

New South Wales Council for Civil Liberties

Submission to the Legal and Constitutional Affairs
Committee
concerning

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

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The Council for Civil Liberties (NSWCCL) thanks the Legal and Constitutional Affairs Committee for the opportunity to make submissions concerning the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. We regret the lateness of this submission, which is due to the requirements of its author to undergo six different brain scans.

I The vital issues

If passed, this bill would cripple the ability of litigants to have access to information that is critical for their cases for retaining a visa, becoming citizens or retaining their citizenship. While it protects the constitutionally guaranteed powers of the High Court, the Federal Court and the Federal Circuit Court to know whatever information is relevant to their reviews of ministerial decisions, it would prevent other courts and other bodies from having such access. And vitally, it not only would allow what it defines as ‘Protected Information’ to be concealed from litigants and their counsel, it would allow them to be denied even the information that such information exists. In effect, only the Minister could use the information in court. This is unacceptable. It is contrary to Australia’s international obligations. But most importantly, it is a severe intrusion on the rights of a person to a fair hearing. It overturns the basic legal principle of equality before the law.

The matters concerned are not trivial. Refusal or cancellation of visas on character grounds leads to deportation, or in the case of recognised refugees, indefinite detention.¹ The cancellation or revocation of citizenship or the finding that it has been renounced or has ceased similarly leads to deportation.²

II Graham and Te Puia

In the words of the High Court summary, ‘Mr Graham is a New Zealand citizen who has resided in Australia from 1976. Mr Te Puia is also a New Zealand citizen and has resided in Australia from 2005. The Minister cancelled Mr Graham’s visa and Mr Te Puia’s visa under s 501(3) of the [*Migration Act* 1958 (Cth)]. Section 501(3) confers power on the Minister to cancel or refuse a visa if the Minister reasonably suspects that the person does not pass the character test set out in the Act, and if the Minister is satisfied that cancellation or refusal is in the national interest. In making each decision, the Minister considered information purportedly protected from disclosure by s 503A of the Act. Section 503A(2)(c) purports to prevent the Minister from being required to divulge or

¹ Habeas corpus cases currently before the courts may modify this.

² In such cases persons are sent to another country, which then has to cope with them. That country may be less able to deal with a person of bad, perhaps very bad, character than Australia is. And, in lesser, real, cases, the person has to cope with living in a country where they may have no means of support, and may not even speak the language.

communicate information to a court or a tribunal (among other bodies) when reviewing a purported exercise of power by the Minister under s 501, 501A, 501B or 501C of the Act, to which the information is relevant.’³

Six of the seven judges of the High Court held that ‘Parliament cannot enact a law which denies to the High Court when exercising jurisdiction under s 75(v) of the Constitution (or to another court when exercising jurisdiction conferred under s 77(i) or (iii) by reference to s 75(v)) the ability to enforce the legislated limits of an officer's power. The practical impact of s 503A(2)(c) was to prevent the High Court and the Federal Court from obtaining access to a category of information which was relevant to the purported exercise of the power of the Minister that was under review, and which was for that reason relevant to the determination of whether or not the legal limits of that power and the conditions of the lawful exercise of that power had been observed. *To that extent, clause 503A(2)(c), had it been valid, would amount to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed*’ (emphasis added).

The High Court majority (6:1) argued, in part, that:

‘The practical effect of s 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister. No inference can be drawn whilst the Minister says that his decision is based upon information protected by s 503A(2), which the court cannot see....To the extent that it so operates, the provision amounts to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) of the Constitution to discern and declare whether or not the legal limits of powers conferred on the Minister by the Act have been observed....In this case the effect of s 503A(2) is effectively to deny the court evidence, in the case of the applicant the whole of the evidence, upon which the Minister's decision was based. It strikes at the very heart of the review for which s 75(v) provides’.

III What the Bill proposes: federal courts

CCL refers members of the Committee to the summary given by the Joint Parliamentary Committee on Human Rights (the Human Rights Committee) and the problems that that committee raises with the Bill. To a degree, what is written below parallels some of that discussion.

³ *Aaron Joe Thomas Graham v Minister for Immigration and Border Protection; Mehaka Lee te Puia V Minister for Immigration and Border Protection* [2017] HCA 33

The Bill accepts that the *federal* courts must have access to information that a Minister relies on in reaching a decision. But it sets out instead to prevent the person whose visa has been revoked from seeing that information by arranging for it to become Protected Information.⁴

What it proposes is that applicants wishing to appeal to the federal courts from a minister's decisions may not be allowed to know what the basis of those decisions are—they can only make submissions with respect to it if they are already lawfully in possession of the information. As the Human Rights Committee argues, it is unlikely that they could manage that.

The Bill further would require the court to order that any party not already in legal possession of the information to be absent while it is considered. That includes not only the applicant, but their counsel as well.

Indeed, the applicants may not know that such a basis, once that is made Protected Information, exists, so cannot ask a court to take it into account. And it prevents tribunals such as the Administrative Appeals Tribunal from having this information, unless the Minister releases it to the tribunal. This effectively prevents an applicant from having a merits review at all.

It is true, that, after the Protected Information has been considered by a court, it may decide to release it. But first, it must determine whether disclosing the information could be against the public interest. In addition to the safety of informants and the protection of security and security organisations' processes, the courts must also consider Australia's relations to other countries, Australia's national security, the risk that gazetted agencies may be discouraged from giving information in the future, the need to avoid disruption to law enforcement and any other matters specified in the regulations.

As the Human Rights Committee noted, in effect, for much of the time, only the Minister or his representatives will be able to present argument to a court on the basis of the protected material. That is contrary to the requirement that parties be equal before courts and tribunals. It is contrary to the requirement that litigants must be provided with

⁴ Under the Bill, organisations such as the Australian security services and law enforcement agencies that have been gazetted by the Minister, or foreign law enforcement bodies that have similarly been gazetted, can release information that is relevant to the character test sections of the Migration Act 1958 or to the Minister's powers in relation to citizenship under the Australian citizenship Act 2007 to the Minister or Commonwealth officers, on condition that it be treated as confidential. Such information is then protected information.

sufficient information so they can give effective instructions in relation to the allegations against them.⁵

This is unacceptable. The Bill should be rejected.

Just as, as the High Court held that a court that is denied such knowledge cannot judge whether or not a minister exceeded her/his powers in making a decision, or whether the decision is unreasonable, so an applicant who is denied knowledge of the basis of those decisions cannot know whether there is an arguable case worth taking to an appeal. An applicant cannot know whether the minister is making mistakes of fact, is ignorant of his or her situation in the real world, or has been misled. He/she cannot argue mitigating circumstances. Applicants cannot properly brief their counsel.

Thus justice cannot be achieved, and cannot be known to be achieved, under the provisions proposed.

The Bill also would prevent any Commonwealth officer in possession of protected information from revealing it to a tribunal, such as the Administrative Appeals Tribunal, to a parliamentary committee, or to the parliament itself.

IV. What an applicant may need to argue

Then Minister found that the plaintiff, Mr. Graham, did not pass the character test by virtue of s 501(6)(b) of the [*Migration Act 1958* (Cth)] because he reasonably suspected that the plaintiff has been or was a member of "the Rebels Outlaw Motorcycle Gang" and that organisation has been or is involved in criminal conduct. The Court did not find it necessary to answer the question as to whether the Minister, exercising power under s 501(3) of the [*Migration Act*], could be satisfied that cancellation of the Plaintiff's visa was in the "national interest" without making findings as to: the Plaintiff's knowledge of, opinion of, support for or participation in the suspected criminal conduct of the Rebels Outlaw Motorcycle Gang; and/or how cancellation of the Plaintiff's visa would "disrupt, disable and dismantle the criminal activities of Outlaw Motorcycle Gangs".

CCL submits that in a case where the Minister's decisions were *not* contrary to the Constitution, such matters could be vital to the plaintiff's case. The Court did argue that 'it is possible that a person may have a compelling case as to why he or she passes the character test. It may be

⁵ Report 1, 2021 at 1.20. The committee references the United Nations Human Rights Committee *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [18]

such as to show that, *prima facie*, the Minister could not have evidence to found his suspicion or that his decision is, in law, unreasonable. The practical effect of s 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister. No inference can be drawn whilst the Minister says that his decision is based upon information protected by s.503A(2), which the court cannot see’.

But how is an applicant or an appellant to know what material is vital to the case—that the Minister’s decision is unreasonable, for example, or based on a false belief—if she/he does not know the basis of the decision, or even that such a basis exists? How could someone (other than Mr Graham) show that he was not a member of a motorcycle gang, or that he did not know that it was engaging in illegal activities, or that he knew but protested or informed the police, if he does not know the allegations against him?

In effect, the Minister will be able to argue his case, and the applicant will not be able to mount a reply. This is not justice.

V. What the bill proposes: the Administrative Appeals Tribunal (AAT)

Restrictions under this Bill also apply to applicants to the AAT seeking a merits review of decisions on character grounds. The Minister can certify that disclosing a 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 papers. Applicants will have to decide whether to seek an order of a court to release protected information without knowing whether such an appeal is likely to succeed, or whether it will assist their cases in any case.

Since it may take a decision of a Federal Court to determine whether Protected Information is relevant, the AAT should be enabled to extend the timetable within which its reviews must be held. Applicants must be informed that there is Protected Information that is relevant to their cases, and given time to determine whether an appeal is appropriate, and to pursue such an appeal.

VI. Further limitations upon knowledge and the courts

In determining whether to allow disclosure of protected content, the courts must consider not only national security, but potential damage to the public interest and Australia’s relations with other countries both of which are factual matters which would be determined by the Minister, and other matters specified in the regulations. This is excessively expansive. The courts cannot consider procedural fairness or the rights

of the applicants, nor the effects of the decision upon the applicants. This is excessively restrictive.

As the Human Rights Committee notes,⁶ ‘without being able to properly test the evidence, and to receive submissions from the person to whom the information relates, it would appear very difficult for the court to effectively perform its judicial review task, including determining the appropriate weight to be given to the information in subsequent proceedings. The court has no flexibility to treat individual cases differently as regards disclosure of information. Where it has been determined that disclosure would create a real risk of damage to the public interest, the court is prevented from disclosing even part of the confidential information, such as a summary of the information or a discrete element of the information, even in circumstances where partial disclosure would assist the court without creating a real risk of damage to the public interest. As such, an applicant could be left in the situation of trying to challenge a decision without having any understanding of the reasons why the decision was made.’

VII. The offence of disclosure

The bill makes it an offence for a Commonwealth officer to disclose Protected Information to anyone other than to the Minister, an authorised Commonwealth officer, or in accordance with a declaration by the Minister or an order of a federal court. This is extraordinarily limited. At the least, the bill should allow for disclosure to be made to the Ombudsman, the Inspector General of Intelligence and Security and the Law Enforcement Integrity Commissioner. There should be further protection for whistle-blowers.

VII. The argument that revealing the case against an appellant may expose the individuals whose names or designations would be revealed

CCL accepts that it may be necessary to conceal information for these specific purposes. (But that is not all that can be declared protected.)

However, the Minister does not *have* to cancel a visa, with the result that an individual is sent to another country. Indeed, when the individual has been resident in Australia for a long period of time, the Minister ought not to do anything of the sort.⁷

⁶ At 1.32

⁷ Mr. Graham had been a resident in Australia for 40 years when his visa was cancelled.

This point requires elaboration. As Jacinda Adern, the New Zealand Prime Minister, argued on Tuesday February 16, Australia is failing to live up to its responsibilities.⁸

The Australian Prime Minister responded, on national television, that his Government will always put Australia's interests first. That is manifestly a bad argument.⁹

Where a citizenship cannot be renounced or removed because the person has only one citizenship, Australia has to manage the person and the safety of country without the cop-out of sending him or her to another country. We seem to be able to do that. There should be no revoking of citizenship, no determination to cease a person's citizenship, no finding that a person has renounced citizenship or that their citizenship has ceased when, because of this legislation, there is no effective appeal.

Therefore, when a person cannot be told why it is in the national interest that his/her visa is to be cancelled, it should not be cancelled, and Australia should accept its responsibility to manage the individual within Australia. If a person cannot be given reasons why his or her citizenship is being revoked or ceased, and given a real opportunity to challenge those grounds in the courts, the citizenship should not be ended.

VIII. The democratic argument

If the Minister does not reveal the reasons for his actions, they are not open to public scrutiny. As noted above, the information, and the fact that the Minister relied on it, cannot be reported to a parliamentary committee, or to the Parliament itself. However convenient a minister may find these provisions, they are essentially undemocratic.

IX. Recommendations

In summary, the Bill will expose people to deportation or detention, through cancellation of visas or loss of citizenship, by grossly unfair procedures. It is nightmarish.

Because of this, because justice cannot be achieved nor be known to be achieved under the scheme to be set up by the Bill, CCL asks the Committee to recommend that the Bill be rejected.

⁸ The case was a woman, Suhayra Adam, who left New Zealand when she was six years old. Under New Zealand Law, when a visa holder has been living in the country for ten years, there is no power to cancel a visa on these sorts of grounds.

⁹ Similar logic would imply that New South Wales and Queensland governments should put the interests of their states first, and allocate as much water from the Murry/Darling system to irrigators as they can use, irrespective of the effects on the cities downstream.

In the alternative, CCL recommends that the bill be amended to ensure:

1. that affected persons are told that there is protected information relevant to their cases;
2. that the kinds of information that can be protected are restricted to information that, if it were to be made public, would set at risk the safety of members of security or law enforcement agencies, or their secret methods of investigation;
3. that the persons are to be told by the Tribunal or the courts, as much of the information as can be revealed without risking the safety of those members.

This submission was prepared by Dr. Martin Bibby on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

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