



Law Council
OF AUSTRALIA

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Senate Standing Committee on Legal and Constitutional Affairs

20 September 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Ms Fiona McLeod SC, President
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- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Migration Law Committee and the Law Institute of Victoria in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to provide feedback on the *Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017* (**Bill**).
2. The Bill has been introduced to strengthen integrity measures and compliance with obligations under Australia's skilled migration programmes. The Law Council generally supports strengthening the integrity of Australia's skilled migration programmes. However, as has been noted by the Law Institute of Victoria, any amendments to the programme should adhere to and uphold the rule of law. To that end, the Law Council has identified some oversights in the Bill which should be rectified to ensure due process and fairness, and offers the following recommendations:
 - (a) the Bill should be amended to make clear expressly that publication of information about a sponsor being sanctioned will not occur until after any merits or judicial review options have been exhausted, consistent with representations made by the Department of Immigration and Border Protection (**DIBP**);
 - (b) the Minister should justify why the immunity from civil liability conferred by proposed subsection 140K(6) is appropriate and necessary, and this justification should be included in the Explanatory Memorandum;
 - (c) the proposed amendments to section 140K, which permit the publication of sanction decision information, should only apply to sanction decisions made on or after the Bill, if passed, comes into force;
 - (d) the DIBP should be required to:
 - (i) explain to the Senate Standing Committee on Legal and Constitutional Affairs how the integrity of data obtained using TFNs as part of DIBP's monitoring and compliance activities will be assured; and
 - (ii) publish guidelines, addressing how it intends to protect the privacy and integrity of tax file numbers (**TFNs**) and the information obtained using TFNs, which are consistent with the Australian Privacy Principles;
 - (e) the DIBP should provide sponsors with the opportunity to comment on any raw data used by the DIBP to inform a sanction decision; and
 - (f) proposed new subsection 338(2)(d) should be removed from the draft Bill, or significantly redrafted, as it is confusing and may inadvertently create unfair outcomes. In addition, non-legislative alternatives to amending the existing section should be considered.

Public disclosure of sanctions

3. The Bill proposes to require the Minister and the DIBP to publish information about sponsors sanctioned for failing to meet their obligations through proposed amendments to section 140K of the *Migration Act 1958* (Cth) (Migration Act) unless otherwise not required. The information required to be published will be prescribed by regulations, as well as any circumstances in which the Minister is not required to publish information.
4. The proposed regulations have not been released. Therefore, it is difficult to form a full picture of how the proposed publication of sanctions regime will operate and therefore to comment on whether it is appropriate. The Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**) has already questioned why the Bill does not specify the type of information that is to be published.¹ Clarity is required in relation to exactly what information will be published about a sanctioned sponsor, to determine if it raises any privacy or other concerns. The Parliamentary Joint Committee on Human Rights (**PJCHR**) has commented that the requirement to disclose sanctions 'raises questions' as to whether it is a proportionate restriction on the right to privacy.²
5. Nonetheless, based on the Bill that is currently available, the Law Council has some concerns about the proposed amendments to section 140K, outlined below.

Natural justice: proposed subsection 140K(5)

6. Proposed subsection 140K(5) states that the Minister is not required to observe natural justice in relation to a publication decision. The Explanatory Memorandum explains that this is because:

*information will only be published... once a decision has been made to take action under current section 140K... and [proposed subsection 140(5)] does not limit the Minister's procedural fairness obligations in relation to the decision to take action.*³

7. While an approved sponsor can seek review of a sanction decision under the current section 140K, there is nothing in the wording of the proposed amendments nor the Explanatory Memorandum which indicate that information will only be published once those merits or judicial review options have been exhausted. That is, on the current drafting of proposed subsections 140K(4)-(7), a Minister could potentially publish information about a sponsor being sanctioned for breaching their sponsorship obligations even if the sponsor has sought review of that decision and the decision is still under review. Both the Law Institute of Victoria and the Migration Law Committee expressed concerns about this potential, as it could seriously prejudice the sponsor's right to procedural fairness.
8. The DIBP has consistently maintained since these changes were announced on 19 April 2017 that it does not intend to publish sanction information regarding decisions that are still under review. However, at this stage, that is at best just a policy, which

¹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 10 of 2017* (6 September 2017), 21.

² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report (Report 9 of 2017)* (5 September 2017) 30-31.

³ Explanatory Memorandum, Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (Cth), 4.

could change, and therefore gives sponsors no real legal protection. Given the potential adverse impact on sponsors, the Law Council recommends that it should be expressly stated in the Bill that no publication will occur prior to exhaustion of available merits and judicial review options.⁴

Recommendation

- **The Bill should be amended to make clear that publication of information about a sponsor being sanctioned will not occur until after any merits or judicial review options have been exhausted.**

Immunity from civil liability: proposed subsection 140K(6)

9. The Law Council notes that proposed subsection 140K(6) protects the Minister from civil liability where information is published in 'good faith'. Executive immunities from civil liability limit the legal rights of persons affected by executive decisions, and therefore warrant particular and thorough justification.⁵ However, the Explanatory Memorandum provides no rationale or justification for the immunity. The Law Council notes the Australian Law Reform Commission's (**ALRC**) findings in its *Traditional Rights and Freedoms – Encroachment of Commonwealth Laws* report that where immunities from civil liabilities affect people's rights, they are presumably only justified when strictly necessary.⁶
10. The immunity from civil liability provided to the Minister by proposed subsection 140K(6) raises concerns, especially in circumstances where the current drafting of the Bill does not assure sponsors that publication of sanctions will not occur before they have exhausted their options for review. For example, if a sanction decision is ultimately set aside on review, but the publication has already occurred, this may effectively leave the sponsor without an effective remedy. The Law Council considers that the Minister should justify why the immunity for civil liability is required.⁷

Recommendation

- **The Minister should justify why the immunity from civil liability conferred by proposed subsection 140K(6) is appropriate and necessary, and this justification should be included in the Explanatory Memorandum.**

Retrospective application of the sanction publication regime

11. The proposed changes, namely the publication of sanctions, apply to sanction actions taken on or after 18 March 2015. The Law Council notes that this would give the Bill retrospective application, contrary to the general legal principle that a law should not have retrospective application.⁸ Retrospective civil laws may create uncertainty for

⁴ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 10 of 2017* (6 September 2017) 22.

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016) [16.1] and [16.6].

⁶ *Ibid* [16.43].

⁷ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 10 of 2017* (6 September 2017) 22.

⁸ *Ibid* [13.1]-[13.2].

individuals and fail to satisfy the procedural fairness that must be afforded by decision-makers to those whose rights or interests are affected by their decisions.⁹ Sponsors that were subject to sanction action on or after 18 March 2015 have already been penalised according to the framework that existed at the time. The Law Council considers that those sponsors therefore have a legitimate expectation that they will not be subject to an additional penalty in the form of ‘naming and shaming’.

12. The Law Council notes the ALRC’s findings that where laws operate retrospectively only from the date of a government announcement of an intention to legislate, they do not disappoint legitimate expectations, that is, do not infringe a person’s right to be afforded procedural fairness.¹⁰ According to the Explanatory Memorandum to the Bill:

[18 March 2015] reflects the date of the Government’s response to the report Robust New Foundations - A Streamlined, Transparent and Responsive System for the 457 Programme (the report).

The Government’s response supported recommendation 21.2 of the report that the Department disclose greater information on its sanction actions, and communicate this directly to all sponsors and the migration advice profession, as well as placing information on the website. This amendment will give effect to that recommendation.

13. The Law Council considers that the Government merely supporting a recommendation is not analogous to the announcement of an intention to legislate. As the Scrutiny of Bills Committee has observed, ‘tying the commencement of legislative provisions to the timing of ministerial announcements tends to undermine the principle that the law is made by Parliament, not by the executive’.¹¹ Further, many recommendations supported by government are never implemented.
14. Therefore, announcement of support for a recommendation cannot give rise to an expectation that legislation to implement the recommendation will follow. Accordingly, the Law Council considers the Government’s justification for the retrospective effect of the proposed laws is insufficient. The Law Council recommends that proposed changes to allow for the publication of sanctions should only be effective from the date the Bill comes into force, if passed.
15. In addition, the Law Council notes that one of the stated purposes of publishing sanction information is to ‘deter businesses from breaching their sponsorship obligations’.¹² It is unclear then why the laws mandating the publication of sanction information need to be retrospective, because they cannot deter the breach of sponsorship obligations that have already been breached. Given retrospective laws cannot guide past action,¹³ the Law Council does not consider deterrence to be a valid justification for the retrospective operation of these proposed laws.

⁹ Ibid [13.5]; see also *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; and *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40.

¹⁰ Ibid [16.43].

¹¹ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 10 of 2017* (6 September 2017) 23.

¹² Explanatory Memorandum, Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (Cth), 4.

¹³ See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016) [13.25] citing Law Council of Australia, *Submission on the ALRC’s Traditional Rights and Freedoms – Encroachment of Commonwealth Laws Issues Paper*, 75 <<https://www.lawcouncil.asn.au/docs/7b7e2358-f914-e711-80d2-005056be66b1/1503-Submission-2950-Traditional-Rights-and-Freedoms-Encroachments-Commonwealth-Laws.pdf>>.

16. Taking to account the above concerns, the Law Council recommends that proposed changes to allow for the publication of sanctions should only relate to those sanctions imposed on or after the date the Bill comes into force, if passed, and should not have retrospective operation. Consistent with the Bill's purpose in relation to the need to raise public awareness about DIBP monitoring activities, de-identified statistical data in relation to sanctions imposed prior to that date may still be published insofar as it does not identify the sanctioned sponsor or any other person involved in the specific monitoring activity. For example, information could be published on the DIBP website in relation to how many times various sponsorship obligations have been breached since their introduction on 14 September 2009 in each programme year by sponsors (based upon their size, industry of operation, etc).

Recommendation

- **The proposed amendments to section 140K, which permit the publication of sanction decision information, should only apply to sanction decisions made on or after the Bill, if passed, comes into force.**

Tax file number collection and ATO data-matching

17. The Law Council notes that the Bill also proposes to amend the Migration Act, the *Income Tax Assessment Act 1997* (Cth) and the *Taxation Administration Act 1953* (Cth) to allow DIBP to collect, record, store and use the TFNs associated with temporary and permanent skilled visas for compliance and research purposes. The Explanatory Memorandum to the Bill explains that TFNs:

*will assist the Department of Immigration and Border Protection to undertake more streamlined, targeted and effective compliance activity. For example, in the context of the employer sponsored skilled migration programme, information obtained from the Australian Taxation Office (ATO) will assist the Department to identify skilled visa sponsors who breach their obligations, including by underpaying visa holders, as well as visa holders who work for more than one employer in breach of their visa conditions.*¹⁴

18. The Law Council considers that clarity is needed in relation to the integrity of the data sources relied upon to instigate such monitoring and compliance activities by DIBP. The PJCHR has commented that its analysis of the disclosure of TFNs 'raises questions' as to the whether the limitation on the right to privacy involved is a proportionate response to its stated objective.¹⁵
19. In addition, sponsors should be afforded the opportunity to comment on 'raw data' obtained through this process, where it forms the basis of a sanction decision, rather than the DIBP delegate's interpretation or summary of that data. Allowing a person to comment on adverse allegations is an important aspect of procedural fairness. While these matters may be addressed on review, at that point it may be too late, given the effect of sanctions on the sponsor.

¹⁴ Explanatory Memorandum, Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (Cth), 8.

¹⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report (Report 9 of 2017)* (5 September 2017) 33.

Recommendations

The DIBP should be required to:

- explain to the Senate Standing Committee on Legal and Constitutional Affairs how the integrity of data obtained using TFNs as part of DIBP's monitoring and compliance activities will be assured; and
- publish guidelines, addressing how it intends to protect the privacy and integrity of TFNs and the information obtained using TFNs, which are consistent with the Australian Privacy Principles; and
- provide sponsors with the opportunity to comment on any raw data used by the DIBP to inform a sanction decision.

Amendment to section 338(2)(d)

20. The proposed amendment to subsection 338(2)(d) intends to 'clarify' the circumstances in which merits review is available for decisions in relation to certain visas that require sponsorship and/or an approved nomination. The Explanatory Memorandum explains that the subsection was not amended at the relevant time to account for other changes to the sponsorship regime,¹⁶ which has led to a 'confusing' situation where it has fallen to the courts to interpret how the subsection applies in the new regime.¹⁷ The Explanatory Memorandum claims the amendment will align the subsection with its policy intention as the subsection as currently drafted has been interpreted by the Federal Circuit Court in *Kandel v the Minister for Immigration and Border Protection*¹⁸(*Kandel*) in a manner 'inconsistent' with that intention.¹⁹
21. The Law Council considers that the proposed section fails to achieve its stated aim of providing clarity. The new version of section 338(2)(d) is complicated and confusing. It has been difficult for the Law Council, including its migration law experts, to discern what the new provisions mean. Self-represented visa applicants, their employers, and migration agents who are not lawyers, are likely to have even more difficulty understanding and applying the proposed legislation.
22. In justifying why interpretation of the subsection by the courts has been unsatisfactory, the Explanatory Memorandum refers only to the case of *Kandel*. *Kandel* was a Federal Circuit Court case decided in 2015. Since then, the Full Court of the Federal Court has considered the meaning of 'sponsored by an approved sponsor' in other cases, including earlier this year, in *Dyankov v Minister for Immigration and Border Protection* (*Dyankov*).²⁰ The Full Court of the Federal Court's judgment demonstrates the complexity of statutory interpretation of the term 'sponsored by an approved sponsor', Yet that language appears in proposed subsection 338(2)(d)(iv). It seems from the Explanatory Memorandum that the proposed legislation has been drafted without awareness of the recent judicial treatment of the current provision.
23. The Law Council considers that proposed new subsection 338(2)(d) has real potential to unjustly deprive visa applicants from merits review. According to the Explanatory Memorandum, the policy objective of subsection 338(2)(d) is to prevent abuse of the

¹⁶ Ibid 6.

¹⁷ Ibid.

¹⁸ [2015] FCCA 2013.

¹⁹ Explanatory Memorandum, Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (Cth), 6.

²⁰ [2017] FCAFC 81.

merits review process by preventing refused sponsored visa applicants who have no sponsor from applying for review of their visa refusal decision. However, the operation of s338(2)(d) as proposed has real potential to remove merits review from cases which are bona fide and meritorious. The Law Council can foresee at least three situations where the proposed legislation could lead to injustice.

24. First, subsection 338(2)(d)(i) requires that 'at the time the decision to refuse to grant the visa is made' the visa applicant must be 'identified in an approved nomination that has not ceased under the regulations'. Visa applicants do not control the timing of when their visa is refused. If, for any number of reasons, a visa application refusal is slow, a meritorious approved nomination may have lapsed by the time the visa application is refused. In those circumstances, a visa applicant would have no merits review rights in relation to their visa refusal.
25. Second, a visa applicant may have their visa refused *before* their nomination and sponsorship applications have been approved. If so, then under subsection 338(2)(d)(i), the visa applicant would have no merits review rights in relation to their visa refusal, because they neither have an approved nomination nor have they applied for merits review of the nomination (because it has not been decided). The visa applicant may be able to show they are 'sponsored by an approved sponsor' within the meaning of subsection 338(2)(d)(iv), but as identified by the Full Court of the Federal Court in *Dyankov*, the meaning of that term is complicated. The applicant again has to satisfy that clause at the time of visa refusal – the timing of which is beyond an applicant's control.
26. Third, the proposed legislation may deprive a visa applicant of merits review in cases where the dispositive reason for refusal was other than the absence of an approved sponsorship or nomination, for example, refusal on PIC 4020 grounds for providing false information. In such cases, an applicant may have no opportunity for merits review to change a wrongly made decision to impose a three year ban on applying for another visa.
27. The Law Council acknowledges that there are, inevitably, unmeritorious applications for merits review. However, depriving worthy applicants of their opportunity to correct error at the Tribunal – as this proposed legislation will do in various cases – is a disproportionate response.

Recommendation

- **Proposed new subsection 338(2)(d) should be removed from the draft Bill, or significantly redrafted, as it is confusing and may inadvertently create unfair outcomes. In addition, non-legislative alternatives to amending the existing section should be considered.**