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IMMIGRATION LAWYERS

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir / Madam

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 – Submissions regarding the Bills contents

1. These submissions address the proposed amendments to the *Australian Citizenship Act 2007* (Cth) (Citizenship Act) and the *Migration Act 1958* (Cth) (Migration Act) (together the Acts) in respect of what the Explanatory Memorandum regarding the Bill describes as Protected Information and its management in decision-making pursuant to the Acts (intended Protected Information regime).

Burden on applicants for review of character cancellation, non-revocation and refusal decisions made under the Acts by Ministerial delegates

2. Broadly speaking, it is clear that the intended Protected Information regime will impose considerable burdens on those applicants whose applications are refused on character grounds in part by reference to Protected Information.

3. As the Acts stand, merits review at the Administrative Appeals Tribunal is available in respect of decisions made concerning applications made by Ministerial delegates in respect of those applicants' character.

4. In those circumstances, an applicant who sought review of such a decision would be forced to make decisions about whether or not to seek an order of a Court regarding the Protected Information without knowing whether the Protected Information could have any real bearing on their chances of succeeding in their application for review (and without any chance of making meaningful submissions regarding what a Court should do in respect of the Protected Information).

5. The burden imposed on applicants is all the greater in applications regarding Ministerial delegates' character decisions under the Migration Act, given the application of the 84-day rule in respect of applications made to the AAT pursuant to section 500 of the Migration Act.

6. In those circumstances, consideration should be given to amendments that empower a Tribunal hearing an application for merits review that is affected by the intended Protected Information regime to make timetabling orders that allow for the suspension of the application before it (including for the purposes of the 84-day rule) to allow applicants to both consider their options in respect of any information they receive that Protected Information has a bearing on their application and to pursue any application in an appropriate Court.

7. Without such amendments, Federal Courts that are already very busy with other matters, will be required to consider complex applications on an urgent (if not very urgent) basis. If no such amendments to the Acts occur as part of the Bill, then the judicial oversight intended to function in the Protected Information regime may well come to nothing.

8. The Bill's initial purpose was to respond to the High Court of Australia (the High Court) decision in Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection [2017] HCA 33 (Graham and Te Puia). However, in the manner it is currently drafted it has far more significant implications noting it also amends the Citizenship Act as well as the Migration Act.

9. In such cases where the Minister intervenes personally, an affected person may not know about the protected information even being before the Minister, be unable to properly respond to such information and will be denied the ability to adequately respond to any such information before them. The ability to challenge it with the Courts has been limited by seeking to limit access in accordance with the High Court cases above.

10. The explanatory memorandum indicates it's *"a reasonable response, allowing fairness in decision-making while protecting the public interest".* There is no fairness in decision making if the non-disclosure of such information is unknown to an affected person before a decision is made on cancelling a visa or citizenship. The independent judicial oversight is restricted and would only occur after such a decision is made in most cases, as persons affected would not be aware of the protected information in the first place.

Clarity regarding whether Protected Information bears on an outcome – need for certificates

11. On our reading of the Bill, there is no certainty that in each case in which Protected Information bears on a decision made under the Acts that an applicant concerned will have notice of this. In other words, there do not appear to be clauses in the Bill that provide for certificates to be issued (to state the Protected Information exists but without divulging it).

12. This is troubling, particularly given the consequences the decisions concerned have on the interests of those persons affected by them (and, potentially, their Australian-citizen relatives and loved ones).

13. Whilst it is appreciated that the intended Protected Information regime needs to preserve the secrecy of the Protected Information, requiring certificates to be provided (as occurs in other areas of the Acts' operation) would not encroach on the secrecy of the Protected Information.

Clarity over what constitutes confidential information

14. The definitions of "gazetted agency" is far too broad and lacks parliamentary scrutiny and are left to the executive to determine and should be included in legislation. There is no definition of what "confidential information" means with the obvious concern that information that is unrelated or avoids government scrutiny could also be included. This Bill should not progress without a clear definition of what constitutes "confidential information". The way the Bill is currently worded it would indicate that it is sufficient that it was disclosed by a gazetted agency and noting there are over 40 agencies currently gazetted.

Other areas of concern with the Bill

15. The Bill denies applicants the right to a fair hearing because it deprives them of the capacity to meaningfully engage with and respond to Protected Information levelled against them. Depriving applicants of a fair hearing in this way, is highly prejudicial to the outcomes of review applications applicants may bring and, on this basis, has serious consequences not only for applicants who are subject to cancellation or refusal decisions but also Australian citizens impacted by such decisions and, potentially, those applicants' family members' visa or citizenship statuses (in light of real prospect of consequential cancellations or refusals).

16. The changes to the definition of 'non-disclosable information' are unnecessary. The definition is already sufficiently broad and any such extension will deny persons the opportunity for a fair hearing and procedural fairness.

17. The Bill as it is currently drafted allows for no disclosure to parliament or parliamentary committees. The criminal penalties for Commonwealth officers are disproportionate to the offence, broadly worded and simply not justified.

18. The Bill as it is currently drafted should not be passed. The lack of time to consider such a Bill that fundamentally impacts both an individual's right to a fair hearing and due process, allows for a lack of parliamentary scrutiny and has significant consequences for persons impacted including Commonwealth officers also an obvious concern.

19. The Explanatory memorandum of the Bill would appear to target outlawed motor bike gangs but it goes way beyond this cohort. It also makes an assumption that the risk to the Australian community is pre-determined before such a review or process has taken place to cancel or revoke a cancellation of a visa or citizenship.

20. We welcome the opportunity to respond on any aspects of the Bill.

Yours sincerely

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