

Chapter 2

Provisions of the bill and issues raised

2.1 This chapter discusses the provisions of the bill, and outlines the issues raised by witnesses and submitters to this inquiry. Lastly, it sets out the committee's views and its recommendation.

Provisions of the bill

2.2 The sole measure in the bill is to insert a new section 503E into the Act, preceding the existing section 504. The Explanatory Memorandum states:

New subsection 503E(1) provides that if section 503A is not a valid law of the Commonwealth (in whole or in part), new subsection 503E(1) will prevent decisions made by the Minister under section 503A 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.¹

2.3 More specifically, this would uphold all decisions made to cancel visas under sections 501, 501A, 501B, 501BA, 501C or 501CA of the Act that were based on protected information provided to the Minister or their delegate under section 503A of the Act. This means that all such decisions would be upheld, even if the High Court were to find that section 503A is not a valid law of the Commonwealth in *Graham and Te Puia*.²

Concerns raised

2.4 Submitters raised a number of matters to the committee, including concerns over:

- The retrospective operation of the bill's provisions;
- The potential denial of natural justice and the right to a fair hearing to some individuals adversely affected by visa decisions;
- The need to preserve and uphold the constitutional principle of separation of powers between the Executive and the Judiciary; and
- Other matters, including potential burden on the judiciary from appeals following the High Court's decision in *Graham and Te Puia*.

Retrospectivity

2.5 Concerns were raised about the retrospective nature of the bill. The Law Council of Australia (Law Council) noted that:

1 Explanatory Memorandum, p. 1.

2 Submission 1, p. 5.

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...³

2.6 Refugee Legal noted that common law rights including the presumption against retrospective operation of the law, applied not only to Australian citizens, but also to non-Australian citizens:

This effect of the proposed amendments offends against the longstanding legal principle of the presumption against retrospectivity. Retrospective laws are commonly considered inconsistent with the rule of law as they make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints 'justified expectations'.⁴

2.7 Dr Martin Bibby shared these concerns, commenting that 'the Senate should have no truck with trying to retrospectively validate processes that are contrary to the Constitution'.⁵

Natural justice and the right to a fair hearing

2.8 Some submitters argued that the provisions of the bill would result in a number of people being denied a fair hearing of their cases. For example, the Law Council suggested that:

...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.⁶

2.9 Refugee Legal noted that denying individuals a fair hearing of their claims could contravene a fundamental principle of Australian law:

The proposed amendment purports to operate to preclude persons affected by s 503A from seeking this legal remedy and being afforded procedural fairness. In doing so, this amendment would deny persons previously unlawfully denied a fair hearing of their claims a further opportunity to access that critical legal safeguard.⁷

2.10 Refugee Legal suggested that the common law already provides for certain information to be protected in cases of judicial review, including information related to national security, law enforcement or diplomatic relations with other countries.⁸

3 *Submission 4*, p. 7.

4 *Submission 3*, p. 5.

5 *Submission 2*, p. 1.

6 *Submission 4*, p. 7.

7 *Submission 3*, p. 4.

8 *Submission 3*, pp. 4–5.

Given this, it argued that the provisions of the bill are 'superfluous', as 'the law already provides a robust framework preventing the disclosure of sensitive information' to individuals seeking review.⁹

2.11 However, the department submitted that the bill would preserve existing rights for relevant individuals to seek appropriate and fair judicial review of decisions to cancel their visas:

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 noncitizens 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.¹⁰

Separation of powers

2.12 Refugee Legal submitted that the bill could be inconsistent with the doctrine of separation of powers, as enshrined in the Constitution.

The Constitution provides for power to be balanced between the judiciary, legislature and executive, so each can act as a check on the power of the other. This is commonly referred to as the doctrine of the separation of powers. It ensures the executive remains fair and accountable by creating checks and balances on its use of power. In this regard, it is essential under the rule of law that the use of the executive's power is lawful and can be legally challenged and determined by the judiciary.¹¹

2.13 Refugee Legal suggested that the bill could potentially contravene the doctrine of separation of powers in two ways:

By purporting to pre-emptively negate the legal implications of a High Court ruling by artificially deeming a law to be valid under an Act despite it having been or being liable to being found to be unconstitutional or otherwise legally invalid; and

By purporting to restrain the judiciary's power to undertake judicial review of administrative decisions under s 75(v) in Chapter III of the Constitution by retrospectively immunising s 503A-related decisions from judicial review.¹²

9 *Submission 3*, p. 5.

10 *Submission 1*, p. 4.

11 *Submission 3*, p. 3.

12 *Submission 3*, p. 4.

Other matters

2.14 The Law Council noted that the bill is being proposed before the High Court hands down its decision in *Graham and Te Puia*. It argued that this could lead to the Parliament passing legislation without a comprehensive understanding of its likely impact on the state of the current law'.¹³ Considering this, the Law Council recommended that the bill be delayed until the High Court has handed down its decision, 'in order to fully determine and understand the consequences of the Bill and the subsections of the existing Act and their impact'.¹⁴

2.15 The Law Council also noted that individuals affected by visa cancellations informed by information protected under section 503A of the Migration Act would still be eligible to seek judicial review of their case, should the bill be passed. The Law Council submitted that this could lead to a significant number of judicial review cases being commenced, should the High Court find section 503A to be invalid, which:

...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.¹⁵

Committee view

2.16 The committee is satisfied that the bill is an appropriate, proportionate and timely strengthening of the Migration Act. Its provisions would maintain the integrity of Australia's visa framework, by upholding decisions that have already been made to cancel or refuse visas for non-Australian individuals who have committed crimes in Australia, or who may pose a significant risk to the Australian community in the future.

2.17 The committee understands that the High Court is yet to hand down its decision in *Graham and Te Puia*, and that some submitters advocated for this case to be concluded before the bill is further considered by Parliament.

2.18 However, the committee supports the Explanatory Memorandum's explicit acknowledgement that the bill is a proactive step to uphold existing decisions, pending the High Court's decision:

Through these amendments the Australian Government wishes to put beyond doubt that existing decisions to refuse or cancel visas under section 501 of the Act remain valid at law, notwithstanding their reliance on confidential information protected by section 503A.¹⁶

2.19 As to other concerns raised by submitters, the committee understands that the bill would not affect the right to judicial review for any person negatively affected by

13 *Submission 4*, p. 5.

14 *Submission 4*, p. 7.

15 *Submission 4*, p. 5.

16 *Explanatory Memorandum*, Attachment A, p. 5.

a decision that was made referring to information provided under section 503A of the Act. Furthermore, the committee also notes that the department has clearly stated in its submission that the bill would not prevent 'a person's right to seek merits review of a relevant decision to the extent that such review is provided under existing law'.¹⁷

Recommendation 1

The committee recommends that the Senate pass the bill.

**Senator the Hon. Ian Macdonald
Chair**

17 *Submission 1*, p. 5.

