Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

25 February 2021

Dear Committee Secretary,

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

I welcome the opportunity to make this submission to the Committee's inquiry into the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 ('the Bill'). I do so in my capacity as a Senior Research Associate at the Andrew & Renata Kaldor Centre for International Refugee Law. The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. It was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

In my view the Bill significantly impairs procedural fairness in a manner that is disproportionate to its stated aims and is likely to have severe consequences for vulnerable individuals. While I accept that in some circumstances it is necessary to protect information from disclosure in the national or public interest, existing mechanisms such as the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSI Act*') and the public interest immunity framework already provide a framework for this. No coherent case has been made for why the measures proposed in the Bill are needed in addition to these mechanisms. Given the lack of a clear justification and the risk of significant harm, my view is that the Bill should not be passed. My reasons are set out in further detail below.

1. Key aspects of the proposed changes

The *Migration Act 1958* (Cth) currently contains a non-disclosure regime that applies to confidential information provided by gazetted intelligence or law enforcement agencies and

used in relation to character based visa cancellations and refusals. This regime was introduced prior to the enactment of the more general *NSI Act*. Whether it is necessary and desirable to maintain a dedicated non-disclosure regime applicable in migration matters in light of the *NSI Act* is a question that has not been explored in depth, and one that it would be prudent to consider before expanding that regime in the manner proposed in the Bill.

In 2017, in *Graham v Minister for Immigration*,[1] the High Court found that aspects of the *Migration Act's* current non-disclosure regime were inconsistent with s 75(v) of the Constitution because they impaired the capacity of the Federal Court and the High Court to conduct judicial review of visa refusal or cancellation decisions that relied on confidential information.

The Bill endeavours to address the decision in *Graham*. If passed, it would repeal the existing character related non-disclosure provisions in the *Migration Act* and replace them with a new framework that would restrict the disclosure of 'confidential information' provided by law enforcement or intelligence agencies and used in relation to character based visa cancellations or refusals. It would also insert a substantially similar framework into the *Australian Citizenship Act 2007* (Cth), which would restrict the disclosure of confidential information that had been used in relation to a range of decisions to deny or strip citizenship.

The framework proposed in the Bill mirrors the existing non-disclosure regime in the *Migration Act* in a number of respects. For example, both the current provisions and the Bill's proposals prevent confidential information from being disclosed to any body or person (including the affected individual and their legal representatives), tribunals (where the affected person might, for example seek merits review), parliament or a parliamentary committee,[2] except where disclosure is within the department and in relation to the exercise of a power,[3] or the Minister has elected to authorise disclosure.[4]

The most significant change in the new framework proposed in the Bill is the way in which access to confidential information in judicial review proceedings is dealt with. It follows from the decision in *Graham* that a federal court undertaking judicial review of a government decision cannot be prevented from accessing information relevant to the decision under review. In response to this, the Bill provides that, where the High Court, the Federal Court or the Federal Circuit Court is undertaking judicial review of a migration or citizenship decision to which confidential information is relevant, the court may order that confidential information must be produced or provided in evidence.[5] However, the Bill considerably limits the ways in which the court can use this information.

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[1] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33.
[2] Proposed ss 52A(2)-(3) of the *Australian Citizenship Act*; proposed s 503A(2)-(3) of the *Migration Act*.
[3] Proposed s 52A(2) of the *Australian Citizenship Act 2007* (Cth); proposed s 503A(2) of the *Migration Act 1958* (Cth).
[4] Proposed s 52B of the *Australian Citizenship Act*; proposed s 503B of the *Migration Act*.
[5] Proposed s 52C of the *Australian Citizenship Act*; proposed s 503C of the *Migration Act*.

If the court orders that information be produced before it, it is required to hold a preliminary hearing to determine whether it can disclose this information to the person who is seeking judicial review, their legal representatives or any other person.[6] Only parties to the proceedings that already have access to the confidential information are permitted to make submissions at this preliminary hearing.[7] Other parties – including the applicant and their legal representatives – must be excluded from the hearing.[8] The Bill does not provide any mechanism whereby confidential information may be disclosed to an applicant or their legal representatives in advance of a judicial review hearing.[9] Effectively this means that at the preliminary hearing the Minister will be able to put forward arguments for non-disclosure of the information, while nobody will be able to present counterarguments weighing in favour of disclosure.

After considering the information presented at the preliminary hearing, the court must decide whether it is able to disclose the confidential information to the applicant, their legal representatives or any other party.[10] The Bill precludes the court from disclosing the information if it determines that disclosure would 'create a real risk of damage to the public interest'.[11] It also heavily curtails the factors that the court is allowed to take into account when determining whether there is a real risk of damage to the public interest. The court is only permitted to look at 7 factors, including things such as 'the risk that the disclosure of information may discourage gazetted agencies and informants from giving information in the future',[12] and 'the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence'.[13] All 7 factors are skewed in favour of non-disclosure. The court has no capacity to take into account factors relevant to the public interest that may weigh in favour of disclosure, such as the risk that non-disclosure may interfere with the administration of justice.

The Bill allows for regulations to specify additional factors that the court may take into account when determining whether disclosure would create a real risk of damage to the public interest.[14] This is undesirable. As the Scrutiny of Bills Committee has noted,[15] regulations and other legislative instruments are not subject to the full range of parliamentary scrutiny that a bill is subject to. If the matters that a court can have regard to when determining whether disclosing information is in the public interest is to be curtailed, this should be done in primary legislation and not by regulation.

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[6] Proposed s 52C(2)-(4) of the *Australian Citizenship Act*; proposed s 503C(2)-(4) of the *Migration Act*.
[7] Proposed s 52C(2) of the *Australian Citizenship Act*; proposed s 503C(2) of the *Migration Act*.
[8] Proposed s 52C(3) of the *Australian Citizenship Act*; proposed s 503C(3) of the *Migration Act*.
[9] The Minister has a power to permit the disclosure of confidential information to specified persons and bodies, but these do not include individuals in respect of whom decisions have been made, or their legal representatives.
[10] Proposed s 52C(5) of the *Australian Citizenship Act*; proposed s 503C(5) of the *Migration Act*.
[11] Proposed s 52C(6) of the *Australian Citizenship Act*; proposed s 503C(6) of the *Migration Act*.
[12] Proposed s 52C(5)(b) of the *Australian Citizenship Act*; proposed s 503C(5)(b) of the *Migration Act*.
[13] Proposed s 52C(5)(d) of the *Australian Citizenship Act*; proposed s 503C(5)(d) of the *Migration Act*.
[14] Proposed s 52C(5)(h) of the *Australian Citizenship Act*; proposed s 503C(5)(h) of the *Migration Act*.
[15] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 1 of 2021 (Commonwealth of Australia, 29 January 2021), 21-22.

When determining the outcome of judicial review proceedings involving confidential information, the court may give confidential information such weight as it considers appropriate, taking into account any submissions that have been made by the parties. Where the court determined that disclosure would create a real risk of damage to the public interest, the outcome is that the Minister will have had the opportunity to make submissions about how this information should be used, and the applicant will not.

2. Procedural fairness and human rights concerns

The framework proposed in the Bill is heavily unbalanced and would deprive a large number of individuals who are denied or stripped of an Australian visa or Australian citizenship of the chance to respond to key information relied upon to reach a decision against them. These individuals would be unable to provide evidence to correct any errors in the information relied upon, or provide reasonable explanations where these exist.[16] Their access to meaningful merits review would be significantly impaired by the fact that tribunals cannot access confidential information except when the Minister has exercised a discretionary power to allow this. While they may theoretically still access judicial review, the fairness and efficacy of such review would be significantly impaired by a framework that is heavily skewed towards excluding them or their legal representatives from knowing or being able to respond to key aspects of the case against them.

These things are particularly dangerous given that the consequences of losing a visa or citizenship for an individual are dire. They face expulsion from Australia – in some cases to a country where they do not speak the language, have no connections or have never lived. In circumstances where removal is not possible, they face indefinite immigration detention. For refugees and others who have fled harm or persecution the consequences are more severe still – they potentially face being returned, or 'refouled' to a country where they may face serious harm or death.

As the Scrutiny of Bills Committee and Parliamentary Joint Committee of Human Rights have noted,[17] the Bill proposes a framework that would erode procedural fairness and the right to a fair hearing,[18] and that would impinge on the prohibition against expulsion of aliens without due process.[19] It does so when the Commonwealth has access to other mechanisms via which information can be protected from disclosure when it might injure the public interest or national security – such as the capacity to claim public interest immunity or the non-disclosure regime provided for in the *NSI Act*.

No clear and coherent justification has been provided for why the specific measures proposed in the Bill are needed. To the extent that a rationale for the Bill has been offered, it

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[16] This is exacerbated by the fact that the Bill expands the definition of non-disclosable information in s 5(1) of the *Migration Act*: see cl 6.
[17] See Senate Standing Committee for the Scrutiny of Bills, above n 15, 17; Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report: Report 1 of 2021 (Commonwealth of Australia, 3 February 2021), 9-13.
[18] International Covenant on Civil and Political Rights (ICCPR), Article 14(1).
[19] ICCPR, Article 13

is inadequate. The Bill's Explanatory Memorandum and Second Reading Speech state that the thresholds for public interest immunity and under the *NSI* do not adequately protect the kind of confidential information that may be provided by law enforcement and intelligence agencies to support character decisions,[20] but this is effectively a bald assertion – no explanation of how these existing mechanisms fall short has been offered.

Moreover, as the PJCHR and Scrutiny of Bills Committee have both identified, there are a range of measures that could have been adopted to reduce the impact that the Bill has on fundamental rights without detracting in any obvious way from its purpose. For example:

- The factors which the court can take into account when determining whether disclosure of confidential information would 'create a real risk of damage to the public interest' could be made non-exhaustive,[21] or could be amended to include factors that weigh in favour of disclosure, such as procedural fairness to the applicant.[22]
- Disclosing of part of the confidential information to the applicant could be allowed where this could be achieved without creating a real risk of damage to the public interest.[23]
- Allowing confidential information relevant to judicial review hearings to be disclosed to a special advocate who could represent the applicant's interests in circumstances where it is determined that this information cannot be disclosed to the applicant.[24]
- Requiring the Minister to consider exercising the power in proposed s 52B(8) of the *Australian Citizenship Act* and proposed s 503B(8) of the *Migration Act* to authorise the disclosure of confidential information to tribunals undertaking merits review or other bodies.[25]

The fact that none of these safeguards have been built into the Bill nor afforded any consideration in the Explanatory Memorandum or Second Reading Speech underlines that the framework proposed in the Bill pursues its stated aims in a manner that disproportionately burdens fundamental rights, with grave consequences for individuals.

3. Constitutional issues

Finally, while the framework proposed in the Bill is designed to address the constitutional problems with the current *Migration Act* regime identified in *Graham*, it is by no means clear that they actually do so. *Graham* confirms that legislation will be inconsistent with s 75(v) of the Constitution if it purports to deprive federal courts charged with conducting judicial review

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[20] Explanatory Memorandum for the Migration and Citizenship Amendment (Strengthening Information Provisions) Bill 2020 (Cth), Statement of Compatibility with Human Rights, 48; Commonwealth, Parliamentary Debates, House of Representatives, 10 December 2020, 11266 (Peter Dutton, Minister for Home Affairs).
[21] Parliamentary Joint Committee for Human Rights, above n 17, 18; Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.
[22] Parliamentary Joint Committee for Human Rights, above n 17, 18
[23] Parliamentary Joint Committee for Human Rights, above n 17, 18; Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.
[24] Parliamentary Joint Committee for Human Rights, above n 17, 18.
[25] Senate Standing Committee for the Scrutiny of Bills, above n 15, 17.

of access to relevant information. It does not automatically follow that allowing courts access to such information in the most restrictive of ways is constitutionally permissible. While the case law in this area leaves much to be defined, the majority in *Graham* noted that whether a statutory provision that affects the exercise of a court's jurisdiction under s 75(v) is constitutionally valid turns on whether the court retains the ability to 'enforce the legislated limits of an officer's power'.[26] Whether a statutory provision infringes this limitation is a matter of 'substance and degree', that requires both an examination of the legal operation of the provision in question, as well as an examination of its practical impact on the court's ability to determine and declare whether the power under review has been exercised in accordance with its limits.[27] The majority went on to note that it might, in the future, be necessary to determine whether other statutory provisions that affect the exercise of a court's jurisdiction are invalid as a matter of substance and degree.[28]

While the framework proposed in the Bill allows courts access to relevant confidential information, it does so in an extremely restrictive manner that will in many cases deny applicants the opportunity to make any submissions in relation to the use of the confidential information in relation to their case. It is arguable that, in at least some circumstances, this framework burdens a court's ability to determine whether a power under review was exercised within its limits.

This is not to say that the Bill is definitely unconstitutional, merely that it is not clear that it succeeds in avoiding the constitutional problems that it seeks to circumvent. Given that 'responding to the decision in *Graham*' is a primary purpose underpinning the proposed reforms to the *Migration Act*, it seems unwise to enact a framework that may not achieve this purpose, and then expand that framework to apply to citizenship decisions. In the event of constitutional challenge, this is likely to lead to uncertainty and inconvenience for the Department of Home Affairs as well as law enforcement and intelligence agencies that may provide information relevant to visa and citizenship refusals and cancellations.

For all the above reasons, I recommend that the Bill should not be passed. If I can be of further assistance to the Committee, please do not hesitate to contact me at sangeetha.pillai@unsw.edu.au.

Yours sincerely,

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[26] *Graham v Minister for Immigration and Border Protection*, above n 1 [48].
[27] Ibid, [48].
[28] Ibid, [65].