The Senate

Legal and Constitutional Affairs Legislation Committee

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 [Provisions]

October 2017

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Recommendation 2

2.36 The Committee recommends that the bill be passed.

Chapter 1

Introduction

1.1 On 22 June 2017 the Senate referred the provisions of the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 17 October 2017.[1] In referring the bill for inquiry, the Selection of Bills Committee noted that stakeholders had voiced concerns in relation to the unintended consequences of the proposed changes to skilled migration visas; and that the complexity of the bill warranted further consultation and investigation.[2]

Background and purpose of the bill

1.2 On 16 August 2017, Mr Alex Hawke MP, Assistant Minister for Immigration and Border Protection, outlined the key measures proposed in the bill and provided the following explanation for the bill:

> The measures in this bill will:
>
> - allow the public disclosure of sponsor sanctions;
> - allow the Department of Immigration and Border Protection to collect, record, store and use the tax file numbers of certain visa holders for compliance and research purposes;
> - provide certainty around when merits review is available for visas that require an approved nomination; and
> - allow the department to enter into an enforceable undertaking with a sponsor who has breached their sponsor obligations.
>
> These measures complement and are part of the significant reform package to abolish the subclass 457 visa and replace it with a new temporary skill shortage visa. The measures in this bill will apply to temporary and permanent sponsored skilled work visas, which include the 457 visa and its replacement, the temporary skill shortage visa.
>
> These measures strengthen the integrity of these visa programs, and protect Australian and overseas workers.
>
> Tax file number sharing and the disclosure of sponsor sanctions will also give effect to recommendations made in *Robust new foundations: an independent review into integrity in the subclass 457 program*.[3]

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1 *Proof Journals of the Senate*, No. 55, 17 August 2017, p. 1756. See also Selection of Bills Committee, *Report No.9 of 2017*, 17 August 2017, p. 1.

2 Selection of Bills Committee, *Report No.9 of 2017*, 17 August 2017, appendix 4 and 5.

3 Mr Alex Hawke MP, Assistant Minister for Immigration and Border Protection, *House of Representatives Hansard*, No. 12 of 2017, 16 August 2017, p. 8610.

Conduct of the inquiry

1.3 Details of this inquiry were advertised on the Committee's website, including a call for submissions to be received by 8 September 2017.[4] The Committee also wrote directly to some individuals and organisations inviting them to make submissions. The Committee received two submissions, which are listed at appendix 1 of this report.

Financial implications of the proposed measures

1.4 The Explanatory Memorandum notes that the financial impact on the proposed amendments is 'low'.[5]

Reports of other Committees

1.5 The Senate Standing Committee for the Scrutiny of Bills,[6] as well as the Parliamentary Joint Committee on Human Rights,[7] raised concerns in relation to the Bill. These concerns will be discussed in chapter two.

Structure of this report

1.6 This report consists of two chapters:

- This chapter provides an overview of the bill, as well as the administrative details of the inquiry.
- Chapter two outlines the provisions of the bill, discusses the key issues raised about the proposed amendments, as well as providing the committee's views and recommendation.

Acknowledgements

1.7 The committee thanks the organisations that made submissions to this inquiry.

4 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

5 Explanatory Memorandum, p. 2.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017,* 6 September 2017, pp. 20–24.

7 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 9 of 2017*, pp. 28–33.

Chapter 2

Key provisions and issues

2.1 The Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (the bill) proposes to amend the *Migration Act 1958* (Migration Act), to authorise the public disclosure of sanctions taken against migration sponsors who fail to satisfy their obligations, and clarify the merits review rights for certain skilled visas. The bill further seeks to amend the Migration Act, the *Income Tax Assessment Act 1936* (ITA Act), and the *Taxation Administration Act 1953* (TA Act) to allow the Department of Immigration and Border Protection (the Department), 'to collect, record, store and use tax file numbers' for compliance activity and research.[1]

2.2 This chapter will outline the key provisions of the bill and discuss the issues raised by the Law Council of Australia (Law Council), the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee). Finally, the Committee's view and recommendations will also be discussed.

Disclosure of sponsor sanctions

2.3 Section 140K of the Migration Act sets out actions that may be taken against approved sponsors for failing to satisfy sponsorship obligations. New subsection 140K(4) of the bill requires the Minister to publish information, including personal information, about an approved sponsor or former approved sponsor who fails to satisfy a sponsorship obligation. New subsection 140K(7) outlines that the regulations may prescribe circumstances where the Minister is not required to publish information.

2.4 The Explanatory Memorandum (EM) notes that this proposed amendment reflects the Government's response to the report, *'Robust New Foundations—A Streamlined, Transparent and Responsive System for the 457 Programme'* (the 457 report). Recommendation 21.2 of the report states:

> That the department disclose greater information on its sanction actions and communicate this directly to all sponsors and the migration advice profession as well as placing information on the website.[2]

2.5 The EM explains that currently the Department is only able to release limited information regarding breaches of sponsorship obligations and that these current practices do not sufficiently inform the public of sponsors who have breached their

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1 Explanatory Memorandum, p. 2.

2 Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations—A Streamlined, Transparent and Responsive System for the 457 Programme,* An Independent Review into Integrity in the Subclass 457 Programme, September 2014, pp. 19 and 100. The Government's response to the recommendations can be accessed here: border.gov.au/about/reports-publications/reviews-inquiries/independent-review-of-the-457-programme/response-to-integrity.

sponsorship obligations.[3] In turn, this may act as an insufficient deterrent to sponsors that have breached, or may breach, their obligations as well as undermining public confidence in the Department's compliance activities in this area.[4] In relation to the nature of information that may be published, the EM states the following:

> The Department will publish an analogous level of detail as is currently published by the OMARA and the FWO, such as business names, Australian Business Numbers, and specific details of their adverse compliance outcome.
>
> … The publication will be appropriately limited to cases where a breach has been substantiated and a sanction has been imposed. As such it will be confined to cases where it is necessary to inform future potential visa holders of the risks of accepting employment with the relevant sponsor and to cases that will genuinely act as a deterrent to other sponsors.[5]

2.6 The Human Rights Committee outlined that the bill engages the right to one's privacy, and while the publication of information relating to a sponsor is likely to be for a legitimate purpose, it questioned the proportionality of this measure on three grounds:

- while the statement of compatibility explains that the publication of information will be in accordance with the *Australian Border Force Act 2015* and the *Privacy Act 1988*, it is not clear whether these Acts will provide an effective safeguard;
- although the EM notes that the publication of information will be limited to cases where a breach has been substantiated and a sanction imposed, the wording of the bill is much more broad; and
- neither the bill nor the EM provide any information as to whether, and how, information can be removed from the public domain if circumstances change.[6]

2.7 The Scrutiny of Bills Committee also raised concerns that the information to be published was prescribed by the regulations rather than outlined in primary legislation and while further information was contained in the EM relating to the type of information to be published, this detail was not provided in the bill.[7] The Law Council noted that it was difficult to comment on the appropriateness of the regime, to determine if it raises any privacy or other concerns, given the proposed regulations have not been released.[8]

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3 Explanatory Memorandum, p. 12.

4 Explanatory Memorandum, p. 12.

5 Explanatory Memorandum, pp. 16–17.

6 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 9 of 2017*, pp. 28–30.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, pp. 20–21.

8 Law Council of Australia, *Submission 1*, p. 6.

2.8 In its submission, the Department confirmed that the publication of sponsor information would only occur where it has been determined that 'the breach is serious enough to warrant the imposition of a sanction under section 140K of the Act.'[9] Furthermore, the Department noted that in developing this measure, it consulted with the Office of the Australian Information Commissioner (OAIC) and the Attorney-General's Department (AGD), in addition to wide consultation for the 457 report. The Department reports that it 'is not aware of any concerns raised by stakeholders since that time, including concerns regarding unintended consequences of the measure.'[10]

2.9 The Department also noted the importance of this measure as a means of deterring businesses from breaching their sponsorship obligations and thereby protecting the wages and conditions of overseas and Australian workers.[11] The Department explained that overseas workers may be more vulnerable to exploitation in the workplace and this measure would assist visa applicants to make more informed decisions about a potential employer.[12]

Natural justice hearing rule

2.10 Natural justice requires that a person who will be affected by a decision receive a fair and unbiased hearing prior to the decision being made. New subsection 140K(5) states that the Minister is not required to observe any requirements of the natural justice hearing rule in publishing information under new subsection 140K(4). The EM explains that subsection 140K(5) does not limit procedural fairness obligations because information will only be published under this new subsection 'once a decision has been made to take action under current section 140K.'[13]

2.11 The Scrutiny of Bills Committee acknowledged that there may already have been a hearing in relation to whether the Minister takes an action under section 140K, however, it noted that the publication of information may occur in circumstances where it is later determined on review, that the action was not justified, and consequently there may not be 'adequate redress to a person who has suffered damage to their reputation.'[14] This issue was also raised by the Law Council:

> While an approved sponsor can seek review of a sanction decision under the current section 140K, there is nothing in the wording of the proposed amendments nor the Explanatory Memorandum which indicate that information will only be published once those merits or judicial review options have been exhausted. That is, on the current drafting of proposed subsections 140K(4)-(7), a Minister could potentially publish information about a sponsor being sanctioned for breaching their sponsorship

9 Department of Immigration and Border Protection, *Submission 2,* p. 5.

10 Department of Immigration and Border Protection, *Submission 2,* p. 5.

11 Department of Immigration and Border Protection, *Submission 2,* p. 5.

12 Department of Immigration and Border Protection, *Submission 2,* p. 5.

13 Explanatory Memorandum, p. 4.

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017,* 6 September 2017, p. 22.

> obligations even if the sponsor has sought review of that decision and the decision is still under review.[15]

2.12 Both the Law Council and the Scrutiny of Bills Committee suggested that the Bill be amended so that it is clear that the publication of information about the sanctioning of a sponsor not occur until all merits and judicial review rights have been exhausted.[16]

Minister's immunity from civil liability

2.13 Proposed subsection 140K(6) provides that no civil liability will arises from any action taken by the Minister in good faith in publishing information under subsection 140K(4).

2.14 The Scrutiny of Bills Committee noted that 'courts have taken the position that bad faith can only be shown in very limited circumstance.'[17] Further, it reported that the EM provided no explanation for this provision and that it expects sound justification in cases where immunity from civil liability is provided, particularly where such immunity could affect individual rights.[18]

2.15 As explained by the Law Council, this provision is especially concerning as the current drafting of the Bill does not clearly specify that the publication of sanctions will only occur after review rights have been exhausted.

> For example, if a sanction decision is ultimately set aside on review, but the publication has already occurred, this may effectively leave the sponsor without an effective remedy. The Law Council considers that the Minister should justify why the immunity for civil liability is required.[19]

Retrospective application

2.16 Item 3 of the Bill outlines the amendments relating to section 140K of the Migration Act, which apply to actions taken under that section on or after 18 March 2015, making these amendments retrospective. The EM notes that these amendments reflect the date of the Government's response to the 457 report.[20]

2.17 The Scrutiny of Bills Committee noted its long-standing concern about provisions that apply retrospectively, in particular, if the legislation will, or may, have a detrimental effect on individuals.[21] The Law Council also expressed their concern

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15 Law Council of Australia, *Submission 1*, p. 6.

16 Law Council of Australia, *Submission 1*, p. 6; and Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 22.

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 23.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 23.

19 Law Council of Australia, *Submission 1*, p. 7.

20 Explanatory Memorandum, p. 5.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 23.

with retrospective provisions and pointed out that the sponsors who breached their sponsorship obligations have already been penalised in accordance with the existing framework and to apply the new sanctions retrospectively may impose an additional penalty on these sponsors.[22]

2.18 The Law Council made the observation that many recommendations are supported by government but are never implemented or legislated, and therefore an 'announcement of support for a recommendation cannot give rise to an expectation that legislation to implement the recommendation will follow.'[23] The Law Council concluded that the proposed amendments to section 140K of the Migration Act should only apply to sanction decisions made on or after the bill comes into effect, if passed.[24]

Disclosure and use of tax file numbers

2.19 The bill proposes to introduce section 506B of the Migration Act, as well as amend the ITA Act and the TA Act to permit the Department to request, provide, use, record and disclose tax file numbers (TFNs) of applicants and visa holders as prescribed by the regulations. The EM notes that the amendments give effect to the Government's support for recommendation 18.2 of the 457 report and explains how the amendments will assist the Department:

- the Department will be able to undertake more effective compliance activity and will assist with the identification of skilled visa sponsors who breach their obligations, for example, by underpaying visa holders;
- data matching of TFNs will improve the Department's ability to undertake research and trend analysis, which will assist the Department's policy development; and
- the storing of TFNs will reduce administrative burden on the Department as it will not need to redact TFNs.[25]

2.20 The Scrutiny of Bills Committee acknowledged that the regulation would be subject to disallowance, however, noted that a legislative instrument would not be subject to the full range of parliamentary scrutiny.[26] It also noted that the EM did not provide an explanation as to why it was necessary to include this information in delegated legislation rather than in primary legislation, and sought further advice from the Minister.[27]

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22 Law Council of Australia, *Submission 1*, p. 8.

23 Law Council of Australia, *Submission 1*, p. 8.

24 Law Council of Australia, *Submission 1*, p. 9.

25 Explanatory Memorandum, pp. 7–8.

26 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 24.

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, 6 September 2017, p. 24.

2.21 The Human Rights Committee noted that while ensuring the effectiveness of the Department's compliance policy is likely to be a legitimate purpose for international human rights law, the provision may not provide a proportionate limit on the right to privacy. This is because the scope of the proposed amendment is broader than the stated objective contained within the EM.[28]

2.22 The Law Council shared these concerns, commenting that greater clarity was needed in relation to the integrity of the data and suggested that further information from the Department was required.[29]

2.23 However, the Department noted that this measure has been in the public domain since March 2015 when the Government accepted the recommendations of the 457 report and that it is not aware of any concerns raised by stakeholders.[30] Further, that in developing this measure, the Department consulted with the AGD, the OAIC, the Treasury, and the Australian Taxation Office.[31]

2.24 The Department explained that data matching using TFNs minimises the risk of misidentifying a visa holder.[32] It also noted how this measure would have a positive impact:

> Tax file number sharing will deter sponsors from breaching their obligations, including the obligation to pay visa holders an appropriate salary. This measure will also improve the Department's ability to identify and take action against visa holders who do not comply with their visa conditions. This will positively impact overseas and Australian works by protecting their wages and conditions.[33]

Review of decisions

2.25 The Bill proposes to amend paragraph 338(2)(d) of the Migration Act to specify the circumstances in which merits review is available for decisions in relation to certain visas that require sponsorship and/or an approved nomination. The EM notes the intention of current paragraph 338(2)(d):

> The intention of current paragraph 338(2)(d) was to prevent abuse of the merits review process by preventing refused visa applicants, who had no sponsor, and therefore no ability to meet the criteria for grant of the visa, from seeking to extend their stay in Australia by lodging a review application.[34]

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28 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 9 of 2017,* p. 32.

29 Law Council of Australia, *Submission 1,* pp. 9–10.

30 Department of Immigration and Border Protection, *Submission 2,* p. 7.

31 Department of Immigration and Border Protection, *Submission 2,* p. 7.

32 Department of Immigration and Border Protection, *Submission 2,* p. 7.

33 Department of Immigration and Border Protection, *Submission 2,* p. 8.

34 Explanatory Memorandum, p. 5.

2.26 The EM explains that courts have interpreted the current provision in a way that has resulted in circumstances where an applicant has review rights that are wider than the original policy intent.[35] Consequently, the proposed provision seeks to clarify that merits review will only be available where:

- there is an approved nomination that has not ceased; or
- an application to review a decision not to approve a nomination has been lodged; or
- an application to review a decision not to approve a sponsorship has been lodged; or
- an applicant who does not require a nomination is, at the time that the visa is refused, sponsored by an approved sponsor.[36]

2.27 However, the Law Council criticised new paragraph 338(2)(d) as being 'complicated and confusing' and that the Law Council and its migration experts found it difficult 'to discern what the new provisions mean'.[37] The Law Council noted that the proposed provision may have been drafted without awareness of a recent judgement and that it 'has real potential to unjustly deprive visa applicants from merits review.'[38] It recommended that the new paragraph 'be removed from the draft bill, or significantly redrafted…'[39]

2.28 The Department argued that this proposed measure will provide certainty to visa applicants in relation to their right to seek merits review and will also reduce the risk of the Department issuing defective notifications.[40] The Department provided the following explanation:

> [The current system] has encouraged sponsors to lodge repeat nomination applications to allow visa applicants to gain access to merits review and remain in Australia. It has also resulted in confusion because visa applicants who are not entitled to seek merits review of a decision to refuse their visa at the time the refusal is made (because there is no approved or pending nomination), can subsequently obtain review rights if a further nomination application is lodged.
>
> The current situation makes it difficult for the Department to properly notify an applicant of their review rights, increases the risk of defective notification, and has led to vexatious applications for merits review aimed solely at inappropriately extending a visa applicant's stay in Australia.

35 Explanatory Memorandum, p. 13.

36 Explanatory Memorandum, p.13.

37 Law Council of Australia, *Submission 1,* p. 10.

38 Law Council of Australia, *Submission 1,* p. 10. The recent judgement referred to by the Law Council of Australia is *Dyankov v Minister for Immigration and Border Protection* [2017] FCAFC 81.

39 Law Council of Australia, *Submission 1,* p. 11.

40 Department of Immigration and Border Protection, *Submission 2,* p. 6.

> Where defective notifications occur, individuals may be incorrectly recorded as unlawful on departmental systems and could be detained unlawfully. There is also a risk of the defective notification resulting in the unlawful removal of an individual.[41]

2.29 The Department noted that the proposed amendment will only affect *onshore* applicants for subclass 457 and 407 visas whose applications are decided after the measure commences.[42] However, the Committee also notes the information from the Department, that the intention is also to amend the Regulations so that Australian sponsors of *offshore* applicants for subclass 457 and 407 visas can apply for the decision to be reviewed in the same circumstances that onshore applicants can.[43]

Committee view

2.30 The measures proposed in the bill are part of a significant reform package to strengthen the integrity of the 457 visa and its replacement, the temporary skill shortage visa. The bill will protect Australian and overseas workers by enhancing the effectiveness of the Department's compliance activity through data matching of TFNs.

2.31 The Committee is of the view that the public disclosure of information concerning a sponsor who has breached their sponsorship obligation will assist to protect Australian and overseas workers while also acting as an additional deterrent to sponsors breaching their obligations. Temporary visa holders are particularly vulnerable to being exploited by their employer and as such, the Committee considers it important that prospective employees have access to information about a particular sponsor doing the wrong thing. The Committee also acknowledges that the rights and privacy of the sponsor is also a factor that must be considered and that the rules of natural justice should not be displaced lightly.

2.32 However, the Committee believes that the bill has achieved the right balance between protecting workers and protecting the rights and privacy of sponsors. In arriving at this conclusion, the Committee notes that sponsors will have full access to natural justice prior to any sanction being imposed and information being disclosed. As outlined in the EM and the submission by the Department, publication of sponsor information will be limited to cases where a breach has been substantiated and considered serious enough to warrant a sanction being imposed.[44] Furthermore, the Committee notes that the merits and judicial review process can sometimes be dragged out for many months or years. To wait for all review options to be exhausted may have the effect of defeating the policy objective of proposed subsection 140K(4).

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41 Department of Immigration and Border Protection, *Submission 2*, p. 6.

42 Department of Immigration and Border Protection, *Submission 2*, p. 6.

43 Department of Immigration and Border Protection, *Submission 2*, p. 7.

44 Explanatory Memorandum, p. 17, and Department of Immigration and Border Protection, *Submission 2*, p. 5.

2.33 While the Committee makes no specific recommendation in respect of the retrospective operation of these provisions, it restates its long-standing general aversion to provisions which operate in this way.

2.34 The Committee believes that greater clarity is needed in relation to the review of decisions concerning 457 and 407 visas. The Committee is concerned that the policy intent relating to the current paragraph 338(2)(d) is not being met and that the paragraph requires amendment. However, the Committee also notes the concerns raised by the Law Council that the proposed amendment to this paragraph is confusing. As such, the Committee considers that there may be scope to consider the drafting of paragraph 338(2)(d) so that it is clear while also meeting its policy intent. However, on balance the committee is of the view that the bill be passed.

Recommendation 1

2.35 The Committee recommends that the wording of paragraph 338(2)(d) is reconsidered to ensure that the paragraph is clearly understood while also achieving its policy objective.

Recommendation 2

2.36 The Committee recommends that the bill be passed.

Senator David Fawcett
Chair

Appendix 1
Public submissions

1 Law Council of Australia

2 Department of Immigration and Border Protection