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PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

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

FRIDAY, 27 AUGUST 2021

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PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Friday, 27 August 2021

Members in attendance: Senators Keneally, McAllister, Paterson and Dr Aly, Mr Dreyfus, Ms Hammond.

Terms of Reference for the Inquiry:

To inquire into and report on:

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

WITNESSES

BRASCH, Dr Jacoba QC, President, Law Council of Australia [by video link]

CAMPBELL, Ms Leonie, Deputy Director of Policy, Law Council of Australia [by video link]

COSTELLO, Ms Georgina QC, Member, Migration Law Committee, Law Council of Australia [by video link]

NEAL, Dr David SC, Co-Chair, National Criminal Law Committee, Law Council of Australia [by video link]

Committee met at 09:32

CHAIR (Senator Paterson): I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security for its review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege unless you are giving evidence from outside Australia. 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 parliament as a contempt.

I now welcome representatives of the Law Council of Australia to give evidence at this public hearing today. Although the committee does not require you to give evidence under oath, I should advise you this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today attracts parliamentary privilege. For these hearings the committee has asked that any opening statements will be written and forwarded to the secretariat prior to the hearing. These statements will be incorporated into the *Hansard* transcript and published as supplementary submissions for the witnesses involved. This will allow for the fullest discussion to occur at the hearing today. I have been corrected by the secretariat, in fact, you are welcome to make a short opening statement if you wish.

The opening statement read as follows—

The Law Council accepts that there is a public interest in law enforcement and criminal intelligence agencies providing probative information to officials responsible for exercising character-related powers, and in there being a means to control the disclosure of such information to persons subject to the exercise of those powers.

However, such a scheme must balance those interests against principles fundamental to a democratic legal system: the right to a fair hearing, effective judicial review, the proper administration of justice, and parliamentary and independent scrutiny of executive power. The Bill does not strike the appropriate balance—nothing that grave consequences follow these powers' exercise, including losing the right to remain in Australia, and to be a citizen.

The Protected Information Framework will apply to information:

• provided by agencies determined by the Minister, without any Parliamentary scrutiny;

• of a kind which need not meet any statutory test as to its nature, sensitivity, veracity or the risks arising from disclosure.

Yet, despite this absence of oversight, the information is afforded inordinate protection from disclosure, testing and review in the administrative and judicial decision-making processes.

Unless the Minister exercises a non-compellable power to permit it, the information will not be available to an applicant or Administrative Appeals Tribunal—they may not know it exists. This means an applicant will, in practice, likely have no means to address the veracity of the information or any inferences drawn from it—that is, to answer the case against them.

During judicial review, an applicant or their lawyer would be prevented from making submissions (unless they already knew the information in a lawful way) and excluded from the any hearing as to whether the information would be disclosed or the weight to be given to the information. Further, in deciding whether to order disclosure, the Court may only consider security and law enforcement interests and may not consider the interests of the parties nor interests in the administration of justice. These measures are significant encroachments on the integrity of the court and its processes. This puts the provisions at risk of being struck down by the High Court.

There are already means to control disclosure of sensitive material in migration decisions:

• in general terms, public servants are prohibited from disclosing material received in confidence unless authorised by law and commit an offence if they do so;

• under the Migration Act, information regarding a section 501 decision is not disclosable to an applicant and may be disclosed only confidentially to the Tribunal, if the Minister considers that this is in the national interest for a range of relevant reasons;

• judicial review, the public interest immunity test and the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) balance the public interest in limiting harm caused by disclosing sensitive information, against procedural fairness and the administration of justice.

The case for the proposed Protected Information Framework has not been made out by careful reference to these existing mechanisms which operate in the most serious criminal cases involving the range of policing and security agencies. Instead, what is required is a whole-of-government approach to handling sensitive information, including in judicial review matters, to ensure consistency across Commonwealth laws.

If, contrary to this submission, the Bill is to proceed, the Law Council recommends amendments, including to provide greater rigour around determining which information is subject to the scheme and provide the court with sufficient discretion to properly perform its judicial review function.

Dr Brasch: Thank you all for the opportunity to speak on this important bill. The Law Council accepts there is a public interest in law enforcement and criminal intelligence agencies providing probative information to officials—I stress the word 'probative'—responsible for exercising character related powers. We also accept there needs to be a means to control the disclosure of such information. But there has to be a balance and, in short, with the greatest respect, the current framework does not hit that balance—the balance that ensures the hallmarks of a democratic legal system, the right to a fair hearing, effective judicial review, proper administration of justice and, what might be of importance to you all, parliamentary and independent scrutiny of executive power. Of course the framework will apply to information provided by agencies determined by the minister without any parliamentary scrutiny and information of a kind which may not meet statutory tests as to its nature, sensitivity, veracity or risks from disclosure. As the current framework is working, during judicial review an applicant or their lawyer would currently be prevented from making submissions about the information unless somehow they already knew about it and, indeed, even excluded from any hearing as to whether information would be disclosed or the weight to be given to that hearing. In short, the current framework does not allow the applicant to answer the case that is against them.

There is already a range of means to control disclosure of sensitive information in migration decisions. In general terms for public servants under the Criminal Code it is a criminal offence to disclose confidential information unless authorised by law. It is an offence, as I said. Under the Migration Act itself there are section 501 decisions. Information there cannot be disclosed to an applicant and may only be disclosed confidentially to the tribunal if the minister considers the national interest and a range of relevant reasons. There is already judicial review, there is the public immunity test, and the National Security Information (Criminal and Civil Proceedings) Act 2004 have the balance of protecting the public interest in limiting harm by disclosing sensitive information and balancing that against procedural fairness and the administration of justice. There are another couple of paragraphs in the opening which you have in front of you, and we are happy now to be of whatever assistance we can in taking questions.

Senator KENEALLY: Thank you to the Law Council for appearing today and thank you for your submission. I note that this bill has already been through the Legal and Constitutional Affairs Committee and you gave evidence there. I also note that it's been through the Scrutiny of Bills Committee here in the parliament. Let me come to some of the key terms upon which this bill rests. One of those is 'gazetted intelligence and law enforcement agencies'. In your view, is that definition appropriate, and what agencies could be captured by that definition?

Dr Neal: The whole process of having gazetted agents given the restrictions that this imposes are so fundamental seems to be a wrongheaded approach. Agencies that enjoy that protection should be specifically included in the legislation, and that's the more important because parliament should be maintaining control of that; it shouldn't be through some subordinate procedure. Which agencies attract that sort of privilege should be clearly identified; otherwise anyone could be gazetted and it falls outside public scrutiny. This should be a legislative requirement.

Senator KENEALLY: I note that the Law Council does recommend that this should be in primary legislation. What if it was done by way of a disallowable legislative instrument?

Dr Neal: Second best. Really, what this legislation is doing is saying that an issue, which is at the heart of the issue brought before the court in respect of an incredibly important issue, is to do with a person's citizenship. That's a very, very significant thing to do, and the idea that it wouldn't be done with full parliamentary scrutiny and the opportunity beyond that for accountability, as our president just outlined, so that, for instance, this committee or some other body such as an IGIS or INSLM would not have parliamentary oversight of the operation of this scheme—both of those things are identified in our submission as defects in the legislation.

Senator KENEALLY: I'm going to come to disclosure in a moment. Can I, for the moment, stick on some of the definitions. Your submission also notes that the bill does not define 'confidential information'. In your reading, how would it be determined whether certain information is confidential and thereby protected?

Dr Neal: That's such an open-ended claim—that some gazetted agency would claim information that they are providing is confidential. If a court finds out that there is confidential information at play, the term 'really' is left undefined as opposed to the national security interests, which are defined in legislation and which are already very broad. The mere fact of confidentiality doesn't seem to be anywhere near appropriate as a basis for keeping from a court evidence about the central issue in the case before the court. That's one of the problems that this legislation has already encountered in the High Court, because, to put it in a very blunt way, it makes a mockery of the court process to say, 'The court is going to be deciding an important issue about citizenship, but the key piece of information which is at play in the decision will not be before the court,' or, alternatively, it might be before the court but not before the applicant so that they could contest it. It makes a mockery of the court process, and essentially that's what the High Court said in Graham: 'We're not going to be here going through a process that looks like a real process but is, in fact, not.'

Senator KENEALLY: I will come in a moment to the independence of the courts. Your submission notes on page 32, and I am paraphrasing slightly, that a wide range of agencies can protect any information given to the Commonwealth officials for the purpose of making adverse decisions about a person with no obligation to ensure that that information is accurate or used judiciously. It seems to me this would allow for incomplete and/or inaccurate information being used and relied upon—is that correct?

Dr Neal: It is. The whole principle of the separation of powers is to say that the courts will scrutinise what's being done by the executive to see that it is soundly based. That separation of powers issue and the role of the courts is very important to our political system. It's a quality control function. Again, it's farcical to have a quality control function where the key issue in the case is not to be disclosed or to be, in a sense, held back from scrutiny by a mere claim to confidentiality by a gazetted agency. We don't see the basis for that. Why would the fact that INTERPOL, the New Zealand Police or anyone else in a prosecution agency providing information about the prior convictions of a person need to be protected in the first place?

Senator KENEALLY: I apologise; I am trying to move quickly through some of these issues, given the limited time we have today. You've also recommended prescribing a minimum level to be held by officers within a gazetted agency who can communicate information. Why is that important, and what minimum level of officer does the Law Council see as appropriate?

Dr Neal: To be clear, in the event that the legislation went forward—but we don't believe it should go forward—at least some level of seniority should be imposed. As our president said in the opening statement, there is a large body of legislative and common law protections for national security interests articulated through both public interest immunity and the NSI legislation. The submissions that this legislation is based on have not canvassed the existing suite of protections for the public interest immunity. In particular, the NSI Act was only passed in 2004, and it is already comprehensive and controversial and under review in certain respects. A comprehensive piece of legislation which deals with all matters coming before the courts arising out of Commonwealth decision-making—that's where the heart of any change should lie, and submissions supporting this bill do not address those issues and do not make out a case why it should be given some sort of special treatment, especially when it's dealing with such an important and fundamental question as a person's citizenship.

Senator KENEALLY: Thank you, Dr Neal. I note the Law Council's considerable concern, set out in your submission, about blanket prohibitions on information disclosure, including as it affects the rights given to a person to answer the case against them. You highlight on page 34 that the avenue of review the bill does provide requires 'that a party may only make submissions and tender evidence if they are aware of the content of the information and it was not acquired unlawfully.' You continue:

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

Would these concerns be at least partially addressed, should the bill proceed, if an amendment was made to provide for partial disclosure of confidential information to an applicant or their lawyer?

Dr Neal: I will ask Ms Costello to deal with that question. She's had direct experience in these cases, and it might be of more assistance to the committee.

Ms Costello: The first thing to say is that right now, with the status quo, very often litigation occurs where we, as lawyers, do not see the material that is, importantly, secret and that the judge has. Also, there are many cases already occurring where even the judge doesn't see the information due to the national security risk of that

information and the existing prohibitions on disclosure of it through public interest immunity and the National Security Information (Criminal and Civil Proceedings) Act 2004. At the moment, usually, when that happens, lawyers can still make submissions about the case and what sorts of principles the decision-maker should apply in grappling with what to consider and how to conduct the case. The change to the status quo presented by these proposed amendments is not justified when you consider that there's nothing wrong with the way it's working now. For that reason, the Law Council doesn't see a justification for the shifts in procedure that these changes would make.

Ms Campbell: If I could just add, on pages 42 to 43 we recommend if the bill does go forward—and that's not our primary recommendation—that there is 'the flexibility to permit the partial disclosure of confidential information to the applicant and/or their lawyer, sufficient to ensure that they understand, and can respond to, the gist of the information and the allegations made' as well as some other important recommendations, including to allow flexibility in the public interest test.

Senator KENEALLY: Thank you. Your submission also raises concern about the prohibition on disclosure to parliament or a parliamentary committee, presumably including to this committee. You note that there are no exceptions for disclosure to certain oversight bodies or disclosure made in accordance with the Public Interest Disclosure Act or the Freedom of Information Act. What is the effect of these prohibitions on parliamentary scrutiny and independent oversight?

Dr Neal: Perhaps I could deal with that. I imagine members of this committee would be surprised that information such as this would not be coming before any of the Commonwealth government agencies that routinely monitor the conduct of the security agencies. That includes the INSLM and IGIS but this committee as well.

Senator KENEALLY: And the Ombudsman, I understand.

Dr Neal: We have seen the Ombudsman's submissions in relation to this bill, and we agree with them. Accountability for secret decision-making is something which is incredibly important in any democracy or any well-run agency, and that accountability should not be secreted somewhere. Ms Costello and I come from Victoria, and Victoria's recently been through the Lawyer X scandal, involving police information and police informers, which is in the territory of this sort of legislation. The ill effects that have flowed from that should be an example everywhere of the difficulties of keeping information gathered by policing and prosecuting agencies in a way which is accountable to parliament and, through the parliament, to the public. This is no exception.

Senator KENEALLY: Thank you. I might just quickly turn to something else, because I know some other members will have questions. Your submission also highlights that this legislation would permit the minister to add additional factors to the public interest test through delegated legislation which, as I understand it currently, would not be disallowable. Could you speak to your concerns about that facet of the bill?

Dr Neal: Again, given the importance of the issues at stake here, for instance, the NSI act and all security legislation have quite specific definitions of what is involved in national security and the public interest. It's in a legislated form and it's defined. Parliament wants to see it, and then it can be reviewed by people making submissions on the legislation and so forth. Again, that's the principle at stake here. Where very significant issues are in play, the parliament needs to legislate about those things and not leave it to executive discretion.

Senator KENEALLY: I apologise: I feel like I'm moving through this rather quickly. There are things I would prefer to be able to explore, but, given our time, I will move on. One of the issues canvassed in the Legal and Constitutional Affairs Legislation Committee inquiry into this bill was something that appears to me, using layman's terms, to fetter the discretion of the court in terms of the factors they can consider and the factors they are not allowed to consider when it comes to the disclosure of information. First, have I read that correctly? Second, if I have, what are the factors the court cannot consider in making a determination on whether the information can be disclosed?

Dr Brasch: I'll deal with the first part of your question, if I can, and then I'll throw to either Dr Neal or Ms Costello for the second. This legislation, in short, is, if I can put it bluntly, executive overreach and overreach into the independence of the court, with the fettering of a court's discretion. Discretion is so critical to the judicial process. But it's the executive troubling—if I can put it that way—or inveigling with the independence of the court and the judges' exercise of their discretion. It is also preventing scrutiny of the parliament and other parliamentary committees such as this one. To go back to something else you asked: Dr Neal referred to Interpol and New Zealand law enforcement agencies. In my submission, a fair reading of this bill is that we are putting greater trust in foreign agencies than in our own courts and our own parliament.

Senator KENEALLY: Can you flesh that out a bit more? I don't think that's an aspect of this legislation that has been well understood. It's the case that a police, security or intelligence agency of a foreign country could provide information and that that would be considered protected, confidential and unable to be shared with the applicant. Is that correct?

Dr Brasch: That's right.

Senator KENEALLY: As I understand it, that could include countries where someone was seeking refuge or has sought refuge.

Dr Brasch: That's right.

Ms Costello: Imagine a situation where in Australia there's a family with an Australian citizen wife and three Australian citizen children, and the father has not taken out Australian citizenship, despite living here for 30 years. That person might be a citizen of a foreign country. They might have significant business interests, and that's why they've chosen not to take out citizenship: because they'd have to give up their citizenship to that other country, and that would limit their travel capacity. It may be that, for corruption reasons, an authority in that foreign country has something that's provided to it that's not true about the person. That information might then somehow be conveyed to Border Force or the Department of Immigration. Because that information comes from a foreign power's law enforcement authority, it could be treated as confidential under this regime and never disclosed to the Australian dad. Then that person, that father, could have his visa cancelled. He might then be detained for—five years of detention is not unusual in this country. He might be in immigration detention for five years and then deported, and those Australian citizen children wouldn't have a father.

This is not something that just affects extreme cases of someone with a tenuous visa right. This law could affect people in our own streets and our own families. It could be that an unreliable, highly prejudicial and non-probative piece of information is cloaked in this regime in a manner which means that the person never knows about it. The status quo shift here means that the lawyer for that person cannot even make a submission to court about why it should be disclosed unless that lawyer knows what's in it. That extremely alarming scenario is an example of why we need to be careful here.

It's regretful to acknowledge it, but occasionally, even in Australia, our own law enforcement agencies might err. As my colleague Dr Neal has mentioned, we've had the Lawyer X situation in Victoria. So there can be mistakes made, and that's why we have merits review in tribunals. It's why we have judicial review in courts. It is so that information can be tested and harsh consequences for people only delivered in a justifiable way.

Senator KENEALLY: One of the other issues that arose in the legal and constitutional affairs inquiry was the incredibly short time frame for that committee to conduct its inquiry and what would appear to be a lack of consultation, both internally and external to government. I do acknowledge that Minister Hawke has acknowledged to some extent the need for further consultation—hence his referral of this bill to this committee. However, my question is: have you had any formal consultation with the government outside of these committee processes in the development of this legislation?

Ms Campbell: I think I can answer that. We have reached out to the Attorney-General's Department and the Department of Home Affairs, and we were referred to Senate legal and constitutional affairs inquiry process rather than having a consultation.

Ms HAMMOND: Thank you all for your submission and for your presentation today. You've raised some really significant and understandable concerns with this legislation. I want to pick up on a line of questioning of Senator Keneally's with respect to the fettering of discretion of the courts. I'll put it out there: isn't it true that lots of pieces of legislation set out what courts can and can't take into consideration? It's in any number of pieces of legislation. How strong is the argument that it fetters the discretion?

Dr Brasch: We're talking about the most important limits which are in in the constitution. Section 75(5) of the Constitution enshrines the right to judicial review of government decisions so that no-one is above the rule of law. Whilst it's very common to fetter discretion, for example, in considering the criteria for satisfaction of a visa—there are specific limits on the way a spouse visa might be decided, for example—it's very different to fetter the discretion of courts carrying out their core task of ensuring a right to a fair hearing, effective judicial review and the proper administration of justice. To fetter discretion of that core task of providing a fair day in court is of another category, and there are real questions about whether the legislation would be unconstitutional for the same sort of reasons expressed by the High Court in Graham.

Ms HAMMOND: There was one other question I wanted to raise. The word is escaping me, but there are a number of submissions that said, if this legislation does go ahead, there should be an opportunity for the applicant to either have their lawyer present when the discussion is being held about the information or to have a second

independent applicant or adjudicator—I can't remember the word used, and I can't find it in front of me right at the moment. I can't remember if it was in one of your submissions. Have you got the term that is escaping me at the moment?

Dr Brasch: I think you're after public interest monitor.

Ms HAMMOND: I think that's it! Thank you. I know you don't want the bill going ahead in any format, but is that something that is worthy of contemplation by this committee?

Dr Neal: You can appreciate that where an issue which is central to the case—like whether a person is going to retain their citizenship—the sort of information that is disqualifying that person or that the minister is relying on to disqualify or revoke the citizenship is not even open. In some cases, it may not be known, under this, either by the court or by the representative of the applicant, and it's really a very plain thing. This is so unfair and uneven handed that the person who is accused of some character failure does not get a chance either through their lawyer or directly to say: 'That wasn't me. You've got the wrong person.' We have instances of security agencies raiding premises, and then they've got the wrong address. Here, if you've got the wrong information, the fact is that information is key to the decision but both the applicant and the applicant's lawyer are excluded from that process. Even if the lawyer is told—and as lawyers we can be told by the prosecution what it is that they're relying on—if we can't say to our client, 'Well, is that the case?' 'No, that's wasn't me. That's my brother,' or, 'I wasn't even in the country at the time,' it just becomes so plain that the apparently just procedure that is embodied in the Australian court system and our political system generally is being gamed.

It is so terribly unfair that there is a good—well, I don't want to predict what the High Court will do. It's very hard to do. But the risk of this sort of legislation getting overturned by the High Court is clearly there and for the very same reasons that are articulated in Graham. Beyond the actual decision in Graham on judicial review, the overall fairness of the system would also be subject to a constitutional attack, and that's because it's so unfair.

Ms HAMMOND: Thank you. I have one final question. I know I said I only had two, but I have one final question. Do any of you know the statistics on how many applications are made to the court each year with respect to visas?

Ms Costello: While someone perhaps tries to answer your question directly, I wanted to say something important about judicial review and the reality of when it can be available. I think the committee shouldn't think that we can save people from the problems with this regime by using judicial review. That's because judicial review is only about correcting legal errors made below. What this regime does is affect the merits review decision—that is, it affects the factual findings of the decision-maker. Usually on judicial review you can't attack those factual findings. The other thing is that there are significant court fees in order to bring judicial review, and there is a shortage of free lawyers willing to help people go to court.

Ms HAMMOND: That's an inquiry in itself, isn't it?

Ms Costello: Yes. We'd love it if you'd look at that. But I don't think you should see judicial review as a panacea. Here we have a limitation on a judicial review that can take place, which, within the Venn diagram, is already within a small circle of the ability of people to actually access effective, legally-represented judicial review rights anyway. It's often too late once the decision has been made in a way where the person hasn't seen the evidence against them to fix it on judicial review, particularly when, even in the status quo, after the decision is made that you might seek judicial review, even the lawyers can't tell, quite often, whether there was non-disclosable information used by the decision-maker to make the decision—

CHAIR: Sorry to intercede here, but I'm very conscious of the time and I have two more colleagues who have questions and only a few more minutes to get it in. Does anyone have a direct answer to Ms Hammond's question?

Ms Campbell: We don't have that information. We may need to take it on notice.

CHAIR: That's okay. We can probably explore that with the department, but if you have it on notice you're certainly welcome to come back to us on it.

Senator KENEALLY: I might flag that I think that evidence was already given to the Senate Legal and Constitutional Affairs Committee, so it's already in a report somewhere.

CHAIR: Great. Ms Hammond, do you have any further questions? I'll take that as a no, and we'll go to Mr Dreyfus and then Senator McAllister.

Mr DREYFUS: Thanks very much, Chair, and I thank Dr Brasch, Dr Neal and Ms Costello for appearing and also the Law Council for a very comprehensive submission, in which you leave us in no doubt that your view is that this bill should not pass. I'm conscious of the time. I was going to ask you to explain a bit more about

procedural fairness, but I'll just note that, on page 39 of your submission, you described and set out a number of core concepts of procedural fairness or natural justice. I want to read to you something that former Chief Justice Mason said in Kioa v West, which is one of the leading cases, which you footnote at page 39. I'll just read it out:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it …

All of you would be familiar with that statement. This bill would take away that right, potentially, wouldn't it?

Dr Neal: It does, and then, in the criteria that the court would be called on to consider, the merits of the case are not included in the list of criteria that the judge has to take into account in determining whether to disclose the information. It really makes a mockery of those things, as I said earlier. The balance between the risk to the public interest versus the substantive merits of the case—all of these are the fundamentals of procedural fairness, and they are trespassed on in this bill without really significant justification. There is a much more elaborate process in the NSI act, which I hasten to add had its own significant difficulties. But even with those very significant difficulties, which we've criticised before, it's a much more considerate piece of legislation than this is, which just seems to put all those things to one side on the basis of confidentiality, and that's not a sufficient reason.

Dr Brasch: To use another phrase well known to lawyers as well: the right to answer the case against you is another golden thread. We all know the golden thread reference. But the right to answer the case is part of the golden thread that makes a democratic legal system.

Mr DREYFUS: Thanks, Dr Brasch. This has been touched on in some of the earlier questions from Senator Keneally, but, to go straight to it, in the current regime under the Migration Act there's a list of factors that the court is to consider in determining whether there would be damage to the public interest if information is disclosed. In this bill, a particular factor which is directly excluded from the court's consideration of public interest is the administration of justice. It's somewhat shocking even to see a bill put before the Australian parliament that would purport to do that, but does the Law Council believe that there's a public interest in the sound administration of justice? Can you think of any possible reason why a court would be prevented from examining that in examining what the public interest is in disclosure?

Dr Brasch: I indicate to you that all of us unmuted at the same time because we were eager to answer the question. I'll let Ms Costello go first.

Ms Costello: We in Australia should be proud of our system of justice. It would be rather cringeworthy to have this legislation passed and to say in black and white in a piece of legislation that the court should not look at the public interest as it affects the right to a fair trial here. In the usual course, there are competing public interests that courts understand when applying the common law public interest immunity test. There's a public interest in protecting Australians from terrorist attacks and not disclosing confidential information. But there's also a public interest in justice being done and being seen to be done and in someone getting a fair trial, and we need to consider the balancing of those factors. This legislation attempts to tip the balance so that the other important forms of public interest can't be considered by the court.

Dr Neal: If it's a see-saw where the public interest is balanced against the interests of the administration of justice and the rights of the person affected, the provision that lists the criteria in this legislation has nothing on the other side of the balance. Public interest is the only thing concerned in that list of criteria, and the administration of justice or the right of the person who's affected, the procedural fairness and the whole process of the court are completely absent in that. The see-saw has got someone's foot planted heavily on one end of it and that is the reason why it's at risk if it comes before the High Court as being disallowed and it would be rightly disallowed. I'd be very disappointed if the High Court did not.

Ms Campbell: It's also something that distinguishes this particular test from other statutory tests, such as under the NSI Act, which does enable regard to be had to any other factor that the court considers relevant and the impact of non-disclosure on the litigant in the proceedings. It enables weight to be given.

Mr DREYFUS: Yes. Thank you. There is just one other matter. I wanted to put a scenario to you that appears in a slightly different form in the minority report by the Labor senators in the Legal and Constitutional Affairs Legislation Committee. My understanding is that the Senate has included it in that report to illustrate how the so-called protected information framework could operate in practice. I'll just read it through for you. 'A valuable informant approaches a state's police force with information about an alleged assault committed by a visa holder. For a range of reasons, state police do not pursue the matter nor do they ever put the allegations to the visa holder. Had the state police force put the allegations to the visa holder, the visa holder would have been able to establish that he was in a different city when the assault took place and so could not have possibly committed the offence.

Years later, the state police force, a gazetted agency, provides a Commonwealth official with details of the allegation against the visa holder on a confidential basis. That information is then provided to the minister, who cancels the visa holder's visa on character grounds because, on reviewing the material, the minister suspects there is substance to the allegation, despite the allegation never having been investigated by the police and never having been put to the visa-holder. Under the provisions introduced by the bill, the non-citizen is informed of the decision to cancel his visa but is denied access to the information from the state police force. The now former visa holder, who has no idea why his visa was cancelled, decides to have the minister's decision reviewed by a court. In determining whether to give the visa holder access to the information, the court is required to consider the protection and safety of the state police force's valuable informant and the fact that the information was communicated to the Commonwealth on the condition that it be treated as confidential. But the court, which is unable to consider issues of fairness or the administration of justice in making its decision, concludes that it must not order the disclosure of the information from the informant to the visa holder. Unable to know, let alone address, the allegation that his visa had been cancelled, the allegation is not contradicted or addressed and the court upholds the minister's decision.'

I'm sorry for the length of that but I'd hope that, in the hypothetical I just read you, the court would find a way to order the disclosure of at least some information to the visa holder, but is a scenario like the one described in that scenario something that could play out under this bill?

Ms Costello: Yes. In fact, it reminds me of a case that I ran and won in the Federal Court, where just that sort of information had been provided. The success we had in the case was that it led to a reasonable apprehension of bias because the decision-maker had highly prejudicial, non-probative and unreliable information before it. So at the moment, in that sort of scenario, you can still find a way to bring justice to a person. But if I had never been able to see the information that was used by the decision-maker, because it was protected under the regime that's contemplated here, then that person just wouldn't have been able to obtain a successful outcome on judicial review.

Dr Neal: It's a classic example of why this issue is already covered. It's a classic of public interest immunity law that the identity of informers is protected in a variety of ways by the courts. So there's a lot of law on it, and why this legislation is needed in relation to something like that is not explained at all in the material underlying this bill.

Dr Brasch: The scenario that you've read to us and we've seen before, it is correct under the bill. It could apply.

Mr DREYFUS: I'll finish with one last question and I appreciate that this is perhaps an appalling question to ask you given how many undesirable provisions there are in this bill. Could I ask you to indicate what is the most concerning aspect of this bill? Or perhaps, putting it another way, if the committee were to accept some version of this new framework, what would be the most important recommendations the committee could make in order to improve the framework?

Ms Costello: I'll just give my colleagues a chance to think of the answer to that by just reminding the committee that the National Security Information (Criminal and Civil Proceedings) Act 2004 applies across the land in various contexts. There are money laundering issues, terrorism issues, terrorism trials, ASIC cases, all sorts of contexts in which the usual principles under the general act apply. Why do we need this bespoke and rather unattractive regime just for migrants and citizens? Anyway, Dr Neal is going to answer your question more directly.

Dr Neal: I think that probably the most significant thing is the obligation. If the minister is relying on information which is not being provided, there should be a notice that that's being done and this could occur at the future judicial review stage or the merits review stage so that, at the very least, the court and the litigant would know that this is lurking. Beyond that, for the reasons we've already explained, it's very hard to pick a measure that would resurrect the substance of this bill.

Senator McALLISTER: Thanks to all of our witnesses for appearing and for your extensive and very useful submission. I wanted to extend the discussion that you've just had with Mr Dreyfus about the kind of information that might be put before a court that would be considered protected under these arrangements. In your submission you made reference to one of the previous gazettals that have been made under the previous arrangements and I've had a look at it. In 2016, Mr Dutton provided notice indicating which law enforcement bodies in Australia would be considered relevant under the act and also the countries. The list of Australian bodies includes, for example, the Department of Family and Community Services in New South Wales, the Department of Children and Families in the Northern Territory, the Commonwealth Department of Social Services. When those bodies come

into possession of information about an individual or a person, that is not really subject to any kind of contest or robust examination to a criminal or even a civil standard, is it?

Dr Neal: No.

Senator McALLISTER: The kinds of pathways by which those organisations come into possession of information are often quite contested, aren't they? Various individuals provide information to departments, often in the context of custody disputes or conflict within a domestic environment. That kind of information in other legal contexts would be subject to quite rigorous examination and testing, would it not?

Dr Brasch: It would. I will take that one because, as you may well know, I'm a family lawyer first and foremost, so this is bread-and-butter stuff for me. It is not unusual for notifications to be made for other purposes, such as bolstering a custody case or whatever. Around the nation, there are plenty of reports of child safety material that is hearsay upon hearsay upon hearsay, but that's why we have cross-examination: to test the veracity of what is being said. It is not something that would be available here.

Senator McALLISTER: You had a discussion earlier with a number of other committee members about the second limb of this, which is foreign law enforcement bodies that might also be permitted to make these confidential submissions. The list in 2016 is comprehensive and organised alphabetically. If you start at A, it includes Abu Dhabi, Afghanistan, Ajman, Albania, Alderney, Algeria, American Samoa, Andorra, Angola, Anguilla, Antarctica and Antigua and Barbuda. It's a very, very long list, and I rather suspect, without having checked it, that it is simply a list of all of the countries in the world. Is it appropriate for this gazettal mechanism to be used? I suppose it just highlights for me the perils of gazettal, as opposed to other means of naming or identifying these entities which are afforded this fairly privileged capacity to provide information confidentially and without scrutiny.

Dr Neal: Yes. Once it's gazetted, there's just a claim by the agency to confidentiality, and that's why we said earlier that this is effectively trusting that long list of agencies, both domestic and foreign, to make a decision about what information will go before an Australian court. That's really dangerous, and it ignores the problem about secrecy and the abuse of power that gets associated with secret information which is not allowed to see the light of day so that it can be exposed as false if, indeed, it is. That is the whole problem, in essence, that we've been speaking about this morning.

Senator McALLISTER: I just want to finish up by going to another question, which is the absence of provisions that would allow information to be disclosed to the IGIS, to ACLEI or under the public interest disclosure schemes more generally. This is a little bit of a dorothy dixer: are there equivalent provisions in other legislation that provide a framework by which departmental officials might make disclosures that we could draw on in thinking about recommendations to remedy this defect in the bill? What is the significance of ensuring that people are able to make disclosures or to engage with the oversight agencies?

Dr Neal: I guess the first point to be made is that, in relation to ASIO and the security agencies, there are already monitors established to oversight them, and that includes this committee. The Ombudsman's submissions in relation to this legislation assume particular significance in that light. But the ability of individuals to challenge these decisions and to have them justified is really the most specific and direct entitlement that people should be accorded and presently are accorded under our Constitution.

Senator McALLISTER: Thank you. Finally, in your submission you are quite critical on the offences, including the penalties that are recommended should people be found to be in breach of them. Could you just explain what your view is about the way the offence provisions should be constructed?

Dr Neal: They should be removed. The Criminal Code already has provisions for public servants breaching information provisions. They're contained in section 122 of the Criminal Code Act and other places. It's not explained why the offence is needed. It should be taken out of the general run of the Criminal Code.

Ms Campbell: The existing criminal code offences also include exceptions for providing information to oversight bodies such as those you've mentioned, and we've pointed to that as a real concern with respect to these current offences.

Senator McALLISTER: So your evidence really is that these provisions ought to be considered redundant; there are adequate penalties available should people breach the confidentiality provisions as part of their employment, and we don't need additional offences described in the bill?

Ms Costello: That's right, Senator.

Senator KENEALLY: We'll have one final question for Senator Keneally. I apologise to our next witnesses, who have been patiently waiting.

Senator KENEALLY: I do apologise as well, but for people who may be watching this hearing there's one clarification I'd like us to make. We've had much discussion about visa holders, but not only does this bill amend the Migration Act; it also amounts the citizenship act. Can you confirm—importantly, for the people who might be watching—that the provisions of this bill not only would apply to visa holders but also would apply to dual citizens in cases of citizenship revocation?

Dr Neal: They apply to citizenship. There is a list of, I think, upwards of a dozen citizenship decisions that are covered by this legislation and would be affected by it, which involve granting of citizenship, in the first place, or revoking it, in the second. It is a fundamental of life in Australia that you are a citizen, and there couldn't be a more important right that you have. If it were to be taken away under these circumstances, that would be a subject of great injustice.

Senator KENEALLY: Just to confirm: this committee is briefed on citizenship revocations of dual citizens when they occur, but the provisions of this bill would actually prohibit the disclosure of information to this committee of citizenship revocations if they're relying on protected information?

Ms Costello: That's right.

Dr Neal: I think that's right, yes.

Senator KENEALLY: Thank you.

CHAIR: I thank the Law Council very much for your very extensive and helpful evidence to the committee today. As always, we're grateful for your engagement. Could you return those questions you've taken on notice by 4 pm on Friday 3 September to allow us to complete our work and our report to the parliament. Thank you very much.

Dr Brasch Will do, Senator. Thank you, for the opportunity, to you and all the members.

GRAYDON, Dr Carolyn, Principal Solicitor and Manager, Human Rights Law Program, Asylum Seeker Resource Centre [by video link]

PILLAI, Dr Sangeetha, Senior Research Associate, Kaldor Centre for International Refugee Law [by video link]

[10:31]

CHAIR: The committee will move to the Kaldor Centre for International Refugee Law and the Asylum Seeker Resource Centre. I apologise to the witnesses for the delay in coming to you. I won't go through the usual introductions, you may have heard it this morning anyway. Thank you for joining us today. Would you like to make a brief opening statement each—and I emphasis 'brief' so that we can get to questions as soon as possible. Perhaps we'll start with the Kaldor centre.

Dr Pillai: Sure, thank you very much for the opportunity to present evidence today. I suppose the key issue that this bill really relates to is the circumstance where a person who is facing visa or citizenship cancellation or refusal should have an opportunity to respond to the case against them. The bill would significantly restrict the circumstances in which a person would have the ability to respond to key information that's been relied on to reach a decision against them and this undermines principles fundamental to the Australian legal system, such as procedural fairness, the right to a fair trial and the rule of law, as well as a number of international human rights obligations that Australia has subscribed to.

This has a number of implications. If a person has their visa or citizenship cancelled or refused without being privy to the reasons for that they won't be able to make a first-instance response to the department, which means that if there's been a simple case of a mistake being made in the information that's been relied on, or if there's a simple and reasonable explanation for something, the person will not have a first-instance opportunity to provide that, and it will be very difficult for the person to make any effective use of merits review mechanisms—especially given that under the bill the Administrative Appeals Tribunal is also restricted from access to any confidential information that is relied on to reach a visa or citizenship decision. While the bill does allow for judicial review—I had the benefit of listening to the previous panel—and while there is capacity for judicial review, the capacity of that judicial review is severely restricted by the model proposed by the bill. I'm a constitutional lawyer. One of the key motivations that underpins this bill is to address the High Court's decision in the Graham case, and, because of how impaired the judicial review is that's made available under the bill, I think there's a very real risk that the same constitutional problems would arise under the framework that has been proposed.

For those reasons, and because there are existing laws that relate to the protection of confidential information under the NSI Act and the common law public interest immunity, and there hasn't been a principled or evidence based justification provided for why that framework is insufficient and exactly what is needed in addition to that framework that this bill provides, because that justification hasn't been provided and that justification is imperative, and because there have been no attempts to build in things that would increase the proportionality of this bill—such as allowing for a special advocate system or allowing for the court to take into account a broader range of public interest criteria—it's my view that this bill should not be passed. Its problems are too fundamental to be easily solved via amendment.

I would reiterate the Law Council's recommendation that a better approach would be to seek to respond to the decision in Graham by reviewing the various laws that already protect the disclosure of confidential information and seek to ask what, if anything, is necessary in addition to those and develop a coherent whole-of-government model that addresses the needs of information agencies, when they're dealing with sensitive information, while providing a framework that allows for those needs to be met in a proportionate manner that minimises unnecessary burdens on individuals and the justice system.

CHAIR: Thank you very much.

Dr Graydon: Thank you so much for the opportunity to provide evidence today regarding this bill, which would have very serious ramifications for fairness, human rights and the rule of law if it were to be passed. The ASRC is a community and legal centre specialising in refugee law. We act for many refugees and people seeking asylum who face refusal or cancellation of their protection visas. We therefore have significant experience and expertise in this jurisdiction.

We've already set out, in our written submission, our strong opposition to this bill, in its entirety. The key points are around the existing powers being already more than sufficient to address the stated need to protect inappropriate disclosure of sensitive information, including to protect the identity of informants, and, therefore, the bill has no valid purpose. In effect, if there were to be any narrow, rare or specific instances where existing

laws were considered insufficient, they should be addressed specifically rather than by this approach of using a sledgehammer to crack a nut.

We're very concerned about the severe prejudice caused to the rights of those directly affected and to their family members, which is not reasonable or justifiable in domestic or international law, and will cause unfair, unaccountable and poor decision-making. That will result in really harmful outcomes, especially for those facing refoulement or indefinite detention as a consequence of visa cancellation or refusal or loss of their citizenship—also for their families, including children who face permanent separation from their parents.

The scope of documents covered by this bill is not defined and remains unclear. Combined with the tough criminal penalties for those who inadvertently disclose protected information, it means that applicants will be receiving virtually no information about the character issues raised against them from those gazetted agencies. We're also concerned that the bill privileges information from law enforcement authorities and elevates them above our courts, above our parliament's scrutiny, with no control over the quality or accuracy of this information. They could include tip-offs made by people with ulterior purposes, information from foreign security sources, including from countries against which the applicants have been found to be refugees or have applied for protection from.

We're also concerned that the scope of decisions is unjustifiably broad; it lumps together citizenship and visa decisions even though the criteria for cancelling or revoking each are vastly different, and it will apply in visa cancellation decisions which raise ordinary civil criminal law issues in more than 90 per cent of cases and don't raise any specific national security issues at all. The very limited judicial scrutiny provided in the bill is insufficient, because the court's discretion to carry out its core function, including to even consider all relevant public interests and the interests of justice, are fettered under this bill.

Moreover, even this limited safeguard will not be automatically triggered or accessible to affected persons. So the parliament is also prevented from providing oversight of the operation of this secretive protected information regime. It will also prevent the AAT from performing its statutory merits review functions and distort judicial functioning, and would still likely be unconstitutional, as noted by the representative from the Kaldor Centre for International Refugee Law.

Finally, I'd like to invite the committee to focus on the people impacted by this bill. Let's start with the families and, in particular the children of those directly impacted who will be facing life-long separation from their loved ones. Don't we also owe them a robust, fair decision-making process which at least explains why they've been denied their father or their spouse, something which will change the course of their lives forever? Turning to those directly impacted, most of them will have been in protracted immigration detention, many in extremely isolated conditions such as on Christmas Island. They will generally be in poor physical and mental health, and they will generally have very limited means for communicating with family and friends and independent health and legal services. They will generally not have access to legal representation, and they'll be unable to secure it, as the laws in this area are very complex. They need specialist help, yet they're not eligible for legal aid and pro bono capacities are very limited. And they could be facing visa cancellation for minor criminal convictions, or even without any convictions. Under this law, they'll be denied access to that vital information they need to defend themselves. This information could be completely false, inaccurate, taken out of context or irrelevant to the legal issues, yet they won't even know that this information exists or which agency it has emanated from. They will not even be able to, usually, lodge an application for themselves in the court. On the off chance, they would have to randomly try and lodge applications in court, because they won't know whether there's non-disclosed information affecting them or not. Their representatives are also excluded from that process.

CHAIR: I'm really hesitant to interrupt, and I apologise for interrupting, but I'm very conscious of the time. It's not your fault that we're running late, but I don't want you to not be able to answer any questions. Is this close to the finish?

Dr Graydon: No problem. I was just going to highlight the lack of integration of these provisions with the AAT's function, often having to make decisions within an 84-day period or else the applicant automatically loses their case. How is an applicant who's unrepresented supposed to even initiate this judicial review process, organise an urgent court hearing and get what information they can possibly use in their AAT matter within these very limited time frames? These are our top-line concerns, and we respectfully request that the committee rejects this bill in its entirely. Thank you very much.

Mr DREYFUS: Thank you very much to both of the submitters for very detailed submissions. Dr Graydon, I think it might be useful for committee if you could reflect on your own experience of representing people who've had their visas cancelled on character grounds. How often would you represent a client whose visa has been cancelled on character grounds?

Dr Graydon: We have quite a high volume. There has obviously been a massive spike in visa cancellation proceedings commenced against people. We do a significant number every year. We're aware of at least a hundred or more cases, but we probably act for around 25 people in that situation, currently.

Mr DREYFUS: So you can speak to us from experience. Under the current protected information framework, how often would your client not have access—and you as the person's lawyer not have access—to the information that the decision-maker has relied on to cancel the visa?

Dr Graydon: In our experience, that arises quite frequently, and it's very difficult to obtain that information under existing provisions under the Freedom of Information Act, for example, where you get very heavily redacted material, often without justification. It can take months in order to get information under Freedom of Information as well. So it's a very limited ability to be able to access the key information that a person needs to be able to respond to the character issues raised against them, and it's not an infrequent problem.

Mr DREYFUS: How does it affect the way that you run the case—that you don't have access? What sort of arguments are available to you when it comes to challenging a decision, if you have been denied access to the information that the decision was based on?

Dr Graydon: It's like fighting with both hands tied behind your back in a blindfold. You cannot substantially address the issues that are affecting the person's fundamental core interests—and, of course, that's what happens at merits review. Then, of course, judicial review is limited to what happened at merits review. So the judicial review aspect cannot remedy the flaws or problems that have occurred at the merits review stage, due to a lack of access to information.

Mr DREYFUS: Yes, Dr Graydon, that echoes the point Ms Costello, on behalf of the Law Council, made to us in the previous session. I appreciate that your submission and many of the other submissions identify serious problems with the existing protection information framework, but could I ask you what aspect of the proposed new protection information framework most troubles you.

Dr Graydon: I think it's the really wide aperture of agencies that can be gazetted and their information automatically privileged as confidential information in the process without any thresholds for ensuring its quality, accuracy and relevance. And then of course there is not being able to respond to any of that. That is at the heart of the problem here: a person just does not have access even to the gist! Not that the gist would be enough for a person to necessarily respond anyway, but to be completely in the dark as to the information that's been provided, which could be completely unreliable—and we do often see instances where information provided is very unreliable. This is not a theoretical problem. We see it every day in the information that we do have current access to.

Mr DREYFUS: If the committee were to ultimately endorse some version of this new framework, what would be the most important recommendations, in your view, that the committee could make to improve the framework?

Dr Graydon: In our submission, this bill is not remediable, and it should be rejected in its entirety. Even the partial disclosure suggestion, if you like, is completely insufficient. Partial disclosure—making someone aware that there may be this confidential information—would only then be useful to a person if they were actually able to access the judicial review process. As I said in my opening statement, most of the clients we're seeing wouldn't be able to access that judicial review process. I would say that there needs to be, at least, a right to legal representation—free legal representation—and there needs to be much tighter control over firstly the quality of the information and also a much more targeted provision of information to applicants, so that they can meaningfully respond.

Mr DREYFUS: Thank you very much, Dr Graydon, and thank you also to the Kaldor Centre for International Refugee Law centre, for whom I have no questions. I thank you for your submission.

CHAIR: Are there any further questions for the Asylum Seeker Resource Centre or the Kaldor Centre for International Refugee Law?

If not, I thank you very much for your brief but helpful appearance before the committee today. We appreciate you making the time to give your perspective on this legislation. Thank you. For any questions you've taken on notice and any you might receive subsequently in writing, if you could provide answers by 4 pm, Friday 3 September, that would be appreciated. Thank you.

CROUCHER, Emeritus Professor Rosalind, President, Australian Human Rights Commission [by video link]

EDGERTON, Mr Graeme, General Counsel, Australian Human Rights Commission [by video link]

[10:51]

CHAIR: I now welcome witnesses from the Australian Human Rights Commission. Do you wish to add anything before we proceed?

Prof. Croucher: I will be joined today by acting general counsel of the commission, Graeme Edgerton, who I believe may be joining as I speak.

CHAIR: When and if he joins us I'll invite him to introduce himself. Would you like to make an opening statement?

Prof. Croucher: Yes, if I may, Chair.

CHAIR: Please.

Prof. Croucher: Thank you for the opportunity to appear and give evidence today. I'm sorry I can't be with you in person, but circumstances require a bit of flexibility in this regard.

CHAIR: That's alright. You're not alone in that.

Prof. Croucher: I begin by acknowledging that I'm speaking to you from the land of the Gadigal people of the Eora nation and pay my respects to their elders past, present and emerging and of course to those on whose lands you are situated today.

The bill is aimed at an important objective, which is protecting information relating to Australia's national security and sensitive criminal investigations when this information is relied on to cancel a person's visa. However, in our view the bill is a disproportionate response to this objective. We suggest this for two reasons. First, there are already robust safeguards in place to protect sensitive information in legal proceedings. As the government acknowledges in the explanatory memorandum, this bill is not necessary to protect national security information, as this is already protected by the NSI Act. Further, public interest immunity has long been relied on and applied by courts to protect police and intelligence agency sources, informants and information-gathering methodologies. Instead, this bill would allow agencies to keep secret a broad range of information of lesser significance and without a proper assessment of whether it would be in the public interest for it to be disclosed when it is relied on as a basis for cancelling a person's visa.

The second reason this bill is disproportionate is that it fetters the ability of courts to conduct a proper assessment of what is in the public interest. While the bill uses the language of public interest, it places 'a thumb on the scales', to adopt the language of Mr Bret Walker SC, the former Independent National Security Legislation Monitor. Under the bill, courts would be prohibited from taking into account matters that weigh in favour of disclosure of information and would only be able to take into account matters that weighed against disclosure.

All agencies, including security agencies, make mistakes at times. This has been recognised many times, including by the Hope royal commission in 1976, which recommended that security assessments by ASIO should be subject to an appeals system. In order for people who have their visas cancelled on character grounds to properly and fairly test the basis for those cancellations, they should be provided with access to the material relied on by government to make those decisions. If there are legitimate public interest grounds for nondisclosure, they should be adjudicated on by an independent court able to take into account the full range of relevant circumstances.

I can give you some examples of how this issue may arise in practice based on the commission's experience. Since 2014, more than 300 people suspected of being part of outlaw motorcycle gangs have had their visas refused or cancelled. Some people falling within this group have serious criminal records. However, it is inevitable when a policy decision is made to target groups of this kind that there will be questions about whether other people properly fall within the scope of the operation. The commission has received complaints from a number of people who have had their visas cancelled under this program. In one case, the person whose visa was cancelled said he didn't even know how to ride a motorcycle. He was able to get access to the material relied on by authorities to cancel his visa. This included a serious allegation: that he had been convicted of assaulting a police officer, which he was able to demonstrate was, in fact, wrong. The alleged incident related to someone completely different and had been included on his record as a result of an administrative error. Without his having access to that material, there was virtually no prospect of that error being corrected.

In another case, the person who had his visa cancelled was a man in his late 50s who had lived in Australia on a permanent visa since he was six years old. He had no criminal record for the previous 20 years other than a driving offence. His visa was cancelled when he travelled overseas on holidays and while his partner, four children and one grandchild were still in Australia. He has been stuck overseas for more than three years now while he has sought review of the cancellation decision. It appears that the basis for the cancellation was a view by state police that he was a member of a motorcycle gang, which was not in itself unlawful. In his case, he was able to obtain a copy of the material relied on by the minister to form this view. The material was a two-page letter from a state police service. The substance of the letter was an alleged association with other people who were alleged to have committed crimes. Without access to that information, it would be virtually impossible for him to challenge the assertions made by police or to answer the allegation that he posed a risk to the safety or good order of the Australian community. If this present bill were passed, this kind of information may be kept secret from people who have their visas cancelled. Without access to this material, they may have no chance of demonstrating that the cancellation decision was not properly made.

In the case of visa cancellations, the right to a fair hearing is particularly important, because a person is likely to lose their liberty if they lose their visa. If a person's visa is cancelled, they become liable for immigration detention, often for long periods, and ultimately removal from Australia. The commission's recommendations are aimed at preserving the right to a fair hearing when reviewing visa cancellation decisions. Mr Edgerton and I are happy to answer questions of the committee. Thank you.

CHAIR: Thank you. We really appreciate that opening statement. I see your colleague has now joined us.

Mr Edgerton: Yes, it's Graeme Edgerton. Apologies for the technical mix-up.

CHAIR: Not at all. Thank you for joining us.

Senator KENEALLY: Thank you to the Human Rights Commission. My first question is a rather straightforward one. In the legal and constitutional affairs inquiry into this bill, there was some discussion about the short time frame for consultation and whether or not formal consultation had occurred within government and external to government. Independent of these hearings, has there been any formal consultation with government with the Human Rights Commission on this legislation?

Prof. Croucher: I'm unable to say specifically about that. May I ask my colleague if he is aware of any other specific consultation that we may have had or was had through my former colleague Mr Santow, the former Human Rights Commissioner.

Mr Edgerton: I'm not aware of any consultation that's been had with the Human Rights Commission in relation to this bill. We wouldn't necessarily expect to be consulted in relation to all national security legislation. We are sometimes. We would expect to be consulted in relation to discrimination and human rights legislation, but I'm not aware of any consultation in relation to this bill.

Senator KENEALLY: Your submission, I do note, recommends that the bill not be passed and observes that the bill, as you've said in your opening statement, has substantial human rights implications. The most significant appeared to be your concern about the right to a fair and public hearing—that is, the ability for people to have procedural fairness. Your submission does make recommendations that, if the bill is to be proceed, that would be designed to enhance the procedural fairness of the bill. Would you support amendments to allow at least a partial disclosure of confidential information to an applicant or their representative in order for them to be able to understand the gist of the allegations against them?

Prof. Croucher: If I may, I will provide a brief response and then invite my colleague to elaborate further. The principal difficulty is: how can you defend or correct what you don't know? Without having that possibility, the place of the applicant is in a very precarious situation. As I mentioned, the consequences in relation to visa cancellation can lead to two years and upwards in immigration detention. So we have suggested some specific alternatives in the event that the bill is to proceed in any way, and the third of those is that the visa candidate is provided with a summary of information, but that is the final step in the three that we suggested might be acceptable alternatives. Although, without any protections at all, the fundamental matter is not addressed in the bill as it stands. May I invite my colleague to elaborate a little further from our perspective.

Mr Edgerton: I agree with what the president has said. The force of our recommendations goes to the particular issue that you've raised—whether the gist of information should be provided to someone. The commission's primary position is that the bill should not be passed at all. If it is passed, we've got three recommendations that we say are interconnected. The third one of those recommendations is that sufficient information is provided to the person so that they can properly understand the case that's made against them and make submissions in response to that. We say for it to be efficient, though, that there would need to be protections

earlier in the process as well. So you would need to have representation at that initial hearing where decisions are being made about how to use the information and what rights are given. We say that could either be the person's lawyer, maybe security cleared, or be a special advocate. But we also need to have changes in relation to how the court is able to assess that material, and that's the balancing exercise you've heard a lot about already. Certainly, if information is withheld, there would need to be, like you say, information about the gist of that material so that people can effectively respond to it.

Senator KENEALLY: Thank you, Mr Edgerton. I think it's an important point that, yes, you do recommend that the bill not be passed but, if it is progressed, that it have these three changes: (1) ensuring the applicant's interests are represented during preliminary hearings, either by a security cleared lawyer or a special advocate; (2) that the court considers aspects that weigh in the favour of disclosure—I'm going to come back to that; that's why I'm going through these—and (3) on that last part, about the disclosure of information, that if the court orders that some material not be disclosed it should at least order a summary of the information, to allow the applicant to understand the substance, of the information.

Can I go to that second one—ensuring the courts consider aspects that weigh in the favour of disclosure? In the legal and constitutional affairs inquiry, this issue of the balance that needs to be struck between the necessity of some information remaining confidential and the independence of the courts and their ability to deliver justice and due process—you spoke to this, in fact, Mr Edgerton. Can you just go through, in your view, the things that the courts are required to consider under this legislation and the things that they're not able to consider under this legislation?

Mr Edgerton: Sure. I'm happy to do that. Maybe the first observation is that there's a list of criteria that's currently in the act that was in the regime considered by the High Court in Graham. That list of criteria includes one particular factor that is not included in this bill. It's the only factor to be excluded from this bill, and that factor is the interests in the administration of justice. Previously that factor was doing all of the heavy lifting in terms of the other side of the scale. All of the other factors that are included in this bill are factors that weigh against disclosure of information. There are no factors that currently weigh in favour of disclosure—such as the interests in the administration of justice—or the right to a fair trial or the impact that nondisclosure would have on the individual who's being affected. We say that the impact of that, as the president said earlier, is to put a thumb on the scales. It's not a proper evaluation of what's in the public interest.

Senator KENEALLY: Thank you. Can I also ask you about some of the definitional matters in this legislation? It seems to me that there is not a clear definition in this legislation of what would constitute protected information. Do you have a view as to whether or not such a definition might improve this legislation?

Mr Edgerton: I think it certainly could improve the legislation. That's what's done in New Zealand when they're looking at similar issues in relation to visa cancellation. There is a definition of the kinds of information that should be protected. It's also the way that the NSI Act approaches protected information. There's a clear definition of what is national security information, including information that relates to law enforcement activities. So that could be included.

Our primary position is that this bill isn't necessary, because the NSI Act and public interest immunity are already sufficient and, as I say, the NSI Act has those definitions included within it. The problem with the definition of information for this bill is that it really only has to meet three criteria: it has to be provided by a gazetted agency to Home Affairs; it has to relate in some way to a character decision—under either the Migration Act or the Citizenship Act—and it just has to have a claim made that it's confidential by the gazetted agency. It doesn't have to be sensitive. It doesn't have to be highly sensitive. There just has to be a claim made that it's confidential, and we say that sets the bar too low.

Senator KENEALLY: Thank you. I'm very pleased you mentioned the New Zealand legislation. Your written answer to a question on notice to the legal and constitutional affairs inquiry goes through the differences between this bill and what exists in New Zealand. I might just say, for the sake of the Secretariat and my fellow committee members, that that would be something worth us considering. I will cease my questions there and cede my time.

CHAIR: Thank you. I know Ms Hammond has a question or two.

Ms HAMMOND: Thank you, both, for your submission. As Senator Keneally just mentioned, the comparison with the New Zealand legislative regime that you've included within your submission today is really of interest and of use. Thank you for that. I note your primary position is not to pass this legislation. One of the proposed amendments that you've put forward if the bill is to proceed talks about a special advocate, that the applicant could have a special advocate represent them. Can you give us some understanding of how that works?

Prof. Croucher: Perhaps, again, my colleague Graeme Edgerton could give you some elucidation on the way that special advocate could work. There's an analogy in the control order regime already, but he's well placed to speak to it.

Mr Edgerton: As the president says, there is already a regime set up where control orders are applied for, and the government seeks to rely on protected information in the making of that control order, which allows for a special advocate to be present. The special advocate is not the lawyer for the person who is going to be affected by the decision but is effectively there to make submissions in the public interest as to why potentially part or a summary of that information should be provided to the person who might be subject to that control order. So there is an existing regime that is already set up there. That regime kind of exists under the NSI Act at the moment but it links to the control order regime under the Criminal Code.

Importantly, even with control orders, the person who is potentially subject to the control order is entitled to know the substance of the claim that's made against them, which is not the case with this proposed regime under the Migration Act. And it seems strange that somebody who might have an order made against them because of potentially being suspected of being involved in terrorist activity should have more rights than someone who is a citizen or permanent resident of Australia.

Ms HAMMOND: Yes. You started off your presentation by saying there's a legitimate objective behind the legislation, which is to protect national security information. It's as much about protecting the source of where that information might come from as well, isn't it? Does that underline your suggestion that a person could be given a summary of the allegations against them but that might exclude where that information actually came from, because that might be revealing security sources or something that is within the national security interest?

Mr Edgerton: That's exactly right. The examples that have been highlighted in the explanatory memorandum for the bill is that this might include information about people's associates or their character. So if the information is personal to the individual or relates to who they've been associating with, it should be possible to provide that information to the person without revealing the source of that information or particular police operations that gave rise to getting that information.

Ms HAMMOND: Thank you both very much and thank you also for the examples that you provided in the context of this hearing about the two case examples, the biker ones. That was very useful in illustrating this.

Mr DREYFUS: Professor Croucher, one aspect of this bill, and you've noted it in your submission, is an actual exclusion hold—the possibility that a court in considering whether or not information should remain confidential, an exclusion from taking into account the administration of justice. Is there something that's essentially a bit offensive about a government presenting to a parliament in a democratic country a bill that purports to tell a court that it can't take into account the administration of justice in considering the public interest?

Prof. Croucher: I think our submission addresses that question directly. We use the thumb-on-the-scales analogy, and I did hear Mr Neal refer to the 'foot placed on one end of the see-saw'. An underlying question for us, as the national human rights institution, is the balance between the executive and the exercise of the court's jurisdiction, in particular the ability to scrutinise decisions. This is an ongoing issue in democratic accountability. I reflected recently on the Magna Carta and so much of the Magna Carta is about the balance between the Crown in that instance and the citizens, and this in a way is the 21st century testing of that balance between the executive in this case, not the Crown, and the courts, so keeping that balance right. We've urged in our submission is the fact that there are protections for the issue that's been raised as the objective of this bill. The NSI regime and the public interest immunity framework already address on a much broader scale the issues to which this bill is also directed. To have the singular focus on visas, and cancellation of citizenship and cancellation of visas, distorts that balance in a way that we would submit as the national human rights institution is unacceptable from a human rights perspective.

Mr DREYFUS: In making decisions courts, and ministers for that matter, are often asked to balance competing public interests, aren't they? It happens all the time. It's not surprising in a civilised society we recognise competing public interests. In fact, as your submission points out, the existing protected information framework in the Migration Act says that, in deciding whether or not to order the disclosure of information, the court must consider Australia's national security and a number of other factors, and that the court must consider the interests of the administration of justice and yet we see in this bill an exclusion from the courts considering the administration of justice. Can you think of a justification—use whatever analogy you like, the thumb on the scales or the foot on the see-saw—for doing that?

Prof. Croucher: I think our submission and my opening remarks are directed to saying it is not correct, it is not an appropriate balance and it does, indeed, go too far. We've suggested that there already protections that have been calibrated with definitions that the court can work with, and with an appropriate recognition of how we can protect the national security concerns but also at the same time provide in the administration of justice for the individual who is affected by their visa or citizenship cancellation that they have an appropriate ability to defend themselves and correct matters that are incorrect in relation to the reasons that are supposedly proffered for making the adverse decision against them. May I invite my colleague Mr Edgerton to add any further insights in relation to answering your questions, Mr Dreyfus?

Mr DREYFUS: Yes.

Mr Edgerton: I think the only extra thing that I would add here is the consequences for making a wrong decision. We say there are two real important human rights here. One is the right to a fair hearing but also the right to liberty. The real vice with this bill is the potential for people to lose their liberty on the basis of secret evidence that may be wrong. Ms Hammond asked earlier on for details about the number of people who potentially could be affected by this bill. Over the past five years, every year there's been approximately a thousand people who've had their visas cancelled on character grounds. Those people make up the bulk of people in immigration detention currently. As of 30 June this year, there were approximately 1,500 people in immigration detention and approximately 800 of those were people who were there because their visas had been cancelled on character grounds. The average length of detention for those people is now well over 600 days.

So really what you're looking at here is a process where someone has their visa cancelled, they don't necessarily have the opportunity to challenge the reasons why and they may well face up to two years in immigration detention as a result. It's not prison. It's administrative detention but the consequences are equivalent to a criminal conviction, without the protections that you would have in a criminal trial. This kind of regime would not be acceptable in a criminal trial. The state can't proceed on the basis of secret evidence unknown to a defendant to convict them of a criminal offence but it's proposed that this kind of regime would be acceptable in a civil proceeding with quasi-criminal consequences.

CHAIR: Any further questions, Mr Dreyfus?

Mr DREYFUS: No. Thanks very much, Chair.

CHAIR: I thank you very much for your attendance and your evidence here today. The committee appreciates your engagement. Any questions you've taken on notice or any that you subsequently receive in writing, we'd be grateful if you could return them by 4.00 pm on Friday 3 September to allow us to complete our report to the parliament. Thank you very much for joining us today.

Prof. Croucher: Thank you, Chair, and thank you, committee.

Proceedings suspended from 11:21 to 12:02

FINTAN, Mr David, Senior Assistant Ombudsman, Strategy Branch, Office of the Commonwealth Ombudsman [by video link]

McKAY, Ms Penny, Acting Commonwealth Ombudsman, Office of the Commonwealth Ombudsman [by video link]

MACLEOD, Ms Louise, Acting Deputy Ombudsman, Office of the Commonwealth Ombudsman [by video link]

CHAIR: The committee will now resume. I welcome representatives of the Commonwealth Ombudsman. Do you wish to make an opening statement today?

Ms McKay: Yes, I do have a short opening.

CHAIR: Please.

Ms McKay: I thank the committee for the opportunity to be here today in relation to your review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020. As you know, this bill seeks to create a framework to protect information that is disclosed in confidence by gazetted law enforcement and intelligence agencies and relied upon in character related visa and citizenship decision-making.

The purpose of our office is to provide assurance that the agencies we oversee act with integrity and treat people fairly. We do that in a number of ways, from conducting inspections to investigating complaints and receiving public interest disclosures. Our oversight role relies on our ability to request and receive information from agencies to gain a full picture of what has happened. Our interest in this review is to ensure that our ability to provide effective oversight works and our independence in performing that role is not impeded.

This bill has the potential to affect the Ombudsman's role in four ways: our ability to receive and consider public interest disclosures from Home Affairs staff; our ability to investigate complaints about visa and citizenship decisions and actions, and that's the administration of those decisions rather than the merits of those decisions; our ability to inspect and report on the circumstances of people in immigration detention; and our ability to inspect law enforcement agencies' use of covert and intrusive powers.

We're concerned that the current secrecy provisions in the bill will compromise our ability to perform our oversight role, by inhibiting the receipt and requesting of information from Home Affairs. Under the current provisions of the bill, the only way a Commonwealth officer can provide specified confidential information to our office is by ministerial authorisation. Commonwealth officers will commit an offence if they disclose confidential information, in relation to visa and citizenship decisions to our office, without that authorisation. This offence is intended to apply despite any other law.

In order for us to continue our work in the same way that we have always been able to, we ask that the bill be amended to include a specific exception to the proposed secrecy provisions—that's section 52A of the Citizenship Act and section 503A of the Migration Act—to avoid any doubt that we can obtain the information necessary to perform our functions and Home Affairs staff can provide information to us without committing an offence.

As we point out in our submission, a specific exception for oversight agencies is an approach that's been adopted in a number of pieces of legislation. By including an exception for our office in the legislation, it creates a clear and transparent pathway for people who might be minded to make a complaint or public interest disclosure as well as staff responding to our requests for information.

We understand that the committee has received a number of submissions containing comments on the policy rationale for this bill. We don't propose to comment on these broader policy issues, but I'm happy to answer any questions the committee might have today.

CHAIR: Thank you very much.

Senator McALLISTER: Your submission, in fact, is quite straightforward and, as you've indicated just now, focuses on a single, narrow but important problem. I want to ask a couple of questions about how that applies to specific parts of your function and then just a few more questions about the recommendations you propose at the end of your submission. Firstly, in terms of public interest disclosures, is it correct to understand that, notwithstanding the protections that are ordinarily provided to a person who makes such a disclosure, those protections would not apply to information that has been classified or deemed protected under the proposed legislation here?

Ms McKay: It's certainly our understanding that for somebody to make a PID—public interest disclosure—to us that involves some confidential information they would be committing an offence, because the offence provision under the proposed bill would apply to that information and the disclosure of that information. There is

at least some ambiguity around that, so it would be our submission that it should be clear that somebody should be able to make those disclosures to our office without committing an offence.

Senator McALLISTER: So it may be argued that those exemptions do apply, it may be argued that they don't, but in securing protection for whistleblowers it ought to be unambiguous. Is that your argument?

Ms McKay: It should be, yes, and that's our submission. There are possibly different interpretations of the legislation and the bill and how they work, but at the moment it is ambiguous. That's why we've asked for that specific exception, in particular, so it creates that clear pathway for people to be able to provide that information to us.

Senator McALLISTER: You indicated in your submission that you receive a relatively high volume of complaints around citizenship and visa issues. Do you also receive a relatively high level of disclosures about those same matters?

Ms McKay: No, not in the same numbers. Some use the Public Interest Disclosure Act as opposed to making a complaint to our office. Certainly, we receive many more complaints.

Senator McALLISTER: In relation to your response to a public interest disclosure and your capacity to investigate the allegation or issue that's been disclosed, you've indicated that the bill expressly overrides your powers under the Public Interest Disclosure Act to request that information. This isn't a question of legislative uncertainty; this is a direct consequence of the legislation. Is that correct?

Ms McKay: In the proposed bill and looking at the EM, as we did for the proposed bill, it does say that the provisions take primacy over any other law. In our interpretation of that, it would take primacy over the Public Interest Disclosure Act.

Senator McALLISTER: And those Public Interest Disclosure Act powers are separate and distinct from some of the other powers that you possess for your other functions?

Ms McKay: Yes, they certainly are. We have powers under the Public Interest Disclosure Act, but we also have powers under the Ombudsman Act to gather information and investigate complaints.

Senator McALLISTER: This is obviously suboptimal in any case, but those powers are similarly compromised, so across the board your ability to actually investigate either complaints or disclosures made to your office would be quite limited?

Ms McKay: I think that that's right. It's an interesting question, because under the Ombudsman Act we have some specific powers to make preliminary inquiries, investigate complaints and obtain information. There is a provision under our Ombudsman's Act that says that a person is not liable to a penalty under provisions of any other enactment by giving information to our office. Usually we would rely on that and that would be fine, but I think at the moment, given the explanatory memorandum and the provisions that are proposed in the bill, it does create a question about which act prevails. We'd say at the moment given the wording in the explanatory memorandum it looks like the bill would prevail over the provisions in our Act.

Senator McALLISTER: Moving on to the second area that you raise in your submission, which we've touched on a little bit already, you fear your investigation and complaints management function would also be compromised?

Ms McKay: Yes.

Senator McALLISTER: And that is essentially for the same reason, that it appears that the confidentiality requirements override your powers?

Ms McKay: That's right, yes.

Senator McALLISTER: I'll ask about the third matter that you raise which is your immigration detention inspection and reporting functions. Before we begin, can you just outline what the policy rationale for those functions is? What's the underlying purpose of the allocation of those powers to the Ombudsman?

Ms McKay: Once a person has been in long-term detention for two years we're then required to report every six months on that person's circumstances in detention. In order for us to do that we require Home Affairs to provide us with information around that person's circumstances. In terms of the interaction of that function with the terms of this bill, if the information about a certain detainee contains sensitive or confidential information from a third party then it may not be provided to us. They could rely on the provisions of the bill not to provide that information to us and then we're kind of acting in a position where we don't have the full picture when we're providing that information to the minister and making a recommendation about the person in detention's conditions.

Senator McALLISTER: I might just take you back to the underlying purpose of that. Why is it in the public interest that we have such a reporting function for persons who are in long-term detention?

Ms McKay: It's to provide that extra layer of assurance. For people who are in long-term detention it's providing that second set of eyes, I guess, in terms of looking at the conditions and all of the circumstances surrounding that person's detention and seeing if there's anything that we can point out that could assist. Sometimes we make recommendations around whether they should be moved within the detention network to be closer to support networks. Sometimes we make a recommendation to the minister about expediting a certain part of the process if they can. Sometimes it's about providing more programs and activities for that person, particularly if they're suffering from mental health issues. It's providing that extra layer of assurance to make sure that people in long-term detention have that focus.

Senator McALLISTER: In part that's because the immigration detention system sits aside from the criminal justice system and people who are detained in this way are not convicted of any crime and are also not subject to the oversights that might exist in our state prisons, for example?

Ms McKay: That's correct. But we're not the only oversight agency that goes into immigration detention either. The Human Rights Commission and the Red Cross also have a role in oversight of immigration detention.

Senator McALLISTER: Okay. Finally, the fourth issue you raise goes to concerns about your inspections of law enforcement agencies' use of covert and intrusive powers. Can you explain a little bit about that function and your concerns about the way the bill might engage with that?

Ms McKay: Sure. We have a number of functions that require inspections of law enforcement's use of covert and intrusive powers, and we go in at regular intervals—they're different under every regime, as you would understand—to inspect the use of those powers by those agencies. I expect that the interaction with the bill for this power will be less. It will be quite minor. But we do rely upon agencies to self-disclose information when they've used those powers, and we were concerned that there is potentially a small overlap if the agency were minded to self-disclose information about compliance with their legislative requirements and it involved confidential information that they couldn't provide to us.

Senator McALLISTER: Thanks. Presumably, that chilling effect is more pronounced because there are specific offences in the proposed framework that apply to officers when they breach the provisions of the framework.

Ms McKay: Yes.

Senator McALLISTER: Okay. I turn, then, to the recommendations you've made about your preferred response to these deficiencies. You essentially observe that there are a range of templates that we might look to to create the necessary exceptions to allow you to continue with your functions. Do you have a view about which of these is preferable, or are they all of equal utility?

Ms McKay: I think there are a number of ways that this can be achieved. Our preference is an exception, and there are a number of pieces of legislation that contain exceptions. I don't think that I have a view on which one is preferable to another, as long as it's clear on its face and unambiguous. There are other ways of achieving the same result—for example, including a defence to the offence provision. That could also work, but our preference is for the specific exception, because it creates a clear pathway for somebody to provide information to us and make a complaint to us, rather than having just a defence to an offence provision, which is sometimes a little bit hard to find and interpret.

Senator McALLISTER: This committee, in different inquiries, has given quite a lot of consideration to the relative merits of exceptions or defences in creating these kinds of pathways.

Ms McKay: Yes.

Senator McALLISTER: One of the objections to a defence is that it is less certain for the person who is making the disclosure or providing the information and, in fact, is not engaged until a prosecution has been initiated, so it creates the possibility that a person may go through a range of very stressful situations where they are charged and then required to mount a defence, rather than knowing from the outset that their actions are protected. When you talk about a chilling effect, is that one of the concerns that you are thinking of?

Ms McKay: Yes, that is certainly a concern, and I guess that's what I was pointing to when I said 'a clear pathway'. A specific exception provides that clear pathway for somebody without their having to go down the path, as you've explained, of potentially facing a prosecution or mounting a defence. So yes.

Senator McALLISTER: Okay. You note on page 6 of your submission, in the second-last paragraph, that Home Affairs has made the argument that the minister is able to authorise the disclosure of confidential information to the office. That's not your preferred model. Can you explain why?

Ms McKay: Yes, I can. I guess we've got a number of concerns with this proposal. Firstly, it's unclear how it would apply to PIDs. If a staff member wanted to make a public interest disclosure that contained confidential information, they would themselves have to approach the minister, which is quite a complex process, and that doesn't provide them with a clear pathway to us.

Senator McALLISTER: Before we move on from public interest disclosures, it may be that the cause for concern in some hypothetical example, in some future government, is in fact that the individual is concerned about the minister's behaviour. There is something about that set of arrangements that is inconsistent with the entire framework for public interest disclosures, is there not?

Ms McKay: I would disagree with that. The public interest disclosure mechanism, we would argue, in terms of our act shouldn't be impaired by ministerial authorisation processes.

Senator McALLISTER: Thank you. Please go on.

Ms McKay: We would also say that it could potentially make the process quite lengthy and complex because we're going to have to rely upon Home Affairs staff seeking the authorisations, generally. I guess we'll be in a position where we don't know what we don't know. It will become quite difficult in practice, I expect, to go through a minister to get authorisation and to get information, and it would also create a delay in the process, so we have some concerns around that.

We're also mindful that we have some safeguards in place around the provision of that sort of information to our office that we can rely upon. Firstly, all of our staff are subject to confidentiality provisions. We have a provision in our act that requires our staff to keep information that is provided to us confidential, and we have the infrastructure in our office, both electronic and soon to be physical infrastructure, to keep that sort of information that is classified at that level.

There is also another safeguard already in the Ombudsman Act, which is an Attorney-General's certificate if information falls within one of the categories specified in the Act. The Attorney-General can issue a certificate preventing the information coming to us. It's a provision that hasn't been used. Well, we're not quite sure if it hasn't been used at all, but we couldn't find a use of it. But it is there and it is a safeguard. If particular confidential information was, for example, going to be of danger to national security, it could be used.

Senator McALLISTER: Understood. That's all I have, Chair. Thank you very much for your evidence.

CHAIR: Dr Aly, you're indicating—

Dr ALY: Thank you, Chair, and thank you to the witnesses for appearing this morning. I only have one question. You mentioned in your submission and today in your evidence the impact of the bill on your remit around immigration detention and law enforcement. I'm wondering if you've given any thought as to whether or not the bill will also impact on other areas of your remit, because you also act as the Defence Force Ombudsman, the Postal Industry Ombudsman and the VET Student Loans Ombudsman. Is it unimaginable that this bill may also have some impacts on other areas of the work that you do?

Ms McKay: I'm looking to my colleagues. Ms Macleod, you might—

Ms Macleod: I think it's less likely, Senator. For example, if someone came to us, complaining about their employment benefits when they're in the Defence Force, because we have jurisdiction over employment related matters, it is unlikely that, in the course of investigating a complaint about that, we'd be seeking information that perhaps is confidential information and falls within the scope of the bill. Postal Industry Ombudsman—again, I think that's not likely. For VET student loans, again, I don't think that's likely to be captured.

Dr ALY: Sorry, what about overseas students? Is there any likelihood there, do you think?

Mr Fintan: I might just add that our understanding of the bill is that it affects particular categories of confidential information that are used for particular decisions under the Migration Act and the Citizenship Act; therefore, the link with those other areas is probably a lot less likely to arise than in the other contexts that the Acting Ombudsman identified.

Dr ALY: With regard to kinds of areas where you have oversight, what about functions? You've mentioned the ability to investigate, to go into immigration detention. Are there other functions that you've given thought to that might also be impacted?

Ms McKay: I think that our submission covers the main areas. I can't think of any other ancillary areas right now that would be affected. I thought this through with some detail before we put the submission through, so the four areas that we've outlined are probably the areas of most concern for us.

Dr ALY: Thank you. Thank you, Chair. That's all from me.

CHAIR: Thank you, Dr Aly. Thank you very much for your attendance and your evidence to the committee this afternoon. If you took any questions on notice, or if you receive any in writing subsequent to the hearing, we'd be grateful if you could return them by 4 pm on Friday 3 September to allow us to complete our report.

Ms McKay: Thank you, Chair. And thank you, committee, for your time.

CHAIR: Thanks, everyone.

Proceedings suspended from 12:26 to 12:55

BIDDLE, Mr Steven, Acting First Assistant Secretary, Immigration Integrity, Assurance and Policy, Department of Home Affairs [by video link]

JOHNSON, Mr Jeremy, Acting Executive Director Business and Partnerships, Australian Criminal Intelligence Commission [by video link]

MAYO, Ms Nicole, Acting Chief Operation Office/General Counsel, Australian Criminal Intelligence Commission [by video link]

RINGI, Ms Heimura, Assistant Secretary, Legislation, Department of Home Affairs [by video link]

RYAN, Mr Nigel, Assistant Commissioner Crime Command, Australian Federal Police [by video link]

WEBBER, Mr Steve, Assistant Secretary, National Security and Law Enforcement Legislation, Department of Home Affairs [by video link]

WILLIAMSON-DE VRIES, Ms Susan, Manager Government and Executive Advice, Australian Federal Police [by video link]

CHAIR: The committee will now resume. I now invite any organisation that wishes to make an opening statement. We have established the Department of Home Affairs does have an opening statement and the ACIC does not. Does the Australian Federal Police wish to make an opening statement?

Mr Ryan: No, thank you.

CHAIR: We will go with the opening statement of Home Affairs.

Mr Biddle: A copy of the statement has been provided to the committee.

The opening statement read as follows—

The Department of Home Affairs welcomes this opportunity to address the Parliamentary Joint Committee on Intelligence and Security (PJCIS) at this hearing, as part of the inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the Bill).

I acknowledge my colleagues from the Australian Criminal Intelligence Commission (ACIC) [Chief of Staff, Jeremy Johnson, and National Manager Legal Service, Nicole Mayo], and the Australian Federal Police (AFP) [Assistant Commissioner Crime Command, Nigel Ryan, and Manager Government and Executive Advice, Susan Williamson-deVries], who are also attending today.

The Government introduced the Bill to enhance the Government's ability to uphold the safety and good order of the Australian community.

The Bill proposes a number of amendments to the *Migration Act 1958* (the Migration Act) and the *Australian Citizenship Act 2007* (the Citizenship Act) 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 risks 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 such as the AFP and ACIC, - is appropriately protected.

By not having access to protected information, migrants who should not be given the right to remain in Australia may be granted a visa or Australian citizenship. This Bill will facilitate the provision of confidential information to the Department of Home Affairs in order to review information relevant to the decision of whether a person meets the requirements under the Migration Act or the Citizenship Act, as the agency which owns the information can provide it to our departmental decision-makers on condition it is treated as confidential information.

The Bill enhances the ability of decision-makers to use confidential information to manage the risk of certain individuals of character concern, where otherwise there may 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 to that 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 agencies 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 access the information in judicial review proceedings involving such decisions and give the information such weight as the court considers appropriate.

CHAIR: First to the AFP and ACIC, I am illustrated—I am interested if you could illustrate briefly some of the situations where you do need to communicate with the department on a confidential basis that helps form the basis of migration and citizenship decision-making. Perhaps we will start with the ACIC and then the AFP?

Mr Johnson: Broadly speaking there are probably two scenarios—I will rephrase that. We are certainly aware that there's information that we hold which would be of use to decision-makers in the context of the decisions made that this bill refers to where that information would be useful for decision makers. However, as it currently stands owing to either lack of protections or lack of confidence that certain information will be protected, we would currently not be in a position to share the information. That arises from two scenarios. One is our own act. Whilst this bill does not impact the functions of the ACIC in the normal course of its business, our act is quite prescriptive about what information we can share, with whom, and under what circumstances, particularly in relation to coercively developed or collected material. Secondly, a fair amount of the information we hold is sourced from partner agencies, mostly state and territory police, of course, and some overseas agencies. Once again, the confidence that they have in sharing information with us relies heavily on our ability to protect that information, so releasing it into a process that doesn't offer any protection of that information then becomes problematic for us. And whilst it's difficult to give individual examples of that, we are certainly aware of information that we have that may be of use in the context of the decisions that are falling under this act, but we wouldn't share it at this time.

CHAIR: So just to be clear, there is current information that you are not able to pass on as a result of the uncertainty caused by the High Court decision. Am I understanding correct?

Ms Mayo: That's correct. Essentially, just to elaborate on what Jeremy said, it falls broadly into five categories of [inaudible] to us with an expectation that it retains confidentiality.

CHAIR: I'm sorry. We have just lost you there. We're having no luck this afternoon with technology. While the ACIC tries to reconnect, perhaps via telephone given that's proven most reliable for others, can I move to the same question to the AFP?

Mr Ryan: Obviously by its very nature, the protected information is highly sensitive and potentially the disclosure of that information can identify human sources, methodologies, capabilities or even the existence of ongoing criminal investigations. I guess, most notably, the areas where we can look at using the disclosure of this information relates to the organised crime space and also in the counter-terrorism space: Obviously, it's our view that it is in the public interest that intelligence and those sources are not publicly disclosed because the disclosure would harm the community by jeopardising investigations and intelligence-gathering activities that obviously combat counter-terrorism and organised crime and also, importantly, the disclosure may put the life and safety of individuals at risk if that is traced back to the source. Another issue for us is that the AFP often holds this information, which is gathered from our state and territory partners and also our foreign law enforcement partners. The disclosure of that information could cause significant damage to our [inaudible] relationships.

Picking up on your interest in some of those examples, Chair, there is a recent matter where the AFP's intelligence operations have been working with Home Affairs on a migration related issue. However, the information shared between those two agencies has been hampered by current legislative barriers. The matter relates to a current counterterrorism matter between us and Home Affairs. We've been unable to identify a way to incorporate the protected information that the AFP holds into the actual assessment, even though the information is highly relevant.

CHAIR: It looks like we have the ACIC back with us. Did you want to expand on the answer that you were partway through?

Ms Mayo: I'm sorry about that. We seemed to have lost the connection. I've heard my colleagues from the AFP. Essentially the confidential basis mirrors what the AFP have said. We're talking methodologies, expectation

of confidentiality, protection of sources and safety, and that runs as far as ongoing operations, activities and even potentially disclosure of the fact that we have an interest in a particular person or group.

CHAIR: I'll move to Home Affairs before I offer the call to other committee members. We've heard some practical examples there from the two agencies in question about the impact of the High Court decision on their case. Some of the witnesses before the inquiry today have said that the NSI Act is sufficient and it provides all the protection that should be necessary or that there are other mechanisms for protection through the court system. Why does the government not agree that those protections are not sufficient and is therefore trying to legislate this scheme?

Mr Webber: The NSI Act is a comprehensive regime which is designed to be used in all circumstances that might be faced in criminal and civil proceedings where protection of information might be needed. Consequently, it has a number of features that the government says are not required in this circumstance. For example, there's a right for the attorney to be heard. It has a notification system where parties are required to notify the attorney if there's information that they think will need protecting. It has a process whereby the attorney can give certificates, and then once those certificates are given that can then involve providing redacted documents, summaries or statements of facts of the things documents might prove. That process triggers a hearing requirement, which comes with it a hearing about who can be present at the hearing. Roughly speaking, we have a volume of court processes here. It's sensible to legislate for a bespoke regime that will be more efficient. That's issue 1. Issue 2 is that the NSI Act really works, and has been used, in civil processes as a means to work with parties and advocates for parties in being given access to the very material that, under the process that the bill would enact, would not be given to parties and to advocates of parties. It's arguable that it may be used to prevent that, but I'm not aware that it ever has been, and I think that's not tested.

CHAIR: On that, can I ask for a clarification. Does the NSI Act apply to organised crime or broader character issues?

Mr Webber: That was the third issue I was going to come to. The NSI Act, specifically, is about national security information, as is hinted at by the very title of the act. It's limited, in its operation, to information that would not be covered by the bill and the government thinks should be covered. So there are those three things.

The bill attempts to create a regime that is bespoke for this kind of information so that it's more efficient, that doesn't have the disclosure risks that are in the NSI Act and that covers the range of information—and that's not something that society hasn't seen. The obvious example is the regime in the AAT security division.

CHAIR: Thank you. I'll offer the call to other colleagues now.

Senator KENEALLY: I will come to the issue about some of the information that the government may seek to keep confidential not fitting under the NSI, but can I stick with the NSI for a moment, please. The one development that has occurred since this legislation was introduced is the release of the Richardson review. On page 59, paragraph 3.133, Mr Richardson says:

> The mechanisms for the protection of national security information in court proceedings … are adequate and not in need of major reform.

He is referring here specifically to the NSI. He goes on to say in paragraph 3.134:

> It is clear that some agencies lack appreciation of the careful balance that must be struck between an accused's right to a fair trial, the principle of open justice and the protection of national security information. Any mechanism designed to protect national security information from disclosure in court proceedings can never offer an absolute guarantee of non-disclosure—that is the reality in a liberal democracy.

I would appreciate—and I think it would assist this committee in its deliberations on this bill—a response from the government to those two paragraphs in the Richardson review.

I note the government has not rejected this finding of Mr Richardson, and I think it would assist us greatly to understand how the government responds to these two paragraphs in the context of this bill. I'm happy if you have a response now but, if you don't, I think it would assist the committee to come back to us in writing to justify this bill in the context of those two paragraphs.

Mr Webber: I can give the department's view as opposed to the government's, and I would say two things. The Richardson review remains in the context of the existing sections 503A and forward, albeit having been overturned or found invalid by the High Court, in Graham. Nonetheless, that system is there and was in place before the Richardson review. I don't know the broad context of page 59—because I haven't read it—but I apprehend that is a broad approach to the adequacy of the NSI Act.

What we are talking about here is a bespoke provision for particular types of—the other point I would make is the department agrees that it can never be guaranteed that information will be protected. This bill doesn't give that

guarantee. It ultimately leaves it in the hands of the court to make the decision about whether disclosure would create the real risk of damage to the public interest and make the decision about the use of evidence, in proceeding to weigh up whatever factors the court needs to weigh up to give evidence weight.

Senator KENEALLY: Because you haven't read this section and because it's not addressed in the department's submission, I would request that the department come back to the committee in writing, having considered paragraphs 3.133 through to paragraphs 3.136. Without wanting to read every single word in those paragraphs out, my observation is this: Mr Richardson makes some important points in terms of the principle of balancing the very competing interests that this bill is dealing with—that is, the need to keep some information confidential and the right to a fair trial, procedural fairness and the ability for an applicant to mount a counter-argument against the evidence against them.

Mr Richardson goes on in paragraph 3.135 to comment on how the American system seeks to strike this balance and says: 'Australian intelligence agencies need to be prepared to move in this direction'—and by that he means a direction—'to have a greater willingness to make public disclosures about sensitive informations and capabilities to achieve a successful prosecution'. Mr Richardson says 'agencies need to weigh up the public benefit of obtaining a successful prosecution as opposed to seeking the absolute protection of sensitive material'. So I would request the department provide the committee with its reflection on those four paragraphs in the Richardson review and how those principles intersect with this legislation and how this legislation is compatible with the government's acceptance of the Richardson review's findings on this point.

I also want to go to the department's submission where it does make the point that the protective framework for non disclosure under the NSI Act is, in the department's argument, 'insufficient for character related decisions under the Migration Act and the Citizenship Act because some of the information the government seeks to keep protected would not meet the definition of security information as set out in the NSI Act' and that protected information 'may include any information related to character'. What I'm trying to understand is why this bill, as many stakeholders have observed, does not include a definition of the protected information that the government would seek to protect? If it is broader than the NSI, what else are you seeking to protect? And can that be defined in the legislation?

Mr Biddle: In the first run, we'll come back to the committee with responses as requested to item No.1. I'll ask my colleague here to continue around the types of information disclosure.

Mr Webber: The second point that you asked about is the difference between the two definitions. The NSI Act applies to security information, so you're looking at national security there defined as defence information, security information as you find it under the ASIO Act, so you're talking espionage, sabotage, politically motivated violence, that kind of thing—roughly terrorism—border-related things as well, international relations and some law enforcement interests. The character provisions in section 501 of the Migration Act rely on a much broader set of information, which won't be covered by this NSI Act. It might be easiest if I just open it instead of trying to remember it. The people who don't satisfy the character test—for example, if they've been convicted of offences—if the minister has a suspicion of them having been a member of a group or organisation that has been involved in criminal conduct, so that requires, sort of, criminal intelligence information as opposed to security intelligence information. It is the same for somebody who is suspected of having been involved in conduct that involves the offence of trafficking in persons, torture, slavery—

Senator KENEALLY: Can I interrupt you here before you read all of section 501 out to us? Is it your assertion that anything in section 501 could be considered character information that therefore could be protected under this bill?

Mr Webber: No, only information that the gazetted agencies provide under the proposal in the bill that provide in confidence—

Senator KENEALLY: But it could include any of the aspects of what's listed under 501?

Mr Webber: If the information is provided in confidence and satisfies that first limb then if it is relevant to a character decision in 501 and those various provisions under 501 and shortly following, yes.

Senator KENEALLY: You are correct. Section 501 is quite broad.

Mr Biddle: The bill essentially leaves it to an agency to determine whether information is to be communicated on the decision that is treated as confidential as it's their information. It's been designed like that partly because of the dynamic changing of the environment that we see. An example would be dark web type examples. They're examples where we don't want to project onto the agencies what type of future environment that they may want to provide information on in the confidential sense, but it's up to the individual agency to determine that information meets the condition of being confidential.

Senator KENEALLY: Okay.

Mr Biddle: And the potential damage that would result from that disclosure and their knowledge, the bill has been designed deliberately in that respect.

Senator KENEALLY: So the bill has been designed to allow agencies fairly wide latitude as to whether or not they can deem information confidential?

Mr Biddle: That is how the bill has been designed. I might just tack on—

Senator KENEALLY: If I can be clear, then the second part of that is that the bill limits the factors the court can consider in determining whether or not that information can be released in some form to the applicant and/or his or her legal representatives?

Mr Biddle: That's correct. What the bill does is lift the factors that can be considered almost directly from the current 503A provisions and transplant them into the bill you see now, with the exception of—sorry, I'll get the particular wording wrong—an administration of justice, broadly speaking, criteria, but—

Senator KENEALLY: Which has been removed. Correct?

Mr Biddle: Yes. But that doesn't mean it doesn't exist—

Senator KENEALLY: Well, where does it exist?

Mr Biddle: The way the bill is constructed is, having made the decision about whether information should be treated in that way, the court gives it with an open discretion the weight that the court considers appropriate, and in making that decision, your administration of justice concepts would be one of the factors a court may look at.

Senator KENEALLY: Maybe it's the phone line, which is not very good, or maybe it's my own inability to follow your argument. Are you saying that somehow the administration of justice is a factor that the court can consider?

Mr Webber: There's a two-step process. The first is for the court to determine whether the information would create a risk of damage to the public interest. In determining that, there is that limited set of factors. If the court does decide that there is a real risk, it makes the order and then gives the evidence the weight in the proceedings that the court considers appropriate. At that second stage of giving evidence weight, the court may take into account how it's been treated.

Senator KENEALLY: What does 'take into account how it's been treated' mean?

Mr Webber: That is the process by which the information comes before the court. It's going to depend on each individual case—that is, the significance of evidence, the strength of evidence. I don't know what other factors a court may take into account, but it can give weight that it considers appropriate.

Senator KENEALLY: But isn't it the case that the interests of the administration of justice have been removed from this legislation?

Mr Webber: From that first step about determining whether there would be a real risk of damage to public interest, yes.

Senator KENEALLY: Thank you. A clear answer; I appreciate it. The NSI Act requires a court, when considering whether to disclose national security information, to undertake a balancing exercise on competing public interest. Your submission says that to include that in this bill would provide inadequate levels of protection for protected information. Is that the case? Can you demonstrate why?

Mr Webber: I should backtrack and say that, firstly, it's important to remember that this bill is based on the act as it currently exists, which would involve no disclosure to the court at all.

Senator KENEALLY: Can I interrupt you? I apologise. Let me be clear: nobody is disputing that there needs to be a framework for sharing protected information with the court in the case of citizenship and visa decisions. We understand that. The whole point of this exercise is to determine whether or not the framework that is being proposed by this legislation is an appropriate one that balances the competing needs of keeping some information protected but also providing procedural fairness. That goes to the heart of this question in terms of, where the NSI Act requires there to be a balancing exercise on competing public interest, the argument from the department is that that would provide inadequate levels of protection for protected information for these types of decisions, citizenship and visas. I'm trying to understand how the department can claim that having a balancing exercise on competing public interest would undermine or somehow make it more difficult to apply a similar process when it comes to citizenship and visa decisions. Why has that been removed? Why can't that be part of this framework?

Mr Webber: The bill changes the current provisions, which would involve no disclosure to a court at all so that there can be disclosure to a court, and, in that disclosure process, it involves a rebalancing of that process

from no disclosure to disclosure on the grounds articulated in the bill. It is a deliberate choice, if you like, because of the significance of the information that underlies those decisions to give the factors articulated in the bill the weight that they are given in the bill.

Senator KENEALLY: To this date, I don't feel the committee has heard evidence that goes to the significance of that information. It is possible that it can't be supplied in a public forum, so if it needs to be supplied in a confidential submission to the committee I would welcome that. But it would be useful to this committee to get a clear exposition from the department as to the type of information that goes to issues of character, that requires the removal of the balancing exercise on competing interests and the administration of justice.

Mr Webber: You do identify, there, the significance of the information that leads to the balancing that the bill provides. It's the damage that would be caused if released and the risks attendant, including the confidence that other agencies and countries might have in Australia's processes. So giving that assurance, that other agencies and entities may provide information and do so securely, is the issue. The significance of that information is perhaps a matter that the Crime Commission or the AFP might assist with.

Senator KENEALLY: You mentioned foreign countries. I would just make the observation that both the United States and New Zealand have different frameworks, ones that allow for the provision of some information to the applicant, ones that lean more strongly into, if I can put it in these terms, the need to have a more equal balancing exercise on the competing public interest.

In the interests of time, I would invite you to come back—whether it be confidential or public, although we would always prefer public—with answers on notice to those questions I've just posed, about the type of information you are seeking to protect and why the administration of justice needs to be removed in order to protect it. I have several other questions but I may put some of them on notice because I'm aware that some of my colleagues may have questions as well.

Ms HAMMOND: As I understand it, the role of this committee is to make sure that what you are putting forward is proportionate and measured. In that context, we've had a number of submissions made to us, which I'm sure you've all read, with respect to, for example, the Human Rights Commission. They also gave examples of two instances where the information was made available to applicants who were then able to counter that the information was false. That gives us grave cause for concern under this legislation because it sets up a mechanism where applicants are not going to get access to information that's being relied on by decision-makers to cancel a visa.

There were three specific recommendations from the Human Rights Commission in their submission. What do you think of the first, the human rights proposal, that they've got a right to be represented at a preliminary hearing in this or that they can have a special advocate there? The second one I think Senator Keneally was just covering with you. The third is, if there's material that shouldn't be disclosed they should still be given a summary of the allegations that have been used against them. What do the department and the various agencies say to those?

Mr Webber: I wonder if I might talk about the special advocate proposal first. The bill provides a system for determining the competing public interests. In the act as it stands now, parliament had determined to strike that balance in a way which is far more restrictive than the system we're seeing now. The approach in the bill is to strike that balance without building into it the risks that a special advocate system would have. The key here is the significance of the information. If you have a special advocate system, as with all information, there are risks that are wrapped up in that kind of a system. I'm talking about the risks of inadvertent disclosure. That is something I've seen myself on more than one occasion. I've seen people submitting to the court accidentally speak the very thing that they had been charged with not speaking. It happens. Then there's just the risk in handling information. You need systems for transporting IT security and physical security and providing office space—all those things—and each of those steps creates a risk, but the policy intent is to not raise for information that is of the significance that we have here. Finally, on that point, there's a risk built into the relationship between the special advocate and the applicant, or a defendant in proceedings, however it may be. Those are people that are in contact. You need to build in rules about how and what may be communicated. It can be done, of course, and it is done, for example, in the provisions in the NSI Act for control audit provisions. Where it's done, it creates risk, and the intent here is to take that human element out. The thing underlying all of that is the significance of the information.

Ms HAMMOND: On that, can I clarify who's making the determination of the significance of the information?

Mr Webber: That is made by the agencies providing the information. They determine that information is provided in confidence.

Ms HAMMOND: I still have concerns. I get all that, but the whole point that you've just said is there's the risk and this is to remove the human element. There's another human element in this, and that is the person against whom a decision is being made. That's a human element as well. I think the ability to know what the allegations are, or what is being used against you to make a decision, is a pretty fundamental thing of our legal system. So to do away with that, we have to be really, really convinced that it's absolutely essential and that this framework is the correct way to do it.

Mr Webber: There is that human element. Just as parliament decided when the current bill was enacted, the balance that is struck in this bill is as you see it, without a special advocate system. The third issue you raised was providing summaries or the like—those sorts of systems. In part, the same applies. The difficulty, which the crime commission alluded to in evidence earlier on in these proceedings, is that for much of this information the summary would necessarily provide the information that the agency would seek to protect and in some circumstances even the very fact of the involvement of that agency, if it were known, would cause harm that agencies seek to avoid.

I'm sorry; I didn't quite understand the first point. I wonder if you could just help me out with that one. It was about a preliminary hearing stage, and I didn't quite understand how that would fit into the bill as it stands.

Ms HAMMOND: Okay. The Human Rights Commission recommended that the applicant's interests should be represented at the preliminary hearing to determine whether the information is disclosed to the applicant and the weight to be given to it in the substantive hearing.

Mr Biddle: I would argue that the bill has a number of safeguards for the applicant by allowing the courts to decide how much weight to give their confidential information in judicial review. The affected person will continue to have the ability to submit reasons against the making of an adverse visa or citizenship decision as part of the relevant decision-making process and in any merits review process related to that decision. The bill does not alter existing rights of the applicant to seek merits review or judicial review of character related decisions. The bill allows the court to admit the confidential information into evidence and to decide how much weight to give it in that evidence. This provides a safeguard to affected persons, particularly in a situation where the court has determined not to disclose the information to them.

The bill also provides a mechanism for the court to consider when it can disclose the information to the applicant where doing so does not create a real risk of damage to the public interest. The balance reflected in the bill will hopefully enable the law enforcement agencies to continue to provide confidential information to the department to make fully informed visa and citizenship decisions on character grounds whilst providing fairness to the applicant.

As mentioned, the affected person will continue to be able to submit reasons against their expulsion in the merits or judicial review process. This may involve a situation where the court has determined not to disclose the protected information. In doing so, the courts will have weighed up a number of factors, including unfair prejudice. So the bill construct provides clear safeguards for the applicant's interests in these proceedings and places the safeguards within the control of the court, as the ultimate place to make that decision.

Further, the existing merits review process will not be affected by the bill. The minister has long had powers to disclose or protect information from disclosure during merits review, and the bill provides the minister with the discretionary power to disclose the confidential information, having consulted the relevant gazetted agency, to specified persons, bodies, tribunals or courts. Where the minister does not authorise disclosure of protected information to a tribunal, the tribunal will have obligations to afford natural justice during any relevant merits review, subject to the obligations imposed on it by proposed section 52B of the Citizenship Act and proposed section 503B of the Migration Act.

The balance reflected in the bill will enable law enforcement agencies to continue to provide confidential information to the department for it to make fully informed visa and citizenship decisions on character grounds. It will also provide fairness to applicants seeking merits or judicial review. This is essential to the government's core business of regulating, in the national interest, who should remain in Australia and who should be granted Australian citizenship and the privileges which are attached.

CHAIR: I'm sorry to interrupt. I'm just conscious of the time. I don't think we really have—

Ms HAMMOND: Thanks, Chair. I've finished.

CHAIR: Thanks, Ms Hammond.

Mr DREYFUS: I'd appreciate it if you could keep your answers short. The department says in its submission:

Since the High Court decision—

in Graham—

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 …

I take it you're suggesting that it's a bad thing that you've limited your reliance on confidential information, but let's just put that to one side for a moment. I want you to be more concrete, and I'm going to ask that the department provide the committee with some information. I'll read you a list; I don't expect you to have it off the top of your head. First, I'd like you to tell the committee the number of character related immigration decisions the government made in the calendar years 2015, 2016, 2017, 2018, 2019 and 2020 and so far in 2021. Then, in respect of each of those calendar years, I'd like you to tell the committee how many of the character related immigration decisions relied on confidential information provided by law enforcement and intelligence agencies. In respect of the character related immigration decisions that did rely on confidential information provided by law enforcement and intelligence agencies, how many of those were challenged by visa holders in a court or tribunal? Finally, of those challenged, I'd like the department to tell the committee how many times a court or tribunal ordered that confidential information be disclosed.

I take it that you'll be able to provide all of that information quite easily, given that you've asserted, presumably on some evidentiary basis, that you have limited your reliance on confidential information since the High Court decision in Graham. To be clear, I'm asking you to prove, with that information, the assertion that you've made in your submission that since the High Court decision in Graham the department has limited its reliance on confidential information et cetera. I don't need an answer now. You can take all that on notice, and I'll look forward, and I'm sure my colleagues on the committee will look forward, to receiving it.

Mr Biddle: The department will take that on notice, thank you.

Mr DREYFUS: Yes, I said you could. The department quite often makes very vague assertions in its submissions to this committee and, speaking for myself, I don't find that satisfactory. If you're going to say that you have 'limited' your 'reliance on confidential information' I want you to provide evidence to back it up. The department should be on notice, that if you can't back that statement up I'll be suggesting to colleagues on the committee that the committee's entitled to disregard the assertion that the department's made. Let's assume that it's true, that the department has, in fact, limited its reliance on confidential information. Can you tell me why that is a bad thing?

Mr Biddle: In the interests of the public interest, there could be people that are getting visa or citizenship decisions that we would have not made that decision on. If there's adverse information held by one of our intelligence agencies that cannot be shared with the department, we may be making decisions for both the visa and citizenship that we would not make if that information was provided to us; therefore, by extension, there is a risk to community.

Mr DREYFUS: Sorry, what are you saying here? I'm not quite following this. There's information that you don't know about, which you are not getting from an intelligence agency. Is that what you are concerned about?

Mr Biddle: Correct. There would be circumstances where intelligence based agencies have adverse information about an individual that, under the current regime, they cannot share with the department. Therefore—

Mr DREYFUS: Why not? Why can't they share it with the department?

Mr Biddle: The agencies choose not to share it with the department on the basis that—

Mr DREYFUS: Why is that?

Mr Biddle: Agencies are choosing not to share it with the department on the assumption that it may endanger other operational work or witnesses or other interests attached to the gathering of that information. That needs a referral back to the AFP and the ACIC, probably, for a more specific example. It may endanger other operational work by providing it to the department and for that information to be released publicly. AFP or ACIC, maybe you can add to that answer.

Mr Ryan: It's a correct assertion, that we make the decision not to provide information on the threat that it would be potentially disclosed. It's done on a case-by-case basis but it usually relates to the potential for the identities of human sources to be made known or AFP or law enforcement methodologies or capabilities or even the existence of ongoing criminal investigations. We weigh those issues up, in terms of the risk of disclosure, and balance it against those things being disclosed.

Mr DREYFUS: That's a very, very familiar balancing decision that is made throughout the Australian government by all intelligence agencies, by all police forces, about how to take the actions they're charged with taking. That's what Mr Richardson is talking about in his report, isn't it? That balancing is a constant of intelligence work, a constant of criminal justice work and a constant of immigration assessment; isn't that right? That's a question to the department.

Mr Webber: Yes.

Mr DREYFUS: Do you think the department might have been relying too much on confidential information which would never be properly tested in a tribunal or in a court, before the High Court made its decision in Graham deciding that your framework was unconstitutional?

Mr Webber: I'm not sure we can answer that. It is a matter of opinion.

Mr DREYFUS: Just have a go. Humour me!

Mr Webber: Personally, I think not. I don't have the numbers that you asked for before, for the period immediately before Graham.

Mr DREYFUS: You've taken that on notice, so we'll see. When we talk of confidential information in the context of this framework, we really are just talking about information that's provided to the department by some other agency, be that a foreign agency or an Australian agency, on the condition that it be treated as confidential. We're not talking necessarily about the objective character of the information itself. It is just information which is confidential because an agency has said it should be treated as confidential; have I got that right?

Mr Webber: Correct.

Mr DREYFUS: In your experience, has an agency ever provided the department with information on the condition that it be treated as confidential in circumstances where there doesn't appear to be a very persuasive or even any evident basis for treating the information as confidential?

Mr Webber: I am not aware of that circumstance personally.

Mr DREYFUS: I can think of a very good example involving the Department of Home Affairs itself. Perhaps some of the officials present recall that, when the committee was inquiring into the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 a couple of years ago, the committee requested information about the 52 offenders who were serving periods of imprisonment for terrorism offences. The committee asked that the information be provided, to the extent possible, in a public submission. Your department initially refused to provide any of the requested information in a public submission, instead providing a classified submission. This was despite the fact that almost all the information requested by the committee was available on public databases; in fact, the committee subsequently discovered that most of the information was available in a consolidated form on the website of the Commonwealth Director of Public Prosecutions. So there's an example for you to ponder of this very department asserting to this committee, somewhat absurdly, that information that was in the public domain—in fact, information that was ready available on a Commonwealth government website—was classified, was confidential. All members of this committee, in our report, rightly criticised the department for making that assertion in the first place.

So, just as the department has previously provided publicly available information to this committee on the condition that it be treated as confidential, an agency could theoretically provide the department with information on the condition that it be treated confidentially, even though the information is publicly accessible such as on a Facebook page or an internet forum. Under this framework that's in this bill, the information would be treated as confidential and that information could be used to cancel a visa on character grounds.

Just to finish this off: if that decision was challenged in a court or tribunal, the information could be withheld from the visa holder and from the visa holder's lawyer. Neither of them would know that the government was relying on publicly available information, because neither the visa holder nor the visa holder's lawyer would necessarily know anything about the information that the government had relied on in making the decision to cancel the visa. In fact, the judge or the tribunal member might not know that the information is publicly available either. The regime you are proposing could produce that outcome, couldn't it?

Mr Webber: That is correct; the character of confidentiality is something determined by the agency. Once determined, it has those flow-on effects.

Mr DREYFUS: What does the department understand the term 'the interests of the administration of justice' to mean?

Mr Webber: Broadly speaking?

Mr DREYFUS: Or even narrowly speaking!

Mr Webber: In this context you would say: the ability of the courts to run the proceedings, which includes all the processes a court needs to go through to make the decision the statute requires it to make.

Mr DREYFUS: Thank you.

Senator McALLISTER: I wouldn't mind the departments collectively giving further thought to Mr Dreyfus's question about the meaning of 'the administration of justice'. I'm not sure that it does generally refer only narrowly to the logistical functions of the court process. Perhaps you might all collectively provide some sort of response about what the administration of justice requires in the circumstances before us, in terms of decisions about migration and citizenship.

My question is one I'd also like you to answer on notice. Witnesses have given us evidence that, as drafted, the bill provides a blanket prohibition on disclosure of protected information to parliament or, in particular, to this committee. They've indicated that there are no exemptions for disclosures that might be made to the Ombudsman either as a protected interest disclosure or in response to inquiries by the Ombudsman, in them exercising their powers. Their written submissions suggest there are no clear exemptions for the IGIS to exercise their powers in relation to this information, and that, more broadly, there are no exemptions or protections for persons who might utilise the provisions of the protected interest disclosure regime. For each of those questions—the Ombudsman, the IGIS, the parliament and this committee, and the protected interest disclosure regime—can you explain (1) the effect of this bill and (2) any amendments you might suggest that would remedy any deficiencies identified in this bill as far as those oversight mechanisms are concerned?

CHAIR: If the witnesses could take that on notice, that would assist the committee. There being no further questions, I thank our witnesses very much for their assistance. We would be grateful if those answers could be returned by Friday 3 September 2021.

Committee adjourned at 13:58