ASRC
Asylum Seeker Resource Centre

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

24 June 2021

Dear Committee Secretary

We welcome the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions Bill 2020* (**the Bill**).

The Asylum Seeker Resource Centre (**ASRC**) is an independent, not for profit organisation working to support and empower people seeking asylum in Australia. The Human Rights Law Program is an accredited community legal centre working within the ASRC to provide holistic legal support to clients at all stages of the refugee determination process, including refugees facing character-related visa refusal and cancellation processes.

We strongly oppose this Bill. The overwhelming majority of "confidential information" covered by the Bill is not related to intelligence matters and does not impact on Australia's national security. This Bill will cause severe prejudice to the ability of people facing visa cancellation, or loss of citizenship, to defend their rights to remain in Australia or retain Australian citizenship. These decisions to cancel visas or remove citizenship typically have catastrophic consequences for the people concerned, including deportation from Australia, irrespective of the length of time they have lived in Australia or their family connections to Australians or their lack of meaningful connections to any other country. Family members, including children, can also be irreversibly harmed by such decisions.

Our key concerns regarding the Bill are as follows:

- Existing powers are more than sufficient to address the stated need to protect inappropriate disclosure of sensitive information which could potentially threaten public interests or national security interests. The Bill is not needed and therefore has no valid purpose.
- This Bill will result in severe prejudice caused to the rights of those directly affected and their family members, which are not reasonable nor justifiable in domestic or international law.
- The Bill will result in unfair, poor decision making and manifestly unjust outcomes for those subject to these powers, especially for those who face *refoulement* to countries of persecution, or indefinite detention as a result of visa cancellation.
- The scope of documents covered by this Bill is not defined and remains unclear.
- The scope of decisions covered by this Bill is too wide.
- The degree and means of document non-disclosure proposed under the Bill is disproportionate to the stated objectives of the Bill and the risks posed by disclosure of that information, especially as it relates to ordinary criminal justice processes and information relevant to other discretionary aspects of the character tests. This is especially given the gravity of the consequences this will cause to those permanently expelled from Australia and separated from their family members.
- The Bill will prevent adequate judicial scrutiny and virtually any parliamentary or merits-review level scrutiny of the operation of this secretive Protected Information regime.
- The Bill will prevent the AAT from performing its statutory merits review functions and distort judicial functioning and may be unconstitutional.

We would be pleased to give evidence to the Committee in a public hearing to further elaborate our concerns with this Bill.

Yours sincerely,

[redacted]

Kon Karapanagiotidis OAM
CEO Asylum Seeker Resource Centre

Submission

1. Legal Background: High Court authority *Graham* and *Te Puia*

In the High Court cases, *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (*Graham* and *Te Puia*), the majority of the Full Bench found that s 503A(2)(c) of the *Migration Act 1958* (Cth) (**the Migration Act**), was invalid to the degree that it interfered with inherent aspects of judicial function of the High Court and the Federal Court when exercising jurisdiction under s 75(v) of the Constitution or s476 of the Migration Act because:

> "*To the extent s 503A(2)(c) operates in practice to deny to this Court and the Federal Court the ability to see the relevant information for the purpose of reviewing a purported exercise of power by the Minister under s 501, 501A, 501B or 501C, s 503A(2)(c) (it)* ***operates in practice to shield the purported exercise of power from judicial scrutiny.*** *The Minister is entitled in practice to base a purported exercise of power in whole or in part on information* ***which is unknown to and unknowable by the court, unless the Minister (after consulting with the gazetted agency from which the information originated) chooses to exercise the non-compellable power conferred on the Minister by s 503A(3) to declare that disclosure to the court can occur****."*[1]
> (Emphasis added)

The Court found that this provision of the Migration Act trespassed upon an inherent aspect of judicial function. It has now been almost four years since the High Court's decision. The fact that the Government now seeks a "work around" of this judgment, rather than accepting the decision of the highest court in the land, that there must be lawful limits to exercise of executive power in this area of decision making which do not encroach upon judicial function, is in itself concerning. This is especially as this Bill purports not only to address the invalidity to the limited extent found by the High Court, but also presses for a major expansion of powers to prevent the disclosure of "confidential information" also under the *Australian Citizenship Act 2007* (Cth) (**the Citizenship Act**).

2. Breach of fundamental rights

The banishment-like stakes faced by people facing visa cancellation or citizenship loss, are equal in gravity to the rights of liberty at stake in many criminal law matters. For those whose refugee or protection visas have been cancelled, they additionally face *refoulement* to countries of persecution[2] or indefinite detention in Australia,[3] both being in breach of Australia's treaty obligations, but permissible under domestic law nonetheless. Thus the wider context of this Bill is that the most fundamental rights are at stake in these decisions.

There are also key human rights at stake in the regime proposed in this Bill. Fundamental fair trial rights contained in Article 14 of the *International Covenant on Civil and Political Rights* (**ICCPR**), ratified by Australia some 41 years ago, provide salient cornerstones of justice.

These include the right of a person to know what evidence is levelled against them, and to have a meaningful opportunity to respond to that evidence through an effective legal defence.[4] These standards are not only applicable to criminal trials, but also applicable to administrative proceedings before a judicial body:

> `*…whether concerning the detention, trial* ***or expulsion of a person****—and required to ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question.*'[5] (Emphasis added)

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[1] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, at 53.
[2] See Section 197C of the *Migration Act 1958* (Cth).
[3] Through the operation of sections 189 and s196 of the *Migration Act 1958* (Cth).
[4] See Article 14 of the *International Covenant on Civil and Political Rights* requiring a fair, independent and public trial including minimum guarantees in Article 14(3) to be informed promptly of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defence; to be tried in his presence; to examine, or have examined, the witnesses against him; and to obtain the attendance and examination of witnesses on his behalf, amongst others.
[5] See UN Human Rights Council *Right to a Fair Trial and Due Process in the Context of Countering Terrorism,* United Nations Counter-Terrorism Implementation Task Force, October 2014. https://www.ohchr.org/en/newyork/documents/fairtrial.pdf at p.4.

We further note that even at the pointiest end of tension between individual rights and public safety, such as criminal matters involving allegations of terrorism or national security issues, that:

> '*Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis. Any such restrictions should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.*'[6]

The vast bulk of visa cancellation and refusal decisions do not involve any national security-related issues but rather, relate to 'ordinary' criminal offending and the application of wide discretionary considerations of "character", meaning there is no justification in this context to apply secretive legal processes, which so patently fail to meet these basic standards of justice.

3. Impact on innocent third parties including children

Aside from causing acute hardship to those directly impacted, decisions to cancel visas or strip citizenship often breach the rights of third parties, such as immediate family members, to family unity[7] and the rights of children to be raised by their parents and have their best interests prioritised in any decisions that impact upon them.[8] In addition to family separation caused by loss of a person's right to remain in Australia, in the case of visa cancellations, the visas of dependent family members will also be consequentially cancelled and so they will also lose their right to remain in Australia, impacting a whole additional gambit of rights breaches.

It is therefore particularly concerning that decisions of this gravity could be taken as proposed by this Bill, without requiring procedural fairness and without sufficient safeguards for courts, tribunals or the parliament to scrutinise the application of these secretive powers to ensure they are being narrowly, strictly and proportionately applied to the minimum extent necessary to protect genuine national security or public interests.

4. Current provisions for non-disclosure of material are sufficient

As the Committee is aware, there are existing legislative provisions to protect the disclosure of information that could potentially jeopardise Australia's national security.[9] The current national security provisions are more than sufficient. For example, exhaustive list in 503C(5) are primarily matters that are already covered by the national security exemptions available to the Minister. For example, one of our clients facing a visa refusal has been unable to access information provided by ASIO to the Department through FOI, which is highly relevant to his visa refusal. Whilst we strongly disagree with the denial of procedural fairness to our client, his situation is evidence that the Minister already has the power to prevent the disclosure of material which he deems relevant to national security. Further restrictions to access to information are unwarranted.

In the Department of Home Affairs' submissions to the Senate Legal and Constitutional Affairs Legislation Committee dated 19 February 2021 (**Department Submissions**), the Department alleged that since the High Court decision in *Graham* and *Te Puia* it had "limited its reliance on confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed, should the Court require the information to be produced in judicial review proceedings and the information was on-disclosed to the applicant, their lawyers or the public".[10]

However, the Department statistics on visa cancellations and refusals suggest otherwise. Since 2017, there have been over 900 s501 visa cancellations per year since 2017 and over 350 s501 visa refusals on average per year.[11] Therefore, it is evident that the Department does not require this Bill in order to cancel and refuse visas on character grounds and law enforcement agencies are already able to share sensitive information with the Department, which is adequately protected by existing non-disclosure laws.

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[6] Ibid, p.1.
[7] As per Article 12 of the *Universal Declaration of Human Rights* and Articles 17 and 23 of the ICCPR.
[8] As per Article 16 and Article 3(1) of the *Convention on the Rights of the Child.*
[9] *Migration Act 1958* (Cth), s 375, 375A, 376, 378. 437, 438, 440, 473GA, 473GB, 473GC, 473GD; *Administrative Appeals Tribunal Act 1975* (Cth), s 35, s35AA, 36, 36B, 38A, 39A, 39B, 66; *Australian Security Intelligence Organisation Act 1979* (Cth), s 81; *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)*, s 38L.
[10]

Also, the Department Submissions allege that without the Bill, the existing protections under public interest immunity and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (**NSI Act**) would not be sufficient to protect the disclosure of national security information.[12] It is difficult to reconcile this assertion with the fact that visa cancellation and refusal rates have remained high. Also, there are other existing laws such as the *Australian Security Intelligence Organisation Act 1979* (Cth) which provide additional protection to prevent the disclosure of material that could jeopardise Australia's nationality security. We note that the Department did not provide any examples of information that is not covered by the NSI Act that would require protection from non-disclosure under the Bill to ensure Australia's national security.

5. Scope of information covered not defined

A very wide ambit of information is potentially covered by the Bill. The lack of any definition of "confidential information" in subsection 503A(1) of the Bill makes it impossible to know how wide this scope could be and creates uncertainty.

This Bill could potentially be applied to all information provided by gazetted agencies under the definitions of "Australian law enforcement or intelligence body", "foreign law enforcement body" and "gazetted agency," which cover 42 Commonwealth, State and Territory statutory authorities and government departments and 285 countries (the entire membership of the United Nations). Under the Bill, the Details of gazetted agencies are also to be treated as confidential information.[13]

Not only is it not possible for an applicant to know there is confidential information in existence, or its content, so they can provide a meaningful response, but it's also not possible for them to even know which agency provided the information, or the details of agencies included in the gazette.

The Senate Committee on Legal and Constitutional Affairs minority report from the Australian Labor Party (**ALP Report**) recommends that the Bill should not be passed. However, a suggested amendment by the ALP is to list the "gazetted agencies" in the legislation and define confidential information. We do not consider that these amendments would make the Bill acceptable given that there is no valid purpose for the Bill due to existing non-disclosure protections and the grave consequences of the Bill outlined in these submissions.

6. Decision types impacted too wide

We oppose this proposed Bill in its current form and its application to decisions under both the Migration Act and the Citizenship Act. We are particularly concerned by the effect of the Bill to lump together a range of decision types under both laws, despite the qualitatively different criteria which applies to each.

Many decision types affected by this Bill, falling under both laws, are in no way related to any national security issues, which is the usual rationale provided for why some modification to usual standards of public and transparent legal processes, is considered necessary. However this rationale simply has no application to the vast majority of character-related visa cancellation decisions and many citizenship loss decisions, highlighting how misdirected this Bill really is.

We note with concern the significant and controversial expansion in recent years of the circumstances in which an Australian citizen or person eligible for Australian citizenship can face refusal, cessation, revocation or cancellation of approval of their citizenship. It is no longer the case that this can occur only in the most extreme and narrow of circumstances.

Similarly, the range of circumstances in which visas can be refused or cancelled under a character test, contained in sections 501, 501A, 501B, 501BA, 501C or 501CA of the Migration Act, (referred to as the **Character Provisions**), has been expanded enormously by the legislature and now provides extremely broad discretions for decision makers, a very low threshold for visa cancellation and Ministerial powers to cancel visas without

merits review,[14] and the power to override decisions of the AAT,[15] subject to only limited judicial review. These already severely undermine the AAT's jurisdiction and the proper functioning of the review process, representing existing alarming gaps in the rule of law, which will be worsened if this Bill becomes law.

As noted above, most visa cancellation decisions do not relate to allegations of conduct concerning issues of national security or security-related offences. Some decisions, but not all, apply to people who have been previously convicted of ordinary crimes under civil criminal law. Contrary to common misconceptions, the Character Provisions are so broad that a person need not have a substantial criminal record in order to face visa cancellation. Those who have served custodial sentences of more than one year can face visa cancellation, but so can people who have never served a day of prison, such as those who have received community-based sentences or wholly suspended sentences. Even people acquitted of crimes can be caught by the Character Provisions. Also, people who have never even been accused of any crime may still fail the character test and have their visa cancelled due to the vagaries of current provisions. These include failure of the character test on the basis of a person's "past and present general conduct"[16] or "suspicion of their association with a group involved in criminal conduct",[17] or based on a "risk the person would in the future "engage in criminal conduct"[18] or even something so tentative as, they might in the future become "disruptive" to the community in some way.[19]

We already regularly see the terrible consequences these overreaching laws have upon people whose visas should never have been cancelled, and also the impacts on their families, who suffer despite the absence of any wrongdoing on their parts. We find it very alarming that this Bill would give people facing visa cancellation or citizenship loss under these wide-ranging provisions, no basis to even know the existence, nature or content of the case levelled against them, preventing them from defending their right not to be permanently expelled from Australia.

7. Exclusion of Parliament from scrutiny role

The process for confidential information contemplated by the Bill will also completely exclude parliamentary scrutiny of whether these secretive provisions are used to protect genuine national security or public interests or to give the executive unfettered power to control these politically sensitive areas of decision making outside of the rule of law. Under this Bill, confidential information cannot be provided to the parliament or parliamentary committees, including the Parliamentary Joint Committee on Intelligence and Security. The ALP Report recommends the removal of the blanket prohibition against disclosure to Parliament and parliamentary committees and notes that "the PJCIS already receives regular briefings on citizenship cancellations". This example highlights that this Bill is a manoeuvre by the government to prevent oversight under the guise of national security to bodies; there is no valid reason to limit disclosure of confidential information to bodies such as the PJCIS and AAT (discussed below), which are already trusted with sensitive material in relation to national security. Therefore, this Bill has no valid purpose and should be rejected in its entirety.

This Bill would, in effect, mean that the non-disclosure of confidential information enjoys a worrying 'cloak of invisibility', from the courts, which will have only limited ability to scrutinise the use of these powers, and will completely exclude the parliament from providing any scrutiny.

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[14] Department of Home Affairs, Visa Statistics, 29 April 2021, https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.
Ibid.
Department of Home Affairs submission to the Inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 19 February 2020, p.6.

[14] Decisions by a delegate to refuse a visa under s 501(1), to cancel a visa under s 501(2), or not to revoke a mandatory visa cancellation under s 501CA(4), are reviewable by the AAT in its General Division under s 501(6)(b), (ba). Only decisions made by delegates are reviewable, not decisions made by the Minister personally. The personal powers of the Minister to cancel or refuse visas under ss 500A(2) and (3), s 501(3), s 501A(2) and (3), s 501B(2) and 501BA(2), and the power to revoke a cancellation in s 501C(4) are not reviewable as they are not included in the list of reviewable decisions in s 500(1), and are also excluded from review by the Migration Refugee Division of the AAT under Parts 5 or 7 of the Migration Act.

[15] Under s 501A and 501BA of the *Migration Act 1958* (Cth).

[16] Section 501(6)(c) of the *Migration Act 1958* (Cth).

[17] Section 501(6(b) of the *Migration Act 1958* (Cth).

[18] Section 501(6)(d)(i) of the *Migration Act 1958* (Cth).

[19] Section 501(6)(d)(v) of the *Migration Act 1958* (Cth).

8. Exclusion of AAT from scrutiny role and distortion of judicial and Tribunal functions

This Bill will impermissibly curtail judicial functions by limiting the courts' ability to engage in usual public judicial balancing exercises to weigh the interests of fairness and justice to the applicant in proportion to any genuine threats to public interests or national security presented by the disclosure of confidential information relevant to the decision.

The Bill provides a limited and exhaustive list of the factors that the Court may consider in determining whether to disclose confidential information, which does not include prejudice to the applicant or the administration of justice. This fettering of the Court's powers creates a significant risk that s 503A will remain invalid under the Constitution despite the Bill's amendments. The ALP Report suggests to amend the 'public interest' test for courts to also consider a right to a fair hearing, issues of procedural fairness and other matters relevant to the administration of justice. However, we do not consider these amendments are sufficient because any exhaustive list of factors that a court can consider involves fettering its discretion, and thereby creates a risk that the legislation remains unconstitutional.

Also, the complete exclusion of the Administrative Appeals Tribunal (**AAT**) from being able to engage with confidential information unless the Minister voluntarily provides for this,[20] is unacceptable given the Tribunal's role in undertaking merits review of an applicant's case. This will in effect neuter the applicant's right to merits review, removing a crucial safety net for ensuring that the correct and preferable decision is arrived at in an individual case. Furthermore, as the AAT is permitted to hear matters in its Security Division relating to intelligence and national security, including the review of security assessments, it is illogical and inconsistent that the AAT is not trusted with confidential information under this Bill.[21]

9. Improper purpose: unfettered Executive control over character-related decision making without valid public interests

We are concerned by the steady creep in overreaching, disproportionate, loosely drafted laws put forward in the name of purported national security or public interests, which seem more directed to reducing accountability of executive decision in the politically sensitive areas of decisions concerning visa cancellation and citizenship stripping, than serving any genuine public interest.

The ALP Report recommends amendments to provide exceptions to the general prohibitions in the Bill for disclosure to oversight and integrity agencies, or in relation to disclosures made in accordance with the Public Interest Disclosure Act and the Freedom of Information Act. However, the primary mechanisms to ensure oversight are through the merits-review process and the judiciary; the suggested amendments would not address the removal of oversight from these mechanisms. Further, such amendments would not address other issues with the Bill, especially in relation to applicants' rights. Also, from our regular experience with requesting information via the Freedom of Information Act, often information is incorrectly identified as relating to national security and sensitive matters and redacted, and there are also very lengthy delays in processing (sometimes over one year). Therefore, any reliance on the Freedom of Information Act to ensure the timely release of confidential information to applicants is misplaced.

Also, the ALP Report proposed an amendment to allow for the independent review of decisions that information be treated as confidential information. We do not consider this amendment addresses the problems with this Bill. Firstly, the introduction of another layer of decision-making creates additional barriers to access to justice for applicants who are often unrepresented to access information about them. Secondly, an extra level of decision-making will demand extra resources from the government to establish and maintain, Thirdly, in light of the time-sensitive nature of visa cancellation/refusal matters (discussed below), any review regarding access to information is likely to take longer than the substantive proceedings on foot. In light of all these considerations and given there is no need for this Bill, this amendment should not be considered as an acceptable solution to rectify this Bill.

[20] Under s 52B(1)(d) of the Bill.
[21] See s 39A(3) of the *Administrative Appeals Tribunal Act*, where it "is the duty of the Director-General of Security to present to the Tribunal all relevant information available to the Director-General".

The system-wide impact of the Bill will be to further weaken scrutiny of, and accountability for, the exercise of executive power relating to visa cancellation and citizenship loss decisions. It will distort and cause dysfunction to our constitutional democracy based on a separation of powers and the rule of law. This Bill takes an authoritarian approach to this area of decision-making and has no place in Australian law.

10. Public interest served by criminal and administrative justice systems operating transparently, not secretively

Especially in relation to character-related decisions based on "ordinary" criminal offending, we note that there is no inherent public interest served by keeping documents relating to the workings of the criminal justice system confidential, in fact quite the contrary, there is a clear public interest in the criminal justice system operating transparently and publicly to ensure continued public confidence in that system. The Lawyer X scandal has highlighted how public interests are jeopardised when the functioning of the criminal justice system departs from public, transparent, ethical operation.

Similar public interests are at stake regarding public confidence in the accountability and oversight of decision-making concerning visa cancellation and citizenship removal. This Bill's intent to shroud both criminal and administrative justice processes in secrecy, is misplaced.

Also, the Bill contains broadly worded criminal offences with harsh criminal penalties for Commonwealth Officers, which seem disproportionate and unjustified in this context, raising obvious concerns for Commonwealth Officers, as well as raising 'red flags' as an unjustified attack upon principles of open government, constitutional democracy and the rule of law in Australia. The Department Submissions allege that these penalties are required to ensure "robust information- and intelligence-sharing relationships with gazetted agencies",[22] however there is no evidence that such information-sharing is not already occurring, as demonstrated by the rapid increase of visa cancellations and refusals discussed above. The ALP Report proposes amendments to ensure disclosure and declaration offences are in line with the Criminal Code. However, as noted above, any criminal sanctions will lead to an over-conservative approach by government officials of not disclosing confidential information in fear of facing criminal penalties. This will result in wide and deep prejudice to applicants' ability to receive and respond to issues relevant to potential loss of their citizenship or visa.

11. Impacts on individual justice interests and barriers faced by applicants

Aside from the public interests at stake, the interests of justice for individuals impacted by visa cancellation, and their need to have access to information relating to their engagement with the criminal justice system to defend themselves, are compelling.

Such information is extremely pertinent to the exercise of power under, or in relation to, the Character Provisions, which often involve the consideration of information supplied by law enforcement or intelligence agencies. This is because these provisions regarding the refusal or cancellation of a visa on character grounds, are most often triggered by criminal charges or convictions or occasionally, adverse national security assessments.

The majority of our clients who face visa refusals and cancellations have had their visa status impacted by past criminal charges and convictions. They require information about these charges and convictions in order to challenge their visa refusals or cancellations. This includes police briefs of evidence and prison records, which, could be considered as "confidential information" by this Bill.

When people seeking asylum or refugees are being considered for visa refusal or cancellation under the Character Provisions by the Department of Home Affairs, there are already significant barriers to them accessing relevant information to put forward their case. For example, our clients require access to their Departmental files, criminal records, medical records and court records. Lengthy delays in Freedom of Information request processing means that people facing visa refusal or cancellation often do not have the required documents to present their case and are denied procedural fairness. Where people have sought review of their visa refusals and cancellations by the Administrative Appeals Tribunal, which is required to provide a decision within a strict 84-day timeframe,[23] frequently people are unable to access the required documents within this period of time.

[22] Department submissions, p. 8.
[23] *Migration Act 1958* (Cth), s 500(6L)(c).

Further, visa holders being assessed under the Character Provisions are always incarcerated, either in the criminal justice system or the immigration detention system. This poses an additional barrier to access to legal representation, as elaborated further below.

Without timely access to this information, our clients are not be able to fully present their cases and challenge any adverse findings against them. Further, often material provided in police briefs and prison or detention records include untested and unverified allegations against alleged perpetrators. In our experience, it is not uncommon for such information to be inaccurate or subjective. Without having access to this material, visa holders would be unable to challenge any unproven allegations or other inaccurate statements regarding their criminality or risk to the community, which may then be relied upon or considered in the decision to cancel their visa. These issues are critical to the Character Provisions and non-disclosure of this information would result in a breach of fair trial standards and fundamental unfairness to applicants.

12. AAT prevented from fulfilling its statutory mandate and review function

The Bill would prevent "confidential information" from being disclosed to the Administrative Appeals Tribunal (**AAT**), except when the Minister voluntarily makes a declaration allowing such disclosure.[24] This is despite the AAT being the body required by law to conduct independent *de novo* merits reviews of visa cancellation and citizenship removal decisions.[25]

Denying the AAT access to "confidential information" will prevent it from fulfilling its statutory mandate to conduct its review because it will be unable have access to, or to take into consideration, all relevant material and will therefore be unable to provide outcomes which are fair, just, economical, informal and quick, in line with its statutory functions.[26] Even if the Minister does allow disclosure of Protected Information to the AAT, the AAT is prohibited from further disclosing that information to any other person,[27] including to the applicant, despite its relevance to the applicant's case and the need for the rules of natural justice to apply.

Subsection 500(6F)(c) provides that the Minister must provide documents that are in the Minister's possession or control; and were relevant to the making of the decision (i.e. the visa refusal/cancellation decision); and contains non-disclosable information. The Bill amends ss500(6F)(c) to note that it is subject to section 503A.

Currently subsection 500(6F)(d) states that the Tribunal may have regard to non-disclosable information for the purpose of reviewing the decision, but must not disclose that non-disclosable information to the person making the application. While the extent of the overlap between "non-disclosable information" and "confidential information" is unclear, it is certain that some overlap will exist. It is arbitrary and illogical that the Tribunal is trusted by the Government not to divulge "non-disclosable information", yet is not trusted with access to "confidential information".

Often the materials provided by the Minister under subsection 500(6F)(c) (referred to as the G-documents) are the only documents that an applicant can access regarding their visa refusal or cancellation matter within the 84-day timeframe before the AAT must make a decision. As the information provided in these documents is curtailed by s503A, applicants are, and will continue to be, further disadvantaged in challenging their visa refusals and cancellations.

We are concerned that the Bill does not provide for any mechanism for the Administrative Appeals Tribunal to access confidential information relevant to its review unless it is voluntarily provided by the Minister under a declaration. This makes the provisions regarding the Court's discretion to access such information redundant if on remittal, the primary decision-maker still does not have access to this same information to make its assessment.

Further, this Bill will also prevent the AAT from properly applying the relevant legal tests it is required to by law. In particular, Direction 90 provides guidance regarding the implementation of the Character Provisions. Information provided by law enforcement or intelligence agencies are directly relevant to three of the

[24] Under s52B(1) of the Bill.
[25] Under section 500 of the *Migration Act 1958* (Cth) and section 52 of the *Australian Citizenship Act 2007* (Cth).
[26] See s2A of the *Administrative Appeals Tribunal Act 1975* (Cth).
[27] Under s52B(3) of the Bill.

considerations in Direction 90 (Protection of the Australian community from criminal or other serious conduct; Expectations of the Australian Community; and Impact on victims). Therefore, any curtailment of access to information provided by law enforcement or intelligence agencies is very likely to have an adverse impact on the final decision regarding a visa refusal or cancellation.

13. Applicants not notified if "confidential information" exists or able to secure court orders for disclosure of information within relevant timeframes

This Bill places an impossible burden on applicants seeking review by the Administrative Appeals Tribunal (**AAT**) of a non-revocation of cancellation decision. They are placed in the invidious position of not knowing if confidential information exists or not, or how it may impact their case, and in order to find out, need to seek an order of a Federal Court (being the Federal Circuit Court, the Federal Court of the High Court). However it is very unlikely that a court would hear an application without any evidence that confidential information exists, leaving the applicant in an impossible bind.

Even this limited safeguard of judicial review concerning confidential information will have little practical effect because s 501 character review applications made by Ministerial delegates before the AAT must be decided within a period of 84 days, or, outrageously, the AAT is taken to have made a decision against the applicant.[28] This Bill does not contain any provisions to "stop the clock" running in relation to the AAT matter, in order for an applicant to be able to pursue a court application regarding the existence of confidential information. Nor does it include any requirement that an applicant be put on notice that confidential information may exist which is relevant to their case. This further undermines the fairness of the merits review process and mutes the effectiveness of the legal safeguard of a right to apply to a court for disclosure of the information.

14. Applicants denied access to an effective defence before the AAT and unable to secure court orders for release of Protected Information without legal representation

A further practical barrier facing many applicants is their lack of access to legal representation, which in the context of the procedures used in the General Division of the AAT, is in itself a breach of procedural fairness and (fair trial standards) to the applicant. Without specialised legal representation, most applicants are unable to meaningfully engage in the AAT review of their case. This is especially because the process is very fast, giving them limited time to raise money or make arrangements for a lawyer but also due to the complexity of the law and the significant demands that this adversarial process places on unrepresented applicants who must face Government lawyers and cross examination, under procedures not unlike those in a criminal trial, without any assistance.

We note that while s 69 of the Administrative Appeals Tribunal Act provides a process whereby an unrepresented applicant before the AAT, who is in financial hardship can apply to the Attorney General's Office for legal or financial assistance in the proceeding, however we are not aware of a single instance where the Attorney General has made such provision, despite the enormous unmet need for legal representation to prevent unfairness in this fraught and complex area of decision making.

Moreover, applicants impacted by this Bill, who are in detention and generally impecunious, will have no means to seek access to the limited judicial review of non-disclosure of confidential information this Bill would afford. No legal aid is available for this kind of application and pro bono services are extremely stretched. The right to seek judicial review of non-disclosure of confidential information will be, for most applicants, a right in name only, as they will have no practical means to exercise this legal right. This means that in most cases there will be no judicial scrutiny of these wide powers to withhold confidential information from applicants and the AAT.

Limited Court scrutiny insufficient to protect procedural fairness rights of applicants

In those limited number of cases where applicants are able to seek judicial review of the non-disclosure of confidential information, we note with concern the limitations placed upon the courts by this Bill in their conduct of this review. While Federal Courts will be able to require the Minister to produce the confidential information to the Court, and will be permitted to see the confidential information, they will only be able hear submissions regarding the risks presented by disclosing the information from those who already have access to the information (i.e. only one side, being the Department or the gazetted agency/source which provided the

[28] Section s 500(6L)(c) of the *Migration Act 1958* (Cth).

information to the Department). The Courts will be prevented from hearing submissions from the applicant, the applicant's representative or from any other party, such as the Australian Human Rights Commission acting under its intervention powers[29] or appointment as *amicus curiae*,[30] regarding the handling of the confidential information.

Should the Court decide that the confidential information cannot be disclosed to the applicant or their legal representative, then they will still have no remedy and will remain prevented from viewing or responding to such information, in breach of natural justice, procedural fairness and fair trial standards for a person to know the case levelled against them and a meaningful opportunity to respond. The applicant and their representative will also be prevented from accessing records of the Court proceedings regarding the decision not to disclose the confidential information.

Also, the Court only has discretion to order disclosure in relation to substantive proceedings regarding the exercise of citizenship powers and s 501 character provisions. The ALP Report has recommended that the Bill is amended to allow the Court discretion to disclose in relation to *any* proceedings. However, this amendment does not address the issues in the Bill. Given applicants cannot provide submissions regarding disclosure to the Courts and the Court's discretion to disclose is fettered, there is a very low possibility that any confidential information will be disclosed under the Bill. Also, given the significant access to justice barriers facing applicants, expanding the Court's discretion to *any* proceedings is unlikely to make any practical difference to applicants and accountability for the Executive.

The ALP Report's suggested amendments includes that the Courts should have the flexibility to permit partial disclosure of confidential information to applicants and/or their lawyers so that they understand and can respond to the gist of the information. However, such amendments do not adequately address the inherent issues with this Bill. Partial disclosure to understand the "gist of the information" will not enable applicants to adequately respond to allegations; given the dire consequences of visa and citizenship cancellation/refusal, applicants should have detailed particulars of the information to be able to respond in accordance with procedural fairness. Also, the ALP Report's suggestion of a lawyer or special advocate to have access to the confidential information to be able to make submissions does not address the problems with this Bill. Without the ability to discuss the confidential information with applicants to obtain their instructions, no representative or special advocate will be able to effectively respond to the confidential information. As outlined above, applicants have a right to know the case being put against them, especially when the consequences are so grave.

In addition, the ALP Report suggests that government officers should not be prevented from disclosing confidential information to other courts where such courts order disclosure and have appropriate procedures for managing disclosure-related risks. Again, this amendment does not deal with the issues in the Bill which make the reality of a Court being able to order disclosure of confidential information an unlikely outcome.

The cumulative effect of these provisions will prevent the Court from providing transparent justice, and will result in Courts subjecting applicants to impermissible denial of their rights to natural justice and procedural fairness, contrary to aspects inherent in judicial function. For this reason the scope of this Bill to empower the executive at the expense of judicial function, as proposed in these provisions, may well also prove to still be unconstitutional.

15. Security-related decision making must still meet minimum requirements

In relation to character decisions based on adverse ASIO assessments or other national security considerations, we remind the Committee that any restrictions on the right of a person to know what evidence is levelled against them, and to have a meaningful opportunity to respond to that evidence through an effective legal defence, must still ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question. Such restrictions must also be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing. This Bill provides none of these assurances.

16. Excessive Ministerial Powers already make character decisions inherently unfair

[29] Under s11(1)(o) and s 1(j) of the *Australian Human Rights Commission Act 1986* (Cth).
[30] Under s46PV of the *Australian Human Rights Commission Act 1986* (Cth).

On top of all these barriers are existing legal barriers in law, which invest excessive powers in the Minister, including powers to cancel visas without natural justice or merits review, and powers for the Minister to override decisions of the AAT,[31] with limited judicial scrutiny of those decisions. In this opaque process, the confidential information provisions of this Bill will be the final straw to, in effect, deny applicants access to genuine merits review of decisions to cancel their visas or remove their citizenship.

17. Conclusion

This Bill should not be passed and we recommend that it be rejected in its entirety.

[31] Under s 501A and 501BA of the *Migration Act 1958* (Cth).