Victoria Legal Aid

A matter of balance: preserving the role of the court and a fair hearing

Submission to the Parliamentary Joint Committee on Intelligence and Security regarding the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Introduction and recommendations

Victoria Legal Aid (**VLA**) welcomes the opportunity to provide information to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) regarding the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**Bill**).

VLA is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. More information about our clients and their circumstances is captured in **Annexure 1**. Our Migration program conducts judicial review in the federal courts and provides services through grants of legal assistance, telephone advice, limited assistance (known as minor work files), and court and tribunal duties. Four of our lawyers have been accredited by the Law Institute of Victoria as specialists in immigration law and administrative law. In 2019–20, the Migration program provided over 1100 advices to asylum seekers and other vulnerable non-citizens, primarily in relation to judicial review of administrative decisions. We also assisted 139 clients on a grant of legal assistance and provided assistance on minor work files in 129 matters. Since July 2018, we have assisted approximately 150 clients who have had their visas cancelled or refused on character grounds. Our work in this area is primarily in relation to judicial review, however on occasion we also assist with revocation requests and appeals to the Administrative Appeals Tribunal (**AAT**).

Through our litigation work we see first-hand the importance of an independent court process where complex cases are determined in a fair manner with the benefit of input from both sides, the person subject to the visa or citizenship decision and departmental representatives. As the stories of our four clients included in this submission show,[1] we also see the consequences of visa refusal and cancellation decisions for people, which include extensive periods of detention or deportation.

VLA recognises the need for appropriate protection of national security and sensitive information provided to the government by law enforcement and intelligence agencies. We share the Government's concern that courts, tribunals and other agencies need clear procedures to ensure the proper handling of sensitive material. However, in the face of potentially very serious consequences for a person affected by a character-related decision, the blanket non-disclosure of relevant information in any form is a disproportionate response.

Informed by our direct work with people affected by these decisions, we highlight the following **concerns with the Bill**:

- **Undermining the balancing role for the courts**. The Bill prescribes what factors courts can consider in determining the risk to the public interest of disclosure of protected information. The

[1] Unless otherwise indicated, names and some small details have been changed to preserve confidentiality. All the clients have consented to the sharing of their stories.

exhaustive list of factors does not include the public interest in a fair hearing or procedural fairness. The Bill undermines the crucial role of courts in undertaking fair, sensible balancing of risk and ensuring proportionality.

- **A lower bar for justifying non-disclosure, including changes to the rules of evidence**. The Bill's removal of the hearsay rule removes the power of the court or a party to interrogate whether the information should have been classified as protected information. The Bill does not limit the types of information that a gazetted agency can subject to the requirement of confidentiality creating the risk that any information can be protected from disclosure based on the subjective classification by a gazetted agency.
- **Excluding the applicant from proceedings**. The Bill excludes the applicant from participating in any proceeding in relation to protected information, including making submissions. This presents a heightened risk of incorrect and unfair decisions and reduces accountability for ensuring the veracity of the information.
- **Expanding certificate regime and the risk of both overuse and misuse**. The Bill will prevent people accessing information that is crucial to their case and contribute to time consuming and expensive litigation, delays and unfair decision making.

To make sure that crucial mechanisms for protecting law enforcement and intelligence capabilities are proportionate and do not undermine key pillars of the Australian justice system, including the proper role for the courts and the ability to receive a fair hearing, we make the following **four recommendations**:

1. **Preserve the balancing role of the court**. The ability of the court to have regard to the public interest in a fair hearing and procedural fairness should be preserved. The factors that the court can consider in assessing real risk to the public interest should also be inclusive, rather than exhaustive. The court should also be able to make orders that ensure non-disclosure is proportionate to the risk posed by disclosure, including partial release.[2]
2. **Maintain robust requirements for non-disclosure**. The Bill's lack of parameters and reduced evidentiary requirements regarding what confidential information can be protected from disclosure make the framework unreasonably broad and open to over-use. The Bill should contain a definition of confidential information to limit the types of information that a gazetted agency can subject to the protection framework. It should be limited to information that is reasonably likely to prejudice national security, or critical law enforcement or intelligence capabilities. In terms of evidentiary requirements, the certificate should not be prima facie evidence that the information is of a confidential nature – this should be determined by the court based on the description given in the certificate or upon examination of the material by a court. The Bill should not exclude the application of the hearsay rule.[3]
3. **Protect the quality and fairness of decisions through participation of both parties in hearings about non-disclosure**. The ability of the court to hear from both parties about the public interest in disclosure or non-disclosure is fundamental to the court's ability to balance risks. It is also important to the integrity of the system, as it ensures that agencies remain accountable for the veracity of the information they seek to pass on. The affected person should be allowed to make submissions and tender evidence about the disclosure of protected information and the weight attributed to it. The affected person should only be excluded on rare occasions, after careful balancing of the risks.[4]

[2] Proposed sections 52C(5) and 503C(5) in the Bill should be amended to include: impact of non-disclosure on a fair hearing; the need to provide the applicant with procedural fairness; and any other matters the court considers relevant. Proposed sections 52C(6) and 503C(6) in the Bill should be amended to give the court discretion to consider options for partial release.
[3] Proposed sections 52A(4) and 503A(4) in the Bill should be removed.
[4] Proposed sections 52C(3), 52C(4), 503C(3) and 52C(4) in the Bill should be removed.

4. **Do not extend the non-disclosure certificate scheme to decisions under the Citizenship Act**. VLA has significant experience in relation to cases involving non-disclosure certificates under the Migration Act. Through this work we see how the use of non-disclosure certificates undermines the transparency and accountability of decision-making and has a severe impact on the lives of clients and their families. To avoid overuse and misuse, as well as costly litigation and delays, the non-disclosure certificate scheme should not be extended to decisions under the Citizenship Act.[5]

The proposed changes and their potential impacts

An overview

The Bill seeks to amend the *Migration Act* 1958 (Cth) (**Migration Act**) and the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) for the purposes of introducing a "protected information framework".

Key elements of how we understand the proposed changes will operate include:

- Information provided in confidence by intelligence or law enforcement agencies to a Commonwealth officer for the purpose of decisions in relation to character or citizenship would be deemed "protected information".
- Protected information could only be disclosed in very limited circumstances, to a limited audience (not including the applicant), subject to the Minister's personal non-compellable discretion.
- The power to order production of the protected information would be retained by the court. However, only parties with lawful knowledge of the "protected information" would be entitled to make submissions on the weight to be attributed to the information and the impact on the public interest of disclosing the information. Only parties entitled to make submissions would be entitled to attend any hearing on the information. In effect, this would altogether exclude the applicant and their legal representative from participating in this process.
- After hearing submissions from eligible parties, the court would be required to make a determination as to whether the disclosure of the "protected information" would create a real risk of damage to the public interest.
- In determining whether there is a real risk of damage to the public interest, the court may only have regard to an exhaustive list of factors. The court is not permitted to take into account the countervailing public interest in ensuring that all parties know the case to be answered and are provided with a fair hearing.
- If the court determines that disclosure would create a real risk of harm to the public interest, it must not disclose the information to anyone, including the applicant or their legal representative. At no point in the process can the court undertake a balancing exercise between competing elements of the public interest for and against disclosure in the particular circumstances of the case.
- The Bill also introduces a non-disclosure certificate scheme into the Citizenship Act, which mirrors that already in the Migration Act, for the management of disclosure of sensitive and confidential information to and by the AAT.

It is important to note that the Migration Act already contains an extensive framework to protect the class of information targeted by the new provisions i.e. information supplied by law enforcement agencies or intelligence agencies in confidence and relied upon for character decisions.[6] There is very

[5] Proposed section 52H in the Bill should be removed.
[6] *Migration Act* 1958 (Cth) s 503A. Information captured by this section cannot be disclosed, unless the Minister exercises his personal non-compellable discretion to make a declaration allowing full or partial disclosure.

little difference between the current provisions and the proposed provisions in terms of *the type* of information that is protected.[7] The key difference is the *process* which the court is to follow once it has ordered production of the information, and the permissible considerations open to the court in determining whether to disclose the information, or part of the information, to the applicant.[8]

The potential effect of the proposed law

Under current law, the court would apply common law principles which govern public interest immunity. The court would normally hear from all interested parties, and then conduct a balancing exercise based on the competing public interests.

In effect the Bill will make it more difficult, and in some cases virtually impossible, for applicants to challenge decisions to refuse or cancel their visas or citizenship on character grounds. In most cases, this will result in prolonged immigration detention until the applicant can be removed from Australia. In cases where there has been a "protection finding", it will result in indefinite detention[9] subject only to third country resettlement or the exercise of the Minister's non-compellable discretionary powers, both of which are highly unlikely.[10] In cases where Australia owes non-refoulement obligations but the non-citizen has not applied for a protection visa and hence there has been no "protection finding", there remains a risk that the non-citizen will be refouled in breach of Australia's international obligations.[11]

The regime the Bill proposes is even more concerning in the context of the limited access to legal representation for people seeking review of decisions to refuse or cancel their visas on character grounds. As the figures in **Annexure 2** and James' story below highlight, a significant proportion –more than 50% – of people seeking review of character-based decisions of visa refusals or cancellations are unrepresented. A recent analysis of judicial review data suggests that applicants with legal representation were on average six times more likely to succeed than unrepresented applicants.[12]

In the absence of legal representation, applicants are much less likely to be aware of the existence of, or reliance on, non-disclosable material. In this context, there are significant risks for accountability and quality decision-making, as well for the individuals and their families whose lives and futures are affected by these decisions.

The impact of character-based visa decisions

Our clients Reza and Jamal's stories highlight the extent of the secrecy that already surrounds character-based visa decisions. They also serve as a powerful reminder of the impact this framework already has on fundamental principles like procedural fairness and on two people who fled the risk of

[7] The bill extends the definition of protected information to information communicated to an authorised Commonwealth officer. This is broader than the information currently protected under s 503A in that the current provisions relate only to information communicated to an authorised migration officer.
[8] *Migration Act* 1958 (Cth) s 5. The existing provisions in the Migration Act also protect "non-disclosable information" from being disclosed to an applicant when disclosure would, in the Minister's opinion be contrary to the national interest because it would prejudice the national security or involve disclosure of cabinet deliberations or decisions. It also protects information whose disclosure would, in the Minister's opinion, be contrary to the public interest for reasons which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings, or where disclosure would found an action by a person, other than the Commonwealth, for breach of confidence.
[9] "Protection finding" is defined in s 36A of the *Migration Act* 1958 (Cth). Section 197C(3) was recently introduced to the Migration Act, and provides that an officer is not authorised or obliged to remove a non-citizen to their home country if they have applied for a protection visa and received a positive protection finding.
[10] Numerous Courts have commented on the unlikelihood of the Minister using his non-compellable powers to intervene in the public interest. For example, in *DQM18* [2020] FCAFC 110 at [108] Bromberg and Mortimer JJ considered the notion that the appellant would be granted a protection visa "infinitesimal" given the Minister's approach to the cancellation of his existing visa. See also *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 35 at [72] per Wigney J, and *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [124] per Kenny and Mortimer JJ.
[11] *Migration Act* 1958 (Cth) s 197C(1) and (2).
[12] See Keyvan Dorostkar, *Judicial Review of Refugee Determinations: More by Luck than Judgement* (12 February 2020). Available at SSRN: https://ssrn.com/abstract=3536740 or http://dx.doi.org/10.2139/ssrn.3536740. Unrepresented applicants were successful in judicial review in just 79 cases out of the 422 successful cases in total. In contrast, represented applicants were successful in 343 cases out of the 422 cases.

death and are now losing health and hope after seven years or more in detention for reasons that have not been disclosed to them.

Reza has been in immigration detention in Australia for over seven years. He is a refugee, has committed no crime and has no adverse security assessment

Reza fled Iran in 2013 after facing persecution because of his religion – his conversion from Islam being punishable by death – and because of his political opinion: he expressed views contrary to those of the regime, including by protest and possessing banned literature, and he came to the attention of the authorities. If he is returned to Iran, he fears being killed, tortured or seriously harmed by Iranian authorities.

The year he arrived, Reza was to be granted a bridging visa, allowing him to remain in the Australian community while his claims for protection were assessed, but at the last minute, a 'security issue' prevented the grant.

In 2016, a draft Departmental document shows he was assessed as being a refugee, but two years afterward, his application was refused.

Australia's courts have found, on three occasions, that decisions made about his visa have been unlawful.

Reza has never been convicted of any crime and has no adverse security assessment. In these circumstances, it is highly unusual that he has not been granted a bridging visa.

In his time in detention, Reza has developed serious mental health issues and has been hospitalised after self-harming. His serious decline in health has made any forced return to Iran all the more dangerous.

The Department has never explained why he is considered unfit to live outside of detention in the Australian community while his visa status is resolved. Instead, he waits in detention as years pass and his health worsens.

Jamal has been in detention for over seven years. The court said references to the non-disclosable information in the decision to refuse his visa "were at best oblique and at worst positively opaque"[13]

Jamal arrived by boat in November 2012. He is from Syria. He was granted a Temporary Humanitarian Stay visa alongside a bridging visa to live in the community where he remained until early 2014. Jamal was detained because of the expiration of the original bridging visa. He has now been in detention for over seven years. Jamal applied for a protection visa in 2016 and was subsequently found to be a refugee.

In 2019, the protection visa application was refused by the Minister under section 501 of the Migration Act. In forming the view that Jamal may in the future be a risk to the community, the Minister had regard to undisclosable information. By way of background, Jamal had never been charged with any offence, here or overseas and was found not to be of security concern by Australia's intelligence organisations. Jamal's behaviour in immigration detention in the years immediately preceding the decision was found to be exemplary.

[13] *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAC 94, 259.

Jamal challenged this decision and in a later judgment of the Full Court, it was observed that the Minister's references to the non-disclosable information in his decision "were at best oblique and at worst positively opaque".[14] The Court went on to note that it was "virtually impossible to work out how, or why, or in what way, the information had impacted on the Minister's findings".[15]

In addition, the Minister accepted that Jamal was suffering from severe mental health issues in the period between February 2014 and April 2015, and that his condition had been exacerbated by his detention. Jamal has been diagnosed as bi-polar. He also at times has experienced suicidal ideation and has been hospitalised on more than one occasion.

In early 2021, Jamal initiated proceedings in the Federal Court seeking release from detention. The matter is awaiting judgment. In the course of this proceeding, the Commonwealth filed evidence which showed that, years earlier, Jamal had been subject to a 'Qualified Security Assessment' (**QSA**) by ASIO. A QSA is issued when ASIO does not assess an individual to be a direct or indirect risk to security and does not recommend any adverse administrative action be taken in relation to that person, but provides information or advice that could be prejudicial to the interests of the person.

This was the first time that Jamal or his lawyers had been made aware of such an assessment. Attempts to obtain such information through freedom of information were unsuccessful as the material was completely redacted under public interest exemptions in the *Freedom of Information Act* 1982 (Cth). We think it is likely that this assessment was the non-disclosable information which formed part of the basis for the Minister to refuse his protection visa application. There is currently no mechanism for Jamal to challenge the previous QSA, nor seek a copy of it.

If Jamal had been made aware of the QSA, and provided an opportunity to comment (bearing in mind that ASIO did not consider him a security risk), he may well have been able to satisfy the Minister that he met the criteria for the grant of a protection visa.

Undermining the balancing role for the courts

Through prescribing what the court can consider in determining the public interest, we are concerned that the Bill will undermine the long-established principle that there is a public interest in a fair hearing.

While the court will be tasked with the role of assessing whether there is a real risk of damage to the public interest if a document or information is disclosed, the Bill prescribes an exhaustive list of considerations to which the court can have regard in assessing this risk.[16] The removal of the court's power to balance competing public interests makes this role meaningless.

[14] *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAC 94, 259.
[15] *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAC 94, 259.
[16] Proposed sections 52C(5) and 503C(5): After considering the information and any submissions made under subsection (2), the Court must determine whether disclosing the information would create a real risk of damage to the public interest, having regard to any of the following matters that it considers relevant (and only those matters): **(a) the fact that the information was communicated, or originally communicated, to an authorised Commonwealth officer by a gazetted agency on condition that it be treated as confidential information;** (b) the risk that the disclosure of information may discourage gazetted agencies and informants from giving information in the future; (c) Australia's relations with other countries; (d) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence; (e) in a case where the information was derived from an informant—the protection and safety of informants and of persons associated with informants; (f) the protection of the technologies and methods used (whether in or out of Australia) to collect, analyse, secure or otherwise deal with, criminal intelligence or security intelligence; (g) Australia's national security; (h) such other matters (if any) as are specified in the regulations.

We are particularly concerned that information which has simply been communicated "on condition that it be treated as confidential information" is a vague and broad term, out of step with other categories included on the list of matters to consider.

The inability of the court to weigh the public interest in confidentiality against the competing public interest of a fair hearing is likely to result in a broad range of information being withheld from applicants. The operation of the Bill in this way is not justified by the objective of protecting law enforcement and intelligence capabilities, as there is no requirement to establish that disclosure would jeopardise intelligence and law enforcement capabilities, simply that the information was communicated on the condition that it would be treated as confidential.[17]

Under current law, on application to the court by a party requesting access to the undisclosed information, the court would be required to identify with precision, and then balance fairly and sensibly, the competing public interests of procedural fairness to the applicant against the need to protect confidential information. It is this balancing exercise which ensures that any non-disclosure is proportionate to the risk posed by disclosure. It is also this exercise that allows courts to identify if there is a way to provide partial disclosure without creating a real risk of damage to the public interest. The Bill does not allow for a balancing exercise, and partial disclosure is not available: once the court has made a finding that disclosure creates a real risk of damage to the public interest, the court is required not to disclose. In our view, this strips the courts of any meaningful oversight and will have a negative impact on the right to a fair hearing in circumstances where the risk to the public interest could be avoided by other means such as partial disclosure.

Recommendation 1: Preserve the balancing role of the court

The ability of the court to have regard to the public interest in a fair hearing and procedural fairness should be preserved. The factors that the court can consider in assessing real risk to the public interest should also be inclusive, rather than exhaustive. The court should also be able to make orders that ensure non-disclosure is proportionate to the risk posed by disclosure, including partial release.

Proposed sections 52C(5) and 503C(5) in the Bill should be amended to include: impact of non-disclosure on a fair hearing; the need to provide the applicant with procedural fairness; and any other matters the court considers relevant.

Proposed sections 52C(6) and 503C(6) in the Bill should be amended to give the court discretion to consider options for partial release.

A lower bar for justifying non-disclosure, including changes to the rules of evidence

There are already a number of measures available to the Department and the Minister to achieve the stated objective of protecting law enforcement and intelligence capabilities.[18] While we already see the impact of these measures on our clients and their ability to understand the case against them, the

[17] See Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, 19, which reported that, in the absence of further information, it was unable to conclude whether the Bill's clear limitations on the right to a fair hearing and the right against expulsion of aliens without due process were reasonable and proportionate.

[18] For example, the *National Security Information (Criminal and Civil Proceedings) Act* 2004 sets out a procedure to prevent disclosure of information which is likely to prejudice national security. See also the broad definition of 'non-disclosable information' under s 5 of the *Migration Act* which imports the language of s130 of the *Evidence Act* 1995 and well established principles of common law. See also s503A of the Migration Act which protects the same class of information as that proposed in the new Bill and ss359A, 424A and 473DE relevant to non-disclosable information in review processes under the Act.

current criteria and the evidentiary requirements for justifying non-disclosure would be substantially weakened by the Bill's proposals.

Current information protections in character-related decisions

In our practical experience, under the current legislative framework, confidential information used in relation to character-related decisions, such as intelligence about a person's alleged criminal background and associations, is not disclosed. Taken in reverse, there are no mechanisms through discovery, or freedom of information requests, for an applicant to access details of adverse information which has been provided through a lawful process by law enforcement or intelligence agencies.

Additionally, in our experience, the original source of the information, including any informants' details, is never disclosed to an applicant. We have been involved in a number of matters where an applicant has been given an adverse security assessment by the Australian Security and Intelligence Organisation (**ASIO**). Without exception, we have not been given access to any information beyond the statement that ASIO has information which has led to an adverse security assessment or partial adverse security assessment. We have not been informed of the source, nor of the nature or extent of the information which forms the basis of the rating. While an applicant is clearly disadvantaged by being deprived of the opportunity to respond to serious adverse information, in this circumstance and given the scope of ASIO's powers, we can infer that non-disclosure relates to national security. The rationale for non-disclosure in adverse security assessment matters is quite distinct from a broad assertion that information must be protected because it has been labelled confidential by a gazetted organisation, which is what the Bill proposes.

In effect, a gazetted organisation will be the arbiter of when the Protected Information Framework is engaged, by the simple act of communicating information as confidential. In and of itself, this category of information cannot be said to present a threat or danger to the original source, or to law enforcement and intelligence capabilities.

Changing the rules of evidence

The Bill also introduces amendments to the rules of evidence. The Bill states that the hearsay rule does not apply to evidence going to whether the subject information was provided by a gazetted organisation in confidence, and is relevant to a decision under section 501 and other specified sections.[19] It also provides that a certificate, signed by an authorised Commonwealth officer, that states that information was communicated to that officer by a gazetted agency, is prima facie evidence of the matters stated in the certificate. This will mean that the 'information' does not need to be described in the certificate itself, nor does the agency need to be named. It is noteworthy that the Bill expands who can certify that the information was given by a gazetted agency from an authorised migration officer (under the current Act) to an authorised Commonwealth officer (under the Bill), which includes any Australian public service officer or a person who is a contracted service provider for the Commonwealth.[20]

This mechanism will exacerbate the difficulties an affected person faces in challenging whether information that is potentially critical to a decision in their case (a) was and (b) objectively should have been, communicated from a gazetted agency in confidence. This is particularly concerning given the Bill contains no definition of "confidential information" (i.e., there is nothing requiring that the information itself may prejudice national security or reveal intelligence capabilities) and there are no apparent limits

[19] See proposed sections 503A(1) and 503A(4); see also proposed sections 52A(1) and 52A(4).
[20] Section 121.1 of the *Criminal Code* Act 1995.

on the nature of information that gazetted agencies can legitimately communicate only on a confidential basis.

Recommendation 2: Maintain robust evidentiary requirements for non-disclosure

The Bill's lack of parameters and reduced evidentiary requirements regarding what confidential information can be protected from disclosure make the framework unreasonably broad and open to over-use. The Bill should contain a definition of confidential information to limit the types of information that a gazetted agency can subject to the protection framework. It should be limited to information that is reasonably likely to prejudice national security, or critical law enforcement or intelligence capabilities.

In terms of evidentiary requirements, the certificate should not be prima facie evidence that the information is of a confidential nature – this should be determined by the court based on the description given in the certificate or upon examination of the information by a court.

The Bill should not exclude the application of the hearsay rule.

Proposed sections 52A(4) and 503A(4) in the Bill should be removed.

Excluding the applicant from proceedings and the impact this has on the fairness and quality of decision-making

The process the Bill proposes in relation to "protected information" essentially excludes the applicant, and the applicant's legal representative, from the process entirely. Proposed sections 501C(2)-(4) provide that a person who does not know the content of the information would be prevented from providing submissions to the court, or attending any hearing, which deals with any of the matters going to public interest disclosure under proposed section 501C(5), or the weight to be given to the information. Given the confidential nature of the information and its source, as well as the intent of the provisions to prevent disclosure to the other parties, including the applicant, it seems likely that the only party able to make submissions to the court, or appear at any hearing would be the Minister.

The function of the court would be impaired by an inability to receive submissions, either in written or oral form, from the party to whom the information relates and who is most affected by the decision.

Not only would the affected person and their lawyer be excluded from the proceedings, but they would also be prevented from accessing any report of the part of the proceeding that relates to the information. This would severely limit the ability of applicants and their lawyers to understand how these laws are being used and applied.

The Bill is unclear as to whether an applicant could ask the court to make an order under proposed section 503C(1) for disclosure of information, or whether it would be up to the court to do this on its own motion. VLA is concerned that unrepresented litigants will not be aware of the existence of any "protected information" and will therefore not know to request the court to order the Minister to produce it to the court. In these circumstances, there is a real risk that these provisions will be over-used, and that incorrect and unfair decisions will result. As outlined above and in **Annexure 2**, this is a significant concern given that over half of applicants are facing these matters without legal representation.

There appears to be no public policy reason for denying an applicant the opportunity to make submissions on matters going to the nature of the protected information and the weight to be attributed to such information. There may, in some limited circumstances, be a reason for a court to order that the applicant or their representative cannot attend a hearing. However, this should always be a decision

made by the court on a case by case basis, in accordance with the balancing exercise referred to above. Having a blanket rule excluding the applicant from the process is not reasonable or proportionate to achieve the stated objective and restricts the court's ability to perform its judicial function.

Additionally, if the providers and users of information classified as confidential, operate in the knowledge that the material will not be properly scrutinised by others including the court, there may be less incentive to ensure the veracity of the information or the purpose of the confidentiality. The additional layer of impenetrability will not be conducive to correct decision-making, including in regard to the threshold issue of whether material should be kept secret.

This risk is exacerbated by the type of information that could fall within the scope of the new Protected Information Framework. In essence, a decision-maker may rely on prejudicial information to form the basis of an adverse decision, without the person most affected being given the opportunity to respond. In some cases, this information may be inaccurate, incomplete or lacking context. In other cases, there may be legitimate mitigating circumstances surrounding the adverse material that could be taken into consideration. Under the proposed changes, the decision maker cannot know that the information is not substantiated because they are prevented from disclosing the information to the applicant and from gathering all the information relevant to the decision-making process. The Bill creates a significant risk that the decision-maker will be unable to perform their statutory duty to come to the correct and preferable decision, and that decisions will be found by courts to be affected by apprehended bias.

James's story and Sam's story below highlight what these risks can look like in practice.

James, a victim of family violence, detained and unable to respond to unsubstantiated allegations that informed visa cancellation decisions

James does not know where he was born. He was brought to Australia as a dependent on a family member's visa. In Australia, James experienced family violence perpetrated by his father and suffered from significant abandonment issues. He found adapting to life in Australia particularly difficult and was eventually forced out of his father's home.

James' visa was cancelled as a result of criminal offending he committed while he was still a child. James sought revocation of visa cancellation and provided submissions in support his request. The submissions highlighted the risks posed to James if he were returned to the country in which he was raised, and argued that to return James would be a breach of Australia's non-refoulment obligations.

The Minister for Home Affairs declined to revoke the cancellation of his visa. James sought judicial review of this decision and in the process learned that there was undisclosed material before the Minister upon which he based his decision; namely reports from an Australian law enforcement agency which related to an alleged association with gangs. This information was unsubstantiated and was not provided to James for comment. James maintains that this information is incorrect, however he was not afforded the opportunity to respond to this adverse information. Had he been provided with this opportunity, it is possible that he could have provided information that may have led to a different outcome.

Earlier this year, the Minister conceded that the decision not to revoke the cancellation of James' visa was affected by legal error. This meant that James' request that the cancellation of his visa be revoked went back to be considered by the Minister or a delegate. James cannot afford to pay for a private lawyer and free community legal centres have told him they do not have capacity to represent him. He has now been in immigration detention for nearly

two years. He is not eligible for a bridging visa and will therefore remain in immigration detention until his matter is resolved.

Recommendation 3: Protect the quality and fairness of decisions through participation of both parties in hearings about non-disclosure

The ability of the court to hear from both parties about the public interest in disclosure or non-disclosure is fundamental to the court's ability to balance risks. It is also important to the integrity of the system, as it ensures that agencies remain accountable for the veracity of the information they seek to pass on.

The affected person should be allowed to make submissions and tender evidence about the disclosure of protected information and the weight attributed to it. The affected person should only be excluded on rare occasions, after careful balancing of the risks.

Proposed sections 52C(3), 52C(4), 503C(3) and 52C(4) in the Bill should be removed.

Expanding the non-disclosure certificate scheme and the risk of overuse

The Bill proposes the expansion of the non-disclosure certificate framework to the Citizenship Act as a means of managing disclosure of sensitive and confidential information to and by the AAT. VLA has significant experience in relation to cases involving non-disclosure certificates under the Migration Act. Through this work we see how the use of non-disclosure certificates undermines the transparency and accountability of decision-making and has a severe impact on the lives of clients and their families.

In our experience, the Department's use of the non-disclosure certificates in other parts of the Migration Act has resulted in adverse information being withheld from applicants unnecessarily. It has not only led to time consuming and expensive litigation seeking access to information that often should have been provided at the outset, but also to long delays and unfair decision making.

In many cases the courts have found that the Department has been using certificates for invalid reasons (for example by citing "public interest immunity" or "confidentiality" without any legal or factual basis), effectively depriving the applicant the ability to know the case before them and resulting in a breach of procedural fairness.[21] The High Court of Australia has held that a breach of procedural fairness will amount to a jurisdictional error in circumstances where the non-disclosure, either of the certificate itself or the material behind any invalid certificate, has denied the applicant the possibility of a different outcome.[22] Courts have also held that not disclosing adverse information to applicants can lead to a finding of apprehended bias.[23]

Sam's visa status was impacted by inaccurate information protected by a certificate. His application is still unresolved after seven years and five legal proceedings

In 2012, Sam left his home country in the aftermath of political protests and the extended crackdown on participants by the regime. He had been an active supporter of a political leader

[21] In December 2017, there were approximately 500 cases currently before the courts in which a certificate (under ss375A, 376 or 438) has been issued but not disclosed to the applicant.
[22] See *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.
[23] See *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136; *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; and *FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 29.

and claimed he was, as many supporters were, violently pursued by the regime. He feared that he would suffer further harm if he remained in his homeland.

In October 2013, a case officer determined that, among other things, Sam's involvement had only been low level and that he did not face a real chance of harm in the future. After the case officer had made the decision to refuse Sam's application, but before his matter had been determined by the Administrative Appeals Tribunal (**AAT**), the Department received information about Sam from Australian law enforcement agencies. This was provided to the AAT by the Department on the basis that it was relevant to the AAT's decision. It was provided under cover of certificate, and it was not disclosed to Sam. Sam did not have the opportunity to give evidence and make submissions in respect of material that contained a number of serious allegations about him. In October 2015, the AAT affirmed the decision to refuse Sam's application.

Sam sought judicial review of this decision and in the process learned of several pieces of undisclosed adverse material, one of which indicated Sam was a 'POI' (person of interest) in relation to a people smuggling operation. The information was misleading and incorrect in significant respects. For example, Sam was not a person of interest in smuggling operations, in fact, he had been a witness in the proceedings.

Sam's underlying judicial review application remains outstanding some seven years and five proceedings later. Most recently, the Full Federal Court, rejecting the Minister's appeal, upheld the Federal Circuit Court's decision in Sam's favour and remitted the application to the Tribunal to be fairly determined. The Full Court held that the decision of the AAT was affected by apprehended bias on the basis that the Tribunal had before it adverse information that was not disclosed to the applicant. The Minister has filed an application seeking special leave to appeal from this decision to the High Court.

Recommendation 4: Do not extend the certificate scheme to decisions under the Citizenship Act

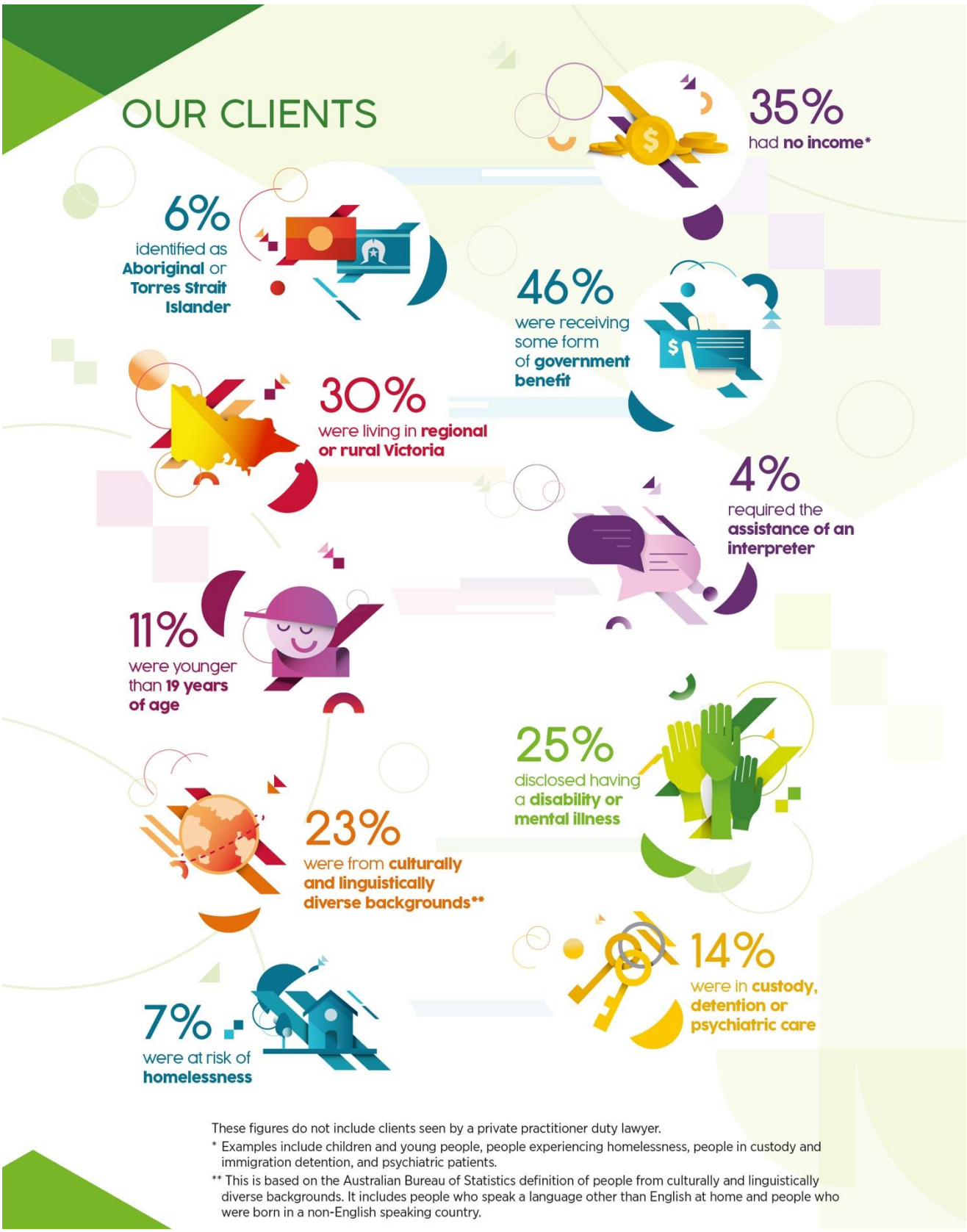
VLA has significant experience in relation to cases involving non-disclosure certificates under the Migration Act. Through this work we see how the use of non-disclosure certificates undermines the transparency and accountability of decision-making and has a severe impact on the lives of clients and their families.

To avoid overuse and misuse, as well as costly litigation and delays, the non-disclosure certificate scheme should not be extended to decisions under the Citizenship Act.

Proposed section 52H in the Bill should be removed.

Annexure 1: VLA's clients

During 2019–20 Victoria Legal Aid assisted 88,662 unique clients, including those seen by a private practitioner duty lawyer.



Annexure 2: Legal representation data

In relation to the judicial review process, in FY 2019/20, 120 applications were filed nationally seeking review of character-based decisions of visa refusals or cancellations. Of those, 62 – over 50% – were unrepresented litigants, and 19 were represented by Legal Aid Commissions. These numbers exclude applications filed in the appellate jurisdiction and, we understand from the Judicial Registrar in migration matters, are generally reflective of the number of applications over the past several years.[24]

In relation to judicial review of decisions to refuse applications for protection visas, from 2013–2019 there were 5812 cases decided in the Federal Circuit Court. Fifty-seven per cent of applicants were unrepresented; 38% had some form of legal representation (with the presence of a solicitor and/or barrister) and 5% of applicants made no appearance. An analysis of judicial review data suggests that applicants with legal representation were on average six times more likely to succeed than unrepresented applicants. Unrepresented applicants were successful in judicial review in just 79 cases out of the 422 successful cases in total. In contrast, represented applicants were successful in 343 cases out of the 422 cases.[25]

As discussed above, in FY 2019/20, VLA approved funding in 139 migration matters. This figure includes applications and appeals in relation to administrative decisions to refuse protection visas in the Federal Circuit Court and the Federal Court, as well as applications and appeals of character related decisions. Many of the character related matters involve a decision made personally by the Minister for Home Affairs, which can only be reviewed by the court on a question of law.

We provided 1100 advices via our daily telephone advice service in FY 2019/20 and a significant proportion of these advices relate to visa cancellation or refusal on character grounds.

Most commonly we receive calls from people held in immigration detention centres across Australia. These clients face a range of difficulties obtaining even the most minor assistance including access to correct application forms, understanding the contents of written material, payment of filing fees, reliance on detention centre guards to file documents within strict time limits.

VLA's funding guideline does not provide funding for casework in AAT, which is the other avenue of review open to some people where the decision to cancel or refuse an application was made by a delegate of the Minister, and not the Minister personally. According to the AAT's 2019/2020 Annual Report, there were 317 visa-related decisions relating to character finalised during the financial year. Of those, 31 were represented by an advocate or agent, 17 by a friend or relative, 144 by a legal representative and 125 were self-represented.[26] Again, this amounts to less than 50% of people receiving legal representation.[27]

[24] Statistics provided by the national registrar, migration Federal Court of Australia.
[25] Keyvan Dorostkar, *Judicial Review of Refugee Determinations: More by Luck than Judgement* (12 February 2020). Available at SSRN: https://ssrn.com/abstract=3536740 or http://dx.doi.org/10.2139/ssrn.3536740.
[26] Administrative Appeals Tribunal, *Annual Report 2019/20*, 152.
[27] We note that it is not clear what level of legal representation people received.