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**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**



This Submission concerns the Inspector-General of Intelligence and Security Amendment Bill 2011 (Cth) (hereafter, the Bill).

The submission supports the amendments the Bill would make to the *Inspector-General of Intelligence and Security Act 1986* (Cth) (hereafter, the Act). To the extent that these amendments go beyond mere clarification, they expand the capacity of the Inspector-General to perform that statutory office.

There is only one aspect of the Bill on which this submission will comment in greater detail than the above. That is Items 10 and 13 of Schedule 1 of the Bill, dealing with non-disclosure of documents or information to any court, and making an offence of such disclosure.

This submission accepts that those amendments clarify and/or rectify unintentional errors in the previous drafting of the Act. However, this submission also suggests that the Committee may wish to take the opportunity provided by its consideration of this Bill to consider the overall constitutionality of blanket non-disclosure provisions of this sort. Recent decisions of the High Court of Australia, in relation to Chapter III of the Constitution and the nature of the judicial power that it confers, suggest 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.<sup>1</sup> Although these cases dealt with a different sort of legislative provision from that which exists in the Act – namely, provisions which on their face appeared to oblige a State court to maintain the confidentiality, including from other parties, of information provided to that court by a State commissioner of police – they would appear to have broader implications. As the High Court has recently reiterated, the judicial power of the Commonwealth, with which it is vested by the Constitution, “brings with it such powers as are incidental and necessary to the exercise” of that power.<sup>2</sup> This may include “A broad power to protect the procedures of the Court against abuse.”<sup>3</sup>

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<sup>1</sup> *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.

<sup>2</sup> *Mzot v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [32] (per Gleeson CJ, Gummow and Hayne JJ); see also at [193] (per Heydon, Crennan and Kiefel JJ).

<sup>3</sup> *Ibid* at [33].

It is conceivable, in principle at least, that in some cases the proper exercise of the judicial power of the Commonwealth by a federal court, or the proper discharge of its judicial function by a State court capable of being vested with federal judicial power,<sup>4</sup> would require the disclosure of information and/or documents in the possession of the Inspector-General, or of a staff member of that office. If such a situation arose, then the constitution would prevail over the Act's attempt to forbid such disclosure. This is not at all to suggest that these provisions are per se unconstitutional. It is simply to point out to members of the Committee that the independence of the judiciary in Australia, which is guaranteed by Chapter III of the Constitution, means that blanket attempts to regulate the court's access to information and documents – such as those found in the Act, and amended by the Bill – may not be effective in all circumstances.

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<sup>4</sup> As contemplated under the so-called *Kable* principle: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.