

Submission by the
Commonwealth Ombudsman

**Review of Commonwealth
Secrecy Provisions**

Submission by the Commonwealth Ombudsman, Iain Anderson

5 May 2023

Introduction and summary

1. The Office of the Commonwealth Ombudsman (the OCO) welcomes the opportunity to make a submission to the Attorney-General's Department's (AGD) *Review of secrecy provisions in Commonwealth laws* (the Review).
2. Our submission explains our functions and powers as an agency in the Commonwealth administrative law system and responds to the following consultation questions:
 - What principles should govern the framing of general secrecy offences and specific secrecy offences, including the categories of persons and information to which it is appropriate for each of these types of offences to apply?
 - Are there any defences that should generally be available for specific secrecy offences? Are there amendments or additions to defences for specific secrecy offences that should be considered?
3. Our submission proposes two key issues for the Review to consider.
 - The first is that there should be exemptions instead of defences to secrecy provisions where a disclosure is part of an integrity or oversight agency's core business.
 - The second is that, to the extent possible, there should be consistency across secrecy provisions that apply to any one integrity agency.

Background

4. The purpose of the OCO is to:
 - provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
 - influence systemic improvement in government administration.
5. We aim to achieve our purpose by:
 - independently and impartially reviewing complaints and disclosures about government administrative action
 - influencing government agencies to be accountable, lawful, fair, transparent, and responsive
 - assisting people to resolve complaints about government administrative action; and
 - providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

The OCO's functions and powers

6. The OCO is a part of Australia's administrative law system, which ensures that administrative decision making is legal, fair, consistent, transparent, and impartial. The primary function of the OCO is to investigate complaints received from members of the public about the administrative decisions and actions of government agencies. As a component of the Commonwealth integrity 'ecosystem', the OCO is an important safeguard and a means of ensuring that the actions of government agencies are consistent with the law.
7. The OCO has several statutory roles. The *Ombudsman Act 1976* (Ombudsman Act) provides for the Commonwealth Ombudsman to also be the Immigration Ombudsman, Law Enforcement Ombudsman, Defence Force Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman, Private Health Insurance Ombudsman and Vocational Education and Training Student Loans Ombudsman. All these statutory roles involve the investigation of complaints about government administration as well as additional functions that may be conferred by relevant Acts or Regulations to meet the needs of each ombudsman.
8. In addition, the OCO is required to undertake and report on regular inspections to ensure Commonwealth and State and territory law enforcement and integrity agencies are using certain covert, coercive and intrusive powers in compliance with the following Acts:
 - *Surveillance Devices Act 2004* – Compliance with surveillance device powers, access to computers, data disruption warrants by law enforcement agencies.
 - *Telecommunications (Interception and Access) Act 1979* – Compliance with telecommunications interception, stored communications, telecommunications data, international production orders by law enforcement agencies.
 - *Telecommunications Act 1997* – Compliance with the regime which allows law enforcement agencies to seek technical assistance from industry.
 - *Crimes Act 1914* – Compliance with controlled operations, delayed notification search warrants, monitoring of compliance with control or supervision orders, account take over warrants by law enforcement agencies.
 - *Fair Work Act 2009* – Compliance with the exercise of compulsory examination powers of the Fair Work Ombudsman.
 - *Australian Federal Police Act 1979* – Oversight of the handling of complaints about AFP conduct and practices.
9. The OCO also has functions under the following Acts:
 - *Freedom of Information Act 1982* – Investigation of and reporting on complaints made under the Act.

- *Migration Act 1958* – Reports to the Minister responsible for the Act on the appropriateness of arrangements for detention of individuals who have been in immigration detention for longer than two years.
- *Public Interest Disclosure Act 2013* – Reporting on compliance with the Public Interest Disclosure Scheme.

Secrecy provisions that impact on the Commonwealth Ombudsman

10. There is the potential for secrecy provisions to impact each activity the OCO undertakes to deliver its oversight functions. These activities include steps the OCO takes to **obtain information voluntarily or under compulsion** by:
 - inspecting records, systems, training and governance material
 - interviewing staff, and
 - observing and assessing processes and practices.
11. Secrecy provisions may also impact how the OCO **provides information** to the public and others through:
 - making recommendations and suggestions for improvements
 - transferring complaints or investigations to other oversight bodies in appropriate circumstances, and
 - preparing statutory reports on our inspection findings which are tabled in parliament and made public.
12. The Ombudsman Act includes secrecy provisions to protect the information the OCO receives, and how the OCO can disclose this information, when carrying out its functions and activities. Section 35 is a general prohibition against disclosure. However, s35A provides that the Ombudsman can disclose information with respect to the performance of the functions of, or an investigation by, the Ombudsman, if it is in the public interest to do so. The OCO supports the retention of this secrecy provision in the Ombudsman Act. It provides complainants and agencies with assurance that the information they provide will be treated appropriately. At the same time, it enables the Ombudsman to make disclosures in the public interest and where appropriate, such as providing de-identified or summarised information in a public statement.
13. Under ss 8(2)(B) and (2C), agencies who provide information to the Ombudsman are provided with explicit protection from prosecution for breach of any statutory secrecy provisions. Although ss8(2B) and (2C) minimise the effect of those other secrecy provisions, they are helpful in providing agencies that have a conservative legal view, or are concerned about wider secrecy provisions, with assurance that the disclosure is permitted.
14. Additional secrecy provisions that would or may apply can arise from the Acts and Regulations that confer additional statutory functions on the Ombudsman. For example,

under the Crimes Act there are several provisions which prohibit certain information from being included in reports on our inspection activities (see our case study below).

15. Finally, in some cases, the acquisition of information by the OCO would subject the Ombudsman and OCO staff to the same secrecy provisions that would be imposed on any other Commonwealth officers in the course of acquiring and using that information. For example, under section 45 of the *Surveillance Devices Act 2004*, there is a prohibition on the use and disclosure of protected information by any person with access to that information, with exceptions that apply to Ombudsman officials in certain circumstances. If Ombudsman officials used or disclosed that information outside of those circumstances, they could be liable for that offence.

Exemptions instead of defences for integrity and oversight agencies

16. Subsection 122.5(3) of the Criminal Code currently provides a defence for information communicated to an integrity agency, including the Commonwealth Ombudsman (included in **Appendix A** for ease of reference). Subsection 122.5(12) provides that employees and officials of integrity agencies, which includes the OCO, do not bear an evidential burden in raising a s122.5(3) defence. This reflects the principle that general secrecy offences should not impinge upon the ability for integrity agencies to perform their functions or duties, and that integrity agencies generally have other prohibitions on the disclosure of information, such as section 35 of the Ombudsman Act. In contrast, the person providing information to the integrity agencies set out in s122.5(3)(a) bears an evidential burden of proof in raising that defence.
17. In the OCO's view, where non-disclosure or secrecy offence provisions are not intended to apply in relation to the activities of an integrity or oversight agency because disclosure to, and by such bodies is necessary for the performance of their functions:
 - an exception or exemption should be preferred to a defence, and
 - any such exception or exemption should, where possible, operate consistently in relation to all oversight and integrity bodies – that is, where the *rationale* for the exception or exemption is the same.
18. Even if a defence is available for such disclosures, the mere existence of an offence potentially creates a chilling effect that inhibits the ability of integrity and oversight bodies to effectively perform their functions and duties, including by potentially inhibiting the willingness of agencies being overseen to provide information.
19. There are several legislative models which strike this balance well. For example, the prohibition on using and disclosing protected information in the *Surveillance Devices Act* do not apply to disclosure to an Ombudsman official.¹ Other legislation with exceptions

¹ Section 57 of the *Surveillance Devices Act 2004* provides for the Ombudsman to be given information and access despite other laws.

for disclosure to the Ombudsman can be found in the Telecommunications (Interception and Access) Act, Crimes Act,² Australian Federal Police Act and Migration Act.³

Consistency in secrecy provisions for integrity agencies

20. There are variances in the secrecy provisions that relate to functions of the Ombudsman. An example of this is set out in the case study below. Greater harmonisation where the powers are underpinned by the same rationale or purpose would be helpful from an operational perspective. It is possible that such variances also exist in legislation that impacts other oversight and integrity entities (particularly those with reporting obligations). Harmonisation in those instances may also be useful.

Case study – annual reporting under the *Crimes Act 1914*

The *Crimes Act 1914* requires the OCO to provide annual reports on the use of a range of covert and coercive powers used by law enforcement agencies. There are four instances where the reporting obligation is subject to non-disclosure and/or secrecy provisions that are either textually or practically different.

3ZZUH – OCO obligation to report on compliance with supervisory orders and monitoring warrants. This provision requires the OCO to report on the AFP's compliance with the use and administration of supervisory orders and monitoring warrants. Subsection 3ZZUH(4) provides:

A report under this section must not include information which, if made public, could reasonably be expected to:

- (a) endanger a person's safety; or
- (b) prejudice an investigation, or prosecution, of an offence; or
- (c) compromise the operational activities or methodologies of:
 - (i) the Australian Federal Police; or
 - (ii) any other Commonwealth, State, Territory or foreign law enforcement, intelligence, or security agency.

The provision does not provide for a criminal penalty.

3ZZGH – Commonwealth Ombudsman obligation to report on inspections in relation to delayed notification search warrants. The provision does not provide for a criminal penalty for non-disclosure of information. However, the provision is subject to s3ZZHA which provides for a criminal penalty for unauthorised disclosure of information relating to delayed notification search warrants subject to a penalty of 2 years imprisonment.

3ZZVX – Commonwealth Ombudsman obligation to report on inspections in relation to account take over warrants. The section includes a non-disclosure provision which requires reports to not include information which, if made public, could reasonably be expected to prejudice an

² Section 88 of the *Telecommunications (Interception and Access) Act 1979* and s3ZZGE of the *Crimes Act 1914* provide for the Ombudsman to be given information notwithstanding other laws.

³ Section 40TS of the *Australian Federal Police Act 1979* (AFP Act) and s486Q of the *Migration Act 1995* provides for the OCO's powers under the *Ombudsman Act 1976* to apply to certain activities under those Acts. Relevantly, ss9(5) of the *Ombudsman Act* provides an exemption to persons providing the OCO with information.

investigation or prosecution or compromise any law enforcement agency's operational activities or methodologies. There is no reference to endangering a person's safety within this provision.

15HO – Commonwealth Ombudsman annual reports on controlled operations. This section substantially replicates s3ZZUH(4). The only distinguishing factor is that it does not make explicit reference to the AFP or law enforcement, intelligence or security agencies by jurisdiction.

Subsection 122.5(3) of the Criminal Code

Information communicated etc. to integrity agency

(3) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it:

(a) to any of the following:

(i) the Inspector-General of Intelligence and Security, or a person engaged or employed to assist the Inspector-General as described in subsection 32(1) of the *Inspector-General of Intelligence and Security Act 1986*;

(ii) the Commonwealth Ombudsman, or another officer within the meaning of subsection 35(1) of the *Ombudsman Act 1976*;

(iia) the Australian Information Commissioner, a member of the staff of the Office of the Australian Information Commissioner, or a consultant engaged under the *Australian Information Commissioner Act 2010*;

(iii) the Law Enforcement Integrity Commissioner, a staff member of ACLEI, or a consultant to, or a person made available to, the Integrity Commissioner under the *Law Enforcement Integrity Commissioner Act 2006*; and

(b) for the purpose of the Inspector-General, the Ombudsman, the Australian Information Commissioner or the Law Enforcement Integrity Commissioner (as the case requires) exercising a power, or performing a function or duty.

Note: A person mentioned in paragraph (3)(a) does not bear an evidential burden in relation to the matters in this subsection (see subsection (12)).