25 JUNE 2021

MCLA (STRENGTHENING INFORMATION PROVISIONS) BILL 2020

Submission to the Parliamentary Joint Committee on Intelligence and Security

VISA
CANCELLATIONS
WORKING GROUP

ABOUT THE VISA CANCELLATIONS WORKING GROUP

The Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellations and migration more generally.

Its membership includes multiple LIV Accredited Specialists in Immigration Law, and is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including :

- Abode Migration;
- Amnesty International;
- Assent Migration;
- Asylum Seeker Resource Centre;
- AUM Lawyers;
- Carina Ford Immigration Lawyers;
- Central Australian Women's Legal Service;
- Circle Green Community Legal;
- Clothier Anderson Immigration Lawyers;
- Darebin Community Legal Centre;
- Erskine Rodan & Associates;
- Estrin Saul Lawyers and Migration Specialists;
- FCG Legal;
- Fitzroy Legal Service;
- Federation of Ethnic Communities Councils of Australia Inc;
- Flemington Kensington Community Legal Centre;
- Foundation House;
- Immigration Advice and Rights Centre;
- Jesuit Refugee Service (JRS) Australia;
- Kah Lawyers;
- Law Access;
- Legal Aid New South Wales;
- Monash University;
- MYAN Australia;
- Northern CLC;
- Peter McMullin Centre on Statelessness;
- Refugee Legal;
- Refugee Advice & Casework Service;
- Russell Kennedy;
- SCALES Community Legal;
- The Kaldor Centre;
- The Law Institute of Victoria;
- The Refugee Council of Australia;
- The University of Melbourne;
- Varess;
- Victoria Legal Aid;
- Welcome Legal, and
- Women's Legal Service NSW.

VISA
CANCELLATIONS
WORKING GROUP

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

---

1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security in response to the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020* (**the Bill**).

2. The Working Group has made submissions regarding proposed amendments to Australia's migration legislation in the past. Particularly relevant now are our concerns that the proposed Bill departs from fundamental principles of the rule of law, including that restrictions on rights be limited and knowable and that discretion can only be exercised within strict legal parameters. The Working Group considers the Bill to undermine basic procedural fairness and has the potential to seriously contravene Australia's *non-refoulement* obligations under international law.

3. In brief, the Working Group submits that:

   - The definition of what constitutes 'protected information' under the Bill **lacks sufficient clarity** and thus provides considerable **undue discretion** to Minister for Home Affairs and the Executive;
   - Applicants or Australian citizens may be precluded from reviewing adverse information, thereby **denying** those individuals **natural justice** in their own matter;
   - If the applicant or Australian citizen is represented, her/his legal representative may also be precluded from having access to certain 'confidential' or 'protected information', thereby **denying** the applicant or Australian citizen **proper legal representation**;
   - The denial of natural justice and representation is **disproportionate** to the Bill's stated purpose because visa cancellation and citizenship cessation **inalterably effect** an individual's life, sometimes placing it at **extreme risk**, and inability to challenge adverse information may result in **indefinite detention**; and
   - Courts will be **unnecessarily burdened** by having to make swift and complex decisions as to whether such 'protected information' should be disclosed to the substantive parties to a matter.

4. For these reasons, the Working Group **strongly recommends** the Bill **be rejected**.

LACK OF CLARITY AND UNDUE DISCRETION TO THE EXECUTIVE

5. The proposed Bill will apply to any information that is '*communicated to an authorised Commonwealth officer by a gazetted agency on condition that it be treated as confidential information*'[1] and as such, becomes 'Protected Information.'

[1] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52A(2)(1)(a).

6. There is no explicit definition of the types of information that may constitute 'confidential' for this purpose; the only requirement being that it is communicated by a 'gazetted agency'. The definition of gazetted agency is broad in its application, while the process of gazetting an agency lacks wider scrutiny.[2]

7. The Bill provides that this 'Protected Information' provided from such 'gazetted agencies' may be withheld from the individuals it addresses—despite potentially being used in decisions against them. While the court may *imply* a presumption that information *will be disclosed* unless the information meets a criterion listed in s 503C(5), no presumption is explicitly provided in this Bill.

8. This lack of clarity provides undue discretion to the Executive—here, to the Department of Home Affairs and the Minister himself. While the Bill provides for judicial oversight, judicial oversight should be *in addition to*, not supplementary for, narrowly defined criteria for which information should not be disclosed. For example, the Bill describes what courts must take into account in making an order to prohibit disclosure based on 'real risk of damaging the public interest,' but does not clarify what *decision-makers,* prior to the court, must consider in seeking to prevent its disclosure.

9. Furthermore, it appears that the judicial oversight only be triggered when an individual has the ability or the resources to challenge a decision by the Minister or his delegates in court. This is because the Explanatory Memorandum indicates the purpose of this Bill is to:

> *[R]espond[] to the High Court of Australia… 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). 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*.[3]

As will be discussed below, individuals facing visa cancellation already face significant hurdles to challenging a decision made by the Minister or his delegates. Bringing a case to court requires resources and representation that many facing cancellation do not have.

10. The Working Group submits the greater discretion provided to the Minister and the Department of Home Affairs is 'undue' because the Government has provided no indication that further withholding or protecting information is needed.

11. The Explanatory Memorandum states that:

> *[T]he Bill encourages law enforcement agencies to continue to provide confidential information to the Department and the Minister to make fully informed decisions in*

[2] *Migration Act 1958*, s 503A(9).
[3] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 2.

> *the refusal or cancellation of visas or citizenship on character grounds to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. It does so by protecting from disclosure, confidential information that is critical to assessing the criminal background or associations of non-citizens in character-related decision-making.*[4]

12. There is no information in the Explanatory Memorandum to indicate that law enforcement agencies were withholding any information from the Department of Home Affairs for fear of disclosure in the first place.

13. The Explanatory Memorandum continues:

> *[T]he current framework which protects against the harmful disclosure of confidential information (which is designed to protect national security related information) does not adequately capture the type of confidential information which is critical to character-related decision-making, such as a person's criminal background or associations. The Bill upholds the protection of confidential information regarding individuals who pose an unacceptable risk to the Australian community and who consequently have their citizenship refused or revoked, or a visa refused or cancelled*.[5]

14. By making reference to the 'current framework,' the Explanatory Memorandum likely refers to information-sharing between the Department of Home Affairs and agencies such as the Australian Security Intelligence Organisation (**ASIO**). Thus, the Bill seeks to *expand* information collection from domestic law enforcement agencies such as the police. 'Protected information' that regards 'an a person's criminal background or associations' will already be known to an applicant, and therefore is not information that needs protection. If the information is known and does not need protection, it should be disclosable. 'Protected information' regarding a person's criminal background or associations that is not already known to the applicant and is credible and serious should be prosecuted, at which point the individual would have the opportunity to face this information in court. If the 'protected information' regarding an person's criminal background or associations is not credible or serious enough to be prosecuted, this suggests that such information is either not credible or not relevant to the individual to be assessed in their matters relating to visas or citizenship.

DENIAL OF NATURAL JUSTICE AND REPRESENTATION

15. The proposed Bill presents a concerning departure from the principles of natural justice by subjecting applicants to a process that lacks transparency and procedural fairness. This is because the Bill would preclude certain applicants and their legal representatives from having access to certain 'confidential information' provided to the Department of Home Affairs in relation to their case.[6]

---

[4] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 46.
[5] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Explanatory Memorandum, 46.
[6] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52A(2) and (3), and item 9, ss 503A(2) and (3).

16. Applicants are already subjected to an inefficient system that is both cost-prohibitive and difficult to navigate. Cancellation of visas on character grounds, which this Bill's Explanatory Memorandum appears to address, are particularly complex. There are numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights, for example by failing to respond to a letter within tight timeframes, or by failing to lodge an application for merits review within the strict timeframes of the legislation, including due to lack of access to legal assistance. This can occur due to a change of address, an inability to comprehend what can be obscure wording,[7] or a lack of access to legal or other assistance. Individuals may also struggle to respond in ways that properly make their cases, owing to numerous factors including linguistic barriers and entrenched disadvantage.

17. Cancellations or revocations may already occur on the basis of adverse security assessments made by ASIO, which is not released to an individual on similar grounds as included in this Bill. Being unable to access ASIO security assessments has been a well-documented and much criticised aspect of Australia's immigration regime.[8] As noted, this Bill intentionally broadens the sources from which information may be withheld, thus increasing the potential inability of an individual to 'know the case against them.'

18. Furthermore, the Bill prohibits both the individual at issue and their legal representative from both knowing what information exists and from participating in the proceedings regarding the use of that information. This is because, under s 503C(3)(a) of the Bill, only parties that are 'aware of the content of the information'—which is earlier defined as confidential information shared with the Department of Home Affairs—are permitted to make submissions to the court on disclosure. Preventing legal representatives from accessing such information prevents applicants from receiving adequate legal advice on their extremely consequential proceedings. Preventing applicants from accessing such information removes their right to respond to material that has been considered in a decision against them.

DISPROPORTIONATE RESTRICTION OF RIGHTS AND RISK OF INDEFINITE DETENTION OR REFOULEMENT

19. While that the Explanatory Memorandum states this Bill is compliant with Australia's obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**), the restrictions on rights of individuals at issue in this Bill are clearly not proportionate to the Bill's intended purpose. This is because visa cancellations can have 'potentially life-destroying' effects:[9] protracted loss of liberty (including indefinite detention), separation from family (sometimes permanent), and serious psychological consequences.[10] The

[7] In *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 (18 April 2019), per Perram J at [62], the Full Court of the Federal Court described the description of timeframes for merits review in a Protection (subclass 866) visa refusal as '*piecemeal, entirely obscure and essentially incomprehensible*.' Cancellation or refusal notifications are not unlike these refusals.

[8] See for example, Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law,' *Melbourne Journal of International Law,* vol 13: 2012, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1687381/Saul.pdf.

[9] Per Allsop CJ in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 (17 December 2018) at [45].

[10] A leading recent review of studies regarding immigration detention and health, for example, found that there "*is a significant relationship between detention duration and mental health deterioration*" and that "*detention should*

risk of such dire consequences is increased where an individual cannot receive a fair hearing and is not able to respond to all adverse information used to decide their cancellation. As the Government has provided no evidence that greater secrecy in decision-making is necessary, it cannot be said that this risk to individuals' fundamental rights is warranted.

20. In addition to this disproportionate restriction, the inability to respond to adverse information regarding visa cancellations may place an individual at risk of loss of refugee protection. This loss of protection may result in either: (1) forcible return to serious harm or other harms in breach of international obligations (being 'refouled'—a breach of Australia's non-derogable obligations under the *Refugee Convention);* [11] or (2) indefinite detention, as the individual no longer has a visa but cannot be removed to their country of origin. Notably, the Full Federal Court has held that procedural fairness should be afforded where *non-refoulement* issues are considered[12]—procedural fairness that would be eroded in the operation of this Bill.

UNNECESSARY BURDEN ON COURT SYSTEM

21. The proposed Bill will unnecessarily burden the court system. By way of example, the Federal Court of Australia's Annual Report 2019-2020 indicates that 'Migration Appeals and Related Actions' are by far the greatest percentage of the Court's appeals workload.[13] A 2018 report for the Commonwealth Attorney-General's Department describes the Federal Circuit Court's migration workload as 'around half.'[14] Notwithstanding the difficulty of appealing decisions for judicial review, each time 'Protected Information' is used as a part of a decision, the proposed Bill will require the court to hear submissions from the Department as that information will be needed for that decision's appeal. As such, courts will be burdened by having to make decisions on these matters as part of the ordinary exercise of their authority.[15]

22. As the Working Group has noted previously, the ongoing dysfunction, delay, and opacity of the cancellation system is a cause for concern. This Bill only increases such issues by adding an additional process for review of information that could have been disclosed, if even redacted as needed, at first instance.

MATTERS ARISING AFTER THE HEARING BY THE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE (THE LCALC INQUIRY)

Victims of crime

23. At the LCALC inquiry hearing, representatives of the Working Group were asked:

---

be viewed as a traumatic experience in and of itself": see M von Wethem et al, 'The impact of immigration detention on mental health: a systematic review", BMC Psychiatry (2018) 18:382.

[11] Convention Relating to the Status of Refugees, 1951, article 42(1).

[12] *CLM18 v Minister for Home Affairs* [2019] FCAFC 170.

[13] Federal Court of Australia, *Annual Report 2019-2020,* 132, https://www.fedcourt.gov.au/__data/assets/pdf_file/0017/80117/AR2019-20.pdf.

[14] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts,* Final report, April 2018, https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf.

[15] *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020,* Sch 1, item 3, ss 52B, *Note 1: In addition, the High Court, the Federal Court of Australia or the Federal Circuit Court may order specified information covered by subsection 52A(1) to be produced or given under section 52C.*

a. whether we consulted with any victims-of-crime groups before making our submissions;
b. whether our representatives had met with any victims of crime or victims-of-crime groups, and
c. why the rights and experiences of victims of crime were not taken into account inour submission.

24. For the reasons that follow, this line of questioning is not useful. Indeed, it is difficult to seewhy this line of questioning was considered relevant.

25. It does not appear that the drafters of the Bill considered it relevant. There is no mention **whatsoever** of victims of crime in the Bill itself or in the Explanatory Memorandum to theBill.

26. No victims of crime and no victims-of-crime groups made submissions to the Inquiry. It isnot clear whether any such individuals or groups were invited to.

27. Victims of crime, by definition, have been exposed to criminal offending. That means thata criminal conviction has been recorded against the perpetrator after determination by Australian courts. That information is easily ascertainable by the Department.

28. Victims of crime have numerous opportunities to be involved in criminal proceedings, by way of victim impact statements and evidence that the Department will then have accessto, as well as in cancellation proceedings, with their views, if known, being a mandatory consideration under Direction no. 90.

29. Indeed, the questions put to the Working Group suggest that members of the Committeemay not have consulted with victims of crime groups nor considered their position and theinputs that victims may already have within the character framework.

30. If it is suggested that victims of crime should be able to provide further confidential information that will not be put in any form to a person facing visa cancellation, we considerthe proposal impermissibly erodes the rule of law and procedural fairness.

31. If the concern is for people who allege offending where no court determination has yet been made but where processes have commenced, the Department can also easily ascertain when charges have been made against a person and routinely cancel visas on that basis.

32. If the concern is about people who allege offending but who have not made a formal complaint to law enforcement – what can perhaps best be called a 'dob in', by nature untested – then we express serious concern about the proposition first that such information should be considered *at all* as a basis for visa cancellation (particularly given the consequences for individuals and communities), and second that a per son subject tosuch an accusation should be left completely unaware of it, and yet have their fate determined by it.

33. This scenario gives rise to very disturbing possibilities. The Committee should be very concerned about the establishment of the Department of Home Affairs as a quasi-

police force, wherein it has the power to determine questions of character separate from existing and specialist law enforcement authorities and entirely in the dark.

34. To the extent that there may be situations where an untested non-criminal allegation against a person should remain confidential, existing provisions in public interest immunity, under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and under the *Migration Act 1958* (Cth) are more than adequate to protect that information.

35. For clarity, we do not consider that the rights of victims of crime is relevant to this Inquiry.

Balancing considerations

36. At the LCALC Inquiry, Senator Carr raised the question of cases where intelligence operations are ongoing in respect of organised crime:

> *To disclose the full particulars of how they got the information and who provided the information, and all of the circumstances around information gathering could prejudice not only a general investigation but also the safety of perhaps an informant. But that information is still relevant in terms of a determination made in relation to someone's visa.*

37. Senator Carr referred to the balancing of competing considerations where information is not sufficiently probative to proceed with criminal charges, but where there are concerns a person's character and the public authority, in good faith, believes that action needs to be taken.

38. **Firstly**, we agree with the Senator that such circumstances are likely to be quite limited. Importantly, no examples have been provided by the Department clarifying the types of cases which are thought to fall within this area.

39. It stands to reason that:

a. if this Bill is indeed a response to *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (Graham and Te Puia),
b. given it is clear national security information is already protected, and
c. in the absence of any other information or examples,

we can speculate that the cases are limited to operations regarding outlaw motorcycle gangs.

40. The Committee must ask itself whether cancelling the visas of people *allegedly associated but without criminality* with such groups is sufficient justification for the Bill, which leaves its subjects and the broader population with extraordinarily limited ability to ensure that a regime of alarming secrecy is properly administered and which will lead to consequences for individuals and communities of the most severe order.

41. As our representative noted, if the intelligence is credible and relevant and relates to a crime then it can appropriately be prosecuted. We consider the burden of proof should

reflect the severity of consequences for affected people, and that information insufficientlyprobative for prosecution should not be relied upon where consequences include prolonged detention, family separation, and refoulement.

42. **Secondly**, it is certainly the case that our members have observed numerous instances where prejudicial information is not provided to a person, and where that information inappropriately impacted them.

43. Sections 375, 375A, 376, 437, 437A and 438 operate to limit information given to an applicant undergoing Administrative Appeals Tribunal review in its Migration and RefugeeDivision. Where the Minister has certified that disclosure of information would be contraryto the public interest, the Tribunal's task is constrained in various ways.

44. For s 438 of the Act, the High Court has confirmed that there is an obligation of proceduralfairness on the Tribunal to disclose the *existence* of information where the Minister has certified that disclosure of the actual information would be contrary to the public interest:

> *[P]rocedural fairness ordinarily requires that an applicant be apprised of an event which resultsin an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded.*
> *…*
> *The entitlement under s 423 [to make submissions] extends to allowing the applicant to presenta legal or factual argument in writing either to contest the assertion of the Secretary that s 438 applies to a document or information, or to argue for a favourable exercise of one or both of the discretions conferred by s 438(3). This entitlement, at least in those specific applications, is capable of meaningful exercise only if the applicant is aware of the fact of a notification having been given to the Tribunal*.[16]

45. **There is no such obligation upon and no such discretion for decision-makers underthe Bill**. The minimum standard of procedural fairness elsewhere in the Act is to allow people to comment on *at least* the validity of the non-disclosure determination.

46. Further, in our experience, when these certificates are challenged they are often found tohave been:

    a. Improperly issued, and/or
    b. Protecting irrelevant information that leads to an apprehended bias on the part ofthe Tribunal, leading to invalidity of their decision.

47. We also see numerous cases where information provided by what will be gazetted agencies under the Bill is completely inappropriate. For example, we have seen instancesof completely false accusations or opinions being made regarding clients still in their teenage years. Our awareness of this information enables us to respond so that the decision-maker has the appropriate information before them.

[16] *Minister for Immigration and Border Protection v SZMTA*; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) per Bell, Gageler and Keane JJ at [29] and [31].

48. Caselaw supports this. In addition to *SZMTA*, in *Minister for Immigration and Border Protection v CED16* [2020] HCA 24, a certificate under s 473GB was purportedly issued but was conceded to be so issued in error:

> *The reason specified in the Certificate, that the Identity Assessment Form was a "Departmental working document", was plainly an insufficient basis for "a claim by the Crown in right of the Commonwealth in a judicial proceeding" that information or matter contained in the Identity Assessment Form "should not be disclosed".*

49. Administration of the law, complex as it is, is fraught and fallible and decision-makers make mistakes. The consequences for individuals mean that such mistakes must be limited. That is why there are processes of accountability: something that this Bill all but removes.

50. **Thirdly,** and relatedly, we note that the Explanatory Memorandum makes no attempt to reconcile the Bill with the obligation on administrative decision makers to act in a manner that is free from bias and pre-judgment. That duty is axiomatic to the administrative function: it is alarming that the Bill makes no reference to it. Private communications with a decision maker implicitly create an apprehension of bias (see for instance *The City of St Kilda v Evindon Pty Ltd* [1990] VR 771 at 777):

> *Citizens are generally aware that it is the accepted practice that no party or representative of a party should have a private communication with a judge or a member of a tribunal who is to hear a case. The mere knowledge that there had been an undisclosed departure from that proper practice would have tended to produce doubts and reduce confidence in the member of the tribunal who presided at the hearing. People would be inclined to wonder why the breach of practice had occurred and how far it had gone.*

51. Plainly, allegations of bias may arise where a law enforcement agency communicates highly prejudicial information about a visa applicant or holder to a decision maker, which may or may not be relevant to their administrative function, and that information cannot be tested or aired with the person concerned.

52. Caselaw is replete with examples of irrelevant communications with decision makers which, albeit irrelevant to their task, nonetheless infect the process with bias, or the reasonable apprehension of it. For instance, in *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, the Secretary of the Department of Home Affairs provided to the Immigration Assessment Authority a significant number of reports made regarding the applicant's behaviour by immigration detention service providers. The High Court described that material in the following terms:[17]

> *The material provided by the Secretary to the Authority for the purposes of the review included considerable information, innuendo and opinions about the appellant's character over 48 pages. It is unclear whether any of this material had even been before the delegate of the Minister. If not, and there are indications that it was not before the delegate, the material would have been specifically chosen*

[17] *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 at [118]-[121].

by the Secretary for provision to the Authority as new information. In either event, however, the material was not relevant to any issue which the Authority had to decide.

…

One category of the irrelevant material provided by the Secretary to the Authority concerned periods of detention of the appellant and offences or alleged offences committed by the appellant. The underlying facts concerning the appellant's commission of an offence, his detention, and his charges were not controversial and were disclosed by the appellant himself in his application. One offence, in March 2015, to which he had pleaded guilty, involved breaking a window whilst he was in detention. The appellant was convicted of damage to Commonwealth property and was released without sentence, with conditions of a reparation payment and good behaviour for six months. The other offence for which he had been charged, as he described it in his application, was "spitting at a guard & breaking a window" during protests in November 2015.

However, the material in this first category was not merely factual statements about the appellant's criminal record. It included descriptive language and suggestions of grave concerns when describing the appellant's criminal charges in November 2015. The material referred to his transfer to different prisons in Western Australia, to his alleged "participation" in a "riot" on Christmas Island in November 2015, and to him facing criminal charges in relation to that riot. It also included an internal departmental email chain with an update from the office of the Commonwealth Director of Public Prosecutions concerning the appellant's "criminal matters" and statements by departmental officers that the appellant's criminal matters were in relation to rioting on Christmas Island and that these criminal matters were still under investigation by the Australian Federal Police. References were also made to "multiple incidents" involving the appellant and there were assertions that a Superintendent of the Australian Border Force had recommended that the appellant remain in detention pending the finalisation of an Australian Federal Police investigation into the "riot" on Christmas Island.

53. There were several matters which combined to 'compel the conclusion' that the Authority had acted in a manner reasonably suggestive of bias, including the following:

First, the material provided by the Secretary to the Authority was qualitatively and quantitatively significantly prejudicial to an assessment of the appellant's character on grounds other than legal grounds. The three categories of material, over nearly 50 pages, provided opinion, suggestion, and innuendo in relation to the appellant's criminal charges concerning "rioting" in November 2015, unspecified "multiple incidents" involving the appellant, alleged but unspecified aggressive behaviour, "[e]scalation" of consideration of the appellant including by national security bodies, and interviews of him by the National Security Monitoring Section.

…

[A]lthough the material was irrelevant, the fair-minded lay observer might reasonably have expected from statements made by the Authority, together with a deafening silence in the reasons of the Authority, that the Authority might have been influenced by the information within the material. On 23 March 2017, prior to reaching its decision, the Authority wrote to the appellant and said that the Department had "provided us with all documents they consider relevant to your

> *case" and that the Authority would "make a decision on your case on the basis of the information sent to us by the department, unless we decide to consider new information". At the outset of its reasons for decision, in the second paragraph, the Authority said that it had "had regard to the material referred by the Secretary under s 473CB of the Migration Act 1958". Nowhere in its reasons did the Authority suggest that any of the material provided by the Secretary was not relevant or that weight had not been placed on any of the material provided by the Secretary.*
>
> *In these circumstances, a fair-minded lay observer would apprehend that the material, together with the basis upon which it was apparently provided, might cause the Authority to form adverse views of the appellant's character and, consciously or subconsciously, the Authority might be influenced by those adverse views either directly in the course of dismissing each of the appellant's claims to be a person in respect of whom Australia has protection obligations or indirectly when reaching conclusions based upon the credibility of the appellant.*

54. Private, prejudicial and irrelevant communication with decision makers will necessarily give rise, on judicial review of a decision, to the reasonable apprehension of bias on the part of the decision maker. Adverse decisions made on the basis of private communications will not be inoculated from review on this basis, simply because of the provisions introduced in the Bill.

55. The Committee should be very concerned that information will be improperly withheld from affected people, as already occurs under a considerably less secretive regime. **This Bill makes it less likely that these instances of error will ever come to light, seriously affecting the integrity of decision-making by the Department and by the Tribunal**.

Additional clarifications: judicial protection

56. At the hearing, the Chair, Senator Henderson, stated that information provided by foreign governments such as North Korea and Iran would only be withheld if it was determined by a judge. We responded that the question would need to come before a court for such a determination, and that this is far from a given, particularly noting that large numbers of people in this space are unrepresented and vulnerable.

57. Affected people are also likely to be in immigration detention, and indeed in *remote* immigration detention such as on Christmas Island where facilities are limited. In our extensive experience, this considerably impairs an individual's access to justice and participation, particularly in accessing legal advice. It also impacts mental health.

58. We wish to emphasise to the Committee that a person may not know that information protected by the Bill even exists, let alone have the resources and access to support to get to court. Even if the matter did get to court, this Bill prevents that person from advancing any arguments for release of that information.

59. This is not speculation. Material on the public FOI disclosure log shows that, of 3,210 people affected by s 501, just 1,126 applied for Tribunal review – a shortfall of 2,084. Of 1,681 cases reviewable by the Federal Court in its original jurisdiction, review was initiated in 1,129 cases. In other words, of 4,189 negative decisions made (not including

the Minister's personal powers to set aside), just 1,129 came before the courts: that is, just 26%.[18]

60. Many of those are likely to have been unrepresented; many would likely not knowto raise the issue of non-disclosable information.

61. The practical effect will be that few cases will get to court. Numerous individuals are likelyto have their lives, and the lives of their loved ones, upended in extraordinary ways, and simply never know why.

62. People who *do* get to court will have likely spent extraordinary periods in immigration detention on the basis of information they have never had the chance to respond to.

63. If a court then determines that the information should have been disclosed, the propriety of that detention will be impugned.

Additional clarifications: the free flow of information

64. We are concerned by the Department's assertion, in evidence, that agencies were reluctant to provide them with information that would apparently justify visa cancellation because of confidentiality concerns.

65. No submissions were made by any organisations to the effect that they are not confident in giving information to the Department of Home Affairs under the existing regime. There is no evidence whatsoever that there is any such concern.

66. It is also difficult to understand how the Department knows that information exists that justify visa cancellation for certain people if agencies will not provide them with that information.

OBSERVATIONS BASED ON ALP MINORITY REPORT

67. In addition to the matters stated, we wish to make some brief further observations based on the ALP's minority report prepared after consideration of the Bill by the Senate Standing Committee on Legal and Constitutional Affairs.

68. We broadly support the first, second and third recommendations made in the minority report. That is, we concur that the Bill should not be passed, that it should be considered in detail by the Parliamentary Joint Committee on Intelligence and Security and be the subject of further community consultation. We agree that the lack of consultation regarding the Bill, and the lack of justification for it in the explanatory materials, suggest the need for serious caution.

69. We do not, however, concur with all aspects of the fourth recommendation made in the minority report. That is, we do not consider that, if the Bill is made law, that the amendments suggested in the fourth recommendation will be sufficient to ensure that it complies with basic rule of law precepts. Rather we consider that, should the government not withdraw the Bill or agree to further stakeholder consultation, then it must be amended to:

[18] Freedom of Information request FA 19/12/01125.

- List the bodies that are 'gazetted agencies';
- Enable a visa holder or applicant to be notified of the communication of confidential information in relation to them by 'gazetted agencies,' and provide for meaningful review of that decision, including by the Administrative Appeals Tribunal;
- Require unqualified disclosure of confidential information in the course of Court proceedings (subject to the current limitations existing under relevant laws) and without requiring the Court to specifically order disclosure only in cases where the 'substantive proceeding' relates to s 501 of the *Migration Act* 1958 (the **Act**); and
- Remove the blanket prohibition on disclosure of confidential information to oversight bodies including the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Office of the Australian Information Commissioner and the Inspector-General of Intelligence and Security.

70. We commend consideration of the 'scenario' set out in the minority report, which highlights the extraordinary consequences of the Bill, if passed into law.

71. The following scenario illustrates, perhaps more sharply, the pernicious potential of the Bill:

> *In an act of retaliation, a perpetrator of family violence makes a false report to police against the victim of that violence. The report alleges violence by the victim against the couple's child.*
>
> *The Victoria Police, a 'gazetted agency,' communicates that report to the Department of Home Affairs, pursuant to a memorandum of understanding between the two agencies.*
>
> *A delegate of the Minister for Home Affairs then considers that report, in light of the guidance given to decision-makers in Ministerial Direction 90. In accordance with that guidance, reports from 'independent sources' regarding family violence, particularly involving vulnerable members of the community such as children, are to be treated seriously – regardless that no formal charges resulted from the incident, and despite strong countervailing considerations.*
>
> *Acting in accordance with that guidance, the delegate cancels the visa held by the victim.*
>
> *In seeking review of that decision before the Administrative Appeals Tribunal, neither the victim nor Tribunal member have access to the substance of the allegations made by Victoria Police, save to note that they involved family violence against the visa holder's child. The former visa holder appears unrepresented before the Tribunal. The Tribunal, again acting in accordance with the guidance given in Direction 90, considers itself bound to affirm the cancellation of the visa.*

72. This scenario involves an entirely foreseeable application of the Bill, if passed into law.

73. Community organisations working closely with survivors of family violence note the increasing misreporting of survivors as primary perpetrators of violence. The phenomenon, of course, predominantly impacts women from migrant and refugee

backgrounds who are disproportionately affected by family violence. For instance, an extensive report co-authored by the Women's Legal Service and Monash University in 2018 observed that:[19]

> *the research, as well as the observations of our duty lawyers, suggest a trend in which male perpetrators are increasingly gaming the intervention order system – and the protective role of police – to further their abuse. This trend is not unique to Victoria, but is occurring globally as family violence is criminalised (see Policy Paper 2). We also identify this trend (below) as a major driver of police 'misidentifying' the 'primary aggressor' when attending the scene of a family violence incident (Wangmann 2009; Mansour 2014; Smith 2015). Despite inadequate state-wide statistical data about police misidentification in Victoria, the research literature, WLSV's own data analysis, and anecdotal evidence reveal that the problem is serious and pervasive. This is true not just for Victoria but across Australia, and in comparable jurisdictions elsewhere (such as the UK and Canada).*

74. The consequences of misidentified survivors (primarily women) are severe, as the authors observe:[20]

> *Police misidentification has significant adverse outcomes and legal consequences for the victim, such as:*
>
> - *Criminal charges: women with no prior criminal history face criminalisation (replicates trauma and abuse, gas-lighting), and women with a prior history face continued criminalisation;*
> - *Separation from children and trauma to children;*
> - *Loss of reputation/access to services, employment, housing rights and access to crisis accommodation, homelessness;*
> - *Immigration rights/visa status – already precarious for victims of family violence, and worse for victims of police misidentification; - Issues arise in other jurisdictions such as: family law (both parenting and property) and child protection;*
> - *Serious economic costs: as well as being economic abuse, it is a significant waste of the victim's (as well as policing, legal and judicial) time and resources;*
> - *Denial of financial payments from crisis services, implications for VOCAT claims;*
> - *Increased vulnerability to further violence; - Loss of trust in police and the justice system. "I thought they were there to keep me safe".*

75. Victim misidentification is thus a serious phenomenon, for which State police forces are inadequately trained and equipped. At the same time, over the past several years, members of the Working Group have observed increasing levels of direct communication between State police and the Department. Such communications take a

[19] Women's Legal Service and Monash University, "Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria' July 2018 <https://www.womenslegal.org.au/~womensle/wp-content/uploads/2021/04/MisID-Policy-Paper.pdf>
[20] Ibid.

similar form – usually 'in confidence' communications from police informants expressing generalised concerns regarding the 'character' of visa holders or applicants who were previously charged but later acquitted of an offence.

76. The character cancellation framework has been extensively amended since 2014 to capture a broad range of conduct, falling well short of a charge or criminal investigation. For instance, pursuant to s 501(6)(d), a person will fail the 'character test' and be liable for visa cancellation or refusal, where:

> (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
> (i) engage in criminal conduct in Australia; or
> (ii) harass, molest, intimidate or stalk another person in Australia; or
> (iii) vilify a segment of the Australian community; or
> (iv) incite discord in the Australian community or in a segment of that community; or
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

77. In a series of recent decisions, Courts have recognised that the Minister, either acting personally or by his delegates, it not required to assess 'risk' by reference to any particular framework, and is effectively at large in that assessment.[21] Thus it is entirely possible that a private communication from police would lead to a finding that a visa holder or applicant failed the 'character test' as broadly set out at s 501(6) of the Act.

78. Further, we note that Direction No 90, introduced on 8 March 2021, effectively create a *presumption* in favour of visa refusal or cancellation in cases involving family violence. The preamble at Part 1, subitem 5.2(5) states:

> *Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence… is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable threat of causing physical harm to the Australian community.*

79. 'Family violence' is defined at Part 1, subitem 4(1) in broad terms:

> ***Family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:

[21] See for instance *Te Puke v Minister for Immigration and Border Protection* [2015] FCA 398 at [71]; *Moana v Minister for Immigration and Border Protection* [2014] FCA 1084 at [18].

a) An assault; or
b) A sexual assault or other sexually abusive behaviour; or
c) Stalking; or
d) Repeated derogatory taunts; or
e) Intentionally damaging or destroying property; or
f) Intentionally causing death or injury to an animal; or
g) Unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
h) Unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on that person for financial support; or
i) Preventing the family member from making or keeping connections with his or her family, friends or culture; or
j) Unlawfully depriving the family member, or any member of the family member's family, of his or her liberty

80. In accordance with subitem 8.2, Part 2 of the Direction, decision-makers must give primary consideration to allegations of family violence, even where no charge or criminal investigation has resulted, but instead *'[t]here is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence.'*

81. The scenario described above is thus an entirely foreseeable outcome, if the provisions of the Bill are made law. The scenario makes it clear that, within the already overbroad and punitive framework of the character cancellation powers, all allegations and information held against a visa holder or applicant must be robustly tested.

CONCLUSION

82. On the basis of the foregoing, the Working Group **strongly recommends** that the proposed Bill **be rejected**.

83. The existing regime already significantly disadvantages individuals and their communities. Detention and removal from Australia are not matters to be taken lightly or to be facilitated with secrecy. Under the proposed framework, Australians will likely never know if these extraordinary powers are being misused or even abused.

84. The Working Group welcomes the opportunity to consult further on a confidential basis. If you would like to discuss any of these matters further, please contact [redacted], the Chair and Deputy Chair of the Working Group, by email at [redacted]