



**Australian Government**  
**Department of Home Affairs**

# **Department of Home Affairs submission to the Inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020**

Senate Legal and Constitutional Affairs Legislation  
Committee

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# 1. Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill), following the introduction of the Bill into the House of Representatives on 10 December 2020.

The Bill was referred to the Committee by the Senate Selection of Bills Committee in its Report No 1 of 2021, on 4 February 2021. The reasons for referral/principal issues for considerations are as follows:

- transparency and natural justice concerns;
- whether people will be denied access to information used against them in visa cancellation decisions made by the Department/Minister when contesting those decisions in court; and
- disproportionate sentencing provisions.

This submission explains the rationale for the Bill and its intended operation and addresses the issues raised by the Selection of Bills Committee.

# 2. Home Affairs' submission

## 2.1. Purpose of the Bill

The Bill is intended to strengthen character-related decision-making under both the *Migration Act 1958* (the Migration Act) and the *Australian Citizenship Act 2007* (the Citizenship Act) and enhance the Government's ability to uphold the safety and good order of the Australian community by managing the risk posed by migrants of character concern.

The Bill proposes amendments to the Migration Act and the Citizenship Act to create a framework for the protection and controlled authorised disclosure of information provided in confidence by gazetted law enforcement and intelligence agencies and relied upon in character-related visa and citizenship decision-making (protected information). The framework will enable the Minister (the Minister) to authorise the disclosure of protected information to specified persons or bodies, such as a tribunal or a Commonwealth officer after consultation with the gazetted agency which provided such information. It also empowers the High Court, Federal Court of Australia and the Federal Circuit Court to order the Minister to disclose information to it if satisfied that the information is protected information and it is for the purposes of the proceedings before the Court in relation to a relevant character-related decision.

If protected information is produced to the Court or given in evidence, a party to the proceedings may make submissions to the Court on the use which the Court should make of the information and the impact disclosure of that information may have, but only where that party is aware of the content of the information and has not obtained the information unlawfully or in circumstances that would found an action for breach of confidence. Protected 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 the parties and any of an exhaustive list of factors (and only those matters) that it considers relevant. The framework will provide safeguards for the applicant by allowing the Courts to decide how much weight to give the protected information in judicial review proceedings. This would include what weight the Court may give protected information produced to the Court or given in evidence in situations where the Court has determined that to disclose the protected information would cause a real risk of damage to the public interest, meaning the applicant and his legal representatives have not seen the relevant protected information.

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### 2.2. Summary of changes to the Migration Act

The Bill amends the Migration Act to introduce a protected information framework, which will:

- provide that the High Court, the Federal Court or the Federal Circuit Court may order the Minister to produce or give in evidence protected information where the Court is satisfied that the information is protected information and its production is for the purposes of substantive proceedings related to a decision to refuse or cancel a visa on character grounds, or revoke or set aside such a decision;
- if such an order is made, permit any person who is aware of the content of the protected information to make submissions to the Court concerning the use that the Court may make of the protected information, and any impact that its disclosure would entail on the public interest unless the content of the protected information was acquired unlawfully or in circumstances that would constitute an action for breach of confidence (whether or not the party was the person who acquired the content unlawfully or in those circumstances);
- for the purposes of hearing submissions about the use and impact of the protected information, provide that the Court must order that the applicant, or any other party to the proceedings, or their legal representatives, must not attend that hearing unless the applicant or the party is permitted to make submissions on the protected information to the Court. The Court may also order that no report of the part of the proceedings that relates to the protected information is to be published, and no person, without the consent of the Court, has access to a file or a record of the Court that contains the protected information;
- require the High Court, the Federal Court or the Federal Circuit Court to determine whether disclosing protected information would create a real risk of damage to the public interest, having regard to any of an exhaustive list of factors that the court considers relevant;
- if the High Court, the Federal Court or the Federal Circuit Court determines that disclosing the protected information would create a real risk of damage to the public interest, prevent the Court from disclosing the protected information to any person, including the applicant, any other party to the proceedings, their legal representatives and any other person who seeks access to a file or record of the Court that contains the protected information; and
- allow the High Court, the Federal Court or the Federal Circuit Court to give such weight to the protected information as the Court considers appropriate in the circumstances, taking into account any submissions made to the Court.

The Bill also amends the Migration Act to introduce new provisions to:

- amend the definition of non-disclosable information to include protected information where the disclosure of such information would, in the Minister's opinion, be contrary to Australia's national interests;
- provide that an officer performing functions under the Migration Act or Citizenship Act commits an offence if protected information is communicated to them and they disclose it to another person, other than in certain circumstances provided for by the provisions to be inserted by the Bill;
- provide that a Commonwealth officer commits an offence if protected information is disclosed to them pursuant to a declaration by the Minister and subject to conditions, and they engage in conduct, or omit to engage in conduct, and that conduct or omission contravenes a condition attached to the declaration; and
- ensure that the protected information framework has effect despite any provisions of the Migration Act or *Migration Regulations 1994* (the Migration Regulations), any law of the Commonwealth and any law of a State or Territory.

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### 2.3. Summary of changes to the Citizenship Act

The Bill amends the Citizenship Act to introduce provisions (which are substantially similar to the provisions in the Migration Act described above) in order to safeguard from unauthorised disclosure, protected information used for:

- decisions to:
  - refuse to approve an application for citizenship;
  - cancel an approval of citizenship;
  - delay the making of the pledge by a conferral applicant who has had their application approved;
  - revoke a person's citizenship;
  - make a determination by the Minister to cease a person's Australian citizenship if the person has engaged in specified conduct;
  - make a determination by the Minister to cease a person's Australian citizenship if the person has been convicted of a specified offence (and sentenced to at least 3 years of imprisonment);
- renunciations of citizenship by conduct;
- cessation of citizenship for service outside Australia in armed forces of an enemy country or a declared terrorist organisation.

The changes will strengthen the framework for the protection and use of confidential information in the Citizenship Act that is substantially the same as that in the Migration Act. This means that confidential information provided by gazetted intelligence and law enforcement agencies, used in certain citizenship decisions, may be provided to a Court by the Minister when ordered by that Court or where the Minister decides to do so. The amendments will ensure that such information may only be disclosed by a Court in circumstances where the Court is satisfied that doing so would not create a real risk of damage to the public interest.

The Bill further amends the Citizenship Act to create a framework for the management of the disclosure to and by the AAT, of information that has been certified by the Minister to be contrary to the public interest for specified reasons, or that was provided in confidence (protected information). The Bill will create a power for the Minister to make a non-disclosure certificate on public interest grounds for information relating to a decision made under the Citizenship Act and is reviewable by the AAT.

The Secretary of the Department of Home Affairs may give the AAT written advice about the significance of the document or information. The AAT will be able to exercise discretion in disclosing information or documents. This provision is intended to cover a document or information that is of a lower threshold of being contrary to the public interest or having been given in confidence, but may still require a level of sensitive handling in light of advice from the Secretary regarding the significance of the information or document.

The Bill also creates a power for the Secretary of the Department of Home Affairs to delegate any of their functions or powers under the Citizenship Act and the *Australian Citizenship Regulation 2016* (the Citizenship Regulation) in writing to any person. This delegation would apply to the Secretary's powers and functions under the new non-disclosure certificate provisions being inserted by this Bill. The only other powers or functions in the Citizenship Act provided to the Secretary are also conferred on relevant employees of the Department, so the power to delegate would not be relevant to those powers and functions. The ability for the Secretary's powers in relation to non-disclosure certificates to be delegated will align with similar provisions in the Migration Act regarding processes for non-disclosure certificates. The number of cases seeking merits review on the basis of a refusal of citizenship application is envisioned to be on a scale where delegation would be appropriate for the foreseeable future.



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### 2.4. Consequential amendments to other legislation

The Bill makes minor consequential amendments to the *Freedom of Information Act 1982* and the *Inspector of Transport Security Act 2006* as explained in the Explanatory Memorandum.

### 2.5. Rationale for the proposed amendments

Law enforcement and intelligence agencies provide confidential information to the Department on the basis that it will be safeguarded from disclosure. This is because, if such information were disclosed, it could cause severe damage to the public interest, and jeopardise the capabilities of law enforcement and intelligence agencies, including active investigations.

Section 503A of the Migration Act was first 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. Section 503A provides that the Minister cannot be required to divulge or communicate such information relied upon in character-related immigration decision-making. Prior to the introduction of section 503A of the Migration Act, it was a matter for the Court to decide, in the particular case, whether a claim by the Minister for public interest immunity should be upheld. It was incumbent on the Minister to satisfy the Court that the claim should be upheld. With the introduction of section 503A, it was no longer open to the Court to weigh the competing public interests in the administration of justice and the free flow of protected information. Departmental decision-makers were able to rely upon protected information provided by gazetted agencies to inform character decisions under section 501 and section 501CA of the Migration Act. This information informed many character-related visa decisions where there would otherwise be insufficient information to underpin a decision, including refusal and cancellation of visas of outlaw motorcycle gang members.

On 6 September 2017, the High Court of Australia found (in *Graham v Minister for Immigration and Border Protection* and *Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33) that section 503A of the Migration Act was partially invalid. The High Court found that the legislation impeded the High Court and the Federal Court of Australia from effectively exercising their jurisdiction to review a character decision. This is because the relevant Minister for Immigration and Citizenship could prevent disclosure of protected information to the Courts, even if this information was used in character-related decision-making.

Since the High Court decision, the Department has limited its reliance on 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, should the Court require the information to be produced in judicial review proceedings and the information was on-disclosed to the applicant, their lawyers or the public. Potential disclosure of such 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.

While the Minister retains the ability to claim that information should not be disclosed to the applicant, their legal representatives or other parties on the basis of public interest immunity, there remains a real risk that the threshold for protecting documents from disclosure under public interest immunity may not be met meaning information may be disclosed.

Public interest immunity applies to protect confidential information where the public interest in its disclosure is outweighed by a competing public interest in it remaining confidential. There is a higher threshold under the test for public interest immunity before confidential information will be protected from disclosure than the test provided for in the Bill. Given the highly sensitive nature of the information provided by intelligence and law enforcement agencies (who do so on the condition that it is treated as confidential), relying on public interest immunity would provide inadequate protection. The Bill provides a clear test for the Court when it is considering whether to disclose protected information – that is, it must determine only whether disclosure of

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the information would create a real risk of damage to the public interest. The Court also has a clear list of matters which it may regard when considering its determination. These matters are all broadly related to the public interest, and reflect and emphasise the highly sensitive nature of the protected information.

Another matter the Court must have regard to are any submissions made by the parties as to the use the Court should make of the protected information and the impact disclosure of that information may have. The Bill ensures that parties who are aware of the content of the information (unless obtained unlawfully or in breach of confidence) may make submissions to the Court. This is important as it allows a party, including the Minister, to be heard about the use of the protected information, and the impact disclosure of that information may have.

Finally, if the Court determines that disclosure of the protected information would create a real risk of damage to the public interest, then the Bill provides a clear obligation on the Court not to disclose it, including to the applicant or their legal representatives. The test for public interest immunity, in the alternative, requires the Court to undertake a balancing exercise between the damage to the public interest disclosure may have and the public interest in the administration of justice. Also, the Court has a range of orders it can make in relation to public interest immunity claims and the information which is the subject of such claims. This may include, for example, partial disclosure of information or full disclosure to an applicant's legal representatives but not the applicant. As noted above, this would provide inadequate protection for protected information, which has been provided by intelligence and law enforcement agencies on a confidential basis. Disclosure of such information could cause severe damage to the public interest, and jeopardise the capabilities of law enforcement and intelligence agencies, including active investigations.

Additionally, the Department also considers that the protective framework for non-disclosure of national security related information under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) would not provide adequate levels of protection from non-disclosure for the type of protected information used in character-related decisions under the Migration Act and the Citizenship Act. This information may not meet the definition of national security information as set out in the NSI Act (meaning it could not be afforded the protections from disclosure under that Act's framework), but nonetheless warrants protection due to potential consequences if the information is divulged. Protected information may include any information related to character. Whilst this may include information relating to a national security threat, it can also - and often does - include information on a non-citizen's criminality more generally. An additional factor is that the NSI Act requires a Court, when considering whether to disclose national security information, to undertake a balancing exercise on competing public interests, similar to that required for public interest immunity. As noted above, this would provide inadequate levels of protection for protected information.

Amendments proposed by the Bill ensure the ability of decision-makers to rely on protected information relating to character where there may otherwise be insufficient information to underpin a decision to prevent individuals who pose a risk to the safety and good order of the community from entering or remaining in Australia, or gaining Australian citizenship and the privileges that come with it. Although the Bill creates a framework to safeguard protected information from unauthorised disclosure, it does not limit a Court's ability to access all of the relevant information that the Minister or delegate considered to arrive at their decision. The Court may order the disclosure of protected information to it. The Court must determine, after considering the protected information and any submissions made, whether on-disclosure would create a real risk of damage to the public interest, having regard to an exhaustive list of factors, which are all broadly related to considerations of the public interest (thus reflecting and emphasising the sensitive nature of the information). If the Court determines there is such a risk, it must not disclose the information any further. The Court may give such weight to the information in the judicial review proceedings as the Court considers appropriate.

Additionally, the Bill will make it an offence for Commonwealth officers to make unauthorised disclosures of protected information provided by gazetted law enforcement and intelligence agencies and used in character-related visa and citizenship decisions. 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 of

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that information to a Commonwealth officer, due to the potential for severe damage to the public interest. Both offences may be punishable by a maximum sentence of 2 years' imprisonment. These measures are designed to protect protected information communicated by gazetted agencies from being disclosed. It is important for the Department to maintain robust information- and intelligence-sharing relationships with gazetted agencies in order to uphold Government policy to maintain the integrity of Australia's border protection framework, to protect the Australian community, and to uphold the integrity of Australia's migration and citizenship framework. The penalty of up to 2 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. The seriousness is owing to the potential for severe damage to the public interest.

Currently, there is no power under the Citizenship Act to enable the Minister to prevent the disclosure of information used in the context of refusing conferral of citizenship or revoking citizenship, where that decision is under merits review by the Administrative Appeals Tribunal (AAT) on the basis that it would be contrary to the public interest, including for reasons relating to the defence, security or international relations of Australia, or because it would involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet. Neither is there a power for the Minister to certify that the disclosure of information would be contrary to the public interest (for any reason other than those set out above), or information given to the Minister in confidence within the context of merits review before the AAT. There is also no framework in the Citizenship Act for the protection and controlled authorised disclosure of protected information. As such, the Bill will also introduce provisions into the Citizenship Act to create a non-disclosure certificate framework, and introduce into the Citizenship Act a protected information framework. The non-disclosure certificate framework is substantially similar to that provided for in sections 437 and 438 of the Migration Act. The protected information framework is substantially similar to the amendments to sections 503A – 503D of the Migration Act provided for in the Bill.

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. Protection of protected information also supports broader strategies relating to counter-terrorism, transnational crime and related activities, and allows the Department to rely on this information in visa and citizenship decision making as it relates to non-citizens of character concern, thus enabling delegates to make decisions to refuse or cancel visas, or refuse citizenship to persons and so better protect the Australian community

## 2.6. Public interest considerations

As noted above, the Court may order the disclosure to it of protected information if it is for the purposes of the proceedings before it. After the Court has considered the information and any submissions made to it about the information by those parties permitted to do so, the Court must determine whether disclosure of the information would create a real risk of damage to the public interest having regard to the following matters that they consider relevant (and only those matters):

- 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;
- the risk that the disclosure of information may discourage gazetted agencies and informants from giving information in the future;
- Australia's relations with other countries;
- the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence;
- in a case where the information was derived from an informant - the protection and safety of informants and of persons associated with informants;



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- 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;
- Australia's national security; and
- such other matters (if any) as are specified in the regulations.

### 3. Conclusion

Criminal intelligence and related information are vital to assessing the criminal background or associations of non-citizen visa applicants and visa holders, and applicants for citizenship, or persons whose citizenship may be considered for revocation. If the person fails the character test, they may be refused a visa, or if they hold a visa, it can be cancelled. Individuals whose visas are cancelled while in Australia are liable for removal from Australia as soon as reasonably practicable. Similarly, a migrant who is seeking to apply for, or who has been granted, citizenship, may have their citizenship application refused, or their citizenship revoked, where information is available that shows they are not of good character. This ensures that the Australian community can be protected from migrants who pose a risk of harm to the interests and good order of the Australian community.

Protected information must be safeguarded in cases where there is a risk of damage to the public interest. Disclosure of protected information could compromise Australia's national security and the operations or capabilities of law enforcement and intelligence agencies.

The changes will ensure that appropriate protection is afforded to sensitive information provided in confidence by law enforcement and intelligence agencies for consideration in character-related visa and citizenship decision-making.