
New South Wales
Council for Civil Liberties

# NSWCCL SUBMISSION

# PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

# THE MIGRATION AND CITIZENSHIP LEGISLATION AMENDMENT (STRENGTHENING INFORMATION PROVISIONS) BILL 2020

**25 June 2021**

**About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The Council for Civil Liberties (NSWCCL) thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make submissions concerning the Migration and Citizenship Legislation Amendment (Strengthening Information *Provisions) Bill 2020 (The Bill). The Bill would amend the Australian* Citizenship Act 2007 and the *Migration Act 1958* in unacceptable and unconscionable ways.

## I. The vital issues

If passed, this bill would cripple the ability of litigants to have access to information that is critical for their cases for retaining a visa, becoming citizens or retaining their citizenship. While it protects the constitutionally guaranteed powers of the High Court, the Federal Court and the Federal Circuit Court to know whatever information is relevant to their reviews of ministerial decisions, it would prevent other courts and other bodies from having such access. And vitally, it not only would allow protected information to be concealed from litigants and their counsel, it would allow them to be denied even the information that such information exists. In effect, only the Minister could use the information in court. This is unacceptable. It is contrary to Australia's international obligations. But most importantly, it is a severe intrusion on the rights of a person to a fair hearing. It overturns the basic legal principle of equality before the law.

The matters concerned are not trivial. Refusal or cancellation of visas on character grounds leads to deportation, or in the case of recognised refugees, indefinite detention. The cancellation or revocation of citizenship or the finding that it has been renounced or has ceased similarly leads to deportation.[1] If, as a result of this legislation, a person is mistakenly found not to be a refugee, they may be killed.

## II. Consideration by Committees

The Bill has already been considered by three parliamentary committees. Two of them, the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills wrote substantial criticisms. The third, the Legal and Constitutional Affairs Committee (The LCAC Committee) was given only two weeks to consider the submissions, hold a public hearing and prepare a detailed report for tabling in the Senate. Accordingly, after recounting the criticisms by organisations such as the Human Rights Commission and the Law Council of Australia, the majority report was limited to repetition of arguments in the Explanatory Memorandum or produced by the Department of Home Affairs supporting the Bill's passage, irrespective of whether they actually answer the criticisms[2] and declared, without argument of its own, that that this bill has a legitimate purpose and that its provisions are reasonable, necessary and proportionate.

The majority did encourage 'the government to consider additional safeguards such as the creation of a special advocate program to represent the interests of the applicant when the court has ruled against disclosure'.

[1] In such cases, persons are sent to another country, which then has to cope with them. That country may be less able to deal with a person of bad, perhaps very bad, character than Australia can. And in lesser, real, cases, the persons have had to cope with living in a country where they have no means of support, and may not even be able to speak the language.

[2] See for example paragraphs 2.27, 2.28, 2.37 and 2.38 of the *Report*.

The minority report of the Australian Labor Party makes a number of important recommendations for amendment.

## III. The reason for the Bill: *Graham and Te Puia*

The Bill is a response to a decision of the High Court in the cases of Graham v Minister for Immigration and Te Puia v Minister for Immigration. Essentially, that decision held that matters which are relevant to a minister's decision cannot be kept secret from the federal courts.

In the words of the High Court summary, 'Mr Graham is a New Zealand citizen who has resided in Australia from 1976. Mr Te Puia is also a New Zealand citizen and has resided in Australia from 2005. The Minister cancelled Mr Graham's visa and Mr Te Puia's visa under s 501(3) of the [*Migration Act 1958* (Cth)]. Section 501(3) confers power on the Minister to cancel or refuse a visa if the Minister reasonably suspects that the person does not pass the character test set out in the Act, and if the Minister is satisfied that cancellation or refusal is in the national interest. In making each decision, the Minister considered information purportedly protected from disclosure by s 503A of the Act. Section 503A(2)(c) purports to prevent the Minister from being required to divulge or communicate information to a court or a tribunal (among other bodies) when reviewing a purported exercise of power by the Minister under s 501, 501A, 501B or 501C of the Act, to which the information is relevant.'[3]

Six of the seven judges of the High Court held that 'Parliament cannot enact a law which denies to the High Court when exercising jurisdiction under s 75(v) of the Constitution (or to another court when exercising jurisdiction conferred under s 77(i) or (iii) by reference to s 75(v)) the ability to enforce the legislated limits of an officer's power. The practical impact of s 503A(2)(c) was to prevent the High Court and the Federal Court from obtaining access to a category of information which was relevant to the purported exercise of the power of the Minister that was under review, and which was for that reason relevant to the determination of whether or not the legal limits of that power and the conditions of the lawful exercise of that power had been observed. *To that extent, clause 503A(2)(c), had it been valid, would amount to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed' (emphasis added).*[4]

The High Court majority (6:1) argued, in part, that:
**'The practical effect of s 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister. No inference can be drawn whilst the Minister says that his decision is based upon information protected by s 503A(2), which the court cannot see....To the extent that it so operates, the provision amounts to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) of the Constitution to discern and declare whether or not the legal limits of powers conferred on the Minister by the Act have been observed....In this case the effect of s 503A(2) is effectively to deny the court evidence, in**

[3] *Aaron Joe Thomas Graham v Minister for Immigration and Border Protection and Mehaka Lee Te Puia v Minister for Immigration and Border Protection*, [2017], High Court of Australia *Summary.*
[4] Ibid.

**the case of the applicant the whole of the evidence, upon which the Minister's decision was based. It strikes at the very heart of the review for which s 75(v) provides'.**[5]

## IV. What the Bill proposes: federal courts

NSWCCL refers members of the Committee to the summary given by the Joint Parliamentary Committee on Human Rights (the Human Rights Committee) and the problems that that committee raises with the Bill. To a degree, what is written below endorses and amplifies some of that discussion.

The Bill accepts that the *federal* courts must have access to information that a Minister relies on in reaching a decision. But it sets out instead to prevent the person whose visa has been revoked from seeing that information by arranging for it to become protected information.[6]

What it proposes is that applicants wishing to appeal to the federal courts from a minister's decisions may not be allowed to know what the basis of those decisions are—they can only make submissions with respect to it if they are already lawfully in possession of the information. As the Human Rights Committee argues, it is unlikely that they could manage that.[7]

The Bill further would require the court to order that any party not already in legal possession of the information to be absent while it is considered. That includes not only the applicant, but their counsel as well.[8]

Indeed, the applicants may not know that such a basis, once that is made protected information, exists, so cannot ask a court to take objections to it or explanations of it into account. And it prevents tribunals such as the Administrative Appeals Tribunal (the AAT) from having this information unless the Minister releases it to the tribunal. This effectively prevents an applicant from having a merits review at all.

It is true, that, after the protected information has been considered by a court, it may decide to release it. But first, it must determine whether disclosing the information could be against the public interest. In addition to the safety of informants and the protection of security and security organisations' processes, the courts must also consider Australia's relations to other countries, Australia's national security, the risk that gazetted agencies may be discouraged from giving information in the future, the need to avoid disruption to law enforcement and any other matters specified in the regulations. And nothing else.[9]

In effect, for much of the time, only the Minister or his representatives will be able to present argument to a court based on the protected material. That is contrary to the requirement that parties be equal before courts and tribunals. It is contrary to the requirement that litigants must

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[5] Graham v Minister for Immigration and Border Protection Te Puia v Minister for Immigration and Border Protection [2017] HCA 33 (6 September 2017) [54], [64], [65].

[6] Under the Bill, organisations such as the Australian Security Services and law enforcement agencies that have been gazetted by the Minister, or foreign law enforcement bodies that have similarly been gazetted, can release information that is relevant to the character test sections of *the Migration Act 1958* or to the Minister's powers in relation to citizenship under *the Australian Citizenship Act 2007*, to the Minister or to Commonwealth officers, on condition that it is to be treated as confidential. Such information is then protected information.

[7] *Report 1*, 2021, p.15 at 1.28.

[8] Proposed subsections 52C(3)-(6) of the *Citizenship Act*, and subsections 503C(3)-(6) of the *Migration Act.*

[9] Proposed subsections 52C(5) of the *Citizenship Act*, and subsections 503C(5) of the *Migration Act.*

know the case that is to be put against them, which necessarily requires that they be provided with sufficient information so they can give effective instructions in relation to the allegations against them.[10]

Worse, though, the protected "information" may lack broader context or be missing crucial details. This is especially likely if the original informant has something to hide.

Just as the High Court held that a court that is denied such knowledge cannot judge whether or not a minister exceeded her/his powers in making a decision, or whether the decision is unreasonable, so an applicant who is denied knowledge of the basis of those decisions cannot know whether there is an arguable case worth taking to an appeal. An applicant cannot know whether the minister is making mistakes of fact, is ignorant of his or her situation in the real world, or has been misled. He/she cannot argue mitigating circumstances. Applicants cannot properly brief their counsel.

The Bill also would prevent any Commonwealth officer in possession of protected information from revealing it to a tribunal, such as the AAT, to any state or territory court, to a parliamentary committee, or to the parliament itself.

Thus justice cannot be achieved, and cannot be known to be achieved, under the provisions proposed. These things are unacceptable. The Bill should be rejected.

## V. What an applicant may need to argue

'The [then] Minister found that the plaintiff, Mr. Graham, did not pass the character test by virtue of s 501(6)(b) of the [*Migration Act 1958* (Cth)] because he reasonably suspected that the plaintiff has been or was a member of "the Rebels Outlaw Motorcycle Gang" and that organisation has been or is involved in criminal conduct. The Court did not find it necessary to answer the question as to whether the Minister, exercising power under s. 501(3) of the [Migration Act], could be satisfied that cancellation of the plaintiff's visa was in the "national interest" without making findings as to: the plaintiff's knowledge of, opinion of, support for or participation in the suspected criminal conduct of the Rebels Outlaw Motorcycle Gang; and/or how cancellation of the plaintiff's visa would "disrupt, disable and dismantle the criminal activities of Outlaw Motorcycle Gangs".[11]

CCL submits that in a case where the Minister's decisions were *not* contrary to the Constitution, such matters could be vital to the plaintiff's case. The Court did argue that 'it is possible that a person may have a compelling case as to why he or she passes the character test. It may be such as to show that, prima facie, the Minister could not have evidence to found his suspicion or that his decision is, in law, unreasonable. The practical effect of s. 503A(2) is that the court will not be in a position to draw any inferences adverse to the Minister. No inference can be drawn whilst the Minister says that his decision is based upon information protected by s.503A(2), which the court cannot see'.[12]

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[10] *Report 1* at 1.20. The Committee references the United Nations Human Rights Committee *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial (2007) (18).*
[11] *Graham and Te Puia*. Answer to question 2, and at 179-183.
[12] *Ibid.* [54].

But how is an applicant or an appellant to know what material is vital to the case—that the Minister's decision is unreasonable, for example, or based on a false belief, or that the information on which he/she relies lacks crucial context—if she/he does not know the basis of the decision, or even that such a basis exists? How could someone (other than Mr Graham) show that he was not a member of a motorcycle gang, or that he did not know that it was engaging in illegal activities, or that he knew but protested or informed the police, if he does not know the allegations against him?

In effect, the Minister will be able to argue his case, and the applicant will not even be able to know the case put against them, not to speak of being able to mount a reply. This is not justice.

## VI. What the bill proposes: the Administrative Appeals Tribunal

Restrictions under this Bill also apply to applicants to the AAT seeking a merits review of decisions on character grounds. Under proposed subsection 503A(3), once information has been protected, an officer to whom information is communicated or the Minister or an authorised Commonwealth officer to whom information is disclosed must not be required to produce the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person; or give the information in evidence before a court, a tribunal, a parliament or parliamentary committee or any other body or person.

Applicants will have to decide whether to seek an order of a court to release protected information without knowing whether such appeals are likely to succeed, or whether they will even assist their cases.

Since it may take a decision of a Federal Court to determine whether protected information is relevant, the AAT should be enabled to extend the timetable within which its reviews must be held. Applicants must be informed that there is protected information that is relevant to their cases and given time to determine whether an appeal is appropriate, and to pursue such an appeal.

## VII. Further limitations upon knowledge and the courts

In determining whether it is in the public interest to allow disclosure of protected information (including to the applicants and their counsel) the courts can only take into account specific factors and nothing else.

These factors are all weighed in favour of non-disclosure. They do not include any factors which may favour disclosure. For example, the courts are required to take into account 'the risk that the disclosure of information may discourage gazetted agencies and informants from giving information in the future'. On the other hand, the courts are denied the ability to take into account relevant factors which would favour disclosure such as respect for the principles of administrative justice.

The bill proposes that further factors to be taken into account by the courts can be added by regulation. Such significant changes should at least be by legislation, allowing for scrutiny and debate by the parliament, and not by regulation.

As the Human Rights Committee notes,[13] 'without being able to properly test the evidence, and to receive submissions from the person to whom the information relates, it would appear very difficult for the court to effectively perform its judicial review task, including determining the appropriate weight to be given to the information in subsequent proceedings. The court has no flexibility to treat individual cases differently as regards disclosure of information. Where it has been determined that disclosure would create a real risk of damage to the public interest, the court is prevented from disclosing even part of the confidential information, such as a summary of the information or a discrete element of the information, even in circumstances where partial disclosure would assist the court without creating a real risk of damage to the public interest. As such, an applicant could be left in the situation of trying to challenge a decision without having any understanding of the reasons why the decision was made.'
Judicial officers are afforded wide discretion in a number of different contexts—that is, we trust them. By curtailing the exercise of judicial discretion by strictly enumerating factors which can and cannot be considered in determining whether the release of information, the Bill would prevent Judicial officers from considering all of the relevant facts of the case that falls to be determined. The exercise of discretion is an important aspect of the judicial function, and the courts should be trusted to exercise their discretion appropriately and proportionally, as they do in relation to many other matters, without statutory curtailment.

## VIII. The grounds for protection and the possibility of misuse

The Bill limits the kind of information that can be protected to material that is relevant to various powers: to refuse citizenship by descent or adoption or conferral, to delay the making of a pledge, to revoke citizenship, to refuse resumption of citizenship, or to find that a persons has ceased to be a citizen,[14] or to cancel or restore visas under the character provisions of the Migration Act.[15] There is however no other limit to what can be protected.

Mr. Andrew Rice, Acting First Assistant Secretary of the Department of Home Affairs, informed the Legal and Constitutional Affairs Committee that 'It's a broad set of law enforcement and security threats that we're looking at dealing with. Some of them would be about ongoing investigations. Some of them would be around sources and methods, about how we arrived at the decision. How did we arrive at the knowledge that allowed us to make a decision? An operation may be concluded, but the protection of the way that it was actually conducted and the methods that were used to either bring someone to justice or form an opinion about that person's security or criminal threat would potentially be at risk, if we were not to have these measures in place.'[16]

But there is nothing in the Bill to limit the protection to such matters. It would be open to an authorised Commonwealth officer to protect *any* dubiously acquired or mistaken material that is relevant to the powers. It could also be open to an authorised Commonwealth officer to protect any information which could merely cause embarrassment to the state.
Given the risk to applicants, it should not be allowed to become a matter of routine for material to be classified as protected.
To prevent protection classification becoming routine or done for poor reasons, NSWCCL recommends that the Bill be amended to restrict the kinds of information that can be protected to information that, if it were to be made public, would set at risk the safety of members of security or law enforcement agencies, or their secret methods of investigation; or failing such

[13] *Report 1* at 1.32.
[14] Proposed subsection 52A(1).
[15] Proposed subsection 503A(1).
[16] LCAC *Hansard* March 2 2021, p.40.

specificity, the threshold be presenting a risk to national security rather than simply being in the public interest; and that a retired judge of a superior court be empowered to review decisions that would prohibit appellants' access to crucial information, before the opportunities for merits review are gone.

## IX. Protecting agencies: foreign governments

Under proposed section 503D, it is not only the information and how it was obtained that would be protected, but the name of the agency that provided the information. Given that agencies have from time to time become unreliable—ASIO and sections of various state police forces come to mind—this is overkill.

It is not only Commonwealth officers who can pass on information with the proviso that it is confidential—officials of foreign countries can do the same . Under proposed section 503D, the name of the of the foreign country government or agency would also be protected. Members of the Committee may be aware of a recent judgement by three judges of the Upper Tribunal of the United Kingdom that was scathing in their rejection of an Australian Government Country Report on Sri Lanka which has been relied upon to refuse protection to Sri Lankan asylum seekers. The UK court declared the Department of Foreign Affairs and Trade (DFAT) 2019 report was inaccurate and contained serious methodological shortcomings. A similar Country report produced by the UK Home Office was also rejected.

The Tribunal also confirmed that if returned to Sri Lanka the Tamils risked torture which was endemic in the country.

In both cases, it turns out, the government departments had relied upon information supplied by the Sri Lankan Government; and the Higher Tribunal found that that was unreliable. If that government had been able to classify the fact that it was the source of the information as protected, our courts would have gone on accepting the view that it is safe for Tamils to return to Sri Lanka—that they are not refugees.

## X. The offence of disclosure

The bill makes it an offence for a Commonwealth officer to disclose protected information to anyone other than to the Minister, an authorised Commonwealth officer, or in accordance with a declaration by the Minister or an order of a federal court. This is extraordinarily limited. At the least, the bill should allow for disclosure to be made to the Ombudsman, the Inspector General of Intelligence and Security and the Law Enforcement Integrity Commissioner and the Information Commissioner and their staff, should be further protection for whistle-blowers in the same terms as are found in Section 122.5 of the Criminal Code.[17]

## XI. The argument that revealing the case against an appellant may expose the individuals whose names or designations would be revealed

CCL accepts that it may be necessary to conceal information for these specific purposes. But this does not justify the Bill denying procedural fairness so significantly. Moreover, there are alternative and superior ways of dealing with persons who have been held to have failed the character test. For example, there is no need to cancel the visas of long-term residents, no

[17] See the Appendix for the full version.

need to send them overseas, no need to put them into indefinite detention. There is good reason not to.[18]

This point requires elaboration. As Jacinda Adern, the New Zealand Prime Minister, argued on Tuesday February 16, Australia is failing to live up to its responsibilities.[19]

The Australian Prime Minster responded, on national television, that his government will always put Australia's interests first. That is manifestly a bad argument.[20]

Where a citizenship cannot be renounced or removed because the person has only one citizenship, Australia has to manage the person and the safety of country without the cop-out of sending him or her to another country. We seem to be able to do that—and generally without post-sentence incarceration. There should be no revoking of citizenship, no determination to cease a person's citizenship, no finding that a person has renounced citizenship or that their citizenship has ceased when, because of this legislation, there is no effective appeal.

Therefore, when a person cannot be told why it is in the national interest that his/her visa is to be cancelled, it should not be cancelled, and Australia should accept its responsibility to manage the individual within Australia. If a person cannot be given reasons why his or her citizenship is being revoked or held to have ceased, and given a real opportunity to challenge those grounds in the courts, the citizenship should not be ended.

## XII. The democratic argument

If the Minister does not reveal the reasons for his actions, they are not open to public scrutiny. As noted above, the information, and the fact that the Minister relied on it, would not be reported to a parliamentary committee, or to the Parliament itself. However convenient a minster may find these provisions, they are essentially undemocratic. If the Bill is to continue, it should be amended to permit disclosure, under appropriate conditions of confidentiality, to Parliament and its committees.

## XIII. Recommendations

In summary, the Bill will expose people to deportation or detention, through cancellation of visas or loss of citizenship, by grossly unfair procedures. It will set lives at risk. It is nightmarish.

Because of this, because justice cannot be achieved nor be known to be achieved under the scheme to be set up by the Bill, CCL asks the Committee to recommend that the Bill be rejected.

In the alternative, CCL recommends that the bill be amended to ensure:

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[18] Mr. Graham had been a resident of Australia for forty years when his visa was cancelled.

[19] The case was a woman, Suhayra Adam, who left New Zealand when she was six years old. Under New Zealand law, when a visa holder has been living in the country for ten years, there is no power to cancel a visa on these sorts of grounds.

[20] Similar logic would imply that New South Wales and Queensland should put the interests of their states first and allocate as much water from the Murry/Darling system to irrigators as they can use, irrespective of the effects on cities downstream.

1. That affected persons, the AAT and the courts as appropriate are told that there is protected information relevant to their cases.

2. That the kinds of information that can be protected are restricted by a definition to information that, if it were to be made public, would set at risk the safety of members of security or law enforcement agencies, or their secret methods of investigation; or failing such specificity, the threshold be national security rather than public interest.

3. That the persons are to be told by the Tribunal or the courts, as much of the information as is necessary to ensure procedural fairness. It should be sufficient for the applicant or their lawyer to be able to understand and respond to the gist of it.

4. That procedural fairness, the right to a fair hearing, the proper administration of justice and adequate oversight of the Executive be included as matters to which the court must have regard when determining whether to disclose information.

5. That in cases where an applicant is not to be permitted to know of material that is crucial to his or her case, it be open to the court to appoint a special advocate to represent the applicant's interests.

6. That proposed sections 52D of the Citizenship Act and 503D of the Migration Act, which allow the name of the agency that provided information to be kept secret, be omitted.

7. That disclosures be permitted to the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and the Law Enforcement Integrity Commissioner, the Information Commissioner, members of their staff and other persons included in section 122.5 of the Criminal Code.

8. That disclosures also be permitted in accordance with the *Public Interest Disclosure Act 2013* (Cth) and the *Freedom of Information Act 1982* (Cth)).

9. That disclosure be permitted, under appropriate conditions of confidentiality, to Parliament and its committees.

10. That an independent adjudicator of senior standing be appointed with power to review the status of information as protected, on referral by an applicant, tribunal or court.

11. That in the event that a reference is made to an adjudicator or to a Federal Court challenging the status of such protected information, the time limits within which the Administrative Appeals Tribunal must hold its review be appropriately extended.

## Appendix
## Criminal Code section 122.5 Defences against charges of unauthorised disclosure of information.

Powers, functions and duties in a person's capacity as a public official etc. or under arrangement

(1) It is a defence to a prosecution for an offence by a person against this Division that:

(a) the person was exercising a power, or performing a function or duty, in the person's capacity as a public official or a person who is otherwise engaged to perform work for a Commonwealth entity; or

(b) the person communicated, removed, held or otherwise dealt with the information in accordance with an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information.

Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).

Information that is already public

(2) It is a defence to a prosecution for an offence by a person against this Division that the relevant information has already been communicated or made available to the public with the authority of the Commonwealth.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

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)).

Information communicated etc. in accordance with the Public Interest Disclosure Act 2013 or the Freedom of Information Act 1982

(4) 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, in accordance with:

(a) the *Public Interest Disclosure Act 2013*; or

(b) the *Freedom of Information Act 1982*.

Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).

Information communicated etc. for the purpose of reporting offences and maladministration

(4A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of reporting, to an appropriate agency of the Commonwealth, a State or a Territory:

(a) a criminal offence, or alleged criminal offence, against a law of the Commonwealth; or

(b) maladministration relating to the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or

(c) maladministration relating to the performance of functions of the Australian Federal Police under:

(i) the *Australian Federal Police Act 1979*; or

(ii) the *Proceeds of Crime Act 2002*.

Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).

Information communicated etc. to a court or tribunal

(5) 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, to a court or tribunal (whether or not as a result of a requirement).

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

Information communicated etc. for the purposes of obtaining or providing legal advice

(5A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of obtaining or providing, in good faith, legal advice in relation to:

(a) an offence against this Part; or

(b) the application of any right, privilege, immunity or defence (whether or not in this Part) in relation to such an offence;

whether that advice was obtained or provided before or after the person engaged in the conduct constituting the offence.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

Information communicated etc. by persons engaged in business of reporting news etc.

(6) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media, and:

(a) at that time, the person reasonably believed that engaging in that conduct was in the public interest (see subsection (7)); or

(b) the person:

(i) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media; and

(ii) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who reasonably believed that engaging in that conduct was in the public interest (see subsection (7)).

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

(7) Without limiting paragraph (6)(a) or (b), a person may not reasonably believe that communicating, removing, holding or otherwise dealing with information is in the public interest if:

(a) engaging in that conduct would be an offence under section 92 of the *Australian Security Intelligence Organisation Act 1979* (publication of identity of ASIO employee or ASIO affiliate); or

(b) engaging in that conduct would be an offence under section 41 of the *Intelligence Services Act 2001*(publication of identity of staff); or

(c) engaging in that conduct would be an offence under section 22, 22A or 22B of the *Witness Protection Act 1994* (offences relating to Commonwealth, Territory, State participants or information about the national witness protection program); or

(d) that conduct was engaged in for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation.

Information that has been previously communicated

(8) It is a defence to a prosecution for an offence by a person against this Division if:

(a) the person did not make or obtain the relevant information by reason of any of the following:

(i) his or her being, or having been, a Commonwealth officer;

(ii) his or her being otherwise engaged to perform work for a Commonwealth entity;

(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and

(b) the information has already been communicated, or made available, to the public (the *prior publication*); and

(c) the person was not involved in the prior publication (whether directly or indirectly); and

(d) at the time of the communication, removal, holding or dealing, the person believes that engaging in that conduct will not cause harm to Australia's interests or the security or defence of Australia; and

(e) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

Information relating to a person etc.

(9) It is a defence to a prosecution for an offence by a person against this Division if:

(a) the person did not make or obtain the relevant information by reason of any of the following:

(i) his or her being, or having been, a Commonwealth officer;

(ii) his or her being otherwise engaged to perform work for a Commonwealth entity;

(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and

(b) at the time of the communication, removal, holding or dealing, the person believes that the making or obtaining of the information by the person was required or authorised by law; and

(c) having regard to the circumstances of the making or obtaining of the information, the person has reasonable grounds for that belief; and

(d) any of the following apply:

(i) the person communicates the information to the person to whom the information relates;

(ii) the person is the person to whom the information relates;

(iii) the communication, removal, holding or dealing is in accordance with the express or implied consent of the person to whom the information relates.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

(10) To avoid doubt, a defence to an offence may constitute an authorisation for the purposes of paragraph (9)(b).

Removing, holding or otherwise dealing with information for the purposes of communicating information

(11) For the purposes of subsection (3), (4), (5) or (5A), it is not necessary to prove that information, that was removed, held or otherwise dealt with for the purposes of communicating it, was actually communicated.

Burden of proof for integrity agency officials

(12) Despite subsection 13.3(3), in a prosecution for an offence against this Division, a person mentioned in subparagraph (3)(a)(i), (ii), (iia) or (iii) does not bear an evidential burden in relation to the matter in:

(a) subsection (1), (4) or (4A); or

(b) either of the following:

(i) subparagraph (3)(a)(i), (ii), (iia) or (iii);

(ii) paragraph (3)(b), to the extent that that paragraph relates to the Inspector-General of Intelligence and Security, the Ombudsman, the Australian Information Commissioner or the Law Enforcement Integrity Commissioner.

Defences do not limit each other

(13) No defence in this section limits the operation of any other defence in this section.

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This submission was prepared by Dr. Martin Bibby on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

[redacted]

**Michelle Falstein**
**Secretary**
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Contact in relation to this submission-[redacted]