

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Validation of Decisions)
Bill 2017 [Provisions]

September 2017

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Recommendation

Recommendation 1

The committee recommends that the Senate pass the bill.

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.¹

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.²

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.³

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.⁴

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

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)*.

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

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.⁶

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.⁷

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.⁸

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.⁹

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...¹⁰

1.12 Section 503A was inserted into the Act in 1998.¹¹ 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.¹²

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.¹³

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.¹⁴

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

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....¹⁵

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)'.¹⁶

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.¹⁷

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'.¹⁸
- 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

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.¹⁹
 - The right to protection of the family under article 17 of the ICCPR;²⁰
 - Australia's commitment to non-refoulement obligations contained in the Refugee Convention, the ICCPR, and the Convention Against Torture (CAT).²¹
 - The right to freedom of movement is protected under article 12 of the ICCPR;²² and
 - The right to an effective remedy, as protected by article 2 of the ICCPR.²³

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.²⁴

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.²⁵

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 2017.²⁶

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.

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

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.

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.

Appendix 1

Public submissions

- 1 Department of Immigration and Border Protection
- 2 Dr Martin Bibby
- 3 Refugee Legal
- 4 Law Council of Australia

