

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation Committee
Migration and Citizenship Legislation Amendment (Strengthening Information
Provisions) Bill 2020

2 March 2021

QoN Number: 05

Subject: Countries with similar legal framework

Asked by: Kim Carr

Question:

Senator KIM CARR: Yes, sure—they'll take this on notice. Mr Rice, in terms of international precedents, this legislation wouldn't exist in the United Kingdom, would it? The submissions here have indicated to us that this type of legislation would be challenged in the House of Lords. Can you tell me of any country of a similar legal framework to ours where legislation of this type exists?

Mr Deane: I think we'd take that on notice.

Answer:

The amendments to the Migration Act respond to a High Court decision which held that the Minister cannot be prevented by section 503A of the Act from being required to divulge confidential information covered by that section to the High Court or Federal Court in judicial review proceedings involving character decisions.

The Bill also provides for amendments to the Citizenship Act which broadly replicate the proposed Migration Act amendments to protect confidential information used in character decision-making in the citizenship context.

The original section 503A scheme was inserted in the Migration Act in 1998 and was strengthened by amendments enacted in 2003. As such, the Bill is tailored to the particular legislative frameworks of the Migration Act and the Citizenship Act and reflects the policy of the Australian government as it relates to character-related matters. The Bill also creates greater consistency between the Migration Act and the Citizenship Act in relation to the protection of confidential information in decision-making.

We note that the legislation of other countries on the handling of confidential information in migration or citizenship decision-making is tailored to their specific circumstances and legislative frameworks and to the policies of their governments.

We note, however, that several States in Australia have enacted laws which govern the use of criminal intelligence information in court proceedings, including by providing that the information is for the court's use only and is not to be further disclosed, including to the applicant in the proceedings.

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QoN Number: 01

Subject: Figure of backlog cases

Asked by: Kim Carr

Question:

Senator KIM CARR: I'll go back to some of your responses because, as dorothies go, you provided us with a great deal of information. I do appreciate that. I want to thank you, Mr Rice. I'm sure you will be applauded when you get back to the department.

You've indicated that there weren't too many cases that are in the backlog. How many cases?

Mr Rice: It's a small number.

Senator KIM CARR: How many?

Mr Rice: I'd probably prefer to take that on notice, because I don't—

Answer:

The Department currently has 13 cases where visa cancellation consideration is unable to be finalised due to concerns around the inability to protect confidential information from disclosure.

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QoN Number: 02

Subject: Disallowable or not disallowable regulations

Asked by: Kim Carr

Question:

Senator KIM CARR: Thank you. While you're at it, can you give us a list of all those matters in the regulations that are subject to disallowable instruments and those that are not disallowable?

Mr Rice: In the proposed bill?

Senator KIM CARR: Yes, in the bill.

Mr Rice: I think our view would be they're all disallowable.

Ms Ringi: Yes, I think can answer that one now, Senator. All the regulations are all disallowable.

Senator KIM CARR: All of them—including the gazetted agencies—are disallowable, are they?

Ms Ringi: I thought the question pertained only to regulations. All regulations are disallowable.

Senator KIM CARR: Yes, but that will be a regulation, won't it? You're making decisions on agencies that are on the gazetted list by regulation. Would that be a disallowable instrument?

Ms Ringi: It's not technically a regulation. I thought the question was in relation to regulations—

Senator KIM CARR: Alright, what would you describe it as?

Ms Ringi: Those are gazette notices.

Senator KIM CARR: Are there any other matters that are not disallowable?

Ms Ringi: I don't believe so.

Mr Rice: No, I don't think so. If we were talking about the public interest test, we say there about such other matters as are specified in the regulations, our expectation is they will be disallowable.

Senator KIM CARR: I just want a comprehensive list. You could take that on notice, please. We want to make sure we've got that right.

Mr Rice: Yes, of course. We can come back to you.

Answer:

Proposed subsection 52C(5) of the Citizenship Act and proposed subsection 503C(5) of the Migration Act set out the matters which the Court is to have regard to when determining whether to disclose confidential information. Paragraph (h) of each of those proposed subsections provides that other matters for the Court to have regard to may be specified in regulations. If regulations are made, they will be legislative instruments and subject to Parliamentary scrutiny and disallowance.

Gazetted agencies would be defined in proposed subsection 503A(9) of the Migration Act. The same definition applies for the purposes of the Citizenship Act. Gazetted agencies are defined to include Australian and foreign law enforcement or intelligence bodies which are listed in the Gazette. A war crimes tribunal established under international arrangements or international law may also be a gazetted agency, but is not required to be listed in the Gazette.

A Gazette notice made under proposed subsection 503A(9) would be a legislative instrument. The *Legislation (Exemptions and Other Matters) Regulation 2015* provides that legislative instruments made under Part 9 of the Migration Act are exempt from disallowance. The proposed amendments to s503A are amendments to Part 9. The Gazette notice would therefore not be subject to disallowance. However, Gazette notices are published on the Federal Register of Legislation.

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QoN Number: 03

Subject: Third party consultation

Asked by: Kim Carr

Question:

Senator KIM CARR: It is convention in the Commonwealth to consult with civil organisations and third-party organisations, particularly in the area of immigration law, is it not?

Mr Rice: And we do, on many occasions.

Senator KIM CARR: But not on this occasion.

Mr Rice: It would appear not.

Senator KIM CARR: Obviously not. I'm trying to get to the why.

Answer:

The subject matter of the Bill relates to protection of confidential information produced and held by intelligence and law enforcement agencies from public release on national interest grounds. There was no consultation with parties external to Government prior to introduction of the Bill in the House of Representatives on 10 December 2020. Following introduction, the Bill and its Explanatory Memorandum were published on the Parliament House website. The Department has not received any direct correspondence from civil organisations or legal bodies in relation to this Bill since this date.

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QoN Number: 04

Subject: Consultation with the Department of Foreign Affairs and Trade

Asked by: Kim Carr

Question:

Senator KIM CARR: Did DFAT get consulted about this measure?

Mr Rice: I'd have to take that on notice.

Senator KIM CARR: Particularly given its effect on our international relations, surely there would have been a proper consultation about that.

Mr Rice: As I said, I'll just check the details of our consultation with DFAT.

Answer:

DFAT was consulted on measures proposed in the Bill.