

# Chapter 1

## Introduction

1.1 On 10 August 2017, the Senate referred the provisions of the Migration Amendment (Validation of Decisions) Bill 2017 (the bill) to the committee for inquiry and report by 4 September 2017.

1.2 The Selection of Bills Committee made this recommendation because:

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.<sup>1</sup>

1.3 The Selection of Bills Committee also noted that the bill is a response to an ongoing challenge in the High Court to section 503A of the *Migration Act 1958* (Migration Act):

[The Bill] will protect visa cancellation decisions that have relied upon information under section 503A of the Act. Information provided under section 503A is currently protected from disclosure to Courts and Tribunals.<sup>2</sup>

### Background and purpose of the bill

1.4 The bill is a response to the High Court cases *Graham v Minister for Immigration (M97/2016)* and *Te Puia v Minister for Immigration (P58/2016)*, which challenge the constitutional validity of section 503A of the Migration Act.<sup>3</sup>

1.5 The High Court notes that the plaintiffs, Mr Aaron Joe Graham and Mr Mehaka Lee Te Puia, are New Zealand citizens who have been resident in Australia on class TY subclass 444 Special Category (Temporary) visas.<sup>4</sup>

1.6 In both cases, the plaintiffs' visas were cancelled by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (the Minister), referring to protected information provided to him under section 503A of the Act. According to the High Court, these visas were cancelled:

...on the grounds that that the plaintiff failed the character test and that it was in the 'national interest' to cancel his visa...The Minister provided a

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1 *Selection of Bills Committee Report*, No. 8 of 2017, p. 3 and appendix 4.

2 *Selection of Bills Committee Report*, No. 8 of 2017, p. 3 and appendix 5.

3 Note these cases are being considered together by the High Court, and so will be referred to in this report as *Graham and Te Puia*. See the *Explanatory Memorandum*, p. 6; see also the second reading speech on the bill made by the Hon Michael McCormack, Minister for Small Business, *House of Representatives Hansard*, 21 June 2017, p. 7191.

4 See the short particulars of the cases at High Court of Australia, *Graham v Minister for Immigration (M97/2016)* and *Te Puia v Minister for Immigration (P58/2016)*.

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statement of reasons which referred to certain information which is protected from disclosure under s 503A of the Act...<sup>5</sup>

1.7 It has been reported that both men are members of motorcycle gangs, and that they are currently in Australian immigration detention pending the findings of the High Court.<sup>6</sup>

1.8 According to the High Court, the questions being considered in the case are:

Are either or both of s 501(3) and 503(A) of the Act invalid, in whole or in part, on the ground that they:

- a. Require a Federal Court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power; or
- b. So limit the right or ability of affected persons to seek relief under s 75 (v) of the Constitution as to be inconsistent with the place of that provision in the constitutional structure.<sup>7</sup>

1.9 The Department of Immigration and Border Protection (the department) summed up the case in its submission:

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.<sup>8</sup>

### ***Section 503A of the Migration Act***

1.10 The Hon Michael McCormack MP, Minister for Small Business, noted in his second reading speech on the bill that:

Section 503A of the act protects information from disclosure when it is provided to the Department of Immigration and Border Protection by gazetted law enforcement or intelligence agencies to support a section 501 character visa application refusal or cancellation decision.<sup>9</sup>

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5 High Court of Australia, *Graham v Minister for Immigration (M97/2016)* and *Te Puia v Minister for Immigration (P58/2016)*.

6 Peter Benson, 'Bikies challenge raises ASIO heat on Labor' in *The Australian*, 14 August 2017.

7 High Court of Australia, *Graham v Minister for Immigration (M97/2016)* and *Te Puia v Minister for Immigration (P58/2016)*. Note that Section 75(v) of the Constitution provides that: 'In all matters:... (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction'.

8 *Submission 1*, p. 4.

9 The Hon Michael McCormack, Minister for Small Business, *House of Representatives Hansard*, 21 June 2017, p. 7191.

1.11 Specifically, at 503A(2)(c) the Act currently provides that protected information can be provided to the Minister to make decisions, but that

...the Minister or officer must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person...<sup>10</sup>

1.12 Section 503A was inserted into the Act in 1998.<sup>11</sup> Since then, a significant number of individuals, including Mr Graham and Mr Te Puia, have been subject to adverse visa decisions made by the Minister or a delegate referring to protected information, and these individuals have not been able to access this information to use as part of an appeals process.<sup>12</sup>

### ***Purpose of the bill***

1.13 In his second reading speech, the Minister for Small Business noted that the bill's provisions are intended to strengthen character provisions of the Migration Act to cancel a visa, regardless of the High Court's decision in *Graham and Te Puia*:

In late 2014, this government strengthened the character provisions of the Migration Act, making it mandatory to cancel a visa if a noncitizen does not pass the character test. Since those changes, the Minister for Immigration and Border Protection has cancelled the visas of over 2,600 noncitizen criminals, including more than 140 organised crime figures.

The purpose of this bill is to uphold the visa cancellations, and application refusals, on character grounds of certain noncitizens who have committed crimes in Australia and who pose a risk to the Australian community.<sup>13</sup>

1.14 More specifically, the Explanatory Memorandum states the bill would:

...[amend] the *Migration Act 1958* (Migration Act) to preserve existing section 501 character decisions made relying on information provided by gazetted law enforcement and intelligence agencies, which is protected, or purportedly protected, from disclosure under section 503A.<sup>14</sup>

1.15 The department made it clear that the bill's amendments would ensure that non-citizens who have been found to 'pose a risk to the Australian community' and have therefore had their visas cancelled:

...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

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10 *Migration Act 1958*, section 503A(2)(c).

11 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*.

12 High Court of Australia, *Graham v Minister for Immigration (M97/2016)* and *Te Puia v Minister for Immigration (P58/2016)*.

13 The Hon Michael McCormack, Minister for Small Business, *House of Representatives Hansard*, 21 June 2017, p. 7191.

14 *Explanatory Memorandum*, p. 1.

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....<sup>15</sup>

### **Concerns raised by the Scrutiny of Bills Committee**

1.16 The committee is aware that the Senate Standing Committee for the Scrutiny of Bills has raised several concerns with the bill's provisions, including noting that the committee generally 'has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively)'.<sup>16</sup>

1.17 The Scrutiny Committee has requested the Minister to provide a:

...detailed justification for seeking to retrospectively validate decisions made in circumstances which may have denied an applicant the right to a fair hearing, and where the practical effect of the legislation would be to reverse any High Court declaration of constitutional invalidity.<sup>17</sup>

1.18 The committee understands that, at the time of writing, the Scrutiny of Bills Committee has not received comments from the Minister on these matters.

### **Concerns raised by the Parliamentary Joint Committee on Human Rights**

1.19 The committee is aware that the Parliamentary Joint Committee on Human Rights has raised concerns about the potential ramifications of the bill, and sought further clarification from the Minister on a number of matters, namely the compatibility of the bill's provisions with:

- The right to due process prior to expulsion under article 13 of the International Covenant on Civil and Political Rights (ICCPR), 'particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed'.<sup>18</sup>
- The right to liberty under Article 9 of the ICCPR, particularly regarding:
  - why it is necessary to validate a class of decisions, when the Minister could make a renewed decision to cancel visas on an individual basis;
  - any alternative means available to protect information only to the extent required for national security, or alternative processes that could allow such information to be tested in some way before a court or tribunal; and

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15 *Submission 1*, p. 3.

16 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 16.

17 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2017*, 9 August 2017, p. 17.

18 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, p. 34.

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- any potentially less rights-restrictive criminal justice or national security mechanisms to address any risk posed by relevant individuals.<sup>19</sup>
  - The right to protection of the family under article 17 of the ICCPR;<sup>20</sup>
  - Australia's commitment to non-refoulement obligations contained in the Refugee Convention, the ICCPR, and the Convention Against Torture (CAT).<sup>21</sup>
  - The right to freedom of movement is protected under article 12 of the ICCPR;<sup>22</sup> and
  - The right to an effective remedy, as protected by article 2 of the ICCPR.<sup>23</sup>

1.20 The committee understands that, at the time of writing, the Parliamentary Joint Committee on Human Rights has not received comments from the Minister on these matters.

### **Financial implications**

1.21 The Explanatory Memorandum includes a financial impact statement that indicates the bill would have 'a low financial impact' on the Commonwealth.<sup>24</sup>

### **Compatibility with human rights**

1.22 The Explanatory Memorandum states that the bill is compatible with Australia's human rights obligations, observing that:

These amendments are for a legitimate purpose and are compatible with human rights. The Bill maintains the status quo for affected persons who have already been assessed as non-citizens of character concern in accordance with section 501 of the Act. To the extent that these amendments may limit human rights, the Government considers those limitations as reasonable, proportionate and necessary.<sup>25</sup>

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19 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, p. 38.

20 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, pp. 39–40.

21 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, pp. 41.

22 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, pp. 42.

23 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 8 of 2017*, 15 August 2017, pp. 43.

24 *Explanatory Memorandum*, p. 1.

25 *Explanatory Memorandum*, p. 1 and Attachment A, p. 8.

### **Conduct of the inquiry**

1.23 Details of the inquiry were advertised on the committee's website, including a call for submissions by 23 August 2017.<sup>26</sup>

1.24 The committee received four submissions, which are listed at appendix 1 of this report. These submissions are also available in full on the committee's website.

### **Structure of this report**

1.25 This report consists of two chapters:

- This chapter provides a brief background and overview of the bills, as well as the administrative details of the inquiry.
- Chapter 2 sets out the proposed amendments that would be made by the bill, and discusses matters raised in submissions to the inquiry.

### **Acknowledgements**

1.26 The committee thanks all organisations and individuals that participated in this inquiry by making submissions.

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26 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)