COMMONWEALTH OMBUDSMAN

Submission by the Commonwealth Ombudsman

Review of National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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Background

The purpose of the Office of the Commonwealth Ombudsman is to:

- Provide assurance that the organisations we oversight act with integrity and treat people fairly
- Influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action; and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Response to Provisions of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Introduction

Schedule 2 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* ('the Bill') establishes a new secrecy framework by amending the *Crimes Act 1914* and the *Criminal Code 1995*.

The explanatory memorandum states that these offences:

> *should in no way impinge on the ability of… the Ombudsman,… or their staff, to exercise their powers, or to perform their functions or duties. These officials are typically entitled to access any information in the course of performing their functions and duties, reflecting the paramount importance of effective oversight of the intelligence community, law enforcement agencies and the public service.*

However, the current drafting of the amendments appears to produce several unintended consequences for my office and produce a result in conflict with the intention outlined in the explanatory memorandum. This submission addresses the following issues which will appear to have an impact on the work of my office:

- The introduction of new offences may impede our inspections functions and the ability of people to make complaints to my office.

- The interaction between the coercive powers provided by the *Ombudsman Act 1979* (Ombudsman Act) and the new offence provisions may create a dilemma for agency staff.

- The requirement to hold information at a 'proper place of custody'.
- The interaction between the new offences and the *Public Interest Disclosure Act* 2013 (PID Act).

In particular, this submission raises the following two consequences for the operation of the new secrecy framework for my office:

1. Commonwealth Ombudsman staff will need to rely on a defence to a serious offence in order to perform the duties of their role

2. External agency staff will need to rely on a defence to a serious offence when responding to requests for information from the Commonwealth Ombudsman.

As well as raising these issues with the operation of the new secrecy framework, this submission proposes possible solutions to overcome these issues.

Issue 1 - The introduction of new offences may impede our inspections functions and the ability of people to make complaints to my office

The operation of the new offences

The Bill introduces a suite of new offences for the disclosure of government information. The provisions operate to make it an offence to communicate, deal with or improperly hold *inherently harmful information* or *information that causes harm to Australia's interests*.

The Bill makes it an offence to remove information from, or hold information outside of, a proper place of custody. A proper place of custody has the meaning prescribed by the regulations which are not yet made.

Inherently harmful information is defined in section 121(1) and includes:

(a) security classified information;
…
(d) information that was provided by a person to an authority of the Commonwealth in order to comply with an obligation under a law;
(e) information relating to the operations capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.

The three limbs of the definition of 'inherently harmful information' referred to above will cover a significant amount of information communicated to, dealt with and held by the Commonwealth Ombudsman.

In relation to limb (a), the definition will cover security classified information gathered for our inspection functions in relation to law enforcement agencies. This information might also be covered under limb (e). The term 'security classified information' does not appear to be defined for the purposes of the new Division. If is taken at its normal meaning, it will capture all material which has been given a security rating, noting that security classifications are given to material by the agency holding the material and could change over time. Accordingly, my Office may be provided with security classified information from a range of agencies during the course of our investigations.

During our investigations, my staff also frequently gather information that has been provided by a person to the Commonwealth in order to comply with a law. This information would arguably fall within paragraph (d) of the definition. This information is found across large areas of public administration including, for example, social security and child support as well as potentially more sensitive information, such as information obtained by law enforcement agencies through their powers. The breadth of this limb of the definition is likely to mean that a range of information sought by my office from Commonwealth agencies in order to investigate complaints will be covered by the definition and therefore covered by an offence if the information is communicated to my office. My officers are then potentially covered by an offence if they deal with that information.

An important aspect of the framework of these offences, then, are the following defences:

- Section 122.5(1): the disclosure was in the course of duties
- Section 122.5(3): the communication of information is to a government oversight agency (i.e. the Ombudsman)
- Section 122.5(4): the communication of information is in accordance with the *Public Interest Disclosure Act 2013.*

Under section 13.3 of the Criminal Code, the defendant bears the burden of pointing to evidence that suggests a reasonable possibility that the matter provided for in the defence is made out. If this is done, the prosecution must then refute the defence beyond reasonable doubt.

While these defences are drafted to provide relief to Commonwealth employees who inadvertently breach the new offence provisions in the course of carrying out their duties, there is a policy question of whether Commonwealth officials should be caught be criminal offences by the mere act of carrying out their duties. An alternative could be for the offence to contain an element to be proved by the prosecution that the person was not acting in the course of their duties.

Scope of the Ombudsman defence

Subsection 122.5(3) states:

> *It is a defence to a prosecution for an offence by a person against this Division relating to the communication of information that the person communicated the information:*
>
> *(a) to any of the following:*
>
> *…*
>
> ii. *the Commonwealth Ombudsman, or another officer within the meaning of subsection 35(1) of the Ombudsman Act 1976;*

The explanatory memorandum explains that this defence:

> *Is intended… [to] be available for a prosecution for dealing with information, moving information from its proper place of custody, or failing to comply with a direction if the person's conduct 'related to' the communication of information to an oversight body, or for the purposes of an oversight body. For example, it is intended that a person be permitted to copy a document for the purpose of communicating the copy to an oversight body.*

However, it is not clear that the provision, as currently drafted, achieves this outcome. This is because the defence only applies to an offence by a person 'relating to the communication of information'. As a result, the defence does not appear to be available for an offence under subsection 122.1(2), which relates to dealing with information. Accordingly, the defence would only be available if the information had actually been communicated to my office and would not be available, for example, if a person was dealing with the information (i.e. photocopying a document) in order to communicate the information at a later date with my office.

Consequences for the Commonwealth Ombudsman

The proposed framework will mean that:

1. Commonwealth Ombudsman staff will need to rely on a defence to a serious offence in order to perform the duties of their role because they will be "dealing with" or "communicating" inherently harmful information.

2. External agency staff will need to rely on a defence to a serious offence when responding to requests for information from the Commonwealth Ombudsman which include inherently harmful information.

It is the second consequence which will is likely to have the greatest impact on the work of my office. In undertaking the functions of my office, my staff rely on agencies providing timely and fulsome information to the Office of the Ombudsman. The new offences will add a layer of complexity for agency staff when considering how to respond to requests for information and may operate as a disincentive to provide information to my office which is required to investigate complaints or systemic issues with public administration.

Issue 2 - The interaction between the coercive powers provided by the Ombudsman Act and the new offence provisions may create a dilemma for agency staff.

While the majority of investigations carried out by my office do not involve the use of coercive powers, an agency staff member may be required under section 9 of the Ombudsman Act to produce information that is, or could be, 'inherently harmful information'. Failure to comply with a request for information under s 9 of the Ombudsman Act may result in an offence being committed under s 36 of that Act, for which the maximum penalty is imprisonment for 3 months or 10 penalty units.

In contrast, the maximum penalty available under the new Division 122 of the Criminal Code for communicating 'inherently harmful information' is 15 years imprisonment.

Agency staff members may find themselves in a dilemma about which piece of legislation has priority and resolve the problem by opting to transgress the provision with the lesser penalty, with the effect that information required by my office to fulfil my functions is not provided.

Issue 3 - The requirement to hold information at a 'proper place of custody'.

The bill and regulations do not currently provide a definition of a proper place of custody. If inherently harmful information is not held in a proper place of custody, an offence is committed under section 122.1(3). My office will hold inherently harmful information under

the current definition proposed in the Bill. Without a definition of a proper place of custody, it is not clear what resourcing or other practical implications this requirement may have on my office.

Issue 4 - The interaction between the new offences and the PID Act

Information communicated, or dealt with, in relation to a disclosure under the PID Act may also fall within the definition of *inherently harmful information.* While a defence exists in relation to communication in accordance with the PID Act, disclosers may need to rely on a defence to a serious offence in order to make use of the Commonwealth's public interest disclosure regime. Similarly, Commonwealth employees who are tasked with functions under the PID Act which includes dealing with disclosed information may need to rely on a defence to a serious offence in order to perform the duties of their role. Public Interest Disclosures made to the Commonwealth Ombudsman may be covered by the defence under section 122.5(3), however I note the limitations of that defence as discussed above.

Additionally, the defence, as with the provision of information to an oversight body, appears to be predicated on the person communicating the information under the PID Act. And this only relates to the offence that is captured by the terms 'relating to the communication of information.' As a result, the defence does not appear to be available for an offence under section 122.1(2) – dealing with information.

I foresee the possibility of these offences discouraging the making of disclosures, which is the purpose for which the PID Scheme was established. It could also cause uncertainty for Commonwealth employees in the performance of their duties under the PID Act.

Possible solutions

Section 24 of the PID Act and sections 7A, 8 and 9 of the Ombudsman Act currently provide comprehensive immunities for the provision of information to my office, but it is not clear whether the new Division 122 of the Criminal Code is intended to override those immunities. Therefore I would support the inclusion of a provision in the Criminal Code clarifying that these immunities are not affected.