

Refugee Legal:

Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020.

Introduction

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.¹ Since its inception over 30 years ago, Refugee Legal and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention. Refugee Legal is the largest provider of free legal assistance to such people in Australia and in the last financial year our total client assistance was 11,000.
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 longstanding member of the peak Department of Home Affairs – NGO Humanitarian Dialogue and other consultative fora.
3. Refugee Legal has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters. Refugee Legal has extensive experience in the provision of free legal assistance to people subjected to visa cancellations and refusal on character grounds, and people applying for conferral of citizenship in Australia.
4. We welcome the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security’s Review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. Our brief submissions and recommendations are based on our experience and expertise.

Submissions

5. Refugee Legal acknowledges the necessity of protecting certain intelligence and law enforcement information from disclosure where it is in the national or public interest to do so, including the Australian Government’s responsibility to protect the community from serious threats to safety and national security. In this context, it is also paramount that principles of accountability and transparency in national and public interest assessments are applied to safeguard fair hearing and procedural fairness rights, and associated human rights. In our submission, the current framework provides more than adequate safeguards to ensure non-disclosure of information in the public or national interest.
6. The stated purpose of the Bill is “in response to the decision in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33. 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.”² The Bill seeks to amend the *Migration Act 1958 (Cth)*

¹ 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.

² Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, Explanatory Memorandum, 2.

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and the *Australian Citizenship Act 2007 (Cth)* (**the Acts**) in order to introduce a protected information framework. The stated purpose of this framework is to encourage free communication between intelligence and law enforcement agencies and the Department of Home Affairs (**the Department**) in matters relating to migrants', non-citizens', and some Australian citizens' character related matters.

7. Certain information provided by intelligence and law enforcement agencies for the purposes of character assessments under the Acts will be deemed "protected information". This information will only be disclosed to certain audiences, notably excluding applicants, subject to the Minister's personal discretion. This is a personal non-compellable power vested with the relevant Minister.
8. Merits review bodies such as the Administrative Appeals Tribunal (**AAT**) and Immigration Assessment Authority (**IAA**) will not have access to the protected information unless the Minister exercises their personal, non-compellable powers to allow access. Of profound concern is the Courts being prohibited from considering countervailing public interest elements of disclosure of the deemed protected information.
9. While the Courts' power to require production of the protected information remains, the Courts' ability to scrutinise the public interest element of disclosure is strictly prescribed. This narrow framework is limited to an exhaustive list of factors a court is permitted to consider in its determination. The applicants and their legal representatives are excluded from this process.
10. Put simply, the courts are limited by a one-sided list of matters heavily directed to non-disclosure in its determination of whether or not it is in the public interest to disclose the protected information. Further, neither the applicant nor their legal representative are able to make submissions as to why such disclosure should occur.
11. Refugee Legal has profound concerns with the proposed amendments. We submit that the Bill should not be passed. Our key reasons are set out below.
12. **No clear or compelling case has been made** by the Government to justify the proposed amendments. We are concerned by the lack of any coherent justification for this Bill; a Bill which would seriously undermine fundamental rights to a fair hearing and procedural fairness. No serious case for the necessity to do so has been made out. A sweeping assertion that law enforcements and intelligence agencies are reluctant to share information with the Department of Home Affairs is advanced as a symptom of shortcomings of the current framework of public interest immunity. However, no proper evidence or analysis has been advanced to support this assertion. Refugee Legal's experience is to the contrary: namely, large volumes of documents, including hearsay records of allegations, are routinely provided to and considered by decision makers in visa cancellation and refusal processes.
13. The lack of a clear and compelling justification for the Bill is of particular concern given the dire consequences facing applicants subject to visa cancellations and refusals. Often the applicants subject to such process are at risk of expulsion to countries where they face grave human rights abuses, or prolonged indefinite detention and/or statelessness in Australia. It is common for this to also involve permanent separation from their families including with their minor children.
14. **The proposed amendments operate to deny procedural fairness** to people subject to these laws. This carries serious adverse implications for the administration of justice and the proper application of the rule of law under the Australian legal system. Under the Australian legal system, a fair hearing and procedural fairness are bedrock principles. In our experience, the ability of person to receive a fair hearing in this context is seriously compromised if they do not have pertinent information about the case against them.

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15. The denial of a fair hearing and procedural fairness risks grave consequences for many often vulnerable people seeking international protection, including real risk of removal to places where they would face human rights violations or death, or prolonged indefinite detention and/or statelessness in Australia.
16. **The Bill seriously compromises the ability of people to seek merits review** of administrative decisions, and acts as a significant barrier to the AAT performing its statutory function. In certain circumstances, merits review would be extinguished in substance due to the Tribunal's inability to access some or all of the information the primary decision is based on. This is because, unless the Minister exercises their personal, non-compellable discretion to provide this information, the Secretary of the Department would be prevented from providing protected information to the AAT.
17. The Bill operates to effectively prevent the AAT from discharging its statutory functions in conducting a review. This is because the AAT will be prevented from accessing all relevant material to the primary decision maker's assessment. In some circumstances the material considered determinative, or given dispositive weight, by the primary decision maker will be shielded from the AAT.
18. In circumstances where the Minister allows the AAT to view protected material, the AAT will be prevented from further disclosing the information to the applicant for comment thereby not complying with principles of natural justice.
19. **The Bill would cause significant delays in achieving fair and just outcomes** in these cases. Under the proposed regime, a person seeking review of a decision to refuse or cancel their visa under character grounds at the AAT would require judicial intervention to access information material to the decision of the primary decision maker. In most circumstances, where the AAT's jurisdiction is limited by strict statutory timelines, such intervention would not be possible to achieve in a timely manner. Such delays are of serious concern, as they inevitably result in deprivation of liberty, prolonged separation of families and exacerbation of mental ill-health of vulnerable persons.
20. In Refugee Legal's experience, information from intelligence and law enforcement agencies can be incomplete, unreliable or erroneous. The nature and causes of this are multifaceted. In our submission, provision of such adverse information to an applicant for comment constitutes a fundamental safeguard against reliance by a decision-maker on unsound information. Where this right to know and respond to the information is denied, the risk of incorrect decisions and serious miscarriages of justice are heightened.
21. **The proposed amendments risk violating Australia's international obligations**, including the prohibition on expulsion of non-citizens without due process under Article 13 of the *International Covenant on Civil and Political Rights (ICCPR)*. As set out above, the Bill would significantly limit fair hearing and procedural fairness rights; and there is a distinct absence of mechanisms to consider questions of proportionality and reasonableness.
22. We also hold profound concerns that one of the clear consequences of denying a fair hearing is that it significantly increases the chances of Australia breaching its non-refoulment obligations under the Refugees Convention, ICCPR and *Convention Against Torture (CAT)*, which commit Australia to not expel a person to face a risk of serious or significant harm. A crucial component of safeguarding Australia's ability to meet its non-refoulment obligations is to ensure the person is afforded a fair hearing of their claims for international protection. This includes a person

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knowing the particulars of any adverse information and having the opportunity to comment in response.

23. In this context, we also note that the Government has a range of existing alternatives to protect information in the public or national interest, including under the public interest immunity laws or the National Security Information (Criminal and Civil Proceedings) Act 2004 (*Cth*). Further the Parliamentary Joint Committee on Human Rights and Scrutiny of Bills Committee both outlined a number of measures which could mitigate the incursion on fundamental rights proposed in the Bill. The failure to seek to incorporate any of these measures into the Bill underscores the acutely disproportionate nature of the provisions of the Bill, particularly given the fundamental rights and dire human consequences at stake.
24. **The Bill seeks to excessively expand Executive powers, limiting the proper role of the Courts at the expense of fundamental rights to a fair hearing under ten rule of law.** In this regard, the Bill expands Ministerial discretion to conclusively determine what information a decision maker, including review bodies may receive. The definition of protected information is simply what the Minister personally determines it to be. We note in particular it proposes to allow executive determination of what matters a Court may consider in assessing whether or not it is in the national or public interest to disclose protected information by regulation. This is of serious concern as regulations are not subject to the same Parliamentary scrutiny as Acts.
25. The Bill proposes mechanisms enabling the Executive, including relevant agencies, to in effect be the arbiter of what constitutes confidential with extremely limited oversight.
26. For these reasons, we submit that the Bill should be rejected in its entirety.

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Defending the rights of refugees

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