



Australian Government
**Department of Immigration
and Border Protection**

Inquiry into the Migration Amendment (Validation of Decisions) Bill 2017

Senate Legal and Constitutional Affairs Legislation
Committee



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Introduction

The Department of Immigration and Border Protection (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Amendment (Validation of Decisions) Bill 2017* (the Bill), following the introduction of the Bill into the Parliament on 21 June 2017.

The measures in the Bill are a proactive response to current proceedings in the High Court of Australia, in which the validity of section 503A of the *Migration Act 1958* (the Migration Act) is being challenged. The relevant cases are P58/2016 – *Te Puia v. Minister for Immigration and Border Protection*, and M97/2016 – *Graham v. Minister for Immigration and Border Protection*. The High Court heard the matters on 30 March 2017 and has reserved its judgement.

Section 503A protects confidential information provided by gazetted law enforcement and intelligence agencies from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person when it is provided for the purpose of informing a decision to refuse a visa application or to cancel a visa on character grounds under the Migration Act.

This submission provides a response to the reasons for referral / principal issues for consideration raised by the Selection of Bills Committee and will provide further information about the measures included in the Bill.

Reason for referral/principal issue for consideration

The reasons for referral/principal issues for consideration by the Committee identified in the Selection of Bills Committee Report No. 8 of 2017 are:

- The complex nature of the Migration Act; and
- The impact any change may have on people seeking a visa, industry bodies, Australian business and residents warrants further consultation and investigation.

Portfolio Submission

Objective of the Bill

The purpose of this Bill is to uphold the visa cancellation or visa application refusal decisions of certain non-citizens of character concern who pose a risk to the Australian community. These measures ensure that those non-citizens who have had their visa cancelled, or their visa application refused, and information protected under the Migration Act was utilised in making the decision, will not have their visas re-instated as a result of the High Court decision in the cases of Graham or Te Puia. Reinstatement of such visas could result in either release from immigration detention or the ability to return to Australia. These non-citizens are of serious character concern, and range from members of outlawed motorcycle gangs to those with serious criminal records. Their release from immigration detention, or their ability to enter Australia, while their cases are reconsidered for character cancellation or refusal puts the Australian community at an unacceptable risk.

Specifically, the Bill amends the Migration Act to preserve existing character decisions which have relied on information which is protected from disclosure under section 503A, notwithstanding their reliance on section 503A information. These amendments will not apply to cases where people have challenged, in a court, a decision to refuse their visa application or to cancel their visa based on section 503A information, and

judgment is reserved, or has been delivered, by a court at the time of commencement. Neither will these amendments prevent individuals from pursuing judicial consideration of their individual cases.

Background

Section 503A of the Migration Act requires a departmental officer and the Minister of Immigration and Border Protection to protect information from disclosure, including to a court, when it is provided by gazetted law enforcement or intelligence agencies to support a visa application refusal or visa cancellation decision made on character grounds. Section 503A was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act 1998* to facilitate law enforcement and intelligence agencies providing relevant information to the Department while ensuring that the content and sources will be protected. This includes protecting the information from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person.

The High Court of Australia is currently considering two cases that challenge the validity of section 503A. These proceedings are *Graham v Minister for Immigration and Border Protection (Graham)* and *Te Puia v Minister for Immigration and Border Protection (Te Puia)*. Section 503A is being challenged on the basis that the Minister cannot be compelled to provide or disclose protected information to a court, and that this power impairs the independence and impartiality of a court.

The measures in this Bill will amend the legal framework in the Act to put beyond doubt that decisions to cancel a visa or refuse a visa application on character grounds that have already been made will remain effective in the event the High Court deems section 503A of the Migration Act invalid.

Affected individuals

This Bill imposes no extra requirements or burden on people seeking a visa, industry bodies, Australian business or residents as it seeks only to uphold decisions already made. It does not impact future visa cancellation or visa application refusal decisions. Nor does it prevent affected individuals from seeking judicial review of their individual decision.

The changes to the Migration Act enacted through this Bill apply to:

- people who have had their visa cancelled, or their visa application refused, on character grounds, or there has been a decision not to revoke such a cancellation or refusal on character grounds, prior to the legislation taking effect; and
- their cancellation, refusal or revocation decision relied on, or otherwise took into account, information that was provided by intelligence or law enforcement agencies on the basis that it was protected from disclosure under section 503A of the Act; and
- those who have not accrued any rights or liabilities as a result of other court proceedings, in which judgement is reserved or has been delivered by a court at the time of commencement.

Persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of these amendments. The amendments will not affect any review rights afforded to non-citizens under law.

The amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation. At the time of this consideration, these persons failed the character test and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation/refusal decisions already.

Measures in Schedule 1 to the Bill

Insertion of new section 503E

The sole measure in the Bill is to insert new section 503E before existing section 504 of the Act.

503E(1)

New subsection 503E(1) applies to decisions made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA before the Bill commences.

If section 503A is not a valid law of the Commonwealth, in whole or in part, new subsection 503E(1) will prevent decisions already made by the Minister from being invalid merely because the decision relied on, or had regard to, confidential information protected, or purportedly protected, by existing subsection 503A(1) or (2). This includes decisions made by a delegate of the Minister.

Further, such a decision will not be invalid, and is taken never to have been invalid, merely because the Minister made the decision based on an erroneous understanding of section 503A or the protection that section would provide against an obligation to disclose information.

The effect of this amendment is to preserve the validity of past decisions to cancel a visa or refuse a visa application on character grounds, including decisions not to revoke such a refusal or cancellation, where the decision relied on information protected under section 503A.

503E(2)

New subsection 503E(2) ensures that subsection (1) does not apply to decisions that are the subject of court proceedings in which judgment is reserved by a court as at commencement of this item, or in which judgment has been delivered by a court before commencement of this item, and the judgment sets aside, or declares invalid, that decision. This item does not affect a person's ability to seek judicial review of a decision on any other ground. Nor does this item affect a person's right to seek merits review of a relevant decision to the extent that such review is provided under existing law.