Law Council
OF AUSTRALIA

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Senate Legal and Constitutional Affairs Legislation Committee

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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.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) regarding its inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**the Bill**).

2. The Bill seeks to amend the *Migration Act 1958* (Cth) (**Migration Act**) and the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**), primarily for the purpose of maintaining a 'Protected Information Framework'. The Law Council acknowledges the Government's intention to provide certainty and clarity regarding the protection of sensitive information. Careful consideration is required regarding existing mechanisms that are in place to protect this information.

3. It appears to the Law Council that the Bill would permit the following types of scenarios:

   - The Minister determines that an Australian citizen ceases to be an Australian citizen, because confidential information was received from a gazetted agency that the person engaged in conduct specified in section 36B of the Citizenship Act, such as financing a terrorist while overseas. The information might be incorrect, or the Australian citizen might be subject to a statutory exception, such as that their actions were unintentional.[1] If the proposed legislation passes, however, the Australian citizen could be denied the opportunity to know the information on which the Minister's decision was made and correct the record. They could cease to be an Australian citizen, without ever being informed of the case against them or being able to put forward their version of events to an Australian court.
   - The Minister decides to cancel the visa of a non-citizen on the basis of confidential information from a gazetted agency, such as an overseas law enforcement agency, that the person does not pass the character test under section 501 of the Migration Act. If the Bill is passed, the person could be wholly denied access to the potentially adverse information on which the Minister's decision was made, and never be given the opportunity to put their side of the story or correct the record. This can and does have serious consequences for visa applicants. For example, members of the Law Council's constituent bodies have clients who have been detained for over 10 years, because their visas have been refused or cancelled based on undisclosed information.

4. This is a significant piece of legislation which warrants additional scrutiny and public debate than that which is currently permitted under the inquiry's short timeframes.

5. The Law Council recommends that:

[1] *Migration Act 1958* (Cth) s 36B ('Migration Act'). See, eg, David Povey, 'Are you accidentally funding terrorism?' (International Compliance Association, Insight, 1 July 2019) https://www.int-comp.org/insight/2019/july/01/are-you-accidentally-funding-terrorism/; Amy Bainbridge and Erin Handley, 'Australian loses appeal in Vietnam against 'terrorism' charges' (ABC News, 2 March 2020) <https://www.abc.net.au/news/2020-03-02/van-kham-chau-appeal-vietnam-court-terrorism-charges/12015954>. See other examples of Australian holidaymakers who have inadvertently run into trouble overseas: Lia Timson and Liam Mannix, 'Australian trio arrested in Bolivia accused of trying to board flight to Brazil with 'explosives'' (Sydney Morning Herald, 21 November 2015) <https://www.smh.com.au/world/australian-trio-arrested-in-bolivia-accused-of-trying-to-board-flight-to-brazil-with-explosives-20151120-gl3l7j.html>.

- the Committee should seek a substantial extension of time to its current inquiry and reporting dates to enable it, and the Australian public, to properly examine and respond to the Bill;
- the existing legislative framework in the Migration Act for protecting confidential information from disclosure should be reviewed by an independent inquiry. This should assess the framework's necessity and proportionality, in light of:
  - the expansive existing mechanisms available to the Commonwealth to protect information that poses a genuine risk to national security, including Australia's defence, security, international relations or law enforcement interests;
  - the lack of clarity and confusion that are likely to flow from multiple intersecting legal frameworks;
  - the need to balance national security objectives with other fundamental objectives underpinning Australian democracy, including the proper administration of justice, the right to a fair trial and procedural fairness, adequate oversight of Executive actions, and the independent functions of Parliament and the judiciary under the Australian Constitution; and
  - the potential for the issues raised by the *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (***Graham***) decision to be addressed by repealing the framework.
- the Bill should not be progressed without such a review first occurring, as well as further consideration of:
  - whether the proposed legislation is likely to curtail the capacity of a court to exercise its judicial review jurisdiction under or deriving from section 75(v) of the Constitution to a substance or degree resulting in invalidity; and
  - whether the necessity and proportionality of the proposed legislation has been demonstrated in this context.

6. If, contrary to the above recommendations, the Bill does progress, the Law Council recommends a number of proposed amendments that would ameliorate it at the end of this submission.

Concerns – Inquiry process

7. The Bill was referred to the Committee on 4 February 2021, for inquiry and report by 10 March 2021. The deadline for submissions to the inquiry is 19 February 2021. This provides stakeholders with only 11 business days in which to make submissions regarding a significant piece of legislation. If there are to be public hearings, the window of opportunity for stakeholders to appear and provide evidence will be, we envisage, similarly short.

8. Restrictive timeframes prevent meaningful engagement, considered analysis and the opportunity to develop appropriate solutions where shortcomings or unintended consequences are discovered in proposed legislation. Truncated inquiry processes are not in the interests of lawmakers, or the people they represent.

9. The Law Council is particularly troubled in this instance, because the issues raised in the Bill have serious implications including for people wishing to challenge their revocation of citizenship, or cancellation or refusal of their visa, in circumstances which may see them ultimately detained as unlawful non-citizens and deported.

10. It engages issues fundamental to a democratic legal system including the right to a fair hearing, effective judicial review, the proper administration of justice and parliamentary and independent scrutiny of executive power. The Law Council is concerned the Bill conflicts with a number of principles underpinning the rule of law, and Australia's international human rights obligations such as Article 14 of the *International Covenant on Civil and Political Rights* (**ICCPR**).

11. The Law Council recommends that the Committee seek a delayed reporting date to Parliament and further public consultation, in order to permit the Australian community a more reasonable timeframe within which to analyse and respond to the Bill.

12. In the timeframe available, the Law Council regrets that it has not been able to conduct a thorough analysis of the Bill. It restricts its comments to the preliminary issues raised below.

Migration Act – Existing provisions

13. The Migration Act currently contains a legislative framework protecting confidential information provided to authorised migration officers by gazetted agencies,[2] where it is relevant to the exercise of powers concerning section 501 'character test' visa cancellation, refusal and revocation decisions (**the section 501 character test regime**).[3] Under this regime, such information must not be disclosed to other persons, including to a court, tribunal, parliament, parliamentary committee or any other body or person.[4] The Minister, however, may declare that specified information may be disclosed in specified circumstances,[5] but does not have a duty to consider whether to exercise this power.[6] This decision is also a privative clause decision.[7] Privative clauses are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[8]

14. The Minister may apply to the Federal Court or Federal Circuit Court for non-disclosure orders, as the Court considers appropriate, for ensuring that this information is not divulged or communicated, including to the applicant or legal representative, in the event that a Ministerial declaration comes into force.[9] In exercising this power, the Court must have regard to an exhaustive list of criteria, including the confidentiality of the information, Australia's relations with other

[2] Migration Act, ss 503A, 503B, 503C and 503D.
[3] See, eg, ibid, s 503A(1): 'and the information is relevant to the exercise of a power under section 501, 501A, 501B, 501BA, 501C or 501CA'.
[4] Ibid, s 503A(1)(a)-(b), s 503A(2)(c)-(d).
[5] Ibid, s 503A(3).
[6] Ibid, s 503A(3A).
[7] Ibid, s 474(7).
[8] Simon Young, 'Privative Clauses: Politics, Legality and the Constitutional Dimension', in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 277.
[9] Migration Act, s 503B(1). The Court may also make interim non-disclosure orders under s 503C on application by the Minister.

countries, Australia's national security, the interests of the administration of justice, and such other matters as specified in regulations.[10] It is an offence to contravene final non-disclosure orders made by the Court.[11]

15. More generally, the Migration Act also provides that the Minister must provide an applicant or holder of a visa with relevant information which would be the reason for adverse decisions, such as refusing to grant a visa or exercising section 116 cancellation powers, and provide the opportunity to respond.[12] Similarly, the reasons for exercising visa cancellation decisions under sections 128[13] and 133A or 133C must be provided. The Administrative Appeals Tribunal (**AAT**) and Immigration Assessment Authority (**IAA**) must also provide applicants with information which would be the reasons for adverse decisions for matters under review and provide the opportunity to comment.[14] However, 'non-disclosable information' is excluded from the information which must be provided. This is information or matter whose disclosure would, in the Minister's opinion:

    - be contrary to the national interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of Cabinet deliberations or decisions;[15] or
    - be contrary to the public interest for a reason which could form the basis of a claim by the Crown in judicial proceedings;[16] or
    - whose disclosure would found an action by a person for breach of confidence.[17]

16. This regime was introduced with the passage of the Migration Legislation Amendment (Protected Information) Bill 2003 into law.[18] The Bill was never referred for inquiry, meaning at the time stakeholders and legal experts did not have the opportunity to provide formal feedback or evidence concerning its provisions and practical effect.[19]

17. Notably, when the regime was enacted, the provisions in the Migration Act enabling the Minister to cancel a visa on character grounds were substantially more limited. Accordingly, the circumstances to which non-disclosure could apply, were more contained. Today, the section 501 character test framework imposeslow thresholds for failure on character grounds, capturing a range of individuals who would not under normal criminal law definitions be considered to have committed serious offences. As the Law Council has previously submitted this legislative expansion

[10] Ibid, s 503B(5).
[11] Ibid, s 503B(12).
[12] Ibid, ss 57, 66(2)(c), 119(1)(a), 120(1);
[13] Ibid, ss 129; 133E (regarding decisions under ss 133A(1) or 133C(1))), and 133F (regarding decisions under ss 133A(3) or 133C(3)).
[14] Ibid, ss 359A(Part 5 reviewable decisions) and 424A (Part 7 reviewable decisions), 473DE (fast track decisions).
[15] Ibid, s 5(1).
[16] By the Crown in the right of the Commonwealth: Ibid, s 5(1).
[17] By a person other than the Commonwealth: Ibid, s 5(1).
[18] Parliament of Australia, 'Migration Legislation Amendment (Protected Information) Bill 2003', *Parliamentary Business* (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1710>.
[19] See Parliament of Australia, 'Search Committees and Inquiries', *Parliamentary Business* (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Committees>.

unnecessary and disproportionate,[20] it has strong concerns regarding any non-disclosure regime that is substantively attached to it.

18. Furthermore, at the time, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) (discussed below) had not been enacted. When the National Security Information Legislation Amendment Bill 2005 was introduced, there was no discussion in the Explanatory Memorandum or Minister's Second Reading Speech of the interaction between it and the non-disclosure regime under the Migration Act.[21]

19. The introduction of the present Bill provides a long-awaited and important opportunity to review, not only the practical effect of the non-disclosure regime under the Migration Act, but the necessity of this legislation in light of other mechanisms.

Changes introduced by the Bill

20. The Law Council's submission responds to the following changes in the Bill, while recognising that there are remaining provisions which it has not yet analysed.

21. Firstly, the Bill repeals the current legislative framework protecting confidential information for section 501 character test regime purposes, replacing it with the new Protected Information Framework. This framework is intended to generally prevent the disclosure of information communicated to an authorised Commonwealth Officer by a gazetted agency on condition that it be treated as confidential, where the information is relevant to the exercise of power under or in relation to a section 501 character test regime power.[22]

22. Key features of the new Protected Information Framework are further discussed below. However, it is worth noting that the Bill is intended (inter alia) to respond to the High Court's decision in *Graham*, which held that the Minister cannot be prevented by statute from being required to divulge such information to the court as is necessary for it to perform its judicial review function.[23]

23. Secondly, the Bill extends the Protected Information Framework with regard to key provisions of the Citizenship Act, by mirroring its protections regarding confidential information provided by gazetted agencies, where the information is relevant to the exercise of a power, under or in relation to, certain provisions regarding the refusal, cancellation, revocation or cessation of Australian citizenship (**listed citizenship powers**).[24]

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[20] See, eg, Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019* (14 August 2019) <https://www.lawcouncil.asn.au/resources/submissions/migration-amendment-strengthening-the-character-test-bill-2019>.

[21] Parliament of Australia, 'National Security Information Legislation Amendment Bill 2005', *Parliamentary Business* (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2299>.

[22] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ss 52A(1)-(2), 503A(1)-(2).

[23] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 2.

[24] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ss 52A(1)-(2), 503A(1)-(2).

24. Thirdly, the Bill expands the definition of 'non-disclosable' information under the Migration Act, which excludes certain information from the reasons required to be provided to visa applicants or holders under the Migration Act when adverse decisions are taken more generally.

25. Under the proposed expanded test, 'non-disclosable information' can additionally include information or matter where:

- it was disclosed by a gazetted agency and the information or matter is relevant to the exercise of a power under, or in relation to, the section 501 character test regime;[25] and
- the further disclosures of the information or matter would, in the Minister's opinion (after consulting the gazetted agency), be contrary to the national interest.[26]

Protected Information Framework

Definition of 'gazetted agency' and 'confidential information'

26. The Protected Information Framework is enlivened by the decision of a 'gazetted agency' to communicate information as 'confidential information'. For example, new section 503A, which contains the key prohibitions on disclosure of information relevant to the exercise of section 501 character test regime powers, etc, refers at subsection 503A(1) to information that:

> *(a) is communicated to an authorised Commonwealth officer by a gazetted agency on condition that it be treated as confidential information; and*
>
> *(b) is relevant to the exercise of a power under or in relation to section 501, 501A, 501B, 501BA, 501C or 501CA.*

27. The Law Council is concerned that the enlivening mechanism, based on the relevant definitions, is broad. It notes in this context that new offences apply if the non-disclosure requirements concerning this confidential information are breached (see further discussion below).[27]

28. New subsection 503A(9) of the Migration Act contains the meaning of 'gazetted agency'. This defines a 'gazetted agency' as: an Australian law enforcement or intelligence body, foreign law enforcement body, or war crimes tribunal, that is 'specified in a notice published by the Minister in the Gazette'. It also defines an 'Australian law enforcement or intelligence body' as a body 'that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence'.

29. Together, this grants an overly broad discretion to the Executive to determine the gatekeepers, and potential scope, of the proposed legislative scheme. While the Law Council recognises that relevant definitions are the same as those which apply

[25] That is, ss 501, 501A, 501B, 501BA, 501C or 501CA.
[26] Sch 1, Item 6.
[27] Eg, proposed new 503A(6) and 503B(7).

under the existing non-disclosure regime of the Migration Act with respect to character test provisions,[28] this does not assuage its concerns, noting that:

- a very broad range of bodies – well beyond those which are commonly considered traditional law enforcement or intelligence bodies – are likely to 'deal with' the information specified in the definition of 'Australian law enforcement or intelligence body', including fraud or security intelligence. For example, these bodies may include Centrelink or the Department of Prime Minister and Cabinet;
- gazette notices are not subject to parliamentary review;
- no definition of 'confidential information' is contained in the Bill, the Migration Act or the Citizenship Act; and
- proposed new sections 503A(5) and 52(5) provide that a certificate, signed by an authorised Commonwealth officer, that states information was communicated to that officer by a 'gazetted agency' is prima facie evidence of the matters stated in the certificate (that is confirming that a 'gazetted agency' communicated confidential information). The information does not need to be described in the certificate, and the agency does not need to be named. This use of a conclusive certificate prevents in practice a person's ability to challenge whether information influential to a decision in their case was actually communicated from a gazetted agency, was communicated as confidential or should be considered confidential.

30. Currently, under the existing legislation, the Minister specifies no fewer than 42 Australian law enforcement or intelligence bodies in the Gazette, many at the state and territory level, including, along with police forces and parole boards, the Department of Human Services and Department of Social Services.[29]. The foreign countries specified in the Gazette relevant to paragraph (b) of the definition of 'gazetted agency' – 'foreign law enforcement body' – are also numerous, encompassing, for example, China, North Korea, Somalia and Iran.[30]

31. Further, as noted, there is no definition of 'confidential information', or limitations on the types of information that a gazetted agency might subject to the condition that it be treated as confidential information. In particular, there is no requirement that the relevant information itself be, eg, reasonably likely to prejudice national security, or critical law enforcement or national security intelligence processes. Nor is there any threshold requirement or criteria regarding the relative seriousness of the information to be protected.

32. Together, these provisions would appear to protect any information from disclosure that any of the gazetted agencies subjectively consider should be confidential. With respect to Australian gazetted agencies, this could include information relating, for example, to individuals' cognitive disabilities or other health information, to welfare payments or other social security information, to low level offences such as minor road traffic offences or shoplifting. It could also include information which is politically sensitive, or may embarrass a Minister or department, such as information which discloses poor administration.

[28] Migration Act, s 503A(9).
[29] Minister for Immigration and Border Protection (Cth), 'Notice Under Section 503A of the Migration Act 1958' in Commonwealth, *Commonwealth Government Notices Gazette*, No GAZ 16/001, 22 March 2016 <https://www.legislation.gov.au/Details/C2016G00414>.
[30] Ibid.

33. With respect to gazetted agencies which are foreign law enforcement bodies, the relevant information may concern activities that are considered crimes in other countries but not in Australia, or for which fair trial guarantees are lacking (eg, regarding charges arising from corrupt systems). It may include, essentially, any information. The threshold appears to be left to each gazetted agency to determine and the Bill includes no independent safeguard to achieve appropriate levels of consistency and no avenue for review.

34. 'Confidential information' may further include information which is ultimately erroneous, ranging from gazetted agency records regarding a person's unpaid debt under the Centrelink online compliance scheme ('Robodebt') which is later disproved, to an Interpol red notice issued which relates to a wrongful conviction which was made in absentia.[31] The Law Council is unaware of what kind of guidance is given to gazetted agencies to determine what should be considered 'confidential information'. However, it considers that guidance should not be considered a substitute for appropriately tight legislative definitions.

35. The Law Council notes that the Senate Standing Committee for the Scrutiny of Bills has requested advice from the Minister as to 'whether the gazetted intelligence and law enforcement agencies which may make use of the proposed scheme should be outlined in primary legislation or at least in delegated legislation subject to parliamentary disallowance'.[32] Should, contrary to the Law Council's key recommendations as set out above, the Bill progress, this recommendation may improve the Bill. Further improvements would include:

- introducing a definition of confidential information, requiring a statutory requirement for a harm-based assessment (on reasonable grounds);
- a minimum level of approval of officers who can communicate the information in confidence, with limits on powers of delegation or authorisation; and
- provision for independent review of such decisions.

Deprivation of right to fair hearing and procedural fairness

36. While the new Protected Information Framework 'is more flexible than the one invalidated in *Graham* insofar as the Court (that is, the High Court, Federal Court and Federal Circuit Court – see further discussion below) is entitled to require the information be produced to it and to give that information such weight as it considers appropriate',[33] both the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights (**PJCHR**) have nevertheless expressed concerns about the Bill.[34] The Law Council also raises a number of significant issues, as discussed below.

37. In particular, new sections 503C and 52C purport to allow the High Court, Federal Court or Federal Circuit Court to order that confidential information be produced to the Court for the purpose of substantive proceedings relating to the exercise of a

[31] Eg, as occurred with respect to refugee Hakeem al-Araibi: Quentin McDermott and Susan Chenery, 'How #SaveHakeem people power freed refugee footballer Hakeem al-Araibi', ABC online, 28 October 2019.
[32] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 17.
[33] Ibid, 16-17.
[34] Ibid, 15-23; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 7-19.

specified power. Where information is produced to the Court in accordance with new subsections 503C(1) or 52C(1), new subsections 503C(2) and 52C(2) state that 'any party to the substantive proceedings' may make submissions and tender evidence regarding the use and weight to be given to the information and the impact that disclosing it may have on the 'public interest' (see definition below).

38. However, this is subject to new subsections 503C(3) and 52C(3), which provide that a party may only make submissions and tender evidence if they are aware of the content of the information and it was not acquired unlawfully.

39. It is not apparent how the applicant or their legal representative will become either aware of the relevant information, or how they can lawfully acquire it. The only means by which it could be disclosed at this stage is through a discretionary Ministerial declaration.[35] However, this declaration only enables disclosure to a specified Minister, Commonwealth officer, court or tribunal, and not to another person.[36] Further, new subsections 503C(4) and 52C(4) confirm that the applicant and their legal representative can be excluded from the hearing under the preceding subsections. Therefore, it appears that in practice, the applicant and their legal representative will be unable to make submissions regarding the use that the Court should make of the information and the weight to be given to it, without knowing what it is.

40. The Court must then, under new subsection 503C(5) and 52C(5), determine whether disclosing the information would create 'a real risk of damage to the public interest', having regard to an exhaustive and disproportionate list of factors.

41. These are: the fact that the information was communicated on a confidential basis; the risk of disclosure discouraging gazetted agencies from giving information in the future; Australia's relations with other countries; the need to avoid disruption to law enforcement, criminal intelligence, criminal investigation and security intelligence efforts; the protection and safety of informants; the protection of criminal intelligence or security intelligence technologies and methods; Australia's national security, and such other matters specified in the regulations.[37]

42. However, the Court may *not* have regard to broader factors in determining the public interest, including the interests of the administration of justice (in contrast to existing subsection 503B(5), concerning non-disclosure orders), or the potential ramifications of the information and proceedings for the applicant or their family.

43. If the Court considers it would create such a 'public interest' risk, then it must not disclose the information, including to the applicant and their lawyer. However, the Court can give weight to the information in the substantive proceedings, under new subsections 503C(7) and 52C(7). The Law Council notes that under the narrowly defined and restrictive public interest test, there is a strong likelihood that the information will not be disclosed to the applicant or their legal representative.

[35] Eg, under proposed subsection 503B(1).
[36] Ibid.
[37] Eg, new subsection 503C.

Right to a fair hearing

44. Article 14(1) of the ICCPR requires that 'all persons shall be equal before the courts and tribunals' and 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[38] As is recognised at the outset in the United Nations (**UN**) Human Rights Committee's General Comment No 32, this right to a fair hearing 'serves as a procedural means to safeguard the rule of law',[39] which is the Law Council's core function.

45. While fairness is relative and interpreted and applied to suit domestic legal frameworks, the right to a fair hearing has been imbued under international law with certain minimum requirements, including the requirement of 'equality of arms', whereby both sides to proceedings must be placed on a similar procedural footing before a court or tribunal:[40]

> *The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.*[41]

46. As the Commonwealth Attorney-General's Department (**AGD**) has explained, the requirement of 'equality of arms' in turn encompasses the right of a party to be heard or to have a reasonable opportunity to present their case:

> *In any event, the procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.*[42]

47. In civil proceedings, this 'demands', according to the UN Human Rights Committee, 'that each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[43]

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[38] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976).
[39] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 1.
[40] Ibid, 1-4.
[41] Ibid, 3.
[42] Australian Government, Attorney-General's Department, 'Fair Trial and Fair Hearing Rights: Public Sector Guidance Sheet' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights>. See also Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10.
[43] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 4. See also Communication No 779/1997, *Aarela and Nakkalajarvi v Finland*, para [7.4]. See also *De Haes and Gijsels v Belgium* [1997] I Eur Court HR [53]. Similarly, the Supreme Court of Canada has held that 'a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case': Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 414 citing *Charkaoui v Canada* [2007] 1 SCR 350, [52].

48. The European Court of Human Rights considered the impact of non-disclosure of confidential information on the right to a fair hearing in *A v United Kingdom*.[44] It noted that in certain circumstances, eg, those engaging national security, full disclosure of the arguments and evidence against an applicant may not be possible, but that 'as much information … as was possible without comprising national security' should be disclosed. 'Where full disclosure [is] not possible,' the Court held, it must be 'counterbalanced in such a way that each applicant still [has] the possibility effectively to challenge the allegations against him'.

49. This decision of the European Court of Human Rights was applied in the United Kingdom in *Secretary of State for the Home Department v AF*.[45] The House of Lords stated that 'non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him'. It held that 'the essence of the case' does not necessarily include 'the detail or the sources of the evidence forming the basis of the allegations', but must include 'sufficient information' to 'enable [a person] to give effective instructions in relation to those allegations'.

Comment

50. The Law Council is concerned that the Protected information Framework may operate to deprive a person of the essence of the case against them, affecting their right to a fair hearing. It agrees with the PJCHR's concerns that:

> *The measure appears to have the effect of withholding sufficient information from the person to the extent that they are unable to effectively provide instructions in relation to, and challenge, the information, including possible criminal allegations against them.*[46]

51. Under international law, the right to a fair hearing can be limited.[47] However, limitations must be in pursuit of a legitimate objective; rationally connected to this objective; and proportionate to achieving this objective – often summarised as 'necessary, reasonable and proportionate'.[48]

52. The Minister states that 'the Bill is for the legitimate purpose of protecting and upholding the good order of the Australian community'[49] and 'the legitimate aim of protecting the public interest',[50] including 'the protection of the Australian community from non-citizens of serious character concern'.[51] The Minister argues that the Bill is

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[44] *A v United Kingdom* (2009) 49 EHRR 29. See also Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 412-413; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10-11.
[45] *Secretary of State for the Home Department v AF* [2009] UKHL 28. See also Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 413-414; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10-11.
[46] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 11.
[47] See ICCPR art 4-5. See also Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007).
[48] Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).
[49] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 49 ('Attachment A – Statement of Compatibility with Human Rights').
[50] Ibid, 47-48.
[51] Ibid 48.

necessary to uphold the capabilities of law enforcement, by providing assurance of the protection of confidential information and the methodologies, priorities, sources, capabilities, and ongoing activities of law enforcement agencies.[52]

53. It is explicitly recognised in the Statement of Compatibility that the Bill requires the Courts 'to consider the potential damage to the wider concept of public interest, not only national security, in determining whether to order onward-disclosure'.[53] The Law Council queries whether this public interest threshold is proportionate to the stated legislative purpose of protecting the Australian community and upholding the capabilities of law enforcement.

54. The Minister advises that 'the Bill strikes a balance' between preserving the right to a fair hearing and protecting the public interest.[54] However, in coming to this conclusion, he considers only the fact that the Bill allows the Court to order the Minister to disclose information to it.[55] This however overlooks the Bill's exclusion of the applicant and their legal representative from any knowledge of the essence of the case against them, and the consequential impact on the right to a fair hearing.

55. In particular, as discussed, the Bill and its supporting materials do not enable weight to be given to the right to a fair hearing, or the interests of the administration of justice – as matters the Court must consider in permitting disclosure. Rather, its 'public interest' test is skewed to matters of criminal intelligence and security intelligence.[56] The Law Council considers that the Bill is imbalanced in its representation of the 'public interest'.

56. The fact that the Minister can specify other matters in the regulations is not a solution.[57] Leaving such matters to delegated legislation is in itself a risk, as there is the potential for the test to be further skewed. More to the point, the Law Council does not agree that it is the purview of the Executive to mandate to the Court matters which should be taken into account in assessing the public interest in the administration of justice. Rather, it is the function of the Court to be able to exercise its judicial power appropriately, which it cannot do properly if the matters it might consider are circumscribed in the manner anticipated by the Bill.

Procedural fairness

57. A guiding principle which aligns closely with the right to a fair hearing, is that the Australian common law further recognises a general duty to accord a person procedural fairness when their rights or interests are affected under law.[58] This is derived from natural law and principles of natural justice.[59] The High Court has held that the duty may be excluded only by 'plain words of necessary intendment'.[60]

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[52] Ibid 47-48.
[53] Ibid 48.
[54] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 48 ('Attachment A – Statement of Compatibility with Human Rights').
[55] Ibid.
[56] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ss 503C(5)(f) and 52C(5)(f).
[57] Ibid, ss 503C(5)(h) and 52C(5)(h).
[58] *Kioa v West* (1985) 159 CLR 550.
[59] Australian Law Reform Commission, 'Chapter 15: Procedural Fairness' in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2 March 2016) 412, 415.
[60] *Annetts v McCann* (1990) 170 CLR 596; *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, [74].

58. While there is no fixed content to the duty, and the procedure depends on the matters in issue, 'the expression 'procedural fairness' … conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[61]

59. In particular, the 'hearing rule' requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.[62] Generally, a fair hearing will require disclosure of the critical issues to be addressed, and of information that is credible, relevant and significant to the issues.[63]

60. The concerns identified above regarding the right to a fair hearing would also appear to be highly relevant to the Bill's likely impact on procedural fairness. In particular, it is clear that the Bill envisages that there may be no possibility of the applicant or their legal representative knowing 'confidential information' which is significant to the case against them, or having the opportunity to be heard with respect to that information. The Law Council queries whether Parliament wishes to abrogate core common law principles in such a blanket manner.

Law Council position

61. The Law Council considers that, at minimum, the wording of new paragraphs 503C(5)(h) and 52C(5)(h) should be changed to add 'any other matter that the Court considers relevant to the administration of justice'. Reference to ensuring the right to a fair hearing and/or procedural fairness could also be included. This would enable a better balancing exercise to be undertaken by the Court.

62. Further, the Minister's ability to specify other matters in the regulations should be deleted. The Court should also be permitted to provide for partial disclosure to the applicant and their legal representative, to in order to provide the 'gist' of the relevant allegations while deleting details which may pose a genuine risk, eg identifying an informer.

63. However, in the opinion of the Law Council, there are existing mechanisms under law, which would allow such a balancing exercise to take place, and which render the current Bill redundant and ill-advised. These are discussed further below.

Prohibitions on disclosure – offences

64. The Bill provides that an authorised Commonwealth officer to whom confidential information communicated by a gazetted agency, which is relevant to the exercise of a listed citizenship power or section 501 character test regime power, under subsections 52A(1) or 503A(1)(a), or disclosed under subsections 52A(2) or 503A(2) must not generally disclose the information to another person.[64]

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[61] *Kioa v West* (1985) 159 CLR 550, 585.
[62] Ibid.
[63] Australian Law Reform Commission, 'Chapter 15: Procedural Fairness' in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2 March 2016) 396 citing *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).
[64] Subject to certain exceptions including where: the person is the Minister or an authorized Commonwealth officer, and the information is disclosed for the purposes of the exercise of either a listed citizenship power, or a section 501 character test regime power (subsections 52A(2) and subsection 503A(2)); the information is

65. An authorised Commonwealth officer commits an offence, punishable by up to two years, if they disclose the information to another person (**the disclosure offence**).[65] The only exceptions relate to:

- disclosure to the Minister/an authorised Commonwealth officer for the purposes of exercising a section 501 character test regime power or a listed citizenship power;[66]
- where disclosure was in accordance with a Ministerial declaration permitting disclosure;[67] or
- the High Court, Federal Court or Federal Circuit Court has ordered its disclosure for the purposes relating to the exercise of either a section 501 character test regime power or a listed citizenship power.[68]

66. Further, where the Minister declares that specified information may be disclosed in specified circumstances,[69] an authorised Commonwealth officer commits an offence, also punishable by two years imprisonment, if:

- information is disclosed to the officer in accordance with such a declaration;
- the declaration specifies one or more conditions;
- the officer engages in conduct, or omits to engage in conduct; and
- the officer's conduct contravenes the condition or conditions (**the declaration offence**).[70]

67. These offences depend on definitions of information to be protected which are, as described above, overly loose and subjective (eg, no definition of 'confidential information' or threshold criteria, a large number of potentially gazettable agencies). The 'confidential information' involved may well protect information which is entirely benign, poses no serious risk to national security or law enforcement and is even in the public domain. It is disproportionate that a Commonwealth authorised officer should face imprisonment of up to two years in these circumstances.

68. The offences are broadly framed. The declaration offence is framed so as to capture non-compliance with potentially non-material conditions.

69. The proposed offences also appear to duplicate the secrecy offences in section 122.4 of the *Criminal Code Act 1997* (Cth) (**the *Criminal Code***), raising questions about their necessity. Under this general offence, which applies to current and former Commonwealth officers, a person commits an offence if they communicate information which they are under a duty not to disclose, and the duty arises under a law of the Commownealth. A penalty of up to two years of imprisonment applies. There is also an aggravated offence in section 122.4A for the disclosure of security classified information (eg secret or top secret) or otherwise the disclosure has a harmful outcome with respect to the security or defence of Australia. Other forms of harm such as to criminal investigations and enforcement actions, and harm to health

subject to a Ministerial declaration (under subsections 52B(1) or 503B(2)); or the information is subject to a court disclosure order by the High Court, the Federal Court of Australia or the Federal Circuit Court (subsections 52C(1) or 503C(1)): the Bill, subsections 52A(2) and 503A(2)).

[65] Subsections 52A(6) and 503A(6).

[66] In accordance with subsections 52A(2) or 503A(2): subsections 52A(6) and 503A(6).

[67] In accordance with subsections 52B(1) or 503B(1): subsections 52A(6) and 503A(6).

[68] Under subsections 52C(1), or 503C(1).

[69] Under subsections 52B(1) and 503B(1).

[70] Subsections 52B(7) and 503B(7).

or safety of the Australian public, also apply. This has a maximum penalty of five years imprisonment.

70. It would appear that the general secrecy offence in section 122.4 of the Criminal Code, as well as the aggravated offence for classified information etc, is sufficient to safeguard the information which is sought to be protected by the Bill.

71. Notably, they also do not contain the extensive exceptions in section 122.5, which provide defences for disclosures to certain oversight bodies, such as the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, and the Law Enforcement Integrity Commissioner, as well as for disclosures in accordance with the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) and the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Such defences are important to ensure some balance between the need for secrecy within the public service, and transparency and accountability of public administration. Nor, as discussed below, are there exceptions for providing the information to a court outside the narrow circumstances contemplated by subsections 52C(1) and 503C(1).

72. The Law Council does not support these offences as proposed in the Bill.

Non-disclosure to a court, tribunal, parliament or parliamentary committee etc

73. In addition to the general prohibition on disclosure by Commonwealth officers described above, the Bill also provides that an officer to whom such information is communicated or disclosed[71] must not be required to:

- produce the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person; or
- give the information in evidence before a court, a tribunal, a parliament or parliamentary committee or any other body or person.[72]

74. The limited exceptions are where the Minister has declared that specified information may be disclosed in specified circumstances,[73] or the High Court, Federal Court or Federal Circuit Court has ordered its disclosure for the purposes of proceedings relating to the exercise of either a section 501 character test regime power or a listed citizenship power.[74]

75. These provisions are augmented by other provisions preventing the disclosure of information disclosed in accordance with a Ministerial declaration to 'any court' (subject to the orders made by the High Court etc).[75]

Effect on administration of justice in the courts

76. The Law Council considers that these restrictions, together with the general disclosure offence which applies to authorised Commonwealth officers, may impede the administration of justice.

[71] Under subsection 52A(2) or 503A(2).
[72] Migration Act, ss 52A(3) and 503A(3).
[73] Ibid, ss 52A(3) and 503A(3), citing ss 52B(1) and 503B(1).
[74] Ibid, ss 52A(3) and 503A(2), citing ss 52C(1), or 503C(1).
[75] Subject to ss 52C(1) and 503C(1): ss 52B(4)-(5), 503B(4)-(5).

77. The relevant prohibitions relate to disclosing to 'a court' or to 'any court'. It would appear that the prohibitions on disclosure, combined with the general disclosure offence, preclude authorised Commonwealth officers from giving evidence or providing information to other courts – eg, state and territory Supreme Courts – including in circumstances where the information may have been originally disclosed as relevant to the exercise of section 501 character test regime or listed citizenship powers, but the evidence is now relevant to other kinds of proceedings (eg, criminal proceedings involving fraud, or anti-terrorism offences). There is no provision in the Bill allowing for these other courts to order its disclosure.

78. It is possible that there are broader mechanisms available to the relevant courts to compel the relevant information. For example, the prohibitions in subsections 52A(3) and 503A(3) and the general disclosure offence only apply to the authorised Commonwealth officer who received the information (or an officer to whom it was subsequently lawfully disclosed). A court hearing a separate matter could still order discovery against the Commonwealth in those proceedings, and it is only the authorised Commonwealth officer or subsequent recipient who is prevented from disclosure. The information could also be compellable directly from the gazetted agency. Nevertheless, the Bill's provisions place a significant dampening effect on the proper administration of justice, in that authorised Commonwealth officers who are subject to the above provisions will be unable to comply with state and territory court orders. It will also complicate its administration as parties and courts must seek alternative means to compel information.

79. Further, the proposed powers of the High Court, Federal Court, and Federal Circuit Court to order disclosure are restricted to information for the purposes 'relating to the exercise of' section 501 character test regime powers or listed citizenship powers. It is not clear why the power of these courts is limited to proceedings that 'relate to' the exercise of these powers, to the exclusion of any other proceedings to which the information may be highly relevant, eg criminal matters. There is also the scope for uncertainty and argument about the meaning of 'relates to' in the context of sections 52C and 503C. In contrast, sections 47 and 47A of the *Surveillance Devices Act 2004* (Cth) empowers the court or tribunal to order disclosure, where satisfied that the disclosure is necessary to ensure that a defendant has a fair trial, or where disclosure is otherwise in the public interest in relation to the proceedings.

80. The Law Council realises that the Minister may declare that the specified information may be provided to a court under subsections 52B and 503B, in which case the authorised Commonwealth officer is not caught by the prohibitions and general disclosure offence. However, this power is discretionary and non-compellable. As such, it may lead to lopsided approaches to ensuring that justice is done.

Effect on parliamentary scrutiny

81. The prohibitions on disclosure to parliament or a parliamentary committee, combined with the general disclosure offence, also appear to inappropriately limit the parliamentary scrutiny of executive power. The Law Council agrees with the statement of the Senate Standing Committee for the Scrutiny of Bills, which, on the basis that 'the Senate already has well-established processes in which the Executive may make claims for public interest immunity', considers that:

> *… it is inappropriate to prescribe a blanket prohibition on the disclosure of confidential gazetted agency information to a parliament or parliamentary committee, with such issues more appropriately being determined on a case-by-case basis by the Senate.*[76]

82. The public immunity test is further discussed below with respect to both the courts and Parliament.

Effect on independent oversight

83. As noted, there is no exception to the offences outlined above for disclosure to oversight and integrity agencies, or in relation to disclosures made in accordance with the PID Act and the FOI Act. While the individual legislation governing many integrity agencies, such as the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity (**ACLEI**), Information Commissioner and Inspector-General of Intelligence and Security (**IGIS**) and the PID Act includes immunities for individuals who make good faith disclosures of information, proposed subsections 52A(7) and 503A(7), which include that sections 52A and 503A override any other law of the Commonwealth.[77]

84. This is likely to serve as a practical disincentive to people who are considering making complaints, voluntary disclosures or who are issued with notices to provide information to an oversight body. On the face of proposed sections 52A and 503A, it would not be possible to disclose information to the Commonwealth Ombudsman, ACLEI or IGIS on a voluntary basis (such as making a complaint), and proposed sections 52A(7) and 503A(7) create doubt as to whether those agencies could compel its production.

Lack of consideration of existing mechanisms

85. The Law Council notes that there are numerous, existing mechanisms available to the Commonwealth to protect classified or otherwise sensitive material.

Mechanisms available for protection in legal proceedings before the courts

86. This includes relevant mechanisms to protect such material that is adduced, or sought to be adduced, in legal proceedings. In particular, the NSI Act creates a framework for national security information to be adduced in evidence, subject to various protective mechanisms (including agreed arrangements for access, storage and handling, and the security clearance of counsel) provided that the court considers the arrangements to be compatible with the right to a fair hearing.

87. For example, section 38L of the NSI Act enables the court to make court orders in civil proceedings for non-disclosure. The factors to be considered by the court in deciding what order to make under the section are set out in subsection 38L(7). These require the court to have regard to whether there would be a risk of prejudice to 'national security', as well as whether any order would have a substantial adverse

[76] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 18.
[77] As well as any other provision of the Act or the regulations, and any law (whether written or unwritten) of a State or a Territory.

effect on the substantive hearing in the proceeding, and any other matter the court considers relevant. In making its decision, the court must give greatest weight to the risk of prejudice to national security.

88. The meaning of 'national security information' under this regime is expansive. It is defined as information either 'that relates to national security'[78] or 'the disclosure of which may affect national security',[79] with the definition of 'national security' extending to 'Australia's defence, security, international relations or law enforcement interests'.[80] The NSI Act further provides broad definitions of 'security interests',[81] 'international relation interests'[82] and 'law enforcement interests'.[83] Notably, the statutory definition of 'law enforcement interests' is a broad and non-exhaustive definition:

> *11 Meaning of law enforcement interests*
>
> *In this Act, law enforcement interests includes interests in the following:*
>
> *(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;*
>
> *(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;*
>
> *(c) the protection and safety of informants and of persons associated with informants;*
>
> *(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.*[84]

89. In the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum for the Bill, it is said:

> *The Bill is necessary to ensure the Department is able to uphold law enforcement capability by providing assurance that any confidential information provided, and its source, are appropriately protected. The current framework in the* National Security Information (Criminal and Civil Proceedings) Act 2004 *is designed to protect national security information. This Bill will ensure that, similarly, confidential law enforcement information that is critical to character-related visa and citizenship decisions, such as a person's criminal background or associations, is also protected from disclosure, to ensure the protection of the Australian community from non-citizens of serious character concern.*[85]

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[78] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 7(a).
[79] Ibid s 7(b).
[80] Ibid s 8.
[81] Ibid s 9.
[82] Ibid s 10.
[83] Ibid s 11.
[84] Ibid.
[85] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 48 ('Attachment A – Statement of Compatibility with Human Rights').

90. The Law Council queries what confidential information that would pose a risk of harm should it be disclosed is not covered under the NSI Act, noting the very expansive definition of 'national security information' discussed above. It considers that if the Government wishes to argue the necessity of maintaining this protected information regime in the Migration Act in addition to the NSI Act regime, it needs to make clear the additional harm there is to be remedied, which cannot be dealt with under the broader NSI Act.

91. The framework in the NSI Act is already additional to the existing ability of the Commonwealth under the common law and section 130 of the *Evidence Act 1995* (Cth) to make a claim for public interest immunity in relation to particular information (with the result that the relevant evidence is excluded, if the court determines that the public interest in non-disclosure outweighs the interest in disclosure).

92. The Minister, in his Second Reading Speech, said that 'public interest immunity does not provide full protection for the type of confidential information that may be provided by law enforcement or intelligence agencies or their sources to support character decisions'.[86] However, it is widely accepted that 'the grounds of what constitutes public interest under the common law are not closed, but generally relate to the interests of central government'.[87] Indeed, even these general grounds appear to cover the Minister's central concern about protecting 'the operations, capabilities and sources of law enforcement and intelligence agencies':[88]

> *Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.*[89]

93. The Law Council cannot identify why information beyond this type of information relating to character decisions should be kept confidential.

94. In addition to the NSI framework and public interest immunity claims, courts also have inherent jurisdiction to control their proceedings, including making decisions to hold certain portions of a hearing in closed court, and to make suppression or non-publication orders in respect of particular evidence. The Bill and its explanatory materials do not have full regard to the full range of available mechanisms available to courts to protect information which poses a genuine risk if disclosed.

95. Further, it fails to properly address the interactions between these mechanisms and the Bill. There is a lack of clarity across the broader landscape of protections for confidential information. As a result, individuals are likely to experience high levels

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[86] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs) ('Second Reading Speech').
[87] Australian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, December 2005) 544 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC102.pdf> citing J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].
[88] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs) ('Second Reading Speech').
[89] Australian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, December 2005) 544 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC102.pdf> citing J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].

of confusion in attempting to navigate between these systems, and may need to call upon significant levels of legal expertise to do so.

96. As discussed, in the truncated time available, the Law Council has been unable to analyse or address all aspects of the Bill, including the proposed amendments to the handling of confidential information by the AAT. It recognises that there may be concerns that the NSI Act does not extend to the AAT's functions. However, the potential role of the Security Division of the AAT to address genuine disclosure risks which are related to section 501 character test or citizenship proceedings should be considered in this context.

Mechanisms available for protection in Parliament

97. As noted, new subsections 503A(3)and 52A(3) prohibit, with certain limited exceptions, the disclosure of information to parliaments and parliamentary committees (as well as to courts, tribunals and any other body or person).

98. However, the Houses of the Australian Parliament have constitutional powers to summons individuals and documents. The Senate, for example, has affirmed that it possess the powers and privileges of the House of Commons as confirmed by section 49 of the Australian Constitution, and has the power to summon persons to answer questions and produce documents, files and papers.[90] Further, it has affirmed that 'subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all persons to answer questions and produce documents'.[91]

99. In practice, the Senate acknowledges that there is some information held by government which ought not to be disclosed (public interest immunity). Odgers has summarised the potentially acceptable public immunity grounds which have attracted some measure of acceptance in the Senate, subject to the relevant circumstances and arguments.[92]

100. These include: prejudice to legal proceedings, prejudice to law enforcement investigation, damage to commercial interests, unreasonable invasion of privacy, disclosure of Executive Council or cabinet deliberations, prejudice to national security or defence, prejudice to Australia's international relations, and prejudice to relations before the Commonwealth and states.[93] However, Odgers has further noted that certain grounds have not been accepted by the Senate. These include advice to government, information subject to statutory secrecy provisions, legal professional privilege, and freedom of information issues.

101. Witnesses may also seek a parliamentary committee's agreement to give evidence in a private session (ie, *in camera*). For example, a case could be made for a public interest immunity claim but the Minister considers, on balance, that the public interest lies in making information available to the committee.[94]

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[90] *Odgers' Australian Senate Practice*, 14th ed (including updates to 31 July 2020), Ch 19 (Relations with the executive government).
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (October 2015).

102. The Bill and its supporting materials do not adequately address why public interest immunity claims and the ability to seek *in camera* proceedings are insufficient to address the protection of confidential information which genuinely poses a risk to national security, law enforcement or Australia's international relations etc.

Curtailment of effective judicial review

103. Regarding the Court's judicial review jurisdiction under section 75(v) of the Constitution, the decision in *Graham* was limited to the effect of paragraph 503A(2)(c), which operated to wholly prevent the Minister from being required to divulge or communicate confidential information to the Court. That is, it denied the Court 'the ability to see the relevant information for the purpose of reviewing a purported exercise of power by the Minister'.[95] To this extent, it was invalid.[96]

104. In allowing the Court (that is, the High Court, Federal Court and Federal Circuit Court) to order the production of confidential information to it under new subsection 503C(1), the current Bill purports to respond to this discrete issue.[97] The Court would now be able to 'see' the information.[98]

105. However, in *Graham*, the High Court left open the possibility that a different 'curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) of the Constitution'[99] might similarly lead to invalidity:

> *It is not necessary in this case to further analyse matters of substance and degree which may or may not result in the invalidity of a statutory provision affecting the exercise of a court's jurisdiction under s 75(v). It may be necessary to do so in the future.*[100]

106. Whether the Bill would still infringe section 75(v) of the Constitution can only be definitively decided by the High Court, should it pass into law. There are passages in *Graham* that might be relied upon in asserting the argument that it would. For example, the High Court explained the issue in *Graham* at a higher level of generality as whether or not a law denies the Court 'the ability to enforce the legislated limits of an officer's power'.[101] It went on to find that 'the practical effect of subsection 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister'. One might argue that, in having the practical effect of preventing an applicant or their lawyer from knowing *any* essence of the case against them or making *any* submissions, the Bill impacts the Court's ability to enforce the limits of an officer's power and draw inferences adverse to the Minister to the degree required for a consideration of invalidity. The problem of blanket prohibitions was also discussed in *Graham* through the High Court's reference to

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[95] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [53].
[96] Ibid, [70].
[97] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 2. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 16-17.
[98] Provided that it made such an order: Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 s 503C(1).
[99] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [64].
[100] Ibid, [65].
[101] Ibid, [48].

Bodruzza v Minister for Immigration and Multicultural Affairs.[102] In this case, the provision held to be invalid 'imposed a blanket and inflexible time limit for making an application for relief under s 75(v)',[103] and the High Court analogised that:

> *Section 503A(2)(c) of the Act imposes a similarly blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether or not legislatively imposed conditions of and constraints on the lawful exercise of powers conferred by the Act on the Minister have been observed.*[104]

107. This is also reminiscent of concerns expressed above regarding the exhaustive and imbalanced nature of the public interest test under new subsection 503C(5)(h). As the Senate Standing Committee for the Scrutiny of Bills has raised:

> *The court has no flexibility to seek any feedback from the applicant to assist in performing its judicial review task. The exhaustive list of matters which are relevant to a judicial determination of whether or not there is a real risk to the public interest do not allow the court to balance that risk against the possibility that the applicant may be able to assist the court in the proper exercise of its judicial review function by responding to the secret information or aspects of that information. Nor does it appear that the court is able to disclose part of the secret information (such as the gist of the information or a discrete element of the information) even in circumstances where a partial disclosure could assist the court without creating a real risk of damage to the public interest. The committee is concerned that the provisions in the bill may continue to operate to undermine the practical efficacy of judicial review in many cases.*[105]

108. The Law Council considers that it would not be prudent to pass the Bill into law without proper examination of this constitutional issue.

Non-disclosable information – 'contrary to national interest'

109. As noted above, the Bill expands the definition of 'non-disclosable' information under the Migration Act, which excludes certain information from the reasons required to be provided to visa applicants or holders under the Migration Act with respect to a range of adverse decisions (including eg, refusal of a visa application, broader cancellation powers, and with respect to AAT and IAA review).

110. As noted, the existing grounds for non-disclosure are already broad, and include where the Minister considers that disclosure would:

- be contrary to the national interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of Cabinet deliberations or decisions;[106] or

[102] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [49], referencing *Bodruzza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 671-672.
[103] Ibid.
[104] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [50].
[105] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 17.
[106] Migration Act, s 5(1).

- be contrary to the public interest for a reason which could form the basis of a claim by the Crown in judicial proceedings;[107] or
- whose disclosure would found an action by a person for breach of confidence.[108]

111. The Bill proposes that 'non-disclosable information' can include information or matter where:

- it was disclosed by a gazetted agency and the information or matter is relevant to the exercise of a power under, or in relation to, the section 501 character test regime[109]; and
- the further disclosures of the information or matter would, in the Minister's opinion (after consulting the gazetted agency), be contrary to the national interest.[110]

112. The Law Council queries whether the inclusion of these additional grounds for non-disclosure are necessary. Under this definition, it is not necessary that disclosure of the relevant information pose any risk to eg, national security, law enforcement or international relations. It does not even need to be 'confidential information'. It is sufficient that it was disclosed by a gazetted agency (with 42 agencies currently gazetted), it is relevant to the exercise of a section 501 character test power (but not necessarily relevant to the adverse decision for which reasons are being provided) and that the Minister considers that its disclosure would be contrary to the national interest.

113. The Law Council notes in this context that where the Minister exercises the power in the 'national interest', the grounds on which judicial review can be sought are heavily truncated. As the Full Federal Court remarked in *Carrascalao v Minister for Immigration and Border Protection*:[111]

> *There can be no doubt that, in this particular statutory context, the expression 'national interest' is, like the expression 'public interest', one of considerable breadth and essentially involves a political question which was entrusted to the Minister.*[112]

114. Given that the 'non-disclosable information' definition relates to the provision of reasons (and in turn, assurances of procedural fairness and natural justice) with respect to a broad range of adverse decisions under the Migration Act, the Law Council considers that the Bill's proposed additions are unwarranted.

Conclusion

115. In view of the existing mechanisms for the protection of sensitive information, clarification is required to demonstrate the necessity and proportionality of the Bill.

116. The Law Council urges the Parliament not to pass the Bill unless and until the threshold question of whether the provisions are in fact necessary is addressed.

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[107] By the Crown in the right of the Commonwealth: Ibid.
[108] By a person other than the Commonwealth: Ibid.
[109] That is, ss 501, 501A, 501B, 501BA, 501C or 501CA.
[110] Sch 1, Item 6.
[111] (2017) 347 ALR 173.
[112] Ibid, 210-211, [156].

117. This can be best achieved by conducting a review into the ongoing necessity and proportionality of the existing Migration Act provisions protecting confidential information, in light of the broader mechanisms available to the Commonwealth, including significant measures which were passed after these provisions.[113] Careful consideration should also be given, as part of this review, to the need to strike a better balance between ensuring confidentiality, where it is genuinely required to guard against significant risks, and the proper administration of justice, natural justice and appropriate levels of oversight and transparency. This approach would be preferable to simply responding to *Graham*, reframing the Protected Information Framework regime to apply in such a blanket manner and with significant penalties for unauthorised disclosure, extending it to citizenship cases, and expanding the circumstances in which applicants under the Migration Act will be unable to know the reasons for adverse decisions.

118. The Law Council advises that there may be further issues in the Bill deserving of careful consideration, including by the Law Council's own constituent bodies, sections and committees, and regrets that current timeframes have not permitted such important consultation to occur. Matters which it has been unable to consider at this time include, but are not limited to, the impacts of the Bill on tribunals (particularly the AAT, having regard to the provisions outlined above and the amendments to AAT powers and procedures contained in Schedule 2 of the Bill), and the amendments to the FOI Act in Part 2 of Schedule 1. For this reason, the Law Council reiterates its primary recommendation that the Committee seek a significantly delayed reporting date on the Bill.

Recommendations

The Law Council recommends that:

- **the Committee should seek a substantial extension of time to its current inquiry and reporting dates to enable it, and the Australian public, to properly examine and respond to the Bill;**
- **the existing legislative framework in the Migration Act for protecting confidential information from disclosure should be reviewed by an independent inquiry. This should assess the framework's necessity and proportionality, in light of:**
  - **the expansive existing mechanisms available to the Commonwealth to protect information that poses a genuine risk to national security, including Australia's defence, security, international relations or law enforcement interests;**
  - **the lack of clarity and confusion that are likely to flow from multiple intersecting legal frameworks;**
  - **the need to balance national security objectives with other fundamental objectives underpinning Australian democracy, including the proper administration of justice, the right to a fair trial and procedural fairness, adequate oversight of Executive**

[113] Eg, the NSI Act.

actions, and the independent functions of Parliament and the judiciary under the Australian Constitution; and

- **the potential for the issues raised by the *Graham* decision to be addressed by repealing the framework.**

- **the Bill should not be progressed without such a review first occurring, as well as further consideration of:**
  - **whether the proposed legislation is likely to curtail the capacity of a court to exercise its judicial review jurisdiction under or deriving from section 75(v) of the Constitution to a substance or degree resulting in invalidity; and**
  - **whether the necessity and proportionality of the proposed legislation has been demonstrated in this context.**
- **if, contrary to the above recommendations, the Bill does progress, it should be amended to:**
  - **outline the bodies that are 'gazetted agencies' in primary legislation;**
  - **introduce statutory safeguards regarding the ability of a gazetted agency to communicate information on condition that it be treated confidential, including:**
    - **introducing a tightly framed definition of 'confidential information', with a requirement for a harm-based assessment on reasonable grounds;**
    - **prescribing a minimum level of officers within a gazetted agency who can communicate such information, with limits on powers of delegation or authorisation; and**
    - **for independent review of such decisions;**
  - **amend the 'public interest' test to enable the court to consider and balance competing objectives in addition to those currently prescribed, including the right to a fair hearing, issues of procedural fairness and any other matter that it considers relevant to the proper administration of justice;**
  - **remove the Minister's ability to add additional factors to the public interest test through delegated legislation;**
  - **enable the High Court, the Federal Court and the Federal Circuit Court the flexibility to permit partial disclosure of confidential information to the applicant and/or their lawyer, sufficient to ensure that they understand, and can respond to, the gist of the information and the allegations made;**
  - **remove the disclosure and declaration offences from the Bill, or, at minimum, include defences which align with section 122.5 of the Criminal Code, and tighten the references to conditions in the declarations offences to 'material conditions';**
  - **enable the High Court, the Federal Court and the Federal Circuit Court to order disclosure in relation to any proceedings, rather than only substantive proceedings relating to the exercise of listed citizenship powers and section 501 character test regime powers;**

- **ensure that officers are not prevented from providing information or evidence to other courts, eg, state and territory courts, where such courts also order such disclosure and have appropriate procedures for managing disclosure-related risks;**
- **remove the blanket prohibition against disclosure to Parliament and parliamentary committees;**
- **include exceptions to the current general prohibitions for disclosure to oversight and integrity agencies, or in relation to disclosures made in accordance with the PID Act and the FOI Act; and**
- **remove the proposed expanded definition of 'non-disclosable information'.**