ANSWERS TO QUESTIONS ON NOTICE:
***MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING INFORMATION PROVISIONS) BILL* 2020**

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1. The Visa Cancellations Working Group (**the Working Group**) again thanks the Committee for the opportunity to provide submissions and evidence to this Inquiry regarding the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**the Bill**).

2. At the public hearing on 5 March 2021, our representatives indicated the Working Group would provide to the Committee further information on a number of topics. We now provide that information, together with clarification of some important points.

3. We note the short timeframes available to submitters in this Inquiry, first in the provision of submissions and subsequent to the giving of evidence. Given the serious nature of this Bill, the Working Group considers more opportunity ought to have been afforded for consultation.

VICTIMS OF CRIME

4. Representatives of the Working Group were asked:

    a. whether we consulted with any victims-of-crime groups before making our submissions;
    b. whether our representatives had met with any victims of crime or victims-of-crime groups, and
    c. why the rights and experiences of victims of crime were not taken into account in our submission.

5. For the reasons that follow, this line of questioning is not useful. Indeed, it is difficult to see why this line of questioning was considered relevant.

6. It does not appear that the drafters of the Bill considered it relevant. There is no mention **whatsoever** of victims of crime in the Bill itself or in the Explanatory Memorandum to the Bill.

7. No victims of crime and no victims-of-crime groups made submissions to the Inquiry. It is not clear whether any such individuals or groups were invited to.

8. Victims of crime, by definition, have been exposed to criminal offending. That means that a criminal conviction has been recorded against the perpetrator after determination by Australian courts. That information is easily ascertainable by the Department.

9. Victims of crime have numerous opportunities to be involved in criminal proceedings, by way of victim impact statements and evidence that the Department will then have access to, as well as in cancellation proceedings, with their views, if known, being a mandatory consideration under Direction no. 79.

10. Indeed, the questions put to the Working Group suggest that members of the Committee may not have consulted with victims of crime groups nor considered their position and the inputs that victims may already have within the character framework.

11. If it is suggested that victims of crime should be able to provide further confidential information that will not be put in any form to a person facing visa cancellation, we consider the proposal impermissibly erodes the rule of law and procedural fairness.

12. If the concern is for people who allege offending where no court determination has yet been made but where processes have commenced, the Department can also easily ascertain when charges have been made against a person and routinely cancel visas on that basis.

13. If the concern is about people who allege offending but who have not made a formal complaint to law enforcement – what can perhaps best be called a 'dob in', by nature untested – then we express serious concern about the proposition first that such information should be considered *at all* as a basis for visa cancellation (particularly given the consequences for individuals and communities), and second that a person subject to such an accusation should be left completely unaware of it, and yet have their fate determined by it.

14. This scenario gives rise to very disturbing possibilities. The Committee should be very concerned about the establishment of the Department of Home Affairs as a quasi-police force, wherein it has the power to determine questions of character separate from existing and specialist law enforcement authorities and entirely in the dark.

15. To the extent that there may be situations where an untested non-criminal allegation against a person should remain confidential, existing provisions in public interest immunity, under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and under the *Migration Act 1958* (Cth) are more than adequate to protect that information.

16. For clarity, we do not consider that the rights of victims of crime is relevant to this Inquiry.

BALANCING CONSIDERATIONS

17. Senator Scarr raised the question of cases where intelligence operations are ongoing in respect of organised crime:

    > *To disclose the full particulars of how they got the information and who provided the information, and all of the circumstances around information gathering could prejudice not only a general investigation but also the safety of perhaps an informant. But that information is still relevant in terms of a determination made in relation to someone's visa.*

18. Senator Scarr referred to the balancing of competing considerations where information is not sufficiently probative to proceed with criminal charges, but where there are concerns a person's character and the public authority, in good faith, believes that action needs to be taken.

19. **Firstly**, we agree with the Senator that such circumstances are likely to be quite limited. Importantly, no examples have been provided by the Department clarifying the types of cases which are thought to fall within this area.

20. It stands to reason that:

    a. if this Bill is indeed a response to *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection [2017] HCA 33 (Graham and Te Puia)*,
    b. given it is clear national security information is already protected, and
    c. in the absence of any other information or examples,

    we can speculate that the cases are limited to operations regarding outlaw motorcycle gangs.

21. The Committee must ask itself whether cancelling the visas of people *allegedly associated but without criminality* with such groups is sufficient justification for the Bill, which leaves its subjects and the broader population with extraordinarily limited ability to ensure that a regime of alarming secrecy is properly administered and which will lead to consequences for individuals and communities of the most severe order.

22. As our representative noted, if the intelligence is credible and relevant and relates to a crime then it can appropriately be prosecuted. We consider the burden of proof should reflect the severity of consequences for affected people, and that information insufficiently probative for prosecution should not be relied upon where consequences include prolonged detention, family separation, and refoulement.

23. **Secondly**, it is certainly the case that our members have observed numerous instances where prejudicial information is not provided to a person, and where that information inappropriately impacted them.

24. Sections 375, 375A, 376, 437, 437A and 438 operate to limit information given to an applicant undergoing Administrative Appeals Tribunal review in its Migration and Refugee Division. Where the Minister has certified that disclosure of information would be contrary to the public interest, the Tribunal's task is constrained in various ways.

25. For s 438 of the Act, the High Court has confirmed that there is an obligation of procedural fairness on the Tribunal to disclose the *existence* of information where the Minister has certified that disclosure of the actual information would be contrary to the public interest:

    > *[P]rocedural fairness ordinarily requires that an applicant be apprised of an event which results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded.*
    > *…*
    > *The entitlement under s 423 [to make submissions] extends to allowing the applicant to present a legal or factual argument in writing either to contest the assertion of the Secretary that s 438 applies to a document or information, or to argue for a favourable exercise of one or both of the discretions conferred by s 438(3). This entitlement, at least in those specific applications, is capable of meaningful exercise only if the applicant is aware of the fact of a notification having been given to the Tribunal.*[1]

[1] *Minister for Immigration and Border Protection v SZMTA*; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) per Bell, Gageler and Keane JJ at [29] and [31].

26. **There is no such obligation upon and no such discretion for decision-makers under the Bill**. The minimum standard of procedural fairness elsewhere in the Act is to allow people to comment on *at least* the validity of the non-disclosure determination.

27. Further, in our experience, when these certificates are challenged they are often found to have been:

    a. Improperly issued, and/or
    b. Protecting irrelevant information that leads to an apprehended bias on the part of the Tribunal, leading to invalidity of their decision.

28. We also see numerous cases where information provided by what will be gazetted agencies under the Bill is completely inappropriate. For example, we have seen instances of completely false accusations or opinions being made regarding clients still in their teenage years. Our awareness of this information enables us to respond so that the decision-maker has the appropriate information before them.

29. Caselaw supports this. In addition to *SZMTA*, in *Minister for Immigration and Border Protection v CED16* [2020] HCA 24 (30 June 2020), a certificate under s 473GB was purportedly issued but was conceded to be so issued in error:

    The reason specified in the Certificate, that the Identity Assessment Form was a "Departmental working document", was plainly an insufficient basis for "a claim by the Crown in right of the Commonwealth in a judicial proceeding" that information or matter contained in the Identity Assessment Form "should not be disclosed".

30. Administration of the law, complex as it is, is fraught and fallible and decision-makers make mistakes. The consequences for individuals mean that such mistakes must be limited. That is why there are processes of accountability: something that this Bill all but removes.

31. **Thirdly,** and relatedly, we note that the Explanatory Memorandum makes no attempt to reconcile the Bill with the obligation on administrative decision makers to act in a manner that is free from bias and pre-judgment. That duty is axiomatic to the administrative function: it is alarming that the Bill makes no reference to it. Private communications with a decision maker implicitly create an apprehension of bias (see for instance *The City of St Kilda v Evindon Pty Ltd* [1990] VR 771 at 777):

    Citizens are generally aware that it is the accepted practice that no party or representative of a party should have a private communication with a judge or a member of a tribunal who is to hear a case. The mere knowledge that there had been an undisclosed departure from that proper practice would have tended to produce doubts and reduce confidence in the member of the tribunal who presided at the hearing. People would be inclined to wonder why the breach of practice had occurred and how far it had gone.

32. Plainly, allegations of bias may arise where a law enforcement agency communicates highly prejudicial information about a visa applicant or holder to a decision maker, which may or may not be relevant to their administrative function, and that information cannot be tested or aired with the person concerned.

33. Caselaw is replete with examples of irrelevant communications with decision makers which, albeit irrelevant to their task, nonetheless infect the process with bias, or the reasonable apprehension of it. For instance, in *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, the Secretary of the Department of Home Affairs

provided to the Immigration Assessment Authority a significant number of reports made regarding the applicant's behaviour by immigration detention service providers. The High Court described that material in the following terms:[2]

> *The material provided by the Secretary to the Authority for the purposes of the review included considerable information, innuendo and opinions about the appellant's character over 48 pages. It is unclear whether any of this material had even been before the delegate of the Minister. If not, and there are indications that it was not before the delegate, the material would have been specifically chosen by the Secretary for provision to the Authority as new information. In either event, however, the material was not relevant to any issue which the Authority had to decide.*
> …
>
> *One category of the irrelevant material provided by the Secretary to the Authority concerned periods of detention of the appellant and offences or alleged offences committed by the appellant. The underlying facts concerning the appellant's commission of an offence, his detention, and his charges were not controversial and were disclosed by the appellant himself in his application. One offence, in March 2015, to which he had pleaded guilty, involved breaking a window whilst he was in detention. The appellant was convicted of damage to Commonwealth property and was released without sentence, with conditions of a reparation payment and good behaviour for six months. The other offence for which he had been charged, as he described it in his application, was "spitting at a guard & breaking a window" during protests in November 2015.*
>
> *However, the material in this first category was not merely factual statements about the appellant's criminal record. It included descriptive language and suggestions of grave concerns when describing the appellant's criminal charges in November 2015. The material referred to his transfer to different prisons in Western Australia, to his alleged "participation" in a "riot" on Christmas Island in November 2015, and to him facing criminal charges in relation to that riot. It also included an internal departmental email chain with an update from the office of the Commonwealth Director of Public Prosecutions concerning the appellant's "criminal matters" and statements by departmental officers that the appellant's criminal matters were in relation to rioting on Christmas Island and that these criminal matters were still under investigation by the Australian Federal Police. References were also made to "multiple incidents" involving the appellant and there were assertions that a Superintendent of the Australian Border Force had recommended that the appellant remain in detention pending the finalisation of an Australian Federal Police investigation into the "riot" on Christmas Island.*

There were several matters which combined to 'compel the conclusion' that the Authority had acted in a manner reasonably suggestive of bias, including the following:

> *First, the material provided by the Secretary to the Authority was qualitatively and quantitatively significantly prejudicial to an assessment of the appellant's character on grounds other than legal grounds. The three categories of material, over nearly 50 pages, provided opinion, suggestion, and innuendo in relation to the appellant's criminal charges concerning "rioting" in November 2015, unspecified "multiple incidents" involving the appellant, alleged but unspecified aggressive behaviour, "[e]scalation" of consideration of the appellant including by national security bodies, and interviews of him by the National Security Monitoring Section.*
> …
> *[A]lthough the material was irrelevant, the fair-minded lay observer might reasonably have expected from statements made by the Authority, together with a deafening silence in the reasons of the Authority, that the Authority might have been influenced by the information within the material. On 23 March 2017, prior to reaching its decision, the Authority wrote to the*

[2] *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 at [118]-[121].

appellant and said that the Department had "provided us with all documents they consider relevant to your case" and that the Authority would "make a decision on your case on the basis of the information sent to us by the department, unless we decide to consider new information". At the outset of its reasons for decision, in the second paragraph, the Authority said that it had "had regard to the material referred by the Secretary under s 473CB of the Migration Act 1958". Nowhere in its reasons did the Authority suggest that any of the material provided by the Secretary was not relevant or that weight had not been placed on any of the material provided by the Secretary.

In these circumstances, a fair-minded lay observer would apprehend that the material, together with the basis upon which it was apparently provided, might cause the Authority to form adverse views of the appellant's character and, consciously or subconsciously, the Authority might be influenced by those adverse views either directly in the course of dismissing each of the appellant's claims to be a person in respect of whom Australia has protection obligations or indirectly when reaching conclusions based upon the credibility of the appellant.

34. Private, prejudicial and irrelevant communication with decision makers will necessarily give rise, on judicial review of a decision, to the reasonable apprehension of bias on the part of the decision maker. Adverse decisions made on the basis of private communications will not be inoculated from review on this basis, simply because of the provisions introduced in the Bill.

35. The Committee should be very concerned that information will be improperly withheld from affected people, as already occurs under a considerably less secretive regime. **This Bill makes it less likely that these instances of error will ever come to light, seriously affecting the integrity of decision-making by the Department and by the Tribunal**.

CLARIFICATIONS

Judicial protection

36. At the hearing, the Chair, Senator Henderson, stated that information provided by foreign governments such as North Korea and Iran would only be withheld if it was determined by a judge. We responded that the question would need to come before a court for such a determination, and that this is far from a given, particularly noting that large numbers of people in this space are unrepresented and vulnerable.

37. Affected people are also likely to be in immigration detention, and indeed in *remote* immigration detention such as on Christmas Island where facilities are limited. In our extensive experience, this considerably impairs an individual's access to justice and participation, particularly in accessing legal advice. It also impacts mental health.

38. We wish to emphasise to the Committee that a person may not know that information protected by the Bill even exists, let alone have the resources and access to support to get to court. Even if the matter did get to court, this Bill prevents that person from advancing any arguments for release of that information.

39. This is not speculation. Material on the public FOI disclosure log shows that, of 3,210 people affected by s 501, just 1,126 applied for Tribunal review – a shortfall of 2,084. Of 1,681 cases reviewable by the Federal Court in its original jurisdiction, review was initiated in 1,129 cases. In other words, of 4,189 negative decisions made (not including the Minister's personal powers to set aside), just 1,129 came before the courts: that is, just

26%.[3] Many of those are likely to have been unrepresented; many would likely not know to raise the issue of non-disclosable information.

40. The practical effect will be that few cases will get to court. Numerous individuals are likely to have their lives, and the lives of their loved ones, upended in extraordinary ways, and simply never know why.

41. People who *do* get to court will have likely spent extraordinary periods in immigration detention on the basis of information they have never had the chance to respond to.

42. If a court then determines that the information should have been disclosed, the propriety of that detention will be impugned.

Impact on courts

43. There is likely to be considerable impact on the resourcing of the courts if this Bill is made law.

44. If it is not known whether there is non-disclosable information on file, or if the nature of that information is not known, people affected by visa cancellation are likely to be advised to seek court determination. Given the large numbers of people affected, this is likely to adversely affect Australia's already strained federal courts.

The free flow of information

45. We are concerned by the Department's assertion, in evidence, that agencies were reluctant to provide them with information that would apparently justify visa cancellation because of confidentiality concerns.

46. No submissions were made by any organisations to the effect that they are not confident in giving information to the Department of Home Affairs under the existing regime. There is no evidence whatsoever that there is any such concern.
47. It is also difficult to understand how the Department knows that information exists that justify visa cancellation for certain people if agencies will not provide them with that information.

CONCLUSION

48. In the circumstances described above, it is difficult to apprehend what gaps this Bill is contemplated to fill. Visa cancellations of non-criminal alleged associates cannot possibly justify this Bill.

49. Under the proposed framework, Australians will likely never know if these extraordinary powers are being misused or even abused. Senator Scarr observed that "flimsy information shouldn't be relied upon" and that no reasonable person would expect that to be taken into account: this Bill gives us no comfort whatsoever that such reliance will not occur.

50. The rule of law requires transparency and procedural fairness. This Bill strips those away completely with no adequate justification.

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[3] Freedom of Information request FA 19/12/01125.

51. The existing regime already significantly disadvantages individuals and their communities. Detention and removal from Australia are not matters to be taken lightly or to be facilitated with secrecy.

52. The Working Group strongly recommends that the proposed Bill be rejected.

53. The Working Group welcomes the opportunity to consult further on a confidential basis. If you would like to discuss any of these matters further, please contact Hannah Dickinson and Sanmati Verma, the Chair and Deputy Chair of the Working Group, by email at workinggroup@visacancellations.org.