

Australian Greens—dissenting report

1.1 The Australian Greens have serious concerns with the proposed Migration Amendment (Validation of Decisions) Bill 2017 (the bill), which 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)'.

1.2 The Greens are concerned that the bill will severely restrict the judiciary's ability to meaningfully oversee the use of executive powers. Should the bill be enacted, it would likely be inconsistent with Chapter III of the Constitution.

1.3 The Greens endorse Refugees Legal's submission, which argued that the bill is an:

...entirely inappropriate encroachment on the jurisdiction of the Judiciary by the Executive and Legislature and is inconsistent with the doctrine of the separation of powers...¹

1.4 The Greens agree with Refugee Legal in that the bill is inconsistent with the Chapter III of the constitution and offends the principle of separation of powers. The bill attempts to negate the legal implications a possible ruling of the High Court before that ruling has been made. And additionally 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.²

1.5 The Greens have concerns with the retrospective nature of the bill.³ Refugee Law noted in their submission that:

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

1.6 The Greens share the Australian Law Council's concerns that the bill may result in refused visa applicants or cancelled visa holders being denied the opportunity

1 Refugee Law, *Submission 3*, p. 3.

2 Refugee Law, *Submission 3*, p. 4.

3 Law Council of Australia, *Submission 4*, p. 7.

4 Refugee Law, *Submission 3*, p. 6.

to present their case as a result of the retrospective application of the bill and that it may deny individuals the opportunity to have their matters reconsidered lawfully.⁵

1.7 The Greens are further concerned that if cancelled visa holders or refused visa applicants are given the right to judicial review they will be denied due process as the result of the bill. As the Law Council of Australia noted:

... 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

1.8 The Greens acknowledge the need for the Executive to withhold information in some circumstances that may, if made public, undermine national security, foreign policy and criminal justice frameworks. However, the Greens agree with Refugee Law's analysis that 'common law contains its own robust strict protections on the disclosure of sensitive information'.⁷

1.9 The Greens emphasise Refugee Law's argument that:

The common law hearing rule requires administrative decision-makers to provide persons with a real and meaningful opportunity to respond to adverse information that is credible, relevant and significant to the decision to be made.⁸

1.10 The bill clearly restricts the ability of in refused visa applicants or cancelled visa holders being able to access the information about themselves which the Executive would have used to deny or cancel their visa. This would deny refused visa applicants or cancelled visa holders a real and meaningful opportunity to respond to adverse information thus threatening due process.

Recommendation 1

1.11 The Australian Greens recommend that the bill not be passed by the Senate.

Senator Nick McKim
Senator for Tasmania

5 Law Council of Australia's, *Submission 4*, p. 7.

6 Law Council of Australia, *Submission 4*, p. 7.

7 Refugee Law, *Submission 3*, p. 4.

8 Refugee Law, *Submission 3*, p. 4.