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Senator James Paterson
Chair
Parliamentary Joint Committee on Intelligence and Security
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Dear Senator Paterson

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

Thank you for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill). I wish to raise an issue that concerns IGIS oversight with respect to the activities undertaken by intelligence agencies for the purposes of the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007* (Citizenship Act).

IGIS understands that the Bill seeks to amend the Migration and Citizenship Acts to establish a framework for prohibiting the disclosure of confidential information provided by gazetted intelligence and law enforcement agencies in relation to certain decisions made under those Acts. Gazetted intelligence agencies provide information to inform relevant decisions of the Department of Home Affairs, or the Minister, under those Acts.

The Bill will make it an offence to disclose confidential information provided by gazetted intelligence and law enforcement agencies not in accordance with the provisions of the Bill, carrying a penalty of two years imprisonment.¹ The secrecy provisions will apply to the Minister and 'authorised Commonwealth officers', where relevant information is communicated to them. An authorised Commonwealth officer is a Commonwealth officer (as defined in section 121.1 of the *Criminal Code Act 1995*) who performs functions or exercises powers under the Migration or Citizenship Acts.

Proposed section 52A(7) of the Citizenship Act and proposed section 503A(7) of the Migration Act in the Bill, provide that the secrecy provisions in those sections would have effect "despite anything in ... any other law of the Commonwealth". I note that section 34B(2) of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) provides that a person is not liable to a penalty "under any law of the Commonwealth" for providing or making available

¹ Proposed section 52A of the Citizenship Act and proposed section 503A of the Migration Act.

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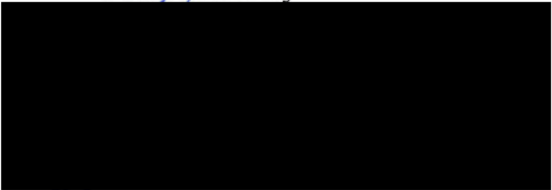
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information or documents in accordance with section 34B(1) of the IGIS Act. If the Bill is passed, there will be a question as to how this apparent inconsistency should be resolved.

In the view I take, section 34B(2) of the IGIS Act would prevail over the proposed provisions in the Bill because of the operation of section 34B(3)(b)(ii) of that Act, which relevantly provides that subsection (2) does not apply if the provision (ie the other law of the Commonwealth) “is expressed to have effect despite this section”. This provision is to be construed as anticipating, and resolving, any issue as to the later enactment of a law which, viewed in isolation, might be read as displacing subsection (2). The effect of subsection (3)(b)(ii) is that subsection (2) is inapplicable *only* where the other law of the Commonwealth “is expressed to have effect despite this section”. That is to say, only where the legislature expresses its intention to displace section 34B *specifically* will a later enactment prevail over subsection (2).

The Committee may wish to consider the above during its consideration of the Bill. The reason I make this submission is not to comment on the policy underpinning these new provisions. I make this submission, rather, because the potential impact of section 34B(3)(b)(ii) of the IGIS Act is not referred to in the Explanatory Memorandum, and I think it is something of which legislators should be aware.

Yours sincerely



The Hon Christopher Jessup QC
Inspector-General

9 July 2021