Refugee Council of Australia

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING INFORMATION PROVISIONS) BILL 2020

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020* to the Parliamentary Joint Committee on Intelligence and Security**.** We thank the Secretary for inviting us to make a submission.

This Bill would deny refugee applicants procedural fairness through a secretive Ministerial process which they would be unable to challenge. It offends the principles of the rule of law and a fair trial and presents a significant risk that refugees who may have confidential information used against them may be sent back to harm.

Australia's non-refoulement obligations requires a fair and effective decision-making process, in order to ensure that those with credible fears are not sent back to harm. This requires an independent assessment and the chance for refugee applicants to review and respond to any adverse information used in deciding their application. This requirement is in the interest of all parties – it supports that a decision maker has all relevant information before making a life or death decision, so that it can make the correct decision.

However, this Bill would prevent refugee and citizenship applicants from reviewing confidential information used against them in their application. It would also prevent the Administrative Appeals Tribunal (AAT) from viewing protected information, essential denying such applicants their right to merits review. It would also require the courts to prevent applicants and their legal representatives from viewing or responding to such information.

RCOA recommends that this Bill not be passed. However, if the Committee is of the view to support this Bill, we recommend, at a minimum, that the Bill be amended to allow for a security-cleared legal representative to view and respond to confidential information on behalf of an applicant. Such a system is already established in other national security matters, and could easily be adopted for migration and citizenship matters.

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1 Risk of incorrect decisions being made due to sole reliance on confidential information

1.1 Information obtained from intelligence and law enforcement agencies is not always reliable or accurate. Information may be missing crucial details, may not give the whole picture of events, or may be missing broader context. This may result errors in decision making where decision makers are only relying on documents provided by intelligence and law enforcement agencies. This risk of incorrect decisions being made is increased when applicants are denied a chance to respond to information or provide additional documents that may assist the decision maker coming to the correct decision. This risk is even more severe when life or death decisions are being made, such as in the case of applications for refugee protection where a person may be sent back to harm if they are refused a protection visa. As such, RCOA emphasises the need to ensure applicants and their legal presentative are given a chance to review and respond to any confidential information in order to assist the decision maker to come to the correct decision.

1.2 For example, in 2012 the Australian Government appointed an Independent Reviewer of Adverse Security Assessments to review the Australian Security Intelligence Organisation (ASIO) adverse security assessments given to the Department of Home Affairs in relation to people who have been found to be refugees but who have not been granted a protection visa because of an adverse security assessment. Before the appointment of an Independent Reviewer, there were no avenues for refugees to seek review of their adverse security assessment. Many refugees, including families and children, remained indefinitely detained for years without a chance to see their security assessments or seek a review of these assessments. After the appointment of an Independent Reviewer of Adverse Security Assessments, at least 57 refugees who had previously been assessed by ASIO as a high security risk had their assessments downgraded to either qualified or the lower level 'non-prejudicial' status.[1] This demonstrates that information provided by intelligence and law enforcement agencies is fallible, and further review of such information may assist decision makers, including the courts, from reaching the correct determination.

1.3 Intelligence and law enforcement reports should not be solely relied upon when making important decisions such as refugee applications. The consequences of an error can be life or death. As such, it is in the Government's own interest to ensure decision makers come to the right decision as to a person's refugee status, to ensure that the Australian Government does not return a person to harm and that they uphold their international legal obligations. To safeguard against errors, applicants and their legal representatives should have a chance to review and address any adverse information relied upon in the decision making of their application.

2 Lack of procedural fairness and safeguards

2.1 The proposed Bill would prevent applicants and their legal representatives from viewing and responding to any 'confidential information' provided by intelligence or law enforcement agencies.[2] The Bill would further restrict officers from disclosing confidential information to a court, tribunal, parliament or parliamentary committee, with a penalty of 2 years' imprisonment,[3] unless the Minister authorises such disclosure under specified circumstances.[4]

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[1] Karen Middleton, 'Exclusive: All 57 ASIO refugee case warnings revised after review' *The Saturday Paper* (3 February 2018) <https://www.thesaturdaypaper.com.au/news/immigration/2018/02/03/exclusive-all-57-asio-refugee-case-warnings-revised-after-review>.
[2] Schedule 1, item 3, proposed subsections 52A(2) and (3) and item 9, proposed subsections 503A(2) and (3).
[3] Schedule 1, item 3, proposed subsection 52A(6) and item 9, proposed subsection 503A(6).
[4] Schedule 1, item 3, proposed section 52B and item 9, proposed section 503B.

2.2 The Bill also allows the High Court, Federal Court of Australia or Federal Circuit Court to order that confidential information be produced for the purpose of the substantive proceedings.[5] If information is ordered to be produced, only a party who is legally aware of the content of the information can make submissions or tender evidence with respect to the information. After hearing submissions, the court would then be required to make a determination as to whether disclosing the information would create a real risk of damage to the public interest and, if so, the court must not disclose the information to any person, including the applicant and their legal representative.[6]

2.3 This is a serious departure from the legal requirement to ensure natural justice. It undermines our legal processes and requires the court to department from procedural fairness principles. As the Scrutiny of Bills Committee notes, 'the court has no flexibility to seek any feedback from the applicant to assist in performing its judicial review task.' As such, there is a real risk that information relied upon by the Minister or the Court by be inadequate or lacking appropriate context in order to reach to correct decision.

2.4 Further, the Bill would prevent the secretary of the Department from giving a document or protected information to the AAT in relation to the AAT's review of a decision if the Minister certifies that disclosing the document or information would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of cabinet deliberations or decisions.[7] As such, the AAT will not have the ability to review decisions where a decision relied upon protected information. The test for this provision is set at the very low standard of being 'contrary to the public interest', a subjective test which rests with the Minister alone. This presents a significant concern where Minister can determine, without any oversight, that certain information be withheld from a member of the AAT. This broad power would essentially remove a person's right to seek merits review before the AAT where a primary decision involved protected information (in the Minister's own determination).

2.5 As both the Scrutiny of Bills Committee and the Parliamentary Joint Committee on Human Rights note, these provisions seriously impose on the right to a fair hearing a natural justice. Under our legal system, everyone is entitled to a fair hearing and a chance to present their case and address any adverse information against them. This proposed Bill provides a secret process where a person's rights can be simply removed by a determination of the Minister. It offends the core principles of our legal system and should be opposed.

2.6 However, should the Committee be in support of the Bill, there is perhaps one possible way to safeguard confidential information provided by intelligence and law enforcement agencies while ensuring procedural fairness. This is to develop a list of authorised legal representatives who can review and respond to confidential information on behalf of their client. This process is already in practice for other national security matters. Under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, legal representatives are required to undergo security clearances and can then view and respond to confidential information on behalf of their client. Such a system could also be developed in the case of migration and citizenship matters. This would ensure a fair process and assist the courts and the decision maker to come to the correct decision regarding a person's application. Such a proposal was recommended by a UNHCR Expert Roundtable in 2012, but has not been adopted.[8]

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[5] Schedule 1, item 3, proposed subsection 52C(1) and item 9, proposed subsection 503C(1).
[6] Schedule 1, item 3, proposed subsections 52C(5)–(6) and item 9, proposed subsections 503C(5)–(6).
[7] Schedule 2, item 5, proposed section 52G.
[8] United Nations High Commissioner for Refugees, 'Expert Roundtable on National Security Assessments For Refugees, Asylum-seekers and Stateless Persons in Australia - Chair's Summary' *Refworld* <https://www.refworld.org/docid/5915edd84.html>.

3 International legal obligations

3.1 This proposed Bill is likely to violate a number of international legal obligations which Australia has committed to uphold. The Parliamentary Joint Committee on Human Rights correctly notes and outlines the international legal requirement under article 13 of the *International Covenant on Civil and Political Rights (ICCPR)*, which requires that:

> *An alien lawfully in the territory of a State Party…may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

3.2 We endorse the Parliamentary Joint Committee on Human Rights' view on Article 13, and emphasise the need to ensure procedural fairness in such proceedings. The PJCHR held that the legislations "does not appear to be proportionate and there is a significant risk that it impermissibly limits the right to a fair hearing and the prohibition against expulsion of aliens without due process."[9]

3.3 In addition, we have serious concerns that the Bill would also violate Australia's non-refoulement obligations under the *ICCPR,* the *Convention Against Torture (CAT)* and the *Refugee Convention* (as it has in many occasions previously).[10] The *non-refoulment* obligation under the *Refugee Convention, ICCPR and CAT* requires Australia not return anyone to harm. Unlike Article 13 on the *ICCPR,* the non-refoulement obligation is absolute and may not be subject to any limitations or derogations. It is considered in international law as *jus cogens*, 'which means that it is a fundamental or peremptory norm of international law which applies to all nations, and which can never be limited.'[11] Accordingly, compliance with the obligation of non-refoulement requires that sufficient safeguards are in place to ensure a person is not removed in contravention of this obligation.[12]

3.4 Inherent in this obligation is the requirement that applicants be afforded a fair hearing and a chance to present their case. The procedural fairness requirement of the non-refoulement obligation ensures states are adhering to their *non-refoulement* obligation and not returning refugees back to harm.[13] As such, under international law, refugee applicants must be afforded with a fair process and the right to address any adverse information used in deciding their case. The European Court of Human Rights has noted that a fair and effective refugee status determination procedure under the non-refoulement obligation must include 'the opportunity to

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[9] Parliamentary Joint Committee on Human Rights, *Report 3 of 2021,* page 59.
[10] See for example the Committee's Fourteenth Report of the 44th Parliament where it considered the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014,* available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/Fourteenth_Report_of_the_44th_Paliament
[11] Ibid page 76.
[12] International Covenant on Civil and Political Rights, article 2. See also Parliamentary Joint Committee on Human Rights Fourteenth Report of the 44th Parliament, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014,* , Second Report of the 44th Parliament (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and Fourth Report of the 44th Parliament (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 201, 513.
[13] For a detailed discussion of this obligation see Regina Jefferies, Daniel Ghezelbash, and Asher Hirsch, 'Assessing Refugee Protection Claims at Australian Airports: The Gap Between Law, Policy, and Practice' (2020) 44 *Melbourne University Law Review* <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3566608/Jefferies-Ghezelbash-and-Hirsch-441-Advance.pdf>, 38.

submit evidence in support of the application and dispute evidence submitted against the application'.[14]

3.5 While the PJCHR did not consider non-refoulement obligations in its first analysis of the Bill, in its concluding report it held that "to the extent that the effect of this measure would be to limit a person's ability to effectively challenge a decision which may lead to their expulsion or deportation, possibly to a country where they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment, the measure may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy."[15]

3.6 There is no derogation from the obligation to ensure refugee applicants are afforded procedural fairness, including a chance to review and respond to any adverse information. The Bill as it stands would deny certain applicants this right, in contravention with Australia's *non-refoulement* obligations.

Recommendation 1

RCOA recommends that the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 not be passed.

If the Committee is of the view to pass the Bill, we recommend that, at a minimum, that the Bill should be amended to provide for a security-cleared legal representative to represent applicants in these matters. Such a legal representative should have full access to the confidential information and have the chance to present a response to this information in at all levels of decision making (from the primary decision to judicial review).

[14] *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 65, 72 (Judge Albuquerque). See also Madeline Gleeson, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific* (Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, 2016) 18-19.
[15] Parliamentary Joint Committee on Human Rights, *Report 3 of 2021,* page 60.