Law Council
OF AUSTRALIA

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

Parliamentary Joint Committee on Intelligence and Security

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About the Law Council of Australia

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

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

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

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

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

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

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of its Federal Litigation and Dispute Resolution Section's Migration Law Committee and Constitutional Law Committee, and the National Criminal Law Committee and National Human Rights Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to respond to the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) regarding its inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**the Bill**).

2. The Bill seeks to amend the *Migration Act 1958* (Cth) (**Migration Act**) and the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) to insert into each a scheme to protect the disclosure of confidential information provided by gazetted agencies, including intelligence and law enforcement agencies (broadly defined), foreign law enforcement bodies or war crimes tribunals. Specifically, the scheme operates when an agency discloses the information to a Commonwealth officer relevant to a character-based visa decision or certain citizenship decisions, on the condition the information be treated as confidential (**Protected Information Framework**).

3. The scheme inserted by the Bill amends a pre-existing scheme in the Migration Act and inserts an identical scheme into the Citizenship Act for the first time.

4. The Law Council accepts that protecting information the disclosure of which would result in genuine risks to criminal and/or national security is a legitimate objective. It is also necessary to protect the use of such information in administrative decision-making contexts, to ensure relevant agencies are comfortable to disclose it.

5. However, such a scheme must properly balance those objectives against principles fundamental to a democratic legal system including the right to a fair hearing, effective judicial review, the proper administration of justice and parliamentary and independent scrutiny of executive power.

6. The Law Council considers this Bill does not strike the appropriate balance. It conflicts with a number of principles underpinning the rule of law, and Australia's international human rights obligations such as Article 14 of the *International Covenant on Civil and Political Rights* (**ICCPR**).[1]

7. Some of the key features of the Bill which demonstrate this concern are:

   - there is no requirement that the 'confidential' information be, either objectively or on a reasonably held opinion, of a sensitive character or nature which justifies such disproportionate measures to protect it;

   - the information would not be available to the Administrative Appeals Tribunal (**AAT**) or Immigration Assessment Authority (**IAA**) to be tested in its review of any original decision made on the basis of the information;

   - the person subject to an adverse decision made using such information is unlikely to be informed of its existence, or permitted to participate in any hearing by a Court as to whether the information can be adduced in judicial proceedings relating to such decisions, effectively denying them the capacity to answer the case against them. This may result in miscarriages of justice;

[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976).

- the High Court, the Federal Court or the Federal Circuit Court (**the Court**) is statutorily deprived of its capacity to consider the interests of the administration of justice in performing its judicial review function; and

- the possibility that the proposed legislation may curtail the capacity of a court to exercise its judicial review jurisdiction under or deriving from section 75(v) of the Constitution to a substance or degree resulting in invalidity.

8. The Australian Government considers that a stand-alone scheme in the Migration Act and Citizenship Act for protecting this kind of information is necessary because neither the 'national security framework' nor common law public interest immunity provide sufficient protection to this kind of law enforcement and intelligence information in judicial proceedings.[2]

9. The Law Council considers that this justification has not been made out.

10. The Law Council considers the preferable course is to take a whole-of-government approach to dealing with sensitive information in judicial review proceedings to ensure consistency across Commonwealth laws. These laws include *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**), which already allows a court to order certain information not be disclosed to a party because there would be a risk of prejudice to national security (broadly defined); general statutory provisions for appropriately protecting confidential information during merits review; and general secrecy offences.

11. As such, the Law Council recommends that the Bill not pass, nor should the existing Protected Information Framework be retained. Instead, it considers that the existing legislative framework in the Migration Act for protecting confidential information from disclosure should be reviewed on a whole-of-government basis.

12. This review should assess the framework's ongoing reasonableness, necessity and proportionality, in light of:

    - the expansive existing mechanisms available to the Commonwealth to protect information that poses a genuine risk to national security, including Australia's defence, security, international relations or law enforcement interests;

    - the lack of clarity and confusion that are likely to flow from multiple intersecting legal frameworks and different information disclosure and protection schemes within the Migration Act itself;

    - the need to balance national security objectives with other fundamental objectives underpinning Australian democracy, including the proper administration of justice, the right to a fair trial and procedural fairness, adequate oversight of Executive actions, and the independent functions of Parliament and the judiciary under the Australian Constitution.

13. Any amendments which are required should be put for public consideration as part of this review. There is currently an important opportunity to ensure that federal legislation works more coherently in achieving dual objectives which Australians hold dear – that is, their security, and a just and fair system of decision-making.

14. If, contrary to the above recommendations, the Bill does progress, the Law Council recommends a number of amendments that would provide for a clearer framework

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs).

for protecting information in these Acts which better balances national security and criminal intelligence objectives with those other fundamental objectives.

The information disclosure framework in the Migration Act and Citizenship Act

Summary of current framework

Migration Act

15. The Migration Act currently provides for the protection of information which is subjectively considered confidential in the following ways.

Tribunal information disclosure scheme

16. The Migration Act generally controls the disclosure of information by the Department of Home Affairs to the AAT and the IAA in the context of merits review by those tribunals of migration decisions (**tribunal information disclosure scheme**) when the Minister certifies that disclosure would be contrary to the public interest (for a specified reason) or the document was given in confidence.

Non-disclosable information scheme

17. The Migration Act also excludes 'non-disclosable' information from the information which the Minister, the AAT and the IAA must otherwise provide an applicant or holder of a visa when it is relevant because it would be the reason for adverse decisions to refuse or cancel a visa (or affirm such decisions)[3] (**non-disclosable information scheme**).

Protected information framework

18. The Migration Act prohibits a Commonwealth official who has received 'confidential information' from gazetted agencies, including intelligence and law enforcement agencies (broadly defined), foreign law enforcement bodies or war crimes tribunals for the purpose of a character test decision[4] from disclosing the information to a person, court or tribunal, except by declaration of the Minister.[5]

19. The current Protected Information Framework overrides those other schemes in the Migration Act when any information which would otherwise come within the purview of those Acts is provided by a gazetted agency on the condition it be treated as 'confidential' for the purposes of a character decision.

Citizenship Act

20. The Citizenship Act does not currently provide for a Protected Information Framework nor tribunal information disclosure scheme. It only includes a non-disclosure scheme which is put in different terms to the non-disclosure scheme in the Migration Act.

[3] Ibid, ss 57, 66(2)(c), 119(1)(a), 120(1); ss 129; 133E (regarding decisions under ss 133A(1) or 133C(1))), and 133F (regarding decisions under ss 133A(3) or 133C(3)); ss 359A(Part 5 reviewable decisions) and 424A (Part 7 reviewable decisions), 473DE (fast track decisions).
[4] Specifically, the exercise of a power under sections 501, 501A, 501B, 501BA, 501C or 501CA.
[5] Sections 503A-503D of the Migration Act

21. In the Citizenship Act, the information which the Minister provides to a person after a cessation or revocation of citizenship decision[6] must not contain information which:

- is operationally sensitive information (within the meaning of the *Independent National Security Legislation Monitor Act 2010* (Cth) (**INSLM Act**));[7]or
- could prejudice:
    - the security, defence or international relations of Australia; or
    - performance by a law enforcement or security agency (within the meaning of the INSLM Act)[8] of its functions; or
- could endanger a person's safety; or
- would be likely to be contrary to the public interest for any other reason.

Amendments to the framework proposed by the Bill

22. In summary, through its main amendments, the Bill would:

- repeal the Protected Information Framework in the Migration Act and replace it with a new one;[9]
- insert the same new amended Protected Information Framework into the Citizenship Act;[10]

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[6] Subsections 36F(6), 36H(5) and 36J(4) of the Citizenship Act.
[7] Section 4 of the INSLM Act defines 'operationally sensitive information' as follows:

operationally sensitive information means:
(a) information about information sources or operational activities or methods available to a law enforcement or security agency; or
(b) information about particular operations that have been, are being or are proposed to be undertaken by a law enforcement or security agency, or about proceedings relating to those operations; or
(c) information provided by a foreign government, or by an agency of a foreign government, where that government does not consent to the public disclosure of the information.

[8] Section 4 of the INSLM Act defines 'law enforcement or security agency' as follows:

law enforcement or security agency means any of the following agencies:
(a) the Australian Federal Police;
(b) the Australian Crime Commission;
(c) the Immigration and Border Protection Department;
(d) the Australian Security Intelligence Organisation;
(e) the Australian Secret Intelligence Service;
(f) the Australian Signals Directorate;
(g) the Australian Defence Force;
(h) the part of the Defence Department known as the Australian Geospatial-Intelligence Organisation;
(i) the part of the Defence Department known as the Defence Intelligence Organisation;
(j) the Office of National Intelligence;
(k) any other agency prescribed by the regulations for the purposes of this definition.

[9] Item 9 of Schedule 1 to the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020.
[10] Ibid, item 3 of Schedule 1.

- extend the non-disclosable information scheme in the Migration Act so that it addresses information disclosed by gazetted agencies including law enforcement or intelligence bodies;[11]

- insert provisions into the Citizenship Act which restrict the disclosure of certain information to the AAT or limit the way in which the AAT may use such information, which are similar to but not identical to those provided in the Migration Act.[12]

23. This submission primarily focuses on the Protected Information Framework.

The proposed Protected Information Framework

Summary of the key features

24. The following table sets out the operation of the Protected Information Framework under the current Migration Act, and as it would operate if the amendments are passed. The framework is divided into four features:

- the original disclosure;

- the Minister's powers to permit further disclosure;

- the Court's powers to order disclosure; and

- offences.

Step	Current Migration Act	Under the Bill
The original disclosure		
Initial disclosure	Information communicated to an authorised officer by a 'gazetted agency' for the purposes of a character test decision on the condition that it be treated as confidential information[13]	The same except that the information need only be 'relevant' to a character test decision, which broadens the test to information which may have been provided for another purpose but is nonetheless relevant to the character test decision.[14]
Evidential rules relating to disclosure	None	In establishing whether information was disclosed: • the hearsay rule does not apply;[15] • a certificate stating that information was communicated by a gazetted agency in confidence is prima facie evidence of that.[16]
Limits on use by person who	The person who received the information either from the gazetted agency or the	Two differences:

[11] Ibid, item 6 of Schedule 1.
[12] Ibid, Schedule 2.
[13] Subsections 503A(1) and (2) of the Act.
[14] Proposed subsection 503A(1).
[15] Proposed subsection 503A(4).
[16] Proposed subsection 503A(5) of the Migration Act.

Step	Current Migration Act	Under the Bill
disclosed information	Minister/another authorised officer must not, unless allowed by the Minister: • disclose it to other persons, other than the Minister or another authorised officer for the purposes of a character test decision;[17] • be required to disclose information to, or give the information in evidence to, a court, tribunal, parliament, parliamentary committee or any other body or person.[18]	• the Court may also order disclosure;[19], albeit in truncated circumstances (see rows below); • a person must not *be required* to give the information in evidence (addition italicised).[20]
The Minister's powers to permit further disclosure		
Disclosure by Minister	Minister may, after consulting with the gazetted agency, permit the disclosure of specified information in specified circumstances to a specified Minister, court, tribunal, or Commonwealth officer.[21]	No substantive change.[22]
Procedural matters relating to the Minister's power	The Minister does not have a duty to consider whether to exercise this power.[23]	Substantively the same.[24] Additionally: • The rules of natural justice do not apply to the consideration of the exercise of this power.[25]
Limits on use by persons disclosed information by Ministerial declaration	The person must: • comply with conditions imposed by declaration; • not be required to disclose information to, or give the information in evidence to, the	Substantively the same.[28] Additionally: • a Minister to whom the information has been disclosed must not be required to produce the information to, or give the information in evidence to, a court

[17] Subsection 503A(1) of the Migration Act.
[18] Ibid, subsection 503A(2).
[19] Proposed subsection 503C(1) of the Migration Act.
[20] Proposed subsection 503A(3) of the Migration Act.
[21] Subsection 503A(3) of the Migration Act.
[22] Proposed subsection 503B(1) of the Migration Act.
[23] Subsection 503A(3A) of the Migration Act.
[24] Proposed subsection 503B(8) of the Migration Act.
[25] Proposed subsection 503B(9) of the Migration Act.
[28] Proposed subsections 503B(2)-(5) of the Migration Act.

Step	Current Migration Act	Under the Bill
	Court unless the Minister separately permits it.[26] The tribunal must not: • disclose it to other persons, other than the Minister or an authorised officer; • be required to disclose information to or give the information in evidence to a court unless the Minister separately permits it.[27]	unless the Minister separately permits it;[29] • the Court may order disclosure by a Minister, person or tribunal;[30]; albeit in truncated circumstances (see rows below) • the tribunal is only permitted to disclose to Commonwealth officers to whom the information has also been disclosed.[31]
The Court's powers to order disclosure		
Role of the Court	Consider, on application by the Minister and if information is relevant to proceedings relating to a section 501 character decision, **whether to make a non-disclosure order** in relation to information which the Minister may declare be disclosed.[32]	Consider, for the purpose of proceedings relating to a section 501 character decision, **whether to cause information to be produced** to the Court or given in evidence.[33]
Rules relating to evidence and procedure	<u>Regarding parties to the substantive hearing</u> None <u>Regarding court orders</u> The Court **may** order: • that some or all of the members of the public are to be excluded from the hearing of the substantive proceedings; or • that no report of the proceedings (or part of) is to be published; or • for ensuring that no person, without the consent of the Court, has access to a file or a record of the Court that contains the information.[34]	<u>Regarding parties to the substantive hearing</u> Any party to the substantive proceedings who is aware of the content of the information and did not acquire the content unlawfully or in breach of confidence, may make submissions concerning the: • use the Court should make of the information for the purpose of the substantive proceedings; • impact that disclosing the information may have on the public interest.[35] <u>Regarding Court orders</u> The Court **must** order: • any person who may not make submissions is excluded from the hearing; • no report of the part of the proceedings that relates to the information is to be published; and • no person, without the consent of the Court, has access to the file or a record

[26] Subsections 503A(4) and (4A) of the Migration Act.
[27] Ibid, subsections 503A(5) and (5A).
[29] Proposed subsections 503B(4)-(5) of the Migration Act.
[30] Proposed subsection 503C(1) of the Migration Act.
[31] Proposed subsection 503B(3) of the Migration Act.
[32] Sections 503B and 503C of the Migration Act.
[33] Proposed section 503C of the Migration Act.
[34] Subsections 503B(2) and 503B(4) of the Migration Act.
[35] Proposed subsections 503B(2)-(3) of the Migration Act.

Step	Current Migration Act	Under the Bill
		of the Court that contains the information.[36]
Criteria relevant to Court orders relating to disclosure	The Court **may** make any orders **it considers appropriate**.[37] In deciding whether to make such an order, the Court must consider **all of** (and only) the following: (a) the fact that the information originally communicated on condition that it be treated as confidential information (b) Australia's relations with other countries; (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence; (d) in a case where the information was derived from an informant—the protection and safety of informants and of persons associated with informants; (e) 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; (f) Australia's national security; (g) the fact that the disclosure of information may discourage gazetted agencies and informants from giving information in the future; (h) the effectiveness of the investigations of official inquiries and Royal Commissions; (i) the interests of the administration of justice; (j) such other matters (if any) as are specified in the regulations.[38]	If the Court **must not** disclose the information if it **'would cause a real risk of damage to the public interest'**.[39] (according to a truncated definition).That is, in deciding whether to make such an order, the Court must consider **any of** (and only) the same list of matters except the following (which *cannot* be considered) • the effectiveness of the investigations of official inquiries and Royal Commissions; • the interests of the administration of justice.[40]
Offences		
Offences	A person commits an offence if: • they engage in conduct which breaches a Court non-disclosure order.[41]	A person commits an offence if they are a Commonwealth officer and they: • disclose the information other than in accordance with the Act, a Ministerial

[36] Proposed subsection 503B(4) of the Migration Act.
[37] Subsections 503B(1) and 503C(3) of the Migration Act.
[38] Subsection 503B(5) of the Migration Act.
[39] Proposed subsection 503C(5) of the Migration Act.
[40] Ibid.
[41] Subsections 503B(12) and 503C(8) of the Migration Act.

Step	Current Migration Act	Under the Bill
		disclosure declaration or a Court order;[42] • engage in conduct in contravention of a condition of a Ministerial declaration relating to the disclosure.[43]

Summary views on the Bill

25. The Bill responds to the decision in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (***Graham***).[44]

26. In that decision, the High Court held that subsection 503A(2) of the Migration Act is invalid to the extent that it applies to prevent the Minister from being required to divulge or communicate information to the High Court or to the Federal Court of Australia in order to enable the Court to review a purported exercise of power by the Minister under the character test decision.[45]

27. The Bill responds to that decision by providing a power for the Court to make an order requiring the Minister to disclose that information. However, as demonstrated in the table, the Bill provides for constrained procedural rules which significantly restrict the capacity of any party other than the Commonwealth to handle the information.

28. The Law Council considers that the Protected Information Framework does not strike the balance between the (reasonable) objective of protecting sensitive information and the methods through which it was obtained, and principles fundamental to a democratic legal system including the right to a fair hearing, effective judicial review, the proper administration of justice and parliamentary and independent scrutiny of executive power.

29. The Law Council is concerned the Bill conflicts with a number of principles underpinning the rule of law, and Australia's international human rights obligations such as Article 14 of the **ICCPR**.

30. Some of the key features of the Bill which demonstrate this concern, which are explored in greater detail below, are:

    - The definition of 'Australian law enforcement or intelligence body',[46] which itself forms part of the definition of 'gazetted agency' may capture a very broad range of bodies – well beyond those which are commonly considered traditional law enforcement or intelligence bodies.

    - There is no definition of 'confidential information', or limitations on the types of information that a gazetted agency might subject to the condition that it be treated as confidential information. The threshold appears to be left to each gazetted

[42] Subsection 503A(6) of the Migration Act.
[43] Proposed 503B(7) of the Migration Act.
[44] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 2.
[45] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [64]-[66].
[46] See proposed subsection 503A(9).

agency to determine (or contend) and the Bill includes no independent safeguard to achieve appropriate levels of consistency and no avenue for review.

- The person who is subject to an adverse decision made using such information will be unable to make submissions or be permitted to participate in any hearing by a Court as to whether the information can be adduced in judicial proceedings relating to such decisions, unless they have the information. Given such proceedings are the only avenue for a person to obtain this information this is likely to constructively deprive them of the opportunity to answer the case against them.

- The Court appears to be statutorily deprived of its capacity to consider the interests of the administration of justice in performing its judicial review function.

31. Under the Bill, information which is inaccurate or unreliable could, for example, be provided by a law enforcement body and relied upon to revoke a person's citizenship or cancel a permanent visa. The information would not be before a tribunal and available to be tested on review, and the affected person would have no realistic means to contribute to a hearing on its disclosure in judicial proceedings and thus make submissions about the weight which should be given to it.

32. This could affect the quality of decision-making by those bodies and lead to unjust outcomes.

33. These are momentous decisions for affected individuals. Persons whose visas are cancelled or who have their citizenship revoked in these situations are liable to be detained.[47] Unless granted another visa, they will be detained until they are removed,[48] which, particularly if found to engage Australia's protection obligations, could be a significant, indefinite period.[49]

34. The Law Council does not consider that a Protected Information Framework, either in its present or proposed amended form, should be included in the Migration Act or the Citizenship Act. Its preferred position is that existing alternative mechanisms should be used for this purpose. However, if this Bill is to be enacted, the Law Council recommends the inclusion of a number of amendments directed towards tilting the balance back towards the administration of justice, which are outlined below.

Law Council's preferred position: a review of the Protected Information Framework should be conducted

[47] Section 189 of the Migration Act.
[48] Subsection 196(1) of the Migration Act.
[49] See Law Council of Australia, *Submission on the passage of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, <https://www.lawcouncil.asn.au/publicassets/0583a0e8-57c7-eb11-943c-005056be13b5/4016%20-%20Clarifying%20International%20Obligations%20for%20Removal%20Bill%202021.pdf>, 7 June 2021, particularly [39]-[52].

Existing frameworks for protecting information in judicial proceedings

Overview

35. The NSI Act already provides for a scheme for dealing with information in Federal Court proceedings where disclosure is likely to prejudice national security. As the Law Council has noted,[50], the operation of the NSI Act has given rise to concerns that in certain circumstances it is not consistent with the right to a fair trial. The extension of the already extensive restrictions on the enjoyment of the right to fair trial should only be contemplated if there are compelling grounds to do so.

36. The framework in the NSI Act is itself already additional to the existing ability of the Commonwealth under the common law to make a claim for public interest immunity in relation to particular information, with the result that the relevant information is immune from disclosure to a party if the court determines that the public interest in non-disclosure outweighs the interest in disclosure.

37. This raises the question of the necessity of continuing to retain any form of Protected Information Framework in the Migration Act, particularly where it raises significant concerns regarding its scope, complexity and impacts on the administration of justice, or extending it to the Citizenship Act, where there are other schemes which are generally intended to handle the production of the same kind of information in court and to which these Acts could be clearly linked.

History of the Protected Information Framework

38. In order to begin to answer that question, it is useful to review the history of the protected information scheme.

39. Section 503A was inserted in 1998 into the Migration Act with the character test visa cancellation scheme in sections 501-501H by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth). The associated Bill was considered by the then Senate Legal and Constitutional Legislation Committee.[51]

40. In the Second Reading Speech Senator Kemp, stated, by way of explanation:[52]

> *Criminal intelligence and related information is critical to assessing the criminal background or associations of non-citizen visa applicants and visa holders. At present, it is difficult for the Department to use such information in making character decisions because its disclosure might be threatened. Australian and international law enforcement agencies are reluctant to provide sensitive information unless they are sure that both the information and its sources can be protected. Greater protection for such material would complement broader national and*

[50] Pauline Wright, President of the Law Council, *Law Council President, Pauline Wright, support to Bernard Collaery*, (Media Statement, 16 October 2020 <https://www.lawcouncil.asn.au/media/media-statements/law-council-president-pauline-wright-support-to-bernard-collaery>.
[51] Senate Legal and Constitutional Legislation Committee, Commonwealth Parliament, *Consideration of Legislation Referred to the Committee – Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997*, March 1998, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/1996_99/mla98/report/report_zip.ashx.
[52] Commonwealth, *Parliamentary Debates*, The Senate, 11 November 1998, 60 (Rod Kemp, Assistant Treasurer).

> *international strategies to counter transnational crime and the activities of those associated with it.*

41. Unfortunately, there was no reference in that Second Reading Speech, nor in the Explanatory Memorandum for the Bill, to either the Evidence Act (of 1995) or public interest immunity. The Senate Legal and Constitutional Legislation Committee report did not explore this point.

42. Importantly, at that stage, a 'gazetted agency' also needed to be '*responsible for* law enforcement, criminal intelligence, criminal investigation or security intelligence' (emphasis added).[53] Further, the NSI Act had not been enacted.

43. This regime was expanded with the passage of the *Migration Legislation Amendment (Protected Information) Act 2003* (Cth).

44. That Act expanded the scheme by:

- broadening the definition of gazetted agencies to include those which are 'responsible for*, or deals with,* law enforcement, criminal intelligence, criminal investigation, *fraud* or security intelligence' (changes italicised).[54] This expansion enabled the inclusion of agencies other than the 'law enforcement agencies' referred to in Senator Kemp's Second Reading Speech as agencies whose information justified these expansive powers; and

- providing for powers enabling to the Minister to apply for non-disclosure orders.[55]

45. Relevantly, in the Second Reading Speech, the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP stated that the justification for including the non-disclosure order powers was to avoid his department having to rely on public interest immunity claims in court matters:[56]

> Currently my department must rely on a claim of public interest immunity to protect the information from disclosure when a character decision is reviewed by a court. If the court does not uphold the claim to immunity then the information must be disclosed.
>
> Any such disclosure would certainly put at risk the provision of this information in the future. In some circumstances and instances, it may even endanger the lives of sources.

46. Importantly, at the time, the NSI Act had not been enacted.

47. In relation to the entities whose information may be protected under the scheme, the then Minister stated:[57]

> *Most gazetted agencies are overseas intelligence and law enforcement agencies. If they cannot be sure that the information they provide, and its source, is adequately protected then they will not continue to provide us with this valuable information.*

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[53] See item 26 of Schedule 1 to the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998.*
[54] See item 5B of Schedule 1 to the *Migration Legislation Amendment (Protected Information) Act 2003.*
[55] Ibid, item 6 of Schedule 1.
[56] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10262 (Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs and Minister Assisting the Prime Minister for Reconciliation).
[57] Ibid.

This will provide more effective protection for confidential information and will complement broader national and international strategies to counter major and transnational crime, including terrorism.

48. The Migration Legislation Amendment (Protected Information) Bill 2003 (Cth) was never referred for inquiry, meaning that at the time stakeholders and legal experts did not have the opportunity to provide formal feedback or evidence concerning its provisions and practical effect.[58]

49. Notably, when the regime was enacted, the provisions in the Migration Act enabling the Minister to cancel a visa on character grounds were substantially more limited than they are currently. Accordingly, the circumstances to which non-disclosure could apply were more contained. Today, the section 501 character test framework imposes low thresholds for failure on character grounds, capturing a range of individuals who would not under normal criminal law definitions be considered to have committed serious offences. They also include persons who have not been convicted of any offence at all. The Law Council has previously submitted that this legislative expansion is unnecessary and disproportionate,[59] and it therefore has significant concerns regarding any non-disclosure regime that is substantively attached to it – particularly a regime which is itself disproportionate and can significantly prejudice the proper administration of justice.

The NSI Act

50. The NSI Act creates a general framework for a court to order whether 'national security information' (which as discussed below, is broadly defined) may be disclosed in criminal or civil proceedings.

Law Council position on the NSI Act

51. The Law Council has previously raised a range of concerns about the NSI Act.[60] The Law Council has previously stated that the NSI Act tilts the balance too far in favour of the interests of protecting broadly-defined national security at the expense of the rights of the accused, and that it is not a proportionate response to addressing the risk that information prejudicial to national security may be released.[61]

52. The Law Council considers that reforms to the NSI Act are required to ensure that the court maintains the interests of justice without being directed to place greater weight on any one consideration, such as national security, over other equally important considerations.[62]

53. However, as will be shown, the NSI Act is also a scheme for protecting from disclosure in judicial proceedings similar (and in some cases the same) information which will be

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[58] See Parliament of Australia, 'Search Committees and Inquiries', *Parliamentary Business* (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Committees>.
[59] See, eg, Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019* (14 August 2019) <https://www.lawcouncil.asn.au/resources/submissions/migration-amendment-strengthening-the-character-test-bill-2019>.
[60] Law Council of Australia, *Inquiry into the operation of the National Security Information (Criminal and Civil Proceedings) Act 2004*, 19 July 2013, <120719-Submission-2745-Inquiry-Operation-National-Security-Information-Act-2004.pdf (lawcouncil.asn.au)>.
[61] Pauline Wright, President of the Law Council, *Law Council President, Pauline Wright, support to Bernard Collaery*, (Media Statement, 16 October 2020 <Law Council President, Pauline Wright, support to Bernard Collaery - Law Council of Australia>.
[62] Ibid.

subject to the new Protected Information Framework, so it is worth contrasting the operation of the two.

Overview of the NSI Act

54. Under the NSI Act, if a party, or the legal representative of a party, to a civil proceeding knows or believes that he or she will disclose national security information, intends to call a witness who will disclose national security information or has applied for a subpoena issued or made an order requiring a person to disclose national security information, that person must give the Attorney-General notice in writing of that knowledge or belief.[63]

55. If the Attorney-General receives such a notice or expects such information will be disclosed in a civil proceeding and considers disclosure is likely to prejudice national security, the Attorney-General may issue a certificate to the discloser providing instructions about the disclosure of the information and this certificate must be given to the court.[64]

56. Upon receiving such a certificate, the court must hold a hearing to decide whether to issue a non-disclosure certificate in relation to the matter.

57. The scheme providing for the conduct of the hearing provides greater opportunity for non-Commonwealth parties in the proceeding to participate in it than the Protected Information Framework as set out under the Bill.

58. As noted, the Protected Information Framework under the Bill only permits people who are actually aware of the information to make submissions and participate in a hearing on whether the information can be disclosed.

59. In contrast, the NSI Act permits a non-Commonwealth party (or their legal representative), who receives written notice that in the proceeding an issue may arise relating to a disclosure of information that is likely to prejudice national security, to:

    - apply for a security clearance, which, if granted, will allow them to participate in such a hearing – otherwise the Court still has a discretion as to whether to allow such a party to be present in any part of the hearing which gives details of the information in question;[65]

    - make submissions about the disclosure of any information or the calling of witnesses which the Attorney-General (or their legal representative) argues should not be disclosed or called.

60. Further, the factors to be considered by Court in deciding whether to make a non-disclosure order in relation to information in question are less confined than those in the Protected Information Framework as it is set out under the Bill.

61. Specifically, under the NSI Act, the Court must consider whether there would be a risk of prejudice to 'national security', as well as whether any order would have a substantial adverse effect on the substantive hearing in the proceeding, and any other matter the court considers relevant. In making its decision, the court must give greatest weight to the risk of prejudice to national security.[66]

[63] Subsection 38D(1) of the NSI Act.
[64] Ibid, section 38F.
[65] Ibid, subsection 38A(3) and section 39A.
[66] Ibid. subsection 38L(8).

62. The Court is able to order that the proceeding be stayed on the ground that a non-disclosure order would have a substantial adverse effect on the substantive hearing of the proceeding.[67]

63. The Hon Philip Ruddock MP, by then the Attorney-General, cited many of these measures in the Second Reading Speech and stated that they 'demonstrate that the government has yet again struck the right balance between protecting national security and protecting the rights of parties'.[68]

64. In contrast, the mandatory factors which the Court must consider under the Protected Information Framework in the Bill do not include any factors relating to the effect non-disclosure would have on the substantive hearing, or indeed *any* factors which relate to the interests or rights of the non-Commonwealth party. As noted, the Court is not permitted to consider the interests of the administration of justice. This is likely to impede the Court's ability to administer justice fairly, and to increase the likelihood that a miscarriage of justice will occur. It is a problematic restriction in the context of the Australian legal system.

The kinds of information dealt with by each scheme

65. The Law Council considers that the Government needs to provide a clear explanation of the types of 'confidential information' referred to in that statement that would not be covered under the NSI Act and would need to be addressed by separate legislation.

66. Under the NSI Act, 'national security information' is defined as information either 'that relates to national security'[69] or 'the disclosure of which may affect national security',[70] with the definition of 'national security' extending to 'Australia's defence, security, international relations or law enforcement interests'.[71]

67. The NSI Act further provides broad definitions of 'security interests',[72] 'international relation interests'[73] and 'law enforcement interests'.[74] Notably, the statutory definition of 'law enforcement interests' is a broad and non-exhaustive definition:

> *11 Meaning of law enforcement interests*
>
> *In this Act, law enforcement interests includes interests in the following:*
>
> *(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;*
>
> *(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;*
>
> *(c) the protection and safety of informants and of persons associated with informants;*

[67] Ibid, subsection 19(4).
[68] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, 1 (Philip Ruddock, Attorney-General).
[69] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), section 7 (definition of 'national security information', para (a).
[70] Ibid, section 7 (definition of 'national security information', para (b).
[71] Ibid section 8.
[72] Ibid section 9.
[73] Ibid section 10.
[74] Ibid section 11

> *(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.*[75]

68. A court would be obliged to consider these interests which a court when deciding whether to make a disclosure order under the NSI Act.[76]

69. In contrast, the Bill does not limit the kind of information which may be subject to the Protected Information Framework to be inserted by the Bill – all that is required is that the gazetted agency provides the information on condition it be treated as 'confidential information'. There is no definition of 'confidential information'.

70. However, the Court is limited in the matters it can consider in deciding to make a non-disclosure order, and many of those matters form part of the definition of 'national security' in the NSI Act.

71. Specifically, the Bill would insert subsection 503C(5), which provides

> *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 4 deal with, criminal intelligence or security intelligence;*
>
> *(g) Australia's national security;*
>
> *(h) such other matters (if any) as are specified in the regulations*.

72. The only paragraphs which are plainly different from the NSI Act are:

- paragraph (a), which enables the Court to consider the mere fact that the information was disclosed on condition that it be treated as confidential information; and
- paragraph (h) – a power to prescribe addition matters in regulations.

[75] Ibid.
[76] Paragraph 38L(7)(a) of the NSI Act.

73. The other paragraphs, paragraphs 503C(5)(b)-(g), are either exactly the same or very similar to aspects of the definition of 'national security' under the NSI Act.

74. The Law Council notes that paragraph 503C(5)(a) is unclear as to what is intended to be caught by this provision. It also considers that such matters should not be left to be specified later in regulations as is proposed under paragraph 503C(5)(h).

75. The Australian Government has justified the introduction of the Protected Information Framework partly on the basis that information provided by gazetted agencies may not necessarily meet the threshold for non-disclosure under the national security framework.[77]

76. However, it is unclear why paragraphs 503C(5)(b)-(g) are insufficient to deal with the need to protect sensitive criminal intelligence information.

77. The Protected Information Framework will override the NSI Act to the extent of any inconsistency: proposed paragraph 503A(7)(b). In effect, inconsistency would arise in any judicial review proceedings arising from a character test decision in which 'confidential information' provided to a Commonwealth official from a gazetted agency is material.

78. This amounts to an expansion – the Migration Act is currently silent on its interaction with the NSI Act.

79. The *National Security Information Legislation Amendment Act 2005* (Cth) amended the NSI Act (of 2004) to apply it to civil proceedings. When the National Security Information Legislation Amendment Bill 2005 (Cth) was introduced, there was no discussion in the Explanatory Memorandum or in the Minister's Second Reading Speech of the interaction between it and the non-disclosure regime under the Migration Act.[78]

80. Further, the primacy of the Migration Act is inconsistent with the operation of the NSI Act intended by the Australian Law Reform Commission (**ALRC**) in is Keeping Secrets report[79] – which informed the development of the NSI Act.

81. It appears that the then Department of Immigration and Multicultural and Indigenous Affairs submitted that the NSI Act should not displace the provisions of the Migration Act which constitutes the current Protected Information Framework.

82. The ALRC stated:[80]

> *It was, and remains, the ALRC's intention that the provisions of the new Act apply equally to all courts and tribunals, including courts and tribunals exercising their powers under the Migration Act. Indeed, the specific formulation of safeguards to be implemented whenever secret evidence is used was motivated in part by the concerns associated with the use of secret evidence in migration matters. In some cases, the provisions of the new Act would not, in any event, displace provisions of the Migration Act; rather, they would augment them. Where the Migration Act is silent*

[77] Commonwealth, no 2.
[78] Parliament of Australia, 'National Security Information Legislation Amendment Bill 2005', Parliamentary Business (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2299>.
[79] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* [2004] ALRC 98.
[80] Ibid, [11.221].

> *on matters which are the subject of the proposed regime, there does not appear to be any compelling reason for exempting the migration scheme from its application.*

83. The Law Council does not consider that there has been adequate explanation for why the proposed Protected Information Framework, which by comparison significantly tilts the balance significantly in favour of protecting information which may be sensitive at the expense of the procedural rights of the applicant, is to be preferred over a whole-of-government statutory response.

84. In the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum for the Bill, it is said: [81]

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

85. The above discussion, in the Law Council's view, underlines the need for a whole-of-government approach to dealing with sensitive information in judicial review proceedings to ensure consistency across Commonwealth laws.

Evidence Act and other powers of the court

86. The framework in the NSI Act is already additional to the existing ability of the Commonwealth under the common law and section 130 of the Evidence Act to make a claim for public interest immunity in relation to particular information, with the result that the relevant evidence is excluded (and in the case of public interest immunity claims – not disclosed to another party at all), if the court determines that the public interest in non-disclosure outweighs the interest in disclosure.

87. The principle of public interest immunity reflects an acceptance by the law that there may be public interest in such documents being immune from disclosure.[82] This may arise in the context of Cabinet minutes and documents which concern the framing of government policy at a high level, and documents relating to national security.[83]

88. Public interest immunity arises from a claim that material should not be disclosed to another party. The court will consider whether the benefit of disclosure to the forensic process outweighs the risk to national security.[84]

89. Section 130 of the Evidence Act, on the other hand, relates to the admissibility of evidence rather than disclosure to a party.[85] The section permits the Court, either on its own initiative or on the application of any person, to direct that information or a document that relates to matters of state not be adduced as evidence if it considers the public interest in admitting such into evidence is outweighed by the public

[81] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 48 ('Attachment A – Statement of Compatibility with Human Rights').
[82] *HT v The Queen* [2019] HCA 40, [28].
[83] Ibid.
[84] Ibid, [33].
[85] Ibid. [36].

interest in preserving secrecy or confidentiality in relation to the information or document.

90. The information or document may be taken to relate to matters of state if adducing it as evidence would:

- prejudice the security, defence or international relations of Australia; or
- damage relations between the Commonwealth and a State or between two or more States;
- prejudice the prevention, investigation or prosecution of an offence; or
- prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
- disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
- prejudice the proper functioning of the government of the Commonwealth or a State.[86]

91. The Minister, in his Second Reading Speech, said that 'public interest immunity does not provide full protection for the type of confidential information that may be provided by law enforcement or intelligence agencies or their sources to support character decisions'.[87] However, it is widely accepted that 'the grounds of what constitutes public interest under the common law are not closed, but generally relate to the interests of central government'.[88] Indeed, even these general grounds appear to cover the Minister's central concern about protecting 'the operations, capabilities and sources of law enforcement and intelligence agencies':[89]

> *Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.*[90]

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

93. In addition to the NSI framework and public interest immunity claims, courts also have inherent jurisdiction to control their proceedings, including making decisions to hold certain portions of a hearing in closed court, and to make suppression or non-

[86] Subsection 130(4) of the Migration Act.
[87] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs).
[88] Australian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, December 2005) 544 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC102.pdf> citing J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].
[89] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs).
[90] Australian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, December 2005) 544 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC102.pdf> citing J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].

publication orders in respect of particular evidence. The Bill and its explanatory materials do not have full regard to the range of available mechanisms available to courts to protect information which poses a genuine risk if disclosed.

Existing frameworks for protecting information in non-judicial contexts

Disclosure to affected persons

94. The Protected Information Framework (currently and as proposed by the Bill) prevents the disclosure of information to a person affected by a character test decision if the information is provided by a gazetted agency on the condition that it be treated as confidential information.

95. However, under the Migration Act, if the information is 'non-disclosable information' it must already not be provided to a person affected by a decision under those Acts.

96. 'Non-disclosable information' is information or matter whose disclosure would, in the Minister's opinion:

- be contrary to the national interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of Cabinet deliberations or decisions;[91] or
- be contrary to the public interest for a reason which could form the basis of a claim by the Crown in judicial proceedings;[92] or
- found an action by a person for breach of confidence.[93]

Disclosure to tribunals

97. Similarly, the Protected Information Framework (currently and as proposed by the Bill) prevents the disclosure to the Tribunal on review of a character test decision if it is

[91] Subsection 5(1) of the Migration Act.
[92] By the Crown in the right of the Commonwealth: Ibid, s 5(1).
[93] By a person other than the Commonwealth: Ibid, s 5(1).

provided by a gazetted agency on the condition that it be treated as confidential information.

98. The Migration Act already operates to prevent the disclosure to the AAT and IAA, or to limit the use of by the AAT and IAA of certain information and documents.

99. The Secretary cannot disclose the material to the AAT or IAA if the Minister certifies disclosure would be contrary to the public interest because disclosure would:

- prejudice the security, defence or international relations of Australia; or
- involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet.[94]

100. In non-refugee matters only, material may be disclosed only to the Tribunal if the Minister certifies that further disclosure would be contrary to the public interest for a stated reason.[95]

101. In all matters, if either:

- the Minister certifies that disclosure of material would be contrary to the public interest for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed (a basis for limit disclosure with advice on use); or
- the material was given in confidence,

the Tribunal may, if it thinks it appropriate to do so having regard to any advice given by the Secretary disclose the material to a party to the review.[96]

102. The *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) itself provides a scheme for protecting the disclosure of sensitive information.

103. It effectively replicates the scheme described in paragraphs 67-69 above, albeit based on certification by the Attorney-General. [97]

104. In considering whether to disclose information, while the AAT must pay due regard to the reason raised, the tribunal:

> *… shall take as the basis of its consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters.*[98]

105. To protect sensitive information generally, the tribunal is given certain powers under section 35 of the AAT Act. While subsection 35(1) reflects the general principle that the hearing of a proceeding before the tribunal should be public, subsections 35(2)-(5) allow the tribunal to: order that a hearing or part of a hearing is to take place in private; give directions in relation to the persons who may be present; and prohibit or

[94] Sections 375, 437 and 473GA of the Migration Act.
[95] Ibid, section 375A.
[96] Ibid, sections 376, 438 and 473GB.
[97] See subsections 36(1) and 36(3) of the AAT Act.
[98] Ibid, subsection 36(4).

restrict the publication or disclosure of information. Under subsection 35(4), this includes prohibiting or restricting disclosure of information to some or all of the parties.

106. In considering whether to give such a direction, the tribunal must have regard to the balancing test under subsection 35(5), requiring it to weigh principles favouring transparency against any reasons in favour of giving such a direction, such as the confidential nature of the information.

107. The AAT also has a Security Division which has special powers and proceedings to deal with security classified information.

Secrecy provisions

108. Finally, the Protected Information Framework as proposed by the Bill would make it an offence for a person to disclose information to any person, tribunal or court, other than to another officer or Minister for the purposes of a character test decision and certain citizenship decisions, or pursuant to a Ministerial declaration or court order.

109. However, the proposed offences appear to duplicate the secrecy offences in section 122.4 of the *Criminal Code Act 1995* (Cth) (**the *Criminal Code***), raising questions about their necessity. Under this general offence, which applies to current and former Commonwealth officers, a person commits an offence if they communicate information which they are under a duty not to disclose, and the duty arises under a law of the Commonwealth. A penalty of up to two years imprisonment applies.

110. There is also an aggravated offence in section 122.4A for the disclosure of security classified information (eg secret or top secret) or otherwise the disclosure has a harmful outcome with respect to the security or defence of Australia. Other forms of harm such as to criminal investigations and enforcement actions, and harm to health or safety of the Australian public, also apply. This has a maximum penalty of five years imprisonment.

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

112. Notably, the offences in the Bill also do not contain the extensive exceptions in section 122.5, which provide defences for disclosures to certain oversight bodies, such as the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, and the Law Enforcement Integrity Commissioner, as well as for disclosures in accordance with the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) and the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Such defences are important to ensure some balance between the need for secrecy within the public service, and transparency and accountability of public administration.

Recommended course of action

113. The Law Council does not consider the Migration Act should contain a Protected Information Framework either in its present form or as proposed by the Bill.

114. Following the decision in *Graham*, the present scheme is invalid to the extent it operates to prevent 'confidential information' provided by gazetted agencies to Commonwealth officials for the purposes of a character test decision, from being disclosed in judicial proceedings arising from a judicial review of that decision.

115. This would appear to leave the consideration of whether such information can be adduced in hearings to the NSI Act (to the extent it is 'national security information'), the Evidence Act (to the extent it is a 'matter of state' for the purposes of section 130) or common law public interest.

116. It is contrary to the rule of law principle that the law be readily known and available and certain and clear,[99] to retain legislation which is partially invalid. In any event, the Law Council is proceeding on the basis that the Australian Government recognises that some amendment is required following the *Graham* decision.

117. The Bill responds to that decision by providing a significantly compromised disclosure order power to the courts which, as discussed further below, the Law Council does not support.

118. The Law Council considers the appropriate approach would be the repeal of the Protected Information Framework from the Migration Act altogether. As a starting point, it is preferable to instead rely on the other frameworks which generally apply to review and determine the non-disclosure of sensitive information, which Australian and foreign law enforcement and national security agencies may provide to Commonwealth officials on the condition that it be treated as confidential, and which may otherwise be relevant to administrative decision-making and court proceedings.

119. The Law Council considers that successive governments have not properly addressed the interactions between these mechanisms, the Migration Act's current provisions and now the Bill. There is a consequential, cumulative lack of clarity across the broader landscape of protections for confidential information. As a result, individuals are likely to experience high levels of confusion in attempting to navigate between these systems, and may need to call upon significant legal expertise.

120. The Law Council acknowledges that some further amendment to the Migration Act may be required to ensure that these schemes are countenanced and, to the extent required, clearly connected to other federal legislation. It may be that further adjustment is made to certain aspects.

121. Drawing these schemes together to ensure they operate coherently and consistently is a significant task, which requires a whole-of-government approach and extensive public consultation. The Law Council suggests that the Department of Home Affairs and the Attorney-General's Department lead a joint review of the existing framework in the Migration Act and the other mechanisms referred to above, which assesses the necessity, proportionality and reasonableness of the scheme.

122. The terms of reference which apply to such a review could be loosely drawn from the Independent National Security Legislation Monitor's functions under the INSLM Act. This is, they would require consideration of whether any scheme:

- contains appropriate safeguards for protecting the rights of individuals and the administration of justice;
- is proportionate to any threat of terrorism or threat to national security (including law enforcement and criminal intelligence objectives);

[99] Law Council of Australia, *Policy Statement – Rule of Law Principles*, March 2011, Principle 1, https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf.

- is necessary, reasonable and proportionate, including in light of alternative legislative mechanisms to protect the information; and
- provides for a clear, consistent approach to protecting such information across federal law.

123. Such a review should include a public consultation process.

Recommendations

The Law Council recommends that:

- **The Bill not be passed.**
- **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.**
- **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.**
- **The Terms of Reference proposed in this submission should be adopted to guide this review.**

Recommended amendments to the scheme

124. If the Law Council's preferred position is not adopted, the Law Council suggests a number of changes to provisions in the Bill.

Greater scrutiny of the protected information

Definition of 'gazetted agency'

125. Under both the present Migration Act and under the scheme to be inserted into the Migration Act and Citizenship Act by the Bill, the protection of information is enlivened by the decision of a 'gazetted agency' to communicate information on the condition it be treated as 'confidential information'.

126. The Law Council is concerned that the enlivening mechanism, based on the relevant definitions, is too broad. As noted, new offences apply if the non-disclosure requirements concerning this confidential information are breached.[100]

127. A 'gazetted agency' is defined as an Australian law enforcement or intelligence body, foreign law enforcement body, or war crimes tribunal, that is 'specified in a notice published by the Minister in the Gazette' (**gazettal power**). An 'Australian law enforcement or intelligence body' as a body 'that is responsible for, or deals with, law

[100] Eg, proposed new 503A(6) and 503B(7) of the Migration Act.

enforcement, criminal intelligence, criminal investigation, fraud or security intelligence'.

128. As noted, the original justification for the scheme was that it would apply to information provided by intelligence and law enforcement agencies. However, including the phrase 'deal with' in the definition of 'Australian law enforcement or intelligence body' permits the Minister to gazette agencies that do not have a law enforcement or intelligence function.

129. Specifically, numerous bodies may 'deal with' the fraud or security intelligence. Under the existing legislation, the Minister has specified 42 Australian law enforcement or intelligence bodies in the Gazette, many at the state and territory level, including, along with police forces and parole boards, several Departments of State – including the Department of Human Services and Department of Social Services – and several State and Territory agencies – including, for example, the Department of Family and Community Services New South Wales.[101]

130. The foreign countries specified in the Gazette relevant to paragraph (b) of the definition of 'gazetted agency' – 'foreign law enforcement body' – are also numerous, encompassing, for example, China, North Korea, Somalia and Iran.[102] This may be considered problematic in that the 'confidential information' which is to be protected from disclosure is provided by foreign law enforcement bodies from States with dubious human rights records, without safeguards enshrined in law.

131. The Law Council considers that gazettal power provides an overly broad discretion to the Executive to prescribe the entities which determine which information is to be protected and the scope of that information. This is exacerbated by the fact that gazette notices are not subject to parliamentary review, in the way that, for example, legislative instruments are through the disallowance provisions under the *Legislation Act 2003* (Cth).

132. There is also no requirement that a decision by a gazetted agency indicating that the information provided should be treated as confidential be taken by an officer at an appropriately senior level.

133. Section 110A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception and Access Act**) provides an apt comparison with respect to the kind of oversight which is required for a provision of this kind.

134. That provision provides for when a body is a criminal law-enforcement agency which can access metadata under the mandatory data retention regime imposed by that Act. The Interception and Access Act specifically prescribes in the primary legislation a number of bodies which are a criminal law-enforcement agency and includes a power which enables the Minister to declare further agencies.

135. In contrast to the gazettal power, a declaration made section 110A of the Interception and Access Act:

- is a legislative instrument;

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

- imposes mandatory considerations relevant to the exercise of the power, including in relation to the:
    - functions of the agency – for example, the Minister must not make the declaration unless the Minister is satisfied on reasonable grounds that the functions of the authority or body include investigating serious contraventions;
    - public interest;
    - consequence of the information to the agency's investigatory functions; and
    - agency's proposed processes and practices to ensure compliance with obligations which would be imposed by that Act.

136. These are kind of features the Law Council would expect to form part of the gazettal power.

Meaning of 'confidential information'

137. There is no definition of 'confidential information', or limitations on the types of information that a gazetted agency might subject to the condition that it be treated as confidential information.

138. In fact, there is no requirement that the relevant information itself have any particular nature which warrants it being treated with such secrecy, eg, reasonably likely to prejudice national security, or critical law enforcement or national security intelligence processes. Nor is there any threshold requirement or criteria regarding the relative seriousness of the information to be protected. The threshold appears to be left to each gazetted agency to determine (or contend), and the Bill includes no independent safeguard to achieve appropriate levels of consistency and no avenue for review.

Discussion

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

140. With respect to gazetted agencies which are foreign law enforcement bodies, the relevant information which is passed on the condition that it be treated as 'confidential' may concern activities that are considered crimes in other countries but not in Australia, or be obtained in circumstances in which fair trial and human rights guarantees are lacking (eg, regarding charges arising from corrupt systems or evidence which was obtained under torture).

141. 'Confidential information' may further include information which is ultimately erroneous, ranging from gazetted agency records regarding a person's unpaid debt under the Centrelink online compliance scheme ('Robodebt') which is later disproved, to an Interpol red notice issued which relates to a wrongful conviction which was made

in absentia.[103] The Law Council is unaware of what kind of guidance is given to gazetted agencies to determine what should be considered 'confidential information'. However, it considers that guidance should not be considered a substitute for appropriately tight legislative definitions.

142. As noted, proposed new sections 503A(5) and 52(5) provide that a certificate, signed by an authorised Commonwealth officer, that states information was communicated to that officer by a 'gazetted agency' is prima facie evidence of the matters stated in the certificate (that is confirming that a 'gazetted agency' communicated confidential information). The information does not need to be described in the certificate, and the agency does not need to be named (in fact the name of the agency is protected in the same way as the information itself).[104] This use of a conclusive certificate prevents in practice a person's ability to challenge whether information influential to a decision in their case was actually communicated from a gazetted agency, was communicated as confidential or should be considered confidential.

143. The Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**) expressed concerns which are consistent with the comments above.

144. Noting that the 'bill does not appear to limit the range of information that the gazetted agencies may determine should be confidential',[105] the Scrutiny of Bills Committee stated that it retained 'serious scrutiny concerns regarding the absence of parliamentary oversight' in the gazettal process,[106] which it stated 'enabled the executive to set a very broad and default rule by which investigative bodies will be presumptively included'.[107]

145. The Scrutiny of Bills Committee stated that it considered that determination of gazetted agencies 'should be a matter for parliamentary debate and decision',[108] and that 'the specification by non-disallowable gazette notice of the exceptionally broad list of bodies who may provide confidential information for the purposes of the bill is an inappropriate delegation of the Parliament's legislative power'.[109]

146. The Law Council agrees with those comments and considers that they describe a scheme which is inconsistent with rule of law principles. It is the Law Council's policy that 'Executive powers should be carefully defined by law' and that '[w]here legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision'.[110]

147. The summary effect of the above is that a wide range of agencies are able to protect any information given to Commonwealth officials for the purpose of a possible adverse decisions about a person, simply by requiring Commonwealth officials to protect it, with no meaningful means to ensure that the power is used judiciously and no guarantee that the information is accurate and provided in good faith.

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[103] Eg, as occurred with respect to refugee Hakeem al-Araibi: Quentin McDermott and Susan Chenery, 'How #SaveHakeem people power freed refugee footballer Hakeem al-Araibi', ABC online, 28 October 2019.
[104] Proposed section 503D of the Migration Act.
[105] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021* (Commonwealth of Australia, 17 March 2021) [2.75].
[106] Ibid, [2.76].
[107] Ibid, [2.77].
[108] Ibid, [2.77].
[109] Ibid, [2.78].
[110] Law Council of Australia, *Policy Statement – Rule of Law Principles*, March 2011, Principle 6(a), https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf.

148. Should, contrary to the Law Council's primary recommendation above, the Bill progress, the Law Council recommends the following amendments to the Bill to ameliorate its impacts (along with other recommendations set out below).

Recommendations

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 minimum level of approval of officers who can communicate the information in confidence, with limits on powers of delegation or authorisation;**
- **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;**
- **require that 'gazetted agencies' be determined in a disallowable legislative instrument;**
- **provide for mandatory reporting documenting the exercise of these powers to an appropriate independent body;**
- **provide for independent review of the exercise of these powers to ensure they have been exercised proportionally.**

Strengthen the right to fair hearing and procedural fairness, and the capacity for judicial review

149. The amendments proposed by the Bill to address the *Graham* decision would entitle the Court to require the information be produced to it and to give that information such weight as it considers appropriate.[111] However, the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights (**PJCHR**) have nevertheless expressed concerns about the Bill.[112] The Law Council also raises a number of significant issues, as discussed below.

Disclosure order process

Rights given to a person to answer the case against them

150. Under the Bill, the only means by which a person affected by a decision made using confidential information provided by a gazetted agency is able to review the information is by obtaining a court order. The Minister's discretionary power to make

[111] Proposed subsections 503C(1) and 503C(7) of the Migration Act, and proposed subsections 52C(1) and (7) of the Citizenship Act.
[112] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021), 15-23; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 7-19.

a declaration[113] only enables disclosure to a specified Minister, Commonwealth officer, court or tribunal, and not to another person.[114]

151. The Law Council does not consider the Bill provides a practical avenue through which such a person may obtain the information.

152. Proposed sections 503C of the Migration Act and 52C of the Citizenship Act would allow the High Court, Federal Court or Federal Circuit Court to order that confidential information be produced to the Court for the purpose of substantive proceedings relating to the exercise of a specified power.

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

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

155. It is not apparent how the applicant or their legal representative will become either aware of the relevant information, or how they can lawfully acquire it.

156. Therefore, it appears that in practice, the applicant and their legal representative will be unable to make submissions regarding the use that the Court should make of the information and the weight to be given to it, without knowing what it is.

157. Further, new subsections 503C(4) and 52C(4) provide that the applicant and their legal representative must be excluded from the hearing under the preceding subsections if they are not capable of making submissions about a possible disclosure order. The practical effect would appear to be that a party whose rights are seriously affected by a decision on information they are denied access to would have little real chance of contesting it.

The role of the Court

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

159. These are: the fact that the information was communicated on a confidential basis; the risk of disclosure discouraging gazetted agencies from giving information in the future; Australia's relations with other countries; the need to avoid disruption to law enforcement, criminal intelligence, criminal investigation and security intelligence efforts; the protection and safety of informants; the protection of criminal intelligence or security intelligence technologies and methods; Australia's national security, and such other matters specified in the regulations.[115]

160. However, the Court may *not* have regard to broader factors in determining the public interest, including the interests of the administration of justice (in contrast to existing

[113] Eg, under proposed subsection 503B(1).
[114] Ibid.
[115] Eg, new subsection 503C.

subsection 503B(5)), or the potential ramifications of the information and proceedings for the applicant or their family.

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

Right to a fair hearing

International law obligations relevant to the right

162. Article 14(1) of the ICCPR requires that 'all persons shall be equal before the courts and tribunals' and 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[116] This provision reflects the fundamental principles of the due administration of justice that have been developed in common law traditions over the centuries and which underpin Australia's legal system.

163. As is recognised at the outset in the United Nations (**UN**) Human Rights Committee's General Comment No 32, this right to a fair hearing 'serves as a procedural means to safeguard the rule of law',[117] which is the Law Council's core function.

164. While fairness is relative and interpreted and applied to suit domestic legal frameworks, the right to a fair hearing has been imbued under international law with certain minimum requirements, including the requirement of 'equality of arms', whereby both sides to proceedings must be placed on a similar procedural footing before a court or tribunal:[118]

> *The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant*.[119]

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

> *In any event, the procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings*.[120]

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[116] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976).
[117] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 1.
[118] Ibid, 1-4.
[119] Ibid, 3.
[120] Australian Government, Attorney-General's Department, 'Fair Trial and Fair Hearing Rights: Public Sector Guidance Sheet' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights>. See also Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10.

166. In civil proceedings, this 'demands', according to the UN Human Rights Committee, 'that each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[121]

167. The European Court of Human Rights considered the impact of non-disclosure of confidential information on the right to a fair hearing in *A v United Kingdom*.[122] It noted that in certain circumstances – eg, those engaging national security – full disclosure of the arguments and evidence against an applicant may not be possible, but that 'as much information … as was possible without comprising national security' should be disclosed. 'Where full disclosure [is] not possible,' the Court held, it must be 'counterbalanced in such a way that each applicant still [has] the possibility effectively to challenge the allegations against him'.

168. This decision of the European Court of Human Rights was applied in the United Kingdom in *Secretary of State for the Home Department v AF*.[123] The House of Lords stated that 'non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him'. It held that 'the essence of the case' does not necessarily include 'the detail or the sources of the evidence forming the basis of the allegations', but must include 'sufficient information' to 'enable [a person] to give effective instructions in relation to those allegations'.

Discussion

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

> *The measure appears to have the effect of withholding sufficient information from the person to the extent that they are unable to effectively provide instructions in relation to, and challenge, the information, including possible criminal allegations against them.*[124]

170. Under international law, the right to a fair hearing can be limited.[125] However, limitations must be in pursuit of a legitimate objective; rationally connected to this objective; and proportionate to achieving this objective – often summarised as 'necessary, reasonable and proportionate'.[126]

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[121] Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 4. See also Communication No 779/1997, *Aarela and Nakkalajarvi v Finland*, para [7.4]. See also *De Haes and Gijsels v Belgium* [1997] I Eur Court HR [53]. Similarly, the Supreme Court of Canada has held that 'a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case': Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 414 citing *Charkaoui v Canada* [2007] 1 SCR 350, [52].

[122] *A v United Kingdom* (2009) 49 EHRR 29. See also Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 412-413; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10-11.

[123] *Secretary of State for the Home Department v AF* [2009] UKHL 28. See also Luke Beck, 'Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004' (2011) 16:2 *Deakin Law Review* 405, 413-414; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 10-11.

[124] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 1 of 2021* (Commonwealth of Australia, 3 February 2021) 11.

[125] See ICCPR art 4-5. See also Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007).

[126] Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

171. The Minister states that 'the Bill is for the legitimate purpose of protecting and upholding the good order of the Australian community'[127] and 'the legitimate aim of protecting the public interest',[128] including 'the protection of the Australian community from non-citizens of serious character concern'.[129] The Minister states that the Bill is necessary to uphold the capabilities of law enforcement, by providing assurance of the protection of confidential information and the methodologies, priorities, sources, capabilities, and ongoing activities of law enforcement agencies.[130]

172. It is explicitly recognised in the Statement of Compatibility that the Bill requires the Courts 'to consider the potential damage to the wider concept of public interest, not only national security, in determining whether to order onward-disclosure'.[131] The Law Council queries whether this public interest threshold is proportionate to the stated legislative purpose of protecting the Australian community and upholding the capabilities of law enforcement.

173. The Bill purports to be justified on the basis that 'it strikes a balance' between preserving the right to a fair hearing and protecting the public interest.[132] However, this conclusion is based on the fact that the Bill allows the Court to order the Minister to disclose information to it.[133] It overlooks the Bill's exclusion of the applicant and their legal representative from any knowledge of the essence of the case against them, and the consequential impact on the right to a fair hearing.

174. The Scrutiny of Bills Committee sought advice from the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**the Minister**) on whether the Bill 'can be amended to allow the court to disclose part of the secret information in circumstances where partial disclosure could be achieved without creating a real risk of damage to the public interest'.[134]

175. In response, the Minister stated, in part:[135]

> *Given the highly sensitive nature of confidential information and the identities of the gazetted agencies, partial disclosure of the information or giving the gist of the information to the applicant or their legal representative could damage the public interest.*

176. Regarding this advice, the Scrutiny of Bills Committee considered that 'it is illogical to suggest that the consideration of partial disclosure will in every case involve the same risks of damage to the public interest as that of full disclosure', noting that 'a core purpose of the bill is to recognise the ability of Courts to determine that even full disclosure of adverse information to an applicant will not in every case cause damage the public interest'.[136]

177. Further, as discussed, the Bill and its supporting materials do not enable the Court, in considering whether to make an order permitting disclosure, to give weight to the right

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[127] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 49 ('Attachment A – Statement of Compatibility with Human Rights').
[128] Ibid, 47-48.
[129] Ibid 48.
[130] Ibid 47-48.
[131] Ibid 48.
[132] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 48 ('Attachment A – Statement of Compatibility with Human Rights').
[133] Ibid.
[134] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021), [1.54].
[135] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021* (Commonwealth of Australia, 17 March 2021), [2.68].
[136] Ibid, [2.72].

to a fair hearing, or the interests of the administration of justice. Rather, the exhaustive matters which the Court may consider in applying the 'public interest' test is heavily skewed to matters of criminal intelligence and security intelligence.[137]

178. At best, the Law Council considers that the Bill is imbalanced in its representation of the 'public interest'.

179. The Scrutiny of Bills Committee also sought advice from the Minister on whether the Bill 'can be amended to provide that the list of matters relevant to assessing the risk to the public interest is non-exhaustive'.[138]

180. In response, the Minister stated, in part:[139]

> *The Bill provides that the Courts may give such weight in the substantive proceedings to the information as the Court considers appropriate in the circumstances. Such circumstances may involve a situation where the Court has determined not to disclose the protected information. This allows the Courts to weigh up a number of factors, including unfair prejudice to an applicant by not having access to the confidential information and 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.*

181. Regarding this advice, the Scrutiny of Bills Committee indicated that it 'remains concerned that the proposed exhaustive list does not allow fairness to individuals to be considered in determining whether disclosing the information would create a real risk of damage to the public interest.'[140]

182. The Minister's response addresses proposed subsection 503C(7) of the Migration Act and 52C(7) of the Citizenship Act, which enable the Court to give 'such weight in the substantive proceedings to the information as the Court considers appropriate in the circumstances'. However, the capacity of a person to give evidence about that weight may be diminished to effectively zero if the information has not been disclosed to that person to begin with.

183. Further, this response was provided to a question raised by the Committee in relation to the exhaustive list of factors which the Court may consider in deciding whether to make a disclosure order, which themselves do not permit it to consider any 'unfair prejudice to an applicant by not having access to the confidential information' or to have regard to the broader interests of justice.

184. The power given to the Governor-General to specify in the regulations other matters the Court may consider in making such an order potentially exacerbates this imbalance.[141] Permitting matters to be added in delegated legislation is in itself a risk, as there is the potential for the test to be further skewed. More to the point, the Law Council does not agree that the Executive should mandate to the Court matters which should be taken into account in assessing the public interest in the administration of justice. This seems fundamentally at odds with the constitutional role and duty of courts. Rather, it is the function of the Court to be able to exercise its judicial power

[137] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ss 503C(5)(f) and 52C(5)(f).
[138] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021), [1.54].
[139] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021* (Commonwealth of Australia, 17 March 2021), [2.68].
[140] Ibid, [2.81].
[141] Ibid, ss 503C(5)(h) and 52C(5)(h).

appropriately, which it cannot do properly if the matters it might consider are circumscribed in the manner anticipated by the Bill.

Procedural fairness

185. A guiding principle which is a fundamental part of the right to a fair hearing, is that the Australian common law further recognises a general duty to accord a person procedural fairness when their rights or interests are affected under law.[142] This is derived from natural law and principles of natural justice.[143] The High Court has held that the duty may be excluded only by 'plain words of necessary intendment'.[144]

186. While there is no fixed content to the duty, and the procedure depends on the matters in issue, 'the expression 'procedural fairness' … conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[145]

187. In particular, the 'hearing rule' requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.[146] Generally, a fair hearing will require disclosure of the critical issues to be addressed, and of information that is credible, relevant and significant to the issues.[147]

188. The concerns identified above regarding the right to a fair hearing would also appear to be highly relevant to the Bill's likely impact on procedural fairness. In particular, it is clear that the Bill envisages that there may be no possibility of the applicant or their legal representative knowing 'confidential information' which is significant to the case against them, or having the opportunity to be heard with respect to that information. The Law Council queries whether Parliament wishes to abrogate core common law principles in such a blanket manner and considers that it should not do so.

Effect on administration of justice in the courts

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

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

191. It is possible that there are broader mechanisms available to the relevant courts to compel the relevant information. For example, the prohibitions in subsections 52A(3) of the Citizenship Act and 503A(3) of the Migration Act and the general disclosure

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[142] *Kioa v West* (1985) 159 CLR 550.
[143] Australian Law Reform Commission, 'Chapter 15: Procedural Fairness' in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2 March 2016) 412, 415.
[144] *Annetts v McCann* (1990) 170 CLR 596; *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, [74].
[145] *Kioa v West* (1985) 159 CLR 550, 585.
[146] Ibid.
[147] Australian Law Reform Commission, 'Chapter 15: Procedural Fairness' in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2 March 2016) 396 citing *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).

offence only apply to the authorised Commonwealth officer who received the information (or an officer to whom it was subsequently lawfully disclosed). A court hearing a separate matter could still order discovery against the Commonwealth in those proceedings, and it is only the authorised Commonwealth officer or subsequent recipient who is prevented from disclosure. The information could also be compellable directly from the gazetted agency, subject to the application of any laws that govern? that agency.

192. Nevertheless, the Bill's provisions place a significant dampening effect on the proper administration of justice, in that authorised Commonwealth officers who are subject to the above provisions will be unable to comply with state and territory court orders. It will also complicate its administration as parties and courts must seek alternative means to compel information.

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

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

Curtailment of effective judicial review

195. Regarding the Court's judicial review jurisdiction under section 75(v) of the Constitution, the decision in *Graham* was limited to the effect of paragraph 503A(2)(c), which operated to wholly prevent the Minister from being required to divulge or communicate confidential information to the Court. That is, it denied the Court 'the ability to see the relevant information for the purpose of reviewing a purported exercise of power by the Minister'.[148] To this extent, it was invalid.[149]

196. In allowing the Court (that is, the High Court, Federal Court and Federal Circuit Court) to order the production of confidential information to it under new subsection 503C(1), the current Bill purports to respond to this discrete issue.[150] The Court would now be able to 'see' the information.[151]

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

197. The Court in *Graham* noted, referring to the judgment of Brennan CJ in *Nicholas v The Queen* [1998] HCA 9, that the 'Commonwealth Parliament can regulate aspects of judicial fact-finding', including through laws which 'modify, or abrogate, common law principles such as those governing the discretionary exclusion of evidence'.

198. However, in *Graham*, the High Court left open the possibility that a different 'curtailment of the capacity of a court exercising jurisdiction under or derived from subsection 75(v) of the Constitution'[152] might similarly lead to invalidity:

> *It is not necessary in this case to further analyse matters of substance and degree which may or may not result in the invalidity of a statutory provision affecting the exercise of a court's jurisdiction under s 75(v). It may be necessary to do so in the future.*[153]

199. Whether the Bill would still infringe subsection 75(v) of the Constitution can only be definitively decided by the High Court, should it pass into law. There are passages in *Graham* that might be relied upon in asserting the argument that it would. For example, the High Court explained the issue in *Graham* at a higher level of generality as whether or not a law denies the Court 'the ability to enforce the legislated limits of an officer's power'.[154] It went on to find that 'the practical effect of subsection 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister'.

200. The High Court has previously held that there is a limit to which such laws may limit the function of the Court. Gaudron J held in *Nicholas v The Queen* [1998] HCA 9:[155]

> *In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.*

201. The Law Council considers that there is some risk that such a situation may arise under the proposed legislative scheme, in circumstances where:

    - a person seeking the court to order disclosure of a matter or information material to an adverse decision made in relation is effectively unable to make submissions to the court about why the public interest weighs in favour of disclosure: only the party which holds the information and resists disclosure is in a position to make submissions to the court in relation to the matter;[156]

[152] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [64].
[153] Ibid, [65].
[154] Ibid, [48].
[155] *Nicholas v The Queen* [1998] HCA 9, [74] (Gaudron J).
[156] See proposed subsections 503C(2)-(4) of the Migration Act.

- the court, in deciding whether to make such an order, is explicitly unable to consider the interests of the administration of justice in deciding whether to make the order.[157]

202. By effectively preventing an applicant or their lawyer from knowing *any* of the essence of the case against them or making *any* informed submissions, the Bill potentially restricts the Court's ability to enforce the limits of an officer's power and draw inferences adverse to the Minister to the degree required for a consideration of invalidity. The problem of blanket prohibitions was also discussed in *Graham* through the High Court's reference to *Bodruzza v Minister for Immigration and Multicultural Affairs*.[158] In this case, the provision held to be invalid 'imposed a blanket and inflexible time limit for making an application for relief under subsection 75(v)',[159] and the High Court analogised that:

> *Section 503A(2)(c) of the Act imposes a similarly blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether or not legislatively imposed conditions of and constraints on the lawful exercise of powers conferred by the Act on the Minister have been observed.*[160]

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

> *The court has no flexibility to seek any feedback from the applicant to assist in performing its judicial review task. The exhaustive list of matters which are relevant to a judicial determination of whether or not there is a real risk to the public interest do not allow the court to balance that risk against the possibility that the applicant may be able to assist the court in the proper exercise of its judicial review function by responding to the secret information or aspects of that information. Nor does it appear that the court is able to disclose part of the secret information (such as the gist of the information or a discrete element of the information) even in circumstances where a partial disclosure could assist the court without creating a real risk of damage to the public interest. The committee is concerned that the provisions in the bill may continue to operate to undermine the practical efficacy of judicial review in many cases.*[161]

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

Recommendations

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**

[157] The 'administration of justice' is not included in the exhaustive list of factors which the Court may consider in proposed subsection 503C(5) of the Migration Act.
[158] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [49], referencing *Bodruzza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 671-672.
[159] Ibid.
[160] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [50].
[161] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 17.

fairness and any other matter that it considers relevant to the proper administration of justice;

- **remove the Minister's ability to add additional factors to the public interest test through delegated legislation;**
- **enable the High Court, the Federal Court and the Federal Circuit Court the flexibility to permit partial disclosure of confidential information to the applicant and/or their lawyer, sufficient to ensure that they understand, and can respond to, the gist of the information and the allegations made;**
- **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;**
- **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.**

Impeding the merits review function of the AAT and IAA

205. The Law Council considers that the Protected Information Framework in the Migration Act and as proposed by the Bill have the practical effect of denying the merits review function of the AAT.

206. The High Court has consistently maintained that the role of the AAT is to make the 'correct or preferable' decision,[162] and would look carefully at any restriction of that function unless proportionate to the security and other concerns underpinning the Bill.

207. In order for the AAT to appropriately exercise its merits review function, it has been granted powers to enable relevant information to be provided to it, consistent with foundational principles of administrative law that decision-making should be transparent and that making the 'correct and preferable' decision depends upon hearing both sides. It is the Law Council's opinion that these powers and principles indicate appropriate alternative approaches that can fulfil the objectives of the Bill without removing the tribunal's merits review function.

208. The Law Council considers that the Bill has been developed without clear regard to the existing AAT powers, including the ability of the AAT under the AAT Act to deal with confidential information under section 35 through eg, private hearings, non-publication and non-disclosure. This includes directing non-disclosure to a party of certain information; or where information poses a genuine risk to security (including law enforcement), the potential for the Security Division to handle such information.

209. Should the Bill be pursued, the Law Council also suggests improvements to help alleviate merits review issues.

[162] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; *Frugtniet v Australian Securities and Investment Commission* (2019) 266 CLR 250.

210. In particular, the Law Council considers that 'confidential information' would be provided to the AAT for consideration, if necessary, by its Security Division, rather than not being provided to the tribunal at all.

211. The Bill could include amendments which set out a procedure by which the Security Division should handle this information. This should include permitting 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. As recommended with respect to the courts[163], the Division should be permitted to disclose the 'gist' of the information to the applicant, sufficient for them to respond to the allegations made against them.

212. As a fallback, the Law Council also supports the Scrutiny of Bills Committee's suggestion that an amendment provide that the Minister has an obligation to consider the exercise of the power to allow disclosure of information supplied by law enforcement or intelligence agencies, including to specified tribunals undertaking merits review of relevant decisions.[164]

213. The Scrutiny of Bills Committee also sought advice from the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs on whether the Bill can be amended to permit disclosure to tribunals.[165]

214. In response, the Minister stated that such a measure was 'not appropriate' given that the information which falls within the protection of the Bill's framework is, by its nature, highly sensitive' and that judicial review of a tribunal decision 'is always available'.[166]

215. However, the Scrutiny of Bills Committee is response indicated that it:[167]

> *… remains concerned about the limitations to judicial review proposed by the bill, and therefore does not consider that the availability of judicial review in this context is effective to overcome the concerns arising from reliance on secret evidence in decision-making at the merits review stage.*

216. The Law Council agrees with this assessment.

Recommendations

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;**
- **set out a procedure by which the Security Division should handle this information, which includes permitting:**

[163] Law Council of Australia, *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020*, 19 February 2021.
[164] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 29 January 2021) 17. It recommends that these amendments be made to proposed s 52B(8) of the Citizenship Act and proposed s 503B(8) of the Migration Act.
[165] Ibid, [1.54].
[166] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021* (Commonwealth of Australia, 17 March 2021) [2.68].
[167] Ibid, [2.83].

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

- **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.**

Effect on parliamentary scrutiny and independent oversight

Parliamentary Scrutiny

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

> *… it is inappropriate to prescribe a blanket prohibition on the disclosure of confidential gazetted agency information to a parliament or parliamentary committee, with such issues more appropriately being determined on a case-by-case basis by the Parliament or a parliamentary committee under the well-established processes for making claims of public interest immunity.*[168]

Independent oversight

218. As noted, there is no exception to the offences outlined above for disclosure to oversight and integrity agencies, or in relation to disclosures made in accordance with the PID Act and the FOI Act. While the individual legislation governing many integrity agencies, such as the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity (**ACLEI**), Information Commissioner and Inspector-General of Intelligence and Security (**IGIS**) and the PID Act includes immunities for individuals who make good faith disclosures of information, proposed subsections 52A(7) and 503A(7) provide that sections 52A and 503A override any other law of the Commonwealth.[169]

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

[168] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021* (Commonwealth of Australia, 17 March 2021) [2.92].
[169] As well as any other provision of the Act or the regulations, and any law (whether written or unwritten) of a State or a Territory.

Recommendations

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;**
- **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**

Prohibitions on disclosure – offences

220. The Bill provides that an authorised Commonwealth officer to whom confidential information communicated by a gazetted agency, which is relevant to the exercise of a listed citizenship power or character test decision power, under subsections 52A(1) or 503A(1)(a), or disclosed under subsections 52A(2) or 503A(2) must not generally disclose the information to another person.[170]

221. An authorised Commonwealth officer commits an offence, punishable by up to two years, if they disclose the information to another person (**the disclosure offence**).[171] The only exceptions relate to:

- disclosure to the Minister/an authorised Commonwealth officer for the purposes of exercising a character test decision power or a listed citizenship power;[172]
- where disclosure was in accordance with a Ministerial declaration permitting disclosure;[173] or
- the High Court, Federal Court or Federal Circuit Court has ordered its disclosure for the purposes relating to the exercise of either a character test decision power or a listed citizenship power.[174]

222. Further, where the Minister declares that specified information may be disclosed in specified circumstances,[175] an authorised Commonwealth officer commits an offence, also punishable by two years' imprisonment, if:

- information is disclosed to the officer in accordance with such a declaration;
- the declaration specifies one or more conditions;
- the officer engages in conduct, or omits to engage in conduct; and

[170] Subject to certain exceptions including where: the person is the Minister or an authorised Commonwealth officer, and the information is disclosed for the purposes of the exercise of either a listed citizenship power, or a section 501 character test regime power (subsections 52A(2) and subsection 503A(2)); the information is subject to a Ministerial declaration (under subsections 52B(1) or 503B(2)); or the information is subject to a court disclosure order by the High Court, the Federal Court of Australia or the Federal Circuit Court (subsections 52C(1) or 503C(1)): the Bill, subsections 52A(2) and 503A(2)).
[171] Proposed subsections 52A(6) of the Citizenship Act and 503A(6) of the Migration Act.
[172] In accordance with proposed subsections 52A(2) of the Citizenship Act or 503A(2); proposed subsections 52A(6) of the Citizenship Act and 503A(6).
[173] In accordance with proposed subsections 52B(1) of the Citizenship Act or 503B(1) of the Migration Act; subsections 52A(6) of the Citizenship Act and 503A(6).
[174] Under proposed subsections 52C(1) of the Citizenship Act or 503C(1) of the Migration Act.
[175] Under proposed subsections 52B(1) of the Citizenship Act and 503B(1) of the Migration Act.

- the officer's conduct contravenes the condition or conditions (**the declaration offence**).[176]

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

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

225. Further, it is not clear that they are required, given they appear to duplicate the existing secrecy offence provisions in section 122.4 of the *Criminal Code*.

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

Recommendations

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'.**

Non-disclosable information – 'contrary to national interest'

227. As noted above, the Bill expands the definition of 'non-disclosable' information under the Migration Act – that is, information which cannot be disclosed in the reasons required to be provided to visa applicants or holders under the Migration Act with respect to a range of adverse decisions (including eg, refusal of a visa application, broader cancellation powers, and with respect to AAT and IAA review).

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

- be contrary to the national interest because it would prejudice the security, defence or international relations of Australia, or involve the disclosure of Cabinet deliberations or decisions;[177] or
- be contrary to the public interest for a reason which could form the basis of a claim by the Crown in judicial proceedings;[178] or
- whose disclosure would found an action by a person for breach of confidence.[179]

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

[176] Proposed subsections 52B(7) of the Citizenship Act and 503B(7) of the Migration Act.
[177] Migration Act, s 5(1).
[178] By the Crown in the right of the Commonwealth: Ibid.
[179] By a person other than the Commonwealth: Ibid.

- it was disclosed by a gazetted agency and the information or matter is relevant to the exercise of a power under, or in relation to, the character test decision;[180] and

- the further disclosure of the information or matter would, in the Minister's opinion (after consulting the gazetted agency), be contrary to the national interest.[181]

230. This scheme would only have work to do in addition to the scheme in section 503A in two possible scenarios.

231. The first is if the gazetted agency provided information relevant to a section 501 cancellation decision which was not provided on the condition it be treated as confidential.

232. The second, possibly more remote scenario, is if:

- The Minister discloses the information to a Commonwealth officer under subsection 503B(1);

- the Minister does not impose a condition preventing the on-disclosure of the information to another person

- that Commonwealth officer considers the information to be relevant to a migration decision which is adverse to a person.

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

234. The Law Council notes in this context that where the Minister exercises the power in the 'national interest', the grounds on which judicial review can be sought are heavily truncated. As the Full Federal Court remarked in *Carrascalao v Minister for Immigration and Border Protection*:[182]

> *There can be no doubt that, in this particular statutory context, the expression 'national interest' is, like the expression 'public interest', one of considerable breadth and essentially involves a political question which was entrusted to the Minister.*[183]

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

Conclusion

[180] That is, ss 501, 501A, 501B, 501BA, 501C or 501CA.
[181] Sch 1, Item 6.
[182] (2017) 347 ALR 173.
[183] Ibid, 210-211, [156].

236. In view of the existing mechanisms for the protection of sensitive information, clarification is required to demonstrate the necessity, reasonableness and proportionality of the Bill. The Law Council recommends that the Parliament not pass the Bill. If it should choose to do so, it should not do so unless and until these threshold questions are addressed.

237. This can be best achieved by conducting a joint review into the ongoing necessity and proportionality of the existing Migration Act provisions protecting confidential information, in light of the broader mechanisms available to the Commonwealth, including significant measures which were passed after these provisions.[184] Careful consideration should also be given, as part of this review, to the need to strike a better balance between ensuring confidentiality, where it is genuinely required to guard against significant risks, and the proper administration of justice, natural justice and appropriate levels of oversight and transparency. This approach would be preferable to simply responding to *Graham*, reframing the Protected Information Framework regime to apply in such a blanket manner and with significant penalties for unauthorised disclosure, extending it to citizenship cases, and expanding the circumstances in which applicants under the Migration Act will be unable to know the reasons for adverse decisions.

[184] Eg, the NSI Act.