

Submission by the
Commonwealth Ombudsman

**Parliamentary Joint Committee on
Intelligence and Security**

Review of the Migration and Citizenship Legislation
Amendment (Strengthening Information Provisions) Bill 2020

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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Introduction and summary

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) review of the *Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020* (the Bill).

This submission outlines the role of the Office, provides information on the Office's existing oversight functions, and considers the impact of the Bill on these oversight functions.

The Office is concerned that the secrecy provisions in the Bill as currently drafted will impede the Office's ability to perform its existing functions with respect to:

- receiving and considering public interest disclosures from staff of the Department of Home Affairs (Home Affairs)
- receiving and requesting information in relation to complaints about the administration of visa and citizenship decisions and actions
- reporting on the circumstances of people in immigration detention and inspecting immigration detention facilities, and
- conducting the Office's functions that involve inspection of law enforcement agencies' use of covert and intrusive powers.

We suggest the Committee consider recommending amendments to the Bill to ensure our Office is able to receive and request information from Home Affairs consistent with the exercise of our existing powers, and the performance of our existing functions and duties. We consider this is generally and most clearly achieved by including a specific exception to the secrecy provisions to this effect.

To avoid any doubt, the Office is not seeking to expand the scope of its jurisdiction in respect of any of the matters dealt with in the Bill. Rather, we are simply seeking to ensure that the performance of our existing oversight role is not impeded by the provisions in the Bill.

To assist the Committee, this submission references several existing legislative models for ensuring secrecy provisions do not impede the capacity of integrity agencies to perform their existing oversight functions.

Our role

The purpose of the Office 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
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

About the Bill

The Bill was introduced into the Parliament on 10 December 2020 and amends both the *Migration Act 1958* (the Migration Act) and the *Australian Citizenship Act 2007* (the Citizenship Act).

Officers from Home Affairs and the Attorney-General's Department (AGD) consulted with the Office after the Bill was introduced into the Parliament and referred to the Senate's Legal and Constitutional Affairs Committee. The concerns contained in this submission have been raised with Home Affairs and AGD during consultation.

The Bill amends the Migration Act (new section 503A) to prohibit the disclosure of confidential information provided to Home Affairs by gazetted intelligence and law enforcement agencies where the information is used for decisions made to refuse or cancel a visa on character grounds, or revoke or set aside such a decision.

The Bill contains substantially similar amendments to the Citizenship Act (new section 52A) to prohibit the disclosure of confidential information used for nine specified decisions affecting citizenship.

The only exceptions to these prohibitions are where:

- the confidential information is being disclosed for the purpose of making one of the specified migration or citizenship decisions
- the Minister allows for the disclosure via a declaration, or
- a Court orders the disclosure.

The Bill makes clear that the prohibition on disclosure would operate despite any other provision in the Migration Act or Citizenship Act, or regulations made under those Acts, or any other provision in Commonwealth legislation, which would include the *Ombudsman Act 1976* (the Ombudsman Act).

The scope of information potentially covered by the prohibition on disclosure in new section 503A of the Migration Act and new section 52A of the Citizenship Act is broad. The prohibition applies in respect of confidential information communicated by an intelligence or law enforcement agency specified by the Minister in the *Gazette* under section 503A(9) of the Migration Act. Currently, 42 law enforcement agencies and Australian intelligence bodies are listed in Schedule 1.¹

¹ Notice under section 503A of the Migration Act 1958 – 16/001, <https://www.legislation.gov.au/Details/C2016G00414>

The Bill's impact on the Office's existing oversight functions

The Office is concerned that the secrecy provisions in the Bill as currently drafted will impede our ability to perform our existing oversight functions by inhibiting our ability to receive and request information from Home Affairs in the performance of those functions.

We've identified at least four areas of activity undertaken in the performance of our existing functions that will potentially be affected by the secrecy provisions in the Bill.

1. PID functions

The Office has a range of functions and powers under the *Public Interest Disclosure Act 2013* (the PID Act), including receiving, allocating and investigating disclosures about other agencies (including Home Affairs), and annually reporting on the operation of the PID Act. The Office is also able to receive and investigate complaints about agencies' handling of public interest disclosures under the Ombudsman Act.

The Office is concerned that new section 503A of the Migration Act and new section 52A of the Citizenship Act will inhibit the ability of individuals to approach the Office to make disclosures under the PID Act.

Specifically, we are concerned that public officials will not be able to make a disclosure about possible wrongdoing in relation to a decision to refuse or cancel a visa on character grounds, or revoke or set aside such a decision, or relevant citizenship decisions, where those decisions are made using confidential information.

We are also concerned that we will not be permitted to seek information from Home Affairs regarding a PID that raised concerns about disclosable conduct related to such decisions. This is because new section 503A(7) of the Migration Act and new section 52A(7) would expressly override the Ombudsman's powers under the PID Act to request such information.

2. Complaints management and investigation functions

The Office is concerned that new section 503A of the Migration Act and new section 52A of the Citizenship Act will limit the ability of people to make complaints to the Office in relation to decisions covered by those provisions.

The Office is also concerned that the new provisions will impede the Office's ability to use its existing powers under the Ombudsman Act to request information relevant to any investigation of a matter covered by the secrecy provisions.

The Office receives a relatively high volume of complaints about Home Affairs' actions in relation to citizenship and visa issues, including decisions to cancel or refuse on character grounds. We assess each complaint and may decide to request information from Home Affairs to further assess the complaint or commence an investigation. The kind of information we typically seek from Home Affairs includes copies of records related to the application or decision in question, chronologies, internal Home Affairs actions, issues or concerns identified with an application, and the information considered in the relevant decision-making process.

The impact of the proposed amendments will be to render opaque aspects of Home Affairs' decision-making processes in those cases where confidential information from a gazetted agency is used, therefore compromising the Office's ability to make inquiries into or investigate these matters effectively.

This is a matter of serious concern, noting that these complaints often relate to decisions that carry significant consequences for the complainant and their family, including possible detention, removal from Australia or deportation.

3. Immigration detention inspections and reporting functions

Section 486N of the Migration Act requires the Secretary of Home Affairs to send to the Ombudsman a report relating to the circumstances of a person's detention for every person who has been in immigration detention for more than two years, and every six months thereafter, even if the person is no longer in detention. This report is to be sent to the Ombudsman within 21 days after the detention reporting time.

The Ombudsman, under section 486O of the Migration Act, is then required to report to the Minister, giving an assessment of the appropriateness of the arrangements for the detention of the person. This assessment must include a statement outlining the assessment for the purpose of tabling in Parliament. The Minister must cause the Ombudsman's statement in relation to the assessment to be tabled in each House of Parliament, within 15 sitting days of receiving the assessment (section 486P of the Migration Act).

As noted earlier in this submission, the list of gazetted agencies subject to the prohibition on disclosure in the Bill is likely to include state and territory child protection agencies, corrective services, police services and welfare agencies such as Services Australia.

The Office is concerned that if a gazetted agency were to provide Home Affairs with information about a person in immigration detention and asked that it be kept confidential, Home Affairs officers would be obliged not to provide the information to the Office, even if it would be relevant as part of Home Affairs reporting obligations under section 486N of the Migration Act and the Office's preparation of assessments under section 486O of the Migration Act.

This is particularly relevant for people held in correctional facilities designated as an Alternative Place of Detention. The Office needs to be able to access the information relevant to these individuals to undertake our assessments thoroughly.

During our inspections of detention facilities, the inspection team may be approached by detainees about certain issues and the team may request follow-up information from Home Affairs in order to investigate those issues further. If that information were provided by a gazetted agency on the condition it be kept confidential, Home Affairs would not be able to provide it to us.

4. Inspections of law enforcement agencies' use of covert and intrusive powers

The Office is concerned that the secrecy provisions in the Bill will operate to limit our ability to seek or receive information relevant to inspections of Home Affairs as part of our inspections of the use of covert law enforcement powers.

These functions include oversight of Home Affairs' compliance with Chapters 3 and 4 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). The Office is concerned that issues may arise if the staff of Home Affairs who provide the Office with inspection data or access to data during an inspection fall within the definition of an 'authorised Commonwealth officer' as used in new sections 503A and 52A, respectively.

In relation to our oversight function for law enforcement agencies' use of covert and intrusive powers, the Office is concerned that if an agency we oversee provided confidential information to Home Affairs, then Home Affairs will be prevented from disclosing the information to the

Office, even though the Office may still be able to access that information from the source agency (for example, the Australian Federal Police) when conducting regular inspections.

Additionally, when agencies identify compliance issues in relation to their uses of covert and intrusive powers, we rely on agencies to self-disclose this information to our Office. We are concerned that the new sections 503A and 52A may have a chilling effect or prevent this practice from occurring.

The Office's preferred approach

The Office suggests the Committee consider recommending amendments to the Bill to ensure the Office is able to receive and request information from Home Affairs consistent with the exercise of our existing powers, and the performance of our existing functions and duties. We consider this is generally and most clearly achieved by including a specific exception to the secrecy provisions to this effect.

The Office notes there are a number of legislative models for ensuring secrecy provisions intended to prohibit the disclosure of protected information do not inhibit the existing functions of the Office and other integrity agencies, such as the Inspector-General of Intelligence and Security (the IGIS) and the Australian Commission for Law Enforcement Integrity (the ACLEI).

By way of example, the protected information provisions in the *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* (the SLAID Bill), which is currently under review by the Committee, do not apply in relation to disclosure to an Ombudsman official. The SLAID Bill includes similar provisions in relation to disclosure to the IGIS.

Existing legislation that includes exceptions for disclosure to the Ombudsman include *Telecommunications (Interception and Access) Act 1979*, *Surveillance Devices Act 2004*, *Crimes Act 1914*, *Australian Federal Police Act 1979* (Part 5), *Migration Act 1958* and *Telecommunications Act 1997* (Part 15).

An alternative, and in the Office's view a less preferable, approach would be to amend the Bill to include a defence to the offence of unauthorised disclosure of confidential information. This could be similar to the defence provided in section 122.5 of the *Criminal Code Act 1995* (the Criminal Code), which provides a defence for disclosures to certain oversight bodies, such as the Commonwealth Ombudsman, the IGIS, and the ACLEI, as well as for disclosures in accordance with the PID Act and the *Freedom of Information Act 1982*.

Whilst Home Affairs has noted that the Bill includes provisions² that would enable the Minister to authorise the disclosure of confidential information to the Office, after consultation with the relevant gazetted agency that provided the information, this is not the Office's preferred model for managing exceptions to the prohibition on disclosure.

In effect, this would require Home Affairs staff, on a case-by-case basis, to seek Ministerial approval to disclose information to the Office in connection with the Office's oversight functions. We are concerned that relying on this provision, when the Office seeks to exercise powers in the performance of its existing functions, will compromise the Office's statutory independence by making the performance of some aspects of our oversight functions subject to Ministerial discretion on a case-by-case basis. This would also make the process of seeking information unnecessarily complex and lengthy.

² See new section 503B of the Migration Act and new section 52B of the Citizenship Act.

The Office wishes to emphasise that it acknowledges and respects the importance of protecting information provided on condition of confidentiality by intelligence and law enforcement agencies. The Office has security infrastructure to support the storage of protected and higher classified information.

Currently, our Canberra office can hold protected and secret classified information physically in appropriate security containers and store protected information electronically via FORTRESS. In addition, the Office is constructing a Zone 4 environment at the Canberra office, which is due to be completed shortly, after which the Office will be able to store secret classified information electronically.