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

Legal Aid NSW submission to Senate Legal and Constitutional Affairs Legislation Committee

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Legal Aid NEW SOUTH WALES

About Legal Aid NSW

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

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

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

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

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Introduction

Legal Aid NSW welcomes the opportunity to comment on the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (the **Bill**).

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

We oppose the Bill for the reasons detailed in this submission. In general, we agree with the observations and concerns raised by Parliamentary Joint Committee on Human Rights (the **Parliamentary Human Rights Committee**) regarding the Bill, and the limits it would impose on the right to a fair hearing and the prohibition against expulsion of aliens without due process.[1]

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

The Bill seeks to change the non-disclosure provisions[2] for confidential information provided by intelligence and law enforcement agencies which are intended for use by an officer in considering whether to:

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

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

If implemented, the provisions of the Bill will adversely affect the ability of a person affected by an unfavourable migration or citizenship decision at every stage of the decision-making process, including the primary, merits review and judicial review stages, by limiting the

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

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

applicant's ability to obtain and understand the underlying reasons for an adverse decision in which confidential or protected information is relied upon.

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

Comments on the Bill

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

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

We are particularly concerned that the Bill provides that the rules of natural justice would not apply in consideration or exercise of the power by the Minister to disclose confidential information to a specified Minister, Commonwealth officer, court or tribunal.[3]

We agree with Gageler J's observation in *Assistant Commissioner Condon v Pompano Pty Ltd*[4] that:

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

The Bill is unnecessary

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

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

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

even though the documents are relevant and otherwise admissible, if it would be injurious to the public interest to disclose them.[5]

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

Further, statutory secrecy provisions in the Migration Act and Citizenship Act already contain detailed statutory secrecy provisions to prevent the disclosure of certain information to a person adversely affected.[6]

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

These provisions limit, to varying degrees, the right of a person adversely affected by evidence to procedural fairness, in particular the right to be aware of and respond to the adverse information.[7]

Unbalanced approach to protecting confidential information

The Bill introduces a protected information framework, in similar terms, into the Citizenship Act[8] and the Migration Act.[9]

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

However, the confidential information can be disclosed if either:

- The Minister declares it can be disclosed to a specified minister, Commonwealth officer, court or tribunal[10]; or
- The High Court, Federal Court of Australia or Federal Circuit Court orders that confidential information be produced to the court if the information was supplied by law

[5] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs CJ).
[6] For example, *Migration Act 1958 (*Cth), subsections 5(1), 501G(1)(e) and section 503A., *Australian Citizenship Act 2007* (Cth), subsections 36F(6), 36H(5).
[7] Note also that the *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14 which provides for a right to a fair and public hearing and a recognises a right to natural justice
[8] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1*,* items 1-5*,*
[9] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1*,* items 5-11.
[10] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, clauses 52B and 503B.

enforcement or intelligence agencies and the information is for the purpose of the substantive proceedings[11]

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

The practical effect of these provisions[12] is that the party adversely affected by the information and their legal representative will be effectively excluded from making submissions to the court. This is because, in most cases, if they have obtained the relevant confidential information they will not have done so lawfully because of the prohibition on disclosure, and the related offences which apply to authorised Commonwealth officers under the Bill.

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

Legal Aid NSW is particularly concerned about the following aspects of the proposed list of factors that a court must consider in deciding whether or not to disclose confidential information[13]:

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

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

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

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

In many cases the affected party will require access to the confidential information to see what the allegation is and to assist them to provide evidence to the contrary or some

[11] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclauses 52C(1) & 503C(1).
[12] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, clauses 52C and 503C.
[13] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclauses 52C(5) and 503C(5).

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

The statutory context is also an important consideration when assessing the appropriateness of the measures proposed by the Bill. The decisions covered by the Bill involve fundamental rights to reside in Australia or to obtain or maintain citizenship. There are often significant related issues, such as the risk of being removed to a country where the person faces a real chance of persecution or significant harm, and the risk of indefinite detention. In relation to citizenship, citizenship loss provisions can apply to people who are Australian by birth, who have Australian parents, and who have never lived outside Australia. The decisions affected by the Bill also have the potential to affect the rights of other people who are not the subject of any adverse concerns, such as the person's children and partners.

The Statement of Compatibility with Human Rights accompanying the Explanatory memorandum states[14]:

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

In our experience it is difficult reconcile this statement with what happens in practice. No examples are provided of the inadequacy of the current arrangements. Neither is it demonstrated that courts' current oversight of public interest immunity claims or claims for the application of the current secrecy provisions by the Commonwealth in the areas affected by the Bill fail to protect the legitimate public interest in non-disclosure of certain confidential information: indeed, courts have routinely upheld claims for non-disclosure on both bases while allowing the adversely affected party to make relevant submissions.[15]

In *Plaintiff M46 of 2013*, Tracey J said that[16]:

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

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

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

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

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

In our experience, the Department relies on section 503A Migration Act which provides that if an agency, such as ASIO, provides information to an authorised migration officer for the purposes of s 501 Migration Act and does so "*on condition that it be treated as confidential information*", that information may not be (subject to some narrow exceptions) divulged or communicated to third parties. That provision is then also used as a basis to refuse access to relevant documents under the Freedom of Information Act. In our experience the Department already resorts too readily to exclusions without proper consideration of the nature of the contents.[17]

Changes to the operation of the Administrative Appeals Tribunal

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

1. Reviewable migration decisions, including cancellation and refusal decisions[18] and non-revocation decisions.[19]

2. Reviewable citizenship decisions[20]

Relevant Migration Act decisions

Under the current statutory arrangements, subsection 500(6F)(c) Migration Act requires the Minister to lodge with the AAT a copy of every document held by them that is relevant to the making of the reviewable decision, and which contains non-disclosable information.[21]

However, the Migration Act also provides that while the AAT may have regard to that non-disclosable information for the purpose of reviewing the decision, it must not disclose it to the person making the application for review.[22]

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

[17] For example, see case study 1 on page 10.
[18] *Migration Act 1958* (Cth), section 501.
[19] *Migration Act 1958* (Cth), subsection 501CA(4).
[20] We have not addressed this aspect of the Bill in this submission.
[21] As defined in *Migration Act 1958* (Cth), section 5.
[22] *Migration Act 1958* (Cth), subsection 500(6F)(d).

The combined effect of changes proposed by Bill would further limit the provision of documents to the AAT which are relevant to the decision under review by potentially capturing what is now defined as non-disclosable information.[23]

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

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

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

As with the comments we have raised in relation to the protection framework in the courts, there is no indication either in the Explanatory memorandum or the Human Rights Scrutiny Report for the Bill that indicates the current regime is not working or has led to the inappropriate public disclosure of confidential information by the AAT that this Bill purports to protect. It has been held by the courts that section 500(6F) of the Migration Act does not operate in the face of s 503A to compel the disclosure to the AAT of the 'protected' information.[24]

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

Freedom of Information Act

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

[23] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, sch 1, items 8 & 9.
[24] *Peters v Administrative Appeals Tribunal* [2005] FCAFC 159.

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

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

Case study 1

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

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

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

The potential impact of the Bill on criminal and related proceedings

Legal Aid NSW's Commonwealth Crimes Unit provides advice and representation in respect of individuals charged with Commonwealth offences, including those convicted of terrorism related offences who are refused parole or are about to have their parole revoked. The High Risk Offender Unit represents individuals subject to applications for control orders under Division 105A of the *Criminal Code 1995* (Cth). The Unit also provides advice, assistance and representation to offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Terrorism (High Risk Offenders) Act 2017* (NSW) (the **THRO Act**).

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

In particular:

- In control order proceedings and Continuing Detention Order proceedings under Divisions 104 and 105A, *Criminal Code Act* (Cth) respectively, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) provides the

court can make orders to withhold sensitive information from the controlee or offender (and their legal representative) and to exclude them from the proceeding;

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

In its recent decision upholding the constitutional validity of Continuing Detention Orders under section 105A.7 of the *Criminal Code* (Cth) the majority judgement of the High Court emphasised the statutory safeguards attached to that scheme, as elements of the ordinary incidents of the exercise of judicial power:[25]

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

If enacted, the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (the **HRTO Bill**) will extend the Commonwealth post-conviction order scheme to include extended supervision orders. Such applications, as with Commonwealth Continuing Detention Orders, will be heard in State Supreme Courts. The HRTO Bill includes provisions preventing or limiting disclosure of national security information and public interest immunity. The HRTO Bill further provides for a new regime pertaining to 'terrorism material'. The Explanatory Memorandum to the HRTO Bill highlights:[26]

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

Impact of the Bill on the above regimes

Proposed new section 52A of the Citizenship Act will apply to information that is communicated in confidence to an authorised Commonwealth officer and is relevant to the exercise of certain prescribed powers under the Citizenship Act. The new protected information framework applies to such information, with broad prohibitions on production

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

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

or disclosure of such information to any court, tribunal, individuals etc, with the sanction of a criminal offence where the information is in fact disclosed or produced.[27] The prohibition has effect despite anything in any other state of federal laws.[28] There are limited exceptions to allow disclosure or production of protected information. These exceptions do not extend to State courts hearing Commonwealth criminal proceedings or dealing with post sentence order applications.

The Explanatory Memorandum to the Bill provides that:[29]

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

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

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

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

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

[27] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclause 52A(3)
[28] Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, subclause 52A(7).
[29] Explanatory Memorandum, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 42.

on condition that it be treated as confidential information, **in relation to a determination** under [relevant provisions of either the Citizenship Act or the Migration Act].”