



Australian Government
Attorney-General's Department

Supplementary Submission to the Senate Legal and Constitutional Affairs Committee

Inspector-General of Intelligence and Security Amendment Bill 2011

This supplementary submission addresses concerns raised by Dr Patrick Emerton of Monash University's Castan Centre for Human Rights Law in his submission to this Inquiry. Dr Emerton raises concerns with Items 10 and 13 of Schedule 1 of the Inspector-General of Intelligence and Security Amendment Bill 2011 (the Bill), which relate to non-disclosure obligations with respect to official information¹. In particular, Dr Emerton suggests that the Committee may wish to consider the overall constitutionality of 'blanket non-disclosure provisions of this sort'² in light of recent decisions of the High Court of Australia, which relate to Chapter III of the Constitution and the nature of the judicial power that it confers³. On this basis, Dr Emerton suggests 'that it may be unconstitutional for Australian parliaments to attempt to impose blanket restrictions on the communication of documents or information to courts that are exercising, or are capable of exercising, federal judicial power'⁴.

Item 10 of Schedule 1 of the Bill seeks to clarify that the existing secrecy offences, contained in section 34 of the *Inspector-General of Intelligence and Security Act 1986* (the Act), are also intended to prevent any unauthorised disclosure by a current or former Inspector-General of Intelligence and Security (IGIS) or IGIS staff member, of sensitive or classified material to a court or tribunal. Item 13 of Schedule 1 of the Bill seeks to rectify an unintended inconsistency in subsection 34(5) of the Act regarding the treatment of 'documents' as opposed to 'information' that arose when the subsection was repealed and substituted by Schedule 4 to the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*, and then amended by Schedule 6 to the *Freedom of Information Amendment (Reform) Act 2010*.

Currently, paragraphs 34(5)(c), (ca), (d) and (e) of the Act deal only with circumstances in which a person can be required to divulge or communicate information, but there are no equivalent

¹ Castan Centre for Human Rights Law, Monash University, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Inspector-General of Intelligence and Security Amendment Bill 2011, prepared by Dr Patrick Emerton, p 1.

² Ibid.

³ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *State of South Australia v Totani* [2010] HCA 39.

⁴ Castan Centre for Human Rights Law, Monash University, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Inspector-General of Intelligence and Security Amendment Bill 2011, prepared by Dr Patrick Emerton, p 1.

provisions relating to documents. Proposed paragraphs 34(5)(ba), (bb), (bc) and (bd) correct this drafting oversight.

The proposed amendments do not seek to impose 'blanket restrictions' on the communication of documents or information to courts nor do they intend to restrict the independence of the judiciary which is guaranteed by Chapter III of the Constitution. On the contrary, the proposed amendments provide for further exceptions to the non-disclosure obligations contained in subsections 34(1), (1AA) and (1AB) of the Act, by expressly preserving the discretion of the court to examine information or documents where the information or document:

- is obtained in the performance of functions or duties or the exercise of powers under the Act, for the purposes of the Act
- is obtained in the performance of functions or duties or the exercise of powers under Division 9 of Part VII of the *Freedom of Information Act 1982* (FOI Act), for the purposes of that Division
- is obtained by the person in the performance of functions or duties or the exercise of powers under section 60A of the FOI Act, for the purposes of that section, and
- is obtained by the person in the performance of functions or duties or the exercise of powers under section 50A of the *Archives Act 1983*, for the purposes of that section.

The proposed amendments are not uncommon in Commonwealth legislation. There are a number of existing examples of these kinds of secrecy provisions which provide that certain persons are not required to disclose information in court or tribunal processes, other than for the purposes of the Act under which the information was obtained⁵. Items 10 and 13 of Schedule 1 were modelled on similar secrecy provisions that apply to some other statutory bodies and investigative contexts, such as subsection 53(6) of the *Transport Safety Investigation Act 2003* or subsection 35(8) of the *Ombudsman Act 1976*.

Provisions of this kind, particularly in the context of the IGIS' role, which requires unfettered access to highly sensitive intelligence and security information, are important as they are intended to prevent the unnecessary and indirect disclosure of sensitive information during the course of legal proceedings that do not relate to the performance of functions or duties or the exercise of powers under the relevant Act, or that may be frivolous or vexatious. The proposed provisions are also intended to ensure that the IGIS' important oversight role is not unnecessarily diverted by the IGIS' Office becoming involved in legal proceedings. For example, under subsection 35(8) of the *Ombudsman Act*, which relates to the disclosure of information by the Ombudsman or officers of the Ombudsman:

⁵ See, eg, *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 32(2); *Child Support (Assessment) Act 1989* (Cth) s 150(5); *Australian Security Intelligence Organisation Act 1979* (Cth) s 81(2); *Ombudsman Act 1976*, s 35(8).

A person who is or has been an officer is not compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorised by a law of the Commonwealth or of a State or Territory, or by consent of parties, to hear, receive and examine evidence, to disclose any information acquired by him or her by reason of his or her being or having been 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*.

Similar to the IGIS' office, the Ombudsman's office handles complaints, conducts investigations, performs audits and inspections, encourages good administration, and carries out specialist oversight tasks. Secrecy provisions such as subsection 35(8) of the Ombudsman Act and the proposed amendments provided for in the Bill, are important in maintaining the investigative integrity of these offices by facilitating broad access to a range of sensitive information whilst ensuring that such information is appropriately protected from unnecessary disclosure. This was the founding principle of the original enactment of these provisions under the IGIS Act in 1986, to provide 'certain protections to the Inspector-General and staff to assist in maintaining the confidentiality of security and intelligence information'⁶. Under the proposed provisions, the court has complete discretion and is not restricted in deciding cases that relate to the performance of functions or duties or the exercise of powers under the relevant Act.

Recent decisions of the High Court in relation to Chapter III of the Constitution⁷, referred to in Dr Emerton's submission, were concerned with very prescriptive provisions which can be distinguished from those proposed by the amendments. Indeed, they related to provisions that removed the court's discretion entirely and created an imperative on the court to make a particular decision, such as the issue of a control order, as was the case in *State of South Australia v Totani & Anor*⁸. As detailed above, the proposed amendments in the Bill do not seek to compel the court to make a particular decision. Rather (as detailed above), they preserve the discretion of the judiciary to examine information or documents where the information or document:

- is obtained in the performance of functions or duties or the exercise of powers under the Act, for the purposes of the Act
- is obtained in the performance of functions or duties or the exercise of powers under Division 9 of Part VII of the *Freedom of Information Act 1982* (FOI Act), for the purposes of that Division
- is obtained by the person in the performance of functions or duties or the exercise of powers under section 60A of the FOI Act, for the purposes of that section, and
- is obtained by the person in the performance of functions or duties or the exercise of powers under section 50A of the *Archives Act 1983*, for the purposes of that section.

⁶ Explanatory Memorandum, Inspector-General of Intelligence and Security Bill 1986, p 19.

⁷ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *State of South Australia v Totani* [2010] HCA 39.

⁸ *State of South Australia v Totani* [2010] HCA 39.

The Attorney-General's Department has responsibility for the scrutiny of Commonwealth secrecy and non-disclosure provisions. The Department was consulted on the proposed amendments. While we carefully review any provisions that propose to limit information being disclosed to a court, we are satisfied that the policy rationale in this case is appropriate, and that the proposed provisions contain mechanisms that enable information to be disclosed to a court where necessary for the performance of functions or duties or the exercise of powers under the relevant Act.