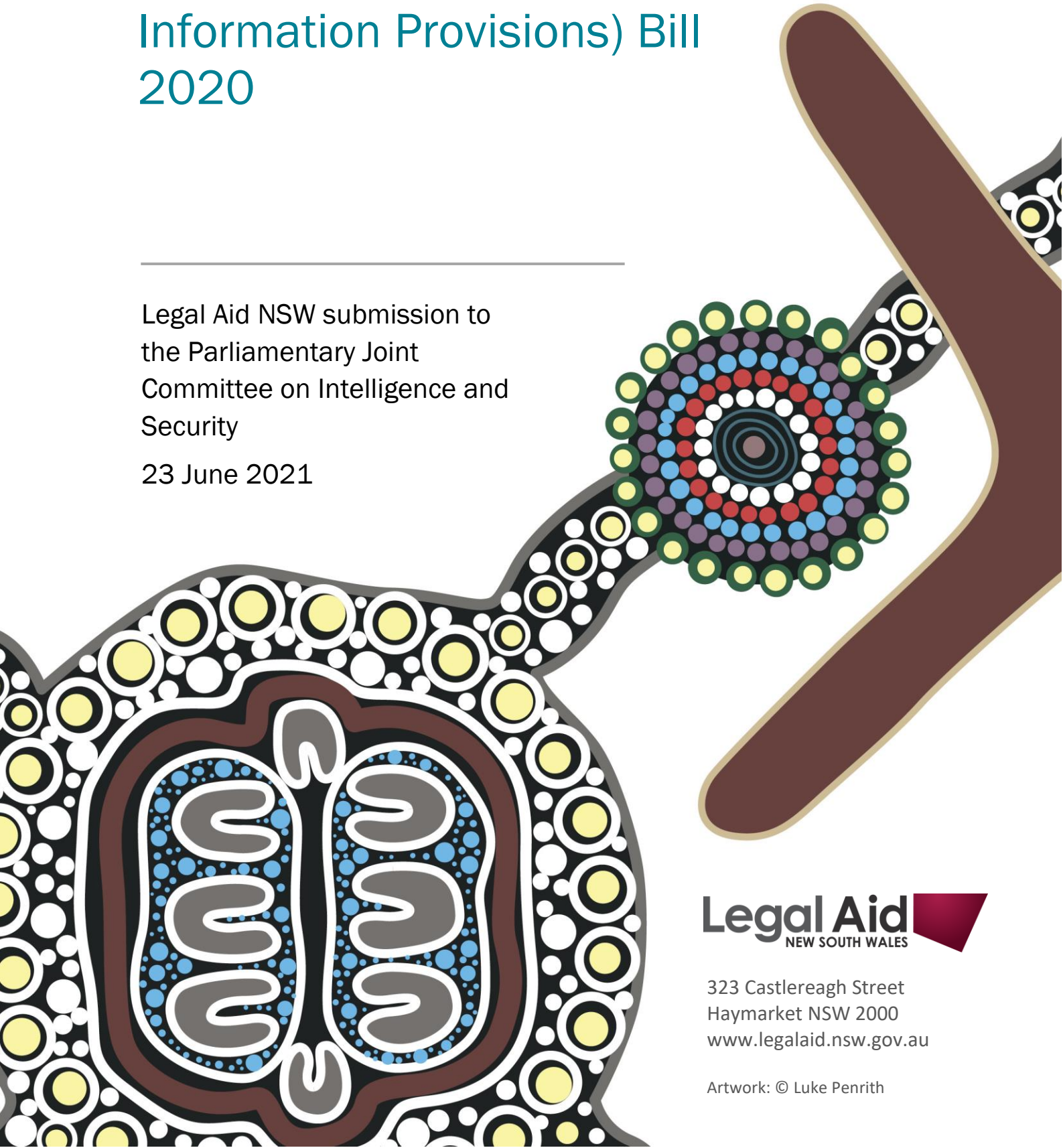
Inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

Legal Aid NSW submission to the Parliamentary Joint Committee on Intelligence and Security

23 June 2021



Legal Aid NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Legal Aid NSW Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court. The Commonwealth Crimes Unit is a specialist Unit within the Criminal Law Division which represents people charged with Commonwealth offences, including terrorism related offences including those convicted of terrorism related offences who are refused parole or are about to have their parole revoked.

Legal Aid NSW's High Risk Offender Unit was established in 2019 as a separate, specialist team within the Criminal Law Division. The Unit represents offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Crimes (High Risk Offenders) Act 2006* (NSW) and *Terrorism (High Risk Offenders) Act 2017* (NSW).

Should you require any further information, please contact:

Bill Gerogiannis

Senior Solicitor, Government Law

(02) 9219 5903
bill.gerogiannis@legalaid.nsw.gov.au

2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) to its review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**Bill**). We have previously made a submission to the Senate Legal and Constitutional Committee's Inquiry into the Bill and attach the transcript of our evidence to that Inquiry, for this Committee's consideration. Evidence given on behalf of Legal Aid NSW is at pages 31-37 of the transcript.

Legal Aid NSW provides extensive advice and casework services to people affected by visa cancellation or refusal decisions based on character and, to a lesser extent, citizenship cases. Lawyers in Legal Aid NSW's Government Law team frequently give advice to unrepresented applicants about these types of cases at all levels of the decision making process and our lawyers also conduct litigation in the Administrative Appeals Tribunal and Federal Court pursuant to a grant of legal aid.

We oppose the Bill for the reasons detailed in this submission. In general, we agree with the observations and concerns raised by Parliamentary Joint Committee on Human Rights (**Parliamentary Human Rights Committee**) regarding the Bill, and the limits it would impose on the right to a fair hearing and the prohibition against expulsion of aliens without due process.[1] These limits have not been justified.

We also note the Parliamentary Human Rights Committee's initial view that the Bill not proceed until questions regarding the proportionality of the Bill, and why the measures it would introduce are proportionate and appropriate, have been answered, and the Parliamentary Human Rights Committee has reached a final position about the Bill's impact on human rights.

The Parliamentary Human Rights Committee's concerns regarding the proportionality of the Bill have not been addressed by the additional information provided by the Minister. The Committee's updated report notes that:

> The safeguards identified by the minister appear to be inadequate and the court would have minimal flexibility to treat different cases differently. There seem to be less rights restrictive ways of achieving the stated objective and access to review is unlikely to be effective in practice. The measure, therefore, does not appear to be proportionate and there is a significant risk that it impermissibly limits the right to a fair hearing and the prohibition against expulsion of aliens without due process.[2]

[1] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report*, (Report 1 of 2021, February 2021), 7-19.

[2] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report*, (Report 3 of 2021, 2 February 2021), 59.

We share these concerns.

The Bill seeks to change the non-disclosure provisions[3] for confidential information provided by intelligence and law enforcement agencies which are intended for use by an officer in considering whether to:

- refuse or cancel a visa on character grounds under the *Migration Act 1958 (*Cth) (the **Migration Act**); or
- revoke or set aside such decisions; or
- refuse, cancel, revoke or cease citizenship under the *Australian Citizenship Act 2007* (Cth) (the **Citizenship Act**).

The Bill also makes consequential amendments to the *Freedom of Information Act 1982* (Cth) (the **Freedom of Information Act**) and the *Inspector of Transport Security Act 2006* (Cth).

If implemented, the provisions of the Bill will adversely affect the ability of a person affected by an unfavourable migration or citizenship decision at every stage of the decision-making process, including the primary, merits review and judicial review stages, by limiting the applicant's ability to obtain and understand the underlying reasons for an adverse decision in which confidential or protected information is relied upon.

The Minister currently has access to both common law public interest immunity grounds for not disclosing confidential information provided by intelligence and law enforcement agencies, as well as existing statutory secrecy provisions. There is no compelling case to suggest that the legitimate purpose of protecting the public interest by non-disclosure of certain information is not adequately addressed by the current arrangements. In our view, the framework proposed by the Bill introduces disproportionately harsh provisions which adversely affect accountable decision-making in two areas of fundamental rights of individuals: residence and citizenship.

Recommendations

Recommendation 1

That the Bill not proceed, for the reasons outlined in our submission.

[3] A detailed description of the protected information framework proposed by the Bill will not be covered in this submission. The Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, provides further information on this.

3. Comments on the Bill

Legal Aid NSW considers that the Bill is a concerning example of executive overreach and is a disproportionate response to the High Court decision in *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33.

We are concerned that the Bill gives undue weight to the public interest in protecting the disclosure of sensitive information and overlooks the fact that the proper and fair administration of justice is also of public interest. It also does not take into account the perspective of a person adversely affected by a decision, their interest in knowing the reasons for the decision and having an opportunity to respond, and the impact the decision will have on them and their family.

We are particularly concerned that the Bill provides that the rules of natural justice would not apply in consideration or exercise of the power by the Minister to disclose confidential information to a specified Minister, Commonwealth officer, court or tribunal.[4]

We agree with Gageler J's observation in *Assistant Commissioner Condon v Pompano Pty Ltd*[5] that:

> Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions and to generate justified feelings of resentment in those to whom fairness is denied. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.

3.1 The Bill is unnecessary

The powers sought by this Bill are not necessary. It has long been accepted that the Executive can seek to refuse production of documents by claiming public interest

[4] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclauses 52B(9) and 50BA(9).

[5] *Assistant Commissioner Condon v Pompano Pty Ltd* 252 CLR 38, [86].

immunity even though the documents are relevant and otherwise admissible, if it would be injurious to the public interest to disclose them.[6]

Typically, a claim for public interest immunity is determined by balancing the identified public interest in withholding the information against the competing public interest in the administration of justice.

The Government has indicated that the Bill is needed to *"protect the identities of criminal informants and undercover police which, if disclosed, may otherwise disrupt active police or intelligence agency investigations*." [7]

In that context in particular, the Bill is simply not necessary. The Commonwealth already has an extensive suite of statutory and common law powers to protect confidential information on the basis of public interest immunity. These clearly encompass sensitive material in relation to the identity of informants.

Section 130 of the *Evidence Act 1995* (Cth) relevantly provides:

Exclusion of evidence of matters of state

> *(1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*
> *(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).*
>
> *(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.*

Most relevant to the present inquiry is subsection (4) which provides that:

Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:

(a) prejudice the security, defence or international relations of Australia; or

[6] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs CJ).

[7] Second reading Speech to the introduction of the Bill by the Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 10 December 2020, 11266.

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an offence; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(our emphasis)

In *HT v R* [2019] HCA 40 the High Court emphasised the wide powers available to a court to protect confidential information while still affording procedural fairness including closed court orders, suppression and non-publication orders, orders limiting inspection to a party's lawyers and the appointment of an independent solicitor to report directly to the court.[8]

Statutory secrecy provisions in the Migration Act and Citizenship Act also already contain detailed statutory secrecy provisions to prevent the disclosure of certain information to a person adversely affected.[9]

Finally, the Commonwealth also has available to it the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the **NSI Act**) which provides for the disclosure of national security information in federal criminal proceedings and civil proceedings conducted in a Commonwealth, State or Territory court.

These provisions limit, to varying degrees, the right of a person adversely affected by evidence to procedural fairness, in particular the right to be aware of and respond to the adverse information.[10]

[8] HT v The Queen [2019] HCA 40, [43]-[46].

[9] For example, *Migration Act 1958 (*Cth), subsections 5(1), 501G(1)(e) and section 503A., *Australian Citizenship Act 2007* (Cth), subsections 36F(6), 36H(5).

[10] Note also that the *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14 which provides for a right to a fair and public hearing and a recognises a right to natural justice

Recommendation 1

That the Bill not proceed, for the reasons outlined in our submission.

3.2 Unbalanced approach to protecting confidential information

The Bill introduces a protected information framework, in similar terms, into the *Australian Citizenship Act 2007* (Cth)[11] and the *Migration Act 1958* (Cth).[12]

Under the proposed framework, an "authorised Commonwealth officer" to whom confidential information is communicated is prohibited from disclosing that information to another person, except in very limited circumstances, or from being required to produce or give the information to a court, tribunal, parliament, or parliamentary committee.

However, the confidential information can be disclosed if either:

- The Minister declares it can be disclosed to a specified minister, Commonwealth officer, court or tribunal[13]; or
- The High Court, Federal Court of Australia or Federal Circuit Court orders that confidential information be produced to the court if the information was supplied by law enforcement or intelligence agencies and the information is for the purpose of the substantive proceedings[14]

If the court makes such an order, the Bill allows only parties who are lawfully aware of the content of the information to make submissions on how the court should use that information and the impact of disclosing the information on the public interest.

The practical effect of these provisions[15] is that the party adversely affected by the information and their legal representative will be effectively excluded from making submissions to the court. This is because, in most cases, if they have obtained the relevant confidential information they will not have done so lawfully because of the prohibition on disclosure, and the related offences which apply to authorised Commonwealth officers under the Bill.

[11] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1, items 1-5,

[12] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1, items 5-11.

[13] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, clauses 52B and 503B.

[14] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclauses 52C(1) & 503C(1).

[15] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, clauses 52C and 503C.

Such an approach fails to properly balance the competing interests which the court must weigh to determine whether it is in the public interest not to disclose the confidential information or whether to disclose and, presumably, on what conditions.

Legal Aid NSW is particularly concerned about the following aspects of the proposed list of factors that a court must consider in deciding whether or not to disclose confidential information[16]:

- the list purports to be exhaustive, thereby preventing the court from considering other important matters which may arise in the particular circumstances of a case

- the list does not include the public interest in ensuring, as far as possible, the open administration of justice as a factor for the court to consider, and

- it includes a provision for 'any other matters' to be specified in regulation. It is undesirable for the government to prescribe matters for the court to consider by way of delegated legislation which, subject to disallowable motion, is not subject to Parliamentary scrutiny. Any expansion of the prescribed matters should be subject to Parliamentary oversight.

As noted above, in most cases the court will not be able to hear submissions from the adversely affected party and nor, it appears, will the impact of non-disclosure on that party be a matter for the court to consider. Legal Aid NSW strongly opposes this approach. It is our view that a fairly stated case in which both sides have access to relevant material, subject to necessary and proportionate legislative responses to protect national security information, benefits not only the parties, but the judicial or administrative decision-maker.

In many cases the affected party will require access to the confidential information to see what the allegation is and to assist them to provide evidence to the contrary or some ameliorating material. We consider that the court should be able to consider disclosing information to an affected party to the extent that it is possible to protect sensitive information, with appropriate removal or redaction of certain sensitive information such as who provided it or how it was obtained. This would assist the court in its task of proper decision making and provide some degree of procedural fairness.

The statutory context is also an important consideration when assessing the appropriateness of the measures proposed by the Bill. The decisions covered by the Bill involve fundamental rights to reside in Australia or to obtain or maintain citizenship. There are often significant related issues, such as the risk of being

[16] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclauses 52C(5) and 503C(5).

removed to a country where the person faces a real chance of persecution or significant harm, and the risk of indefinite detention. In relation to citizenship, citizenship loss provisions can apply to people who are Australian by birth, who have Australian parents, and who have never lived outside Australia. The decisions affected by the Bill also have the potential to affect the rights of other people who are not the subject of any adverse concerns, such as the person's children and partners.

The Statement of Compatibility with Human Rights accompanying the Explanatory memorandum states[17]:

> The Minister retains the ability to claim public interest immunity, however, the threshold for public interest immunity **does not adequately protect the type of confidential information used in character-related decisions**. This means there is a real risk of the Administrative Appeals Tribunal or the Courts divulging the confidential information – and its source – to other parties, including the non-citizen [emphasis added].

In our experience, it is difficult reconcile this statement with what happens in practice. No examples are provided of the inadequacy of the current arrangements. Neither is it demonstrated that courts' current oversight of public interest immunity claims or claims for the application of the current secrecy provisions by the Commonwealth in the areas affected by the Bill fail to protect the legitimate public interest in non-disclosure of certain confidential information: indeed, courts have routinely upheld claims for non-disclosure on both bases while allowing the adversely affected party to make relevant submissions.[18]

In *Plaintiff M46 of 2013*, Tracey J said that[19]:

> What these authorities [referred to earlier in the judgment] amply demonstrate is that, where public interest immunity claims are made in respect of information relating to national security and the claims are supported by proper material, the public interest in non-disclosure will normally outweigh any competing public interest.

While many of the decided court cases relate to adverse ASIO assessments, this reflects the approach of the courts to public interest immunity claims by the Commonwealth.

In our experience, the Department relies on section 503A Migration Act which provides that if an agency, such as ASIO, provides information to an authorised migration officer for the purposes of s 501 Migration Act and does so "*on condition that it be treated as confidential information*", that information may not be (subject to

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[17] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 'Statement of Compatibility with Human Rights', 48.

[18] See for example *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* [2014] FCA 90, *Sagar v O'Sullivan* (2011) 193 FCR 311; [2011] FCA 182 and *BSX15 v Minister for Immigration and Border Protection* [2016] FCA 1432).

[19] *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* [2014] FCA 90, 30.

some narrow exceptions) divulged or communicated to third parties. That provision is then also used as a basis to refuse access to relevant documents under the Freedom of Information Act. In our experience the Department already resorts too readily to exclusions without proper consideration of the nature of the contents.[20]

3.3 Changes to the operation of the Administrative Appeals Tribunal

There are two areas in which the Bill seeks to change the framework of non-disclosure of information for proceedings in the Administrative Appeals Tribunal (**AAT**):

1. Reviewable migration decisions, including cancellation and refusal decisions[21] and non-revocation decisions.[22]

2. Reviewable citizenship decisions.[23]

3.3.1 Relevant Migration Act decisions

Under the current statutory arrangements, subsection 500(6F)(c) Migration Act requires the Minister to lodge with the AAT a copy of every document held by them that is relevant to the making of the reviewable decision, and which contains non-disclosable information.[24]

However, the Migration Act also provides that while the AAT may have regard to that non-disclosable information for the purpose of reviewing the decision, it must not disclose it to the person making the application for review.[25]

Section 503A Migration Act then operates to limit the obligation in subsection 500(6F)(c) to disclose documents to the AAT. The section provides that if an agency, such as ASIO, provides information to an authorised migration officer for the purposes of section 501 of the Migration Act and does so "on condition that it be treated as confidential information", that information may not be (subject to some narrow exceptions) divulged or communicated to third parties, including to a court, tribunal, or parliament. The current non-disclosure provisions in relation to "protected information" in section 503A are not dissimilar to clause 503A of the Bill.

[20] For example, see case study 1 on page 16.

[21] *Migration Act 1958* (Cth), section 501.

[22] *Migration Act 1958* (Cth), subsection 501CA(4).

[23] We have not addressed this aspect of the Bill in this submission.

[24] As defined in *Migration Act 1958* (Cth), section 5.

[25] *Migration Act 1958* (Cth), subsection 500(6F)(d).

The combined effect of changes proposed by Bill would further limit the provision of documents to the AAT which are relevant to the decision under review by potentially capturing what is now defined as non-disclosable information.[26]

It is our submission that this further limitation on the AAT's power to have access to what is now called non-disclosable information is an unjustified limitation on the ability of the AAT to conduct a proper merits review of the reviewable decision.

Merits review is a crucial right for an applicant facing visa cancellation or refusal on character grounds. The rights of the visa holder are substantially affected as a cancellation/non-revocation decision carries a lifetime bar on re-entry to Australia and as noted above, may impact on other fundamental rights (e.g. not to be returned to a country where they face persecution or significant harm). A tribunal may be lower in the judicial hierarchy, but for an applicant it represents the last time that the merits of their case can be argued. If they do not succeed at the tribunal then they are limited to arguing jurisdictional error in the superior courts.

For this reason it is important that the AAT maintain its ability have access to as many of the relevant documents to inform its decision on the merits of the case, even though the applicant may be denied the opportunity to see the non-disclosable documents by subsection 500(6F)(d) Migration Act.

As with the comments we have raised in relation to the protection framework in the courts, there is no indication either in the Explanatory Memorandum or the Human Rights Scrutiny Report for the Bill that indicates the current regime is not working or has led to the inappropriate public disclosure of confidential information by the AAT that this Bill purports to protect. It has been held by the courts that section 500(6F) of the Migration Act does not operate in the face of s 503A to compel the disclosure to the AAT of the 'protected' information.[27]

While the current regime in relation to non-disclosable information still raises substantial procedural fairness issues for an applicant, the proposed framework leaves open the possibility that the AAT will be further limited in accessing information which formed part of the basis for the adverse decision and to which it has had access until now. It is difficult to discern a good public policy reason for further limiting the AAT's ability to conduct merits review in which it and the person adversely affected by the decision can be confident that the correct and preferable decision has been reached.

[26] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1, items 8 & 9.

[27] *Peters v Administrative Appeals Tribunal* [2005] FCAFC 159.

3.3.2 Freedom of Information Act

The current prohibition on disclosure in section 503A Migration Act is also used as a basis to refuse access to relevant documents under the Freedom of Information Act. It is our experience that the Department is resorting to using exclusions too readily without proper consideration of the nature of the contents.

The Bill extends the current prohibition under section 38(3) Freedom of Information Act to information covered by the proposed section 52A of the Citizenship Act. Similar concerns arise regarding the potential improper use of the non-disclosure provisions in this context.

This case study demonstrates that these powers are relied upon unnecessarily, particularly where it pertains to someone's criminal history (which does not necessarily have any national security concerns at all). The proposed protected information regime may make challenging inappropriate FOI refusals more difficult.

Case Study: 1

We acted for a client in a judicial review matter in which the validity of notification of a decision to our client was the issue. Our client had missed the 28 days period to request revocation of a cancellation decision. We sought a copy of relevant documents under FOI. The Department refused release of the documents partially on the basis of section 503A Migration Act.

The material held by the Department consisted of Australian Federal Police criminal histories and sentencing remarks that had originally been provided to our client. Our client's sentence was delivered in open court and the judgment in relation to his sentence had been published and available publicly.

We sought internal review and most of the material on the file was released.

3.4 The potential impact of the Bill on criminal and related proceedings

Legal Aid NSW's Commonwealth Crimes Unit provides advice and representation in respect of individuals charged with Commonwealth offences, including those convicted of terrorism related offences who are refused parole or are about to have their parole revoked. The High Risk Offender Unit represents individuals subject to applications for control orders under Division 105A of the *Criminal Code 1995* (Cth).

The Unit also provides advice, assistance and representation to offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Terrorism (High Risk Offenders) Act 2017* (NSW) (**THRO Act**).

Under these criminal and quasi-criminal regimes, information that would also meet the proposed definition of "protected information" under the Bill would be dealt with under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), public interest immunity and/or specific statutory provisions.

In particular:

- In control order proceedings and Continuing Detention Order proceedings under Divisions 104 and 105A, *Criminal Code Act* (Cth) respectively, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) provides the court can make orders to withhold sensitive information from the controlee or offender (and their legal representative) and to exclude them from the proceeding.

- In matters under the THRO Act, the NSW Attorney General or a prescribed terrorism intelligence authority (currently limited to NSW state agencies such as the police and Correctives NSW) can apply to the Supreme Court to request that information be dealt with as "terrorism intelligence". The Supreme Court must take steps to maintain the confidentiality of terrorism intelligence, including hearing evidence about the intelligence in private or restricting access to the terrorism intelligence. The Supreme Court must provide either the offender or the offender's legal representative, or both, access to, or a copy of, the terrorism intelligence.

In its recent decision upholding the constitutional validity of Continuing Detention Orders under section 105A.7 of the *Criminal Code Act 1995* (Cth). the majority judgement of the High Court emphasised the statutory safeguards attached to that scheme, as elements of the ordinary incidents of the exercise of judicial power:[28]

> The Minister is required to ensure that reasonable inquiries are made to ascertain any facts that would reasonably be regarded as supporting a finding that the order should not be made. Subject to a qualification as to information which the Minister is likely to seek to prevent or control the disclosure of, whether under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) or otherwise, **the application must include a statement of any such facts** [emphasis added].

[28] *Minister for Home Affairs v Benbrika* [2021] HCA 4, 12.

If enacted, the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (**HRTO Bill**) will extend the Commonwealth post-conviction order scheme to include extended supervision orders. Such applications, as with Commonwealth Continuing Detention Orders, will be heard in State Supreme Courts. The HRTO Bill includes provisions preventing or limiting disclosure of national security information and public interest immunity. The HRTO Bill further provides for a new regime pertaining to 'terrorism material'. The Explanatory Memorandum to the HRTO Bill highlights:[29]

> Existing judicial safeguards around the use of PII [public interest immunity] and the NSI Act will apply, which will ensure that offenders always know the case against them and will be able to contest claims for PII [public interest immunity] and orders sought under the NSI Act in accordance with existing practice. Courts will retain the power to determine these orders, and may exercise their inherent jurisdiction to stay proceedings entirely if satisfied that withholding information would involve unacceptable injustice or unfairness.

3.4.1 Impact of the Bill on the above regimes

Proposed new section 52A of the Citizenship Act will apply to information that is communicated in confidence to an authorised Commonwealth officer and is relevant to the exercise of certain prescribed powers under the Citizenship Act. The new protected information framework applies to such information, with broad prohibitions on production or disclosure of such information to any court, tribunal, individuals etc, with the sanction of a criminal offence where the information is in fact disclosed or produced.[30] The prohibition has effect despite anything in any other state of federal laws.[31] There are limited exceptions to allow disclosure or production of protected information. These exceptions do not extend to State courts hearing Commonwealth criminal proceedings or dealing with post sentence order applications.

The Explanatory Memorandum to the Bill provides that:[32]

> The Bill amends the Migration Act to protect disclosure of confidential information provided by gazetted intelligence and law enforcement agencies where the information **is used for decisions** made to refuse or cancel a visa on character grounds, or revoke or set aside such decisions (Protected Information).

[29] Explanatory Memorandum, Counter Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, 25.

[30] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclause 52A(3)

[31] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclause 52A(7).

[32] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 42.

However, the protected information framework introduced by the Bill is not limited, on its face, to information **used for** decisions to refuse or cancel a visa on character grounds. Instead, it applies more broadly to information **relevant to** decisions to refuse or cancel a visa on character grounds.

Legal Aid NSW is concerned that without clear and express limitation, the proposed new protected information framework may extend to prevent the disclosure or production of evidence in criminal and related proceedings for Commonwealth offences and in respect of high risk terrorist offender applications, being evidence that may also be relevant to decisions to refuse or cancel a visa on character grounds (but are not exclusively relevant to such proceedings).

An authorised Commonwealth officer who has received confidential information that is also relevant, or potentially relevant, to criminal proceedings may be prevented from producing the information in response to a subpoena because of the combined effect of the offence provision in clause 52A(6) of the Bill and the wide application of clause 52A in 52A(7). Facing criminal sanction, a cautious Commonwealth officer may well be justified in refusing to produce or disclose relevant information in criminal and quasi-criminal proceedings. Only the High Court, Federal Court and the Federal Circuit Court can, for the purpose of "substantive proceedings" (being proceedings in relation to decisions to refuse or cancel a visa on character grounds) order production or disclosure of protected information. State Supreme and other courts have no such power.

To avoid doubt, we suggest that if the Bill is progressed notwithstanding our fundamental concerns as to its necessity and proportionality, it should be amended to explicitly limit the protected information framework to substantive proceedings under the Citizenship Act or the Migration Act. This could be achieved, for example, if proposed section 52A(1)(a) were to read "is communicated to an authorised Commonwealth officer by a gazetted agency on condition that it be treated as confidential information, **in relation to a determination** under [relevant provisions of either the Citizenship Act or the Migration Act]."

COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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

TUESDAY, 2 MARCH 2021

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Tuesday, 2 March 2021

Members in attendance: Senators Kim Carr, Henderson, Scarr [by audio link].

Terms of Reference for the Inquiry:

To inquire into and report on:

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

WITNESSES

CALDWELL, Ms Caitlin, Member, Visa Cancellations Working Group [via video link]

KEENE-McCANN, Ms Jennifer, Member, Visa Cancellations Working Group [via video link]

Committee met at 10:03

CHAIR (Senator Henderson): I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. The committee's proceedings today will follow the program as circulated. These are public proceedings being broadcast live via the web and in Parliament House.

I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in confidence, described as being in camera. If you are a witness today and intend to request to give evidence in camera, please bring this to the attention of the secretariat as soon as possible.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

With the formalities over, I welcome everyone here today. We now move to our first witnesses appearing before us. Do you have any comments to make on the capacity in which you appear?

Ms Caldwell: I'm a migration agent.

CHAIR: Do you have an opening statement?

Ms Keene-McCann: We do. We would like to thank the committee for inviting the Visa Cancellations Working Group both to provide a submission and to be here today. We acknowledge we are speaking from Aboriginal land—I am calling in from Wurundjeri land—and we pay our respects to elders past, present and emerging, and to any First Nations people who may be joining in today.

For reference, the Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellation and migration more generally. The working group is comprised of individuals from private law firms, not-for-profit organisations, community legal centres and tertiary institutions. Some of our members will be providing evidence later today. We have previously been invited to give evidence to Senate committee inquiries, and we're grateful for this opportunity.

The Visa Cancellations Working Group strongly recommends that this bill be rejected. In sum, this is because of four primary points. Firstly, the bill's definition of what constitutes protected information lacks sufficient clarity and provides undue and excessive discretion to the Minister for Home Affairs and the executive. Secondly, the bill precludes applicants and, indeed, Australian citizens, as well as their legal representatives, from reviewing adverse information, thereby denying natural justice in their matter. Thirdly, the potential impact of the bill is disproportionate to its aims, including depriving individuals of their rights under Australia's international obligations, while lacking adequate evidence to indicate the bill's necessity. Finally, the bill adds to the complexity of a system that is already rife with delay and opacity. This is particularly detrimental to those who are unrepresented. In short, this bill raises concerns for rule-of-law principles such as procedural fairness, access to justice and adherence to international law.

While we would be happy to discuss each of these points, it is important to also impress upon the committee the devastating effects of visa cancellations. The consequences of visa cancellation and citizenship revocation, which this bill makes more likely by denying an individual the ability to be aware of and challenge adverse information, are grave. Those who are owed protection may be returned to countries in which they face death or serious harm, in direct contravention of Australia's obligations under the refugee convention. Those who cannot be returned but are not given a visa on the basis of information they may not know exists face indefinite detention. Moreover, such decisions irreparably affect not only the life of the individual in question but also the lives of their friends, colleagues, partners or spouses, and children, who themselves are all a part of the Australian community.

Regarding character cancellations, which this bill's explanatory memorandum appears to address, practitioners have already seen unfounded and highly prejudicial communications between law enforcement authorities, media and the department—even about people who are still teenagers. This bill permits the minister to label, control and

use adverse information against an individual while removing their ability to know and respond to the case against them unless and until the minister provides that information to a court. Our current system regarding cancellations is inefficient, cost prohibitive and difficult to navigate. Because of this, as one member of the working group eloquently said: 'Our clients are already facing department decisions with both hands tied behind their back. With this bill it's as if we're amputating their hands.' For these reasons, the working group strongly recommends this bill be rejected. We welcome the opportunity for the committee's questions.

CHAIR: Thank you for your opening statement. I have a few questions before I—

Senator KIM CARR: Excuse me. I seek to table the documents from the Commonwealth of Australia government gazette, which is notices under section 503A of the Migration Act 1958, which is the list of organisations and agencies that the Commonwealth's relying upon to provide advice on these matters, these characters matters, which are referred to in this bill. And, further, the list of countries under schedule 2, list of foreign law enforcement countries or parts of foreign law enforcement countries that the department relies upon to provide advice on these matters. I'll be seeking to ask witnesses about those matters. I've asked the secretariat if they could provide copies of that to the witnesses.

CHAIR: I thank you very much, Senator Carr.

Senator KIM CARR: Is that tabled?

CHAIR: Yes, thank you very much, Senator Carr. We will arrange to have a copy of that document distributed to witnesses. I will start by asking you a number of questions, and then I will hand over to other senators. Has your organisation ever advocated for a measure which would expand or facilitate visa cancellation powers?

Ms Keene-McCann: Not to my knowledge. I'd be happy to—

CHAIR: Thank you. Does your organisation include any representatives from victims-of-crime groups at all?

Ms Keene-McCann: Not to my knowledge.

CHAIR: Did your organisation consult with any victims-of-crime groups before making your submission to this inquiry?

Ms Keene-McCann: No.

CHAIR: Have you ever met with victims of crime or victims-of-crime groups?

Ms Keene-McCann: I have met with victims of crime, understanding that some of the clients that we have previously represented are themselves victims of crime. I'm happy to defer to my colleague as well.

CHAIR: When you say you've met with victims of crime, was that in relation to these matters?

Ms Keene-McCann: Not in relation to these matters. I defer to my colleague, however.

Ms Caldwell: I have not met with victims of crime in relation to these matters either. We'd be happy to take that question on notice and put it out to the rest of our colleagues to see whether or not any of our colleagues have. But me personally? I have not.

CHAIR: Are you aware that your submission to this inquiry does not mention victims of crime at all—not even once?

Ms Keene-McCann: Yes, that's correct. Particularly in our capacity where we represent people who have had or are facing character cancellation, many of our clients themselves have also been in situations where they are victims of crime or they have been victims of inequity and inequality. I appreciate the line of questioning, and I understand it, but I would say that doesn't—sorry, I don't know if my connection is poor.

CHAIR: No, I can hear you.

Ms Keene-McCann: The rights of victims of crime and the experiences of victims of crime of course should be taken into consideration. What we are arguing is not that the crimes committed against—

CHAIR: Could I just clarify though: if that's the case, that the rights of the victims of crime should be taken into consideration, including in relation to the bill before us today, why hasn't that been referenced at all in your submission?

Ms Keene-McCann: That's an excellent question. To be honest, our submission was put together very quickly, given that we had 11 working days to provide it. To be clear about our concerns about the character regime, there are instances where an individual's visa can be cancelled on suspicion of association with groups, on suspicion of poor character. We're not only talking, in the character regime, about individuals who have been sentenced for serious crimes. So while I completely respect that, that's where our submission is coming from.

CHAIR: Thank you both very much. I don't have any further questions at this time, and I will hand over to Senator Carr.

Senator KIM CARR: How important are the principles of a fair trial to our judicial system, in your view?

Ms Caldwell: We believe strongly that the principles of natural justice and the right to a fair trial underpin our judicial system. They're principles that are foundational to our legal system and they have been upheld as one of the cornerstones of the Australian legal system, so any bill that seeks to deny that to applicants should be subject to a very, very, very high level of scrutiny.

Senator KIM CARR: Are the principles of a fair trial in a country like Australia dependent upon the capacity of a person accused knowing what they're accused of?

Ms Keene-McCann: Yes, the principles of a fair trial, in any country and under international law, includes being able to respond to adverse information.

Senator KIM CARR: Is that sometimes referred to as natural justice and procedural fairness?

Ms Caldwell: Yes, it is.

Senator KIM CARR: Do you think that's fundamental to the principles of a fair trial?

Ms Caldwell: We do, yes.

Ms Keene-McCann: Absolutely.

Senator KIM CARR: Sorry?

Ms Keene-McCann: I was going to say absolutely—and given circumstances, where the consequences of a hearing or decision are as grave as to deprive someone of their liberty or to return them to harm, they're fundamental.

Senator KIM CARR: Is it normal, in terms of descriptions of a fair trial in a country like Australia, that a person is accused of an offence or whose liberty is in question may not be accused of an offence at all—they may have their liberty put in question—is able to have proper legal representation? The *Hansard* record doesn't record nods, I'm afraid.

Ms Keene-McCann: Apologies. We were reaching for the unmute button!

Senator KIM CARR: Does this bill offend those principles, in your mind?

Ms Caldwell: Absolutely. This bill, as it's currently framed, will deprive applicants and their legal representatives, should they have legal representation, from knowing that adverse information against them has been found and taken into account. It will prevent applicants and their legal representatives from being able to respond to that information. Therefore—without the right of reply, without the right to even know what has been taken into account in terms of making this decision—it will deny the right of a fair trial and it fails to observe the principles of natural justice.

Senator KIM CARR: The Law Council's made some submission to us, amongst others. They, like all the submissions we have before us today, are highly critical of this bill, because those fundamental principles of our legal system are being undermined by this legislation. I can also turn to the Human Rights Commission submission. It says:

> 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.

Do you believe that this bill would set in train a measure such as been outlined by the Human Rights Commission in the quote that I have just read to you?

Ms Caldwell: Yes, we do. We believe that this would set a very dangerous precedent and, fundamentally, has the ability to result in practical injustices.

Senator KIM CARR: Can you explain why?

Ms Caldwell: The provisions of the bill, first of all, are unnecessarily broad. There is no definition either in the Migration Act or the Citizenship Act of what actually constitutes confidential information. This bill relies on information from a gazetted agency. Again, there is no scrutiny. The act of gazetting an agency is purely discretionary. It is not subject to scrutiny and, therefore, this bill has the potential to encapsulate a wide variety of agencies, possibly providing adverse information and, again, that information would not be disclosed to the other party.

Senator KIM CARR: So we have secret information, provided in secret to one side in the proceedings, is that the proposition you're putting to this committee?

Ms Caldwell: Yes, that is.

Senator KIM CARR: I've sent you some documents. Do you have those documents—those gazetted lists? So that information could be provided by the North Korean government, the Chinese government, the Iranian government about persons who are currently residents in Australia who might be citizens of Australia, and that information couldn't be challenged by the person that is being subject to action by the Commonwealth: Is that the evidence that you present to this committee?

Ms Caldwell: Yes, that is as we understand it. The bill would allow secretive information from those agencies to be provided to the government without the other party to the matter being aware of that information being provided or—

Senator KIM CARR: I just want to be clear. Those countries are all on the list, aren't they: North Korea, Iran, various Middle Eastern countries, China?

These are countries that don't abide by the rule of law as we understand it. Is that the case?

Ms Keene-McCann: Importantly, these are also countries from which clients that we may represent may be claiming protection or may have claimed protection. It is particularly anathema to imagine, but that information could be shared or flowed between governments and used against an individual.

Senator KIM CARR: If I look at the agencies that are listed on this list of so-called intelligence bodies, it includes the department of social security and the department of The Treasury. That's correct, isn't it?

Ms Keene-McCann: That's our understanding.

Senator KIM CARR: There are various state departments.

Ms Keene-McCann: That's our understanding.

Senator KIM CARR: And these are organisations that have never, ever made a mistake, aren't they!

Ms Keene-McCann: I agree. Already in the character cancellation regime there is the opportunity to use information or have information included in an individual's file, to which their representative may not know what had been taken into account in the decision-making process that could be erroneous. That already exists in the regime, and this only increases that possibility.

Senator KIM CARR: The normal principles that we have in our judicial system are that you are—and particularly if your liberty is at stake, and the Refugee Council and other bodies deal with these issues on a daily basis. We have a situation where persons may lose their citizenship but can't be actually sent to another country and may well end up in detention indefinitely. Is that a prospect that you are aware of?

Ms Keene-McCann: That's a very real prospect.

Senator KIM CARR: And they may well be faced with a situation based on information provided by a whole series of countries with very, very dubious judicial systems or by agencies which have a long track record of making errors, and that advice can't be challenged through this legislative instrument. Is that the submission you're making?

Ms Keene-McCann: That is.

CHAIR: Senator Carr, I'm sorry, but I do want to clarify one thing here, because I think it needs to be made clear and you've referenced foreign governments. The information provided by foreign governments would only be withheld if it was the judge which exercised his or her discretion in accordance with—

Senator KIM CARR: Well, you can ask your questions, Madam Chair. I'm asking mine.

CHAIR: I understand that, but I just need to clarify that this information—

Senator KIM CARR: Madam Chair, you can question all you like, but the point is—

CHAIR: It's very important—

Senator KIM CARR: Well, it's not very important—it goes to the principles of the bill.

CHAIR: I would just ask the witnesses to clarify that it is a discretion of the judge as to whether the information is withheld. Is that correct?

Ms Keene-McCann: I'm happy to clarify that, Senator, and thank you for that. That is our understanding of the bill. However, it requires getting up to a court. Decisions made in these circumstances are often made initially by the department. It then needs to be challenged. It may go to the AAT. The AAT may not have the information unless the minister decides to issue that information to a tribunal. It is only when it potentially gets challenged in

a court that there is a question about whether the minister may use this information and decide whether it can be withheld. And our point of view—one of our primary issues—is that many people in this space go unrepresented, and the more vulnerable they are the less likely they are to be able to get to a position where a court is hearing this.

CHAIR: Thanks. Senator Carr?

Senator KIM CARR: So how would your client, for instance—their legal representatives—know about this secret information?

Ms Caldwell: We are very concerned because we don't believe that our clients will know about this secretive information. To our knowledge, the bill does provide for the other party to put forward to a court that this information should be disclosed. As my colleague has said, however, this relies on the matter being before a court. It also relies on the applicant or their legal representatives knowing that there is information that has been found against them, and the content of that information. We can't argue or put forward that information should be disclosed when we don't know whether there is information or what the substance of that is, except on the basis of natural justice. This bill would mean that all we would be to say, to the best of my knowledge, is that in the interests of natural justice and a fair trial—which form the cornerstone of our legal system—our clients have a right to know this adverse information.

Senator KIM CARR: Would not a judge benefit from seeking submissions from the defence counsel? Is that normal practice in the courts in Australia?

Ms Caldwell: I will defer this to Jennifer. Jennifer, are you happy to speak to this one?

Ms Keene-McCann: Sure, I'm happy to. It is normal practice under the rule of law to be able to answer a case against you.

Senator KIM CARR: In the normal course of events in a court proceeding—I'm not a lawyer; I've just observed this—judges normally seek submissions from defence counsel and ask them to make submissions about evidence that's presented. Would it not normally be the case that a court would seek advice from the defence as to matters before the court—factual matters, for instance, or their view on the matter? We have a submission here that says:

Nor does it appear that the court is able to disclose part of the secret information (such as the gist of the information or a discrete element of the information) even in circumstances where a partial disclosure could assist the court without creating a real risk of damage to the public interest.

How does a judge call upon the defence to actually make comment upon secret information?

Ms Keene-McCann: Presently, the bill does not provide for that.

Senator KIM CARR: Furthermore, is it not the provision of this bill that the AAT can be obliged not to consider matters if the minister issues instructions, under this measure, in regard to the powers of the AAT, in regard to the schedule of this bill? Is that the case? Is the AAT actually limited as to what information it has as well?

Ms Caldwell: Yes, we believe that that is the case.

Senator KIM CARR: Is it not the provision of this bill to limit the FOI Act to prevent public disclosures under the FOI Act?

Ms Caldwell: Yes, we believe that this bill would also limit public disclosures under the FOI Act.

Senator KIM CARR: Is it not the proposal of this bill to override any other law of the Commonwealth—I repeat: any other law of the Commonwealth—to prevent people providing access to the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Information Commissioner and the Inspector-General of Intelligence and Security? Is that not the provision of this legislation?

Ms Caldwell: Yes, we believe the bill would enable that.

Senator KIM CARR: So how is this not fascist legislation? It's an extraordinary proposition!

CHAIR: We probably don't need the dramatics, Senator Carr.

Senator KIM CARR: Let's be clear about this. You've had 11 days to make a comment on this bill. You've been questioned as to who you've consulted. Did the department consult you before this bill was put in?

CHAIR: Senator Carr, I would just ask you to lower the temperature of your questioning.

Senator KIM CARR: Madam Chair, this is a shocking piece of legislation. You want to criticise these witnesses because they haven't referred to victims of crime. I say that the crime here is the government wanting to

pursue legislation like this. Really, it is improper for you to challenge their validity and integrity when they have, in good faith, put a submission in to this committee.

CHAIR: Senator Carr, do you have a question, please?

Senator KIM CARR: I have asked them: what consultation was there with your organisation before this legislation was presented to the Senate, given that it appeared in the last week of the House of Representatives sittings? There has only been one speaker; that's the minister. There's been no consultation with anyone else, as far as I know, but it may be that you can correct me. Has there been any consultation with you?

Ms Caldwell: There has not. These were submissions that we did indeed have to scramble to get together. We were obviously prioritising them, because we were so concerned by the content.

Senator KIM CARR: I thank you for your submission; I thank you for the efforts you've made. But it is an extraordinary proposition, where a bill's before us, to override all Commonwealth legislation and attempt to slip it through in the way in which this is being done—and you're being criticised, because you didn't mention some other groups. Thank you very much.

CHAIR: I have a couple of further questions that I want to raise with you. In the bill, there is a framework that will provide that, during judicial review, the Federal Court of Australia or the Federal Circuit Court may order the minister to disclose confidential information to it that was used in a visa decision. Are you aware of that?

Ms Keene-McCann: Yes.

CHAIR: Are you aware that the bill provides that the minister can provide submissions to the courts and tender evidence about the use of the information and the impact that further disclosure would have on the public interest?

Ms Keene-McCann: Yes. I would just add again that it requires that they get to the court, and many of these would not; and, if they do get to the court, the time that an individual would be in immigration detention is extraordinary.

CHAIR: Are you aware that the provisions of this bill provide, as part of the judicial review framework, that the court must determine, after considering the information and any submissions made, whether further disclosure would create a real risk of damage to the public interest; and, if the court determines there is a risk, then the information must not be disclosed, but, ultimately, it is a matter for the court to make that independent determination? Are you aware of the provisions in the bill to that effect?

Ms Keene-McCann: We're aware of those provisions, and our argument is that it would be extremely difficult for it to eventually get to a court. I note that the department, in their submissions, which seem to be the only submissions for the bill that we were able to read, indicates that the public interest immunity, which weighs up the interest of the administration of justice, was considered not protective enough.

CHAIR: Thank you very much. Senator Scarr has a question or two for you.

Senator SCARR: Thank you to the witnesses for appearing before us, for your submissions and for all the work you do in this area. I want to take a bit of a step back and ask what your thoughts are in terms of a general proposition. You have a situation where someone is in this country, and they're on a visa, potentially. I'm not referring to any specific case; I'm just trying to work, in my own mind, through a particular scenario and how the law should respond in that scenario. You've got someone who's on a visa in this country, and the intelligence agencies and law enforcement agencies are doing some sort of covert operation into organised crime. They might have someone embedded in an organised crime entity who's providing important intelligence information. The intelligence authorities have that information. To disclose the full particulars of how they got the information and who provided the information, and all of the circumstances around information gathering could prejudice not only a general investigation but also the safety of perhaps an informant. But that information is still relevant in terms of a determination made in relation to someone's visa.

From a policy perspective, it seems to me that there has to be some sort of balance struck with the rights of the individual who has the visa. This is what I'm interested in your thoughts on: from a public policy perspective, there also needs to be an appreciation of the need for confidentiality and the realisation that the disclosure of information in particular circumstances—and I would have thought the circumstances are quite limited—could prejudice not only an investigation but also the welfare of informants and the welfare of sources of information in circumstances where it's important that that information flow continues. What's your perspective in terms of balancing those two competing considerations, because from my perspective we're not looking at one in isolation from the other? There can be two genuine competing public policy considerations in this space, so I'm interested in the witnesses' views with respect to how you get the balance right.

Ms Caldwell: That is a great question. What I will say, from my perspective and something that the Visa Cancellation Working Group has discussed, is that there are already measures in place that balance that. We already have specific guidelines about how we deal with confidential information. We already know as practitioners that there is protected information that is not disclosed to us. What we are saying is—and we agree with the Law Council's recommendation—an independent inquiry be conducted into existing legislation in this area and its adequacy. We are submitting that we already do have legislation that deals with this that is adequate, and this bill is so broad in what it may encapsulate and so broad in the ways that it may be exploited that we do not believe it's necessary. We believe that the existing framework is more than enough to deal with that competing public policy.

Senator SCARR: So, from your perspective, you think the existing protections are sufficient? We'll have a number of witnesses over the course of the day, so the questions to put to those witnesses who have a different view are: Why are the existing protections not sufficient? From a public policy point of view, why do we need to go the extra step? Is that an appropriate framing of the discussion we're having today?

Ms Keene-McCann: I agree. Rather than that the current regime is sufficient, I think we also would say that the current regime includes information that hasn't been tested by a court already, that prejudicial information on presumed associations, information where people are never charged, police reports and those sorts of things can already be included. There is no evidence before us and no submissions beyond the Department of Home affairs to indicate there is a concern for the free flow of information. In our experience that information flows already to the detriment of our clients. I don't know that anyone would dispute that there is, as my colleague said, confidential information regarding sources. However, this is not the information that you necessarily need to answer a case against you. So there is that necessity point to raise, and I again refer to the Law Council's recommendations of an inquiry into the regime in general.

Senator SCARR: I take those points. From your perspective, you think the current protections are sufficient. It has been raised with me that some of the information which is currently protected under the National Security Information (Criminal and Civil Proceedings) Act only protects national security related information, which could be a much higher bar than information that just relates to, say, a matter concerning character for—coming back to my hypothetical situation—someone who is involved in an outlawed motorcycle gang. Are you aware of that potential problem—that the bar is too high at the moment to capture the sorts of information, the sort of scenario I'm talking about, where someone's involved in an organised criminal activity that doesn't necessarily jeopardise national security but is of great concern to the public authorities?

Ms Keene-McCann: I would be happy to take on notice the opportunity to provide further information regarding working group members' experience in representing clients where prejudicial information is already available to the department and it's not necessarily clear in the decision that that is what was taken into account. I am aware of a concern that there would be information that is not national security related but may relate, for example, to criminal associations. However, there's also still a question that we put in our submissions that if this information is credible and relevant and relates to a crime then it should be prosecuted. If it's not, and if it's not relevant to a crime and it's not sufficient enough for prosecution, it may not be credible or relevant for character.

Senator SCARR: Just taking that point—and I understand the concept, and I'm a fervent believer in the rule of law, I can assure you—at one end of the spectrum you've got entirely flimsy information that shouldn't be relied upon, presumptions et cetera. I don't think any reasonable person would expect that to be taken into account in terms of a visa decision—which, as you've rightly stated, can have a huge impact on someone's life and also the life of their family. At the other extreme you've got a case where the Director of Public Prosecutions can bring a case and bring criminal proceedings. But there is a big area in between, isn't there, including, from a civil law perspective, determinations being made around all sorts of matters on the balance of probability? So, it's not at a criminal level of burden of proof but a civil burden of proof. I guess one of the questions I have is: how do you accommodate that area, which is somewhere less than the criminal burden of proof but where, on the balance of probability, there are concerns about the character grounds of someone and the public authority, in good faith, believes that action needs to be taken? Isn't there an area where it is legitimate for a public authority to take action that is somewhat less than the criminal burden of proof?

Ms Keene-McCann: I take that argument and understand that—civil versus criminal. I think something to take into consideration in visa cancellations is that the effect of a visa cancellation is not just on the individual—it potentially deprives someone of their liberty and potentially puts them in indefinite detention or places them in harm—but also affects every other person who is in that person's life: children, spouses, colleagues. So, I would argue that that burden of proof should be higher, because of the detrimental effect of the ultimate decision.

Senator SCARR: Okay. I understand your comments. I have no further questions and thank the witnesses for their submission and for their helpful answers to my questions.

CHAIR: Thank you very much, Senator Scarr. We've really reached our time limit, so I would like to thank members of the Visa Cancellations Working Group for giving evidence this morning.

Senator KIM CARR: If there are other issues that you wish to pursue, could you advise the committee? We've got a very short reporting time line, but if you think there are questions that you don't think have been adequately answered today, there's always the opportunity to provide additional information on any of those matters. I just draw that to your attention.

Ms Keene-McCann: Thank you.

Ms Caldwell: Thank you, Senator Carr. We will have a discussion with [inaudible] to make sure that everything has been covered or provide that additional information.

CHAIR: Thank you very much for your time today.

BIBBY, Dr Martin, Convenor, Asylum Seeker Action Group, NSW Council for Civil Liberties [by video link]

CATALLO, Ms Angela, Committee Member, NSW Council for Civil Liberties [by video link]

[10:49]

CHAIR: I would now like to welcome representatives from the NSW Council for Civil Liberties. Thank you for taking time to give evidence today. Information on parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submission as submission 12. Do you wish to make any corrections to it?

Dr Bibby: [inaudible] have been raised by the Parliamentary Joint Committee on Human Rights, the Law Society and the Human Rights Commission. It infringes the right of persons to—

CHAIR: I'm sorry, Dr Bibby, before you go on, I was just asking whether you wished to make any corrections to your submission, submission 12. If not, do you have any comments to make on the capacity in which you appear?

Ms Catallo: I am the co-convenor of the Asylum Seeker Action Group.

CHAIR: Thank you. Could I ask you to make a brief opening statement before we go to questions.

Dr Bibby: Thank you. Objections to this bill have been raised by the Parliamentary Joint Committee on Human Rights, by the scrutiny committee, by the Law Society and by the Human Rights Commission, and they're very strong. The bill infringes the right of persons to know what is alleged against them. It infringes the principle of equality before the court. It infringes the principle that the state should not rely on secret evidence where a person's liberty is at stake. It infringes on the principle that governs our political system, the supremacy of parliament. Under the bill, once information is made protected, the people who are affected—applicants to the courts—cannot be told what that information is unless they know it legally. Nor can their counsel know. So they cannot demonstrate that it is mistaken or that there are factors that ought to have been taken into consideration so that the minister's decision was unreasonable. They cannot properly instruct their counsel. The court system cannot function fairly. It cannot function properly.

On the other hand, the minister and his representatives can use the information. It's true that the federal courts can reveal the information, but there are restrictions on what a court can take into account. The courts must consider not only national security but potential damage to the public interest and Australia's relations with other countries, and these are factual matters which would be determined by the minister. Other matters to be specified are the regulations. But, unless the regulations say otherwise, the courts are prevented from taking into account the impact upon the applicants or upon the administration of justice.

It's not as though these consequences are trivial. People whose visas are cancelled on character grounds get sent to their countries of citizenship irrespective of whether they have any means of support or even speak the language. Families can be broken up. If they are recognised refugees or their countries won't accept them, they lose their freedom and can be kept in detention for many years. Ten years of lost freedom is a huge penalty to pay in addition to any prison time served for an offence. While not taking a position on the matter, the High Court quoted that the plaintiff [inaudible] Te Puia was prevented from arguing that he was not a part of the Rebel bikie gang, that he had no knowledge of its criminal activities, that he did not participate in them, nor could he question how a cancellation of the plaintiff's visa would disrupt, disable and dismantle the criminal activities of outlaw motorcycle gangs.

As the Human Rights Committee notes:

> Without being able to properly test the evidence and to receive submissions from the person to whom the information relates, it would appear very difficult for the court to effectively perform its judicial review task, including determining the appropriate weight to be given to the information in substantive proceedings … the court is prevented from disclosing even part of the confidential information, such as a summary of the information or a discrete element of the information, even in circumstances where partial disclosure could assist the court without creating a real risk of damage to the public interest. . As such, an applicant could be left in the situation of trying to challenge a decision without having any understanding of the reasons for which the decision was made.

The bill prevents disclosure to the ombudsman, Inspector-General of Intelligence and Security and the Commission for Law Enforcement Integrity. There's no provision for whistleblowers. State courts cannot use the information.

The Human Rights Commission says:

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.

This is more than just placing a 'thumb on the scales' in an attempt to influence a particular outcome.

We think there is a more apt image: it is Justice, with her scales discarded, with one ear blocked and with a minister whispering secretly into the other.

CHAIR: Thank you very much. for that. Like what I addressed with the Visa Cancellations Working Group, has your organisation, the New South Wales Council for Civil Liberties, ever advocated for a measure which would expand or facilitate visa cancellation powers?

Dr Bibby: No. In fact our policy for a long time had been that the whole of section 501 of the Migration Act and the associated sections should be repealed.

CHAIR: In fact, it is the case, in reference to your policy, which I believe was passed at your 2020 annual general meeting, you passed a policy advocating for the removal of powers to cancel visas belonging to criminals and your organisation's official policy is that it is unjust to protect the Australian community from recidivist, non-citizen offenders by deporting them. Is that the case?

Dr Bibby: Yes.

CHAIR: Does your organisation have a policy on whether it is just for Australian citizens to be victimised again and again by recidivist non-citizen offenders?

Dr Bibby: I don't think we have needed such a policy. It's quite straightforward that they should not.

CHAIR: So do you believe that it is just to expose the Australian community to that level of harm without taking any appropriate action, such as cancelling a visa?

Ms Catallo: Our policy isn't saying that the Australian public should be exposed to recidivism. Our policy is that these people have been longstanding members of the Australian community. They actually came to Australia long before they were criminals. Their criminal activity came about as part of their living in the Australian community. Then it is part of the Australian community's responsibility to work with these people after they have left the criminal system. It's not right by international rules for Australia to say: 'This person lived and became a criminal here. However, now we are going to send them back to a country that they have no experience of, where they often have no language and which they have hardly ever lived in.'

CHAIR: Can I just go back to understanding the nature of your submission to our inquiry today. Did your organisation consult with victims of crime before making your submission to this inquiry? As we all know, including those who are listening today, this is a balancing act—the Australian government's response to those who are not Australian citizens or who have some sort of visa whereby a visa may be cancelled and that person, because of their criminal activity and the harm that they've committed towards other Australians, may be subject to deportation. So, in balancing these issues, did you consult with any victims-of-crime groups?

Dr Bibby: The direct answer is there was no time to do anything of the sort. The time for submissions was very short indeed, and I had some extra restrictions placed upon me for medical reasons. However, the question of how we protect members of our society who are at risk from repeat offenders is not one to be answered by saying, 'We will kick those people over to another country and then that country can look after them instead.' That's quite straightforwardly an immoral proposal and an immoral set of actions.

CHAIR: Even though, just to be clear, they would be a citizen of that other country to which they are facing deportation?

Dr Bibby: We could take our lead from the New Zealand legislation, which says that if a person has been within the country for 10 years then they're not to be exported to another country. If a person has become a criminal within Australia, it's Australia's responsibility to look after them and to handle them. After all, we deal with people who aren't our citizens and we don't consider it exceptionally difficult to do so.

CHAIR: Even though the criminal concerned may in fact not be an Australian citizen and may be here on some other form of visa?

Dr Bibby: I think you're missing the point—

CHAIR: You're saying their rights are as important as perhaps those of Australian citizens that they may have harmed in the execution of their criminal activities?

Dr Bibby: Their citizenship is less relevant than the question of where they became criminals.

CHAIR: Are you saying if they become a criminal in Australia that then gives them some sort of right to stay here?

Dr Bibby: No, it means we have a duty to look after them.

CHAIR: Right. I see. You reference the fact that you hadn't had much time to consult with groups, such as victims-of-crime groups, before making your submission, but this is an issue that you've long considered, as you referenced before, in relation to the policy decision of the New South Wales Council for Civil Liberties. Have you ever consulted with victims-of-crime groups in relation to your policy whereby—and this is your official policy—that it is unjust to protect the Australian community from non-citizen offenders by deporting them?

Have you ever consulted with any victims-of-crime groups?

Dr Bibby: I don't know. I'd have to take that question on notice. I will leave that there.

CHAIR: Thanks, Dr Bibby. I have just a couple more questions. Your submission to this inquiry asserts it is 'manifestly a bad argument' for the government to put Australia's interests first. If the government shouldn't put Australia's interests first, whose interests should it prioritise? Are you saying noncitizens who are serious criminal offenders should be prioritised over the interests of Australians?

Dr Bibby: No, that doesn't follow.

CHAIR: Can you explain your position, then?

Dr Bibby: The position is: arguing that you should be able to send people over to another country because it's in Australia's interests to do so is a piece of immorality. It's as straightforward as that. If you look at the argument in itself: if a state government were to say, 'We're going to put the interests of our state ahead of the interests of Australia or ahead of the interests of other states', they would probably be criticised for doing that, particularly if the consequences for the citizens for the other states were severe. It's just a straight immoral argument.

CHAIR: Thank you, very much, Dr Bibby. I have no further questions at this stage.

Senator KIM CARR: This bill is being presented in very short order. You haven't been consulted about the bill, have you? Has the government sought to engage your views on the bill?

Dr Bibby: No.

Senator KIM CARR: Are you aware of any civil society organisation that has been consulted on this bill?

Dr Bibby: We haven't had time to consult with them.

Senator KIM CARR: So you wouldn't know; fair enough! To your specific submission: in the view of the Council for Civil Liberties, how much of the bill do you think is about amending the act to deal with the invalid sections identified by the High Court in the 2017 case and how much is about expansion of the powers of the executive?

Dr Bibby: I would need to take that on notice.

Senator KIM CARR: Alright. Have you had an opportunity to look at any of the other submissions that have been presented to this committee?

Dr Bibby: Since I wrote the submission, yes.

Senator KIM CARR: Have you looked at the Law Council's submission, for instance?

Dr Bibby: Yes. I've looked at the Law Council's submission, the Human Rights Commission's submission and the comments of both parliamentary committees.

Senator KIM CARR: The Law Council, in their submission, has queried the definition of 'confidential information' and suggested it poses a risk which is currently not covered by current legislation—that is, the National Security Information (Criminal and Civil Proceedings) Act 2004, the NSI Act—which provides a quite specific definition of 'national security information'. There is a working group that has looked at these. What do you think of those provisions of the NSI Act? Do you think they are adequate to cover national security matters?

Dr Bibby: I think I would need to take that on notice too.

Senator KIM CARR: Let me deal with the question of so-called confidential information. Paragraph 34 of the Law Council's submission says:

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

We have seen cases of that, I will say as an aside—

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

Can you provide us with your views on relying on secret information such as that outlined under these registered agencies?

I understand the secretariat's provided you with a list of the agencies that the government's now going to rely upon or has relied upon to date. It includes a series of security agencies and government departments, including Centrelink, through the Department of Social Services, various state government agencies and a number of foreign government agencies. Are you aware of that list?

Dr Bibby: No.

Ms Catallo: I've seen the list and can comment on it.

Senator KIM CARR: What do you say to the proposition that this so-called confidential information that the government's relying upon is upon bodies such as this? Have they ever got anything wrong?

Ms Catallo: I'm very concerned that a number of government departments are put on a list which—in the STEM it talks about legal [inaudible] areas, and in the list there are a whole lot of government departments listed. To have those government departments on such a list also concerns me. The doping agency's also there, and the doping agency has the right to get information from children as young as under 12, so that concerns me as well. The range there is just far in excess of what would be needed, even under the legislation.

Senator KIM CARR: It has been presented that these represent an incremental creep, in terms of the attempts to broaden ministerial powers to cancel visas. The character test framework imposes very low thresholds for failure on character grounds. It captures a range of individuals who would not normally be considered, in criminal law definitions, to have serious criminal offences.

Ms Catallo: I would agree. The example I would cite is point 34. In South Australia, the department of education and child development is the same department, so not only would that collect any information to do with child protection issues but it could also, potentially, involve decisions that were internal investigation matters, including employer investigations. I would find it concerning that that could be used as the basis of a character determination.

Senator KIM CARR: There has been evidence presented to the committee that this advice is provided by a series of agencies determined by the minister and that the list is, in itself, not subject to parliamentary scrutiny—that is, it's not a disallowable instrument. Some of these government agencies—for instance, the North Koreans, the Iranians, the Chinese—don't have a judicial system that we would acknowledge as being equivalent, in terms of the rule of law as we understood it. What do you say to that proposition?

Dr Bibby: We're concerned about the organisations, particularly overseas organisations, on the list. You have to abide by the laws in these places, and they're often laws that we would not accept, like the Iranian laws on homosexual activity.

Senator KIM CARR: We've had cases, in recent memory, where soccer players have been subject to Interpol notices, for instance, which we wouldn't normally accept—accusations made that wouldn't meet the normal rules of evidence that we accept. Then it would be said it'll be subject to the judge making a determination on what is available. The truth of the matter, though, is a defence counsel wouldn't know about that. Is that your understanding, in terms of this provision, that there is a one-sided view in what information is available to the court?

Dr Bibby: That's correct.

Senator KIM CARR: I come back to this simple proposition. It has been put to you about the rights of people in this country. Is it also a right in this country, in terms of the balance between so-called national security objectives and fundamental objectives of democracy, including proper administration of justice, the right to a fair trial, procedural fairness, adequate oversight of executive actions and independent functions of parliament and the judiciary under the constitution—aren't they also rights that we would expect in a country like this?

Dr Bibby: Absolutely.

Senator KIM CARR: Isn't it the case that this legislation actually gives us a judicial system more resembling North Korea than a country such as we would expect for the rule of law in Australia? This wouldn't happen in Britain, for instance, would it? This legislation wouldn't happen in Britain, would it?

Dr Bibby: I'd have to take that on notice too, I think, to check the British legislation.

Senator KIM CARR: In terms of your international experience, would the European Court of Human Rights allow information of secret hearings of this type being used against people in judicial proceedings, where they weren't able to know about it, let alone challenge its validity? For instance, the Law Council provide two examples on page 14 of their submission. They talk about the House of Lords and the European Court of Human Rights that have dealt with similar issues. They say those principles would not apply in the United Kingdom or in Europe. Is that the case?

Dr Bibby: I would be reliant on the Law Council's own submission for that.

Senator KIM CARR: Would you take that on notice and give me your advice as to whether or not you can think of any cases where similar judicial systems to Australia's would allow this type of legislative framework to exist? Finally, you mention—

CHAIR: Senator Carr, I will need to ask you to wrap up.

Senator KIM CARR: Finally, you mentioned the capacity of people to make complaints to various bodies, including the ombudsman and the inspector-general of security, under the new sections of this bill. A person actually commits an offence if they provide information under clause 503B (1) and 503C (1) and the person who does that is not to provide information to any other body or person. Further, under subclause (7) of clause 503A this legislation overrides 'any other law of the Commonwealth'. How often do you see measures such as that in legislation, where we're overriding the laws of the Commonwealth in terms of restrictions on people's access to normal scrutiny measures such as the ombudsman and the inspector-general of security? These are propositions that you would normally see as the supervisors of our security agencies.

Dr Bibby: Never seen anything like it.

CHAIR: By way of clarification, Dr Bibby, you mentioned the parliamentary human rights committee, which had considered this bill, in your opening remarks. I was actually chair of that committee when the committee considered the bill. I want it to be made known and very clear that the committee has not reached a concluded view in relation to the bill. To share with everyone and anyone listening, or obviously reading the *Hansard* transcript, it's important that I make it clear that the committee did note 'that the bill engages and limits the right to a fair hearing and the prohibition against expulsion of aliens without due process'. It also noted that 'these rights may be subject to permissible limitations', as a matter of international human rights law, 'if they are shown to be reasonable, necessary and proportionate'. The committee went on to say that it:

> … considers that the bill pursues the legitimate objective of upholding law enforcement and intelligence capabilities, and insofar as the measure protects disclosure of confidential information where disclosure may jeopardise law enforcement or intelligence activities, the bill is rationally connected to objective. The committee considers further information is required to assess the proportionality of the measure.

As I said before, the committee made it very clear in its report No. 1 of 2021 that it has not yet formed a concluded view and is seeking further information from the minister.

Senator KIM CARR: So we'll look forward to the concluded view and you trying to justify it.

CHAIR: Senator Carr, if you could just respect the fact that I want to accurately portray—

Senator KIM CARR: You're accurately trying to defend the indefensible.

CHAIR: Senator Carr, please do not interrupt. I want to accurately portray the outcome of that committee hearing and what's in report No. 1 of the Parliamentary Joint Committee on Human Rights. We are now at the end of our time. I thank you both very much for your time today. If there are any further comments or clarifications that you can provide, please forward those through to the secretariat. Thank you both very much for your time today.

EDGERTON, Mr Graeme, Deputy General Counsel, Australian Human Rights Commission

SANTOW, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

[11:20]

CHAIR: It's now my pleasure to welcome representatives from the Australian Human Rights Commission. I thank you so much for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submission as submission No. 3. Do you wish to make any corrections to it?

Mr Santow: No, thank you, Chair.

CHAIR: I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Would you like to make a brief opening statement?

Mr Santow: Yes, thank you, Chair. This bill deals with confidential material used in certain migration and citizenship decisions, especially to refuse or cancel a person's visa on character grounds. The bill would limit how this information may be disclosed to affected visa holders, to tribunals and to courts. We acknowledge the importance of protecting victims of crime, but the commission is concerned that the bill will not achieve that aim in an appropriate, effective way. Specifically, we are concerned that the bill would disproportionately limit the right to a fair and public hearing.

We make five points. Firstly, when an applicant can't effectively contest the government's arguments and evidence, it's hard to achieve an equality of arms. This sort of scenario could arise under the bill: the government receives information that a person who has lived in Australia for many years previously committed a crime overseas but was never charged with an offence; the government then relies on this information to cancel the person's Australian visa. The person who is the subject of allegations is often best placed to show when they are wrong, but, if the information is kept secret, this person cannot effectively contest a false claim. Our law does not treat government secrecy and the right to a fair trial as being of equal value. Only in exceptional cases would the government be justified in withholding relevant information in court proceedings, and that's a point that we elaborate on at paragraph 58 of our submission.

Secondly, a fair trial is especially important in this specific area of decision making. If a person's visa is cancelled, they are likely to be placed in immigration detention, often for long periods, and, ultimately, removed from Australia. Restricting information relevant to such a momentous decision can increase the risk of error and result in a breach of human rights.

Thirdly, under the bill, a court will hold a preliminary hearing to decide whether to require the production of relevant material. But only the minister's representatives can participate in the hearing and the court is only permitted to consider factors that weigh against disclosing the information to the applicant, not factors that weigh in favour of disclosure. That process is more likely to lead to error, because the court is prevented from considering all relevant matters.

Fourthly, in the Graham case, the High Court found the current non-disclosure provisions were unconstitutional because of the way they restricted judicial review. The non-disclosure provisions in this bill are different, but they, too, would restrict judicial review—a function that is vital to the separation of powers. While the commission has not undertaken a detailed constitutional analysis of the bill, we echo the broader concern of the Senate Standing Committee for the Scrutiny of Bills that the bill may 'operate to undermine the practical efficacy of judicial review in many cases'.

Fifthly, the government can already protect confidential information. Under the NSI Act and the law on public interest immunity, the minister can apply to a court to keep confidential national security and other sensitive information where this is in the public interest. This existing law strikes an appropriate balance in protecting such information while enabling a court to protect the fairness of its proceedings.

For these reasons we recommend that the bill not be passed. However, if the committee plans to proceed, we propose three key amendments to the bill. Firstly, the applicant's interests should be represented at any preliminary hearing where the applicant is excluded. Secondly, a court should be able to consider all the relevant factors, in determining whether to allow information to be disclosed, not just factors that weigh against disclosure. Thirdly, the applicant should be given a summary of any confidential information so that they can meaningfully

respond to it in the proceedings, including by saying why it may be wrong. We are happy to answer any questions.

CHAIR: Thank you very much. I'll ask Senator Carr to ask questions first.

Senator KIM CARR: Thank you. The statement of compatibility with human rights which is attached to this bill, which is obviously provided by the Commonwealth department, states that the limitations placed by the bill on the right to equality before the courts and tribunals are reasonable, proportionate and justified—that's in the explanatory memorandum. How do you respond to the assertion?

Mr Santow: We have a number of concerns that lead us to conclude that this is a disproportionate limitation on the right to a fair hearing. The core concerns are these. Firstly, the visa holder can be excluded from the relevant proceedings, and so that means that, where there's an allegation against them that may be absolutely critical in cancelling the individual's visa, the individual may be unable to know that allegation and therefore unable to contest that allegation. The other core concern that we have that goes to the right to a fair hearing is that, while the court is enabled under the bill to consider the public interest in disclosing the relevant material, the bill contains a very unusual provision. It essentially limits the consideration of the public interest only to factors that are against disclosing the material. In other words, the court cannot consider factors that go the other way. It cannot even consider the administration of justice, which is, of course, central to the centuries-old concept of the public interest.

Mr Edgerton: Maybe I could add to that answer.

Senator KIM CARR: Yes, please.

Mr Edgerton: When you're considering whether the bill is reasonable, necessary and proportionate, or whether it's a reasonable limitation on the right to a fair hearing, one thing that you need to take into account is whether there are other measures that would be less restrictive of human rights but would be as effective in terms of achieving the overall objective. We say that there are measures that currently exist that are effective and that are less restrictive on human rights, and those are the legislative provisions in the NSI Act and resort to public interest immunity claims.

Senator KIM CARR: The amendments to the proceedings of the AAT are also matters of concern. Can you explain what your concerns are and why you hold them?

Mr Santow: We acknowledge in our written submission that the constitutional issue that was at the heart of the Graham case applies to courts and not to tribunals, but the tribunal is a critical forum where human rights can be protected. It is the only place where you can get full independent merits review of this sort of decision. So it is critically important that a tribunal is able to have all of the relevant material before it that would enable it to get to the truth of an allegation that someone fails the character test. In our system we rely on the adversarial process, so, as I mentioned earlier, it is often the person who is the subject of an allegation who is best placed to be able to identify any errors in that allegation. The tribunal would not have that information which would help it get to the truth.

Senator KIM CARR: That's a pretty fundamental problem, isn't it? If the AAT is there to deal with merits review and it can't do its job doesn't it undermine a pretty basic role for the AAT?

Mr Santow: The AAT plays a central role in upholding the right to a fair hearing and so we are concerned that that those provisions would disproportionately limit that right.

Senator KIM CARR: I'll come back to this issue then, several of the submitters—you, the Refugee Council, the Law Council—are also saying the bill shouldn't proceed but if it were to proceed then there may be a case for an applicant to be represented by a lawyer or a special advocate. Can you explain your recommendation with regard to that matter? How that would alleviate any concern at all?

Mr Santow: As you say, our primary position is that the bill should not proceed because there are other ways of achieving the government's legitimate aim here that would have a lesser impact on human rights. But the particular kind of argument in the alternative there is that if you were able to put in place an arrangement whereby, say, a lawyer, indeed even a security cleared lawyer, has access to the contested information then that lawyer might be able to mitigate the harm that their client would face by not being able to contest that allegation directly. But we do make the point that if you are wanting to mitigate this harm you would need to do a number of things. That's just one of the things that we propose.

Senator KIM CARR: So a mitigation measure, yes.

Mr Santow: You would also need, for example, to provide a summary of the gist of the allegation—ideally to the individual concerned.

Senator KIM CARR: The central question though that you have carriage of is to argue the position on human rights. Would that be a fair statement?

Mr Santow: Yes.

Senator KIM CARR: The right to a fair hearing and the prohibition—particularly when it comes to expulsion of aliens—is an international obligation we have. Is that the case?

Mr Edgerton: That's right. Article 13 of the ICCPR has particular provisions that ensure fair process when you are dealing with procedures involving expulsion of aliens.

Senator KIM CARR: Yes. So this issue about proper administration of justice is central to our international obligations?

Mr Santow: That's correct. I think what the UN Human Rights Committee has made clear is that when a country has established a process to try and get to the truth of an allegation of serious bad behaviour that might justify someone being expelled the process by which it arrives at that conclusion has to be a fair one. So that's really at the heart of our submission.

Senator KIM CARR: That goes to the question of natural justice and procedural fairness?

Mr Santow: Correct.

Senator KIM CARR: That's why you're so concerned about these provisions of secret information being provided by a list of agencies which do not have parliamentary oversight, including a list of countries which don't have a proud record on human rights?

CHAIR: Senator Carr, just to clarify: I'll ask you to make it clear that there is judicial oversight of this confidential information. That's what this bill is all about.

Senator KIM CARR: Madam Chair, if you're going to intervene when I'm asking the questions I'll be only too happy to interject when you're asking questions!

CHAIR: I just want the evidence—

Senator KIM CARR: That's not the role of the chair!

CHAIR: that's being given today to be very clear.

Senator KIM CARR: It's not the role of the chair to run the government line when I'm asking a question!

CHAIR: Senator Carr, could I just ask you to return to questions. I do—

Senator KIM CARR: I would if you didn't interrupt all the time!

CHAIR: Senator Carr, please—

Senator KIM CARR: I'll ask the officers: is it your concern that there is in fact a list of agencies put forward and not subject to parliamentary scrutiny which, in itself, involves other countries which don't have a proud record in terms of their human rights, and that those matters can be put before a court where the applicant, who may well be in prison for an indefinite period of time, doesn't have the capacity to challenge the advice with which they're provided? Is that the basis of your submission?

Mr Santow: Perhaps I can make two quick observations. Firstly, the list that you refer to is a very long list. Because the term 'confidential information' is not defined then it's information, in other words, that those bodies hold. As you said, it's a long list and it goes well beyond Australian government bodies that generally handle national security or other information of the greatest sensitivity to Australia. This shows the extraordinary breadth of information that can be kept confidential under the bill.

The second observation is that government agencies, with the absolute best of intentions, can make mistakes. I'll refer to very detailed historical analysis of this—the Hope Royal Commission on Intelligence and Security. It dealt with the review of adverse security assessments by ASIO. In its second report, it concluded that 'errors of fact can occur'. It went on to say, essentially, that even a well-resourced and highly professional organisation like ASIO, when it is gathering intelligence for the benefit of Australia, can sometimes make mistakes.

What we would say is that when that information might be used in a very momentous decision, including a decision to refuse or cancel someone's visa, it's very important that the information is able to be contested by the person who is perhaps best placed to correct an error.

Senator KIM CARR: And these are not necessarily people, in terms of the visa holder or the citizen who is being expelled or threatened with expulsion, who have committed any serious crime—that's correct?

Mr Santow: The character test goes broader than that. From what we can tell, it seems that the bill is not directed towards the commission of serious crimes. If someone committed a serious crime in Australia then there

would be no need for confidential information; it would be very clear on the public record that the person had been convicted of a crime. This actually goes to allegations which have not been proven—

Senator KIM CARR: Suspicions. Is that the word used?

Mr Santow: Suspicions—yes, that would be a good summation.

Senator KIM CARR: So confidential information may well be based on erroneous information—like robodebt—because it enlists the agencies, like the social security organisations?

Mr Santow: That's correct.

Senator KIM CARR: And it could include Interpol red notices, which have led to people facing wrongful convictions in absentia—is that correct?

Mr Santow: That's correct.

Senator KIM CARR: We've had a recent case involving a soccer player, for instance, at the Pascoe Vale soccer club, from memory, one of my local soccer clubs. These are not part of any legislative definitions, though, in terms of this bill, are they?

Mr Santow: That's correct—they're the—

Senator KIM CARR: There's also the question of refoulement, is there not? How does that issue reflect on our human rights obligations?

Mr Edgerton: The concern that we expressed in our submission was more about the possibility of indefinite detention. Someone may well have a protection visa cancelled on character grounds and then they're put in the invidious position of being a person who isn't able to be returned to a particular country because Australia continues to have protection obligations to that person despite their protection visa being cancelled. But, because their visa has been cancelled on character grounds, almost certainly they won't be released from immigration detention, because government policy is that those people's cases don't get referred for the consideration of discretionary ministerial powers—for example, under section 195A of the Migration Act, to grant someone a visa or, under 197ADB to put someone into community detention. So the effect is that they can't be returned home and they can't be released from detention, and they face the prospect of indefinite detention.

Senator KIM CARR: Are you aware of any other country with a similar judicial system to ours that has legislation of this type on its books?

Mr Santow: I'm not aware, but we haven't done a comprehensive analysis.

Senator KIM CARR: Would you like to take that on notice?

Mr Santow: We can certainly try to provide an answer to that question.

Senator KIM CARR: Thank you.

Mr Santow: I'm conscious of the limited time.

Senator KIM CARR: We have very limited time; I understand that. This whole process is obscenely rushed. Is it a human rights concern that there are attempts being made here as part of this to make amendments that would affect the PID Act and the FOI Act; that the amendments to the legislation would affect integrity agencies such as the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Information Commissioner and the Inspector-General of Intelligence and Security; and that, while the PID Act includes immunities for individuals who make good-faith disclosures of information, proposed section 52A(7) of the Australian Citizenship Act and proposed section 503A(7) of the Migration Act, included in this bill, would override any other Commonwealth law?

Mr Santow: In the limited time, we weren't able to do a detailed analysis of that part of the bill. I do note the Law Council and perhaps some of the other submitters undertook an analysis of that issue. Prima facie, it's of concern, but I can't give a detailed response.

Senator KIM CARR: Well, I would ask you to take that on notice. Would it be a matter of concern to the Human Rights Commission that the legislation before this parliament, on which we are being asked to make judgement, includes amendments that would override any other Commonwealth law in regard to legislative oversight of those agencies and individuals' rights in terms of their civil liberties? My reading of this is that it means a two-year jail sentence if they breach, and the submission here is that it's a practical disincentive to people seeking to provide information or voluntary disclosures to those oversight bodies.

Mr Santow: We will take that question on notice.

Senator KIM CARR: Thank you. Finally, the High Court made its decision in 2017, so has the commission been made aware of what the government has been doing in the meantime in its approach to removal of persons? They say they're reluctant to use information in the intermediate period, in the last three years. Have you been made aware of any—

Mr Santow: I think that's a question for the Department of Home Affairs.

Senator KIM CARR: I know. I will ask them. I'm asking you: have you been made aware of any actions the Commonwealth has been using since the High Court?

Mr Edgerton: I don't think we've been made aware of particular cases, but the Commonwealth has continued to have available to it the NSI act and also public interest immunity claims.

Senator KIM CARR: Yes. Are you aware of any issues in regard to the administration of that from a human rights perspective?

Mr Santow: I'm not. I think the Legal Aid NSW written submission provides some examples of the use of public interest immunity. I think it might be in footnote 15 of their written submission.

Senator KIM CARR: Thank you very much.

CHAIR: Thank you very much, Senator Carr. I have just a couple of questions by way of clarification. You referred to the National Security Information (Criminal and Civil Proceedings) Act and made the comment that that was sufficient insofar as dealing with confidential information is concerned, and you said that that concerned national security information and other sensitive information. My understanding of the bill is that it does not include other sensitive information, that it only relates to national security information, and that this is very much at the heart of why these amendments are necessary, because the scope currently is too narrow.

Mr Santow: Just to clarify, I'll make two points. First, at the start, what we said was that the combination of the NSI Act and the law on public interest immunity provides the capacity for the government to keep confidential national security information, and that's the NSI Act, primarily, and other types of sensitive, government-held information, and that's public interest immunity. My understanding of this bill is that it does not deal primarily with national security information. It's more directed towards information that may be allegations that someone may fail the character test, but it may not rise as high or become as serious as national security information.

CHAIR: But it is the case that the NSI Act does not reference within its scope, or the definition of information which can be protected, other sensitive information?

Mr Santow: No. What we said was that public interest immunity deals with that other category—not national security information but the other category of information. It's the NSI Act that deals with national security information.

CHAIR: Thank you for clarifying that. Just to be very clear, you accept the fact that the NSI Act is limited in its scope?

Mr Santow: Absolutely. I'm sorry if I was unclear. That's what I was trying to say at the outset. I apologise.

CHAIR: I just want to take you to the comments of the Parliamentary Joint Committee on Human Rights on this bill. I referenced before that this bill has been considered, but there has not been a concluded view expressed on it. One of the comments of the committee, in its remarks in report No. 1 of 2021, is:

The committee considers that the bill pursues the legitimate objective of upholding law enforcement and intelligence capabilities, and insofar as the measure protects disclosure of confidential information where disclosure may jeopardise law enforcement or intelligence activities, the bill is rationally connected to this objective.

Do you accept that position?

Mr Santow: Yes. Can I just explain what I understand about those two critical words, 'rationally connected'?

CHAIR: Yes.

Mr Santow: I think the committee's preliminary view there was that this bill is operating in an area which is a legitimate area of government activity—which is, broadly speaking, to protect the Australian community. We don't dispute that. The point that we're trying to make is that the government can protect the Australian community in a way that is more targeted, that is less likely to have the unintended consequence of impinging quite seriously on the right to a fair hearing.

CHAIR: I just want to draw on the example that Senator Scarr raised earlier in the hearing today. He referred to a situation where there might be an undercover investigation—say, a particular organised crime activity by a group—where police or intelligence agencies may have someone there undercover, or there may be an informant,

and it involves serious crime but not the sort of crime which is in the public domain. This is not a situation of national security, yet the activities of that organised crime group are critical in terms of assessing whether a visa should be cancelled or whether citizenship should be withdrawn. Isn't it the case that there are situations where further information is required beyond it just being national security-related information?

If that information was disclosed, it could put others at harm. Therefore, what is your objection to a judge making an independent determination about whether that confidential information should be disclosed under circumstances where, if it was disclosed, it could place others at serious risk of harm or even death?

Mr Santow: I can make two observations. First, we, of course, accept that the decision-maker and, ultimately, a tribunal or court may need to consider a range of information, not just national security information, in determining whether someone fails the character test. What we have said is that there are a range of ways in which the court can enable that information, or the gist of that information, to be put to the individual, the visa-holder or their representative so that they can identify any errors, while at the same time protecting, for example, the source of some protected disclosure.

CHAIR: I'm putting an example to you where, if that confidential information was put to the respondent, that may put other lives at risk or put other people in danger. I'm referring to an instance where there might be an undercover operation. As soon as the respondent is aware, even in general terms, about the activities which might involve someone who is embedded in a group, that could place that person at serious risk. Aren't there situations where it is simply not appropriate or where it places other Australians at risk if this confidential information is disclosed?

I understand your concerns. But when a judge is making an independent decision—not the government, not the department, not the applicant—surely that balances the competing human rights at stake here. We're also talking about the human rights of those who undertake law enforcement activities, and one of their human rights is the right to life—the right for their life to be protected. How do you weigh that up?

Mr Santow: I was starting to say that there are two things that can be done here. In that very unusual but important scenario that you've just outlined, we advert to the possibility of using some kind of special advocate. Essentially, the situation would be that the individual concerned may not receive the protected information.

CHAIR: So you accept that there may be times when it is absolutely warranted that the respondent or the individual should not be in receipt of that confidential information?

Mr Santow: Yes. I'm reluctant to go too far down a hypothetical, but what I'm saying is that there are a number of things that the government and, ultimately, the courts can do to protect that information and to protect the source of that information.

You also make the point that the court is given the role of assessing the public interest. What we are really concerned about—and I can't stress this enough—is: the way the bill is drafted is that it actually does not enable the court to make a full assessment of the public interest, because it circumscribes or it limits the factors that a court can consider when determining the public interest only to factors that weigh against disclosing the information. It does not, for example, permit the court to consider something as fundamental as the administration of justice which are the words that are used in the act at the moment. We expand on this issue at paragraphs 46 and 47 of our written submission.

Mr Edgerton: Can I add to that?

CHAIR: Yes, sure.

Mr Edgerton: You have raised a really important issue in terms of the court being able to make an independent decision about whether information should be released in these circumstances, balancing the very serious issues about potentially prejudicing investigations or the identities of witnesses on the one hand, and the rights of the visa applicant on the other hand. We would say that that's precisely what is available now to courts. It's available through making an application for public interest immunity over information that would otherwise, for example, prejudice an investigation or reveal the identity of a source or the identity of a witness. They're classic examples of where orders are made by courts to protect those sources and to protect the identities of witnesses.

Senator KIM CARR: Can you give examples—

CHAIR: Sorry, Senator Carr—

Mr Edgerton: But there also needs to be a facility to ensure that an applicant has enough information about the content of what's said against them so that they can adequately respond to it.

CHAIR: Picking up your point about public interest immunity, I'd put to you that it does not protect all information. If we consider, for instance, a criminal informant, it may protect parts of the informant's statement, but it will not necessarily protect the whole of the statement or the fact that there is even an informant's statement in existence, which itself could give rise to risks insofar as undercover operations or some other law enforcement activity. So I would respectfully disagree with you that public interest immunity is a coverall. It simply is not.

Mr Edgerton: It's not a coverall in the sense that it automatically excludes all of the information that an agency may want to have excluded. That's correct. But what it does do—

CHAIR: Including the existence of an informant involved in a law-enforcement activity—and that's at the heart of the example I gave before about balancing the competing human rights interests, protecting those who are alleged to be criminals against those whose life may be in danger because it's revealed that they are an informant involved in a law-enforcement activity.

Mr Edgerton: Sure. I come back to what I said before. Revealing the identities of informants is a classic case in which courts will not disclose information, because—

CHAIR: With respect, I'm not referring to it revealing the identity; I'm referring to the fact that even disclosing that there is in existence an informant is of itself in issue.

Mr Edgerton: Sure. And that is one of the things that courts should be able to balance, which I think was the point that you were making earlier. There should be able to be a judicial assessment of the risks of disclosing information versus the prejudice to an applicant in an individual case. But I think it comes back to what Senator Scarr was saying before. There needs to be a balance struck between those two things. And the problem with this bill is that it fetters the court's ability to strike that balance because it says to the court, 'You can only take into account this particular list of factors and only that list of factors,' and it doesn't let the court take into account the factors that are on the other side of the scale. So it's not a balancing exercise that the court's undertaking. Whereas, under a public interest immunity test, which we have at the moment, the court is able to take into account a full range of factors. It will hear the evidence from agencies about risks to investigations, weigh that appropriately and then make a decision based on all of those facts.

CHAIR: Thank you very much. I don't have any further questions.

Senator KIM CARR: Can I follow up that question—

CHAIR: Senator Carr, we've got a couple of minutes left.

Senator KIM CARR: I'm just wondering where we find the bill that prevents police corruption. We've got a situation in Victoria at the moment, a royal commission around informants and police relationships. The rights of whistleblowers versus the rights of informants—there are a whole series of measures, I would have thought, and a long history in this country about police relationships with informants and undercover agencies and the like. It's a troubled history, I might say. The bill doesn't deal with those questions, does it?

Mr Santow: It only deals with factors that weigh against disclosing the information.

Senator KIM CARR: And it doesn't deal with the issues that relate to a fair trial and judicial fairness and the principles that underpin our human rights obligations to make sure that people are actually protected from the abuse of power.

Mr Santow: Yes. We refer in our submission to Justice Mason of the High Court in one of the leading cases here, the ANAC case. Essentially, that was the critical point that he was emphasising, which is that the court must consider the administration of justice in undertaking this sort of weighing process that is at the heart of public interest immunity. What we would urge is that the parliament consider expanding any kind of public interest test so that it can consider those sorts factors that are woven into the fabric of our legal system.

Senator KIM CARR: Thank you.

CHAIR: Mr Santow and Mr Edgerton, thank you very much for your time today. We appreciate your evidence. If you want to send any further follow-up comments or clarifications, can you do so fairly promptly to the secretariat. Thank you very much.

Proceedings suspended from 12:00 to 12:47

GRAYDON, Dr Carolyn, Principal Solicitor, Asylum Seeker Resource Centre [via videolink]

HEWAARACHCHI, Mr Virajith, Senior Solicitor, Refugee Legal [via videolink]

HIRSCH, Mr Asher, Senior Policy Officer, Refugee Council of Australia [via videolink]

MANNE, Mr David, Executive Director and Principal Solicitor, Refugee Legal [via videolink]

PILLAI, Dr Sangeetha, Senior Research Associate, Kaldor Centre for International Refugee Law [via videolink]

SARAVANAMUTHU, Ms Rachel, Senior Solicitor, Asylum Seeker Resource Centre [via videolink]

CHAIR: Welcome. Thank you very much for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submissions as submissions 7, 11, 14 and 15. Do you wish to make any corrections to your respective submissions? No? Okay. Would any or all of you like to make an opening statement?

Dr Pillai: Thank you for the opportunity to provide evidence today. It's my view that this bill should not be passed. I've had the benefit of listening to the earlier sessions of this inquiry, so I thought it would be helpful if I used this time to speak to some of the issues that have come out of that discussion. I want to say up-front that I completely acknowledge the need to protect victims of crime and accept that the interests of victims of crime may be one of several factors that warrant consideration when determining if and when a person stands to lose their visa or their citizenship, but none of these issues are really particularly relevant to this specific bill. The bill that is before the committee for consideration today doesn't actually have anything to do with the circumstances in which a person stands to lose their visa or their Australian citizenship. Those circumstances in both cases remain completely unchanged by the bill.

Rather, the bill is about the circumstances in which a person who is facing visa or citizenship cancellation should have the opportunity to respond to the case against them. The bill would significantly restrict the circumstances in which a person facing visa or citizenship cancellation would have any capacity to respond to key information relied upon to reach a decision against them. As we said in our written submission, this undermines principles that are fundamental to the Australian legal system, such as procedural fairness and the right to a fair trial and the rule of law. It also undermines a number of international human rights obligations that Australia has subscribed to.

If a person has their visa or citizenship cancelled without being privy to the reasons for that cancellation, this would mean that the person would be unable to make a first-instance response to the department and would lose the opportunity to provide, for example, information to correct a mistake in the information that the department is relying on or provide a reasonable explanation where such an explanation is available. It would also be very difficult for a person in that position to make any effective use of merits review mechanisms, especially given that under the model proposed in the bill the AAT is also restricted from access to the same confidential information that provides the basis for a cancellation decision.

As came up in the hearings earlier this morning, it's true that the bill still enables a person who faces visa or citizenship cancellation to access judicial review and that where judicial review is available the court has the capacity to order that it be given access to the confidential information that's been relied upon. However, under the model that the bill proposes, the quality of this judicial review is significantly eroded. The person facing cancellation as well as their legal advisers and representatives will be, by default, excluded from the preliminary hearing in which the confidential information is disclosed to the court. And while the court is still able to subsequently decide to disclose this information to the applicant and their lawyers, its capacity to decide in their favour is extremely restricted by the provisions of the bill. That is because, when determining whether the information should be disclosed, the bill only allows the court to take into account factors that go against disclosure. Indeed, while a primary purpose underpinning this bill is to avoid the constitutional problems identified by the High Court in the Graham case that arise when courts are restricted from access to confidential information relevant to judicial review proceedings, it's not actually clear that the very restrictive model for disclosure that is put forward in the bill actually does avoid these constitutional problems.

In short, the bill proposes a model whereby, in a large number of cases, people who face visa and citizenship cancellation will have absolutely no opportunity to know or respond to the case against them, and it does so even when less-restrictive options, such as partial disclosure of information or a special advocate system, might be suitable. As both the Parliament Joint Committee on Human Rights and the scrutiny of bills committee have noted in their reports, no explanation has been offered so far as to why these other alternatives have been excluded. This

is particularly dangerous and disproportionate given the extremely onerous effect that visa and citizenship stripping can have on an individual, which can include expulsion to a country where they have never lived and have no network, separation from children and other family members. And where expulsion isn't possible, indefinite immigration detention, and in the case of some refugees refoulement to a country where they might face harm. For these reasons it's my very strong view that this bill should not be passed. Thank you.

CHAIR: Thank you very much. Can I ask for any other opening statements, please?

Mr Hewaarachchi: I would also like to thank the committee for the opportunity to contribute to this important inquiry. I appear on behalf of Refugee Legal with our Executive Director, David Manne [inaudible] Refugee Legal is specialist [inaudible] legal centre providing three legal assistants to refugees and migrants experiencing disadvantage in Australia. For over 33 years Refugee Legal has provided critical legal assistance to many thousands of people in the community and detention centres around Australia, including for people who would be adversely affected by this proposed bill.

We oppose the bill in its entirety. There is no clear and compelling justification for the introduction of a new protected information framework. In our submissions, the proposed amendments operate to deny procedural fairness and in turn deprive the people affected of a fair hearing. Both of these are bedrock principles of our legal system and must be protected. The bill severely impedes the ability of decision-makers [inaudible] and merits review stage, bodies such as the Administrative Appeals Tribunal, in reaching a fair, just and timely outcome. Finally, it restricts the ability of the courts to properly consider the proportionality of impact of disclosure by confining consideration to a number of prescribed matters heavily weighted towards non-disclosure. Put simply, the proposed bill operates to create a framework where the executive and its agencies in effect determine which information—material decisions affecting the rights of people—is made available to that affected person.

The consequences of this bill to the people we assist are grave. These include, as Sangeetha mentioned, rendering people stateless in Australia, subjecting people to prolonged indefinite detention and returning people to countries where they face serious human rights abuses and, in extreme cases, their death. One of the fundamental safeguards against these dire outcomes is the access to the very thing that this bill threatens: a fair hearing under the rule of law. We urge the committee to recommend against the passage of this bill.

CHAIR: Thank you. Any further opening statements?

Ms Graydon: Thank you very much to the committee for this opportunity to appear today. We endorse the comments made by other colleagues who've already have made their opening statements. By way of background, the Asylum Seeker Resource Centre's Human Rights Law Program provides legal assistance to disadvantaged people seeking asylum at all stages of the process, including the departmental level, the merits review process we've been talking about today as well as judicial reviews—so across all three levels.

I'd like to start by highlighting the challenges facing many of our clients who—many of the assumptions in relation to judicial review as being safeguard [inaudible] some difficulties with this non-disclosure information are based on the assumption that people have access to legal representation. In our experience, a vast number of people going through these processes—departmental, merit review or judicial review—do not have access to legal representation. So as far as the emphasis on judicial review as a safeguard, many applicants will have no opportunity to seek to review because they've lacked legal representation at all stages of the process. This really puts them in such an inherent position of weakness, especially given the complexity of the existing laws that are already in place, the very adversarial process that applies—especially the merits review process where government lawyers are represented but applicants are often not represented. And the assumption that there will be judicial review as a safeguard for people in that situation is misplaced.

We are one of the very few legal services that provide any access to justice for judicial review matters. It is of great concern to the Federal Court to see unrepresented people before them continuously. So building the safeguards into the judicial review level is insufficient. What we are looking at under this bill is a situation where the tribunal itself does not have access to that information, even though they are the merits review decision-maker, who need to provide the merits review decision in relation to that case. So under the existing law, where the tribunal may have access to that non-disclosable information, under this law they will not be able to have access to that information unless a minister exercises a discretion to make a declaration and to make that information available to the AAT. As noted in earlier submissions, it's largely been just a merits review process as another tier in terms of being a genuine merits review for people going through the process. So what we see with this bill coming into effect would be a distortion of all the stages of the process if a person doesn't have access to information and know the case against them at any point in that process.

As was highlighted by other colleagues, we are talking about severe repercussions of these decisions not only for the person facing visa cancellation or loss of their citizenship but also for completely blameless third parties, like their family members and especially in relation to their children. At no point in any of these processes is Australia's obligation to give primary consideration to the best interests of the child factored into any of this decision-making. We already are very concerned by the very low bar that we have in relation to visa cancellation and citizenship-loss cases. This bill would add an additional layer of gross unfairness for applicants going through that process and affect those innocent parties.

We would like to highlight there has been no case put forward as to what gaps in the existing law this proposed bill fills. We're aware that there are myriad other laws about protecting sensitive information that are already in place. Some of them already cause us concern, quite frankly. There is a real need for there to be a proper review and streamlining of these laws, because, as we see it, it will create legal uncertainty and a real lack of clarity when there are so many different intersecting legal regimes on the same topic that are already in place. We would see that there is no need for this law. It doesn't fulfil any purpose that's not already being met by existing law.

Finally, we would just like to highlight the issues for legal representatives in even making these judicial review applications which are supposed to be safeguards in deciding whether or not applicants have any chance of getting access to that information. As legal representatives, we can't file an application for judicial review unless we're willing to certify that it has merit. But if, as the legal representative, you have no knowledge as to whether or not this protected information even exists, let alone whether its contents may interact with your client's application, it's impossible for you to sign a certification saying, 'There is merit to this application.' That creates an additional professional, ethical and legal barrier for lawyers even being able to raise applications for judicial review seeking disclosure of the information.

Our submission is that this bill should not be passed. We don't think any of the proposed amendments will address the core issues at stake in relation to applicants' lack of access to judicial review. That's our final submission and position in relation to the proposed agreements that have been put forward by some of the other parties appearing before this committee.

CHAIR: Thank you very much, Dr Graydon. Mr Hirsch, do you have a brief opening statement?

Mr Hirsch: Yes, thank you. I will be brief. I am here today on behalf of the Refugee Council of Australia and particularly refugees and the organisations that support them. As my colleagues on this panel have already noted, this bill is an infringement of our longstanding tradition of procedural fairness—essentially, the right to view and respond to information used against you. It is a core value that people should have the chance to view and address any information used in deciding their case. Ensuring applicants have a fair hearing is in everyone's interest—it is for decision-makers to get it right and it protects against sending people back to harm. Without the chance to respond to secret information, how do we know that the information being used against a person is reliable? There have been many examples where the department has relied on secret information only to later find out that such information was lacking, insufficient or incorrect. Allowing a person to respond to such information only strengthens the decision-making process and helps the decision-maker, the courts or the department [inaudible] decision. We're talking about people's lives here. Decisions made on a refugee application can be life or death. We should be making sure that decision-makers have all the relevant information before them. We ask the committee to oppose this bill or, at the very least, introduce alternative mechanisms to safeguard [inaudible].

CHAIR: Thank you very much, Mr Hirsch. We will now go to questions. This is obviously a panel discussion with the four organisations. Senator Carr, do you have any questions?

Senator KIM CARR: I would like to be quite direct here. Mr Manne, you've got extensive experience in representing refugees and appearing before various tribunals. What's the effect of this bill in terms of people that you've sought to represent in the past? What would the effect be if this bill was to be carried on the capacity of you to be able to represent people in judicial proceedings in this country?

Mr Manne: It would significantly undermine the ability to properly represent people throughout the process, and, fundamentally, it would seriously undermine the ability of people that we represent to know the case against them and to be able to respond to that meaningfully and to get a fair hearing. That's what's at stake here. What's also at stake here—and the context is critical—is in many of the situations that we're talking about people face life-threatening harm and are seeking protection in Australia and are either then at serious risk if they don't get a fair hearing, that fundamental safeguard, of the wrong decision been made, serious miscarriages of justice following and then people being deported to danger, including the prospect of torture or death. That's what's at stake. If they're not sent because of the character context we're talking about, some people are not deported but are instead held in prolonged and indefinite detention, which in Australia, as we know, can mean many, many years with no end in sight being locked up, often without charge or trial. They're some of the key consequences.

Senator KIM CARR: So it's not always the case that people are guilty of serious crimes in terms of the character test, is it? In your experience, what sorts of claims are being made against people subject to the character test?

Mr Manne: It varies vastly. It can be minor matters. It can be suspicion or association. It can be mere allegations which remain completely untested. It can range from that to minor offences to more serious crimes, but it's a very wide gamut. My colleague might want to add to that.

Mr Hewaarachchi: There have been instances where people have been refused visas for minor offences such as trespass as a result of severe mental ill-health. This is not in abstract; this is an actual matter that we had with a person just recently. [inaudible]

I guess the other important element here is it doesn't just impede on our ability to represent our clients; it significantly impedes the ability of the Administrative Appeals Tribunal, which is the review body of these primary decisions, from discharging its statutory function.

Senator KIM CARR: To any of you, the resource centre, for instance, draws our attention to the Independent Reviewer of Adverse Security Assessments. In 2012 it found 57 refugee applicants had their original security assessments downgraded or either qualified or non-prejudicial assessments. Is there a history of security agencies getting things wrong, of Centrelink getting things wrong?

Mr Manne: I might jump in again, if I can, and then go to colleagues. There is a case I wanted to raise which goes to this point. It's a case of someone who we acted for who was seeking asylum. They had arrived in Australia and were detained. Their case was refused on the basis of a security assessment and they were unable to view the material—that is, the case against them—to know the information and to properly respond to it. After various legal battles, including in the courts, where he was unable to access that information, and only because of the ability to have a legal representative [inaudible] case, he brought a complaint to the Inspector-General of Intelligence and Security. I might just summarise the findings for a man who was held in detention for three years and, for much of that time, was unable to properly get a fair hearing or present his case. The findings were these: ASIO relied on adverse reports from an overseas security service which were internally inconsistent. ASIO took no action to corroborate the allegations in the reports contrary to internal guidelines. The reports should have been viewed with scepticism because ASIO knew that the country concerned had been assessed as having a poor human rights record, particularly in relation to the ethnic group to which the applicant belonged. ASIO did not have reasonable grounds to believe the applicant had been truthful in his statement supporting his application for a protection visa. ASIO failed to seek from the applicant an explanation of the adverse imputations in the reports from the overseas security service before it issued the assessment. Had it done so, it is likely that he would have been able to provide satisfactory responses. Ultimately, the director-general of ASIO withdrew the adverse assessment relating to the client of ours, directed a review, and, effectively, our client ended up being granted a protection visa and released from detention. Nonetheless the applicant was held for a prolonged period in detention while this process was undertaken.

Senator KIM CARR: In terms of this legislation, which extends those provisions that already exist, is there a danger, in your assessment, that that type of injustice could in fact be broadened?

Mr Manne: Absolutely. There's a very serious prospect of the extension of that very kind of injustice through these provisions, and that's because these provisions seek to, effectively, block any proper or proportionate consideration of matters which could be put and weighed in the assessment of security risk or otherwise. I might leave it to other colleagues—

Senator KIM CARR: In the opening statement there were some comments made about the capacity of judicial review under this measure, if I heard that right. It will be argued by government that this bill provides for adequate judicial review. Given, for instance, in the case of Sri Lanka, where there has been example after example of quite bias security reporting—and we've got on the list here other counties: North Korea, China, Iran and various others where there have been issues with regard to INTERPOL where they have been open to serious abuse of process—I'm wondering if you or any of the other witnesses would like to comment on the capacity for judicial review under this legislation.

Dr Pillai: I'd like to say something briefly and then throw it open to everybody else. The quality of judicial review that the bill provides for is that—the court is called upon to make a determination. What happens first, where confidential information has been relied upon and the matter gets the judicial review stage, is the court has to have a preliminary hearing if it wants to hear the information, where it hears what the information is. The applicant will always be excluded from that because, prior to this stage, there is no capacity for the applicant or their lawyers to have the information. That will be done with representations made by the government only.

The court, then, needs to make a decision about whether to disclose that information to any other parties, including the applicant and their lawyers. When they make that determination, it's phrased as 'The court can determine whether disclosure is warranted in the public interest,' but the court is only allowed to take into account a very small list of factors. There are seven factors and all of them go against disclosure. Things like the rights of the child, other human rights, even things like the capacity of the case being prejudiced or a wrong decision being reached if the information is withheld are not things that the court is allowed to take into account. So there's a skewed list of factors that the court's allowed to have regard to. They weigh very heavily against disclosure.

The likely result, therefore, is going to be that the applicant doesn't, ultimately—a judicial review proceeds under circumstances where the government has access to the confidential information and is allowed to make submissions about whether it should be used or not used, and the applicant is not allowed to make any response to that. What I would say to the argument that this is adequate is: what's the need to withhold a broader range of factors from being taken into account if there are cases where the circumstances are so serious that the public interest would be severely compromised, people would be in danger, their lives would be at risk, if the information wasn't disclosed? That should be the result, even if the court is allowed to take into account a broader range of factors. There's no need to skew the factors.

That's the reason why judicial review is really inadequate. It's also part of the reason why there might be constitutional problems with the mechanism that's being put forward, but I'll throw it open to others now.

CHAIR: Any other view?

Dr Graydon: Perhaps just to highlight that we're not only talking about the national security style cases. The application of these laws is to this very wide range of decisions that often, albeit politically sensitive decisions, relate not to national security but to common crime—or not even, as was pointed out by my colleagues. The discretions already built into visa application processes are so wide, and we don't need a substantial criminal record to trigger a visa cancellation. A person can be acquitted or by association or only have received a community based order in order to be tripped up under these character provisions. So the breadth of decisions that are going to be subject to this cloak of invisibility is very concerning.

In relation to the point about the access to judicial review, our primary concern is how people are even going to get to that point. So many people are not going to be able to apply for judicial review or be able to make a special application within their judicial review application because of the legal representation, which is the No. 1 issue that we see in this area. It is, in a sense, a perfect storm because there are no organisations that are funded or provide support to assist in this area, specifically. It's very hard, often, to attract counsel to this area, especially at the merits review stage where there are no costs available. Your classic, typical applicant has no or limited legal representation that's available.

I think the complexity of the legal processes that they're subject to and the complexity of the law is another thing that needs to be taken into consideration, when looking at the unfairness of the process that's being proposed under this bill and also the lack of effectiveness of judicial review as a safeguard to the potential for abuse under this bill.

Senator KIM CARR: I've got two other questions.

Ms Saravanamuthu: Sorry, would it be possible for me to add further to what my colleague has just shared?

CHAIR: Yes.

Ms Saravanamuthu: I'd just like to remind people and bring to the fore that every applicant in this situation is incarcerated, either in immigration detention or in prison, which adds to the increased difficulties in accessing legal representation, in addition to the reopening of the Christmas Island detention centre where many of the applicants facing cancellation refusals are being held. We're also dealing with serious mental health issues and we have some difficulty reaching our clients on Christmas Island, particularly in light of the recent unrest which happened on the island. It's in a different time zone and there are other ancillary issues that we face for our clients who are in incarceration.

Another important issue to bear in mind is that these new provisions are also in the context of increasing difficulty in accessing documentation through freedom-of-information requests. In addition to our clients not being able to access their full departmental files when they're facing visa cancellation or refusal, which has serious consequences, we're being requested to present their cases before the merits review without full access to their documents. Often that's within the limited 84-day time frame as well as the strict two-business-day rule before the AAT. We're then required to seek judicial review, again with no full access to the documents.

We regularly have clients who are unable to access their documents due to national security provisions or other provisions under the Freedom of Information Act regarding law enforcement and public safety. We find that there

are often extensive redactions. We have to seek internal review and then approach the Office of the Australian Information Commissioner and, in some cases, even seek review at the Administrative Appeals Tribunal to access those documents. That demonstrates, as other panellists have pointed out, that there's clearly no need for an additional layer of secrecy or prevention of access to people's documents.

Senator KIM CARR: The other concern that I've picked up in the submissions relates to clauses 52A and 503, which go to the effect of unauthorised disclosures. This is where a person commits an offence if they disclose information, including information to the Commonwealth Ombudsman, the Australian Commissioner for Law Enforcement Integrity, the Information Commissioner and the Inspector General of Intelligence and Security. The PID Act includes immunities for individuals to make good faith disclosures. But then, of course, under section 7 of this provision it suggests:

(7) This section has effect despite anything in:

… … …

(b) any other law of the Commonwealth; or

(c) any law (whether written or unwritten) of a State or a Territory; …

Are you familiar with that section? And, if you are, what do you think the effect of those provisions will be?

Dr Graydon: I think it will result in a very careful, conservative and fearful approach by those with access to that information, to widen the scope of information that won't be disclosed in order to protect themselves from potential prosecution under fairly draconian provisions that do not seem proportionate to the issues raised.

Ms Saravanamuthu: I'd also like to say that, as I shared regarding freedom-of-information requests, we regularly see over-redaction of information that isn't actually confidential information or a risk to national security. So, if we're already seeing that, with serious offences being in place it's likely to widen the scope, as Carolyn said.

Senator KIM CARR: Would anyone else like to comment on those provisions?

Mr Manne: We'd broadly agree with the comments just made by our colleagues, but we'd otherwise be happy to take it on notice and provide a short note.

Senator KIM CARR: Would you? I would appreciate that. It strikes me that it's a measure which hasn't been fully understood yet.

Mr Manne: Yes.

Senator KIM CARR: Like so much of this bill, it's been rushed and the fact that it can change any other law of the Commonwealth, or any law of a state or territory, may not be appreciated—

Mr Manne: Yes.

Senator KIM CARR: and that may well have far-reaching consequences for the way in which we operate in terms of the oversight provisions of all other bureaucratic agencies.

Mr Manne: Yes.

Senator KIM CARR: I'd appreciate it if you could do that. If there's a majority for the second reading of this bill, which is still an open question, do your organisations have any view as to what amendments might be necessary to alleviate some of the more draconian aspects of what some might call fascist legislation?

Mr Hirsch: Perhaps I can talk about it first of all. Clearly, my colleagues have highlighted a number of potential [inaudible] in the bill and submitted that it shouldn't be passed in its current form and that there are many reasons we wouldn't be supporting any kinds of amendments. But perhaps one area where it may be possible to at least safeguard some of these concerns is in the introduction of a security-cleared legal representative to act as a lawyer for the applicant in these matters, either at the primary decision stage or at merits review and judicial review. This is a system that's already set up for other national security matters—in 2004 it was introduced—and that allows applicants to choose a lawyer who has gone through the relevant security clearances set by ASIO who can then view the information used against the applicant and then respond to that information as well. Now, that doesn't solve all the problems, and [inaudible] around [inaudible] that the courts [inaudible] disclose such information, but it perhaps goes some way to ensuring some kind of procedural fairness where the applicant can respond through their legal representative.

Mr Manne: Our submission is that the bill should be rejected in its entirety, and the reason for that is that, in our submission, there are more than adequate safeguards to ensure non-disclosure of information in the public and national interest, and, really, our submission is that we should actually in fact be exploring the scope to increase procedural safeguards for people in this situation, the subject of this bill, rather than further restricting them. So,

as to any proposals, we are very reluctant to be trying to propose a number of amendments, whether technical or otherwise, to a bill which, at its heart, is fundamentally flawed.

Dr Graydon: We would further endorse that position just put forward by Mr Manne, but we'd also add that any amendments to the arrangements will be largely meaningless unless there is a right—a funded, resourced right—to legal representation in this whole space, which is what is currently lacking. So how a person will be able to [inaudible] gain access to supposed safeguards is truly a very major question that hasn't been answered. That would need to be an area provided for in legislation.

Dr Pillai: My submission is also that the bill should be rejected in its entirety because the problems with it run quite deep. However, I would say that a real problem here has been the lack of any explanation for why safeguards that are feasible were not considered, and both the scrutiny of bills committee and the Parliamentary Joint Committee on Human Rights noted this. They said that safeguards that could have been built in to reduce the impact of this bill include things like allowing the court to take into account a broader range of factors when determining whether disclosure is in the public interest, a special advocate system or disclosure to a security-cleared lawyer, as my colleague from the Refugee Council suggested. It's really disturbing that the bill was put forward without any consideration of these safeguards. If the bill were to proceed to a second reading and the question of safeguards were to fall on the table, then—while it is my view that the bill should be rejected in its entirety—I would say that it's important that, as my colleagues at the Asylum Seeker Resource Centre have just said, that inquiry is holistic and looks at the impact that those safeguards would have. Would procedural fairness be properly protected by the safeguards? Would there be problems with access to legal representation? It's not just a question of sticking in a couple of safeguards and then calling it okay. That would need to be a holistic inquiry for it to be a worthwhile exercise, in my view.

Mr Manne: Another comment we would make is about the inadequate time frames for consultation on what is such a grave matter, which goes to the very heart of one of the fundamentals under a constitutional democracy, and that's a fair hearing. Senator Carr referred to this provision, which we have undertaken, on notice, to comment on. There are not only the matters that are clear but some that appear to potentially propose other, far-reaching measures which could have broader implications. There are very short time frames here and very limited consultative fora. The other thing that goes to the heart of a lot of these matters is proportionality.

I'd note too, with real concern, that the Parliamentary Joint Committee on Human Rights and the scrutiny of bills committee both raised profound concerns about a number of measures and also suggested measures that could mitigate—at least, potentially mitigate—the incursion on fundamental rights that we've all referred to today. It's not apparent that these matters have been considered with any rigour at all.

The final point, which it would be very interesting to know further from the government on, is: what is the explanation for the lack of evidence or analysis of the need for this bill? Is it, for example, that they believe that the evidence or analysis, to the extent that it exists, mustn't be disclosed? I say that seriously. Are there matters that we're unaware of to lead to this bill? Otherwise, what we seem to have is a situation of a bill with radical implications but with almost no proper justification for necessity.

CHAIR: Look, I will now move to myself. I've got a couple of questions. Thank you very much, Senator Carr. Firstly, you've raised some concerns about the period of time you've had to comment or raise concerns about the bill. It was introduced into the House of Representatives on 10 December 2020. Can I ask any members of the panel: have you at any time forwarded to the government or the minister any concerns in relation to the bill, since 10 December? Can I assume that that's a no from each of you?

Senator KIM CARR: We have the submissions.

CHAIR: No, I'm not—I'm just asking that question. So I will take it that that hasn't occurred. Just as another point of clarification to Mr Manne—this was raised a bit earlier and I have clarified this already in this public hearing today—the Parliamentary Joint Committee on Human Rights handed down a preliminary report in relation to this bill, report No. 1 of 2021, but the committee made it clear that it had not yet formed a concluded view in relation to this matter. I was actually chairing the committee at that time, so I just want to make that point. Certainly the legal adviser to the committee raised some legitimate concerns, and the committee also did raise some concerns in that the bill does engage and limit 'the right to a fair hearing and prohibition'. But, of course, in international human rights law, as you know, there is then the assessment as to whether there are permissible limitations if they are shown to be reasonable, necessary and proportionate. So the committee's consideration of the bill is still being undertaken, and the minister is to provide the committee with further information before the committee makes a final assessment.

I just want to briefly provide the example that I have raised before. This is in relation to confidential information which is not a matter of national security. I'm talking perhaps about an organised crime group, where there might be an informant embedded in the group and there is highly sensitive confidential information which, if it were disclosed to the respondent, could put someone in peril or even potentially endanger their life. Of course, that does not concern a matter of national security. So I'd like each of you to respond to the issue that public interest immunity and the measures under the National Security Information (Criminal and Civil Proceedings) Act don't go far enough in that respect and that is why a broader definition of confidential information is required, as set out in this bill. Can I ask you to respond to that. Do I have anyone that wants to make a comment about that?

Dr Pillai: I didn't make detailed submissions on this. I believe that later in the day both Legal Aid NSW and Victorian Legal Aid will be able to speak to this in quite a bit of detail, and I would defer to them. The only response that I have is that I think it's incumbent upon the government and the department to justify what is lacking in the law as it stands. We have both a framework for applying for public interest immunity and a law that deals with the nondisclosure, where appropriate, of national security information. Effectively, the only justification that has been made for why that is insufficient is a bald assertion in the department's submission that it is insufficient. For a bill that has such a profound impact on the rights of individuals and in which such scant attention is given to other safeguards that can be built in—and that is something that both the Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights have noted—there has been no consideration of the ways in which this harsh impact could be mitigated. I think it's incumbent upon the government to make a case for what is lacking in the law, and that hasn't been done.

CHAIR: I'm putting to you that very issue: that the protected information relates only to national security matters. There are other matters that are not covered by the national security information, such as confidential information which might concern serious criminal offences that are not in the public domain—such as someone who is embedded on behalf of a law enforcement agency in an organised crime group—where even disclosure about those matters could put someone's life at risk. Surely that justifies the expansion of the definition of confidential information as set out in this bill?

Dr Pillai: I don't want to speak to the specifics of the scenario. I would like to leave it to others to speak to that specific scenario in detail, because it's not, primarily, my area of expertise. However, I would respond to your first point that the current provisions only deal with the nondisclosure of national security matters. I don't believe that's true. There is also a framework for applying for public interest immunity that relates to matters that are not national security matters. As the Australian Human Rights Commission said in their evidence this morning, it's the combination of the public interest immunity framework and the National Security Information Act that provides the existing regime. It's not correct that it's only national security matters that can be not disclosed.

CHAIR: No, and I have made the point already to the Human Rights Commission that public interest immunity, for instance, does not protect all information. If there is a criminal informant—using the example I've raised—it may protect parts of the informant's statement but it will not necessarily protect the whole statement or the fact that there is an existent informant's statement. That's the issue that I'm putting to you.

Can I move quickly because we've only got a few more moments.

Dr Pillai: I do have a response to that, though.

CHAIR: Yes, sure.

Dr Pillai: Without speaking to the detail of the existing regime, none of that is a response to why there haven't been safeguards built into this bill and why the list of factors that the court can take into account when it decides whether or not to disclose information is so limited. None of that is a response to that. Even if there are circumstances which the current framework doesn't canvass—and that case can be made, if it exists—that is not a justification for the bill and the extent that it goes to. It's still a disproportionate response to the situation.

CHAIR: Thank you. Can I ask any or all of you to respond to the Department of Home Affairs' submission on page 6. It says:

Since the High Court decision, the Department has limited its reliance on confidential information provided by law enforcement and intelligence agencies in character-related immigration decision-making due to the uncertainty over how such information would be managed, should the Court require the information to be produced in judicial review proceedings and the information was on-disclosed to the applicant, their lawyers or the public. Potential disclosure of such information may pose an unacceptable risk to the intelligence capabilities, operations and sources of law enforcement and intelligence agencies, including active investigations. This risks jeopardising the trusted relationship between the Department and law enforcement and intelligence agencies.

Could I ask you to respond to those concerns that are being articulated by the department?

Dr Pillai: My response is very short, and it's that I'm a constitutional lawyer and I'm not confident that this bill avoids the constitutional issue in Graham. So, if that's been the department's response to that decision, it's entirely possible that the same risk would apply. It's not clear—it's a murky area of law—but it's very possible that, because of the extremity of this bill, the same constitutional issue arises and the department would be in the same position.

CHAIR: Any other comments from anyone?

Dr Graydon: I would just comment that one of the key concerns is about the lack of definition of 'confidential information'. So, when the scope of information that's covered by this bill is unknowable, and also the agencies that can be the source to that information, and all of the information that's passed on to the department that can be used in relation to these decisions can all be included, there are no current constraints placed on what kinds of information they can identify as having been provided on a confidential basis. There is also the wide scope of additional decisions that this will apply to, and the fact that there are the existing protections in place, as have already been pointed out, in addition to section 503A of the act, which relates to the High Court's decision in Graham that is still applicable, and section 38 of the FOI Act, which includes a number of specific carve outs for the protection of law enforcement and public safety, national security, defence or internal relations, or documents obtained in confidence. There still is an absence of a rationale or justification for why this bill is required.

Mr Manne: Yes, we'd agree with those comments. But I'd say that the starting point for this is that the submission you refer to from the department is, again, very sweeping in its assertions, without any evidence or analysis upon which it's based in the context we've been discussing, which is the potential for serious incursions on fundamental rights and constitutional protections. One would hope that the department and the government will advance more rigorous information and arguments and evidence to support those kinds of sweeping assertions that talk about creating uncertainty. It refers to qualifications like 'may', not 'will'.

The fundamental point here is that there's really a choice. This bill does provide a very stark choice between a regime it proposes, where effectively the executive and its agencies would be in many respects, in effect, the sole arbiter of how to define 'confidential information' and the information that is to be protected with extremely limited scrutiny—the kind of scrutiny that is so limited that it bears almost no resemblance to ordinary protections under the rule of law in this country and certainly does not allow in any way proper testing of that information or definitions of that information in the way that we ordinarily expect in this country. That's the choice. And to base the choice on broad and sweeping assertions by the department about what might happen or may happen in the future is insufficient, to put it mildly. So, that's our broad submission on that point, and it's very difficult to respond further.

CHAIR: Perhaps I could just ask you to respond to this point. I was referring to the department's submission for the purposes of this public hearing, but fundamentally the determination is made by the court, by the judge, not by the department or the government. So it's a matter for the judge to determine where there is a proper basis to release the confidential information, taking into account the public interest test. Surely, that must give you some comfort that it is the courts which are exercising this discretion?

Mr Manne: If the courts are able to perform their ordinary function, but the bill proposes something quite different to start with—that is, that the provisions of the bill are heavily skewed toward exclusion of disclosure of the information. It's very one-sided and it's also prescriptive. So rather than including ordinary considerations for the judge, such as the consideration for administration of justice and, indeed, a fair hearing and procedural fairness, those matters are not included as considerations. Rather, what is proposed here is an exhaustive—that is, definitive—list of considerations which are heavily skewed toward exclusion of that information from disclosure.

In a way, the ordinary operation of the courts, which is to balance or weigh considerations, is effectively undermined under this bill so that the sort of lens through which the judge can view those matters is so confined as to all but limit other possibilities, such as elemental issues such as a fair hearing and procedural fairness.

CHAIR: Just using your example of the administration of justice: if the judge were allowed to consider a matter such as the administration of justice, can you explain what different that would make in terms of procedural fairness?

Mr Manne: It's difficult to give a very precise answer because it would depend on the facts of the case. But, in a broad sense, it would enable the court to perform its ordinary function—to balance considerations to engage in a weighting of considerations, or a proper weighing up of considerations. That includes the ability of a person—the applicant—to know the case against them. What's being proposed here is a regime where that is all

but impossible. It's all but impossible, for example, for the applicant to participate in a process to determine the matters—the claim for confidentiality or protected information—let alone being able to put the case—

CHAIR: But just to be clear: when the judge is making that assessment, they're making that assessment in relation to whether the confidential information should be released. You're arguing that there should be a broader range of factors that the judge should be able to take into consideration, such as the administration of justice. That's a different test, isn't it, to the actual release of the confidential information? Remember, there are two limbs to this test. The first limb of the test is if the confidential information should be released or disclosed. And if you're arguing that there needs to be a broader range of factors that the judge should take into account, I'm asking you, for instance, about the administration of justice and what that means in practice.

Mr Manne: It would depend on the facts of the case as to precisely what it meant in a particular circumstance. It's very difficult to give you—

CHAIR: Sure, I appreciate that.

Dr Graydon: I'll add something in relation to the administration of justice. I think it would help to increase the aspect of the prejudice caused to the applicant, which could then be included in the weighing process. I'll hand over briefly to Rachel.

Ms Saravanamuthu: I'd like to make the point that it's inconsistent that the Administrative Appeals Tribunal is trusted with non-disclosable information regarding national security matters but, at the same time, is not seen as trustworthy to share other confidential types of information.

CHAIR: Thank you very much. I also want to note in regard to your concerns which were raised about constitutionality that this is actually referenced in the explanatory memorandum. The issues raised in the High Court decision have been specifically addressed, and the measures in the bill will ensure that the courts have access to all the information that was before the minister when the decision was made. So that should alleviate some of the concerns which have been raised in relation to constitutionality.

Dr Pillai: I would say only that I've read that and didn't find it to be a particularly thorough response, and it's not my view that it adequately responds to the issues.

CHAIR: Thank you. Your concerns are noted. We now have to bring our panel to an end. Thank you so much for your evidence today. Today we've heard from the Refugee Council of Australia, Refugee Legal, the Kaldor Centre for International Refugee Law and the Asylum Seeker Resource Centre. If you wish to provide the secretariat with any further information or answers to questions on notice, there's limited time to do so; I think Friday lunchtime is our deadline, because we're on a fairly short time frame.

CLARK, Ms Chelsea, Manager, Migration, Civil Justice, Access and Equality, Victoria Legal Aid [by video link]

FISHER, Ms Sarah, Manager, Migration, Victoria Legal Aid [by video link]

GEROGIANNIS, Mr Bill, Senior Solicitor, Government Law, Civil Law Division, Legal Aid NSW [by video link]

KETLEY, Ms Harriet, Senior Legal Project Officer, Criminal Law Division, Legal Aid NSW [by video link]

[13:51]

CHAIR: Welcome. Thank you so much for your time this afternoon. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submissions as submissions No. 4 and No. 9 respectively. Do you wish to make any corrections to your respective submissions? I'll take that as a no; thank you. Would any of you like to make a brief opening statement before we go to questions?

Ms Clark: Yes.

CHAIR: Please go ahead.

Ms Clark: VLA's migration team runs a number of services, including a daily phone advice service, minor work in litigation trials along with court and tribunal duties. Our clients typically include asylum seekers, refugees, victims of family violence and those facing visa cancellation. Since July 2018 we have assisted approximately 150 clients through the granting of legal assistance in relation to applications for judicial review of decisions to cancel or refuse their visas on character grounds. VLA's criminal law program operates the largest criminal law practice in Victoria. Last year the criminal law division assisted over 46,000 unique clients. Through its diverse practice, VLA is uniquely placed to see how the visa cancellation scheme affects individuals and their families as well as the justice system more broadly.

Informed by our practice, I intend to make a brief statement about the following points: firstly, it's crucial to preserve the role of the courts in balancing competing public interests, including through participation of both parties in hearings about non-disclosure; secondly, there's the need to maintain robust requirements for non-disclosure, including a definition of confidential information; and, thirdly, we have concerns regarding the expansion of the non-disclosure certificate scheme to decisions under the Citizenship Act.

I go to the first point. The courts play a vital, independent role in balancing the competing public interest between, on the one hand, the protection of national security and critical law enforcement and intelligence capabilities and, on the other hand, the public interest in giving a person affected by a decision the opportunity to respond to adverse information. The courts provide oversight of public interest immunity claims and ensure that material is not withheld from applicants when it should be disclosed. This is important to the integrity of the system as it ensures that agencies remain accountable for the veracity of the information they seek to pass on. This helps to maintain public confidence in the administration of justice.

Under the proposed bill, the court is being asked to weigh the public interest in what is, essentially, a secret hearing, without receiving any submissions from the affected person or their legal representative and only having regard to one side of the public interest ledger. The court is prevented from considering the public interest in a fair hearing. This makes the balancing exercise moot. In effect, the bill will make it more difficult and, in some cases, virtually impossible for applicants to challenge decisions to refuse or cancel their visas or citizenship on character grounds. In our experience, this leads to prolonged immigration detention and, in other cases, a risk of refoulement in contravention of Australia's international obligations.

To the second point, the bill provides no guidance on the type of information that may be certified as confidential by a gazetted authority. In doing this, it removes any analysis by a third party, including a court, about whether, in fact, it should be protected information. The bill's lack of parameters and reduced evidentiary requirements make the framework unreasonably broad and open to overuse. When this is combined with the exclusion of the affected person from preliminary proceedings and the limits placed on the court's oversight, there is a real possibility that information that should have been disclosed will be withheld from affected persons.

Thirdly, the expansion of the certificate regime into the Citizenship Act will undermine the transparency and accountability of decision-making. In VLA's experience, the department's use of non-disclosure certificates has resulted in information being withheld from applicants unnecessarily, leading to long delays and unfair decision-making. The bill's proposed curtailment of natural justice, in respect of the non-disclosure certificates, is creating

a culture of non-disclosure and is a fundamental departure from the well-established proposition that an affected person be provided with sufficient information in order to be able to provide a meaningful response to adverse information.

That is all from our opening statement and we're happy to take questions.

CHAIR: Thank you very much, Ms Clark. Before I ask Legal Aid NSW to make an opening statement, I just want to, along with Senator Carr, welcome grade 6 students from Geelong Grammar School who are here at this Main Committee Room. It's terrific to see our students coming to Canberra and learning all about our democratic institution, including the very important Legal and Constitutional Affairs Senate Committee. So welcome to you all! I now ask Legal Aid NSW to make an opening statement.

Mr Gerogiannis: Thank you, Senator. Firstly, we would like to acknowledge the Cadigal people, who are the traditional owners of the land on which we are speaking. We would like to pay our respects to elders, both past and present, of the Eora nation and extend that respect to other Aboriginal and Torres Strait Islander peoples present and following this broadcast.

We appreciate the committee's invitation to Legal Aid NSW to make submissions regarding this bill. Of course, the submission has the details of what we have put, in relation to the bill, but there are two main aspects to it. The first is the civil administrative law issues raised by the proposed legislation, in relation to decisions that cancel or refuse a visa on character grounds as well as decisions to refuse, cancel or revoke citizenship, again, substantially on character grounds. The concerns that we've raised in our submissions are reflected in many of the submissions that have been provided to the committee. There's no argument that sometimes a government must act on information that it cannot disclose due to considerations such as national security. However, weighing against that is a countervailing consideration that a democratic government and its agencies must act accountably. In our view, the protected information framework proposed by the bill introduces disproportionately harsh provisions which adversely affect accountable decision-making and offer no real justification for departing from existing avenues that are available to the minister for nondisclosure of sensitive information either in the courts or to the AAT. We echo the concerns raised by the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills regarding the apparent relegation of the rights of people who've been adversely affected by these decisions to have their cases considered fairly, with the ability to answer the case against them to the fullest extent that is possible, coupled with the curtailment of judicial oversight.

Secondly, from the perspective of our criminal defence practice, we are also concerned about the potential impact of the bill on criminal proceedings. In particular, the bill appears to have very broad application beyond visa and citizenship cancellation proceedings through broad provisions expressly overriding state and common law and the introduction of a broad criminal offence prohibiting disclosure of confidential information by an authorised Commonwealth officer. Where confidential information is held by an authorised Commonwealth officer, they would be prohibited from introducing the information in criminal proceedings unless the minister consents to such disclosure. There is no obligation on the minister to consent, and there's no defence provision to cover situations where the information held by the Commonwealth officer is required to be communicated to a court. Such a broad offence, coupled with non-compellable ministerial discretion towards nondisclosure, risks undermining the disclosure obligations of prosecution agencies which are fundamental to the right of an accused to a fair trial.

They are our opening remarks. We're happy to take questions.

CHAIR: Thank you very much.

Senator KIM CARR: To both sets of witnesses, you both referred to this need for balance, balance in terms of the provision for the protection of security and secrecy against fundamental democratic rights, including the proper administration of justice, the right to a fair trial, procedural fairness, adequate oversight of executive actions and, of course, the independent functions of parliament and the judiciary under the Constitution. How well in your judgement does this bill provide that balance?

Ms Fisher: Perhaps I'll go first. Senator Carr, I think you've raised all the key issues of concern. We strongly believe that the protections that the government are seeking to introduce are disproportionately unfair. The applicant is going to be excluded from the proceeding relating to whether or not it's in the public interest for there to be nondisclosure. The threshold for whether something is going to be in the public interest or not—we're not talking about harm to the public interest; we're talking about damage, which can be ephemeral or temporary—is extremely low. The applicant is going to be excluded from that proceeding entirely. It's unclear how an applicant is going to be aware that there is protected information which has not been disclosed and how an applicant is going to institute a proceeding in court. It does appear that that would have of to be by the court's own volition,

and the court is going to be greatly hampered in its judicial oversight by only being able to consider a list of exclusive factors on one side of the public interest ledger, so on the side of nondisclosure. We say that is very severely hampering its ability to come to the correct decision.

Another thing of concern to us is that there is no definition of 'confidential information'. It's very difficult to understand why the government says that some information without parameters needs to be protected and cannot be protected by the very comprehensive frameworks currently available under the national security information act and under public interest immunity laws. Those are some of the factors which are of concern. Perhaps our colleagues in New South Wales might like to add to that.

Mr Gerogiannis: Very broadly we agree with those observations. A weighing-up exercise implies looking at both sides of the public interest, and the matters that are set out in the proposed legislation only go one way. It's not a balancing exercise as far as we can see.

In addition to the specified factors that the court has to take into account, another area of concern is that the legislation leaves it open that other matters can be specified in regulation. If the legislation is passed in its current form, it's nevertheless not desirable to indicate by regulation what factors a court should take into account because regulations are not subject to the same parliamentary scrutiny as legislation and those factors ought to be spelled out in legislation rather than being left at large by the executive.

Senator KIM CARR: Is there a problem, in your assessment, with relying upon international organisations that have a record of getting things wrong—for instance, the Sri Lankan security services, the North Korean security services or the Chinese security services? And Australian security services or government agencies, like Centrelink, have a long, documented history of getting things wrong. Is there a problem relying on that in courts where the defendant—and that is the case of the people that you're representing—is not able to challenge the evidence that's been presented?

Mr Gerogiannis: Yes, we'd agree with that broad proposition, without identifying particular sources. The difficulty is that the person who's adversely affected under the proposed legislation simply has no means of making their position known firstly in order to make submissions to the court regarding those balancing factors we talked about earlier. That then leads to the possibility that an adverse decision could be made and sustained on information that may be incorrect. Without those checks and balances and proper judicial oversight it's very difficult.

Senator KIM CARR: The point I'd raise is that they're all organisations on the gazetted list to date. If this legislation is passed, who knows who will be on the gazetted list. That's a matter for future declaration. But all of those organisations I've named are on the list at the moment. They all have records in which there have been errors of fact in their determinations. Is it your experience that courts benefit from having access to defence counsel in terms of advising on evidence that's presented?

Ms Fisher: Just returning to a point that you made earlier about errors being made by government authorities, Victoria Legal Aid has quite extensive experience in relation to robodebt, and it's a matter of public record that very significant errors were made by that Commonwealth department, to the tune of 470,000 debts which had to be waived and $72 million which had to be repaid. If information related to a Commonwealth debt had been passed by a gazetted agency, being Centrelink, to a Commonwealth officer and the fact of the debt being waived was not passed on to a Commonwealth officer, an allegation of fraud could potentially have been made against someone who was at the mercy of the robodebt scheme.

Senator KIM CARR: In terms of Victorian Legal Aid, can you expand on concerns regarding the expansion of the certificate regime?

Ms Clark: So we have two major concerns about the expansion of the certificate regime to the AAT. The first is that the bill attempts to codify the requirements of natural justice as they relate to the new provisions and essentially excludes common law requirements of procedural fairness. I think we would all agree that procedural fairness is a foundational principle of justice and that when a statute creates a decision-making process, there is a presumption that the procedure will be fair. What this new bill proposes is to give the AAT a wide discretion as to whether or not to disclose the information itself and whether or not to disclose the certificate, and provides the applicant with no procedural fairness in relation to both of those issues. This not only has an impact on the individual's case but we would argue it contributes to this culture that it's okay to take information into account in making your decision and not disclose it to the applicant. So that's our first concern.

Our second concern is based on our experience in relation to certificate matters in the migration and refugee division. So, to be clear, most of our work is not in that division, and we assist people at the review stage. But, in our experience, it's actually not until that stage that the fact that a certificate exists becomes known. What that

means is that a lawyer doing their job properly sees that there's a certificate that has been issued and needs to instigate proceedings to have that information disclosed to the applicant to ensure the applicant has had a fair review at the AAT stage. What in our experience we've seen is that in the majority of cases the certificates themselves have been invalid. They've been used on information for which they should not have been and that information has been disclosed to an applicant before any order of the court but just on a review by the department as to whether or not in fact that information should have been disclosed.

We have cases where clients have been to the court several times to try to get access to information which ends up being totally benign. Conversely, we also have had cases where the information behind the certificate is adverse and prejudicial, and that information has not been provided to the applicant to receive a response. I guess our concern is that the overuse of the certificate system in the MRD of the AAT will be copied into the citizenship decisions.

Senator KIM CARR: Could I ask both of you, because the presumption here is that judicial review processes are available to everyone: what percentage of applicants do you service, in terms of the refugee case load? I know that the statistics more generally, in terms of legal aid, suggest that very few people get access to legal aid in this country. How many people, in your judgement, don't have resources to engage with the court system? Do you have any advice for us on that matter? Either group—New South Wales or Victoria—could you provide us with advice?

Mr Gerogiannis: Perhaps I could jump in. I can't say that we have any precise numbers, but, anecdotally, it's well understood that, within the areas where we work, the vast majority of clients, or applicants, are unrepresented. Certainly, that's the case for the visa cancellation regime for the AAT. There are any number of unrepresented applicants before the Federal Court. Often, legal aid funds are limited and not always available. That also varies across jurisdictions within Australia.

If I could just, with your permission, jump back to something in relation to the AAT: as Chelsea Clark said, there is a plan to introduce a certificate system into the Citizenship Act, but there are already existing provisions in the AAT Act for the minister to seek confidentiality orders. The AAT has pretty broad confidentiality provisions in section 35 of the AAT Act, where it can make orders based on public interest, after weighing up the competing factors. The Attorney-General, in fact, has the power to issue certificates in relation to certain information in sections 36 to 36D of the AAT Act. So there are provisions already in the AAT Act that, in our view, more than adequately cover any concerns that there may be in terms of disclosure, without the need for codifying the natural justice rules, as these provisions purport to do. There doesn't seem to be any good reason given for why these provisions, both in the AAT and in the Federal Court, can't continue.

Senator KIM CARR: Thank you. Can I just get some advice from Victoria on the reach of legal aid?

Ms Clark: Last year we assisted 139 clients on grants for legal assistance in relation to judicial review matters. Those numbers have been fairly steady over the last three or four years. When one compares that to the number of cases that are actually going through the courts, one can see that that's really just a drop in the ocean.

Senator KIM CARR: How many go through the courts? I'm going to wrap up with this. How many go through the courts?

Ms Clark: I'd have to take that on notice. It would be available in—

Senator KIM CARR: If you could. I'm just trying to get a sense of proportion in terms of access to justice.

Ms Clark: Yes.

Ms Fisher: We would echo New South Wales in the numbers at the AAT level in visa cancellation matters. I would say the vast majority go unrepresented. That's not work that Victoria Legal Aid can undertake under its guideline.

CHAIR: Thank you. I have a number of questions. Isn't it the case that under the current regime there is information that is not covered by the definition of 'confidential information'? So, if I refer to the acts as well as public interest immunity—in only covering national security, doesn't that present a problem?

Ms Fisher: I'm sorry—I don't think there is a definition of 'confidential information'.

CHAIR: No, I didn't say that. I said: isn't it the case that, regarding the existing protections—the National Security Information (Criminal and Civil Proceedings) Act—that only relates to national security information. That's the case, isn't it?

Ms Fisher: Correct.

CHAIR: And in relation to public interest immunity, that does not protect all information.

Ms Fisher: I think that's an arguable point.

CHAIR: I just want to refer you to the minister's second reading speech in the House of Representatives, when the bill was introduced on 10 December 2020. He said that it's important that these measures are passed—and I'll paraphrase it to some degree—and that while the type of confidential information used in character related decisions may not necessarily meet the threshold for nondisclosure, under the national security framework it nonetheless warrants protection. And I've used throughout the hearing today the example of very sensitive information concerning an undercover arrangement for an organised crime group as but one example of where the alleged criminal conspiracy or crime has not been placed into the public domain. The minister went on to say:

This is because of the potential consequences if the information is divulged—including the risk of compromising Australia's national security and the operations, capabilities and sources of law enforcement and intelligence agencies.

I would like to put to you: aren't those considerations very important also in the administration of justice?

Ms Fisher: I think there are many parts to the extract that you've read from the department's submission. Firstly, I would say that national security is very comprehensively covered by the protections available under the National Security Information (Criminal and Civil Proceedings) Act.

CHAIR: Yes, I understand that, but my point was that other types of sensitive information are not covered under that act.

Ms Ketley: Perhaps I could jump in there. There are a number of safeguards and protections of that sort of information apart from the NSI act. The public interest immunity provisions at common law are well developed and are not closed. There are appeal mechanisms through the courts and tribunals where a government would not be satisfied with a decision at an interlocutory level as to the application of the public interest immunity provisions. But, most importantly, there is section 130 of the Evidence Act. Section 130 does cover the situation that you have raised in questions today—in particular, in relation to protection of the existence or identity of a confidential source of information relating to the enforcement of administration of a law of the Commonwealth or the state. That is subsection (e) of section 130.

CHAIR: Just to pick up on that point: that doesn't include confidential information such as whether there is an informant who might be engaged in a particular law enforcement operation. You're only referencing the identity. I'm making a broader point—that public interest immunity is not a complete protection. In fact, the minister makes that reference in his second reading speech. He says:

…public interest immunity does not provide full protection for the type of confidential information that may be provided by law enforcement or intelligence agencies or their sources to support character decisions.

Ms Ketley: Our position is we do not agree with that proposition. The Evidence Act is very clear that it applies to the existence of an informant and not just the identity of that informant and that that list is an inclusive list. The court also has inherent jurisdiction to control access to and dissemination of particularly sensitive evidence, and it uses those. It uses them on a case-by-case basis to tailor orders, whether it be by undertakings of the parties—it's a common thing. The High Court has in 2019 in the matter of H v R—and I'm happy to provide the citation to the committee—underlined the fact that the court has inherent jurisdiction to control its proceedings, including access to secretive [inaudible]. So, in our view, the NSI act is a very important part of this discussion, but there are other statutory and common law provisions which are not closed. We also understand that the NSI act itself is presently under review by the Independent National Security Legislation Monitor. It may be that relevant recommendations would assist the inquiry, in terms of the necessity of this bill, in due course.

CHAIR: Can I just raise with both of you, being Legal Aid NSW and Victoria Legal Aid—did you consult with any victims-of-crimes groups in relation to your submission, including, in the case of Victoria Legal Aid, the Victorian Victims of Crime Commissioner?

Ms Fisher: Thank you for that question. As you would appreciate, the lead-in time for drafting submissions for consideration by this committee was extremely short, and we took the decision that we had to address the aspects of the proposed bill and go to our practice. We did not have the opportunity to contact any advocacy groups, but I do note that the Department of Home Affairs' submission does not include any information from advocacy groups on behalf of victims of crime. I would also—

CHAIR: Could I also address that same question to Legal Aid NSW?

Mr Gerogiannis: No, we didn't. We didn't refer to any victims groups in the drafting of this submission. I would note, however, [inaudible] the context. As Ms Fisher said, the time frames were very tight. In terms of these cancellations—

CHAIR: Just to cover off this point—since the bill was introduced into the House of Representatives on 10 December 2020, given this is very much concerning your core business, has either of your organisations sought to make any sort of submission to the minister or the government about these matters?

Ms Fisher: I'm sorry, Senator—I'm not quite sure what you mean.

CHAIR: Since the introduction of the bill on 10 December 2020, has Legal Aid NSW or Victoria Legal Aid made any submission or written any letter raising concerns about the bill?

Ms Ketley: I can say that no, we have not. We have responded by way of a written submission to this inquiry, and we're very grateful for the opportunity to do so. One of the very important points that we have made concerns the potential application of these reforms to criminal proceedings in state courts and the risk that the very broad offence provision, which is a provision of strict liability, will prohibit disclosure and production of relevant and admissible information that is held by authorised Commonwealth officers in criminal proceedings. Our concern about that from a practice perspective is that, where full disclosure is unable to be provided in criminal proceedings, the remedy is an application to stay the proceedings. That is in nobody's interests, including the victims, prosecutors and the accused persons.

CHAIR: Thanks, Ms Ketley. Can I ask Victoria Legal Aid to just address that question of the submission or any letter that might have been sent to the government raising concerns since the introduction of the bill?

Ms Clark: No, Victoria Legal Aid has not, other than providing a written submission to this committee.

CHAIR: Thank you. We are running out of time. I just want to very briefly clarify one matter. There was a reference made to possible breaches of non-refoulement obligations and that this would, obviously, affect the rights of the applicant or the respondent. It is the case, however, that if there is a relevant decision leading to a person's removal from Australia then a number of processes are available to consider Australia's non-refoulement obligations, including that the affected person will still have the ability to submit reasons against the making of an adverse visa or citizenship decision as part of the relevant decision-making processes. That's the case, isn't it?

Ms Clark: You're quite right that if someone's visa is cancelled they have an opportunity, if they respond within the requisite time period, to make submissions as to why their visa should not be cancelled. But it's important to note that if that happens under the mandatory system they are detained as a result of their visa being cancelled. I believe that in the submission, I think it was by the Australian Human Rights Commission, they provided some statistics on the number of protection visas that have been cancelled under the new 501 provisions. The result for those people is that, because of section 197C of the Migration Act, there is an obligation on the officer to remove that person from Australia, and any international obligations and protection obligations are not relevant to that obligation to remove the person as soon as reasonably practicable.

CHAIR: Just to clarify: isn't it the case that, depending on the person's circumstances, the person may be able to lodge a protection visa application, which would allow their protection claims to be considered, and all such claims could be considered, including in relation to ministerial intervention processes before the person becomes available for removal?

Ms Clark: No, the cases I'm talking about are actually protection visas that have been cancelled. Therefore, they are barred from making another application for a protection visa, so that isn't an option for them. Their options are that they are removed from Australia or the minister for immigration, or the Minister for Home Affairs, exercises his non-compellable power under section 195A of the act to release someone into the community. There's no application process for that. You can't ask for the minister to do that. There's no obligation on the minister at all to do that. So these people are left in a very precarious situation and are at risk of refoulement, which has serious implications not only for the individual but also for the Australian nation.

CHAIR: Thank you very much for that. We have now gone a bit over time.

Senator KIM CARR: I have one question.

CHAIR: We have actually run out of time.

Senator KIM CARR: It's a very simple question.

CHAIR: Alright, but a very quick one.

Senator KIM CARR: When did either of your organisations receive an exposure draft of the legislation? Were there any consultations with you about this legislation before it was introduced?

Ms Fisher: Not from our perspective.

Mr Gerogiannis: Not to our knowledge either, Senator.

CHAIR: Thanks. I'd like to thank Legal Aid NSW and Victoria Legal Aid for your evidence this afternoon. We do appreciate your time very much. If you have any responses to the questions on notice, it would be very much appreciated if you could provide those to the secretariat by midday this Friday. Thank you again for your time this afternoon.

Proceedings suspended from 14:35 to 14:45

DEANE, Mr Ian, Special Counsel, Department of Home Affairs

KIRKWOOD, Mr Angus, First Assistant Secretary, Citizenship, Department of Home Affairs

RICE, Mr Andrew, Acting First Assistant Secretary, Immigration and Community Protection Policy Division, Department of Home Affairs

RINGI, Ms Heimura, Assistant Secretary, Legislation, Department of Home Affairs

CHAIR: Welcome. Thank you for taking the time to give evidence today. Information about parliamentary privilege has been provided to you and is available from the secretariat. The committee has received your submission as submission No. 2. Do you wish to make any corrections to the submission?

Mr Rice: No.

CHAIR: Thank you. I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only question asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Do you have an opening statement?

Mr Rice: Yes, we do.

CHAIR: Could you please present that.

Mr Rice: The Department of Home Affairs welcomes this opportunity to address the Senate Legal and Constitutional Affairs Legislation Committee as part of its inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. The bill proposes a number of amendments to the Migration Act 1958 and the Australian Citizenship Act 2007 to protect sensitive information provided by gazetted law enforcement and intelligence agencies on a confidential basis for use in visa and citizenship decision-making in order to enhance the government's ability to manage risk to the community posed by certain individuals of character concern.

The amendments to the Migration Act respond to a High Court decision in 2017 in which the court held that the minister cannot be prevented by section 503A of the Act from being required to divulge certain confidential information to the High Court or the Federal Court of Australia in judicial review proceedings involving character decisions. The bill also takes the opportunity to replicate the Migration Act scheme in the Citizenship Act, which currently has no provisions protecting confidential information used in decisions made under that act.

The bill will also amend the Citizenship Act to create a power for the minister to issue a non-disclosure certificate on public interest grounds in relation to information relating to a decision made under the Citizenship Act where that decision is reviewable by the Administrative Appeals Tribunal. This change replicates a similar power that already exists in the Migration Act for migration related decisions.

Criminal intelligence and related information is vital to assessing the criminal background or associations of non-citizen visa applicants and visa holders. The measures in this bill will ensure that sensitive information, disclosed in confidence by law enforcement and intelligence agencies, is appropriately protected. The bill enhances the ability of decision-makers to use confidential information to manage the risk of certain individuals of character concern where there may otherwise be insufficient information to underpin a decision. The bill helps ensure that individuals who pose a risk to public safety will be prevented from entering or remaining in Australia by providing a framework which protects the confidential information from disclosure where to do so creates a real risk of damage to the public interest.

The measures in the bill do not alter existing rights to seek merits review or judicial review of character related decisions. The bill allows courts to admit the confidential information into evidence and to decide how much weight to give it in the evidence, which provides a safeguard to affected persons—particularly in a situation where the court has determined not to disclose the information to them. The balance reflected in the bill will enable law enforcement agents to provide confidential information to the department to make fully informed visa and citizenship decisions on character grounds while ensuring that the courts are able to assess the information in judicial review proceedings involving such decisions and give the information such weight as the court considers appropriate. Thank you, Chair.

CHAIR: Thank you very much, Mr Rice. I'd like to start by asking you some questions in relation to the High Court decision. How has the decision in the High Court case Aaron Joe Thomas Graham v Minister for

Immigration and Border Protection; Mehaka Lee Te Puia v Minister for Immigration and Border Protection 2017 High Court of Australia 33 disrupted the cancellation of visas belonging to members of outlaw motorcycle gangs?

Mr Rice: Thank you, Chair. I might start and allow Mr Deane to make some comments as well. There have been a number of operational cases in recent years, since the High Court decision, where it has not been possible to proceed with the full character decision, on the basis of the risk that the information provided could be disclosed by the court. There are not large numbers but the risks at stake in those cases are quite high. These relate to a strong association with criminal elements and/or security risk related matters as well. So it has impeded some of the decision-making that would have been ordinarily made prior to—

CHAIR: Can you expand on that in a little more detail and explain the nature of the confidential information, in broad terms, which has prevented the government from cancelling the visas belonging to members of outlaw motorcycle gangs?

Mr Rice: The information that would have been withheld would be of a nature that goes to issues such as associations that the individual might have, suspicion of involvement in criminal behaviours, tendencies towards extremist type behaviour. This is, generally, of a nature that comes to law enforcement and security agencies through fairly sensitive sources and operational methods. What's at stake, if the information could be disclosed, is a real threat to those sources and methods. In short, it's about the associations and the criminal and security related tendencies of the individual.

CHAIR: Mr Deane, do you have anything to add to that?

Mr Deane: Only that, effectively, 503A hasn't been relied upon since the High Court decision because of the uncertainties around the way it would be dealt with, the information would be dealt with, if it was revealed to a court.

CHAIR: Meaning that the confidential information might be passed on to the applicant or the respondent depending on the—

Mr Deane: That's right; correct.

CHAIR: And that could give rise to a real risk that other investigations might be compromised. Is that the case?

Mr Deane: It could be that. It's also about the damage that that would do to the confidence of other agencies in the department's ability to protect the information. If you go back to the original purpose of 503A—it was inserted in 1998 and strengthened in 2003—it was all about ensuring that other agencies could confidently give sensitive information to the department in the knowledge that it could be protected.

CHAIR: So could you explain why these changes in the bill are necessary?

Mr Rice: The reason the changes are required is because that will allow decision-makers to have access to the full spectrum of information that will allow them to make a decision, and that decision, if it is challenged in court proceedings, will have been a fully informed decision. At the present moment, there are some cases, as Mr Deane was saying, that we just haven't proceeded. There are potentially high-risk individuals that we have not been able to proceed with, for either refusal or cancellation, because of the reluctance of agencies to provide this confidential information.

CHAIR: Are you able to specify in more detail what that means in practice?

Mr Rice: What that can mean in practice is that visas that might ordinarily have been refused may not be refused or that the grounds for a cancellation of a visa may not be as strong as they could be in order to make the decision. Potentially, in the citizenship space, there may well not be sufficient grounds to refuse the conferral of citizenship.

CHAIR: How will the bill protect active law enforcement and security agency investigations from being compromised?

Mr Rice: It will protect those investigations by ensuring that the confidential information can be provided to the courts, but the courts need to take into account the public interest before further disclosure of that information. We see additional checks and balances being put in place, and we see, as Mr Deane was saying, the ability to address what the High Court has said about the operation of the framework.

CHAIR: So you reject the assertion in some submissions that the bill is unconstitutional?

Mr Rice: We have taken extensive advice in the process to ensure that the bill is now constitutional.

Mr Deane: That is the case. It wouldn't surprise you to know that, because the bill is designed to give effect to the High Court decision, legal advice has been obtained in the course of drafting the bill. The bill reflects that advice.

CHAIR: When we were speaking about offenders—I, throughout this hearing today, have referred to and used the example, as has Senator Scarr, of the concerning situation where there might be an undercover operation in an organised crime organisation, such as an outlaw motorcycle gang—and the revelation of details of that undercover operation may put people in great peril and may, of course, compromise the investigation. Is that one example of the sorts of offences or offenders that you're concerned about and that you are targeting? Can you give me some examples of some other offenders?

Mr Rice: That is certainly one example of the concern that has existed in relevant agencies around provision of this information. It's a broad set of law enforcement and security threats that we're looking at dealing with. Some of them would be about ongoing investigations. Some of them would be around sources and methods, about how we arrived at the decision. How did we arrive at the knowledge that allowed us to make a decision? An operation may be concluded, but the protection of the way that it was actually conducted and the methods that were used to either bring someone to justice or form an opinion about that person's security or criminal threat would potentially be at risk, if we were not to have these measures in place.

CHAIR: What are the likely consequences, if this bill is not passed?

Mr Rice: We would expect that some visa refusals and visa cancellations would not take place—I'm sorry, I should say citizenship conferrals and revocations as well—

Mr Kirkwood: Mostly conferrals.

Mr Rice: The decisions would be taken, but, should there be a challenge in the courts, then the government agencies would need to think very seriously about whether they would proceed with the court process, given the risk of the disclosure of the information that was used.

CHAIR: Today we've heard evidence that the existing legal regime—I refer in particular to the National Security Information (Criminal and Civil Proceedings) Act—and public interest immunity provides sufficient safeguards in relation to protecting confidential information, which goes beyond matters concerning national security. What's your response to that? And do you have any comment in relation to—I think it was the Law Society or Victoria Legal Aid which referred to it—section 130 of the Evidence Act?

Mr Deane: That section is a statutory reflection of common law public interest immunity, and, on public interest immunity, I would refer you to the 2003 amendments to 503A which were specifically designed to protect information—503A protected information once it got to the courts. The minister, in the second reading speech for that bill, actually said that, currently, the department could only rely on public interest immunity, and if the court does not uphold the claim then the information must be disclosed. The new scheme of statutory protection is intended to provide more effective protection than is provided by the doctrine of public interest immunity as the mechanism for protecting information. That choice was made, back in 2003, that public interest immunity was not sufficient, because it's a very fluid doctrine that requires a claimant to make out their case. It's then a balancing exercise for the court, balancing public interest against the administration of justice, and the outcome is always uncertain. And that's what the minister, in 2003, was getting at.

CHAIR: So this is not a catch-all, by any stretch—public interest immunity?

Mr Deane: Yes. The outcome is always uncertain and the balancing is, as I say, between the need to protect the public interest in law enforcement or whatever and the needs of the administration of justice. That works in many, many cases, but it wasn't considered sufficiently certain in this area, and that's why the 2003 amendments actually were designed to supplant public interest immunity. I guess what I'm saying is that that debate was had then, and the parliament agreed to a different balancing of public interest, and the parliament is always able to rebalance or arrive at its own balance on public interest, and that's what the amendments in 2003 did.

CHAIR: This bill fills in some critical gaps—

Mr Deane: Correct.

CHAIR: in terms of areas of information which are not covered by either public interest immunity or the National Security Information (Criminal and Civil Proceedings) Act?

Mr Deane: Yes. Just as importantly, if the court orders the minister to disclose this information, the important thing is that there's a regime established under the bill for the way the court should deal with the information, and, importantly, it requires the court to make a determination against certain criteria that are specified in the bill so

that the court has that say on whether the information should be disclosed or not, according to that public interest test, but—

CHAIR: So this is not a matter for the minister; this is very much in the hands of the judge, in the hands of the court, based on criteria.

Mr Deane: Correct.

CHAIR: There has been some criticism of the criteria, the factors that the judge would need to consider in determining whether confidential information should be disclosed. Can I ask you to respond to that criticism? Some witnesses today have testified that the factors are not broad enough and that they're skewed in one direction.

Mr Deane: That's a deliberate choice to rebalance, if you like, the factors and to give more weight—predominant weight obviously—to the public interest in protecting security and intelligence information.

CHAIR: But not just national security information?

Mr Deane: No—law enforcement information and national security information. But it's a deliberate choice. But I think what's important to note is: unlike public interest immunity, where if a claim is upheld by a court the information is not admitted into evidence at all, the information will be admitted in evidence. It may not be disclosed to the applicant, but it will always be admitted in evidence, and then the court has the ability to give it such weight as it considers appropriate. In that respect, it's stronger than public interest immunity, because it means that the court doesn't exclude the evidence or the information from its purview, if you like.

CHAIR: From being considered?

Mr Deane: Correct.

CHAIR: The information is disclosed for the judge to consider as part of the proceedings?

Mr Deane: Correct.

CHAIR: Which is in contrast to public interest immunity when the relevant document may not be disclosed?

Mr Deane: If the claim is upheld and the judge says the public interest would best be served by this not being admitted into evidence, it doesn't get admitted into evidence, so the court can't consider it. That's the difference. Under this scheme, this court does consider it.

CHAIR: The section 501 regime is designed to protect the Australian community from noncitizens of character concern. How does the bill seek to advance this objective?

Mr Deane: I think what it does is make sure that all information that can be taken into account in a decision around people of that nature is taken into account because there's no risk in the minds of the agencies providing the information, principally, or the decision-maker believing that this information is going to be further disclosed and then having to make a decision about whether to have regard to that information or not. So we think that the regime around mandatory cancellation and other aspects will actually be strengthened by ensuring that the full gamut of information is able to be provided and be considered.

CHAIR: Can you reflect on how this regime operated between 1998 and 2017? I take note of the amendments in 2003. Then, of course, everything changed with the High Court case. But can you explain how that regime was operating and how successful it was?

Mr Deane: I'm familiar with a number of decisions taken by ministers over the years relying on 503A information, and some of them involved overseas OMCGs and—

CHAIR: That's outlaw motorcycle gangs?

Mr Deane: Outlaw motorcycle gangs. There were a number of court challenges to the use of 503A and in fact they precipitated the changes in 2003 which were designed to strengthen the scheme in light of a number of those court decisions. The most recent decision by the full court of the Federal Court was, I think, in 2015. It looked at the case of Mr Vella, who was president of the Rebels and had his visa cancelled by a minister. He challenged that all the way up to the High Court. The full Federal Court decision was a very fulsome consideration of the history of the scheme and the fact that it deliberately set out to limit procedural fairness in the interests of protecting the information and concluded that the parliament was able to do that. That decision also referred to a number of earlier decisions, so it's quite a good potted history of the operation of the scheme.

CHAIR: I have a couple of quick questions. Could you explain how the public interest test operates in the context of this bill?

Mr Deane: It operates according to the terms of the bill.

Mr Rice: The court would have regard to those factors as an exhaustive list and make a decision on the basis of that around further disclosure.

CHAIR: Which factors? Could you just explain those.

Mr Rice: The factors that are in the bill. They go to broad definitions around national security and law enforcement protections that I think are probably seen in other bills as well.

CHAIR: Some witnesses today have raised concerns that the bill may lead to breaches of Australia's non-refoulement obligations. Do you agree with this?

Mr Rice: We obviously take non-refoulement into account in a range of our decision-making. There are a range of factors around cancellation of visas and opportunity for revocation and so forth which give the applicant the full gamut of the challenges to the decisions. In our view, this would not change that. We would still be making decisions based on risk of the individual, but we still need to take non-refoulement into account as well.

CHAIR: What about concerns with the bill raised about compliance with Australia's international obligations?

Mr Rice: We would say that if those international obligations go to questions of natural justice and procedural fairness for people who are subject to administrative decision-making and wish to avail themselves of access to justice those matters are taken into account in the design of the scheme. Mr Deane set out before the ability for information to be disclosed to the court and for the court to make a decision on the basis of further disclosure and, throughout that process, the individual still has access to a judicial process.

Senator KIM CARR: I'll go back to some of your responses because, as dorothies go, you provided us with a great deal of information. I do appreciate that. I want to thank you, Mr Rice. I'm sure you will be applauded when you get back to the department.

You've indicated that there weren't too many cases that are in the backlog. How many cases?

Mr Rice: It's a small number.

Senator KIM CARR: How many?

Mr Rice: I'd probably prefer to take that on notice, because I don't—

Senator KIM CARR: If that's the case, we've got to get answers back by Friday because of the truncated reporting timelines.

Mr Rice: Certainly, Senator. I think we can do that. We thought you might ask that, so we were looking yesterday—

Senator KIM CARR: I'm sure you did. That's why I'm surprised you don't have it on tap.

Mr Rice: I could tell you a number but I just want to make sure it's the right one.

Senator KIM CARR: Thank you. While you're at it, can you give us a list of all those matters in the regulations that are subject to disallowable instruments and those that are not disallowable?

Mr Rice: In the proposed bill?

Senator KIM CARR: Yes, in the bill.

Mr Rice: I think our view would be they're all disallowable.

Ms Ringi: Yes, I think can answer that one now, Senator. All the regulations are all disallowable.

Senator KIM CARR: All of them—including the gazetted agencies—are disallowable, are they?

Ms Ringi: I thought the question pertained only to regulations. All regulations are disallowable.

Senator KIM CARR: Yes, but that will be a regulation, won't it? You're making decisions on agencies that are on the gazetted list by regulation. Would that be a disallowable instrument?

Ms Ringi: It's not technically a regulation. I thought the question was in relation to regulations—

Senator KIM CARR: Alright, what would you describe it as?

Ms Ringi: Those are gazette notices.

Senator KIM CARR: What aspects of this bill will be subject to parliamentary scrutiny and what won't be, including those measures that are contained in the bill for the gazetting of the law enforcement agencies and the enforcement countries?

Ms Ringi: That gazette notice as now and under the bill would not be disallowable.

Senator KIM CARR: Are there any other matters that are not disallowable?

Ms Ringi: I don't believe so.

Mr Rice: No, I don't think so. If we were talking about the public interest test, we say there about such other matters as are specified in the regulations, our expectation is they will be disallowable.

Senator KIM CARR: I just want a comprehensive list. You could take that on notice, please. We want to make sure we've got that right.

Mr Rice: Yes, of course. We can come back to you.

Senator KIM CARR: While we're at it, I want to ask about your intention under provisions 52A and 503A in regard to unauthorised disclosures, in regard to the PID act and the FOI act, which are ancillary measures under this package, governing many of the integrity agencies such as the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Office of the Australian Information Commissioner and the Inspector-General of Intelligence and Security. They provide that individuals who make good faith disclosures of information would be exempt from the normal provisions. Are they covered by this legislation?

Mr Rice: This legislation has, I think, a blanket prohibition on disclosure.

Senator KIM CARR: So people would not be able to make disclosures to the Commonwealth Ombudsman, the Australian Commission of Law Enforcement and Integrity, Information Commissioner, Inspector-General of Intelligence and Security, in regard to matters contained within this bill. Is that your intention?

Mr Deane: If information comes to the department from a gazetted agency on condition that it be treated as confidential, then it attracts provisions of the bill. But then it could well be a matter for the minister to decide to disclose it—

Senator KIM CARR: The question is that under those provisions if an officer sees information, they're prevented from approaching any of these scrutiny bodies under current law.

Mr Deane: I think that's correct, yes.

Senator KIM CARR: Thank you. Section (7) of the bill has effect despite anything in:

(a) any other provision of this Act or the regulations; or

(b) any other law of the Commonwealth …

Does that mean that this bill overrides all other Commonwealth legislation and all other state or territory legislation?

Mr Deane: Sorry, which provision are you—

Senator KIM CARR: I'm referring here to the provisions of the act under schedule 1, in regard to the disclosure provisions, 53B, 503C(1). The provisions that are outlined on page 139 of the bill itself in section 7.

Mr Deane: That's the effect of it.

Senator KIM CARR: That's the effect of it?

Mr Deane: Yes.

Senator KIM CARR: Thank you. You've said this bill is a response to the High Court decision from 2017. Why has it taken you three years to develop a response?

Mr Rice: I think, as Mr Deane alluded to before, there's some fairly significant consultation that's needed to be undertaken with the agencies. The only information with our legal advisers—

Senator KIM CARR: So the consultations with the security agencies—who else?

Mr Rice: With our legal advisers.

Senator KIM CARR: On the constitutionality issues, the Solicitor-General, presumably. Who else?

Mr Rice: AGS, the Australian Government Solicitor, and a range of Commonwealth agencies as well, in the way we would normally do that.

Senator KIM CARR: Are there any civil organisations, any legal bodies, like the Law Council? Was there any consultation, for instance, with any of the witnesses that have appeared today?

Mr Rice: Not to my knowledge.

Senator KIM CARR: Why not?

Mr Rice: It's probably been a question of our sense that we could work through it with our own legal advisers.

Senator KIM CARR: It is convention in the Commonwealth to consult with civil organisations and third-party organisations, particularly in the area of immigration law, is it not?

Mr Rice: And we do, on many occasions.

Senator KIM CARR: But not on this occasion.

Mr Rice: It would appear not.

Senator KIM CARR: Obviously not. I'm trying to get to the why.

Mr Rice: I'm not sure. Maybe we should come back to—

Senator KIM CARR: Will you take that on notice as well, please?

Mr Rice: Yes, we'll come back to you on that.

Senator KIM CARR: Thank you. Is it the case that the framework you've now developed is likely to be highly controversial?

Mr Rice: Some people might say that.

Senator KIM CARR: Every submission we've received has been very hostile. I've not seen anything quite as hostile.

CHAIR: Except from the department itself, of course.

Senator KIM CARR: The department agrees with the government. That's an extraordinary revelation.

CHAIR: I'm just clarifying, Senator Carr.

Senator KIM CARR: We've had one positive submission—from you. I'm astounded. It would be astounding if you were critical of your own bill, I agree.

Mr Rice: We would say that there's a lot at stake here and—

Senator KIM CARR: There is.

Mr Rice: that one of those things is around the operation of the visa and citizenship program and that the ongoing operation of law enforcement and security agency operations are vitally important to the security of this country and, therefore, we need to proceed with these provisions.

Senator KIM CARR: The problem you've got is, the agencies you've got on the gazetted list have a record of getting it wrong. The Hope royal commission has given a long list of examples where the security agencies have got it wrong. Robodebt, the reliance on social security agencies—they've got it wrong. You have examples of foreign intelligence service here that, frankly, you would not feed, you would not keep company with. They're on your list. What's the opportunity for the defendant—in this case, the applicant, as you put it—to challenge the evidence that's presented when we have such a long history of getting it wrong?

Mr Rice: What I would say to that is the regime has been set up such that the court can make decisions around disclosure.

Senator KIM CARR: Mr Rice, that's the problem. It's a one-sided biased operation. The court won't hear from the applicant or the legal representatives of the applicant to challenge the evidence that's presented. That's a fundamental principle of our legal system. I'm no lawyer but isn't that a fundamental principle, that you get the chance to answer the cases put to you? In our country, isn't that the case?

Mr Deane: Could I just reiterate the point that the scheme has been on the statute books since 1998, strengthened in 2003—

Senator KIM CARR: I'm the one who stood for parliament—

CHAIR: Senator Carr, Order! Could you please allow the witness to answer the question.

Senator KIM CARR: Mr Deane, we've been through this—

CHAIR: Senator Carr, could you allow Mr Deane to finish answering the question.

Senator KIM CARR: I've heard your case before, Mr Deane.

CHAIR: Senator Carr, order, please. I would ask you to give Mr Deane the opportunity to finish—

Senator KIM CARR: He's got a tick and flick on two occasions.

CHAIR: Excuse me, Senator Carr; please allow Mr Deane to finish answering your question.

Mr Deane: I just wanted to make the point that there was considerable debate in 2003.

Senator KIM CARR: Where? In this parliament?

Mr Deane: Yes.

Senator KIM CARR: In the Australian Senate—there was considerable debate?

CHAIR: Senator Carr, please allow the witness to finish answering the question.

Mr Deane: I did look at the parliamentary debates and I noticed there was a lot of debate about it in the House of Representatives and in the Senate. The point I'm making is that the amendments are designed to take account of the High Court decision and, in doing so, to provide a mechanism for how the court will deal with the information, which wasn't there before. Then it replicates the scheme in the Citizenship Act, which—

Senator KIM CARR: I understand the argument. You've now said this should deal with information within certain criteria. It's taking away discretion from the court, so they must deal with it in certain criteria, and there are deliberate choices, you said, as to how we should proceed with these matters and to protect the security and law enforcement issues—that was the prejudice that had been made with regard to this new regime you're proposing. But it goes much further than the provisions from the 2003 amendments, which you say had extensive debate. My understanding is it was debated on a Wednesday night. We can go to the detail of that if you like. On what basis, other than to provide certainty, can we say that you're proceeding with this? Isn't that the claim you're putting to us? This is about providing certainty?

Mr Deane: Correct. Certainty in terms of—

Senator KIM CARR: Since when is the court system about certainty?

CHAIR: Senator Carr, again I would ask you to allow Mr Deane to answer the question.

Mr Deane: Well, it's about parliament determining the way in which the competing public interest should be balanced, guiding the court, if you like, as to the criteria that should be applied in determining whether disclosure should take place or not. It's not unheard of for parliament to strike the balance.

Senator KIM CARR: It's made the balance against the capacity of the legal system to hear from the applicant or for the applicant's legal adviser to challenge the evidence. Isn't that the case?

Mr Deane: That's a deliberate choice. Until the court makes that crucial decision about disclosure—whether disclosure would or would not harm the public interest. If it decides that it would not harm the public interest then the court is able to disclose the information.

Senator KIM CARR: Is it the case here that you're saying the present regime is not adequate to deal with national security?

Mr Rice: That's correct.

Senator KIM CARR: The NIS is not adequate?

Mr Rice: Yes.

Senator KIM CARR: Why shouldn't this bill have gone off to the national security committee to be examined, then, rather than come here? Why is it being rushed in this way if it's such an important question of national security?

Mr Rice: The department did not make decisions about where the bill was referred. For the reasons you pointed out before, as it's been some time since the High Court case, our sense is that we need to move on with this so that we can make the right decisions on visa and citizenship processes.

Senator KIM CARR: The Human Rights Commission have indicated that, in their view, there are serious questions about its compatibility with our human rights obligations. Have you considered that matter?

Mr Rice: We have, and I refer you back to what I said before to the chair's questions. We're aware of our human rights obligations, and we think that questions around natural justice, access to justice, and procedural fairness and so forth have been taken into account in this framework.

Senator KIM CARR: You're supposed to take into account the effect of foreign governments, aren't you, as part of the consideration of this?

Mr Rice: That's correct.

Senator KIM CARR: The New Zealand Prime Minister has described the character test in the visa cancellation bill as having a corrosive effect on the relationship. Did you take that into account?

Mr Rice: What we would have taken into account is information that might come to us from New Zealand authorities, such as the New Zealand Police. There's an active cooperation program between New Zealand agencies and Australian agencies. We've certainly taken the protection of that information into account as it goes to questions of relations with New Zealand.

Senator KIM CARR: In 2019, the New Zealand High Commissioner, Dame Annette King, flagged concerns over the growing hostility in the relationship, particularly how New Zealanders are treated:

I think it shows the concern and disappointment that we have in the changes that have been made, particularly from 2014 on.

Is that the sort of information you think we should be made aware of?

Mr Rice: What we've had regard to in this framework is the question around implementation of law enforcement policing national security regulatory information that might come from New Zealand and that might assist our decision-makers to make their decisions.

Senator KIM CARR: Two weeks ago, the New Zealand Prime Minister asserted that Australia was exporting its problems by cancelling the citizenship of a woman who allegedly joined the Islamic State in Syria. That is a woman who left New Zealand at the age of six, was a resident of Australian from that time and had become an Australian citizen. She left Australia and travelled to Syria on an Australian passport. Did you take any steps in regard to consulting with the New Zealanders about that matter before actions were taken?

Mr Rice: Senator, I'm sorry, that's not relevant to what we're talking about here. If there had been consultations, it would have been with New Zealand police and security agencies about the protection of their information.

Senator KIM CARR: You wouldn't be able to tell us if you had. I am just wondering how far the consultation goes with these types of things. Is that the sort of protected information you think should be kept from parliament?

Mr Rice: Like I said before, we would be working with the New Zealanders around the protection of any information they might provide to our agencies that might assist with our decision-making. That's what we would have regard to in this framework.

Senator KIM CARR: I take it there was an IDC process before this bill was drafted?

Mr Rice: It certainly involved consultation with a range of government agencies and our portfolio agencies.

Senator KIM CARR: So it would have been gone beyond just the Attorney-General's Department, wouldn't it? It would have gone beyond the Solicitor-General and it would have gone beyond the Human Rights Commission, wouldn't it?

Mr Rice: Certainly to a range of agencies.

Senator KIM CARR: Did DFAT get consulted about this measure?

Mr Rice: I'd have to take that on notice.

Senator KIM CARR: Particularly given its effect on our international relations, surely there would have been a proper consultation about that.

Mr Rice: As I said, I'll just check the details of our consultation with DFAT.

Senator KIM CARR: I'd appreciate that. In terms of the operations of the AAT, how does this affect the capacity of the AAT to function, particularly in regard to merits review?

Mr Rice: I think that it's mostly citizenship related.

Ms Ringi: I'm sorry: could you just repeat the question about how it affects the AAT?

Senator KIM CARR: In practical terms, how do the operations of this bill affect the operations of the AAT, particularly in terms of its assessment of their capacity to undertake proper procedure reviews of the department's actions?

Ms Ringi: As you would be aware, these provisions replicate provisions that have been in the Migration Act for many years and are designed to protect sensitive information from being disclosed, particularly to the applicant. There are two powers, both of which give the minister a power to certify in relation to certain information that was relevant to its decision and would otherwise normally be provided to the tribunal. The first of those relates to the most serious and sensitive information, and as it currently is in the Migration Act it would enable the minister in these most exceptional cases to make a certificate which would have the effect that the information would not be provided to the tribunal. That is one which would normally be used very, very sparingly, I think.

The other power, which is used more often, which is also in the Migration Act in relation to the migration refugee division, is the power for the minister to make a certificate either that the information or the document was provided in confidence or that it would form the basis for a public interest immunity claim before a court. In that situation the document is provided to the tribunal, but it's provided with information as to the potential damage should that information be disclosed to the applicant. It is then a matter of discretion for the tribunal, taking into account the matters in that certificate, as to whether or not they would disclose it to the applicant.

So it doesn't prevent the tribunal from accessing it, other than, as I said, in those most exceptional cases. Nor does it prevent the tribunal from providing it to the applicant; it's a matter for the tribunal.

Senator KIM CARR: How does an applicant get a fair hearing, supposing the information that you're relying upon, or that the minister or the department are relying upon, to make a decision is wrong? How does a person get to challenge that information?

Ms Ringi: In those cases, where a certificate is issued and the tribunal makes the decision that the information is such that there would be prejudice to the public interest and that it should not be disclosed to the applicant, again, as we said, it's similar to the provisions being amended in relation to the court proceedings in the rest of the bill. It's a matter for the legislature to provide that balance between the competing public interests. In this particular case the public interest, should the tribunal make that decision, would be that the detriment, should it be released to the applicant, would outweigh—

Senator KIM CARR: Ms Ringi, the question I'm asking you is this: how does the person who is the applicant get a fair hearing if they don't know about this information?

Ms Ringi: In this case, the fair hearing would be whatever information could be produced for the applicant. But it would not include that information. That would have been a decision made by the tribunal, balancing up those competing interests.

Senator KIM CARR: I'm still wondering about this: if you don't know about it how can you challenge it, for a start? That's the first point. How do you challenge something you don't know exists?

Mr Rice: I'm just—

Ms Ringi: I believe the—sorry, Mr Deane.

Mr Deane: I'm just thinking back to Mr Vella's case. Mr Vella did know that the minister took into account 503A information, because that was stated in the decision record. What he couldn't discover was the content of that information, so that was the source of the challenge which was ultimately dismissed by the Federal Court. So the existence of the 503A information is apparent.

Senator KIM CARR: It's known—

Mr Deane: Correct.

Senator KIM CARR: But not the detail.

Mr Deane: Correct.

Senator KIM CARR: So the information I'm getting to is the question of incorrect information—erroneous information. We could rely on the Sri Lankan or Iranian governments which could say, 'You're in breach of an Interpol warrant or whatever,' which we saw in the recent case. If you're a Tamil and the Sri Lankan government says you're a terrorist then we're relying on information which is just wrong. How does someone get to challenge that information?

Mr Rice: Having had some experience in the previous Customs service's intelligence division, information comes from many different sources, as you said. One of the processes in the intelligence process and the investigative process is to give appropriate weight to all of those elements—to prove and to disprove. I think it's unlikely that a single piece of information, no matter its source, would be the only reason for doing something. So I don't think it quite follows to the extent of what you're suggesting.

Senator KIM CARR: Are you saying that the agencies are inevitably always right? Is that what you're saying, Mr Rice?

Mr Rice: I'm saying that there's a process for them to be right.

Senator KIM CARR: So robodebt didn't exist? You've got them on your list.

Mr Rice: I can't speak to that.

Senator KIM CARR: No, you can't. But my point to you is that you say—

CHAIR: Senator Carr, you do need to direct questions to the—

Senator KIM CARR: Mr Rice, is it the case that you have social security on your list?

Mr Rice: That's one of the agencies on the list, yes.

Senator KIM CARR: And one of the sources of information may be about an applicant. They don't all have to be members of bikie gangs, do they? Under the character test it could be for a person who is actually not necessarily convicted of a serious crime but who you suspect is involved in something else, including fraud or whatever it is. It may be that they have a social security problem, couldn't it, under these provisions? Is that proposition far-fetched?

Mr Rice: What we have regard to is the provisions around refusal and cancellation as they relate to visas and citizenship. So there's a range of factors.

Senator KIM CARR: Yes, a range of factors. But what is the reason you've got the state and Commonwealth agencies for social security here? Tell me: why are they there?

Mr Rice: In the process around refusal, cancellation, conferral and so forth, we have regard to character issues, one of which might go to criminal considerations. Those are big calls to be making, so we would have regard to a range of information. You've mentioned social security information. I suspect that, in the decision-making process, it would potentially be a number of elements coming from a number of those agencies on the list that would be part of our decision-making process.

Senator KIM CARR: Yes. But am I wrong to assume that the reason they're there is that you want to know whether or not they have good social behaviours, whether they're paying their social security and whether or not they are subject to Centrelink problems—those sorts of actions? Presumably that's what it's there for, isn't it?

Mr Rice: As we were saying before, there are thresholds around decisions on refusals and cancellation. We have regard to a broad set of information in making those decisions. There are a number of provisions in both acts around the ones that allow us to make decisions on refusal or cancellation.

Senator KIM CARR: Yes. As to the tax office, presumably you want to know whether or not they're paying their taxes or they're accused of tax fraud or those sorts of things. Would that be a fair assumption to make?

Mr Rice: As I said before, the decision-making process needs to have regard to whatever information is going to answer the question about the thresholds for refusal or cancellation.

Senator KIM CARR: Sure.

CHAIR: Sorry, Senator Carr. Just to clarify, that wouldn't necessarily mean that it's deemed to be confidential information and therefore not available to the applicant. I just think that point—

Mr Rice: Quite right, Chair. There's a range of information taken into account. A lot of it probably ends up being disclosed to the courts. But this framework is—

CHAIR: Yes. I just want to make that point.

Senator KIM CARR: But the point is that, under this legislation, information from that source can be confidential and not disclosed.

CHAIR: Only if it meets the test.

Mr Rice: Well, under this regime, it needs to be determined by the agencies to be confidential.

Senator KIM CARR: Yes, it's a suspicion. That's all it has to be: a suspicion.

Mr Rice: There's a process for them to determine what is confidential information, and where it isn't—

Senator KIM CARR: Mr Rice, is it the case that all it has to be is a suspicion?

Mr Rice: As I said before, going back to my knowledge of the way these things work—

Senator KIM CARR: Mr Rice, under the legislation, the word 'suspicion' is used, is it not?

CHAIR: Senator Carr, order! Please give Mr Rice an opportunity to finish answering the question.

Mr Rice: I was saying that there's a range of things that are taken into account and there are thresholds that have to be met.

Senator KIM CARR: Including suspicion?

Mr Rice: Suspicion, in the midst of a range of other information that would be taken into account.

Senator KIM CARR: I just want to be clear, Mr Rice. Is it the case that all these agencies need to do is to suspect that you're a bad person?

CHAIR: Senator Carr—

Senator KIM CARR: It's a question to Mr Rice, not to you, Madam Chair.

CHAIR: I understand that, but please make it clear that this is a decision for the judge as to whether—

Senator KIM CARR: It isn't. That is a question for Mr Rice.

CHAIR: Yes, I understand that, but I don't want—

Senator KIM CARR: Thank you very much, Madam Chair, for your assistance.

CHAIR: Thank you.

Senator KIM CARR: Is that a question that is, in fact, part of this regime? It simply has to be a suspicion?

Mr Rice: It's about information that is confidential, and there are a range of sources and methods that go together to develop information that then is classified as confidential.

Senator KIM CARR: Yes. Thank you, Mr Rice. But it's not challengeable by the applicant. That's the point.

Mr Rice: That's the regime.

Senator KIM CARR: That's the civil liberties issue here. That's the real question—the nub of this issue. These are not subject to the normal provisions of the law in regard to judicial process.

Mr Rice: Well, as Mr Deane has said, we would say that the information can be disclosed to the court.

Senator KIM CARR: If you know about it.

Mr Rice: And when the court makes the decision, on the basis of the public interest test, it may further disclose.

Senator KIM CARR: Thank you, Mr Rice. Much appreciated.

CHAIR: Thank you very much, Senator Carr. I have just a couple of very quick clarifying questions before we finish up. I will just pick up on the point that Senator Carr was making. Say an agency had a suspicion about fraud, whether it be social security or tax fraud, and that's information which is relevant in the cancellation of a visa or a citizenship. Then it becomes a matter for the court to determine whether that confidential information is such that it should not be disclosed.

Mr Rice: That's correct.

CHAIR: There's no confusion about this. This is not going to be a matter for any government department to make a decision.

Mr Rice: That's correct.

CHAIR: I also just want to reflect on the fact that, in our legal system, there are longstanding arrangements where, in a number of different respects, one party may not have input into a decision in every single respect, such as an ex parte application for an injunction or court applications for search warrants.

Mr Deane: That's correct.

CHAIR: I also just want to clarify this. There is an expansive list of countries—and Senator Carr has referenced a number of countries—with which, clearly, we don't always see eye to eye. In relation to any request or any information from any particular country—say, about a cancellation of a visa—it is the case that that information is independently scrutinised, and then there is that additional safeguard applied by the court as to whether such information should be disclosed?

Mr Rice: That's correct. Any information received from any source needs to be assessed as to its validity.

CHAIR: Alright. Thank you very much.

Senator KIM CARR: Can I ask you—

CHAIR: Senator Carr, very, very quickly, because we have gone over time.

Senator KIM CARR: Yes, sure—they'll take this on notice. Mr Rice, in terms of international precedents, this legislation wouldn't exist in the United Kingdom, would it? The submissions here have indicated to us that this type of legislation would be challenged in the House of Lords. Can you tell me of any country of a similar legal framework to ours where legislation of this type exists?

Mr Deane: I think we'd take that on notice.

CHAIR: You'll take that on notice. Alright. Thank you very much. I would like to thank the officials from the Department of Home Affairs for your time today. We do appreciate you giving evidence this afternoon.

This concludes today's proceedings. The committee has agreed that answers to questions taken on notice at today's hearing should be returned by 12 pm on Friday 5 March 2021. I do thank all witnesses for giving evidence today. This is an important part of the parliament's scrutiny of legislation, and of course these sorts of public hearings do give all organisations an opportunity to make a submission and have their say. So I thank all those who have made a submission and appeared before us today. I would also like to thank Hansard, broadcasting and the secretariat. I declare the hearing adjourned.

Committee adjourned at 15:48