

Friday, 27 August 2021

Opening Statement - PJCIS hearing on Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Dr Jacoba Brasch QC, President, Law Council of Australia

The Law Council accepts that there is a public interest in law enforcement and criminal intelligence agencies providing probative information to officials responsible for exercising character-related powers, and in there being a means to control the disclosure of such information to persons subject to the exercise of those powers.

However, such a scheme must balance those interests against principles fundamental to a democratic legal system: the right to a fair hearing, effective judicial review, the proper administration of justice, and parliamentary and independent scrutiny of executive power. The Bill does not strike the appropriate balance – noting that grave consequences follow these powers' exercise, including losing the right to remain in Australia, and to be a citizen.

The Protected Information Framework will apply to information:

- provided by agencies determined by the Minister, without any Parliamentary scrutiny;
- of a kind which need not meet any statutory test as to its nature, sensitivity, veracity or the risks arising from disclosure.

Yet, despite this absence of oversight, the information is afforded inordinate protection from disclosure, testing and review in the administrative and judicial decision-making processes.

Unless the Minister exercises a non-compellable power to permit it, the information will not be available to an applicant or Administrative Appeals Tribunal – they may not know it exists. This means an applicant will, in practice, likely have no means to address the veracity of the information or any inferences drawn from it – that is, to answer the case against them.

During judicial review, an applicant or their lawyer would be prevented from making submissions (unless they already knew the information in a lawful way) and excluded from the any hearing as to whether the information would be disclosed or the weight to be given to the information. Further, in deciding whether to order disclosure, the Court may only consider security and law enforcement interests and may not consider the interests of the parties nor interests in the administration of justice. These measures are significant encroachments on the integrity of the court and its processes. This puts the provisions at risk of being struck down by the High Court.

There are already means to control disclosure of sensitive material in migration decisions:

- in general terms, public servants are prohibited from disclosing material received in confidence unless authorised by law and commit an offence if they do so;

- under the Migration Act, information regarding a section 501 decision is not disclosable to an applicant and may be disclosed only confidentially to the Tribunal, if the Minister considers that this is in the national interest for a range of relevant reasons;
- judicial review, the public interest immunity test and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) balance the public interest in limiting harm caused by disclosing sensitive information, against procedural fairness and the administration of justice.

The case for the proposed Protected Information Framework has not been made out by careful reference to these existing mechanisms which operate in the most serious criminal cases involving the range of policing and security agencies. Instead, what is required is a whole-of-government approach to handling sensitive information, including in judicial review matters, to ensure consistency across Commonwealth laws.

If, contrary to this submission, the Bill is to proceed, the Law Council recommends amendments, including to provide greater rigour around determining which information is subject to the scheme and provide the court with sufficient discretion to properly perform its judicial review function.

Contact: Dr Fiona Wade, P. 0419 097 896, E. Fiona.Wade@lawcouncil.asn.au