Australian Human Rights Commission

Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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1 Introduction

1. The Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth) (the Bill) introduced by the Australian Government.

2 Summary

2. The *Migration Act 1958* (Cth) (Migration Act) currently contains a regime for limiting or preventing the disclosure of certain material that the Minister or a delegate of the Minister relies upon when making a decision to refuse or cancel a visa on character grounds.[1] The regime applies to information communicated in confidence by a broad range of law enforcement and intelligence agencies. The regime limits disclosure of this information by the Administrative Appeals Tribunal (AAT) when it is conducting merits review of those decisions, and (prior to 2017) to a court when it is conducting judicial review of those decisions.

3. In 2017, part of that regime was held to be unconstitutional because it prevented the Federal Court and the High Court from exercising jurisdiction to ensure that the Minister and delegates were acting within the scope of the powers given to them under the Migration Act. If courts did not have access to the information relied upon to refuse or cancel a visa, they could not determine whether these powers were being properly exercised. Significantly, the provisions held to be invalid prohibited the provision of information to courts regardless of how important the information was to the review being conducted by the court and regardless of the importance of any interest sought to be protected by law enforcement or intelligence bodies.

4. Despite the High Court's decision in 2017, the Minister retained the power to protect national security information in court proceedings through the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act). More broadly, the Minister also retained the power to make applications for public interest immunity in relation to other confidential information. In the Commission's view, these powers are sufficient to protect significant operational information of law enforcement and intelligence agencies while ensuring that justice is able to be done when cases are before

the court. The amendments proposed in this Bill are therefore unnecessary.

5. The Bill seeks to make three broad sets of amendments:

   - it would replace the current non-disclosure regime in the Migration Act, which applies to information relevant to a decision to refuse or cancel a visa on character grounds, with a new regime dealing with the same subject matter
   - it would insert a non-disclosure regime in the *Australian Citizenship Act 2007* (Cth) (Citizenship Act) in substantially the same terms as the regime proposed for the Migration Act. The regime in the Citizenship Act would apply to information provided by law enforcement and intelligence agencies in relation to the making of a broad range of decisions under that Act
   - it would insert a new regime for non-disclosure certificates into the Citizenship Act.

6. Given the limited time available for making submissions in relation to this Bill, in this submission the Commission has focused on the first set of amendments. However, because the second set of amendments is in substantially the same form, the Commission's recommendations apply to both the first and second sets of amendments.

7. There are two key problems with the new non-disclosure regime.

8. First, while the new regime accepts (as it must) that a court may make an order requiring relevant material to be produced to it, the regime then seeks to fetter the court's ability to decide how that information is used. The court must hold a preliminary hearing at which only the Minister's representatives are present to decide how to deal with the material. In making the decision, the court is only permitted to take into account factors that weigh against disclosure of the information to the applicant and is not permitted to take into account factors that weigh in favour of disclosure.

9. Secondly, if the court decides, pursuant to this one-sided weighing exercise, that the information is not to be disclosed to the applicant, it is then to conduct the substantive hearing with the Minister able to rely on secret evidence adverse to the applicant. This has very serious implications, particularly in visa cancellation proceedings, which may result in the detention of the applicant for a number of years.

10. The Bill has substantial human rights implications. The most significant is the right to a fair and public hearing. A key aspect of a fair hearing is the principle of 'equality of arms'. This principle requires that each side be given the opportunity to contest all of the arguments and evidence adduced by the other party.

11. Further, the Bill runs counter to a strong tradition at both common law and in Commonwealth legislation, that the state should not be permitted to rely on secret evidence in cases where a person's liberty is at stake.

12. The Commission recommends that the Bill not be passed because it is not necessary having regard to the other protections available for confidential information under the NSI Act and pursuant to applications for public interest immunity.

13. If the Bill is passed, the following amendments to the regime are necessary to increase the fairness of the process.

    - The applicant's interests should be represented at the preliminary hearing to determine whether the information is disclosed to the applicant, and the weight to be given to it in the substantive hearing. This could be achieved by permitting the applicant's lawyer to be present (if necessary, a security cleared lawyer) or by permitting the applicant's interests to be represented by a special advocate (as can occur in control order proceedings).
    - The court should be permitted to consider not only factors that weigh against disclosure of the information but also factors that weigh in favour of disclosure.
    - If the court orders that some material not be disclosed to the applicant, it should also make orders requiring a summary of the information or a statement of relevant facts to be prepared to enable the applicant to make meaningful submissions in relation to the substance of the confidential information.

14. Before turning to the detail of the Commission's submissions, it is appropriate to make two more general comments.

15. First, the Commission is concerned about the limited time available for making submissions in relation to this Bill. The Bill responds to a High Court decision delivered almost three and a half years ago, and yet this Committee has been required to report within five weeks of referral to it, leaving only two weeks for the Australian public and members of civil

society to make submissions. More time ought to have been allocated for review of this significant Bill to permit sufficient time for adequate submissions to be made.

16. Secondly, this submission does not consider the use of secret evidence before the AAT. The use of secret evidence in that forum is a significant concern and was the subject of a detailed review by the Australian Law Reform Commission in 2004.[2] While the constitutional issues identified by the High Court that have prompted this Bill do not apply to merits review of decisions by the AAT, the same human rights issues about the importance of a fair and public hearing do. In some respects, it is more important that applicants for review are able to access sufficient information about the Minister's decision-making process in the AAT because that is generally the only opportunity they have for merits review of a decision that can result in their detention. The present Bill would not change the existing law in relation to the review by the AAT of decisions to refuse or cancel a visa on character grounds.[3] However, the new non-disclosure certificates under the Citizenship Act are likely to increase the level of secrecy in AAT proceedings reviewing decisions made under that Act. If there is to be law reform in this area, it should start with making AAT proceedings more transparent.

3 Recommendations

17. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill not be passed.

If Recommendation 1 is not accepted, the following amendments to the Bill should be made:

Recommendation 2

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

Recommendation 3

The Commission recommends that proposed s 52C(5) of the *Australian Citizenship Act 2007* (Cth) and s 503C(5) of the *Migration Act 1958* (Cth) be amended to:

(a) Delete the words '(and only those matters)'

(b) Include the following additional relevant factors to which the court must have regard:

(i) the seriousness of the issues in relation to which disclosure is sought

(ii) the likelihood that disclosure will affect the outcome of the case

(iii) the likelihood of injustice if the documents are not disclosed

(iv) whether the liberty of the applicant is at stake.

Recommendation 4

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

4 Background

18. The Bill responds to the decision of the High Court in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (*Graham*). That case involved a challenge to the constitutional validity of s 503A(2)(c) of the Migration Act. Relevantly, that section provided that the Minister or an authorised migration officer must not be required to divulge or communicate certain confidential information received from a 'gazetted agency' to a court, a tribunal, a parliament or parliamentary committee or any other body or person. Such information could be

used by the migration officer or the Minister in determining whether a visa holder or a visa applicant passed the 'character test' in s 501(6) of the Migration Act but otherwise was to be kept secret.

19. A 'gazetted agency' included an 'Australian law enforcement or intelligence body'. This in turn was defined broadly to include a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence.

20. The High Court held that the secrecy provision in s 503A(2)(c) was so broad that it substantially curtailed the capacity of a court to discern and declare whether the Minister had acted within his statutory power. To that extent, this provision was found to be unconstitutional. The focus of the Court's concern was the ability to keep information secret from a court that was reviewing a decision by the Minister or a delegate of the Minister to refuse or cancel a visa on character grounds.

21. The Constitution provides the High Court with the jurisdiction to determine whether an officer of the Commonwealth has acted in accordance with the powers given to that officer by legislation.[4] The same jurisdiction is given to the Federal Court when reviewing a migration decision.[5] As a result, a law that denies these courts the ability to enforce the legislated limits on an officer's power will be invalid.[6] In *Graham*, the Court said that the effect of s 503A(2)(c) was to deny to the court 'information which, by definition, is relevant to the purported exercise of the power of the Minister that is under review'.[7] The court was denied that material:

- irrespective of the importance of the information to the determination to be made by the court; and
- irrespective of the importance of the interest sought to be protected by the law enforcement or intelligence body.[8]

22. The High Court described the unfairness that would result from the secrecy provision in the following way:

> [I]t is possible that a person may have a compelling case as to why he or she passes the character test. It may be such as to show that, *prima facie*, the Minister could not have evidence to found his suspicion or that his decision is, in law, unreasonable. The practical effect of s 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister.[9]

23. It is worth noting that while the present Bill would permit a court to order the production of confidential information, it could still result in the visa holder or visa applicant to whom the material relates from being able to make any submissions about it. As described in more detail below, the Bill provides that a party may only make submissions about the confidential information at a pre-hearing stage if they are already aware of its content and the information was not acquired unlawfully.[10] The Bill also provides that when an officer of the Department receives the confidential information from the law enforcement or intelligence agency, it is an offence for them to release it to anyone outside the Department.[11] The practical result is that in a judicial review proceeding it will only be the Minister who is able to make submissions about this material at the pre-hearing stage. At this stage, the Bill would restrict the Court from considering all of the factors that are relevant to the public interest in determining whether the material may be released to the applicant. As a result, substantially the same problem identified by the High Court in *Graham* could arise again: the applicant may be prevented from demonstrating why the decision made by the Minister is legally unreasonable.

24. The Court in *Graham* held that s 503A(2)(c) was invalid to the extent that it would prevent the Minister from being required to divulge or communicate information to the High Court or the Federal Court when reviewing a decision to refuse or cancel a visa on character grounds.[12]

25. While the Court in *Graham* focused its attention on the problem of denial of relevant information to courts, it warned that there may be other ways in which legislation limits the capacity of courts to conduct judicial review of administrative decisions that also results in the invalidity of that legislation. Such provisions would need to be considered in a future case.[13] There may well be questions about whether the regime proposed in the current Bill is constitutional.

26. In any event, regardless of whether or not the Bill is valid on constitutional grounds, it would be likely to hamper a court in performing judicial review in relevant matters. As the Senate Standing Committee for the Scrutiny of Bills observed, the Bill may 'operate to undermine the practical efficacy of judicial review in many cases'.[14] That, in turn, would restrict the right to a fair trial of an individual seeking justice before the court. Given the significant human rights risk, which is discussed in further detail in Part 7 of this submission, the Commission submits that the Bill should not be passed.

5 Other protections for information in the public interest

27. Judgment in *Graham* was handed down on 6 September 2017.

28. Although s 503A(2)(c) was held to be invalid, and thus has had no legal effect since that date, the Commonwealth has continued to have the ability to withhold information in judicial review proceedings challenging a decision to refuse or cancel a visa on character grounds, if withholding the information was necessary in the public interest or if it amounted to national security information.

29. First, the Commonwealth can claim public interest immunity. This doctrine permits information to be protected against disclosure in the course of litigation if the court is of the opinion that disclosure would injure an identifiable public interest.[15] A claim by a member of the Executive that it would be contrary to the public interest for information to be disclosed is not conclusive. The court must weigh the public interest claimed by the Executive against the public interest in achieving justice in the particular case. Where a person's liberty is at stake, production is more likely to be ordered.[16]

30. These principles are also reflected in s 130 of the *Evidence Act 1995* (Cth) which sets out a non-exhaustive list of factors to be taken into account by the court:

    - the importance of the information or the document in the proceeding
    - if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor
    - the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding
    - the likely effect of adducing evidence of the information or document, and the means available to limit its publication
    - whether the substance of the information or document has already been published
    - if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—

whether the direction is to be made subject to the condition that the prosecution be stayed.

31. As the High Court noted in *Graham*, the essential difference between evidence being withheld by reason of public interest immunity and by reason of s 503A(2) is that in the case of claims of public interest immunity the courts determine whether that should occur.[17]

32. Secondly, the Commonwealth can rely on the NSI Act to protect 'national security information'. This comprises information about Australia's defence, security, international relations or law enforcement interests.[18] For the purposes of that Act, law enforcement interests include:

- avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence
- protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence
- the protection and safety of informants and of persons associated with informants
- ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.[19]

33. The object of the NSI Act is to 'prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, **except to the extent that preventing the disclosure would seriously interfere with the administration of justice**' (emphasis added).[20]

34. Again, the test applied by the court requires it to weigh competing public interests. The court hearing an application that national security information not be disclosed must consider:

- whether there would be a risk of prejudice to national security if the relevant information were disclosed
- whether any order preventing or limiting disclosure would have a substantial adverse effect on:

- the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence (in the case of criminal proceedings); or
- the substantive hearing of the proceeding (in the case of civil proceedings)

- any other matter the court considers relevant.[21]

35. The court in each case is directed by the legislation to give 'greatest weight' to the risk of prejudice to national security.[22] The first Independent National Security Legislation Monitor said that this provision relating to criminal proceedings risked an appearance of placing a 'thumb on the scales' to achieve a result contrary to how the judge would have otherwise determined the issue on its merits, and recommended its repeal.[23] The provision applying to criminal proceedings was held to be constitutional in *Lodhi v R* (2007) 179 A Crim R 470. However, an essential aspect of the primary reasoning of both the trial judge and the New South Wales Court of Criminal Appeal involved reading down the word 'greatest' to mean 'greater'.[24] This did not mean that the balance would always come down in favour of non-disclosure. The court was still required to undertake an exercise of balancing the risk to national security against the potential adverse effect on the fairness of the hearing, with an understanding that more weight was to be given to considerations of national security.

36. It is also important to note that a court hearing a federal criminal proceeding retains the ability to stay the proceeding if an order for non-disclosure of national security information under the NSI Act would have a substantial adverse effect on a defendant's right to receive a fair hearing.[25]

37. The Explanatory Memorandum for the present Bill suggests that the existing range of protections for information are not sufficient because:

> the current framework which protects against the harmful disclosure of confidential information (which is designed to protect national security related information) **does not adequately capture the type of confidential information** which is critical to character-related decision-making, such as a person's criminal background or associations.[26]
>
> (emphasis added)

38. That is, there appears to be no concern about the adequacy of the protection of national security information. The claimed legislative gap

is in relation to information that would not fall within the definition of national security information but that the Executive nevertheless does not want to disclose.

39. The Explanatory Memorandum acknowledges that it would be open to the Executive to make a claim for public interest immunity in relation to information about these additional matters such as a person's criminal background or associations.[27] However, it says that the test applied by a court or tribunal in assessing a claim for public interest immunity—weighing competing public interests and potentially releasing information if it forms the view that it is in the interests of justice to do so—creates a 'real risk' that some confidential information may be released.[28]

40. It appears that the rationale for this Bill is based in a view that public interest immunity is insufficient and that it is aimed at further limiting the discretion of a court or tribunal to release information the Government considers confidential.

6 Provisions of the Bill

41. As noted above, this submission focuses on the main amendments to the Migration Act in Sch 1, Part 1 of the Bill. While the Commission has not had the time to fully consider the impact of the amendments to the Citizenship Act, it notes that these provisions are substantially the same as the non-disclosure provisions proposed to be inserted into the Migration Act and that similar concerns are likely to arise.

42. The proposed amendments to the Migration Act would apply to confidential information provided by a 'gazetted agency'[29] to an officer with responsibilities under the Migration Act, in circumstances where the confidential information is relevant to a decision about whether to refuse or cancel a visa on character grounds (or to revoke such a refusal or cancellation).[30]

43. There is a general obligation of secrecy imposed on the officer not to disclose that information,[31] subject to a number of exceptions. It is an offence to disclose the information other than in accordance with one of those exceptions.[32] The information may be disclosed:

- internally within the Department or to the relevant Minister[33]
- if the Minister gives permission in writing[34]

- to the High Court, the Federal Court or the Federal Circuit Court pursuant to an order to do so.[35]

44. It is the last of these exceptions that seeks to address the High Court's decision in *Graham*. There is no longer a prohibition on giving information to a court. A court may require production of the information if it is for the purpose of a proceeding about the exercise of the Minister's power to refuse or cancel a visa on character grounds. However, the Bill would place three limits on how the court can then deal with the information.

45. First, the court is required to hold a secret hearing, where the applicant, the applicant's lawyers and the public are excluded, so that the Minister may make submissions about:

- the use that the court should make of the information in the proceeding and the weight to be given to the information; and
- any impact that disclosure of the information would have on the public interest.[36]

46. Secondly, the court is required to determine whether disclosing the information would create 'a real risk of damage to the public interest'. However, unlike the test for public interest immunity or the tests under the NSI Act, the court is prohibited from taking into account all of the factors that may be relevant to the public interest. Instead, the court may only take into account the list of factors set out in s 503C(5)(a)–(h). While these factors are undoubtedly important, the requirement that the court consider *only* these factors means that the court may not take into account other factors that might tend in favour of disclosure of the information, including:

- the seriousness of the issues in relation to which disclosure is sought
- the likelihood that disclosure will affect the outcome of the case
- the likelihood of injustice if the documents are not disclosed[37]
- whether the liberty of the applicant is at stake.[38]

47. Significantly, the list of factors in proposed s 503C(5)(a)–(h) excludes the only factor in the current s 503B(5) (dealing with the factors a court must take into account in making a non-disclosure order) that may weigh in favour of disclosure, namely: 'the interests in the administration of justice'.[39]

48. Effectively, the court is being asked to assess only one side of the test that would ordinarily be considered in a public interest immunity application. It may assess the strength of the Executive's claim that the information is confidential, but it may not assess whether disclosure of the information is necessary to achieve justice in the proceeding.

49. This is more than just placing a 'thumb on the scales' in an attempt to influence a particular outcome. It prohibits any consideration at all of matters on the other side of the scales. It does not amount to a balancing exercise at all.[40]

50. If the court determines, on the basis of the limited list of factors in s 503C(5)(a)–(h), that disclosing the information would create 'a real risk of damage to the public interest', then the court must not disclose the information to any person, including the applicant.

51. Thirdly, while the court in the substantive proceedings may give the information such weight as it considers appropriate,[41] if the court is prohibited from disclosing the information to the applicant and the applicant's lawyer then its decision about what weight to give the evidence will not be able to be informed by any relevant submissions from the applicant or the applicant's lawyer, given their exclusion from the preliminary, closed hearing.

7 Human rights issues

7.1 Right to a fair and public hearing

52. The key human rights issues in assessing this Bill are:

- whether the court should be prohibited from taking into account any factors that weigh in favour of documents being disclosed to the applicant when assessing what the public interest requires
- whether the Minister should be permitted to rely on secret evidence when defending a decision to refuse or cancel a visa on character grounds.

53. The Statement of Compatibility with Human Rights properly identifies that the Bill engages the right to a fair and public hearing under article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). This issue is also discussed in detail by the Parliamentary Joint Committee on Human Rights in its preliminary analysis of the Bill.[42]

54. Article 14 relevantly provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

55. The right of access to courts and tribunals and equality before them, is not limited to citizens. The United Nations Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state.[43] The concept of 'suit at law' encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.[44]

56. There is a separate right in article 13 of the ICCPR that deals with the fairness of procedures to remove non-citizens from a country. The ICCPR does not require these procedures to be undertaken by a court.[45] While procedures described in the Bill may ultimately result in removal from Australia, they are directed at decisions at an earlier stage. In any event, if domestic law gives a judicial body the task of making decisions about expulsions or deportations, then the guarantee of equality of all persons before courts and tribunals in article 14(1) and the principles of impartiality, fairness and equality of arms implicit in this guarantee are appliable to those judicial processes.[46]

57. The principle of equality between parties requires that each side be given the opportunity to contest all of the arguments and evidence adduced by the other party.[47] The UK Supreme Court has said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.[48]

58. The High Court of Australia has held that access by parties involved in litigation to relevant material is essential to a fair trial. Failure to ensure such access will have broader implications than the fairness of a particular case: it is apt to undermine public confidence in the administration of justice. Justice Mason, in a ruling on public interest immunity, referred to two principal considerations:

> The first is that it is central to our conception of the administration of justice that documents relevant and material to the issues arising in litigation should not be withheld from the parties and that each party enjoys as an incident of his right to a fair trial the right to present as part of his case all the relevant and material evidence which supports or tends to support that case. The existence of Crown privilege [now known as public interest immunity] as an acknowledged exception should not be seen as a reason for diminishing the force or the importance of this conception of the administration of justice, but rather as embracing a group of "exceptional cases" in which the public interest in the proper administration of justice has been outweighed by a superior public interest of a self-evident and overwhelming kind.
>
> The second consideration, closely connected with the first, is the need to maintain public confidence in the administration of justice. The withholding from parties of relevant and material documents, unless justified by the strongest considerations of public interest, is apt to undermine public confidence in the judicial process.[49]

59. In some particularly exceptional cases, involving the imposition of control orders, the House of Lords and the European Court of Human Rights have endorsed the use of special advocates to make submissions in a person's interests when, for reasons of national security, a person has been unable to review certain material themselves.[50] The starting point in such cases is that it is 'essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.[51] This necessarily requires a full assessment of both the factors in favour of and the factors against disclosure. Where full disclosure was not possible, other accommodations were required to ensure that the person 'still had the possibility effectively to challenge the allegations against [them]'.[52] At a minimum, the person needed to be provided with 'sufficient information about the allegations against [them] to enable [them] to give effective instructions'.[53] This is also now a legislative requirement in Australia when national security information is sought to be withheld from a person in relation to control order proceedings.[54]

60. There is a substantial body of case law that considers the requirements of procedural fairness that fall on the Executive when making claims of public interest immunity. These considerations are also relevant to the right to a fair hearing. Some of that case law also indicates the difficulties that can arise when only the Executive knows the content of

the relevant information. In a recent case, the Full Court of the Federal Court said:

> As full and as frank a disclosure of such information as is consistent with maintaining a claim for public interest immunity privilege should be made at the outset; the disclosure of as much information as possible should not depend upon judicial intervention to "encourage" the disclosure of information which could have been, and should have been, disclosed voluntarily.[55]

61. The baseline position is that an applicant for review must be provided with sufficient information to fairly put them in a position where they can make meaningful submissions. The reasons of the Federal Court acknowledge the important role played by courts in providing oversight of public interest immunity claims to ensure that this minimum level of information is provided. If this Bill were passed in its current form, the role played by the courts would be significantly reduced because of the limited factors permitted to be taken into account in assessing the public interest. It would significantly increase the risk of material that properly should be provided to a review applicant not being provided.

62. The Statement of Compatibility asserts that the limitations on the right to a fair and public hearing are justified in order to protect the confidential nature of information relied on in refusing or cancelling a visa, and the methodologies, priorities and capabilities of law enforcement agencies in obtaining that information.[56] Those arguments may be relevant to the question of whether the applicant should be excluded from a hearing in which potentially confidential information is being discussed. However, the Statement of Compatibility does not address whether it is fair for any assessment of the public interest to ignore the impact of non-disclosure on the administration of justice or whether it is fair for the Government to subsequently rely on secret evidence that is not known to the applicant. There has been no attempt to consider and weigh the fairness of a proceeding in these circumstances and little attempt to show why existing protections are insufficient. Therefore, there is no proper basis for a conclusion that the extent to which the Bill impacts on the right to a fair hearing is reasonable and proportionate.

63. The Commission considers that the way in which the Bill limits the right to a fair and public hearing is not reasonable or proportionate, particularly in light of the availability of less restrictive alternatives—the

NSI Act and public interest immunity—which allow a court to properly balance each of the relevant factors in issue.

7.2 Prohibition on secret evidence in cases involving liberty

64. Applications for public interest immunity or for non-disclosure of information pursuant to the NSI Act are directed to the admissibility of evidence. If the claim is upheld, the information is not admitted into evidence and cannot be relied upon by either party. If it is admitted into evidence, it is available equally to both parties.[57] An unusual aspect of the regime proposed in the Bill is that it would permit evidence to be admitted but be available only to the court and the Minister. That is, it would permit the court to proceed on the basis of secret evidence, adverse to the review applicant and unknown to them.

65. There is a strong common law tradition against the use of secret evidence, particularly in criminal trials. In *Condon v Pompano*, French CJ said:

> At the heart of the common law tradition is 'a method of administering justice'. That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it. Antithetical to that tradition is the idea of a court, closed to the public, in which only one party, a government party, is present, and in which the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear.[58]

66. Similarly, officers of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department have confirmed that the NSI Act does not permit the use of secret evidence in a Commonwealth criminal trial—that is, evidence adverse to the accused that the accused is not allowed to know.[59]

67. In civil cases where a person's liberty is at stake, the Australian Government has, appropriately, also formed the view that courts should not proceed on the basis of secret evidence not known to the person at risk of losing their liberty. This issue was highlighted in relation to the recent Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth). The Bill proposes to extend the regime under the NSI Act, which currently provides for special advocates to be appointed in control order proceedings, so that special advocates could also be appointed in proceedings where an extended

supervision order is sought. Both control orders and extended supervision orders involve the imposing of conditions on a person while they are in the community. The special advocate regime permits orders to be made under the NSI Act that allow the court to consider national security information that is withheld from the respondent, provided that:

- the respondent has been given sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations; and
- a special advocate is appointed to represent the interests of the respondent in the proceeding.

68. Importantly, the Government acknowledged that it would *not* be appropriate for this regime to be applied to civil continuing detention order proceedings. The reason for that concession was that the potential outcome of a continuing detention order proceeding—ongoing detention for up to three years—is much more severe and is analogous to a criminal sanction. According to the Government, relying on 'court-only evidence', which was withheld from a respondent in those circumstances, could not be justified.[60]

69. The same reasons that cause secret evidence to be rejected in continuing detention order proceedings also apply in relation to proceedings in which a court is considering whether a decision to cancel a person's visa was valid. Both cases involve civil proceedings that may result in administrative detention. In the case of a person whose visa is cancelled, the period of detention is not time bound and, in some cases, can be longer than that of a convicted terrorist offender subject to a continuing detention order. Any individual continuing detention order is subject to a maximum period of three years at a time.[61]

70. Once a person's visa is cancelled under s 501, they must be taken into immigration detention.[62] Any other existing visas they hold are taken to be cancelled and any existing applications for visas are taken to be refused.[63] They are not permitted to make an application for any other visa (except a protection visa).[64] In those circumstances, there are only two ways in which they can be released from immigration detention into the Australian community.

71. First, they could seek review of the decision to cancel their visa (or of a decision not to revoke a mandatory cancellation). This would generally

involve merits review in the AAT and, if unsuccessful, judicial review in the courts. For some decisions that are made personally by the Minister, there is no review available in the AAT and the only forum to seek review is in the courts. In order for the person to effectively put their case for review, they must have access to the information relied upon by the Minister in making the cancellation decision. That is the particular issue of concern with the present Bill.

72. Given the breadth of the 'character test' in s 501(6), without access to this information a person may have no idea of the reason why they are said to have failed the character test, and no opportunity to effectively test whether there were legal errors involved in reaching that conclusion. For example, a person may fail the character test as a result of a relevant conviction,[65] but also as a result of a *suspicion* that they are a member of a particular group,[66] a *suspicion* that they have been involved in particular conduct,[67] an assessment of their risk of engaging in particular conduct,[68] and even a general impression that they are not of good character.[69]

73. Secondly, they could be granted a visa by the Minister or placed into community detention.[70] However, these ministerial powers are personal, discretionary and non-compellable. There is no requirement for the Minister to even consider the exercise of these powers, 'whether he or she is requested to do so by any person, or in any other circumstances'.[71] Further, under guidelines issued by the Minister, people who have had their visas cancelled on character grounds should generally not be referred for consideration of the exercise of these powers.[72] The existence of these discretionary powers is clearly not a sufficient remedy if the review process for visa refusals and cancellations is unfair.

74. Statistics that reflect how decisions to cancel a person's visa can have a direct and profound impact on their liberty, and why resorting to secret evidence in court proceedings challenging such decisions is inappropriate, include the following:

- Over the past 5 years, on average more than 1,000 people have had their visas cancelled under s 501 of the Migration Act each year.[73]
- More than half of the people currently in immigration detention are people whose visas were cancelled under s 501 of the Migration Act.[74]

- The average period of detention for people currently in immigration detention is more than 600 days.[75] This is longer than at any time in at least the past 10 years.[76]
- Of the people currently in immigration detention, more than 100 people have been detained for longer than 5 years.[77] Some people currently held in immigration detention have been detained for longer than 10 years.[78]

75. All of this detention is administrative detention at the discretion of the Executive (see [73] above) and not as a result of any sentence of imprisonment ordered by a court.

76. Unlike criminal proceedings, the applicant requires an order from the court that the cancellation decision was invalid in order to avoid detention. The applicant is unable to rely on the ultimate safeguard available in criminal proceedings of a stay to prevent an unfair trial.[79] This means that fairness must be ensured in other ways.

77. There are further, specific concerns that arise where a person has a protection visa cancelled on character grounds. From July 2014 to August 2020, there were 494 refugees who had their protection visas cancelled under s 501 of the Migration Act.[80] The Australian Government continues to owe protection obligations to each of these people and its policy, appropriately, is not to return people to a place where they have a well-founded fear of persecution.[81] As noted above, once they have had their visas cancelled on character grounds, current policy is not to refer them for consideration of community detention or a visa to allow them to be released from detention. If they cannot be released and they cannot be returned to the country where they face a real chance of persecution, they can remain indefinitely in closed immigration detention facilities.[82] This is a further reason why it is vital that visa cancellation decisions can be properly scrutinised, so that if there are errors they can be identified and corrected.

7.3 Addressing the human rights issues

78. The human rights issues raised above, particularly:

- the fairness of legal proceedings in which visa cancellation decisions are challenged, and
- the risk of prolonged and indefinite detention for people who have had their visas cancelled on character grounds,

mean that the most appropriate response is for the Bill not to be passed.

79. In those circumstances, the Executive could continue to rely on the NSI Act to protect national security information and claims of public interest immunity to protect other confidential information that would be contrary to the public interest to disclose. The courts would retain the ability to take into account the full range of public interest factors in determining whether or not disclosure was appropriate in an individual case. If some material was not disclosed, the courts would also retain the maximum degree of flexibility to adjust their procedures as necessary to ensure that justice was done in the individual case.

80. If, contrary to the Commission's primary recommendation, the Bill is passed, it should be amended in three ways to reduce the human rights impact.

81. First, there should be provision for the applicant's interests to be represented during the preliminary hearing dealing with the confidential information. Ideally, this would involve the applicant's lawyer being present so that the applicant's interests can be directly represented. This may require the lawyer to be security cleared, depending on the nature of the relevant information. Alternatively, a special advocate could be appointed to represent the applicant's interests, as provided for in relation to control order proceedings.

82. Secondly, the court hearing an application for non-production of information should be permitted to take into account all of the factors relevant to an assessment of the public interest. There can be no justification for the restricted list of factors in the Bill, which removes the ability of courts to take into account the interests of the administration of justice.

83. Thirdly, if the court orders that some material not be disclosed to the applicant, it should also make orders requiring a summary of the information or a statement of relevant facts to be prepared to enable the applicant to make meaningful submissions in relation to the substance of the confidential information.

84. The particular form of recommendations made by the Commission is set out in section 3 above.

Endnotes

[1] Migration Act, ss 503A–503D.
[2] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (2004) ALRC Report 98, Ch 10, https://www.alrc.gov.au/publication/keeping-secrets-the-protection-of-classified-and-security-sensitive-information-alrc-report-98/.
[3] The High Court's decision in *Graham*, discussed below, was limited to the prevention of relevant information being provided to a Court during judicial review proceedings. There was no change to s 500(6F) which permits the AAT to have regard to 'non-disclosable information' when reviewing a decision to refuse or cancel a visa (or a decision not to revoke a mandatory cancellation of a visa) on character grounds.
[4] *Constitution*, s 75(v).
[5] Migration Act, s 476A(1)(c) and (2).
[6] *Graham* at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[7] *Graham* at [52] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[8] *Graham* at [52] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[9] *Graham* at [54] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[10] Bill, proposed s 503C(3).
[11] Bill, proposed s 503A(6). The information may only be released pursuant to a declaration made by the Minister under s 503B or pursuant to an order made by a court pursuant to s 503C. However, even in the case of an order made by the Court, the *ex parte* hearing regime in s 503C(2) applies.
[12] *Graham* at [64] and [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[13] *Graham* at [65] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[14] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, at [1.53].
[15] *Sankey v Whitlam* (1978) 142 CLR 1.
[16] *Sankey v Whitlam* (1978) 142 CLR 1 at 42 (Gibbs ACJ) and 61–62 (Stephen J).
[17] *Graham* at [34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[18] NSI Act, s 8.
[19] NSI Act, s 11.
[20] NSI Act, s 3(1).
[21] NSI Act, ss 31(7) (criminal proceedings) and 38L(7) (civil proceedings).
[22] NSI Act, ss 31(8) (criminal proceedings) and 38L(8) (civil proceedings).
[23] Independent National Security Legislation Monitor, *Annual Report 2013*, pp 137–139, https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2013.pdf.
[24] *Lodhi v R* (2007) 179 A Crim R 470 at [36]–[38] (Spigelman CJ, with whom Barr J [121] and Price J [215] concurred).
[25] NSI Act, s 19(2).
[26] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, p 46.
[27] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, p 48.

[28] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, p 48.
[29] Bill, proposed s 503A(9): defined in the same way as it is currently, including a broad range of Australian law enforcement and intelligence bodies.
[30] Bill, proposed s 503A(1).
[31] Bill, proposed s 503A(2).
[32] Bill, proposed s 503A(6).
[33] Bill, proposed s 503A(2).
[34] Bill, proposed s 503B.
[35] Bill, proposed s 503C.
[36] Bill, proposed ss 503C(3)–(4).
[37] Each of the preceding three factors have been recognised by the Full Court of the Federal Court as bearing on the test of public interest immunity: *Commonwealth v Northern Land Council* (1991) 30 FCR 1 (reversed in the result but not by reference to principle in *Commonwealth v Northern Land Council* 176 CLR 604), cited in *Betfair Pty Ltd v Racing New South Wales and Another (No 7)* (2009) 181 FCR 66 at 78 [33] (Jagot J). See also *Evidence Act 1995* (Cth), s 130(5).
[38] *Sankey v Whitlam* (1978) 142 CLR 1 at 42 (Gibbs ACJ) and 61–62 (Stephen J).
[39] Migration Act, s 503B(5)(i).
[40] Cf. *Lodhi v R* (2007) 179 A Crim R 470 at [46] (Spigelman CJ, with whom Barr J [121] and Price J [215] concurred).
[41] Bill, proposed s 503C(7).
[42] Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 1 of 2021*, 3 February 2021, pp 7–19.
[43] Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 9. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en.
[44] Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 16. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en.
[45] Human Rights Committee, *Zundel v Canada*, Communication No. 1341/2005, UN Doc CCPR/C/89/D/1341/2005 (14 May 2006), para 6.8. At https://juris.ohchr.org/Search/Details/1332.
[46] Human Rights Committee, *Everett v Spain*, Communication No. 961/2000, UN Doc CCPR/C/81/D/961/2000 (26 August 2004), para 6.4. At https://juris.ohchr.org/Search/Details/1136.
[47] Human Rights Committee, *Jansen-Gielen v The Netherlands*, Communication No. 846/1999, UN Doc CCPR/C/71/D/846/1999 (14 May 2001), para 8.2, https://juris.ohchr.org/Search/Details/917; Human Rights Committee, *Äärelä and Näkkäläjärvi v Finland*, Communication No. 779/1997, UN Doc CCPR/C/73/D/779/1997 (7 November 2001), para 7.4, https://juris.ohchr.org/Search/Details/939.
[48] *Al Rawi v Security Services* [2012] 1 AC 531 at [12], quoting *Kanda v Government of Malaya* [1962] AC 322 at 337.

[49] *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 593 (Mason J).
[50] *A v United Kingdom* (2009) 49 EHRR 29; *Secretary of State for the Home Department v AF* [2009] UKHL 28.
[51] *A v United Kingdom* (2009) 49 EHRR 29 [218].
[52] *A v United Kingdom* (2009) 49 EHRR 29 [218].
[53] *A v United Kingdom* (2009) 49 EHRR 29 [220]; *Secretary of State for the Home Department v AF* [2009] UKHL 28 at [59] (Lord Phillips of Worth Matravers).
[54] NSI Act, s 38J(1)(c).
[55] *Jaffarie v Director General of Security* (2014) 226 FCR 505 at [113].
[56] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, p 47.
[57] *HT v The Queen* [2019] HCA 40 at [32] (Kiefel CJ, Bell and Keane JJ) and [71]–[72] (Gordon J).
[58] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [1] (French CJ).
[59] Independent National Security Legislation Monitor, *Annual Report 2013*, pp 125 and 140–143, https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2013.pdf.
[60] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), Statement of Compatibility with Human Rights, at [84], https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6593_ems_e9a7f0c6-ef21-48fb-a6d3-33cfd4b97546/upload_pdf/747065.pdf;fileType=application%2Fpdf.
[61] Criminal Code, s 105A.7(5).
[62] Migration Act, s 189(1).
[63] Migration Act, s 501F. This provision does not apply to protection visas.
[64] Migration Act, s 501E. They may only apply for a protection visa if they have not previously had a protection visa cancelled or an application for a protection visa refused (s 48A).
[65] Migration Act, s 501(6)(a), (aa), (ab) and (e).
[66] Migration Act, s 501(6)(b).
[67] Migration Act, s 501(6)(ba).
[68] Migration Act, ss 501(6)(d), (g) and (h).
[69] Migration Act, s 501(6)(c).
[70] Migration Act, ss 195A and 197AB.
[71] Migration Act, ss 195A(4) and 197AE.
[72] The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Guidelines on Minister's detention intervention power - section 195A of the Migration Act 1958*, November 2016, section 4; the Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 10 October 2017, section 10.
[73] Department of Home Affairs, *Key visa cancellation statistics*, https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.
[74] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p 7 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2020.pdf.

[75] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p 12 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2020.pdf.

[76] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p 12 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2020.pdf; Department of Immigration and Citizenship, Immigration Detention Statistics Summary, 31 January 2013, p 9 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-20130131.pdf.

[77] Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, 31 December 2020, p 12 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2020.pdf.

[78] Department of Home Affairs, Answer to question on notice, Portfolio question number LCC-BE20-356, 2020-21 Budget estimates, Legal and Constitutional Affairs Committee, https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=02d82c70-baf0-4c0c-978e-07e455851733.

[79] Cf. *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [178] and [212] (Gageler J).

[80] Department of Home Affairs, Answer to question on notice, Portfolio question number LCC-BE20-350, 2020-21 Budget estimates, Legal and Constitutional Affairs Committee, p 2 https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=58a61168-ab52-410a-bdf3-8a20882e8bb5.

[81] There is a question about whether this policy is consistent with the Migration Act as it currently stands: *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27 at [17], [22], [25] (Besanko and Thawley JJ); *AJL20 v Commonwealth* [2020] FCA 1305 at [123] (Bromberg J).

[82] Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, pp 135–136 https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention.