



Australian Government
Attorney-General's Department

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Senate Legal and Constitutional Affairs Committee

**Inquiry into the Oversight Legislation Amendment
(Robodebt Royal Commission Response and Other
Measures) Bill 2024**

Attorney-General's Department Submission

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Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (the Committee) inquiry into the Oversight Amendment (Robodebt Royal Commission Response and Other Measures) Bill 2024 (the Bill).

The Bill implements the Government's response to recommendations 21.1 and 21.2 of the report of the Royal Commission into the Robodebt Scheme (Royal Commission). The Bill will bolster the powers and capability of the Commonwealth Ombudsman (the Ombudsman) and the Inspector-General of Taxation and Taxation Ombudsman (IGTO) to ensure that Commonwealth agencies are subject to stronger and more rigorous oversight. Enhancing the role of these oversight bodies will provide greater assurance to the public that agencies are acting with integrity and accountability.

The Bill would:

- impose a statutory duty on agency heads and their staff to use their best endeavours to assist the Ombudsman and the IGTO in the performance of all their functions (recommendation 21.1)
- enhance the Ombudsman's and IGTO's powers to obtain full, free and direct access to agency records by introducing a provision equivalent to section 33(3) of the *Auditor-General Act 1997*, requiring agencies to provide all reasonable facilities and assistance (recommendation 21.2)
- modernise and enhance the investigatory powers of the Ombudsman and IGTO by providing a power to obtain access to documents and other records by remote means
- extend the new and enhanced duties and powers contained in the Bill to apply in relation to all statutory offices held by the Ombudsman under the Ombudsman Act
- amend the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to clarify that the Inspector-General of Security and Intelligence (IGIS) is entitled to reasonable facilities and assistance when making preliminary inquiries of the head of an intelligence agency
- make technical amendments to the Ombudsman Act to clarify provisions and improve readability.

The Bill was developed in close consultation with the Treasury, the Office of the Commonwealth Ombudsman, the Office of the IGTO and the Office of the IGIS.

The department consulted all Commonwealth departments on the statutory duty to assist the Ombudsman and the enhanced information-gathering powers in the Bill. Consultation was also undertaken on the extension of the enhanced duties and powers to other functions of the Ombudsman with departments that have policy responsibilities in relation to the industry being oversighted. All agencies in the National Intelligence Community (the NIC) were consulted on the amendments to the IGIS Act. No significant concerns with the Bill were raised through the consultation process.

Background

Current oversight arrangements

The Commonwealth Ombudsman is empowered to investigate the administrative actions of most Commonwealth government agencies, subject to some limited exclusions such as the NIC and the Australian

Taxation Office (for which bespoke alternative oversight arrangements exist). The Ombudsman also oversees a range of private sector entities in its roles as Postal Industry Ombudsman, Overseas Student Ombudsman, National Student Ombudsman, Vocational Education and Training Student Loans Ombudsman and Private Health Insurance Ombudsman.

To support its oversight functions, the Ombudsman Act provides the Ombudsman with a range of information-gathering powers. These include powers for the Ombudsman to enter premises, request information from agencies and compel production of documents.

The IGTO performs a similar role in investigating taxation administration decisions and systems relating to taxation administration. The *Inspector-General of Taxation Act 2003* applies many of the powers contained in the Ombudsman Act to the IGTO, including information-gathering powers.

Recommendations of the Royal Commission

The report of the Royal Commission emphasised the importance of strong and effective oversight mechanisms in safeguarding the community's dealings with government. In considering the oversight role of the Ombudsman in relation to the Robodebt Scheme, the Royal Commission found that there was evidence of a readiness on the part of some public servants to conceal information and mislead the Ombudsman. The Royal Commission also found that good faith participation in Ombudsman investigations could not always be assumed. It made two recommendations to strengthen the role and powers of the Ombudsman:

- A statutory duty be imposed on departmental secretaries and agency chief executive officers to ensure that their department or agency uses its best endeavours to assist the Ombudsman in any investigation concerning it, with a corresponding statutory duty on the part of Commonwealth public servants within a department or agency being investigated to use their best endeavours to assist the Ombudsman in the investigation (recommendation 21.1)
- The Ombudsman Act be amended to confer on the Ombudsman a power in equivalent terms to that in section 33(3) of the *Auditor-General Act 1997*, which requires agencies to provide reasonable facilities and assistance in the exercise of certain information-gathering powers (recommendation 21.2).

The Government's response to the report of the Royal Commission accepted recommendations 21.1 and 21.2 and noted that equivalent amendments would be introduced for the IGTO.

Overview of the measures in the Bill

Statutory duty to assist

The Bill introduces a new statutory duty to assist the Ombudsman in the performance of the Ombudsman's functions. The duty would require that agency heads ensure their agency uses its best endeavours to assist the Ombudsman. The duty would also extend to individuals by requiring that officers of agencies use their best endeavours to assist the Ombudsman.

This duty is intended to reinforce the responsibility of agency heads to ensure their agency acts in good faith and proactively assists the Ombudsman in the performance of their functions. It is also intended to make it clear that the responsibility to assist the Ombudsman lies with every member of the public service.

The inclusion of the statutory duty implements recommendation 21.1 of the Royal Commission in full. While the Royal Commission recommended the statutory duty apply in the context of *investigations* by the Ombudsman, the Bill would extend the statutory duty to assisting the Ombudsman in the *performance of all of their functions*. This would include making preliminary inquiries, conducting investigations and following up on implementation of recommendations. This is intended to reflect the full spectrum of the Ombudsman's functions, which are not limited to investigations, and emphasise the importance of engaging with the Ombudsman in good faith at all times.

Consistent with the Government's response to the Royal Commission, the statutory duty would also apply to the IGTO in the performance of its functions.

Enhanced information-gathering powers

Requirement to provide reasonable facilities and assistance

The Bill would enhance the Ombudsman and IGTO's powers to obtain full, free and direct access to records by introducing an equivalent provision to subsection 33(3) of the Auditor-General Act, requiring officials to be provided with all reasonable facilities and assistance for the exercise of their powers.

Under section 14 of the Ombudsman Act, an authorised officer may enter premises occupied by an agency, or by a Commonwealth service provider under a contract with an agency, for the purposes of carrying on an investigation. The Bill would make it a criminal offence for a person who is the occupier, or is in charge of, premises to fail to provide reasonable facilities and assistance to the Ombudsman or IGTO when exercising this power to enter premises. The terms 'occupier' and 'in charge of' are intended to capture persons who have a significant degree of control over the department or agency located at the premises and would include an agency head or principal officer, or a site leader for the relevant location.

The Bill would also strengthen the information-gathering powers of the Ombudsman by explicitly providing that, when exercising the power to access premises, an authorised officer may access, inspect, take extracts from or make copies of any documents or records that may be relevant to the investigation. This would encompass access to both physical and electronic records held on site.

These amendments implement recommendation 21.2 of the Royal Commission in full, and are intended to strengthen the Ombudsman's powers and reinforce the responsibility of agencies to proactively assist the Ombudsman in an investigation.

Consistent with the Government's response to the Royal Commission, the amendments would also apply to the IGTO when exercising its power to enter premises to carry out investigation.

Remote access power

The Bill provides an additional power for the Ombudsman and the IGTO to obtain access to documents and records by remote means for the purposes of an investigation.

This power is intended to supplement the Ombudsman's existing information-gathering powers and ensure that the Ombudsman has a modern and effective suite of powers to allow for the conduct of full and transparent investigations. It would not expand the scope or type of information that the Ombudsman is able to access under its existing powers but would instead ensure powers can be exercised consistent with contemporary practices and without first having to enter an agency's premises. The term access by 'remote

means' is intended to take its ordinary meaning and include access by any means that does not require a physical presence at the premises of an agency being investigated. For example, this could include access by remote log-in credentials.

The remote access power would not be unfettered. Access would be required to be undertaken by an authorised officer of the Ombudsman for the purposes of a specific investigation. The Ombudsman would also be required to give notice of the intention for one or more authorised persons to access the documents or records and the period of access.

Similar to the Ombudsman's power to access premises, it would be an offence for a principal officer of an agency or a Commonwealth service provider to fail to provide reasonable facilities and assistance for the effective exercise of the remote access power. This is intended to ensure that agencies cannot frustrate the Ombudsman's ability to access the information it needs to conduct effective investigations.

There would be a defence to the offence of failing to provide reasonable facilities and assistance where facilitating access would pose an unacceptable risk to the security of any documents or records or to the system where they are stored. The defence is intended to clarify that it would not be unreasonable for an agency to refuse to provide facilities and assistance to the Ombudsman provided there are legitimate and serious security reasons that mean remote access would not be appropriate.

The remote access power would also be available to the IGTO for the purposes of an investigation.

Extension of enhanced duties and powers to other Ombudsman functions

The Bill would extend the new statutory duty to assist and the enhanced information-gathering powers to apply to all statutory offices held by the Ombudsman under the Ombudsman Act. This includes oversight over a range of private sector entities in the Ombudsman's role as, for example, the Private Health Insurance Ombudsman, Overseas Student Ombudsman and the new National Student Ombudsman.

Each of these statutory offices plays an important role in ensuring that complaints about the actions of government and private sector entities are resolved effectively, as well as providing assurance to the public that these sectors are operating with integrity and accountability. Extending the new and enhanced duties and powers is intended to support the performance of these important functions. It would ensure there is clear responsibility on the part of all bodies within jurisdiction to provide assistance to the Ombudsman and would provide the Ombudsman with access to modern powers that support full, independent and transparent investigations regardless of the function it is performing.

Amendments to the IGIS Act

Amendments to the IGIS Act made by the Bill would clarify that the IGIS is entitled to reasonable facilities and assistance when making preliminary inquiries of the head of an intelligence agency. The IGIS Act already places such an obligation on heads of intelligence agencies when the IGIS is undertaking inspections. The amendment would improve consistency of agency head obligations under the IGIS Act and ensure an equivalent obligation exists when the IGIS undertakes preliminary inquiries to determine whether they are authorised to or should inquire into the action of an intelligence agency.

Technical amendments

The Bill would make a range of minor and technical amendments to the Ombudsman Act to clarify provisions and improve readability of the Act. These include amendments to correct inconsistent references and remove redundant references to provisions that have been repealed.

The Bill would also make several contingent amendments in relation to other Bills that were before Parliament at the time of introduction of this Bill. These amendments would extend the statutory duty to assist the Ombudsman and the enhanced information-gathering powers in the Bill to the newly established National Student Ombudsman. The National Student Ombudsman was established as a function of the Ombudsman in the Universities Accord (National Student Ombudsman) Act 2024 which received Royal assent on 10 December 2024. A further contingent amendment would correct an omission in subsection 35(5) of the Ombudsman Act to limit disclosure by the Ombudsman of information held by the National Anti-Corruption Commission that is subject to a public interest certificate. As the Intelligence Services Legislation Amendment Bill 2023, currently before the House of Representatives, makes an unrelated amendment to the same provision, a contingent amendment is necessary.

Conclusion

The department thanks the committee for the opportunity to make a submission to the inquiry into the Bill. Strong and effective oversight mechanisms are essential to the proper functioning of government. The Bill would enhance the powers of oversight bodies, particularly the Ombudsman and the IGTO, to position these bodies to ensure government agencies act with integrity and accountability.