

## Refugee Legal:

### Submission to the Senate Legal and Constitutional Affairs Committee: *Migration Amendment (Validation of Decisions) Bill 2017*

#### 1 Introduction – Refugee Legal

- 1.1 Refugee Legal (formerly the Refugee and Immigration Legal Centre) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.<sup>1</sup> Since its inception over 28 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.
- 1.2 Refugee Legal specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection (**DIBP**) Immigration's Advice and Application Assistance Scheme (**IAAAS**) and a member of the peak DIBP-NGO Dialogue and the DIBP Protection Process Reference Group. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.
- 1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Validation of Decisions) Bill 2017 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise, as briefly outlined above.

#### 2 Outline of submissions

- 2.1 We recommend that the *Migration Act 1958* (**the Act**) not be amended in the way proposed by the Bill for the following reasons:
- 2.2 We have identified the following principal concerns with the amendment proposed by the Bill:
  - a) It amounts to an entirely inappropriate and profoundly concerning encroachment on the jurisdiction of the courts and is fundamentally inconsistent with the separation of powers mandated by Chapter III of the Commonwealth of Australia Constitution Act (the Constitution) and the rule of law; and
  - b) It would potentially result in a number of people who may have been unlawfully denied a fair hearing of their claims again subject to further unjust denials of access to due process under the law.
- 2.3 Both of the above matters are developed below.

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<sup>1</sup> Refugee Legal (Refugee and Immigration Legal Centre) is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. Refugee Legal brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

### **3 The proposed amendment**

- 3.1 Currently, s 503A of the Act purports to protect from secondary disclosure, certain information sourced from law enforcement and intelligence agencies and provided to the Minister for Immigration and Border Protection (**the Minister**) or an authorised DIBP officer for the purpose of character-based decisions under the Act. Critically, s 503A provides that an authorised migration officer and the Minister “must not be required to divulge or communicate the information to a court, a tribunal a parliament or parliamentary committee or any other body or person”.<sup>2</sup> That provision states this immunity from disclosure is lost only if the Minister exercises his or her personal non-compellable power to make a declaration permitting the disclosure to a specified court or tribunal.
- 3.2 Following this, s 503A operates in practice to mean that a decision to cancel a person’s visa on character grounds may be made based on specified information that the person has had no opportunity to access or comment on. And further, that provision operates to prohibit disclosure of that protected information not only to a tribunal for merits review processes, but also to a court of law, if the legality of that character decision is challenged.
- 3.3 The one amendment proposed by the Bill seeks to insert new s 503E, which purports to retrospectively to validate character decisions made under the Act in reliance on s 503A, in the event that provision is found by a court to be invalid under law. The Explanatory Memorandum to the Bill provides that the amendment proposed “is in response to current proceedings in the High Court of Australia, *Graham and Te Puia*, in which the validity of section 503A of the Act is being challenged”.<sup>3</sup> Similarly, in the Assistant Minister’s Second reading Speech it was stated: “[t]he measures in this bill are in response to current proceedings in the High Court of Australia, in which the validity of section 503A is being challenged”.<sup>4</sup> No other policy rationale has been provided in support of the amendment.
- 3.4 The High Court proceedings in *Graham and Te Puia*<sup>5</sup> concern two plaintiffs whose visas were personally cancelled by the Minister on character grounds in circumstances where the Minister relied on information that was purportedly protected from disclosure by s 503A of the Act. The plaintiffs contend that s 503A is invalid by reason of the limitation it purports to impose on a federal court being inconsistent with its judicial powers and Chapter III of the Constitution. The High Court has reserved its judgment in this case.
- 3.5 In the event the High Court accepts the plaintiffs’ grounds of contention and s 503A is thereby found to be invalid, the law would operate to provide that any other decisions previously made affecting other persons that relied on s 503A would be liable to being found to be affected by jurisdictional error (and as a consequence, not be lawful decisions). Critically, such a finding by a court would allow those persons to have their

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<sup>2</sup> s 503A(2)(c).

<sup>3</sup> Explanatory Memorandum, [6].

<sup>4</sup> Parliament of Australia, House of representatives, Hansard: Bills, Migration Amendment (Validation of Decisions) Bill 2017, Second Reading Speech, 21 June 2017.

<sup>5</sup> *Graham v. Minister for Immigration and Border Protection* (M97/2016); *Te Puia v. Minister for Immigration and Border Protection* (P58/2016).

case re-considered by the decision-maker according to law.

- 3.6 New s 503E seeks to pre-empt and negate the consequences of the High Court decision in the event it is in favour of the plaintiffs, by inserting new section 503E. This new provision essentially provides that, in the event s 503A is found to be invalid, any decision made by the Minister or his or her delegates in reliance on that provision is not an unlawful decision for the purposes of the Act.
- 3.7 Section 503A was first inserted in the Act in 1998<sup>6</sup> and in our experience it is likely that a substantial number of individuals may be affected if the High Court finds that provision to be legally invalid in part or whole. This amendment purports to apply retrospectively to legally validate all past decisions for the purposes of the Act to prevent those people affected from having their case re-considered according to law.

#### **4 Separation of powers**

- 4.1 It is our submission that this proposed amendment would amount to an entirely inappropriate encroachment on the jurisdiction of the Judiciary by the Executive and Legislature and is inconsistent with the doctrine of the separation of powers.
- 4.2 The Constitution provides for power to be balanced between the judiciary, legislature and executive, so each can act as a check on the power of the other. This is commonly referred to as the doctrine of the separation of powers. It ensures the executive remains fair and accountable by creating checks and balances on its use of power. In this regard, it is essential under the rule of law that the use of the executive's power is lawful and can be legally challenged and determined by the judiciary. This independence of the judiciary and its critical role within that power sharing model under the Constitution is undermined if the legislature purports to prevent the judiciary from examining the legality of the conduct of those who are bound by those rules of law.
- 4.3 In *Plaintiff S157/2002 v Commonwealth*<sup>7</sup> the High Court entrenched judicial review of administrative decision-making for jurisdictional error under s 75(v) of the Constitution as a 'fundamental constitutional principle'.<sup>8</sup>
- 4.4 The proposed amendment would in practice operate to provide that irrespective of whether s 503A is inconsistent with the Constitution, or is otherwise not a valid law for any other reason, any decision made prior to the commencement of the amendment relying on that invalid law (which would otherwise generally make that an unlawful decision for that reason), is not an invalid decision for the purposes of the Act. As above, the government's explanatory documents confirm the policy rationale for this amendment is entirely limited to restricting the application of the High Court decision to persons in similar circumstances.

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<sup>6</sup> *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Act 114 of 1998), Schedule 1, Item 26.

<sup>7</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>8</sup> *Ibid*, at 511 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. See also Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law Under the Australian Constitution' (2003) 14(4) Public Law Review 219.

- 4.5 We are profoundly concerned that the proposed amendment offends the principle of the separation of powers and is inconsistent with Chapter III of the Constitution, separately and collectively, in the following respects:
- By purporting to pre-emptively negate the legal implications of a High Court ruling by artificially deeming a law to be valid under an Act despite it having been or being liable to being found to be unconstitutional or otherwise legally invalid; and
  - By purporting to restrain the judiciary's power to undertake judicial review of administrative decisions under s 75(v) in Chapter III of the Constitution by retrospectively immunising s 503A-related decisions from judicial review.

## **5 Right to a fair hearing**

- 5.1 We submit that the proposed amendment may result in a number of people unlawfully denied a fair hearing of their claims being further denied that legal right. Such a fundamental denial of due process is contrary to fundamental principles of Australian law.
- 5.2 In the event the High Court finds s 503A to be invalid in whole or in part, it would generally be open to persons affected by an earlier character decision that relied on s 503A to withhold critical information that was determinative in their case, to apply to a court for judicial review of that decision. If a court found that decision to have been unlawful (that is, affected by jurisdictional error), in our experience the most common remedy would be for the court to remit the decision back to the original decision maker to decide the matter according to law. This would include complying with the obligation to afford procedural fairness in respect of the adverse information that would be no longer protected by s 503A in accordance with any judgment of the High Court.
- 5.3 The proposed amendment purports to operate to preclude persons affected by s 503A from seeking this legal remedy and being afforded procedural fairness. In doing so, this amendment would deny persons previously unlawfully denied a fair hearing of their claims a further opportunity to access that critical legal safeguard.
- 5.4 It is important to note that allowing affected persons to access a fair hearing of their claims in the absence of s 503A does not mean that the relevant sensitive information previously protected by that provision would, as a necessary consequence, be disclosed to that individual. This is because the common law contains its own robust strict protections on the disclosure of sensitive information, as detailed below.
- 5.5 The common law hearing rule requires administrative decision-makers to provide persons with a real and meaningful opportunity to respond to adverse information that is credible, relevant and significant to the decision to be made.<sup>9</sup> This common law procedural fairness rule is a foundational principle of due process as it protects a person's right to a fair hearing so they are provided with sufficient information to understand and respond to information that adversely affects their interests.
- 5.6 Relevantly, judicial authority strictly provides that the scope of what information must be disclosed by administrative decision-makers to affected individuals is determined by

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<sup>9</sup> *Kioa v West* (1985) 159 CLR 550 per Brennan J at 629.

such matters as whether that information relates to sensitive subject matter such as national security, law enforcement or diplomatic relations with other countries.<sup>10</sup> We acknowledge the case law in this regard and this underscores the critical need of the Executive to protect from disclosure information that may undermine national security, criminal justice legal frameworks and foreign policy.

- 5.7 While acknowledging the critical importance of such public immunity protections, judicial authority on this issue demands a careful balance of these public immunity considerations with the principle of a right to a fair hearing (that is, a person's right to know the substance of the case against them so that they can reasonably respond to the determinative issues that will decide the outcome of their case). In this regard, the common law does not, as a matter of law, generally extend public interest immunity to forms of information solely on the basis that they derive from a particular source or are of a particular character (for example, information sourced from a national security government agency or that which relates to ongoing criminal investigations by Australian Federal Police). Instead, judicial authority demands that, wherever possible, the information be put to the person affected where it can be done so while preserving that public interest immunity (for example, by removing the source of the information or the names of the persons concerned as to de-identify the content as to not prejudice those matters that attract public interest immunity).<sup>11</sup> In this regard, the common law provides for strict public immunity protections while balancing the obligation to give a person a fair hearing of their claims. Ordinarily, the question is not whether procedural fairness is owed – it is; the question is what the scope of procedural fairness is in the particular circumstances.
- 5.8 On this basis, it is our submission that s 503A is not only inconsistent with the right to a fair hearing but is also entirely superfluous, the law already provides a robust framework preventing the disclosure of sensitive information. For this reason, any apparent policy rationale to preserve the validity of s 503A (for persons previously affected by this provision) to avoid the risk in the future of those persons accessing sensitive information that may prejudice Australia's national security and criminal justice systems, is entirely unfounded; adequate legal protections already exist.
- 5.9 Following the above, we additionally submit that the amendment proposed by the Bill should not proceed for the following reasons:
- It may result in a number of people unlawfully denied a fair hearing of their claims being further denied of that fundamental legal right; and
  - s 503A serves no useful purpose in protecting information from disclosure that may prejudice Australia's national security and criminal justice systems and if it is found to be invalid by the High Court the common law provides sufficiently robust and strict public immunity protections for such information in the event persons previously adversely affected by that provision were found eligible for a re-hearing of their claims.

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<sup>10</sup> *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46; and *BSX15 v Minister for Immigration and Border Protection* [2017] FCAFC 104.

<sup>11</sup> *Ibid.*

## **6 Retrospective application**

- 6.1 Refugee Legal is profoundly concerned about the retrospective effect of the proposed amendments and the adverse impact this would have on individuals who may be found to have been unlawfully denied or stripped of their visa and permission to remain in Australia.
- 6.2 Enjoyment of common law rights and freedoms apply not only to citizens, but also to non-citizens.<sup>12</sup> This includes the presumption against retrospective operation of the law, and the requirement for appropriate justification for any such laws.
- 6.3 This effect of the proposed amendments offends against the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints "justified expectations".<sup>13</sup>

## **7 Case study**

- 7.1 We provide the following case study to assist with illustrating our above submissions.

*Mary is a New Zealand citizen and single mother with two Australian citizen children. Mary lived in Australia since she was 2 years old as a permanent resident. All of her family reside in Australia and she has never returned to New Zealand and is not aware if she has family there.*

*Mary is a victim of family violence perpetrated by the children's' father, Ben (also a New Zealand citizen). Mary recently separated from Ben, moving with the children to live with her sister. Shortly after Mary moved out of her and Ben's residence he was convicted of a number of drug related offences and sentenced to a term of imprisonment.*

*Recently, the Australian Federal Police (AFP) provided information to DIBP in confidence that included that as part of a finalised investigation that led to Ben's conviction, the AFP obtained information indicating Ben was an active member of an organised criminal network, and prior to that Ben's place of residence was believed to be one of many 'grow houses' used by that criminal organisation to cultivate cannabis (the AFP information).*

*Following this, a DIBP officer sent Mary a notice of intention to consider cancellation of her permanent visa under s 501(2). That letter stated that DIBP had received information that may form the basis for a reasonable suspicion that she did not meet the character test in s 506 for reason of her being not of 'good character', having regard to her past and present criminal and general conduct. That letter did not disclose any particulars of the AFP information that DIBP was purporting to rely on. That DIBP letter also explains the consequences of a decision to cancel her visa, including immigration detention and removal from Australia.*

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<sup>12</sup> *Bradley v Commonwealth* [1973] HCA 34; 128 CLR 557, at [26].

<sup>13</sup> HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276.

### ***Current law***

- 7.2 Under the current law, s 503A would operate to prohibit DIBP and the Minister from disclosing any of the AFP information to Mary making it exceptionally hard for her to provide a meaningful response and effectively denying her a right to a fair hearing of her case. In the event DIBP (and not the Minister personally) made a decision to cancel Mary's permanent visa she would be entitled to apply to the Administrative Appeals Tribunal (**the AAT**) for merits review of that decision. However, under s 503A, DIBP would be prohibited from disclosing the AFP information to the AAT unless the Minister personally intervened to permit that disclosure. Even if the Minister acted on that non-compellable personal power to permit that disclosure, the AAT would be prohibited under s 503A from disclosing that information to Mary, and again effectively denying her a meaningful hearing of her case.
- 7.3 If Mary is not successful at the AAT she could apply to a Federal court for judicial review of the AAT decision, including on the basis that she was denied a fair hearing of her claims. However, again s 503A would preclude the AFP information from being disclosed to the court unless the Minister personally intervened to permit it to do so. It is noted that, where such information is not available to a court, it would severely restrict that court's capacity to consider the merits of Mary's claim that she was denied a fair hearing, and again effectively deny Mary a fair hearing of her claims.

### ***High Court case***

- 7.4 In the event that the High Court found s 503A to be unconstitutional or otherwise invalid, then as a general rule Mary would be entitled to seek relief from a court directing the AAT (or DIBP if she did not apply to the AAT, or the Minister if he or she made the decision personally) to reconsider the decision to cancel Mary's visa according to law (including without having regard to s 503A).
- 7.5 Upon reconsideration, in the absence of s 503A, the decision-maker would generally be obliged under law to provide to Mary the substance of all adverse information that is relevant to the decision to cancel her visa. However, that decision-maker would be bound by common law principles of public interest immunity so as not to disclose any sensitive information that would prejudice such critical matters as ongoing criminal investigations by the AFP, but would also be obliged to disclose any information that does not attract that immunity and is relevant to the decision at hand. In Mary's case, the scope of the information needing to be disclosed to her may include (subject to whether that or related AFP investigations were ongoing, and consultations with that government agency) that the Department had information received from law enforcement authorities in Australia indicating she may have been associated with members of an organised criminal network and been personally involved in or had knowledge of the commission of illegal activities relating to drugs. Having been equipped with that information Mary would for the first time be able to provide a meaningful and informed response in support of her case.

### ***The proposed amendment – s 503E***

- 7.6 In Mary's circumstances, if the High Court found s 503A to be unconstitutional or otherwise invalid but the amendment proposed by the Bill was enacted, that new law

would purport to operate to deny her any legal remedy if she sought to challenge in court the decision to cancel her visa. The amendment purports to do this by creating a legal fiction in the Act that operates to provide that even if the decision to cancel her visa was not lawful, it was not an invalid decision for the purposes of the Act and therefore cannot be the subject of relief from a court of law.

## **8 Conclusion**

- 8.1 Refugee Legal is profoundly concerned that the amendment proposed by the Bill would represent an entirely inappropriate encroachment on the jurisdiction of the Judiciary by the Executive and Legislature and is inconsistent with the Constitution, the doctrine of the separation of powers and the rule of law.
- 8.2 Refugee Legal also holds significant concerns that, in practice, the amendment may unjustly deny persons who in the past were unlawfully deprived of a fair hearing from a further opportunity to access due process in being afforded that fundamental legal right.
- 8.3 For these reasons we submit that the Act not be amended in the way proposed by the Bill.

**Refugee Legal**

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Defending the rights  
of refugees.

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