SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Senator Carr asked the following question on 2 March 2021:

Are you aware of any other country with a similar judicial system to ours that has legislation of this type on its books?

The response to the honourable senator's question is as follows:

In the limited time available to answer questions on notice, the Commission has not been able to conduct a detailed comparative analysis of regimes in other countries.

The analysis below focuses on the corresponding New Zealand law and the ways in which it differs from that in Australia. In particular, it examines how classified information may be used in decisions regarding deportation from New Zealand of residence class visa holders as a result of their criminal conduct or because they are a risk to security.

The New Zealand regime differs from the Australian regime in two key ways. First, the liability of a person to deportation as a result of their prior criminal conduct is closely tied to the amount of time they have spent living in New Zealand. The longer a person has been in New Zealand, the more serious a person's criminal conduct has to be in order to trigger deportation.

Secondly, the New Zealand legislation relating to the protection of classified information ensures greater safeguards for the visa holder, including at the respective stages of primary decision making, merits review and judicial review. The person is entitled to a summary of allegations arising from the classified information so that they can respond to them. Further, if classified information is relied upon, the person is entitled to be represented by a special advocate. Those safeguards are similar to recommendations 2 and 4 in the Commission's written submission.

<u>New Zealand's character-related immigration framework</u>

New Zealand's immigration law is contained in the *Immigration Act 2009* (NZ).

The New Zealand regime differentiates between temporary visa holders and residence class visa holders. This answer refers only to the liability for deportation of residence class visa holders. Australians travelling to New Zealand are granted a residence class visa on arrival, provided they meet the necessary character requirements.

A person may be refused a visa on character grounds (including character grounds existing at the time of grant that later come to light).[1] However, once a residence class visa is granted,

[1] *Immigration Act 2009* (NZ), s 160.

unless the person breaches the conditions of their visa[2] they cannot have their visa cancelled based on their subsequent conduct merely because of a view formed about their character. Instead, in order for a residence class visa holder to be deported, they must have either engaged in relevant criminal conduct, been convicted of that conduct and received a sentence of a sufficient length; or they must be assessed by the Minister as being a threat or risk to security. The thresholds for relevant criminal conduct substantially avoid a key problem with the Australian system of visa cancellation on character grounds, namely, the uncertainty about when a person fails to meet the character test and the potential to have to rely on secret information in making that decision.

If a residence class visa holder has been in New Zealand for:

- up to two years, a conviction for a crime that has a prison sentence of at least 3 months means they are liable for deportation;
- up to five years, a conviction for a crime that has a prison sentence of more than 2 years means they are liable for deportation;
- up to 10 years, a prison sentence of more than 5 years means they are liable for deportation;
- more than 10 years, they will effectively not be deported regardless of their criminality.[3]

A separate provision permits deportation where the Minister certifies that a person constitutes a threat or risk to security.[4] This is clearly a higher threshold than the lowest criterion that applies in Australia: mere satisfaction that the person is not of good character based on their past and present general conduct.[5]

It will be clear whether a person has been convicted of a relevant offence and sentenced to a term of imprisonment of sufficient length to require deportation. It appears that in potential deportation cases for a residence class visa holder it will primarily be where the Minister is considering certifying that a person is a threat or risk to security that reliance may need to be placed on classified information.

Classified information

'Classified information' is defined in s 7 of the *Immigration Act 2009* (NZ). In order for information to meet this definition, it must be of a particular nature and give rise to particular risks if disclosed. This is significantly different from the regime proposed in the current Bill which requires only that the information be provided in confidence from a gazetted agency to the Department of Home Affairs.

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2 *Immigration Act 2009* (NZ), s 159.

3 *Immigration Act 2009* (NZ), s 161. The periods of residence are exclusive of any time spent in prison. See: New Zealand High Commission, *Submission to the Joint Standing Committee on Migration inquiry into review processes associated with visa cancellations made on criminal grounds*, 12 September 2018, pp 3–4, at https://www.aph.gov.au/DocumentStore.ashx?id=ddc6e30e-c4f0-4b38-9cea-dc205848f537&subId=660090.

4 *Immigration Act 2009* (NZ), s 163.

5 *Migration Act 1958* (Cth), s 501(6)(c)(ii).

In New Zealand, confidential information in this context includes information that:

(a) might lead to the identification, or provide details, of the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the relevant agency; or

(b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the relevant agency; or

(c) has been provided to the relevant agency by the government of another country, an agency of a government of another country, or an international organisation, and is information that cannot be disclosed by the relevant agency because the government, agency, or organisation from which the information has been provided will not consent to the disclosure.

The information should not be disclosed under New Zealand law if disclosure would be likely:

(a) to prejudice the security or defence of New Zealand or the international relations of New Zealand; or

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country, an agency of a government of another country, or an international organisation; or

(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(d) to endanger the safety of any person.

Protection of classified information

The *Immigration Act 2009* (NZ) sets out special provisions for the use of classified information in decision making by primary decision makers, in merits review proceedings in the Immigration and Protection Tribunal (**Tribunal**), and in court proceedings.

At the primary decision-making stage:

- classified information may be relied upon in making decisions if the Minister determines that it relates to matters of security or criminal conduct[6]

- the agency providing the classified information to the Minister has a duty to ensure that the information is balanced and includes any classified or non-classified information that is favourable to the relevant person[7]

- before classified information is relied on in relation to a person's liability for deportation, they must be provided with a summary of the allegations arising from the classified information and an opportunity to comment on it[8]

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6 *Immigration Act 2009* (NZ), s 33(1).
7 *Immigration Act 2009* (NZ), s 36.
8 *Immigration Act 2009* (NZ), s 38.

- if classified information is relied on to make a prejudicial decision, the reasons for that decision must refer to the existence of the classified information.[9]

During merits review proceedings before the Tribunal:

- the Tribunal must be given access to classified information that was relied on to make the decision[10]

- before holding a substantive hearing, the Tribunal must hold a preliminary closed hearing during which the relevant agency may make submissions about the classified information, however:

    - the purpose of this preliminary hearing is only for the Tribunal to understand the nature of the classified information and *not* to make any substantive decisions about the use to which it may be put

    - the person affected by the decision is entitled to be represented at this hearing by a special advocate[11]

- the Tribunal must approve and provide a summary of the allegations arising from the classified information to the person affected so that they have the opportunity to comment on it[12]

- the Tribunal must then determine whether the classified information is relevant and credible, and must disregard it if it is not[13]

- if the Tribunal determines that potentially prejudicial information does not meet the definition of 'classified information' then the information must either be provided to the person affected (if the agency agrees to this course), or disregarded by the Tribunal.[14]

During judicial review proceedings in a Court:

- the Court must be provided with the classified information relied on in making the relevant decision[15]

- the Court must first consider whether any classified information proposed to be relied upon is relevant[16]

- as with proceedings at the Tribunal level, if the information is relevant the Court must approve and provide a summary of the allegations arising from the classified information to the person affected so that they have the opportunity to comment on it.[17]

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9 *Immigration Act 2009* (NZ), s 39.
10 *Immigration Act 2009* (NZ), s 241(1).
11 *Immigration Act 2009* (NZ), s 241(2)–(5).
12 *Immigration Act 2009* (NZ), s 242.
13 *Immigration Act 2009* (NZ), s 243.
14 *Immigration Act 2009* (NZ), s 243(2)(b).
15 *Immigration Act 2009* (NZ), s 259(1).
16 *Immigration Act 2009* (NZ), s 254.
17 *Immigration Act 2009* (NZ), s 256.

Special advocates

If the Minister intends to rely on classified information in making a decision under the *Immigration Act 2009* (NZ), the Minister must notify the relevant agency.[18] The agency must then provide the names of at least three possible special advocates to the person affected by the decision.[19] A special advocate is a security cleared lawyer.[20] The role of the special advocate is to represent the person who is the subject of a decision made involving classified information.[21] The Minister must provide the special advocate with access to the classified information.[22] The special advocate may commence proceedings on behalf of that person and may make submissions and cross examine witnesses at any closed hearing where the person is not present.[23] The special advocate must at all times ensure that the confidentiality of the classified information remains protected.[24]

The person affected by the decision may communicate on an unlimited basis with their special advocate before the special advocate has been provided with access to the classified information. After that point, a special advocate may only communicate with the person in writing and only if the contents of that communication are approved by the Tribunal or the Court hearing the proceeding.[25]

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[18] *Immigration Act 2009* (NZ), s 265(1).
[19] *Immigration Act 2009* (NZ), s 265(2).
[20] *Immigration Act 2009* (NZ), s 264.
[21] *Immigration Act 2009* (NZ), s 263(1).
[22] *Immigration Act 2009* (NZ), s 263(4).
[23] *Immigration Act 2009* (NZ), s 263(2).
[24] *Immigration Act 2009* (NZ), ss 263(3) and (6).
[25] *Immigration Act 2009* (NZ), s 267.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Senator Carr asked the following question on 2 March 2021:

Is it a human rights concern that there are attempts being made here as part of this to make amendments that would affect the PID Act and the FOI Act; that the amendments to the legislation would affect integrity agencies such as the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Information Commissioner and the Inspector-General of Intelligence and Security; and that, while the PID Act includes immunities for individuals who make good-faith disclosures of information, proposed section 52A(7) of the Australian Citizenship Act and proposed section 503A(7) of the Migration Act, included in this bill, would override any other Commonwealth law? …

Would it be a matter of concern to the Human Rights Commission that the legislation before this parliament, on which we are being asked to make judgement, includes amendments that would override any other Commonwealth law in regard to legislative oversight of those agencies and individuals' rights in terms of their civil liberties? My reading of this is that it means a two-year jail sentence if they breach, and the submission here is that it's a practical disincentive to people seeking to provide information or voluntary disclosures to those oversight bodies.

The response to the honourable senator's question is as follows:

The Bill includes direct amendments to the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and has an indirect effect on the operation of the other laws referred to in the question. Each of these issues is considered in turn.

Amendments to the FOI Act

The Bill contains what are described as 'consequential amendments' to the FOI Act. These amendments confirm that the secrecy provisions introduced by the Bill will prevail entirely over a person's right to access documents under the FOI Act, even to the extent that the documents in question contain an applicant's own personal information.

Schedule 1, Part 2, items 12 and 13 of the Bill would amend s 38 and Sch 3 of the FOI Act.

Section 38 of the FOI Act currently deals with the disclosure of documents covered by secrecy provisions in certain Commonwealth enactments. The relevant secrecy provisions must be ones either listed in Sch 3 of the Act, or that refer explicitly to s 38 of the FOI Act.

Section 38(2) provides that a person may still request access to a document covered by this section to the extent that it contains personal information about them. However, s 38(3) provides that a person may *not* obtain access, even to their own personal information, if the disclosure is prohibited by the current ss 503A and 503D of the *Migration Act 1958* (Cth)

(**Migration Act**). That is, of all of the secrecy provisions covered by s 38 of the FOI Act, the secrecy provisions in ss 503A and 503D are the most restrictive and prevent a person from obtaining access to documents entirely, even to the extent that those documents contain personal information about them.

The first amendment, in item 12, would apply this exemption to the proposed new ss 503A and 503D of the Migration Act, and also extend it to the proposed new ss 52A and 52D of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**).

The second amendment, in item 13, would include the proposed new ss 52A and 52D of the Citizenship Act in Sch 3.

It is not clear that these amendments are necessary in light of s 37 of the FOI Act. Section 37 provides, among other things, that a document is exempt from disclosure if its disclosure could be reasonably expected to:

- prejudice the conduct of any investigation of a breach of the law
- disclose the existence or identity of a confidential source of information in relation to the enforcement or administration of the law
- endanger the life or physical safety of any person
- disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

If a document contains a person's personal information and is not already exempt for one of the above reasons, there are real questions about why they should not be permitted to seek access to it (subject to the application of any other relevant exemptions).

In the Commission's view, the inability to obtain any of documents covered by the Bill through FOI reinforces the importance of ensuring that there is a fair process for determining whether an applicant in Court proceedings can obtain access to relevant documents under s 503C of the Migration Act and s 52C of the Citizenship Act. A fair process could be achieved by not passing this Bill and ensuring that claims for confidentiality are assessed according to the orthodox tests for public interest immunity at common law or pursuant to s 130 of the *Evidence Act 1995* (Cth).

<u>Impact on independent oversight</u>

The Law Council of Australia at [83] of its submissions raises concerns that the breadth of the non-disclosure provisions, and the offences for contravening those provisions, may have an impact on:

- disclosures under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**); and

- oversight by integrity agencies such as the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Information Commissioner, and the Inspector-General of Intelligence and Security.

The Law Council notes that the PID Act and legislation governing at least some of the above agencies provides immunities for people who make good faith disclosures of information.[26] However, s 52A(7) of the Citizenship Act and s 503A(7) of the Migration Act would appear to override these immunities and prevent information being disclosed, at least in relation to voluntary disclosures. The Bill provides that the non-disclosure provisions, and the offences for contravening those provisions, have effect despite anything in any other law of the Commonwealth.

The Commission agrees with this analysis. It is likely to have serious implications for the operation of those agencies and may impede investigations into conduct that:

- is contrary to law, perverts the course of justice, constitutes maladministration, is an abuse of public trust, or unreasonably results in a danger to the health or safety of a person[27]

- amounts to maladministration of Commonwealth laws[28]

- relates to the legality or propriety of activities of an intelligence or security agency.[29]

There does not appear to be a suitable public policy justification to interfere with the ordinary operations of these oversight agencies, merely because a 'gazetted agency' has provided information to the Department of Home Affairs in confidence for use in a character assessment under the Migration Act or a relevant decision under the Citizenship Act.

Significantly, the protection of classified information under the *Immigration Act 2009* (NZ) does not limit or affect the application of the *Ombudsmen Act 1975* (NZ), the *Official Information Act 1982* (NZ) or the *Privacy Act 2020* (NZ).[30]

This analysis reinforces the Commission's view that the secrecy provisions in the Bill are too broad, and it supports the Commission's primary recommendation that the Bill not be passed.

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[26] For example: PID Act, s 10; *Ombudsman Act 1976* (Cth), ss 7A(1A)–(1C) and 8(2A)–(2C); *Law Inspector-General of Intelligence and Security Act 1986*, s 34B.

[27] PID Act, s 29 (meaning of 'disclosable conduct').

[28] *Ombudsman Act 1976* (Cth), s 5(1).

[29] *Inspector-General of Intelligence and Security Act 1986* (Cth), s 8.

[30] *Immigration Act 2009* (NZ), s 35(2)(a).