New South Wales Council for Civil Liberties (CCL)

Answers to questions taken on notice, unanswered questions and incompletely answered questions by the Legal and Constitutional Committee (the Committee), at the hearings on March 2 concerning the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020.

To your specific submission: in the view of the Council for Civil Liberties, how much of the bill do you think is about amending the act to deal with the invalid sections identified by the High Court in the 2017 case and how much is about expansion of the powers of the executive?

The attempt by this legislation to prevent people who are held to have failed the character test or to have lost their citizenship from showing that the Minister is wrong, to prevent the Administrative Appeals Tribunal from knowing what the reasons for the Minister's decisions are and to stymie appeal to the federal courts (all three levels) must be seen together with the recent swinging increases to the costs of appeal to the Federal Circuit Court and the power given to the Minister to override decisions of the AAT. That is, there has been an ongoing campaign to protect the Minister from justified criticism, from being found to be mistaken and having his decisions overruled. It is an attack upon the rule of law.

Ministers and their advisors are not infallible, any more than the CCL or the Committee. The CCL has had reason before to refer to the case of Dr. Haneef, in which the then Minister, his departmental advisors, the Federal police and possible ASIO did not know what literally any schoolboy might have told them, that SIM cards are able to be purchased for a very small sum from supermarkets.

A degree of humility is appropriate.

But this bill must be seen also in context of the Minister's boasts about the number of visa cancellations he has done compared to the previous administration. There is something wrong here.

The Law Council, in their submission, has queried the definition of 'confidential information' and suggested it poses a risk which is currently not covered by current legislation—that is, the National Security Information (Criminal and Civil Proceedings) Act 2004, the NSI Act—which provides a quite specific definition of 'national security information'. There is a working group that has looked at these. What do you think of those provisions of the NSI Act? Do you think they are adequate to cover national security matters?

The CCL was gravely concerned by the passage of the NSI Act in 2004, on the grounds that it would be used to cripple the attempts by defendants or parties to a civil dispute to defend themselves. Unhappily, our fears were realised.

The NSI is more than adequate in protecting national security concerns. In our view, the NSI goes too far. Accused persons, applicants for reversal of visa decisions, people supposed to have lost their citizenship—they are entitled to know the essence of the cases against them.

The Law Council and the Human Rights Commission have nevertheless noted that that Act contains safeguards to enable the courts to take into account the requirements of justice in making a determination whether to keep material secret—even if, as the Human Rights Commission has noted, subsections 31(7a) and (8) mean that the Attorney General has his thumb on the scales of justice.

The Law Council is unaware of what kind of guidance is given to gazetted agencies to determine what should be considered 'confidential information'. However, it considers that guidance should not be considered a substitute for appropriately tight legislative definitions. Can you provide us with your views on relying on secret information such as that outlined under these registered agencies?

As we noted in our submission, there are occasions when information that is relevant to a case must be kept secret because of the risk to those who obtained it, or of the disclosure of the methods by which the information was obtained. Such information can be relevant to criminal cases. But its use must be limited and strictly controlled. Courts must determine if there is a real risk if the information is revealed, whether a summary or an indication of the general context can be revealed. It must be available for merits reviews, not only for appeals on legal grounds. And a security cleared special advocate for the defendants or candidates for visa cancellation must have access to all of the material. And the defendants of applicants must have knowledge of the essence of the case against them. There should be no visa cancellations or denials of citizenship when that cannot be done.

What do you say to the proposition that this so-called confidential information that the government's relying upon is upon bodies such as this? Have they ever got anything wrong?

Any of the forty-two bodies? Of course they have. Nobody is infallible. ASIO for instance was notorious for many years for its incompetence. But the point is that they *could* get things wrong. And then people will lose their visas or their citizenship, or their opportunities to become citizens, and under this legislation coupled with what is already in place have no effective appeal.

But as well as the list of Australian organisations which can supply “protected information”, there is a very long list of other countries which can do so—well over one hundred and fifty. They include countries whose governments have lied about their citizens. Is information from the People’s Republic of China to be kept secret and used to victimise immigrants? From Uzbekistan? From Russia?

In terms of your international experience, would the European Court of Human Rights allow information of secret hearings of this type being used against people in judicial proceedings, where they weren't able to know about it, let alone challenge its validity? For instance, the Law Council provide two examples on page 14 of their submission. They talk about the House of Lords and the European Court of Human Rights that have dealt with similar issues. They say those principles would not apply in the United Kingdom or in Europe. Is that the case?

As the Law Council notes, the European Court of Human Rights held that where full disclosure is not possible, each applicant must still ‘have the possibility to effectively to challenge the allegations against him’. To the best of our knowledge, the practice in the United Kingdom was that where information was kept secret from a defendant or a person liable to banishment, a special advocate is appointed, who has access to the material and can

mount a defence. But the House of Lords decision quoted by the Law Council says that a party 'must know the essence of the case against him'. Even a special advocate is not enough.

Isn't it the case that this legislation actually gives us a judicial system more resembling North Korea than a country such as we would expect for the rule of law in Australia? This wouldn't happen in Britain, for instance, would it? This legislation wouldn't happen in Britain, would it? Do any of you have any knowledge of recent legislation in the UK?

We are not familiar with the situation in North Korea. We cannot think of any legislation this bad that has been enacted in the United Kingdom since the days of absolute monarchs, and maybe not then. We have asked Liberty, our counterpart in the UK, for comment.

Have you ever consulted with any victims-of-crime groups?

Victims are entitled, under both international and Australian law, to have their voices heard concerning the impact of crimes one themselves. But they are not entitled to *determine* what happens to convicted criminals, especially after their punishment is completed.

Victims are often pressed by unscrupulous members of the media to comment on whether the penalty on a convicted person is sufficient. Their responses are almost always that the penalty is insufficient, and they often seek penalties that are worse than the offences—more than an eye for an eye. And no one deserves to be kept locked up in conditions that in some respects are worse than prisons, for ten years, with no effort at rehabilitation and no prospect of release.

Such "consultation", since such views can and should have no effect, only makes the victims feel worse. The determination of appropriate penalties is a difficult and complex business, requiring a good deal of knowledge of circumstances such as the effects of imprisonment and the likelihood of rehabilitation. It is properly left to experienced judges.

CCL would be concerned to be adding further to the suffering of victims, and would counsel the Committee against adding to that distress. Nevertheless, we are open to approaches by victims' groups, as with all others. We have, to our knowledge, never been approached by such groups about the desirability or otherwise of making former criminals who have served their sentences and regret their crimes, victims in their turn.

Though the majority of the primary offences in the year to June 2020 for which people had their visas cancellations because they have failed the character test (character cancellations) were crimes that might leave the victims fearful of repercussions, the largest category of offences are drug offences. Driving offences figure too. (The smallest group is indecent behaviour.)[1] These are not offences which have victims fearful of repercussions. But as Senator Carr pointed out, the range of matters listed under subsection 501(6) of the Migration Act contains very minor matters, and these do not have any victims at all.

[1] Department of Home Affairs, Key Visa Cancellation Statistics 2020