



Submission by the
Commonwealth Ombudsman

**National Anti-Corruption Commission Bill
2022**

Submission by the Commonwealth Ombudsman, Iain Anderson

14 October 2022

Introduction and summary

1. The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to make a submission to the Joint Select Committee on National Anti-Corruption Commission Legislation comprising the National Anti-Corruption Commission Bill 2022 (the Bill) and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential Bill). If enacted, these bills would establish the National Anti-Corruption Commission (the NACC).
2. This submission outlines the proposed new role and responsibilities of the Office in Australia's integrity landscape and identifies the points of interaction between the NACC and the Office. This includes:
 - the Office's oversight of the NACC's use of covert and intrusive powers
 - the Office's oversight of complaints about NACC administrative actions
 - the Office's referral of corruption issues and information to the NACC
 - the NACC's ability to commence an investigation into a corruption issue previously investigated by the Office
 - the impact of the NACC's information gathering powers on the Office.
3. I note 7.292 of the Explanatory Memorandum for the Bill and Consequential Bill states the Commonwealth Ombudsman would have jurisdiction to investigate complaints about the NACC. Under cl 184 of the Bill the Inspector of the NACC, rather than my Office, would take complaints about the NACC. My Office would have jurisdiction to investigate the administrative actions of the NACC.
4. I am satisfied that the mechanisms for my Office to oversee the NACC's use of covert and intrusive powers are sufficient. Subject to being appropriately resourced, I am also satisfied with the mechanisms for my Office to oversee state integrity agencies' use of the covert and intrusive industry assistance powers under Part 15 of the *Telecommunications Act 1997*.

Our role

5. The purpose of the Office is to:
 - provide assurance that the organisations we oversee act with integrity and treat people fairly
 - influence systemic improvement in public administration in Australia and the region.
6. We seek to achieve our purpose by:
 - identifying administrative deficiencies through independent review of complaints about Australian Government administrative action
 - fostering public administration that is accountable, lawful, fair, transparent and responsive
 - providing a level of 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 covert, intrusive and coercive powers within our jurisdiction.

Oversight of the NACC's use of covert and intrusive powers

7. The Bill would empower the Office to oversee the NACC's use of covert and intrusive powers under the following legislative regimes:
 - Controlled operations powers under Part IAB of the *Crimes Act 1914*, which would provide legal protection to the NACC and civilian participants for conduct that is otherwise unlawful or subject to civil liability during covert investigations.
 - The use surveillance devices, tracking devices and computer access warrants, which would enable the NACC to covertly access and search devices such as laptops, tablets, mobile phones and USBs under the *Surveillance Devices Act 2004*.
 - Telecommunications interception powers under Chapter 2 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) which would enable the NACC to listen or record information passing over telecommunications systems, in real time without the knowledge of the person making the communication.
 - Stored communications powers under Chapter 3 of the TIA Act, which would enable the NACC to access the content of communications that have already occurred and are stored in the systems of a carrier or carriage service provider. Examples of stored communications include Short Message Service (SMS), Multimedia Messaging Service (MMS), emails and voicemails.
 - Telecommunications data (commonly referred to as 'metadata') powers under Chapter 4 of the TIA Act, which would enable the NACC to access information about an electronic communication other than the contents or substance of that communication – for example, the date, time and duration of a communication.
 - International production orders under Schedule 1 of the TIA Act, which would enable the NACC to access telecommunication interceptions, telecommunications data and stored communications from prescribed communications providers in foreign countries with which Australia has a designated international agreement.
 - Industry assistance powers under Part 15 *Telecommunications Act 1997*, which would enable the NACC to request and, in limited circumstances, compel designated communications providers to provide technical assistance. This could include requesting or requiring a carrier to increase the data allowance on a device to enable a surveillance device to be remotely monitored without consuming the target's data; or requesting or requiring a social media platform to assist with testing or developing a tool to automate the creation of online personas and historical content to facilitate online engagement.
8. Consistent with the Office's oversight of other agencies' use of these powers, we would carry out our oversight of the NACC through:
 - inspecting the NACC's records, systems, training and governance material
 - interviewing staff
 - observing and assessing processes and practices
 - making recommendations and suggestions for improvement
 - preparing statutory reports on our inspection findings which are tabled in Parliament and made public.
9. Concurrently with the NACC reform, the Consequential Bill amends the *Telecommunications Act 1997* to permit the following state-based anti-corruption

commissions to use the covert and intrusive industry assistance powers under Part 15 of the *Telecommunications Act 1997*:¹

- the Independent Commission Against Corruption of New South Wales
 - the New South Wales Crime Commission
 - the Law Enforcement Conduct Commission of New South Wales
 - the Independent Broad-based Anti-corruption Commission of Victoria
 - the Crime and Corruption Commission of Queensland
 - the Independent Commission Against Corruption of South Australia
 - the Corruption and Crime Commission of Western Australia.
10. Robust oversight is critical to maintaining public confidence and trust in integrity agencies. It is important that when it affords agencies additional powers – particularly where those powers are covert – the Government ensures the responsible oversight body is appropriately funded to provide effective assurance.
11. We are engaging with Government about proposed funding options to ensure my Office can provide effective oversight of these agencies’ use of the industry assistance powers.

Oversight of complaints about NACC administrative actions

12. Complaints about the conduct or activities of the NACC will be handled by the Inspector of the NACC.² Such complaints could concern the NACC’s investigations, and allegations of corruption against the NACC or NACC staff.
13. The Office will have jurisdiction to investigate administrative actions of the NACC. This is because the NACC fits the definition of a ‘prescribed authority’ within the meaning of the *Ombudsman Act 1976* (Ombudsman Act), being a body established by an enactment for a public purpose, and there being no exemptions to the definition of ‘prescribed authority’ that expressly apply to it. Examples of what might fall within the definition of ‘administrative action’ and therefore the Office’s jurisdiction include complaints about delays in the NACC taking action or communicating with complainants, and administrative practices in relation to a hearing.³
14. We recognise that while this potentially concurrent jurisdiction with the Inspector in terms of complaints ensures comprehensive oversight, it will require our Office to develop and maintain working relationships with the NACC (potentially with a MOU) to prevent duplication of effort. The Office may also conduct an own motion investigation into the NACC and would seek to consult with the Inspector as part of this process.

¹ National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill (Cth) 2022, cl 263-270.

² National Anti-Corruption Commission Bill (Cth) 2022, cl 184.

³ National Anti-Corruption Commission Bill (Cth) 2022, cl 94; Explanatory Memorandum for the Bill and Consequential Bill, paragraph 7.229.

Referral of corruption issues to the NACC

Public interest disclosures

15. The Office is, like all Commonwealth agencies, subject to the *Public Interest Disclosure Act 2013* (PID Act). Our current or former staff or officials can make disclosures to the Office about conduct.
16. The Office is also (along with IGIS) the oversight body for Public Interest Disclosures (PIDs). The PID Act works with the Ombudsman Act to give the Office the functions and powers required to receive PIDs relating to other agencies, or PID complaints relating to how a PID was handled by another agency. As the oversight body for the PID scheme, the Office currently handles and investigates PIDs relating to the conduct of public officials from other Commonwealth agencies.
17. Under the NACC legislation, if the Office's PID team identifies a corruption issue concerning another agency within a PID made to the Office, the PID team could refer the corruption issue to the NACC using the general voluntary referral provision.⁴ In certain circumstances, the PID team could also transfer the information about the corruption issue to the NACC under new provisions in the Ombudsman Act.⁵
18. Under the NACC legislation, the Office, as per any other Commonwealth agency, would be required to refer PIDs about the Office (internal PIDs) that contain corruption issues to the NACC.⁶ This would require the Office's PID team to refer corruption issues to the NACC Commissioner where the PID team identifies serious or systemic corruption issues involving past or current staff members.
19. This obligation mirrors the mandatory obligations on the Commonwealth Ombudsman, as the head of a Commonwealth agency, to refer any corruption issue involving past or current staff to the NACC Commissioner.⁷ This obligation would arise as soon as the Ombudsman becomes aware of such a corruption issue. It is appropriate that staff in the Office of the Commonwealth Ombudsman are subject to the NACC regime.
20. The Bill provides for the Office to continue to take action in relation to a PID⁸ unless directed by the Commissioner to stop that action.⁹ Such a direction could only be provided where the Office's actions would impact on the effectiveness of the Commissioner's actions.¹⁰ To ensure a PID was not neglected by either our Office or the NACC, our Office would develop and maintain working relationships with the NACC to ensure decisions around action are communicated by and to either body.
21. PID referrals and transfers of corruption information to the NACC under the new clause 6G of the Ombudsman Act would fall within the scope of the 'NACC disclosures', under

⁴ National Anti-Corruption Commission Bill (Cth) 2022, cl 32.

⁵ National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill (Cth) 2022, cl 130.

⁶ National Anti-Corruption Commission Bill (Cth) 2022, cl 35.

⁷ National Anti-Corruption Commission Bill (Cth) 2022, cl 33.

⁸ National Anti-Corruption Commission Bill (Cth) 2022, cl 39.

⁹ National Anti-Corruption Commission Bill (Cth) 2022, cl 43(1).

¹⁰ National Anti-Corruption Commission Bill (Cth) 2022, cl 43(2)(b).

the regime.¹¹ This would protect PID officers making referrals from civil, criminal or administrative liabilities.¹² We note the critical importance of this provision given the current secrecy provisions in the PID Act which make it an offence to disclose information connected to a PID to another person.¹³

22. Importantly, the Bill currently does not adversely impact on the operation of the PID Act and Ombudsman Act as it relates to the Offices' abilities to handle PIDs. Should there be further amendments proposed to the Bill, ensuring these amendments do not water down protections afforded by the PID Act or oversight powers of the Office will be important.
23. Further, the Office understands PID reform remains a priority for the government and further legislative amendments are likely. The Office will continue to consult and cooperate with relevant agencies as PID reforms are developed.

Complaints

24. For complaints received by the Office which raise a serious or systemic corruption issue, the Office would have discretion to refer information concerning these complaints to the NACC, and in the case of potential NACC corruption, the Inspector of the NACC.¹⁴ Following the referral of such information, the Consequential Bill allows the Office to investigate such a complaint, investigate further, not investigate the complaint or not investigate further.
25. Maintaining the discretionary nature of this power ensures the independence of the Office as well as providing flexibility so oversight systems remain intact. A possible outcome of this is some complaints may be missed or double handled. To mitigate the risk of these scenarios occurring, the Office would develop and maintain working relationships with the NACC to ensure decisions around action are communicated by and to either body.

Previous investigations by the Office

26. Clause 45 of the Bill provides the NACC would be able to commence an investigation into a corruption issue previously investigated by the Office where a public interest threshold is met. Subclause 45(3) sets out a non-exclusive list of matters to which the Commissioner may have regard in determining whether the public interest threshold is met.

Information gathering powers of the NACC

27. The Office would be subject to information gathering powers of the NACC Commissioner including directions to produce information or documents relevant to a corruption

¹¹ National Anti-Corruption Commission Bill (Cth) 2022, cl 23 – NACC disclosure is defined to include (a) where a person refers a corruption issue under Part 5 of the NACC Bill, which covers PID referrals, and (c) where a person gives information relating to a corruption issue.

¹² National Anti-Corruption Commission Bill (Cth) 2022, cl 24.

¹³ PID Act, s 65.

¹⁴ National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill (Cth) 2022, cl 130 – new section 6G of the Ombudsman Act.

investigation¹⁵ and search powers.¹⁶ The confidentiality (or secrecy) provisions in the Ombudsman Act are ‘trumped’ by the NACC’s information gathering powers.¹⁷ An Ombudsman officer who complies with such a direction from the NACC does not commit an offence under the Ombudsman Act.¹⁸

28. Where the NACC’s investigation report may involve the release of sensitive information which relates to the Office, the NACC would be obliged to consult the Commonwealth Ombudsman first.¹⁹ The Ombudsman, like other heads of Commonwealth agencies, would be provided an opportunity to respond before the NACC Commissioner included information critical of the Ombudsman in an investigation report.²⁰
29. Further, the Office has coercive information gathering powers under a range of legislation including the power to require an agency to give us relevant information and answer our questions.²¹ The NACC could direct the Office to provide such information to the NACC,²² unless it is protected by the exempt secrecy provisions established by the Bills.²³ While not an obligation on the NACC, it would be desirable for the NACC to consult the Office before including coercively acquired information in a NACC investigation report as there may be a public interest in such information remaining confidential.

Other comments

30. The Bill empowers the NACC Commissioner to hold hearings with the same protections and immunities as a Justice of the High Court.²⁴ However, the clause provides that the protections and immunities do not limit the powers of the Office to investigate issues of administrative practice in relation to a hearing held under the NACC regime.²⁵
31. Clause 31(1)(a)(i) of the Bill titled ‘Protection for journalist’s informants’ contains the phrase ‘person who works in a professional capacity as a journalist’. The Office notes that similar wording is used in the TIA Act. The Office has suggested the Attorney-General’s Department develop guidance on this topic to help agencies determine when a person is working in a professional capacity as a journalist. Our experience overseeing the TIA Act has shown that frequently this assessment is not straightforward.

¹⁵ National Anti-Corruption Commission Bill (Cth) 2022, cl 57.

¹⁶ National Anti-Corruption Commission Bill (Cth) 2022, Part 7, Division 7.

¹⁷ National Anti-Corruption Commission Bill (Cth) 2022, cl 114(1)(c).

¹⁸ National Anti-Corruption Commission Bill (Cth) 2022, cl 114(6).

¹⁹ National Anti-Corruption Commission Bill (Cth) 2022, cl 151.

²⁰ National Anti-Corruption Commission Bill (Cth) 2022, cl 153.

²¹ For example, paragraph 7 of this submission lists a series of Acts under which the Office has coercive information gathering powers.

²² National Anti-Corruption Commission Bill (Cth) 2022, cl 57.

²³ National Anti-Corruption Commission Bill (Cth) 2022, cl 114(1)(c).

²⁴ National Anti-Corruption Commission Bill (Cth) 2022, cl 94(1).

²⁵ National Anti-Corruption Commission Bill (Cth) 2022, cl 94(3).