Law Council
OF AUSTRALIA

Migration Amendment (Validation of Decisions) Bill 2017

Senate Legal and Constitutional Affairs Committee

25 August 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Migration Law Committee and the Administrative Law Committee of the Federal Litigation and Dispute Resolution Section in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to comment on the Migration Amendment (Validation of Decisions) Bill 2017 (**the Bill**).

2. The Bill seeks to respond to current proceedings before the High Court in Australia, in which the validity of section 503A of the *Migration Act 1958* (**the Act**) is being challenged. As outlined in the Explanatory Memorandum to the Bill, the cases are: *Te Puia v Minister for Immigration and Border Protection P58/2016* and *Graham v Minister for Immigration and Border Protection M97/2016*. These matters were heard on 30 March 2017 and judgement has been reserved by the High Court.

3. The Bill gives rise to concerns from the Law Council's perspective. These include:

    - The retrospective nature of the Bill.

    - The Bill would prevent individuals who have had a visa cancelled or refused under sections 501, 501A, 501B, 501BA, 501C and 501CA of the Act, where protected information under section 503A was relied upon or considered, from having their visas or visa applications reinstated and the opportunity to respond to that information prior to their visa being cancelled or refused.

    - The Bill is being proposed prior to the handing down of the High Court of Australia's decisions in the relation to the above matters which may result in the Parliament passing legislation without a comprehensive understanding of its likely impact on the state of the current law.

    - Under the Bill persons who have had their visas cancelled or refused on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following commencement of the proposed amendments. This may result in a significant number of judicial review proceedings should the High Court find that section 503A is in fact invalid. The Law Council is concerned this may result in an unnecessary use of Court resources, given that the High Court may have already considered the validity of decision affected by section 503A.

4. The Law Council makes the following recommendations in relation to the Bill:

    - The Bill should be held over until such time as the High Court makes its decision in the above matters in order to fully determine and understand the consequences of the Bill and the subsections of the existing Act and their impact.

    - The Bill should not operate retrospectively to valid decisions which may be found to be invalid by the High Court in the above rulings.

The purpose of section 503A and the impact of the Bill

5. The Explanatory Memorandum to the Bill highlights that the reason this Bill should be passed is to protect the Australian community. Specifically, the Bill aims to prevent those individuals who have had a visa cancelled (under sections 501, 501A, 501B, 501BA, 501C and 501CA) on the basis of information protected under section 503A from being released from immigration detention or returning/entering Australia should the High Court find that section 503A is invalid.

6. In effect, the Bill proposes to validate cancellations and refusals based on information relied upon by the Minister or Delegate, that has not and must not be provided to the individual for response or comment, even if this process is found to be invalid by the High Court.

7. The proposed new section 503E would remove the right of an individual to have their cancellations or refusals reconsidered validly allowing them to access and comment on material/information held by the Minister or delegate prior to their visa being cancelled or refused on the basis of that material. The Law Council is concerned that the proposed amendments may deny these individuals natural justice during the cancellation or revocation consideration and that it would not allow meaningful judicial oversight of the use of executive powers.

8. The Department of Immigration and Border Protection's submission in response to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into this Bill states that the objective of the 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 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 re-enter Australia while their cases are reconsidered for character cancellation or refusal puts the Australian community at an unacceptable risk*. [1]

9. The Law Council recognises the need to protect the Australian community as an important objective. However, the Department or Minister retain the power to cancel or refuse visas for any individual who does not meet the character test. In regards to concerns about affected individuals re-entering the Australian community, it is within the Department and Minister's powers to cancel an individual's visa immediately upon arrival to Australia or release from detention if necessary. These cancellation decisions can then be made validly in respect of any High Court decisions.

10. The Law Council submits it is essential that the Minister and the Government as a whole exercise their power lawfully.

[1] Department of Immigration and Border Protection's submission in response to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Amendment (Validation of Decision) Bill 2017,* 3.

Retrospective application of the Bill

11. It appears that the Government intends the provisions of the Bill to apply to all decisions made prior to the day after Royal Assent. The Law Council opposes the retrospective application of the amendments to the Bill.

12. The Bill is retrospective in that it would apply to all cancellation and refusal decisions which relied on section 503A information.

13. As a consequence of the proposed retrospective application of the amendments in the Bill, cancelled visa holders or refused visa applicants may be denied the opportunity to properly present their case. Further whilst a cancelled visa holder or refused visa applicant may have a right to judicial review, they will be not have access to or be able to question the validity of protected information that may have been used against them in making a decision to cancel or refuse their visa under sections 501, 501A, 501B, 501BA, 501C and 501CA.

14. The Department of Immigration and Border Protection's submission in response to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into this Bill suggests that 'these amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation'. [2] However, depending on the outcome of the High Court cases, the Bill may deny individuals the opportunity to have their matters reconsidered lawfully.

15. The effect of the Bill is that any decision of the High Court which invalidates section 503A is overridden. The Law Council is concerned this may not be consistent with ensuring that executive decision making should comply with the principles of natural justice.

Recommendations:

- **The bill should not be passed until the decision on the relevant High Court matters is determined and properly considered by Parliament The Bill should be held over until such time as the High Court makes its decision in the above matters in order to fully determine and understand the consequences of the Bill and the subsections of the existing Act and their impact.**

- **The Bill should not operate retrospectively to valid decisions that may be held by the High Court to be invalid.**

[2] Department of Immigration and Border Protection's submission in response to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Amendment (Validation of Decision) Bill 2017,* 3.