



Refugee Council
of Australia

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING INFORMATION PROVISIONS) BILL 2020

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to comment on the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020*. This Bill would deny refugee applicants procedural fairness through a secretive Ministerial process which they would be unable to challenge. It offends the principles of the rule of law and a fair trial and presents a significant risk that refugees who may have confidential information used against them may be sent back to harm.

Australia's non-refoulement obligations require a fair and effective decision-making process, in order to ensure that those with credible fears are not sent back to harm. This requires an independent assessment and the chance for refugee applicants to review and respond to any adverse information used in deciding their application. This requirement is in the interest of all parties – it ensures that a decision maker has all relevant information before making a life or death decision, so that they can make the correct decision.

However, this Bill would prevent refugee and citizenship applicants from reviewing confidential information used against them in their application. It would also prevent the Administrative Appeals Tribunal (AAT) from viewing protected information, essentially denying such applicants their right to merits review. It would also require the courts to prevent applicants and their legal representatives from viewing or responding to such information.

RCOA recommends that this Bill not be passed. However, if the Committee is of the view to support this Bill, we recommend, at a minimum, that the Bill be amended to allow for a security-cleared legal representative to view and respond to confidential information on behalf of an applicant. Such a system is already established in other national security matters, and could easily be adopted for migration and citizenship matters.

1 Risk of incorrect decisions being made due to sole reliance on confidential information

- 1.1 Information obtained from intelligence and law enforcement agencies is not always reliable or accurate. Information may be missing crucial details, may not give the whole picture of events, or may be missing broader context. This may result in errors in decision making where decision makers are only relying on documents provided by intelligence and law enforcement agencies. This risk of incorrect decisions being made is increased when applicants are denied a chance to respond to confidential information or provide additional documents that may assist the decision maker coming to the correct and preferable decision in accordance with the law. This risk is even more severe when life or death decisions are being made, such as in the case of applications for refugee protection where a person may be sent back to harm if they are refused.

a protection visa. As such, RCOA emphasises the need to ensure applicants and their legal representatives are given a chance to review and respond to any confidential information in order to assist the decision maker to come to the correct decision.

- 1.2 For example, in 2012 the Australian Government appointed an Independent Reviewer of Adverse Security Assessments to review the Australian Security Intelligence Organisation (ASIO) adverse security assessments given to the Department of Home Affairs in relation to people who have been found to be refugees but who have not been granted a protection visa because of an adverse security assessment. Before the appointment of an Independent Reviewer, there were no avenues for refugees to seek review of their adverse security assessment. Many refugees, including families with children, remained indefinitely detained for years without a chance to see their security assessments or seek a review of these assessments. After the appointment of an Independent Reviewer of Adverse Security Assessments, at least 57 refugees who had previously been assessed by ASIO as a high security risk had their assessments downgraded to either qualified or the lower level 'non-prejudicial' status.¹ This demonstrates that information provided by intelligence and law enforcement agencies is fallible, and further review of such information may assist decision makers, including the courts, from reaching the correct determination.
- 1.3 Intelligence and law enforcement reports should not be solely relied upon when making important decisions. In the case of refugee applications, the consequences of an error can be life or death. As such, it is in the Government's own interest to ensure decision makers come to the right decision as to a person's refugee status, in order to ensure that the Australian Government does not return a person to harm and that uphold its international legal obligations. To safeguard against errors, applicants and their legal representatives should have a chance to review and address any adverse information relied upon in the decision making about their application.

2 Lack of procedural fairness and safeguards

- 2.1 The proposed Bill would prevent applicants and their legal representatives from viewing and responding to any 'confidential information' provided by intelligence or law enforcement agencies.² The Bill would further restrict officers from disclosing confidential information to a court, tribunal, parliament or parliamentary committee, with a penalty of two years' imprisonment,³ unless the Minister authorises such disclosure under specified circumstances.⁴
- 2.2 The Bill also allows the High Court, Federal Court of Australia or Federal Circuit Court to order that confidential information be produced for the purpose of the substantive proceedings.⁵ If information is ordered to be produced, only a party who is legally aware of the content of the information can make submissions or tender evidence regarding how the court should consider the evidence. This means that the applicant will usually be excluded from making submissions regarding the use of confidential information in such proceedings. Such a process would result in a secret hearing without the applicant, presenting a significant concern regarding a fair hearing. After hearing submissions (usually in secret from the Minister), the court would then be required to make a determination as to whether disclosing the information would create a real risk of damage to the public interest. If so, the court must not disclose the information to any person, including the applicant and their legal representative.⁶ The requirements for considering whether information may be disclosed are very broad - in favour of non-disclosure. Under these provisions, it is very unlikely a court would ever be authorised to disclose confidential information in proceedings. This is a serious departure from the usual legal

¹ Karen Middleton, 'Exclusive: All 57 ASIO refugee case warnings revised after review' *The Saturday Paper* (3 February 2018) <<https://www.thesaturdaypaper.com.au/news/immigration/2018/02/03/exclusive-all-57-asio-refugee-case-warnings-revised-after-review>>.

² Schedule 1, item 3, proposed subsections 52A(2) and (3) and item 9, proposed subsections 503A(2) and (3).

³ Schedule 1, item 3, proposed subsection 52A(6) and item 9, proposed subsection 503A(6).

⁴ Schedule 1, item 3, proposed section 52B and item 9, proposed section 503B.

⁵ Schedule 1, item 3, proposed subsection 52C(1) and item 9, proposed subsection 503C(1).

⁶ Schedule 1, item 3, proposed subsections 52C(5)–(6) and item 9, proposed subsections 503C(5)–(6).

requirement to ensure natural justice. It undermines our legal processes and requires the court to depart from procedural fairness principles. As the Scrutiny of Bills Committee notes, 'the court has no flexibility to seek any feedback from the applicant to assist in performing its judicial review task.' As such, there is a real risk that information relied upon by the Minister or the Court may be inadequate or lacking appropriate context necessary to reach to a correct decision.

- 2.3 Further, the Bill would prevent the secretary of the Department from giving a document or protected information to the AAT in relation to the AAT's review of a decision if the Minister certifies that disclosing the document or information would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of cabinet deliberations or decisions.⁷ As such, the AAT will not have the ability to review decisions where a decision relied upon protected information. The test for this provision is set at the very low standard of being 'contrary to the public interest', a subjective test which rests with the Minister alone. This presents a significant concern where the Minister can determine, without any oversight, that certain information be withheld from a member of the AAT. This broad power would essentially remove a person's right to seek merits review before the AAT where a primary decision involved protected information (in the Minister's own determination).
- 2.4 As both the Scrutiny of Bills Committee and the Parliamentary Joint Committee on Human Rights note, these provisions seriously impinge on the right to a fair hearing (a requirement of natural justice). Under our legal system, everyone is entitled to a fair hearing and a chance to present their case and address any adverse information against them. This proposed Bill provides a secret process where a person's rights can be removed by a determination of the Minister. It offends the core principles of our legal system and the rule of law, and should be opposed.
- 2.5 However, should the Committee be in support of the Bill, there is perhaps one possible way to safeguard confidential information provided by intelligence and law enforcement agencies while ensuring procedural fairness. This is to develop a list of authorised legal representatives who can review and respond to confidential information on behalf of their client. This process is already in practice for other national security matters. Under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, legal representatives are required to undergo security clearances and can then view and respond to confidential information on behalf of their client. Such a system could also be developed in the case of migration and citizenship matters. This would ensure a fair process and assist the courts and the decision maker to come to the correct decision regarding a person's application. Such a proposal was recommended by a UNHCR Expert Roundtable in 2012, but has not been adopted.⁸

3 International legal obligations

- 3.1 This proposed Bill is likely to violate a number of international legal obligations which Australia has committed to uphold. The Parliamentary Joint Committee on Human Rights correctly notes and outlines the international legal requirement under article 13 of the *International Covenant on Civil and Political Rights (ICCPR)*, which requires that:

An alien lawfully in the territory of a State Party...may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

⁷ Schedule 2, item 5, proposed section 52G.

⁸ United Nations High Commissioner for Refugees, 'Expert Roundtable on National Security Assessments For Refugees, Asylum-seekers and Stateless Persons in Australia - Chair's Summary' *Refworld* <<https://www.refworld.org/docid/5915edd84.html>>.

- 3.2 We endorse the Parliamentary Joint Committee on Human Rights' view on Article 13, and emphasise the need to ensure procedural fairness in such proceedings.
- 3.3 However, the Parliamentary Joint Committee on Human Rights has not considered Australia's non-refoulement obligations under the *ICCPR*, the *Convention Against Torture (CAT)* and the *Refugee Convention* (as it has on many occasions previously).⁹ The *non-refoulement* obligation under the *Refugee Convention*, *ICCPR* and *CAT* requires Australia not return anyone to harm. Unlike Article 13 on the *ICCPR*, the non-refoulement obligation is absolute and may not be subject to any limitations or derogations. It is considered in international law as *jus cogens*, 'which means that it is a fundamental or peremptory norm of international law which applies to all nations, and which can never be limited.'¹⁰ Accordingly, compliance with the obligation of non-refoulement requires that sufficient safeguards are in place to ensure a person is not removed in contravention of this obligation.¹¹
- 3.4 Inherent in this obligation is the requirement that applicants be afforded a fair hearing and a chance to present their case. The procedural fairness requirement of the non-refoulement obligation ensures states are adhering to their *non-refoulement* obligation and not returning refugees back to harm.¹² As such, under international law, refugee applicants must be afforded a fair process and the right to address any adverse information used in deciding their case. The European Court of Human Rights has noted that a fair and effective refugee status determination procedure under the non-refoulement obligation must include 'the opportunity to submit evidence in support of the application and dispute evidence submitted against the application'.¹³
- 3.5 There is no derogation permissible from the obligation to ensure refugee applicants are afforded procedural fairness, including a chance to review and respond to any adverse information. The Bill as it stands would deny certain applicants this right, in contravention with Australia's *non-refoulement* obligations.

Recommendation 1

RCOA recommends that the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 not be passed.

If the Committee is of the view to pass the Bill, we recommend that, at a minimum, that the Bill should be amended to provide for a security-cleared legal representative to represent applicants in these matters. Such a legal representative should have full access to the confidential information and have the chance to present a response to this information at all levels of decision making (from the primary decision to judicial review).

⁹ See for example the Committee's Fourteenth Report of the 44th Parliament where it considered the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/Fourteenth_Report_of_the_44th_Pliament

¹⁰ Ibid page 76.

¹¹ International Covenant on Civil and Political Rights, article 2. See also Parliamentary Joint Committee on Human Rights Fourteenth Report of the 44th Parliament, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, , Second Report of the 44th Parliament (February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and Fourth Report of the 44th Parliament (March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 201, 513.

¹² For a detailed discussion of this obligation see Regina Jefferies, Daniel Ghezelbash, and Asher Hirsch, 'Assessing Refugee Protection Claims at Australian Airports: The Gap Between Law, Policy, and Practice' (2020) 44 *Melbourne University Law Review* <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3566608/Jefferies-Ghezelbash-and-Hirsch-441-Advance.pdf>, 38.

¹³ *Hirsi Jamaa* (2012) ECtHR Application No 27765/09 65, 72 (Judge Albuquerque). See also Madeline Gleeson, *Where to from here? Report from the Expert Roundtable on regional cooperation and refugee protection in the Asia-Pacific* (Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, 2016) 18-19.