



**Submission by the
Commonwealth Ombudsman**

REVIEW OF SECRECY LAWS

INQUIRY CONDUCTED BY THE
AUSTRALIAN LAW REFORM COMMISSION

Submission by
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INTRODUCTION

The Commonwealth Ombudsman is appointed under the *Ombudsman Act 1976* and is given functions by that Act, the *Freedom of Information Act 1982*, the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Crimes Act 1914* and the *Migration Act 1958*. The Commonwealth Ombudsman is also the ACT Ombudsman (under the *Ombudsman Act 1989*) and, in that capacity, has a role under the *Freedom of Information Act 1989* and the *Public Interest Disclosure Act 1994*.

The Ombudsman is also, or may be called, the Defence Force Ombudsman, the Taxation Ombudsman, the Law Enforcement Ombudsman, the Immigration Ombudsman and the Postal Industry Ombudsman (see *Ombudsman Act* ss 4(3), 4(4), 4(5), 19B, 19L). The Ombudsman is assisted by two Deputy Ombudsmen and a staff of about 150, in offices in all state capitals, Darwin and Alice Springs. The Ombudsman's principal work includes:

- dealing with about 20,000 complaints a year
- conducting several 'own motion' investigations aimed at significant or systemic issues in government
- conducting inspections and other oversight required or permitted by legislation.

SECRECY AND CONFIDENTIALITY PROVISIONS AND THE OMBUDSMAN

Ombudsman Act

Section 35 of the Ombudsman Act contains a general prohibition against disclosure that applies to the Ombudsman, Deputy Ombudsmen, staff, other delegates and police secondees. The prohibition relates to:

any information acquired by [an officer] by reason of his or her being an officer, being information that was disclosed or obtained under the provisions of this Act or under Division 7 of Part V of the *Australian Federal Police Act 1979*, including information furnished by the Ombudsman of a State or information disclosed to or obtained by the Commonwealth Ombudsman in the exercise of a power of the Ombudsman of a State delegated to him or her as provided by subsection 34(7).

The general prohibition is then subject to exceptions; disclosure is permitted by an officer –

- for purposes connected with the exercise of the powers and the performance of the functions of the Ombudsman
- with the consent of the agency (or its Minister) or the individual who provided the information
- in a report in the course of setting out the grounds for the conclusions and recommendations contained in the report.

Various provisions of the Ombudsman Act (ss 35(5), 35B, 35C) provide that the Attorney-General can certify that the Ombudsman may not disclose specified information.

The Act further provides in s 35A that the Ombudsman can disclose information with respect to the performance of the functions of the Ombudsman or an investigation, if in the Ombudsman's opinion it is 'in the public interest' to do so. The disclosure may be made to any person, or to the public, a section of the public, or by way of a public statement. Limitations that apply to that authority to make a public interest disclosure are:

- A disclosure is not authorised if it is likely to interfere with the carrying out of an investigation or the making of a report (s 35A(2))
- A disclosure must not identify a complainant 'unless it is fair and reasonable in all the circumstances to do so' (s 35A(3)).
- Before publishing a report that is expressly or impliedly critical of a person or an agency the Ombudsman must provide the person or agency with the opportunity to comment (that is, procedural fairness) (s 8(5))

The Ombudsman Act also contains an express provision for disclosure to the Australian Commissioner for Law Enforcement Integrity (s 35AA) and provisions permitting complaint information to be disclosed when a complaint is transferred.¹

Inspection functions

The Ombudsman is subject to secrecy or confidentiality provisions in relation to the inspection of records concerning:

- telecommunications interception²
- access to stored telecommunications³
- surveillance devices⁴
- extended migration detention⁵

There are no express provisions relating to controlled operations.⁶ In the case of the other law enforcement inspection roles, the Ombudsman is able to provide information to other inspection bodies.

Investigation targets

During the course of investigations, the Ombudsman obtains information, voluntarily and under compulsion, from agencies and others who are considered to be able to provide information. In some cases, as with any other Commonwealth official to whom information is disclosed, the Ombudsman and staff can then

¹ Sections 6(4A), 6(4D), 6(7), 6(10), 6(14), 6(18).

² Section 92 of the *Telecommunications (Interception and Access) Act 1979* applies s 35(2) of the Ombudsman Act and omits s 35A.

³ Section 157 of the *Telecommunications (Interception and Access) Act 1979* applies s 35(2) of the Ombudsman Act and omits s 35A.

⁴ Section 45, *Surveillance Devices Act 2004* contains a general prohibition

⁵ Section 486O, *Migration Act 1958*, applies the Ombudsman Act.

⁶ See Division 2A of Part 1AB, *Crimes Act 1914*.

become subject to other secrecy provisions - for example, s 16 of the *Income Tax Assessment Act 1936*.

EFFECT OF SECRECY PROVISIONS ON THE OMBUDSMAN

Ombudsman Act

The Ombudsman considers that little or nothing would be gained from repealing the secrecy provision in the Ombudsman Act. That provision is consistent with other requirements in the Ombudsman Act - that the Ombudsman investigate in private (s 8(2)) and that the Ombudsman not report on, or disclose, critical opinion without having accorded procedural fairness (s 8(5)). The secrecy provision serves as a constant reminder to Ombudsman staff that the information they receive is held only for work purposes and is inherently sensitive. They are also informed on engagement of other legislation which may create an offence of disclosing information.

The current provisions give complainants and agencies an assurance that the information they provide will be treated with respect and care. In that way, the secrecy provision actually enhances the flow of information rather than inhibits it.

Any assurance the Ombudsman can give is, of course, subject to the requirements of the Freedom of Information Act. The Ombudsman's office invariably seeks to transfer to the relevant agency requests for documents that originated with that agency and that most closely relate to its functions. In that way, requests for information that have been copied to the Ombudsman can be handled consistently with requests for any similar information received by the agency itself.

The general prohibition is well-balanced by the capacity of the Ombudsman and a limited number of delegates to make disclosures in the public interest. This power is most often exercised when the Ombudsman issues a public statement containing an abbreviated and de-identified form of what may have been prepared as a report. This position contrasts with that of some State counterparts who can only release information via a report to Parliament.

The public interest disclosure power is also exercised when the Ombudsman decides not to rely on non-compellability in legal proceedings and when the Ombudsman receives and needs to disclose information about a possible threat to life or safety.

Inspection legislation

Secrecy provisions are likewise necessary for protection of information in the exercise of the Ombudsman's inspection functions. The law enforcement activities subject to inspection or similar oversight by the Ombudsman are, by their nature, highly sensitive. The value of a criminal investigation would be reduced if the target of the investigation were to learn that his or her telephone calls were being intercepted or that he or she was under some form of surveillance.

The Ombudsman considers, however, that there would be value in having similarly-expressed provisions that would preclude Ombudsman staff from making disclosures other than as necessary to conduct thorough and efficient oversight. A proposal has been put to government for amendment of the Ombudsman Act to contain a template or default set of powers to be applied whenever the Ombudsman is given an inspection or oversight function.

The Ombudsman also has the function of overseeing extended immigration detention.⁷ That role requires access to highly sensitive information, for example about asylum seekers and people likely to be deported or removed following concerns about their character. It is a function in relation to which information should be protected by a secrecy provision.

Other provisions

The Ombudsman has always had the power under s 9 of the Ombudsman Act to issue a notice requiring a person to provide information or documents or to attend and answer questions. A person issued with a notice must comply, despite other legislation but receives wide protections in ss 9(4)-(5A):

(4) Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:

(a) would contravene the provisions of any other enactment (whether enacted before or after the commencement of the Prime Minister and Cabinet Legislation Amendment Act 1991); or

(aa) might tend to incriminate the person or make the person liable to a penalty; or

(ab) would disclose one of the following:

(i) a legal advice given to a Minister, a Department or a prescribed authority;

(ii) a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege; or

(b) would be otherwise contrary to the public interest;

but the information, the production of the document or record or the answer to the question is not admissible in evidence against the person in proceedings other than:

(c) an application under subsection 11A(2); or

(d) proceedings for an offence against section 36 of this Act or an offence against section 137.1, 137.2 or 149.1 of the Criminal Code that relates to this Act.

(5) A person is not liable to any penalty under the provisions of any other enactment by reason of his or her furnishing information, producing a document or other record or answering a question when required to do so under this Act.

⁷ The Ombudsman is required to prepare a report once a person has been held in immigration detention for two years: *Migration Act 1958* s 4860. The Government announced on 29 July 2008 that the Ombudsman will also be asked to prepare a report once a person has been held in detention for six months

(5A) The fact that a person is not excused under subsection (4) from furnishing information, producing a document or other record or answering a question does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that information, document or other record or answer.

Apart from a claim that a notice is invalid for some reason, the only basis for declining to comply is that the Attorney-General has issued a certificate that disclosure would be contrary to the public interest for a specified reason (s 9(3)). The office has no recollection of any such certificate ever having been issued.

In fact, the Ombudsman has only occasionally had to issue notices, and has avoided doing so because of the additional level of formality and delay inevitably involved. Agencies almost invariably respond positively to written or oral requests from Ombudsman staff, typically on the basis that to do so forms part of the duties of the officer contacted by the Ombudsman or that the existence of a complaint to the Ombudsman implies the consent of the agency client for it to disclose information.

The office observed some erosion in agency cooperation for a period, possibly due to wider secrecy provisions or a conservative legal view being taken of the effect of privacy and other legal restrictions on disclosure to the Ombudsman. In 2005, the Ombudsman Act was amended to provide to agencies and individuals providing information voluntarily a similar level of protection to that provided when the Ombudsman issues a notice. The extended protection applies where a person provides information to the Ombudsman and 'reasonably believes that information or a document ... is relevant to an investigation' (s 8(2A)(a)(ii)). The Act specifically provides in s 8(2B) and (2C) that the protection includes protection against prosecution for breach of a statutory secrecy provision.

Although this change had the effect of minimising the effect of secrecy provisions in other legislation, it is hard to draw from the change any broader lesson about the need for amendment of secrecy provisions. The climate that gave rise to the need for this change in the Ombudsman Act was probably due more to a cultural attitude within some agencies that rested on conservative legal advice or excessive legal caution about when disclosure was permitted and appropriate.

In the great majority of cases, agencies provide information requested by the Ombudsman and other information they believe may be relevant to an investigation. Where an agency declines to cooperate, Ombudsman staff will usually discuss the reasons with the agency, attempt to address any doubts and then consider whether the Ombudsman should issue a notice.

WHISTLEBLOWER ISSUES

The Ombudsman's submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs⁸:

- referred to the office's involvement in the *Whistling While They Work* research project

⁸ <http://www.aph.gov.au/house/committee/laca/whistleblowing/subs/sub031.pdf>

- supported the introduction of a whistleblower scheme to protect those who act in the public interest
- supported protection being given to a person who has made a disclosure, from civil, criminal or employment sanctions that might otherwise apply to the making of that disclosure; this would provide protection against prosecution for breach of a secrecy provision
- supported the idea that, in limited circumstances (for example, a threat to public health or safety) a person who has already made a disclosure through the mandated process should be able to make a public disclosure of the same information; this right, to make a unilateral public disclosure, may need to be adjusted to protect sensitive national security or similar information.

Consistent with a whistleblowing scheme along these lines, the Ombudsman considers that any person making a disclosure to the Ombudsman, in good faith, should not face any prospect of any criminal, civil or administrative consequences.

PRACTICAL FRAMEWORK FOR PROTECTING INFORMATION

Alignment with classification and security clearance requirements

An Ombudsman staff member conducting an investigation that requires access to the documents of another agency will not always have a security clearance at a level specified by that agency for access to its documents. There is nothing in the Ombudsman Act (or, generally, other legislation) to prevent access by Ombudsman officers in these circumstances. In fact, the Ombudsman Act provides a broad right of access to most documents held by other agencies. The information obtained from other agencies can only be used for the purposes of an investigation and is protected by secrecy provisions in the Ombudsman Act and other legislation.

Agencies are sometimes reluctant to allow access to information except in accordance with their own internal security classification procedures. The Ombudsman's office and agencies have always been able to agree upon a course of action that resolves this tension, but it can hamper speedy investigation. It is an issue that warrants broader consideration.

Another situation where Ombudsman investigations encounter difficulty with secrecy provisions is where a complaint is received from a person that their FOI request was denied because of the operation of a secrecy provision.⁹ An enthusiastic reliance by the agency on its own secrecy provision can impede efficient investigation of that complaint by the Ombudsman in a context where the use of the provision was not intended.

Memoranda of Understanding

The Ombudsman has memoranda of understanding with some other agencies, including oversight agencies, about relationships including exchange of

⁹ Section 38, *Freedom of Information Act 1982*

information. These acknowledge each other's statutory powers and rights, for example. These appear to work well.

Swearing Oaths of Office

In contrast to some of its State counterparts,¹⁰ there is no statutory requirement for new Ombudsman staff to swear an oath of office. Although it has not been a style of Commonwealth employment to require an oath of office, there may be merit in this approach as a way of communicating to staff their special duties and responsibilities.

¹⁰ Eg, *Ombudsman Act 1973* (Vic) s 10.