed Bill presents a concerning departure from the principles of natural justice by subjecting applicants to a process that lacks transparency and procedural fairness. This is because the Bill would preclude certain applicants and their legal representatives from having access to certain 'confidential information' provided to the Department of Home Affairs in relation to their case.[6]

16. Applicants are already subjected to an inefficient system that is both cost-prohibitive and difficult to navigate. Cancellation of visas on character grounds, which this Bill's Explanatory Memorandum appears to address, are particularly complex. There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to respond to a letter within tight timeframes, or by failing to lodge an application for merits review within the strict timeframes of the legislation, including due to lack of access to legal assistance. This can occur due to a change of address, an inability to comprehend what can be obscure wording,[7] or a lack of

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[5] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 46.
[6] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52A(2) and (3), and item 9, ss 503A(2) and (3).
[7] In *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 (18 April 2019), per Perram J at [62], the Full Court of the Federal Court described the description of timeframes for merits review in a Protection (subclass 866) visa refusal as '*piecemeal, entirely obscure and essentially incomprehensible*.' Cancellation or

access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

17. Cancellations or revocations may already occur on the basis of adverse security assessments made by ASIO, which is not released to an individual on similar grounds as included in this Bill. Being unable to access ASIO security assessments has been a well-documented and much criticised aspect of Australia's immigration regime.[8] As noted, this Bill intentionally broadens the sources from which information may be withheld, thus increasing the potential inability of an individual to 'know the case against them.'

18. Furthermore, the Bill prohibits both the individual at issue and their legal representative from both knowing what information exists and from participating in the proceedings regarding the use of that information. This is because, under s 503C(3)(a) of the Bill, only parties that are 'aware of the content of the information'—which is earlier defined as confidential information shared with the Department of Home Affairs—are permitted to make submissions to the court on disclosure. Preventing legal representatives from accessing such information prevents applicants from receiving adequate legal advice on their extremely consequential proceedings. Preventing applicants from accessing such information removes their right to respond to material that has been considered in a decision against them.

DISPROPORTIONATE RESTRICTION OF RIGHTS AND RISK OF INDEFINITE DETENTION OR REFOULEMENT

19. While that the Explanatory Memorandum states this Bill is compliant with Australia's obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**), the restrictions on rights of individuals at issue in this Bill are clearly not proportionate to the Bill's intended purpose. This is because visa cancellations can have 'potentially life-destroying' effects:[9] protracted loss of liberty (including indefinite detention), separation from family (sometimes permanent), and serious psychological consequences.[10] The risk of such dire consequences is increased where an individual cannot receive a fair hearing and is not able to respond to all adverse information used to decide their cancellation. As the Government has provided no evidence that greater secrecy in decision-making is necessary, it cannot be said that this risk to individuals' fundamental rights is warranted.

20. In addition to this disproportionate restriction, the inability to respond to adverse information regarding visa cancellations may place an individual at risk of loss of refugee protection. This loss of protection may result in either: (1) forcible return to serious harm or other harms in breach of international obligations (being 'refouled'—a breach of Australia's non-derogable obligations under the *Refugee Convention);*[11] or (2) indefinite detention, as the individual no longer has a visa but cannot be removed to their country of origin. Notably, the Full Federal Court has held that procedural fairness should be afforded

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refusal notifications are not unlike these refusals.

[8] See for example, Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law,' *Melbourne Journal of International Law,* vol 13: 2012, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1687381/Saul.pdf.

[9] Per Allsop CJ in Hands v Minister for Immigration and Border Protection [2018] FCAFC 225 (17 December 2018) at [45].

[10] A leading recent review of studies regarding immigration detention and health, for example, found that there "*is a significant relationship between detention duration and mental health deterioration*" and that "*detention should be viewed as a traumatic experience in and of itself*": see M von Wethem et al, 'The impact of immigration detention on mental health: a systematic review", BMC Psychiatry (2018) 18:382.

[11] *Convention Relating to the Status of Refugees*, 1951, article 42(1).

where *non-refoulement* issues are considered[12]—procedural fairness that would be eroded in the operation of this Bill.

UNNECESSARY BURDEN ON COURT SYSTEM

21. The proposed Bill will unnecessarily burden the court system. By way of example, the Federal Court of Australia's Annual Report 2019-2020 indicates that 'Migration Appeals and Related Actions' are by far the greatest percentage of the Court's appeals workload.[13] A 2018 report for the Commonwealth Attorney-General's Department describes the Federal Circuit Court's migration workload as 'around half.'[14] Notwithstanding the difficulty of appealing decisions for judicial review, each time 'Protected Information' is used as a part of a decision, the proposed Bill will require the court to hear submissions from the Department as that information will be needed for that decision's appeal. As such, courts will be burdened by having to make decisions on these matters as part of the ordinary exercise of their authority.[15]

22. As the Working Group has noted previously, the ongoing dysfunction, delay, and opacity of the cancellation system is a cause for concern. This Bill only increases such issues by adding an additional process for review of information that could have been disclosed, if even redacted as needed, at first instance.

CONCLUSION

23. On the basis of the above, the Working Group **strongly recommends** that the proposed Bill **be rejected**.

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[12] *CLM18 v Minister for Home Affairs* [2019] FCAFC 170.
[13] Federal Court of Australia, *Annual Report 2019-2020,* 132, https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf.
[14] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts,* Final report, April 2018, https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf.
[15] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52B, *Note 1: In addition, the High Court, the Federal Court of Australia or the Federal Circuit Court may order specified information covered by subsection 52A(1) to be produced or given under section 52C.*