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**HOME AFFAIRS PORTFOLIO  
DEPARTMENT OF HOME AFFAIRS**

**PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE**

**Parliamentary Joint Committee on Intelligence and Security  
Review of the Migration and Citizenship Legislation (Strengthening  
Information Provisions) Bill 2020**

**27 August 2021**

**Asked by:** Mark Dreyfus

**Questions on Notice to the Department of Home Affairs**

Note that, unless stated otherwise, all references to “confidential information” (and similar references) in these questions should be read as references to information communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information for the purposes of section 503A of the Migration Act.

If the Department does not know how to answer a question or any question is unclear, the Department should seek clarification from the Secretariat (rather than not answering the question).

To the extent possible, all responses should be provided in a public submission to the Committee.

**1) Please provide the Committee with the following information:**

- a. The number of character-related immigration decisions the Government made in the calendar year 2015, 2016, 2017, 2018, 2019, 2020 and so far in 2021;**

| <b>s501 decisions by calendar year</b>      |             |             |             |             |             |             |                                    |
|---|-------------|-------------|-------------|-------------|-------------|-------------|------------------------------------|
|   | <b>2015</b> | <b>2016</b> | <b>2017</b> | <b>2018</b> | <b>2019</b> | <b>2020</b> | <b>2021<br/>As at 31 July 2021</b> |
| <b>Cancelled</b>                            | 908         | 1052        | 1212        | 883         | 895         | 1179        | 475                                |
| <b>Not Cancelled<br/>(Including Warned)</b> | 88          | 24          | 53          | 14          | 32          | 39          | 28                                 |
| <b>Refused</b>                              | 256         | 576         | 512         | 444         | 318         | 535         | 438                                |
| <b>Not Refused<br/>(Including Warned)</b>   | 524         | 973         | 1051        | 675         | 847         | 519         | 241                                |
| <b>Not Revoked</b>                          | 35          | 352         | 459         | 409         | 377         | 455         | 232                                |
| <b>Revoked</b>                              | 57          | 362         | 319         | 217         | 209         | 265         | 64                                 |

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- b. In respect of each of those calendar years, how many of the character-related immigration decisions relied on confidential information provided by law enforcement and intelligence agencies;**
- In 2015, **six** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
  - In 2016, **five** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
  - Between 2017 - 2021, **no** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
- c. In respect of the character-related immigration decisions that relied on confidential information provided by law enforcement and intelligence agencies, how many of those were challenged by visa holders in a court or tribunal; and**
- Of the six decisions in 2015, **five** were challenged in the AAT and courts in terms of the confidential information.
  - Of the five decisions in 2016, **fewer than 5** were challenged in the AAT and courts in terms of the confidential information.
  - Between 2017 - 2021, **no** decisions were challenged in the AAT or courts in terms of the confidential information.
- d. Of those challenged, how many times did a court or tribunal order that confidential information be disclosed.**
- Nil<sup>1</sup>.
- 2) In addition, how many times since 1 January 2015 has the Administrative Appeals Tribunal overturned or changed a decision to cancel a person's visa on character-related grounds?**

Between 1 January 2015 and 6 September 2021, the Administrative Appeals Tribunal overturned or changed 293 decisions to cancel a person's visa on character grounds.

- a. Over the same period, how many times did the Tribunal overturn or change a decision to cancel a person's visa on character-grounds because the Tribunal determined that confidential information was erroneous, lacked credibility or did not provide a sufficient basis for cancelling a person's visa?**

Nil record.

Having regard to the list of "law enforcement agencies" and Australian intelligence bodies listed in Schedule 1 of the Gazette Notice issued under section 503A of the Migration Act 1958 - 2016/028, GAZ 16/001 commencing on 1 April 2016:

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<sup>1</sup> *Caveat:*

- *Figures were extracted from Departmental systems on 3 August 2021. As data has been drawn from a live systems environment the figures provided may differ slightly in previous or future reporting.*
- *This information is provided for the specific purpose of this request. Any other use of the information provided will require consideration and clearance by Data Division, and a separate request should be made to [data.clearance@homeaffairs.gov.au](mailto:data.clearance@homeaffairs.gov.au)*

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- 3) Since 1 April 2016, how many times has the Attorney-General's Department provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 4) Since 1 April 2016, how many times has AUSTRAC provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 5) Since 1 April 2016, how many times has the Australian Commission for Law Enforcement Integrity provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 6) Since 1 April 2016, how many times did the Australian Crime Commission provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Three occasions until the end of 2016 calendar year.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Nil record.

- 7) Since 1 April 2016, how many times has the Australian Federal Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 8) Since 1 April 2016, how many times has the Australian Secret Intelligence Service provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

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- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 9) Since 1 April 2016, how many times has ASIO provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 10) Since 1 April 2016, how many times has ASIC provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 11) Since 1 April 2016, how many times has Australian Sports Anti-Doping Authority provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 12) Since 1 April 2016, how many times has the Australian Taxation Office provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 13) Since 1 April 2016, how many times has CrimTrac provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

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- 14) Since 1 April 2016, how many times has the Department of Defence provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 15) Since 1 April 2016, how many times has the Department of Foreign Affairs and Trade provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 16) Since 1 April 2016, how many times has the Department of Human Services provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 17) Since 1 April 2016, how many times has the Department of the Prime Minister and Cabinet provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 18) Since 1 April 2016, how many times has the Department of Social Services provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 19) Since 1 April 2016, how many times has the Department of the Treasury provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

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- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 20) **Since 1 April 2016, how many times has the Director of Public Prosecutors [sic] provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 21) **Since 1 April 2016, how many times has the Interpol National Central Bureau, Canberra provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

Where the ability to share personal identifiers is authorised by the Australian Privacy Principals, or relevant information disclosure provisions within the *Customs Act 1901*, *Australian Border Force Act 2015*, *Migration Act 1958* (the Migration Act), or regulations associated with these Acts, the Department can seek consent from the owners of the information contained within the Interpol Notice to disclose the existence of the notice to the person or the contents of the notice for the purposes of assessing whether visa refusal or cancellation grounds are enlivened under the Character provisions in the Migration Act.

This also allows the Minister to put forward the contents of a notice to the visa holder/applicant for the purposes of procedural fairness.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 22) **Since 1 April 2016, how many times has New South Wales Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 23) **Since 1 April 2016, how many times has WA Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

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**24) Since 1 April 2016, how many times has VicPol provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**25) Since 1 April 2016, how many times has the WA Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**26) Since 1 April 2016, how many times has the SA Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**27) Since 1 April 2016, how many times has Tasmanian Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**28) Since 1 April 2016, how many times has Queensland Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**29) Since 1 April 2016, how many times has ACT Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

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- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 30) Since 1 April 2016, how many times has NT Police provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

- 31) Since 1 April 2016, how many times has a corrective or correctional services department of a state or territory provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision? Please provide a breakdown (i.e. identify each corrective or correctional services department by name, and provide information on how many times that department has provided the Department of Home Affairs with confidential information).**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by those agencies to the person whose visa was cancelled?**

Not applicable.

- 32) Since 1 April 2016, how many times has a parole board or authority or prisoner review board of a state or territory provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision? Please provide a breakdown (i.e. identify each corrective or correctional services department by name, and provide information on how many times that department has provided the Department of Home Affairs with confidential information).**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by those agencies to the person whose visa was cancelled?**

Not applicable.

- 33) Since 1 April 2016, how many times has the Australian Capital Territory Department of Justice and Community Safety provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

- a. **On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.



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**34) Since 1 April 2016, how many times has the Australian Capital Territory Government Community Services provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**35) Since 1 April 2016, how many times has the Department of Justice in NSW provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**36) Since 1 April 2016, how many times has the NSW Crime Commission provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**37) Since 1 April 2016, how many times has Department of Family and Community Services NSW provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**38) Since 1 April 2016, how many times has the Department of the Attorney-General and Justice NT provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**39) Since 1 April 2016, how many times has the Crime and Corruption Commission QLD provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

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- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 40) Since 1 April 2016, how many times has the Department of Communities, Child Safety and Disability Services provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 41) Since 1 April 2016, how many times has the Attorney-General's Department of South Australia provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 42) Since 1 April 2016, how many times has the Department of Education and Child Development South Australia provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 43) Since 1 April 2016, how many times has the Department of Justice Tasmania provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

- 44) Since 1 April 2016, how many times has the Department of Health and Human Services Tasmania provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?

Nil record.

- a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?

Not applicable.

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**45) Since 1 April 2016, how many times has the Department of Justice and Regulation Victoria provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**46) Since 1 April 2016, how many times has the Independent-Broad-Based Anti-Corruption Commission Victoria provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**47) Since 1 April 2016, how many times has Family and Community Services Victoria provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**48) Since 1 April 2016, how many times has the Department of the Attorney-General Western Australia provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**49) Since 1 April 2016, how many times has the Crime and Corruption Commission Western Australia the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by that agency to the person whose visa was cancelled?**

Not applicable.

**50) Since 1 April 2016, how many times has the Department for Child Protection and Family Support Western Australia provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

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**Having regard to the list of foreign law enforcement countries or parts of foreign law enforcement countries listed in Schedule 2 of the Gazette Notice issued under section 503A of the Migration Act 1958 - 2016/028, GAZ 16/001 commencing on 1 April 2016:**

**51) How many countries in the world are not referred to in Schedule 2?**

Schedule 2 lists **280** 'foreign law enforcement countries or parts of foreign law enforcement countries'. The list at Schedule 2 includes autonomous territories, external territories and disputed states, in addition to United Nations (UN)-Member States or UN-recognised states.

The UN has a list of **193** Member States. However, there are UN-recognised states that are not UN Member States). There are **195** UN-recognised states, including Palestine and the Vatican City, which are both UN-recognised states but are not UN Member States.

All **195** UN Member States and UN-recognised states are included in Schedule 2.

**52) Since 1 April 2016, how many law enforcement agencies from a "foreign law enforcement country" have provided the Department of Home Affairs with confidential information that was used to inform a character-related immigration decision?**

Nil record.

**a. On how many occasions did the Government ultimately disclose some or all of the confidential information provided by foreign law enforcement countries to the person whose visa was cancelled?**

Not applicable.

**53) Of the "foreign law enforcement countries" listed in Schedule 2, how many of them currently have sanctions imposed on them by the United Nations Security Council?**

Department of Foreign Affairs and Trade (DFAT) has portfolio responsibility for managing the implementation of the sanctions regime under Australian sanction laws. Information is available on the DFAT website at [Sanctions regimes | Australian Government Department of Foreign Affairs and Trade \(dfat.gov.au\)](https://www.dfat.gov.au/sanctions-regimes).

**54) Since 1 April 2016, has the Department of Home Affairs ever received confidential information from a foreign law enforcement country that had – at the time the Department received the information – sanctions imposed on it by the UNSC? If so, how many times?**

Nil used to inform a character-related immigration decision.

**55) With respect to the Democratic People's Republic of Korea (North Korea):**

**a. Why is this listed as a foreign law enforcement country?**

North Korea was included as a law enforcement country to err on the side of caution.

**b. Has confidential information from North Korea ever been used to inform a character-related immigration decision? If so, why?**

Nil record of confidential information from North Korea used to inform a character-related immigration decision.

**56) Since 1 April 2016, has the following ever happened:**

**a. the Department of Home Affairs received confidential information from a "foreign law enforcement country";**

**b. the confidential information related to a visa holder;**

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- c. the visa holder had – or claimed to have – a well-founded fear of persecution from the relevant foreign law enforcement country; and
- d. the information from the foreign law enforcement country informed the Government’s decision to cancel the visa holder’s visa on character grounds? If so, how many times?

Nil record for all of the above.

- 57) Noting that it is an Australian external territory, why is Norfolk Island listed as a foreign law enforcement country?**

Until 2016, Norfolk Island was a semi-autonomous external territory to Australia.

The gazette notice has yet to be updated to account for the change in status of Norfolk Island in 2016.

- 58) Since the High Court handed down its decision in *Graham v Minister for Immigration*, how many times did a law enforcement agency listed in Schedule 1 of the Gazette Notice issued under section 503A of the Migration Act 1958 (2016/028, GAZ 16/001 commencing on 1 April 2016) decline to provide the Department of Home Affairs with confidential information because of a perceived inadequacy with the Protected Information Framework?**

We are unable to provide this information as the Department does not collect data on how many times a law enforcement agency has declined to provide the Department with confidential information because of a perceived inadequacy with the Protected Information Framework.

- 59) Since the High Court handed down its decision in *Graham v Minister for Immigration*, how many times did an agency from a foreign law enforcement country listed in Schedule 2 of the Gazette Notice issued under section 503A of the Migration Act 1958 (2016/028, GAZ 16/001 commencing on 1 April 2016) decline to provide the Department of Home Affairs with confidential information because of a perceived inadequacy with the Protected Information Framework?**

We are unable to provide this information as the Department does not collect data on how many times a law enforcement agency has declined to provide the Department with confidential information because it was concerned that the information would be disclosed to a visa holder or in a court or tribunal process.

- 60) Prior to the High Court handing down its decision in *Graham v Minister for Immigration*, how many times did a law enforcement agency listed in Schedule 1 of the Gazette Notice issued under section 503A of the Migration Act 1958 (2016/028, GAZ 16/001 commencing on 1 April 2016) decline to provide the Department of Home Affairs with confidential information because it was concerned that the information would be disclosed to a visa holder or in a court or tribunal process?**

We are unable to provide this information as the Department does not collect data on how many times a law enforcement agency has declined to provide the Department with confidential information because it was concerned that the information would be disclosed to a visa holder or in a court or tribunal process.

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- 61) Prior to the High Court handing down its decision in *Graham v Minister for Immigration*, how many times did an agency from a foreign law enforcement country listed in Schedule 2 of the Gazette Notice issued under section 503A of the Migration Act 1958 (2016/028, GAZ 16/001 commencing on 1 April 2016) decline to provide the Department of Home Affairs with confidential information because it was concerned that the information would be disclosed to a visa holder or in a court or tribunal process?**

We are unable to provide this information as the Department does not collect data on how many times a foreign law enforcement agency has declined to provide the Department with confidential information because it was concerned that the information would be disclosed to a visa holder or in a court or tribunal process.

- 62) After the Department wrongly asserted to the Committee that information the Committee had requested in relation to high risk terrorist offenders during its inquiry into the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 was “classified” when – in fact – most of the information was publicly accessible, did the Department conduct an internal inquiry – or implement some kind of process – to ensure that such a mistake would not be made again? If not, why not? If so, please explain what process the Department undertook?**

In September 2019, as part of the inquiry into the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, the Department of Home Affairs (the Department) incorrectly advised the Committee that it could not provide the details of a number of high risk terrorist offenders in an unclassified format.

On 30 September 2019, the Department corrected the advice in correspondence to the Committee Secretariat. The correspondence included the requested information in an unclassified submission. The Department has since reviewed its processes and broadened and strengthened its consultation with stakeholders to ensure that accurate advice is provided regarding the status of information requested by the Committee (including for example with the Commonwealth Director of Public Prosecutions). Where the Committee asks a question to which witnesses are not able to provide immediate, accurate advice, it will be taken on notice and promptly acquitted.

- 63) Since 1 April 2016, how many times has the Department been provided with information on the condition that it be treated confidentially in circumstances where the information was known to be – or subsequently discovered to be – publicly accessible?**

We are unable to provide this information as the Department does not collect data on how many times it has been provided with information on the condition that it be treated confidentially in circumstances where the information was known to be – or subsequently discovered to be – publicly accessible.

- 64) In respect of each of the recommendations made by the Law Council in its submission to this inquiry:**
- a. What is the Department’s response to the recommendation?**
  - b. What are the likely consequences / implications if the recommendation is implemented?**
  - c. What is the Government’s position on the recommendation?**

### Law Council Submission Recommendations

#### Recommendation 1 to 4

**Law Council’s preferred position: a review of the Protected Information Framework should be conducted - Recommended course of action - The Law Council recommends that:**

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- 1) **The Bill not be passed.**
- 2) **Instead, there should be a whole-of-government review of the scheme in the Migration Act (and Citizenship Act), and any proposed amendments, for dealing with sensitive information, including a public consultation process.**
- 3) **This review should be directed towards ensuring that any proposed scheme is necessary, reasonable and proportionate, having regard to the availability of alternative existing schemes for protecting the information.**
- 4) **The Terms of Reference proposed in this submission should be adopted to guide this review.**
  - a. **What is the Department's response to the recommendation?**

The Bill should be passed.

Section 503A of the *Migration Act 1958* (the Migration Act) was first introduced by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* in response to the reluctance of law enforcement agencies to provide confidential information to authorised officers unless they could be sure that the information and its sources could be protected from disclosure. The Department was thus able to rely upon confidential information provided by law enforcement and intelligence agencies to inform character test based visa decisions under the section 501 provisions of the Migration Act.

Following the High Court decision in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, the current framework provides inadequate protection from on-disclosure for confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed if subject to judicial review.

The High Court in *Graham* and *Te Puia* found section 503A of the Migration Act is in part invalid. The Bill responds to the High Court decision that the Minister cannot be prevented by section 503A of the Migration Act from being required to divulge certain confidential information to the High Court or the Federal Court of Australia in judicial review proceedings involving character decisions.

The Bill also takes the opportunity to replicate the Migration Act scheme in the *Australian Citizenship Act 2007*, which currently has no provisions protecting confidential information used in decisions made under that Act. The Bill also replicates a similar power that already exists in the Migration Act for migration related decisions by creating a power for the Minister to issue a non-disclosure certificate on public interest grounds in relation to information relating to a decision made under the Citizenship Act where that decision is reviewable by the Administrative Appeals Tribunal.

In terms of reasonableness, the Bill addresses the High Court ruling by providing a framework which empowers the Court to require disclosure of the relevant protected information to it and to consider whether it can be disclosed to any other party if doing so does not create a real risk of damage to the public interest.

This allows the Courts to review effectively the Executive's decision-making specified in the Bill.

The balance reflected in the Bill will enable law enforcement agencies to continue to provide confidential information to the Department to make fully informed visa and citizenship decisions on character grounds, while providing a framework for the Courts to access the information in judicial review proceedings challenging such decisions and determine whether the information can be disclosed to any person, including the applicant, without creating a risk of damage to the public interest.

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### **b. What are the likely consequences / implications if the recommendation is implemented?**

As noted above, since the High Court decision, the current framework provides inadequate protection from on-disclosure for confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed if subject to judicial review.

If the Bill is not passed, the potential disclosure of sensitive information may pose an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies - including active investigations. This risks jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies.

Where a decision-maker is not able to rely on adverse information, they may be prevented from refusing or cancelling the visa or refusing citizenship of certain individuals who present a serious character concern.

Given the rapidly evolving and complex security challenges, the amendments are necessary to ensure protection of confidential information shared between the Department, law enforcement and intelligence agencies, and to uphold public and national security interests.

### **c. What is the Government's position on the recommendation?**

Consultation on the Bill is ongoing, and therefore whole-of-government issues are being factored into the Bill.

Further, the Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 5**

**Greater scrutiny of the protected information - If the Bill is to proceed, the Law Council recommends that it be amended to:**

**Introduce a definition of confidential information, requiring a statutory requirement for a harm-based assessment (on reasonable grounds);**

#### **a. What is the Department's response to the recommendation?**

The concept of confidential is deliberately, not defined, given that the nature and content of the information to be communicated is wide-ranging and will vary from case to case.

Given the rapidly evolving and complex security challenges, it would not be appropriate to set parameters around the definition of confidential information. It is essential that gazetted agencies have the appropriate discretion to determine whether the information is such as to require protection under the Bill's framework. It is the agencies themselves (and not the Department) which make that judgment because they are best placed to appreciate the sensitivity of the information and the potential damage that would result from its disclosure. The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential, as it is their information.

It is the intention of the Bill to limit the protected information framework to information that, if it were made public, would jeopardise ongoing law enforcement investigations and/or the sources of the information. The Bill and existing framework aim to strike an appropriate balance between protecting the public interest and ensuring that the Courts can receive protected information as evidence in judicial review proceedings, decide whether the information can be disclosed to any person, including the applicant, without damaging the public interest and give such weight in the proceedings to the information as the Court considers appropriate.



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### **b. What are the likely consequences / implications if the recommendation is implemented?**

As such, a definition would limit, and could undermine, the Bill's framework. This, in turn, may increase the risk that relevant agencies are less willing to provide confidential information to the Department for character-related visa and citizenship decisions. The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential for use in a character-related decision (and to thereby attract the protection of the Bill's provisions), as it is their information.

It is the agencies themselves (and not the Department) which make that judgment because of their knowledge of the sensitivity of the information and of the potential damage that would result from its disclosure. Information is only communicated to the Department by agencies on the condition that it is treated as confidential. As such, the framework in the Bill seeks to protect confidential information provided by law enforcement and intelligence agencies from disclosure, including during judicial review.

For example, the Australian Criminal Intelligence Commission (ACIC) has its own policies as to what information can be shared, with whom, and under what circumstances, particularly in relation to coercively developed or collected material. Often, this information is sourced from partner agencies (national and international), which rely heavily on the ACIC's ability to protect that information. Releasing the information into a process that does not offer any protection then becomes problematic. The Australian Federal Police shares the same concern.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

## **Recommendation 6**

**A minimum level of approval of officers who can communicate the information in confidence, with limits on powers of delegation or authorisation;**

### **a. What is the Department's response to the recommendation?**

It is the agencies themselves (and not the Department) which make the judgment about the sensitive nature of the information and the damage that would result from its disclosure.

Information provided by law enforcement and intelligence agencies will vary from case to case, with varying levels of sensitivity.

The gazetted agency which provides confidential information to the Department is best placed to make decisions about the appropriate level of approval of officers who can communicate the information in confidence.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

It is important that gazetted agencies have the appropriate discretion to make decisions about the communication of information that is provided to the Department in confidence.

Additional restrictions in the flow of confidential information between gazetted agencies and the Department could unduly delay efficient decision-making in a rapidly evolving and complex security environment.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 7

**Tighten the definition of ‘Australian law enforcement or intelligence body’ so it is restricted to entities responsible for law enforcement and intelligence information, rather than simply dealing with it. Alternatively, amend the scheme to provide for different kinds of protection for entities which are responsible for law enforcement and intelligence information;**

**a. What is the Department’s response to the recommendation?**

It is not necessary to tighten the definition of Australian law enforcement or intelligence agencies in section 503A(9) of the Migration Act. It is important that an expanded list of agencies capture emerging trends, such as domestic violence to inform decisions to character-related visa and citizenship decisions. These agencies may not provide this type of confidential information to the Department unless it can be protected from disclosure.

Gazetted agencies include Australian and foreign law enforcement or intelligence bodies which are listed in the Gazette. This is published on the Federal Register of Legislation.

A war crimes tribunal established under international arrangements of law may also be a gazetted agency and is not required to be listed in the Gazette. The gazetted agencies are therefore publicly identifiable. As such, it is not necessary to list the gazetted agencies in either primary or delegated legislation. The gazetted agencies are therefore publicly identifiable.

The concept of confidential information provided by gazetted agencies is deliberately broad given that the nature and content of the information to be communicated is wide-ranging and will vary from case to case.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Tightening the definition of Australian law enforcement or intelligence agencies may not provide the kind of comprehensive protection required for the full range of confidential information provided by law enforcement and intelligence agencies to support character-related decisions.

In practice, law enforcement and intelligence agencies only provide information on the condition it be treated as confidential where it is relevant to the exercise of a relevant character or citizenship decision, notably in very few cases as referenced.

Restrictions could adversely impact the Department’s ability to rely on a broader range of confidential information from gazetted agencies to inform visa and citizenship decision making to refuse or cancel visas, or refuse citizenship to persons who pose a risk to the Australian community.

**c. What is the Government’s position on the recommendation?**

The Government will consider holistically all Committees’ recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 8

**Require that ‘gazetted agencies’ be determined in a disallowable legislative instrument;**

**a. What is the Department’s response to the recommendation?**

The gazetted intelligence and law enforcement agencies are defined in the Bill in both the Migration Act and the Citizenship Act. Gazetted agencies include Australian and foreign law enforcement or intelligence bodies which are listed in the Gazette. This is published on the Federal Register of Legislation.

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A war crimes tribunal established under international arrangements of law may also be a gazetted agency and is not required to be listed in the Gazette. The gazetted agencies are therefore publicly identifiable. As such, it is not necessary to list the gazetted agencies in either primary or delegated legislation.

**b. What are the likely consequences / implications if the recommendation is implemented?**

The current approach in the Bill is appropriate and additional mechanisms as proposed would be duplicative and unnecessary.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 9**

**Provide for mandatory reporting documenting the exercise of these powers to an appropriate independent body;**

**a. What is the Department's response to the recommendation?**

The Department does not think it is necessary to provide for mandatory reporting on the provision and use of information protected by the Bill's framework. This is because in practice the number of instances where the framework will be availed of is likely to be limited and scrutiny of the use of the provisions will be provided by the Courts via judicial review proceedings.

**b. What are the likely consequences / implications if the recommendation is implemented?**

The current approach in the Bill is appropriate and additional mechanisms as proposed would be duplicative and unnecessary.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments. Concerns raised by these bodies will also form part of the consideration.

### **Recommendation 10**

**Provide for independent review of the exercise of these powers to ensure they have been exercised proportionally.**

**a. What is the Department's response to the recommendation?**

An independent review is not necessary as the disclosure framework in the Bill provides for the Court to determine whether disclosure of the information would create a real risk of damage to the public interest. In this way, the Bill provides for independent judicial review of the gazetted agency's decision to communicate information on the condition that it be treated as confidential information

**b. What are the likely consequences / implications if the recommendation is implemented?**

The current approach in the Bill is appropriate and additional mechanisms as proposed would be duplicative and unnecessary.

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### c. What is the Government's position on the recommendation?

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

#### Recommendation 11

**Strengthen the right to fair hearing and procedural fairness, and the capacity for judicial review - If the Bill is to proceed, the Law Council recommends that it be amended to:**

**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;**

#### a. What is the Department's response to the recommendation?

Should matters relating to administration of justice be included as a consideration for the Court to consider when determining whether to disclose protected information, there is the risk that the Court would be more likely to on-disclose protected information if it finds the considerations of the administration of justice outweigh the other factors.

There was a deliberate choice by Parliament in 1998, by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*, to rebalance the factors to be considered when determining potential damage to the public interest, giving predominant weight to the public interest in protecting security and intelligence information. This was strengthened in 2003, by the *Migration Legislation Amendment (Protected Information) Act 2003*, which deliberately replaced public interest immunity as the mechanism for protecting such information.

The measures in the Bill do not alter existing rights to seek merits review or judicial review of character related decisions. The Bill will allow the Court, in its review of such a decision to consider the protected information, determine whether its disclosure, including to the applicant, would create a risk of damage to the public interest and, in any event, to give such weight to the information as the Court considers appropriate which may take into account whether the information has been disclosed to the applicant.

#### b. What are the likely consequences / implications if the recommendation is implemented?

This could impact ongoing law enforcement operations or intelligence activities, and also the agencies' consideration of whether to provide information to the Department if the information cannot be protected adequately.

Currently, the Australian Criminal Intelligence Commission and Australian Federal Police are disinclined to provide information which would be of use to decision-makers in the context of character-based migration and citizenship decisions due to a lack of protection, or lack of confidence that such information will be protected.

### c. What is the Government's position on the recommendation?

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 12

**Remove the Minister's ability to add additional factors to the public interest test through delegated legislation;**

**a. What is the Department's response to the recommendation?**

Sections 52C(5)(h) and 503C(5)(h) were included in the Bill in order to provide flexibility, given the rapidly evolving and complex security challenges in Australia.

Amendments to the *Australian Citizenship Regulation 2016* and *Migration Regulations 1994* are disallowable and accordingly, will be accompanied by a Statement of Compatibility with Human Rights and subject to parliamentary scrutiny.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Given rapidly evolving and complex security challenges, it is important the Bill provide flexibility to specify other matters in the Regulations. This will enable the Courts to consider all relevant factors in determining whether disclosing the information would create a real risk of damage to the public interest.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 13

**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;**

**a. What is the Department's response to the recommendation?**

The Bill, as currently drafted, does not prohibit the Court from ordering partial disclosure if the Court considers that disclosure would not create a real risk of damage to the public interest.

Moreover, the Bill provides a safeguard for the applicant by allowing the Court to decide how much weight to give to the confidential information.

This allows the Courts to weigh up a number of factors, including the nature of the information, fairness to the applicant and the public interest, in having regard to the information in judicial review proceedings challenging visa and citizenship decisions that relied on protected information.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Notwithstanding the above, given the confidential nature of the information communicated in confidence by the gazetted agencies and the identity of the gazetted agency itself, even partial disclosure of the information may damage the public interest.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 14

**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 character test decision powers;**

**a. What is the Department’s response to the recommendation?**

The scope of the Bill is purposefully narrow. It applies only to information provided by a gazetted agency on condition it be treated as confidential information:

- to an “authorised Commonwealth officer,” defined as a Commonwealth officer whose duties consist of, or include, the performance of functions, or the exercise of powers, under or for the purposes of the Australian Citizenship Act 2007 or Migration Act 1958; and,
- which is relevant to the exercise of a power set out in s 503A(1)(b) or s 52A(1)(b).

It is in this context that s 503C and s 52C set out the circumstances in which a Court may order the disclosure of information for the purposes of substantive proceedings relating to the exercise of a power under s 503A(1)(b) or s 52A(1)(b).

The same information if disclosed by a gazetted agency to a person for a purpose not set out in the Bill is not governed by the proposed amendments.

**b. What are the likely consequences / implications if the recommendation is implemented?**

This recommendation creates unnecessary complexity to a framework that is clearly defined, and where there are likely to be more relevant avenues for obtaining the information.

If the information is relevant to matters outside the framework in the Bill, it would be open to a law enforcement or intelligence agency to provide the information to a relevant government department or agency through other avenues. As such, it would not be governed by the framework in the Bill.

**c. What is the Government’s position on the recommendation?**

The Government will consider holistically all Committees’ recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 15

**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.**

**a. What is the Department’s response to the recommendation?**

The Bill is directed at managing disclosure of protected information to Federal Courts, including the High Court, because it is those Courts that have jurisdiction to review character-related decisions under the Migration Act and the Citizenship Act. In relation to other Courts, the Bill provides that the Minister for Home Affairs (after consulting the gazetted agency) may disclose confidential information in specified circumstances, including to a court or tribunal. This means that the confidential information may be lawfully disclosed during court proceedings.

Restricting disclosure of confidential information for the purpose of criminal prosecution may be necessary to protect the capability of law enforcement agencies and the public interest as described above.

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Any limitation on the right to equality before the courts will be mitigated by the fact that, in order to proceed, there must be sufficient evidence as considered by the court for the hearing to proceed fairly. If there is not sufficient evidence for the hearing to proceed fairly, courts may exercise their inherent powers to take appropriate action, such as discontinuing prosecution, to prevent injustice.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

As noted above, confidential information can be disclosed in court proceedings in specified circumstances, under the Bill. Restrictions on disclosure are necessary to ensure the capability of law enforcement agencies and the public and national interests are not compromised.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 16**

**Impeding the merits review function of the AAT and IAA - If the Bill is to proceed, the Law Council recommends that it be amended to:**

**Permit 'confidential information' to be provided to the AAT for consideration, if necessary, by its Security Division, rather than not being provided to the tribunal at all;**

### **a. What is the Department's response to the recommendation?**

Current s 503A of the *Migration Act 1958* does not permit disclosure of confidential information to the Administrative Appeals Tribunal (AAT).

There was a deliberate choice by Parliament in 1998, by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*, on the scope of disclosure of the confidential information including to a tribunal for character-related visa decisions. The limitations on providing all of the information to the affected person are in place to strengthen the Government's ability to uphold public safety and the good order of the Australian community.

The High Court judgment in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection [2017] HCA 33* found s 503A was only invalid to the extent it related to information being withheld from the High Court of Australia or the Federal Court of Australia.

While the *Administrative Appeals Tribunal Act 1975* (AAT Act) contains provisions relating to the disclosure of sensitive or confidential information or documents, the Department considers more robust provisions are required to adequately protect such information provided by gazette agencies.

In respect of the Security Division, its operation and role differs to that of the General Division, where character-related visa decisions and citizenship matters are heard.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

Any implications will require consultation with the AAT and the Attorney-General's Department. The practice and procedure of the tribunal are a matter for the AAT. Any amendments to the AAT Act and related regulations are a matter for the Attorney General's Department.

We note that this recommendation is likely to require further resourcing for the Department and the AAT to mitigate the increased risk of inadvertent disclosure and possible data breaches. This is because of the increase in the instances in which confidential information will need to be handled by the Department (e.g. departmental officers arranging for the routine transfer of files to the Tribunal), and an increase in the amount of confidential information that will need to be safely

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managed and stored by the Tribunal (notwithstanding processes in the Security Division to manage this information).

Consideration would also need to be given to the likelihood that this recommendation will extend the time to finalise character-related visa decisions (which need to be made within 84 days by the AAT), including factoring in the more resource intensive and prescriptive processes in the Security Division. Consideration will also need to be given to the impact this recommendation will have on the overall timeliness of the AAT caseload.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

Any changes to the AAT's structure or resourcing, including expanding the remit of the Security Division of the AAT will require consultation with the AAT and the Attorney-General's Department.

### **Recommendation 17**

#### **Set out a procedure by which the Security Division should handle this information.**

##### **a. What is the Department's response to the recommendation?**

The practice and procedure of the Security Division are a matter for the Administrative Appeals Tribunal. Any amendments to the *Administrative Appeals Tribunal Act 1975* and related regulations are a matter for the Attorney-General's Department.

##### **b. What are the likely consequences / implications if the recommendation is implemented?**

Any implications will require consultation with the AAT and the Attorney-General's Department. The practice and procedure of the tribunal are a matter for the AAT. Any amendments to the AAT Act and related regulations are a matter for the Attorney General's Department.

We note that this recommendation is likely to require further resourcing for the Department and the AAT to mitigate the increased risk of inadvertent disclosure and possible data breaches. This is because of the increase in the instances confidential information will need to be handled by the Department (e.g. departmental officers arranging for the routine transfer of files to the Tribunal), and an increase in the amount of confidential information that will need to be safely managed and stored by the Tribunal (notwithstanding processes in the Security Division to manage this information).

Consideration would also need to be given to the likelihood that this recommendation will extend the time to finalise character-related visa decisions (which need to be made within 84 days by the AAT), including factoring in the more resource intensive and prescriptive processes in the Security Division. Consideration will also need to be given to the impact this recommendation will have on the overall timeliness of the AAT caseload.

##### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

Any changes to the AAT's structure or resourcing, including expanding the remit of the Security Division of the AAT will require consultation with the AAT and the Attorney General's Department.



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### Recommendation 18

**A security-cleared legal practitioner (or if necessary, a special advocate) to attend hearings, access the relevant information and make submissions on behalf of an applicant to whom the information may not be disclosed;**

**a. What is the Department's response to the recommendation?**

The special advocate scheme is appropriate and justifiable in the context of the NSI Act and its application in terrorism-related proceedings. However, the scheme would arguably be inappropriate, and difficult to justify, in character related decision-making in the migration and citizenship context, given the potential volume and nature of cases and operational imposts.

The Bill provides safeguards to applicants by allowing the courts to admit confidential information into evidence and to decide how much weight to give to that evidence.

When determining how much weight to give to the confidential information, the courts are entitled to consider any factor considered relevant, including prejudice to an applicant by not having access to the confidential information (if the Court determines not to disclose the information to the applicant), and the public interest.

The factors the courts may consider include any information that the applicant, their authorised representative or any third party has raised in support of their case, irrespective of whether the protected information has been disclosed to the applicant or their authorised representative.

The framework in the Bill also provides a mechanism which allows the court to consider whether it can disclose the information to the applicant (amongst others) if doing so does not create a real risk of damage to the public interest.

In this way, the court can exercise its judicial functions in order to conduct an effective judicial review.

**b. What are the likely consequences / implications if the recommendation is implemented?**

As stated above, special advocate scheme would arguably be inappropriate and difficult to justify in character related decision-making in the migration and citizenship context, given the potential volume of cases and operational imposts.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 19

**The Tribunal to disclose the 'gist' of the information to the applicant, sufficient for them to respond to the allegations made against them**

**a. What is the Department's response to the recommendation?**

Please refer to response to Question on Notice 64, Recommendation 13 from Law Council of Australia.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to Question on Notice 64, Recommendation 13 from Law Council of Australia.

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### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

#### **Recommendation 20**

**If these recommendations are not accepted, oblige the Minister to consider whether the nature of the information is such that it may be disclosed to specified tribunals undertaking merits review of relevant decisions.**

### **a. What is the Department's response to the recommendation?**

The Bill provides that the Minister for Home Affairs (after consulting the gazetted agency) may disclose confidential information in specified circumstances, including to a court or tribunal. This means that the confidential information may be lawfully disclosed during court or tribunal proceedings.

This restriction on disclosure of confidential information is necessary to protect the capability of law enforcement agencies and the public interest. Information which falls within the protection of the Bill's framework is, by its nature, highly sensitive. This is because it is information communicated to the Department by its intelligence and law enforcement agency partners on the condition that it is treated as confidential.

It is the agencies that have designated the information as confidential and therefore requiring protection under the Bill's framework. It is the agencies themselves (and not the Department) which make that judgment because of the sensitive nature of the information and their knowledge of the potential damage that would result from its disclosure.

The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential, as it is their information.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

As noted above, confidential information can be disclosed in tribunal or court proceedings in specified circumstances, under the Bill.

Disclosure of confidential information outside the framework of the Bill could risk jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies. This may result in information that is relevant to character decisions not being made available to the decision-maker for consideration. Furthermore, disclosure of protected information outside the framework of the Bill could compromise Australia's national security and the operations or capabilities of law enforcement and intelligence agencies.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 21

**Effect on parliamentary scrutiny and independent oversight - If the Bill is to proceed, the Law Council recommends that it be amended to:**

**Remove the blanket prohibition against disclosure to Parliament and parliamentary committees;**

**a. What is the Department's response to the recommendation?**

The Bill provides that neither a Commonwealth officer nor the Minister can be required to produce protected information to, or give the information in evidence before, Parliament or a parliamentary committee. The High Court decision in *Graham and Te Puia* did not find this element of the provisions to be invalid.

In terms of independent review of executive decisions, the Bill addresses the High Court ruling by providing a framework which empowers the Court to require disclosure of the relevant protected information to it and to consider whether it can be disclosed to any other party if doing so does not create a real risk of damage to the public interest.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Given the sensitive nature of the confidential information provided by intelligence and law enforcement agencies and the potential damage to the public interest, blanket disclosure of information may not provide the kind of comprehensive protection required for the full range of confidential information provided by law enforcement and intelligence agencies to support character-related decisions.

This is crucial, given the sensitive nature of the confidential information and the importance of the Department's information sharing relationships with intelligence and law enforcement agencies, as well as the potential damage to the public interest if such information is disclosed.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 22

**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**

**a. What is the Department's response to the recommendation?**

There are avenues available for Commonwealth oversight bodies to request confidential information for use in the exercise of their oversight functions.

The Department notes that the Bill includes provisions that would enable the Minister to authorise the disclosure of protected information to specified persons or bodies such as a tribunal or a Commonwealth officer (including to Commonwealth oversight bodies) after consultation with the gazetted intelligence agency which provided the information. This allows the Minister to consider on a case-by-case basis whether to disclose the relevant information. This flexibility ensures that the Minister can still protect the information if it is particularly sensitive.

While acknowledging that the oversight bodies have a different view, the Department's view is that the Bill is likely to have a very limited potential to impact the functions of these oversight bodies, since it only applies in respect of information that falls with the narrow criteria set out in the Bill.

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The provisions relate to information that is provided by a gazetted agency:

- to an “authorised Commonwealth officer,” defined as a Commonwealth officer whose duties consist of, or include, the performance of functions, or the exercise of powers, under or for the purposes of the *Australian Citizenship Act 2007* or *Migration Act 1958*; and,
- which is relevant to the exercise of a power set out in s 503A(1)(b) or s 52A(1)(b).

The same information if disclosed by a gazetted agency to a person for a purpose not set out in the Bill is not governed by the proposed amendments.

Commonwealth oversight bodies may also request the relevant information directly from gazetted agencies. Such requests would not be governed by the provisions of this Bill.

The Bill is not inconsistent with the *Public Interest Disclosure Act 2013* and *Freedom of Information Act 1982* (FOI Act), both of which include provisions which exclude the type of information that is envisaged by the Bill from disclosure.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

The exclusions under the FOI Act and the PID Act do not cover the full scope of information protected by Bill.

Potential disclosure of confidential information may pose an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies - including active investigations. This is particularly where confidential information disclosed under the FOI Act could be given directly to the affected person.

Information provided by law enforcement and intelligence agencies will vary from case to case, with varying levels of sensitivity. This makes it difficult to amend the Bill to provide for a blanket exemption on the disclosure of confidential information to specified persons or agencies for use in the exercise of their oversight functions.

### **c. What is the Government’s position on the recommendation?**

The Department acknowledges that the Commonwealth oversight and integrity agencies have a different view as to the impact of the Bill. However, any amendments would require consultation with gazetted law enforcement and intelligence agencies and whole of government approval.

The Government will consider holistically all Committees’ recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments. Concerns raised by Commonwealth oversight and integrity bodies will also form part of the consideration.

### **Recommendation 23**

**Prohibitions on disclosure – offences - If the Bill is to proceed, the Law Council recommends that it be amended to:**

- **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’.**

#### **a. What is the Department’s response to the recommendation?**

It is important that the Bill creates an offence for Commonwealth officers to make unauthorised disclosures of such information due to the potential damage this would cause to the public interest, including the capabilities of law enforcement and intelligence agencies.

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The Bill will also make it an offence for Commonwealth officers to contravene any condition specified in a declaration which discloses protected information to that officer

The creation of these offences highlights the seriousness with which the Government regards the unauthorised disclosure of such information or the contravention of conditions attached to any disclosure due to the potential for severe damage to the public interest.

Both offences may be punishable by a maximum sentence of two years' imprisonment.

These measures are designed to protect protected information communicated by gazetted agencies from being disclosed.

The penalty of up to two years' imprisonment is consistent with the penalties for making unauthorised disclosures of certain information under the secrecy provisions of the *Australian Border Force Act 2015* and the *Australian Federal Police Act 1979*.

The offence is proportionate to the seriousness with which the Government regards unauthorised disclosures of confidential information.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

It is important that the Bill creates an offence for Commonwealth officers to make unauthorised disclosures of such information due to the potential damage this would cause to the public interest, including the capabilities of law enforcement and intelligence agencies.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **65) In respect of each of the recommendations made by the Australian Human Rights Commission in its submission to this inquiry:**

#### **a. What is the Department's response to the recommendation?**

#### **b. What are the likely consequences / implications if the recommendation is implemented?**

#### **c. What is the Government's position on the recommendation?**

### **Recommendation 1**

**The Commission recommends that the Bill not be passed.**

#### **a. What is the Department's response to the recommendation?**

The Bill should be passed.

Section 503A of the Migration Act was first introduced by the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 in response to the reluctance of law enforcement agencies to provide confidential information to authorised officers unless they could be sure that the information and its sources could be protected from disclosure. The Department was thus able to rely upon confidential information provided by law enforcement and intelligence agencies to inform character test based visa decisions under the section 501 provisions of the Migration Act.

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Following the High Court decision in *Graham and Te Puia*, the current framework provides inadequate protection from on-disclosure for confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed if subject to judicial review.

The High Court in *Graham and Te Puia* found section 503A of the Migration Act is in part invalid. The Bill responds to the High Court decision that the Minister cannot be prevented by section 503A of the Act from being required to divulge certain confidential information to the High Court or the Federal Court of Australia in judicial review proceedings involving character decisions.

The Bill also takes the opportunity to replicate the Migration Act scheme in the Citizenship Act, which currently has no provisions protecting confidential information used in decisions made under that Act. The Bill also replicates a similar power that already exists in the Migration Act for migration related decisions by creating a power for the Minister to issue a non-disclosure certificate on public interest grounds in relation to information relating to a decision made under the Citizenship Act where that decision is reviewable by the Administrative Appeals Tribunal.

The Bill addresses the High Court ruling by providing a framework which empowers the Court to require disclosure of the relevant protected information to it and to consider whether it can be disclosed to any other party if doing so does not create a real risk of damage to the public interest.

This allows the Courts to review effectively the Executive's decision-making specified in the Bill.

The balance reflected in the Bill will enable law enforcement agencies to continue to provide confidential information to the Department to make fully informed visa and citizenship decisions on character grounds, while strengthening the role of the Courts in being able to access such information in judicial review proceedings and give such weight to the information as the Court considers appropriate.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

As noted above, since the High Court decision, the current framework provides inadequate protection from on-disclosure for confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed if subject to judicial review.

If the Bill is not passed, the potential disclosure of sensitive information may pose an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies - including active investigations. This risks jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies.

Where a decision-maker is not able to rely on adverse information, they may be prevented from refusing or cancelling the visa or citizenship of certain individuals who present a serious character concern.

Given the rapidly evolving and complex security challenges, the amendments are necessary to ensure protection of confidential information shared between the Department, law enforcement and intelligence agencies, and to uphold public and national security interests.

### **c. What is the Government's position on the recommendation?**

Further, the Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

## **Recommendation 2**

## UNCLASSIFIED

The Commission recommends that for the purposes of the preliminary hearing under proposed s 52C(4) of the Australian Citizenship Act 2007 (Cth) and s 503C(4) of the Migration Act 1958 (Cth) the applicant may be represented by a lawyer (if necessary, a security cleared lawyer) or have their interests represented by a special advocate.

**a. What is the Department's response to the recommendation?**

Please refer to response to QoN 64, Recommendation 18 from the Law Council of Australia.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to QoN 64, Recommendation 18 from the Law Council of Australia.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 3

The Commission recommends that proposed s 52C(5) of the Australian Citizenship Act 2007 (Cth) and s 503C(5) of the Migration Act 1958 (Cth) be amended to: (a) Delete the words '(and only those matters)' (b) Include the following additional relevant factors to which the court must have regard:

- (i) *the seriousness of the issues in relation to which disclosure is sought*
- (ii) *the likelihood that disclosure will affect the outcome of the case*
- (iii) *the likelihood of injustice if the documents are not disclosed*
- (iv) *whether the liberty of the applicant is at stake.*

**a. What is the Department's response to the recommendation?**

Should the additional factors as proposed by the Australian Human Rights Commission (AHRC) be included as a consideration for the Court to consider when determining whether to disclose protected information, there is the risk that the Court would be more likely to on-disclose protected information if it finds that those considerations outweigh the risk of damage to the public interest.

There was a deliberate choice by Parliament in 1998, by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*, to rebalance the factors to be considered when determining a claim for public immunity interest immunity, giving predominant weight to the public interest in protecting security and intelligence information. This was strengthened in 2003, by the *Migration Legislation Amendment (Protected Information) Act 2003*.

However, the measures in the Bill do not alter existing rights to seek merits review or judicial review of character related decisions. The Bill will allow the Court, in its review of the protected information, to consider the information and determine how much weight to give to that information, taking into account the fact that it has not been made available to the affected person.

Where the Court has determined not to disclose the information, the Court may take into account the fact that it has not been made available to the affected person, when deciding what weight to give that information. In doing so, the Courts will have weighed up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information as well as the public interest.

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This provides clear safeguards for the applicant's interests in any proceedings and places these safeguards within the control of the Court.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

The potential disclosure of protected information could impact ongoing law enforcement operations or intelligence activities, and also the agencies' consideration of whether to provide information to the Department if the information cannot be protected adequately.

This risks jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies.

Where a decision-maker is not able to rely on adverse information, they may be prevented from refusing or cancelling a visa or citizenship of individuals who presents a serious character concern.

This has implications for ensuring the Australian community can be protected from people who pose a risk of harm to the interests and good order of the Australian community.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 4**

**The Commission recommends that the Bill be amended to provide that if the court determines under s 52C(5) of the Australian Citizenship Act 2007 (Cth) or s 503C(5) of the Migration Act 1958 (Cth) that disclosing the confidential information would create a real risk of damage to the public interest, the court must make an order requiring a relevant person to give the applicant sufficient information, including by way of summary of the confidential information or a statement of relevant facts, to enable the applicant to make meaningful submissions in relation to the substance of the confidential information.**

### **a. What is the Department's response to the recommendation?**

Please refer to response to Question on Notice 64, Recommendation 13 from Law Council of Australia.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to Question on Notice 64, Recommendation 13 from Law Council of Australia.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.



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66) In respect of each of the recommendations made by the NSW Council for Civil Liberties in its submission to this inquiry:

- a. What is the Department's response to the recommendation?
- b. What are the likely consequences / implications if the recommendation is implemented?
- c. What is the Government's position on the recommendation?

### Recommendation 1

**Recommend that the Bill be rejected.**

The Department notes the NSW Council for Civil Liberties recommendation, for the Bill not to be passed, or if it is passed, that the following recommendations be implemented:

### Recommendation 2

**That affected persons, the AAT and the courts as appropriate are told that there is protected information relevant to their cases.**

a. What is the Department's response to the recommendations?

Where natural justice provisions apply, the affected person would be advised that there is protected information pertaining to their case in a Notice of intention to consider cancellation or refusal.

Where natural justice provisions do not apply, the affected person would be advised that there is protected information pertaining to their case in the decision record for their visa cancellation or refusal.

b. What are the likely consequences / implications if the recommendation is implemented?

Not applicable.

c. What is the Government's position on the recommendation?

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 3

**That the kinds of information that can be protected are restricted by a definition to information that, if it were to be made public, would set at risk the safety of members of security or law enforcement agencies, or their secret methods of investigation; or failing such specificity, the threshold be national security rather than public interest.**

a. What is the Department's response to the recommendations?

The concept of confidential is deliberately broad (that is, not defined), given that the nature and content of the information to be communicated is wide-ranging and will vary from case to case.

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Given the rapidly evolving and complex security challenges in Australia, it would not be appropriate to set parameters around the definition of confidential information. It is essential that gazetted agencies have the appropriate discretion to determine whether the information is confidential and therefore requiring protection under the Bill's framework. It is the agencies themselves (and not the Department) which make that judgment because of the sensitive nature of the information and their knowledge of the potential damage that would result from its disclosure. The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential, as it is their information.

It is the intention of the Bill to limit the protected information framework to information that, if it were made public, would not be in the public interest as it would jeopardise ongoing law enforcement investigations and the sources of this information. The Bill and existing framework aim to strike an appropriate balance between protecting the public interest and providing fairness to the applicant.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

As such, a definition would limit, and could undermine, the Bill's framework. This, in turn, may increase the risk that relevant agencies may be less willing to provide confidential information to the Department for character-related visa and citizenship decisions. The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential, as it is their information.

It is the agencies themselves (and not the Department) which make that judgment because of the sensitive nature of the information and their knowledge of the potential damage that would result from its disclosure. The Bill will only apply to information which is communicated to the Department by agencies on the condition that it is treated as confidential. As such, the framework in the Bill seeks to protect confidential information provided by law enforcement and intelligence agencies from disclosure during judicial review.

For example, the Australian Criminal Intelligence Commission (ACIC) has its own policies as to what information can be shared, with whom, and under what circumstances, particularly in relation to coercively developed or collected material. Often, this information is sourced from partner agencies (national and international), which rely heavily on the ACIC's ability to protect that information. Releasing the information into a process that does not offer any protection then becomes problematic. The Australian Federal Police shares the same concern.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

#### **Recommendation 4**

**That the persons are to be told by the Tribunal or the courts, as much of the information as is necessary to ensure procedural fairness. It should be sufficient for the applicant or their lawyer to be able to understand and respond to the gist of it.**

#### **a. What is the Department's response to the recommendations?**

The Bill, as currently drafted, does not prohibit the Court from ordering partial disclosure if the Court considers that disclosure would not create a real risk of damage to the public interest.

The current approach in the Bill is appropriate and any consideration of whether to disclose part of the relevant information would be duplicative and unnecessary.

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Nonetheless, the Bill will provide safeguards for the applicant by allowing the courts to decide how much weight to give to the confidential information.

This allows the courts to weigh up a number of factors, including fairness to the applicant and the public interest, in using this information in review of visa and citizenship decisions.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Given the confidential nature of the information communicated in confidence by the gazetted agencies and the identity of the gazetted agency itself, partial disclosure of the information could damage the public interest.

Risks of damage to the public interest would arise from partial or full disclosure given the confidential nature of the information in question.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 5**

**That procedural fairness, the right to a fair hearing, the proper administration of justice and adequate oversight of the Executive be included as matters to which the court must have regard when determining whether to disclose information.**

**a. What is the Department's response to the recommendations?**

Please refer to response to QoN 64, recommendation 11 from the Law Council of Australia.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to QoN 64, recommendation 11 from the Law Council of Australia.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 6**

**That in cases where an applicant is not to be permitted to know of material that is crucial to his or her case, it be open to the court to appoint a special advocate to represent the applicant's interests.**

**a. What is the Department's response to the recommendations?**

The Bill will allow the courts to admit confidential information into evidence and to decide how much weight to give to that evidence. This will allow the courts to weigh up a number of factors, including prejudice to an applicant by not having access to the confidential information (if the Court determines not to disclose the information to the applicant), and the public interest.

It is for the Government to consider introducing other safeguards, such as a special advocate scheme, to represent the applicant's interests.

**b. What are the likely consequences / implications if the recommendation is implemented?**

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The special advocate scheme is appropriate and justifiable in the context of the NSI Act and its application in terrorism-related proceedings. However, the scheme would arguably be inappropriate, and difficult to justify, in character related decision-making in the migration and citizenship context, given the high volume of cases and operational imposts.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 7**

**That proposed sections 52D of the Citizenship Act and 503D of the Migration Act, which allow the name of the agency that provided information to be kept secret, be omitted.**

### **a. What is the Department's response to the recommendations?**

The Bill maintains the policy intention that the name of the gazetted agency as well as the confidential information be protected. Amendments were made by the *Migration Amendment (Protected Information) Act 2003* to protect the details of a gazetted agency (including its name and the conditions on which it communicated confidential information to the Department) from disclosure under sections 503A, 503B and 503C, to overcome a Full Federal Court decision.

The supplementary explanatory memorandum to the Migration Amendment (Protected Information) Bill 2003 explains that the amendment to protect a gazetted agency's details from disclosure was necessary to ensure that the original policy intention, to protect such information under section 503A, is restored.

These protections to the details of the gazetted agency as well as the information itself were necessary to ensure that gazetted agencies continue to provide valuable confidential information, which is relevant to the refusal or cancellation of a visa on character grounds, to the Department. Such agencies are reluctant to provide sensitive information unless the information (including the gazetted agency's details) is given the strongest possible protection from disclosure.

From the time that section 503A was introduced into the *Migration Act 1958* (the Migration Act) by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998*, it was intended that both the confidential information relevant to making character decisions and the source of this information would be protected. This was made clear by the explanatory memorandum to that Act.

### **b. What are the likely consequences / implications if the recommendation is implemented?**

For the reasons outlined above, the protections are necessary to ensure that the original policy intention, which is to protect such information under sections 503A, and mirror this in the *Australian Citizenship Act 2007*.

### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 8

**That disclosure be permitted to the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and the Law Enforcement Integrity Commissioner, the Information Commissioner, members of their staff and other persons included in section 122.5 of the Criminal Code.**

#### **a. What is the Department's response to the recommendations?**

In the first instance, the Department notes that the Bill includes provisions that would enable the Minister to authorise the disclosure of protected information to a specified Commonwealth officer (which would include an officer in a Commonwealth oversight body) after consultation with the gazetted intelligence agency which provided the information. This allows the Minister to consider on a case-by-case basis whether to disclose the relevant information and, if so, on what conditions. The Department considers that this process could be formalised through Memoranda of Understanding with the oversight bodies and protocols to facilitate oversight mechanisms' access to protected information, following passage of the Bill.

While acknowledging that the oversight bodies have a different view, the Department's view is that the Bill is likely to have a very limited potential to impact the functions of these oversight bodies, since it only applies in respect of information that falls with the narrow criteria set out in the Bill.

The provisions relate to information that is provided by a gazetted agency:

- to an authorised Commonwealth officer on condition that it be treated as confidential information; and
- is relevant to the exercise of a power under or in relation to one of the provisions specified in s 52A(1)(b) of the Citizenship Act or s 503A(1)(b) of the Migration Act).

Information will vary from case to case, with varying levels of sensitivity. This makes it difficult to amend the Bill to provide for blanket exemption on the disclosure of confidential information to specified persons or bodies for use in the exercise of their oversight functions.

The Department's view is that if a Commonwealth oversight body has a concern about the communication of protected information to the Department, there is nothing in the Bill that would preclude them from obtaining the relevant information directly from a gazetted agency to the extent that their own powers enable them to do so. The Bill seeks to maintain Section 503A of the Migration Act, which was first introduced by the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 in response to the reluctance of law enforcement agencies to provide sensitive information to authorised officers unless they could be sure that the information and its sources could be protected from disclosure, and to extend this provision to the Citizenship Act.

#### **b. What are the likely consequences / implications if the recommendation is implemented?**

The Department considers that oversight mechanisms are not unduly affected by the Bill.

The Department notes the suggestions provided in stakeholder submissions and will further engage with the relevant agencies, including the Ombudsman and IGIS. We note in particular the Ombudsman's submission and oral evidence which indicated its preferred approach is that an exception be implemented in respect of the performance of its powers or, alternatively, that a defence be included in respect of disclosures to oversight bodies and under the *Freedom of Information Act 1982* and *Public Interest Disclosure Act 2013*.

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We also note the IGIS's view that section 34B(2) of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) would prevail over the proposed provisions in the Bill because of the operation of section 34B(3)(b)(ii) of the Act and will further consider the interaction of that provision with proposed sections 52A(7) and 503A(7). We will also seek to discuss the circumstances in which a person might seek to provide information to the IGIS in circumstances where their oversight function relates to the actions of Australian intelligence agencies, including ASIO and ASIS, (who are also gazetted agencies for the purposes of section 503A), and does not extend to character related decision-making under the Migration Act and the Citizenship Act which the Bill is designed to strengthen.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments. Concerns raised by these bodies will also form part of the consideration.

### **Recommendation 9**

**That disclosures also be permitted in accordance with the Public Interest Disclosure Act 2013 (Cth) and the Freedom of Information Act 1982 (Cth)).**

**a. What is the Department's response to the recommendations?**

Please refer to response to QoN 64, recommendation 22 from Law Council of Australia.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to QoN 64, recommendation 22 from Law Council of Australia.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 10**

**That disclosure be permitted, under appropriate conditions of confidentiality, to Parliament and its committees.**

**a. What is the Department's response to the recommendations?**

Please refer to response to QoN 64, recommendation 21 from Law Council of Australia.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to QoN 64, recommendation 21 from Law Council of Australia.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

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### Recommendation 11

**That an independent adjudicator of senior standing be appointed with power to review the status of information as protected, on referral by an applicant, tribunal or court.**

**a. What is the Department's response to the recommendations?**

The current approach in the Bill is appropriate and additional adjudication of confidential information would be duplicative and unnecessary.

The Bill provides a mechanism for information to be disclosed to the Court and the Court to determine whether disclosing the information to the applicant (amongst others) would create a real risk of damage to the public interest, having regard to the specified factors

The Bill allows the Courts to admit the confidential information into evidence and to decide how much weight to give it in the evidence. This provides a safeguard to affected persons—particularly in a situation where the Court has determined not to disclose the information to them.

The Bill will restore protection for confidential information provided by law enforcement and intelligence agencies by restricting disclosure beyond the courts. This will provide assurance to law enforcement and intelligence agencies that confidential information will be handled appropriately.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Additional adjudication of confidential information during proceedings is not necessary as the disclosure framework in the Bill provides for the Court to determine if the confidential information should be disclosed. In this way, the Bill provides for independent judicial review of the confidential to determine whether information should be disclosed.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### Recommendation 12

**That in the event that a reference is made to an adjudicator or to a Federal Court challenging the status of such protected information, the time limits within which the Administrative Appeals Tribunal must hold its review be appropriately extended.**

**a. What is the Department's response to the recommendations?**

As noted above under Recommendation 11, the current approach in the Bill is appropriate. Additional mechanisms are unnecessary and duplicative, adding complexity and delays to decision-making.

**b. What are the likely consequences / implications if the recommendation is implemented?**

As noted above under Recommendation 11, additional adjudication of confidential information during proceedings is not necessary as the disclosure framework in the Bill provides for the Court to determine if the confidential information should be disclosed. In this way, the Bill provides for independent judicial review of the confidential to determine whether information should be disclosed.

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### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **67) In respect of each of the recommendations made by Legal Aid NSW in its submission to this inquiry:**

#### **a. What is the Department's response to the recommendation?**

#### **b. What are the likely consequences / implications if the recommendation is implemented?**

#### **c. What is the Government's position on the recommendation?**

### **Recommendation 1**

#### **That the Bill not proceed, for the reasons outlined in our submission**

The Department notes the Legal Aid NSW recommendation, for the Bill not to be passed, with regard to the following concerns:

### **Recommendation 2**

#### **The Bill is unnecessary**

#### **a. What is the Department's response to the recommendation?**

Please refer to the response to QoN 64, recommendations 1-4 from the Law Council of Australia.

#### **b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to the response to QoN 64, recommendations 1-4 from the Law Council of Australia.

#### **c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 3**

#### **The Bill has an unbalanced approach to protecting confidential information**

#### **a. What is the Department's response to the recommendation?**

Section 503A of the Migration Act introduced by the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 to address requests from law enforcement agencies that confidential information and its sources be adequately safeguarded from disclosure. Parliament made a deliberate choice to give more weight to the public interest in protecting law enforcement and intelligence information provided in confidence from gazetted agencies. The High Court decision in *Graham and Te Puia*, found that section 503A of the Migration Act was partially invalid.

The Bill and existing framework aim to strike an appropriate balance between protecting the public interest and providing fairness to the applicant.

The limitations on providing all of the information to the affected person are in place to strengthen the Government's ability to uphold public safety and the good order of the Australian community. The affected person will continue to have the ability to submit reasons against the making of an adverse visa or citizenship decision as part of the relevant decision-making process and in any merits



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review process in relation to that decision. The Bill will provide safeguards not previously included in the framework for the applicant by allowing the Courts to decide how much weight to give the confidential information in judicial review.

The Bill also provides a mechanism for the Court to consider whether it can disclose the information to the applicant (amongst others) if doing so does not create a real risk of damage to the public interest. The balance reflected in the Bill will enable law enforcement agencies to continue to provide confidential information to the Department to make fully informed visa and citizenship decisions on character grounds, while providing fairness to applicants seeking merits or judicial review of a departmental decision.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Not applicable. Refer to part a) of this response: the Bill and existing framework aim to strike an appropriate balance between protecting the public interest and providing fairness to the applicant.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 4**

#### **The Bill changes the operation of the Administrative Appeals Tribunal**

**a. What is the Department's response to the recommendation?**

Existing merits review rights will not be affected by the Bill.

The Bill will provide the Minister with discretionary powers to disclose the confidential information (having consulted the relevant gazetted agency) to specified persons, bodies, tribunals or courts.

Where the Minister does authorise disclosure of protected information to a Tribunal, the Tribunal will have obligations to afford natural justice during any relevant merits review subject to the obligations imposed upon it by s52B of the Citizenship Act and s503B of the Migration Act.

**b. What are the likely consequences / implications if the recommendation is implemented?**

Not applicable. Refer to response part a) of this response.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

### **Recommendation 5**

#### **The Bill has potential impacts on criminal and related proceedings**

**a. What is the Department's response to the recommendation?**

Please refer to response to QoN 64, recommendation 15 from Law Council of Australia.

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**b. What are the likely consequences / implications if the recommendation is implemented?**

Please refer to response to QoN 64, recommendation 15 from Law Council of Australia.

**c. What is the Government's position on the recommendation?**

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments.

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### HOME AFFAIRS PORTFOLIO DEPARTMENT OF HOME AFFAIRS

#### PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

*Asked by: Kristina Keneally*

**Question 68:**

**Can the Department reflect on paragraphs 3.133 to 3.136 of the Comprehensive Review of the Legal Framework of the National Intelligence Committee (Richardson Review) and provide a written response to justify the Bill?**

**Answer:**

The Department of Home Affairs does not dispute the findings of the Richardson Review.

The Department understands the Richardson Review did not undertake detailed consideration of issues that were the subject of other parliamentary inquiries, including the current inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill).

The Richardson Review was asked to consider the adequacy of national security information handling provisions under the National Security Information (Criminal And Civil Proceedings) Act 2004 (NSI Act), including the protection of information relating to counter terrorism and foreign interference prosecutions, and found that the mechanisms for the protection of national security information in court proceedings through the NSI Act are adequate and not in need of major reform. The Review supported minor targeted amendments to improve the effective operation of the NSI Act where they would not interfere with the fundamental principles at play in criminal proceedings.

The NSI Act only applies when invoked in a particular court proceeding, it does not have automatic application to all criminal and civil proceedings.

The Bill is not inconsistent with the NSI Act. The Bill complements the NSI Act, and is a different reform for a different purpose. The Bill seeks to legislate for a bespoke regime where protected information is shared with the court during judicial review of certain character-related citizenship and visa decisions.

Following the High Court decision in *Graham and Te Puia*, the Courts can require the disclosure of confidential information used in a character decision during judicial review proceedings. The Bill will restore and strengthen protection for confidential information provided by law enforcement and intelligence agencies by restricting disclosure beyond the courts. This will provide assurance to law enforcement and intelligence agencies that confidential information will be handled appropriately when used in character-related visa and citizenship decision-making.

The Department relies on confidential information provided by law enforcement and intelligence agencies to assess certain character-related visa and citizenship decisions. This ensures that the Australian community can be protected from people who pose a risk of harm to the interests and good order of the Australian community.

Confidential information must be protected in cases where there is a risk of damage to the public interest. For example, disclosure of confidential information could compromise Australia's national security and the operations or capabilities of law enforcement and intelligence agencies.

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**Asked by:** Kristina Keneally

### Question 69

**How do the principles [at paragraphs 3.133 to 3.136 of the Richardson Review] intersect with this legislation and how is this legislation compatible with the government's acceptance of the Richardson review's findings on this point?**

**Answer:**

The paragraphs of the Richardson review which refer to the *National Security Information (Criminal And Civil Proceedings) Act 2004* (NSI Act) relate to striking an appropriate balance between the right to a fair trial or hearing, the principles of open justice and the protection of national security information in legal proceedings.

As noted at QoN 1, the Bill complements the NSI Act and seeks to legislate for a bespoke regime. The balance reflected in the Bill will enable law enforcement agencies to continue to provide confidential information to the Department to make fully informed visa and citizenship decisions on character grounds, while providing fairness to applicants seeking merits or judicial review of a departmental decision.

The limitations on providing all of the information to the affected person are in place to provide assurance to law enforcement and intelligence agencies that confidential information will be handled appropriately when used in character-related visa and citizenship decision-making.

The affected person will continue to have the ability to submit reasons against their expulsion in a merits and/or judicial review process.

Further, in the judicial review process, the Court will be able to consider the information, consider whether disclosure would create a real risk of damage to the public interest, and how much weight to give to protected information.

There are safeguards for the applicant by allowing the Courts to decide how much weight to give the confidential information in judicial review, and to disclose this information in the event it finds that there would be no real risk of damage to the public interest by doing so.

Where the Court has determined not to disclose the information, the Court may take into account the fact that it has not been made available to the affected person, when deciding what weight to give that information. In doing so, the Courts will have weighed up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information as well as the public interest.

This provides clear safeguards for the applicant's interests in any proceedings and places these safeguards within the control of the Court.

**Asked by:** Kristina Keneally

### Question 70

**Why doesn't the Bill include a definition of the protected information that the government would seek to protect?**

**Answer:**

Given the rapidly evolving and complex security challenges, it would not be appropriate to set parameters around the definition of confidential information. It is essential that gazetted agencies have the appropriate discretion to determine the information that is provided to the Department in confidence.

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The concept of confidential is deliberately broad (that is, not defined), given that the nature and content of the information to be communicated is wide-ranging and will vary from case to case. As such, a definition would limit, and could undermine, the Bill's framework. The Department is concerned that this in turn may increase the risk that relevant agencies may be less willing to provide confidential information to the Department for character-related visa and citizenship decisions. The Bill intentionally leaves it to an agency to determine whether information is to be communicated on condition that it be treated as confidential, as it is their information.

It is the agencies themselves (and not the Department) which make that judgment because of the sensitive nature of the information and their knowledge of the potential damage that would result from its disclosure. Information is only communicated to the Department by agencies on the condition that it is treated as confidential. As such, the framework in the Bill seeks to protect confidential information provided by law enforcement and intelligence agencies from disclosure during judicial review.

For example, the Australian Criminal Intelligence Commission (ACIC) has its own policies, legislated secrecy provisions and requirements to protect specific types of information as stipulated under ACIC's legislation, Australian Crime Commission Act 2002. This informs what information can be shared, with whom, and under what circumstances, particularly in relation to coercively developed or collected material.

Often, this information is sourced from partner agencies (national and international), which rely heavily on the ACIC's ability to protect that information. Releasing the information into a process that does not offer any protection then becomes problematic. The Australian Federal Police shares the same concern.

**Asked by:** *Kristina Keneally*

### Question 71

**Why is administration of justice not listed as an exception for disclosure purposes?**

**Answer:**

Should the administration of justice be included as a consideration for the Court to consider when determining whether to disclose protected information, there is the risk that the Court may then be more likely to on-disclose protected information if it finds the considerations of the administration of justice outweigh the other factors.

This could impact ongoing law enforcement operations or intelligence activities, and also the agencies' consideration of whether to provide information to the Department if the information cannot be protected adequately.

Currently, the Australian Criminal Intelligence Commission and Australian Federal Police are disinclined to provide information which would be of use to decision-makers in the context of character-based migration and citizenship decision due to a lack of protection, or lack of confidence that such information will be protected.

There was a deliberate choice by Parliament in 1998, by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*, to rebalance the factors to be considered when determining a claim for public immunity interest immunity, giving predominant weight to the public interest in protecting security and intelligence information. This was strengthened in 2003, by the *Migration Legislation Amendment (Protected Information) Act 2003*.

The measures in the Bill do not alter existing rights to seek merits review or judicial review of character related decisions. The Bill will allow the Court, in its review of the protected information,

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to consider the information and determine how much weight to give to that information, taking into account the fact that it has not been made available to the affected person.

*Asked by: Mark Dreyfus*

**Question 72**

- A. How many character related immigration decisions have been made each calendar year in 2015, 2016, 2017, 2018, 2019, 2020 and to date in 2021?**
- B. How many relied on confidential information provided by law enforcement and intelligence agencies?**
- C. Of those, that relied on confidential information, how many were challenged in a court or tribunal?**
- D. How many times did a court or tribunal order confidential information to be disclosed?**

**Answer:**

- A. How many character related immigration decisions have been made each calendar year in 2015, 2016, 2017, 2018, 2019, 2020 and to date in 2021?**

| s501 decisions by calendar year             |      |      |      |      |      |      |                            |
|---|------|------|------|------|------|------|----------------------------|
|   | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021<br>As at 31 July 2021 |
| <b>Cancelled</b>                            | 908  | 1052 | 1212 | 883  | 895  | 1179 | 475                        |
| <b>Not Cancelled<br/>(Including Warned)</b> | 88   | 24   | 53   | 14   | 32   | 39   | 28                         |
| <b>Refused</b>                              | 256  | 576  | 512  | 444  | 318  | 535  | 438                        |
| <b>Not Refused<br/>(Including Warned)</b>   | 524  | 973  | 1051 | 675  | 847  | 519  | 241                        |
| <b>Not Revoked</b>                          | 35   | 352  | 459  | 409  | 377  | 455  | 232                        |
| <b>Revoked</b>                              | 57   | 362  | 319  | 217  | 209  | 265  | 64                         |

- B. How many relied on confidential information provided by law enforcement and intelligence agencies?**
  - In 2015, **six** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
  - In 2016, **five** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
  - Between 2017 - 2021, **no** character decisions were made relying upon confidential information (s503A only) by a gazetted agency.
- C. Of those, that relied on confidential information, how many were challenged in a court or tribunal?**
  - Of the six decisions in 2015, **five** were challenged in the AAT and courts in terms of the confidential information.
  - Of the five decisions in 2016, **fewer than 5** were challenged in the AAT and courts in terms of the confidential information.

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- Between 2017 - 2021, **no** decisions were challenged in the AAT or courts in terms of the confidential information.

### D. How many times did a court or tribunal order confidential information to be disclosed?

Nil<sup>2</sup>.

*Asked by: Jenny McAllister*

#### Question 73

**I wouldn't mind the departments collectively giving further thought to Mr Dreyfus's question about the meaning of 'the administration of justice'. I'm not sure that it does generally refer only narrowly to the logistical functions of the court process. Perhaps you might all collectively provide some sort of response about what the administration of justice requires in the circumstances before us, in terms of decisions about migration and citizenship.**

#### **Answer:**

The administration of justice is a multifaceted concept, which broadly acknowledges the need to balance the principle of open justice with the particular circumstances of a case, and the object of the Courts (and the Tribunal) to ensure the just, efficient and economical resolution of proceedings. The concept would generally apply in the context of migration and citizenship decisions in a similar way to other administrative decisions.

The administration of justice is relevant to the common law test for determining a claim for public interest immunity, which requires a Court to balance the harm to the public interest that would occur if the information was disclosed, against any frustration or impairment of the administration of justice if the information was withheld. The factors relevant to the administration of justice include open justice, the right to a fair hearing, issues of procedural fairness and any other matter the Court considers relevant.

The framework in the Bill modifies the test at common law due to concerns a Court may order the disclosure of confidential information provided in relation to visa and citizenship character decisions which could compromise Australia's national security, cause damage to the public interest, and jeopardise the operations or capabilities of law enforcement and intelligence agencies, including active investigations.

The Bill allows the Court to order the disclosure of confidential information to it. The confidential information may only be further disclosed by the Court, including to the applicant, in circumstances where the Court determines that to do so would not create a real risk of damage to the public interest, having regard to the information itself, any submissions made by entitled parties and any of the exhaustive list of factors.

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#### <sup>2</sup> *Caveat:*

- *Figures were extracted from Departmental systems on 3 August 2021. As data has been drawn from a live systems environment the figures provided may differ slightly in previous or future reporting.*
- *This information is provided for the specific purpose of this request. Any other use of the information provided will require consideration and clearance by Data Division, and a separate request should be made to [data.clearance@homeaffairs.gov.au](mailto:data.clearance@homeaffairs.gov.au)*

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The framework provides safeguards for the applicant including by allowing the Courts to decide how much weight to give the confidential information in judicial review proceedings. In doing so, the Court can consider factors going to the administration of justice, such as prejudice to the applicant.

The current legislative framework affords the applicant various protections, including procedural fairness and the right to merits and/or judicial review, which will not be disturbed by the Bill.

*Asked by: Jenny McAllister*

### Question 74

**The Bill provides no exemption from disclosure to Commonwealth Ombudsman, IGIS, the Parliament, this Committee and the protected interest disclosure regime. Can the Department explain the effect of the Bill and remedy it might recommend to address deficiencies in the Bill?**

**a. what is the effect of the Bill on these oversight mechanisms?**

**Answer:**

There are avenues available for Commonwealth oversight bodies to request confidential information for use in the exercise of their oversight functions.

The Department acknowledges that the Commonwealth oversight bodies have a different view as to the effect of the Bill on their oversight.

In the first instance, the Department notes that the Bill includes provisions that would enable the Minister to authorise the disclosure of protected information to a specified Commonwealth officer (which would include an officer in a Commonwealth oversight body) after consultation with the gazetted intelligence agency which provided the information. This allows the Minister to consider on a case-by-case basis whether to disclose the relevant information and, if so, on what conditions. The Department considers that this process could be formalised through Memoranda of Understanding with the oversight bodies and protocols to facilitate oversight mechanisms' access to protected information, following passage of the Bill.

While acknowledging that the oversight bodies have a different view, the Department's view is that the Bill is likely to have a very limited potential to impact the functions of these oversight bodies, since it only applies in respect of information that falls with the narrow criteria set out in the Bill.

The provisions relate to information that is provided by a gazetted agency:

- to an authorised Commonwealth officer on condition that it be treated as confidential information; and
- is relevant to the exercise of a power under or in relation to one of the provisions specified in s 52A(1)(b) of the Citizenship Act or s 503A(1)(b) of the Migration Act).

Information will vary from case to case, with varying levels of sensitivity. This makes it difficult to amend the Bill to provide for blanket exemption on the disclosure of confidential information to specified persons or bodies for use in the exercise of their oversight functions.

The Department's view is that if a Commonwealth oversight body has a concern about the communication of protected information to the Department, there is nothing in the Bill that would preclude them from obtaining the relevant information directly from a gazetted agency to the extent that their own powers enable them to do so. The Bill seeks to maintain Section 503A of the Migration Act, which was first introduced by the Migration Legislation Amendment (Strengthening of



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Provisions relating to Character and Conduct) Act 1998 in response to the reluctance of law enforcement agencies to provide sensitive information to authorised officers unless they could be sure that the information and its sources could be protected from disclosure, and to extend this provision to the Citizenship Act.

In relation to disclosure to the Parliament and Parliamentary Committees, please refer to written response QoN 64, Recommendation 21.

The Government will consider holistically all Committees' recommendations and concerns raised by stakeholders in their submissions and during hearings regarding the formulation and operation of the Bill and the need for amendments. Concerns raised by these bodies will also form part of the consideration.

### **b. what amendments would you recommend to remedy the deficiencies in the Bill in relation to oversight mechanisms?**

#### **Answer:**

As stated at question 6(a), the Department considers that oversight mechanisms are not unduly affected by the Bill.

The Department notes the suggestions provided in stakeholder submissions and will further engage with the relevant agencies, including the Ombudsman and IGIS. We note in particular the Ombudsman's submission and oral evidence which indicated its preferred approach is that an exception be implemented in respect of the performance of its powers or, alternatively, that a defence be included in respect of disclosures to oversight bodies and under the *Freedom of Information Act 1982* and *Public Interest Disclosure Act 2013*.

We also note the IGIS's view that section 34B(2) of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) would prevail over the proposed provisions in the Bill because of the operation of section 34B(3)(b)(ii) of the Act and will further consider the interaction of that provision with proposed sections 52A(7) and 503A(7). We will also seek to discuss the circumstances in which a person might seek to provide information to the IGIS in circumstances where their oversight function relates to the actions of Australian intelligence agencies, including ASIO and ASIS, (who are also gazetted agencies for the purposes of section 503A), and does not extend to character related decision-making under the Migration Act and the Citizenship Act which the Bill is designed to strengthen.

**Asked by:** Kristina Keneally

#### **Question 75**

**What type of information that goes to character requires removal from public interest factor of general administration of justice? What type of information is the department trying to protect?**

**Answer:** From Australian Criminal Intelligence Commission (ACIC)

The ACIC is Australia's national criminal intelligence agency, with a specific mandate to address serious and organised crime. Serious and organised crime is defined in subsection 4(1) of the *Australian Crime Commission Act 2002* and means an offence that:

- involves two or more offenders, substantial planning and organisation,
- involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques,
- is committed, or is of a kind that are is ordinarily committed, in conjunction with other offences of a like kind,

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- are specifically listed in paragraph (d) of the definition including but not limited to money laundering, drugs, firearms offences, cybercrime and fraud, and
- are punishable by imprisonment for a period of 3 years or more.

The ACIC maintains criminal intelligence holdings, which include lists and assessments of entities or individuals involved in serious and organised crime.

The nature of some of this information is highly sensitive and cannot be shared or released publicly due to the potential impact on real-time law enforcement operations and personal safety of individuals and law enforcement operatives.

Prior to any information sharing, the ACIC will consider if sharing or disclosing information will result in any compromise of operations or law enforcement methodologies used to collect or analyse criminal intelligence. The paramount priority is the protection and safety of human sources, or those connected with human sources. It also extends to technologies, capabilities and the source of the information. Protection of the lawful methods used to collect or analyse criminal intelligence becomes critical if the disclosure of that information would compromise the effectiveness of those methods.

Criminal intelligence also attracts a high security classification due to the source of the material, which requires special handling.

The ACIC works with partner agencies to share intelligence and considers requests for information on a case-by-case basis.

**Answer:** From Australian Federal Police

### **Provide evidence of the significance of the information that is sought to be kept confidential by the Bill**

The case study below demonstrates the significance of keeping some types of information confidential.

#### **Case Study – Counter Terrorism and Special Investigations (CTSI) Intelligence Information**

- AFP Intelligence Operations works with Home Affairs on migration related matters. However, information sharing between our agencies have been hampered by current legislative barriers.
- Recently CTSI Intelligence and Investigations were working with Home Affairs on a character/citizenship assessment.
- Due to the need to avoid exposing AFP methodologies and information sources, the agencies were unable to identify a way to incorporate highly relevant information regarding the matter into the assessment, even though the information was highly relevant.

### **Provide a clear exposition on the types of information going to character that requires removal of the balancing of competing interests**

The AFP has identified the following categories of information that it considers is necessary to protect from public exposure.

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### Information provided in confidence to the AFP by law enforcement partners in Australia and overseas

- Exposure of information provided in confidence can jeopardise AFP relationships with law enforcement partners.
- Disclosure of information provided on a police to police basis may be considered an unlawful action by partner countries.
- This may impact Australia's ability to access information from these partners in the future.

### Information that reveals the identity of human sources

- The AFP does not allow the exposure of human sources.
- This is to ensure the safety of the source and/or their families and associates as well as to ensure the integrity of the AFP's current and future human source capabilities.

### Information that reveals AFP methodologies, capabilities and investigations

- Exposure of covert and discreet capabilities and investigations can jeopardise current and future investigations.