



Auditor-General for Australia



1 February 2019

Dr Sean Turner
A/g Committee Secretary
Legal and Constitutional Affairs Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Dr Turner

Australian National Audit Office submission—inquiry into the National Integrity Commission Bill 2018, National Integrity (Parliamentary Standards) Bill 2018, and National Integrity Commission Bill 2018 (No. 2)

The attached submission is provided in response to your invitation of 13 December 2018 to provide a submission to the Legal and Constitutional Affairs Legislation Committee's inquiry into the National Integrity Commission Bill 2018, National Integrity (Parliamentary Standards) Bill 2018 and National Integrity Commission Bill 2018 (No. 2).

The Australian National Audit Office's (ANAO) review of the proposed integrity framework created by the Bills has focused on the application of the *Public Governance, Performance and Accountability Act 2013* to the entities and office holders established under the Bills, and the Bills' interface with the *Auditor-General Act 1997*. The submission also makes a number of observations regarding the successful implementation of the framework, based on our audit experience.

A key issue is how best to establish an effective Australian National Integrity Commission (the Commission) and Parliamentary Inspector of the Australian National Integrity Commission (Parliamentary Inspector) without affecting the existing mandate and independence of the Auditor-General and ANAO. As an independent officer of the Parliament, the Auditor-General's primary role is to provide independent assurance to the Parliament through public reporting. Accordingly, the Auditor-General has complete discretion in the performance or exercise of Auditor-General functions and powers under the *Auditor-General Act 1997*. Establishing clear and independent working relationships between the Auditor-General and any new statutory office holders, including the proposed National Integrity Commissioner and Parliamentary Inspector (including as the auditor of the

new Commission and integrity functions) will enhance the effectiveness of the federal integrity framework.

I welcome the framework's application to ANAO staff in the performance of their administrative functions. However, in their current form the Bills would impact negatively on the independence of the Auditor-General and the effective administration of Auditor-General functions under the Auditor-General Act in a number of respects. Of particular concern is the extension of the coercive and mandatory information-gathering powers of the Commission and office holders to the Auditor-General and ANAO staff in the performance of Auditor-General functions.

As discussed further in the attached submission, the ANAO would support a model which involves:

- application of the Public Governance, Performance and Accountability Act to the proposed Commission, Parliamentary Inspector function, Whistleblower Protection Commissioner function, Parliamentary Integrity Adviser function and Parliamentary Standards Commissioner function—including external audit and review by the Auditor-General under the Auditor-General Act;
- mandatory reporting obligations applying to an entity's accountable authority, including the Auditor-General, regarding their own employees;
- the Auditor-General having a discretion to disclose particular information to the National Integrity Commissioner, Whistleblower Protection Commissioner and/or Parliamentary Inspector where such information is obtained in the course of performing an Auditor-General function under the Auditor-General Act, if the Auditor-General is of the opinion that the disclosure is in the public interest. This approach would be consistent with the Auditor-General's existing power to disclose particular information to the Commissioner of the Australian Federal Police if the Auditor-General is of the opinion that the disclosure is in the public interest;
- the National Integrity Commissioner, Whistleblower Protection Commissioner and Parliamentary Inspector having authority to request information and assistance from the Auditor-General, and the Auditor-General exercising (in the public interest) a discretion relating to any such request. This approach is preferred to the introduction of coercive information-gathering powers to compel the Auditor-General or ANAO staff to disclose information obtained in the course of undertaking an Auditor-General function under the Auditor-General Act;
- avoiding any implication that a referral of issues from the National Integrity Commissioner or Whistleblower Protection Commissioner is a direction to the Auditor-General;
- arrangements which ensure that the proposed new integrity framework and operations of the proposed Commission and Parliamentary Inspector do not affect the performance of Auditor-General functions, information-gathering powers or the Auditor-General's independent reporting to Parliament; and
- avoiding a situation where heads of Commonwealth agencies and their personnel are compelled to disclose proposed ANAO reports and report extracts or information in those documents, contrary to the Auditor-General Act.

The need to address these issues not only reflects the need to preserve the independence of the Auditor-General and the ANAO in the performance of Auditor-General functions, but also the broad mandate provided by Parliament to the Auditor-General. That mandate is not limited to misconduct and corruption within the Commonwealth public sector—which is the primary focus of the draft Bills and a number of other integrity agencies—but extends to all aspects of entities' efficiency, effectiveness, economy and ethical behaviour in their administration of public resources. That mandate is discharged with the express purpose of providing independent assurance and reporting to the Parliament on the proper use of public resources by entities.

I see the intention in creating the Commission and other new functions as adding to the existing integrity framework and would be concerned if the Auditor-General's mandate and independence were to be adversely affected, given the important role that the Auditor-General has in respect of providing transparency and accountability through reporting to the Parliament. Treating the Auditor-General solely as the head of a Commonwealth agency without acknowledging this broader mandate brings with it challenges to the independence of the Office.

The submission notes that impacts on the Auditor-General Act resulting from the establishment of the proposed Commission, Parliamentary Inspector function, Whistleblower Protection Commissioner function, Parliamentary Adviser function and Parliamentary Standards Commissioner function—particularly any impacts on audit independence and reporting—are likely to be of interest to the Parliament's Joint Committee of Public Accounts and Audit, which is the ANAO's oversight committee under the *Public Accounts and Audit Committee Act 1951*.

The key contact for the ANAO is

Yours sincerely

Grant Hehir
Auditor-General

ANAO submission

Legal and Constitutional Affairs Legislation Committee

Inquiry into the National Integrity Commission Bill 2018 [Provisions], the National Integrity (Parliamentary Standards) Bill 2018 [Provisions], and the National Integrity Commission Bill 2018 (No. 2)

Background: role of the Auditor-General

The office of Auditor-General was the first statutory integrity entity established by the Commonwealth Parliament, following passage of the *Audit Act 1901*. That Act was the fourth passed by the new Commonwealth Parliament. As such, the functions and role of the Auditor-General are well established in the accountability framework of the Australian public sector.

The Auditor-General is an independent officer of the Parliament whose functions, as set out in the *Auditor-General Act 1997*, include:

- auditing the financial statements of Commonwealth entities, Commonwealth companies and their subsidiaries;
- auditing annual performance statements of Commonwealth entities in accordance with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act);
- conducting performance audits, assurance reviews, or audits of the performance measures, of Commonwealth entities and Commonwealth companies and their subsidiaries;
- conducting performance audits of Commonwealth partners as described in section 18B of the Auditor-General Act;
- providing other audit services as required by other legislation or allowed under section 20 of the Auditor-General Act; and
- reporting directly to the Parliament on any matter or to a Minister on any important matter.

The Auditor-General's mandate is not limited to misconduct and corruption within the Commonwealth public sector, but extends to all aspects of entities' efficiency, effectiveness, economy and ethical behaviour in their administration of public resources. The audit and assurance function is not an investigatory function of the type undertaken by other Commonwealth integrity bodies.

The Auditor-General has strong information-gathering and access powers, including powers to compel the provision of information, documents and evidence.

The Auditor-General is assisted in the performance of statutory functions by the Australian National Audit Office (ANAO).

The Auditor-General's primary role is to provide independent assurance to the Parliament through public reporting. Audit and other reports prepared by the ANAO (including the papers used to develop them) are therefore protected by Parliamentary privilege under section 16 of the *Parliamentary Privileges Act 1987*. Section 16 also prohibits the use of such reports and papers as evidence in court and tribunal proceedings. This was the Commonwealth's position in the recent Federal Court action, *Thales Australia Pty Limited v Auditor-General for the Commonwealth*.

Further, strict confidentiality requirements apply to the conduct of audits and reviews under the Auditor-General Act, so as to preserve the confidentiality of government and other information until reports are presented to the Parliament and in the interests of providing due process and natural justice to audited entities and those with a special interest in a report.

Consistent with the Auditor-General Act and auditing standards, the ANAO's audit and assurance processes are iterative—evidence collected by the ANAO is presented to audited entities and those with a special interest for comment, so as to inform the final audit opinion and findings provided to Parliament by the Auditor-General. The ANAO's understanding of evidence may therefore evolve in the course of an audit or assurance activity, and it is not uncommon for concerns and issues arising early in an audit to be clarified and resolved as a result of further testing and analysis of audit evidence.

ANAO performance and financial statements audits include procedures intended to assess entity risks and internal controls—including those relating to fraud prevention/detection and ethical conduct—and the Auditor-General's reports may include findings and conclusions concerning misstatements of financial results or indeed possible misconduct and/or corruption. In recent years, financial statement audits have included findings regarding weakness at a systems control level in major initiatives such as VET, child-care and NDIA provider arrangements. Performance audits have also made findings relating to the administration of probity arrangements in public sector procurements.

The ANAO is not an investigatory agency and will, if necessary and consistent with auditing standards, bring evidence of possible misconduct and/or corruption to the attention of the responsible accountable authority and investigating authority within the affected entity where one exists. This was done, for example, in the course of performance audits on:

- Defence credit cards—see paragraphs 3.17 and 4.33 of Auditor-General Report No.33 2015-16 *Defence's Management of Credit and other Transaction Cards*; and
- Defence disposals—see Auditor-General Report No.19 2014-15 *Management of the Disposal of Specialist Military Equipment*. In the context of that audit, the ANAO drew information to the attention of the then Inspector-General Defence and also sought information from the Inspector-General on the outcome of a number of internal reviews.

Information and findings presented in audit reports have also prompted internal investigations by entities. For example, this occurred in the course of the credit cards audit mentioned above, and in the context of Auditor-General Report No.16 2016-17 *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (page 96 of that audit reproduces correspondence from the responsible department about the internal review).

The ANAO is also aware, including through its involvement in the Integrity Agencies Group convened by the Australian Public Service Commission, of instances where it has conducted audit work in relation to activities which are also the subject of investigations by other integrity agencies. This has not posed any difficulty to date.

The performance audit process and Auditor-General's reporting to Parliament continued independently of the various investigations referred to above.

Section 8 of the Auditor-General Act provides that as an independent officer of the Parliament, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to: whether or not a particular audit is to be conducted; the way in which a particular audit is to be conducted; or the priority to be given to any particular matter. In the exercise of these functions or powers, the Auditor-General must, however, have regard to the audit priorities of the Australian Parliament, as determined by the Parliament's Joint Committee of Public Accounts and Audit (JCPAA).

The ANAO also receives a regular flow of correspondence from Parliamentarians and the public requesting that it audit or review aspects of government administration and this correspondence will sometimes include accusations of improper or corrupt conduct. From time to time, persons bringing their concerns to the attention of Ministers, the Parliament, responsible entities and integrity agencies also provide copies of that correspondence to the ANAO.

The JCPAA is the ANAO's oversight committee, with statutory responsibilities under the *Public Accounts and Audit Committee Act 1951* to examine all reports of the Auditor-General, consider the operations and resources of the ANAO, and otherwise report to the Parliament on any matter relating to the Auditor-General's functions and powers. Proposed amendments to the Auditor-General Act (and its predecessor, the *Audit Act 1901*) and other legislation which impacts on the role of the Auditor-General and ANAO have been the subject of inquiries by the JCPAA given its statutory role and relationship with the Auditor-General.

Under the Auditor-General Act, the Auditor-General is assisted in the performance of statutory functions by the ANAO, an independent statutory agency with staff engaged under the *Public Service Act 1999*. The Auditor-General is the accountable authority for the ANAO under the PGPA Act, and the Agency Head under the Public Service Act. The ANAO consists of the Auditor-General and staff of the Office. Under the Auditor-General Act, directions to staff of the ANAO relating to the performance of the Auditor-General's functions may only be given by the Auditor-General or ANAO staff authorised to give such directions by the Auditor-General. These statutory safeguards protect the independence of the Office.

The remainder of this submission addresses a number of key issues, in the context of the background information set out above, relating to: the proposed National Integrity Commission (the Commission), Parliamentary Inspector of the Australian National Integrity Commission (Parliamentary Inspector), Parliamentary Integrity Adviser and Parliamentary Standards Commissioner; and the interface between the Bills and Auditor-General Act:

- application of the PGPA Act to the Commission, Whistleblower Protection Commissioner function, Parliamentary Inspector function, Parliamentary Integrity Adviser function and Parliamentary Standards Commissioner function, and arrangements for external audit and review of the Commission and those functions by the Auditor-General;
- reporting to the National Integrity Commissioner and Whistleblower Protection Commissioner by the Auditor-General, as the accountable authority and agency head for the ANAO, in respect to ANAO staff;
- arrangements for the disclosure of particular information to the National Integrity Commissioner and Whistleblower Protection Commissioner by the Auditor-General, where that information has been collected in the course of performing an Auditor-General function;
- use of the Commission's, Parliamentary Standards Commissioner's (and if prescribed by regulations the Parliamentary Inspector's) coercive powers to compel ANAO staff to disclose information obtained in the course of undertaking an Auditor-General function;
- use of the Commission's, Parliamentary Standards Commissioner's (and if prescribed by regulations the Parliamentary Inspector's) coercive powers to compel other heads of Commonwealth agencies and their personnel to disclose information obtained in the course of undertaking an Auditor-General function;
- referring issues to the Auditor-General for investigation;
- avoiding impacts on the Auditor-General's information-gathering powers;
- avoiding impacts on the Auditor-General's independent reporting to Parliament; and
- the operation of the proposed Parliamentary Inspector function.

The submission also makes a number of observations regarding the implementation of the new integrity framework, based on our audit experience.

Issue 1: Application of the PGPA Act to the Commission, Whistleblower Protection Commissioner function, Parliamentary Inspector function, Parliamentary Integrity Adviser function and Parliamentary Standards Commissioner function, and arrangements for external audit and review of the Commission and those functions by the Auditor-General

The PGPA Act should apply to the proposed Commission (including the Whistleblower Protection Commissioner function), Parliamentary Inspector function, Parliamentary Standards Commissioner function and Parliamentary Integrity Adviser function, including external audit and review by the Auditor-General under the Auditor-General Act. The National Integrity Commission Bill 2018 (NIC Bill) and very similar National Integrity Commission Bill 2018 (No. 2) currently provide that the Commission will be a listed entity in accordance with the PGPA Act.

- As the external auditor for the proposed Commission the ANAO would, for example, undertake the annual audit of the Commission's financial statements and periodic performance audits of the Commission's administration against the PGPA Act requirements for efficient, effective, economical and ethical use of public resources.
- As the external auditor of the Commission and the Whistleblower Protection Commissioner function, Parliamentary Inspector function, Parliamentary Standards Commissioner function and Parliamentary Integrity Adviser function, the Auditor-General may decide to conduct performance audits or other reviews of the administration of those functions, which clause 271 of the draft NIC Bill and clauses 80 and 90 of the National Integrity (Parliamentary Standards) Bill 2018 (NI(PS) Bill) indicate will be undertaken by staff of the Parliamentary Departments made available to assist the Parliamentary Inspector, Parliamentary Standards Commissioner and Parliamentary Integrity Adviser.
- We note that under subclause 253(2) of the NIC Bill and subclause 40(2) of the NI(PS) Bill the Parliamentary Inspector and Parliamentary Standards Commissioner would be independent officers of the Parliament. The Parliamentary Budget Officer is similarly an officer of the Parliament and is subject to external audit and review by the Auditor-General.

Clause 235 of the draft NIC Bill provides a discretion to the National Integrity Commissioner to exclude information from an annual report intended for the Parliament if the Commissioner is satisfied that the information is sensitive information and 'it is desirable in the circumstances' to exclude the information from the annual report. For the avoidance of doubt, it should be made clear that this provision would not extend to information appearing in the Auditor-General's Independent Auditor's Report to the responsible Minister on the Commission's annual financial statements, or in the future, the Auditor-General's independent report on the Commission's annual performance statements.

As drafted, the NIC Bill appears to provide that the existing Australian Commission for Law Enforcement Integrity (ACLEI) will continue to be a listed entity under the PGPA Act, with the Law Enforcement Integrity Commissioner remaining as the accountable authority of ACLEI. However, the Law Enforcement Integrity Commissioner would be subject to direction from the National Integrity Commissioner in accordance with amendments to the *Law Enforcement Integrity Commissioner Act 2006* made by clause 2 of Schedule 1 of the NIC Bill. The effect of this would be that substantive functions under the Law Enforcement Integrity Commissioner Act would be jointly administered by the National Integrity Commissioner and the Law Enforcement Integrity Commissioner (noting that the National Integrity Commissioner cannot provide directions in relation to the Law Enforcement Integrity

Commissioner's functions and powers under either the PGPA Act or Public Service Act). The Parliament may wish to consider the implications of these proposed arrangements for the accountability of the National Integrity Commissioner and Law Enforcement Integrity Commissioner. Other instances of split or unclear accountabilities appear to arise in respect to:

- clause 218—which provides that the Commission's CEO (who is the entity accountable authority) is also subject to direction by the Commissioners; and
- amendments in clause 1 of Schedule 1 of the NIC Bill—which provide that the National Integrity Commissioner may be appointed by the Minister to act as the Law Enforcement Integrity Commissioner. This would be unusual as the National Integrity Commissioner would then be the accountable authority of ACLEI, but not the accountable authority of the Commission.

Issue 2: Reporting to the National Integrity Commissioner and Whistleblower Protection Commissioner by the Auditor-General, as the accountable authority and agency head for the ANAO, in respect to ANAO staff

Clauses 44 and 162 of the NIC Bill require a head of a Commonwealth agency to notify the National Integrity Commissioner as soon as practicable after becoming aware of an allegation, or information that raises a corruption issue, or a whistleblower protection issue. The Auditor-General is the head of a Commonwealth agency.

The ANAO has no objection to such reporting processes applying in respect to allegations, or information, that raise corruption or whistleblower protection issues relating to ANAO staff, but notes the potential impact of clauses 44 and 162 of the draft NIC Bill on the independent conduct of Auditor-General functions if the Auditor-General is required to stop an audit or review activity which an affected staff member may be part of. The preferred approach is for the Auditor-General to decide on the deployment of an affected staff member, pending the outcome of any investigation into their conduct, so that an audit or review may continue.

The draft NIC Bill would allow the National Integrity Commissioner to direct the head of a Commonwealth agency to give the National Integrity Commissioner all the information and documents that relate to the issue and which are in the possession or under the control of the head of the agency. As discussed further in the context of Issue 3 below, the Auditor-General should have a discretion (to be exercised in the public interest) regarding the provision of information to the National Integrity Commissioner relating to an ANAO staff member's conduct, so as to avoid the unnecessary disclosure of material collected in the performance of an Auditor-General function—material which is otherwise subject to the confidentiality obligations established by subsection 36(1) of the Auditor-General Act. To address this issue, consideration should be given to referencing section 36 of the Auditor-General Act in paragraph 79(4)(d) of the NIC Bill.

This approach would have the further benefit of helping to address issues of Parliamentary privilege arising in respect to information collected in the course of an Auditor-General function, the purpose of which is to report independently to the Parliament. As discussed in the background to this submission, audit and other reports prepared by the ANAO (including the papers used to develop them) are protected by Parliamentary privilege under section 16 of the *Parliamentary Privileges Act 1987*. Section 16 also prohibits the use of such papers as evidence in court and tribunal proceedings.

The benefits of preserving the Auditor-General's discretion (to be exercised in the public interest) regarding the provision of information and the conduct of an Auditor-General function apply equally to the following parts of the draft NIC Bill:

- subclauses 50(2) and 50(3)—which require the head of a Commonwealth agency, including the Auditor-General, to comply with any request from the National Integrity Commissioner for information to assist the Commissioner in making a decision about dealing with a corruption issue;
- subclauses 50(5) and 53(6)—which provide that the National Integrity Commissioner may direct the head of a Commonwealth agency to which the corruption issue relates, including the Auditor-General, to not investigate a corruption issue. As currently drafted, it is not clear if this provision would allow the National Integrity Commissioner to direct the Auditor-General to stop an audit or review, as a corruption issue may relate to an audit or review;
- subclauses 53(3) and 53(4)—which require the head of any Commonwealth agency, including the Auditor-General, to comply with any request from the National Integrity Commissioner for information relating to an own initiative investigation of the Commissioner;
- clause 58—which provides that the National Integrity Commissioner may direct the head of a Commonwealth agency that has started or continued investigating a corruption issue before the National Integrity Commissioner made a decision to deal with that issue, including the Auditor-General, to give the National Integrity Commissioner information or documents. As currently drafted, the Auditor-General would need to comply with such a direction including a direction to provide audit evidence to the National Integrity Commissioner;
- clause 72—which requires a person to give information or produce documents specified in a notice from the National Integrity Commissioner. Clause 77 establishes an offence for failure to comply with the notice and paragraph 79(4)(d) ensures that this offence applies where failure to do so results from the need for ANAO staff to comply with the confidentiality obligations in section 36 of the Auditor-General Act. As discussed above, it would be appropriate to consider including section 36 of the Auditor-General Act as one of the secrecy provisions referenced in the draft NIC Bill, including in paragraph 79(4)(d);
- clause 82—which allows the National Integrity Commissioner to summon a person to attend a hearing and give evidence or produce documents or things. Clause 92 establishes offences for failure to attend a hearing, failure to swear an oath or make an affirmation or answer a question and paragraph 102(5)(d) ensures that this includes where failure to do so results from the need for ANAO staff to comply with the confidentiality obligations in section 36 of the Auditor-General Act. As discussed above, it would be appropriate to consider including section 36 of the Auditor-General Act as one of the secrecy provisions referenced in the draft NIC Bill, including in paragraph 102(5)(d);
- clause 89—which provides that the National Integrity Commissioner may direct that particular information must not be published, or must not be published except in a particular manner. As discussed, the making of such a direction in respect to information collected by the ANAO in the performance of an Auditor-General function would erode the Auditor-General's independent exercise of powers and reporting to the Parliament;
- clause 113—which gives the National Integrity Commissioner and authorised officers the ability to apply for a search warrant to search premises where there is reasonable grounds for suspecting that there is or will be evidential material. The ANAO has no objection to search warrants to enter its premises for the purpose of an investigation relating to the conduct of its staff (in the exercise of their administrative functions), but would object to the power applying in relation to information collected in the course of performing an Auditor-General function, which is held in confidence under section 36 of the Auditor-General Act, and for the purposes

of preparing reports to Parliament. Information of this type will attract Parliamentary privilege and could not be used as evidence in court and tribunal proceedings;

- subclauses 165(4) and 165(5)—which require the head of a Commonwealth agency, including the Auditor-General, to comply with any request from the Whistleblower Protection Commissioner for information to assist that Commissioner in monitoring and providing guidance in relation to disclosures of wrongdoing;
- subclauses 169(2) and 169(3)—which require the head of a Commonwealth agency, including the Auditor-General, to comply with any request from the Whistleblower Protection Commissioner for information to assist that Commissioner in making a decision about dealing with a whistleblower protection issue;
- subclauses 172(3) and 172(4)—which require the head of any Commonwealth agency, including the Auditor-General, to comply with any request from the Whistleblower Protection Commissioner for information relating to an own initiative investigation of that Commissioner;
- subclauses 169(5) and 172(6)—which provide that the Whistleblower Protection Commissioner may direct the head of a Commonwealth agency to which the whistleblower protection issue relates, including the Auditor-General, to not investigate a whistleblower protection issue. As currently drafted, it is not clear if this provision would allow the Whistleblower Protection Commissioner to direct the Auditor-General to stop an audit or review as a whistleblower protection issue may relate to an audit or review; and
- clause 177—which provides that the Whistleblower Protection Commissioner may direct the head of a Commonwealth agency that has started or continued investigating a whistleblower protection issue before the Whistleblower Protection Commissioner made a decision to deal with that issue, to give the Whistleblower Protection Commissioner information or documents. As currently drafted, the Auditor-General would need to comply with such a direction including providing audit evidence to the Whistleblower Protection Commissioner.

Clauses 45 and 163 of the draft NIC Bill provide for the National Integrity Commissioner and Whistleblower Protection Commissioner to enter into agreements with the head of any Commonwealth agency. It would be unusual for the Auditor-General to enter into any overarching agreement, which may erode independence. The preferred approach would be to engage as necessary on specific issues, having regard to the particular circumstances and the respective functions of the Auditor-General, National Integrity Commissioner and Whistleblower Protection Commissioner.

Finally, the ANAO notes that the definition of corrupt conduct in clause 9 of the NIC Bill is broad and under subclause 9(6) would include not only conduct that could constitute a criminal offence but also conduct giving rise to a civil liability, disciplinary offence, reasonable grounds for dismissing a public official or a substantial breach of an applicable code of conduct. Care should be taken to ensure that mandatory reporting on a broad front does not result in the Commission receiving a lot of information on lower-level matters that may divert resources from its ability to investigate more serious matters.

- Clause 45 of the draft NIC Bill gives the Commissioner direction-making powers for setting the level of detail and the way in which information or documents relating to an allegation may be given to the Commissioner. There would be benefit in consulting within the sector to inform the development of such directions, so as to set appropriate thresholds and facilitate understanding and compliance.
- There is a need for clarity around relevant roles, responsibilities and processes. Past audits of the introduction of sector-wide initiatives, such as the introduction of PGPA Act requirements,

have highlighted the benefit of clearly specifying requirements and the timely provision of supporting guidance for entities, to facilitate effective implementation and compliance with relevant requirements. Similarly, the introduction of the Public Interest Disclosure scheme demonstrated that a significant investment is required to effectively implement sector-wide regimes.

Issue 3: Arrangements for the disclosure of particular information to the National Integrity Commissioner and Whistleblower Protection Commissioner by the Auditor-General, where that information has been collected in the course of performing an Auditor-General function

Clauses 44 and 162 of the NIC Bill require a Commonwealth agency head to notify the National Integrity Commissioner as soon as practicable after becoming aware of an allegation, or information, that raises a corruption issue, or a whistleblower protection issue. The Auditor-General is the head of a Commonwealth agency but also has access to information about other Commonwealth agencies and Commonwealth partners that is collected in the course of performing Auditor-General functions.

This section considers the specific issues involved in relation to the Auditor-General reporting and providing information to the National Integrity Commissioner, Whistleblower Protection Commissioner and/or Parliamentary Inspector about information collected in the course of performing an Auditor-General function. This differs from the matters discussed in the context of Issue 2 above, which considered the same clauses in the context of the Auditor-General potentially having to report to the National Integrity Commissioner and Whistleblower Protection Commissioner about information relating to ANAO staff.

The ANAO has no objection in principle to the disclosure of particular information, provided that the disclosure does not impact on the performance of Auditor-General functions or independent reporting to the Parliament. As noted in the background to this submission, the ANAO has in the past brought particular information to the attention of responsible accountable authorities and investigating authorities, and audit processes have continued independently of internal investigations resulting from the provision of that information.

Giving the Auditor-General authority to disclose particular information would build on the history of collaboration with investigatory authorities and would strengthen the Commonwealth integrity framework. Balancing considerations, outlined in the background to this submission, are that the Auditor-General Act provides the Auditor-General with independence in the conduct of statutory functions and discretion regarding the disclosure of particular information where that information has been collected in the course of performing an Auditor-General function. Further, strict confidentiality requirements apply under section 36 of the Auditor-General Act in respect to the disclosure of information collected by the ANAO and/or provided to others by the ANAO.

To effectively balance the desired outcomes of strengthening the integrity framework while also preserving the independent performance of Auditor-General functions, it is proposed that the Auditor-General not be obliged to disclose information or refer matters arising in the course of ANAO audit or assurance activities to the proposed Commission, and that the Auditor-General not be subject to any directions made by the National Integrity Commissioner or Whistleblower Protection Commissioner in this respect. An alternative approach is to extend the current scope of subsection 36(2) of the Auditor-General Act, to enable the Auditor-General to disclose particular information to the National Integrity Commissioner, Whistleblower Protection Commissioner and/or Parliamentary Inspector, in addition to the AFP Commissioner, if the Auditor-General considers it is in the public interest to do so.

This alternative approach would have the additional benefit of enabling the Auditor-General to form an opinion as to whether the public interest is best served by providing particular information only to the AFP Commissioner or proposed Parliamentary Inspector if, in the course of auditing the

administration of the proposed Commission, the ANAO identifies possible corruption relating to the Commission. Similarly, the Auditor-General should have the discretion to disclose information only to the AFP Commissioner if possible corruption is identified relating to the Parliamentary Inspector. Preservation of the Auditor-General's independence in this respect would further strengthen the proposed integrity framework. In contrast, the draft NIC Bill would require the Auditor-General to provide such information to the National Integrity Commissioner and/or Whistleblower Protection Commissioner, regardless of the particular circumstances or any risks of so doing.

- Under the alternative approach, the Auditor-General would continue to bring relevant information collected in the course of an Auditor-General function to the attention of the entity accountable authority (consistent with the Auditor-General Act and auditing standards), with the exception of possible corruption by the agency head. The receipt by an accountable authority of information from the ANAO raising concerns about possible corruption would activate the proposed obligations on heads of Commonwealth agencies to make their own information disclosures and referrals to the National Integrity Commissioner or Whistleblower Protection Commissioner.
- We also note that the majority of information collected in the course of performing Auditor-General functions is from Commonwealth entities. Rather than compel the Auditor-General to provide such information, the National Integrity Commissioner, Whistleblower Protection Commissioner or Parliamentary Inspector would be able to source such information directly from entities.

As already noted, in the context of Issue 2 above, the alternative approach would have the further benefit of:

- helping to address issues of Parliamentary privilege arising in respect to information collected in the course of an Auditor-General function, the purpose of which is to report independently to the Parliament. Audit and other reports prepared by the ANAO (including the papers used to develop them) are protected by Parliamentary privilege under section 16 of the *Parliamentary Privileges Act 1987* and cannot be used as evidence in court and tribunal proceedings; and
- avoiding the unnecessary disclosure of material collected in the performance of an Auditor-General function—material which is otherwise subject to the confidentiality obligations established by subsection 36(1) of the Auditor-General Act. To address this issue, consideration should also be given to referencing section 36 of the Auditor-General Act in the Bills, including in paragraphs 79(4)(d) and 102(5)(d) of the draft NIC Bill.

As discussed in the context of Issue 2, the benefits of preserving the Auditor-General's discretion (to be exercised in the public interest) regarding the provision of information and the conduct of an Auditor-General function apply equally to the following parts of the draft NIC Bill:

- subclauses 50(2) and 50(3);
- subclauses 50(5) and 53(6);
- subclauses 53(3) and 53(4);
- clause 58;
- clause 72;
- clause 82;
- clause 89;
- clause 113;
- subclauses 165(4) and 165(5);
- subclauses 169(2) and 169(3);

- subclauses 172(3) and 172(4);
- subclauses 169(5) and 172(6); and
- clause 177.

Finally, clauses 44 and 162 of the NIC Bill provide that the head of a Commonwealth agency must notify the National Integrity Commissioner or Whistleblower Protection Commissioner as soon as practicable after becoming aware of an allegation or information that raises a public sector corruption or whistleblower protection issue. As discussed in the background to this submission, the ANAO adopts iterative processes designed to assist its understanding of audit evidence and to offer procedural fairness to auditees. The ANAO's understanding and assessment of evidence may therefore evolve in the course of an audit or assurance activity. The public interest is best served by avoiding a situation where the Auditor-General is obliged to report prematurely on issues arising in the course of performing an Auditor-General function, before the relevant evidence has been fully tested and assessed. It is not uncommon for concerns and issues arising early in an audit to be clarified and set aside as a result of further testing and analysis of audit evidence. The alternative approach addresses the risk of having to report prematurely and possibly unnecessarily to the Commissioners.

Issue 4: Use of the Commission's, Parliamentary Standards Commissioner's, (and if prescribed by regulations the Parliamentary Inspector's) coercive powers to compel ANAO staff to disclose information obtained in the course of undertaking an Auditor-General function

As noted above, the NIC Bill provides that the National Integrity Commissioner and if the regulations allow, the Parliamentary Inspector, have coercive information gathering powers, which would extend to ANAO staff and contractors. In addition, the NI(PS) Bill provides the Parliamentary Standards Commissioner with the same information-gathering powers as the Auditor-General for use in inquiries relating to alleged or suspected contravention of the parliamentary code of conduct or ministerial code of conduct.

The ANAO has no objection to such powers applying in respect to its staff in the exercise of their administrative functions, but notes the potential impact of those provisions on the independent conduct of Auditor-General functions by ANAO staff.

As discussed in the background to this submission, subsection 40(2) of the Auditor-General Act provides that directions to staff of the ANAO relating to the performance of the Auditor-General's functions may only be given by the Auditor-General or ANAO staff authorised to give such directions by the Auditor-General. These statutory safeguards protect the independence of the Office.

Further, subsection 36(2) of the Auditor-General Act provides that if a person has obtained information in the course of performing an Auditor-General function, the person must not disclose the information except in the course of performing an Auditor-General function or for the purpose of any Act that gives functions to the Auditor-General. A criminal penalty of imprisonment for 2 years applies to a breach of this subsection.

In order to avoid a conflict arising between the Auditor-General Act and the Bills, and to respect the independent functions of the Auditor-General, National Integrity Commissioner and potentially the Parliamentary Inspector and Parliamentary Standards Commissioner, it is proposed that the these office holders instead be given authority to formally request information and assistance from the Auditor-General (where the information has been obtained in the course of performing an Auditor-General function). It is further proposed that the Auditor-General retain a discretion to provide such information for the reasons discussed in the context of Issues 2 and 3 above, and in particular to guard against a situation where it may not be in the public interest to provide information to the

Commissioners or Inspector where that information relates to possible corruption affecting the Commission or Parliamentary Inspector function.

Issue 5: Use of the Commission's, Parliamentary Standards Commissioner's (and if prescribed by regulations the Parliamentary Inspector's) coercive powers to compel other heads of Commonwealth agencies and their personnel to disclose information obtained in the course of undertaking an Auditor-General function

As noted above, the NIC Bill provides that the National Integrity Commissioner and, if the regulations allow, Parliamentary Inspector have coercive information gathering powers which would extend to Commonwealth agency heads and their personnel. Similarly, the NI(PS) Bill provides the Parliamentary Standards Commissioner with the same information-gathering powers as the Auditor-General.

Subsection 36(3) of the Auditor-General Act provides that a person commits an offence (with a penalty of imprisonment for two years) if the person receives any of the following documents and discloses any information in those documents without the Auditor-General's consent:

- a proposed report (including a draft) under section 19 of the Auditor-General Act;
- any other report (including a draft) created for the purposes of preparing a proposed report under section 19 of the Auditor-General Act; or
- an extract from a report referred to in this section.

This provision applies to the recipients of such ANAO documents, who are typically personnel of government entities and other persons with a special interest in a report or report extract. Subsection 36(3) is administered strictly by the Auditor-General and the ANAO, so as to preserve the confidentiality of government and other information until reports are presented to the Parliament and in the interests of providing due process and natural justice to audited entities and those with a special interest in a report.

Further, information in these ANAO documents may subsequently be treated as sensitive or certificated information under section 37 of the Auditor-General Act—information which the Auditor-General cannot be compelled to disclose publicly, including to the Parliament. Section 37 is discussed further in the context of Issue 8 below.

As discussed, these ANAO documents are also protected by Parliamentary privilege under section 16 of the *Parliamentary Privileges Act 1987* and cannot be used as evidence in court and tribunal proceedings.

To ensure there is no conflict with subsection 36(3) or section 37 of the Auditor-General Act, the Bills should avoid any implication that Commonwealth agency heads or their personnel could be compelled to disclose the contents of this class of ANAO documents, without the explicit consent of the Auditor-General. To avoid conflict, consideration should be given to referencing section 36 of the Auditor-General Act in the Bills.

Issue 6: Referring issues to the Auditor-General for investigation

Paragraphs 12(1)(f) and 14(1)(d) of the draft NIC Bill give the National Integrity Commissioner and Whistleblower Protection Commissioner the functions of referring issues to government agencies for investigation, and these powers are set out in clauses 46 and 165.

As discussed in the background to this submission, section 8 of the Auditor-General Act provides that as an independent officer of the Parliament, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not

subject to direction from anyone in relation to: whether or not a particular audit is to be conducted; the way in which a particular audit is to be conducted; or the priority to be given to any particular matter. In the exercise of these functions or powers, the Auditor-General must, however, have regard to the audit priorities of the Australian Parliament, as determined by the Parliament's Joint Committee of Public Accounts and Audit (JCPAA).

To ensure there is no conflict with section 8 of the Auditor-General Act, the Bill should avoid any implication that a referral from the National Integrity Commissioner or Whistleblower Protection Commissioner is a direction to the Auditor-General.

Issue 7: Avoiding impacts on the Auditor-General's information-gathering powers

Clause 241 of the draft NIC Bill provides that past and present Commission staff are generally not compellable in proceedings before any court, tribunal, authority or person having power to require the production of documents or the answering of questions. Similarly, clauses 36 and 68 of the NI(PS) Bill provide that the Parliamentary Integrity Adviser and Parliamentary Standards Commissioner are not required to disclose protected Adviser information or protected Commissioner information to any court, tribunal, authority or person having power to require the answer of questions or the production of documents.

As noted in the background to this submission, in the exercise of the majority of Auditor-General functions, the Auditor-General has extensive information-gathering and access powers, including coercive powers to compel the provision of information, documents and evidence (see sections 30 to 35 of the Auditor-General Act). Subclause 238(5) of the NIC Bill and clauses 33 and 65 of the NI(PS) Bill would give these office holders the discretion to provide information to the Auditor-General and therefore appear to have the effect of limiting the Auditor-General's information-gathering powers, which have been conferred by the Parliament to facilitate the performance of the Auditor-General's functions for the purpose of independent reporting to Parliament on entities' administration of public resources.

Issue 8: Avoiding impacts on the Auditor-General's independent reporting to Parliament

As outlined in the background to this submission, the Auditor-General is an officer of the Parliament whose primary role is to provide independent assurance to the Parliament through public reporting. Further, the ANAO has in the past brought particular information to the attention of responsible accountable authorities and investigating authorities. Audit processes and the Auditor-General's reporting to the Parliament continued independently of other investigations resulting from the provision of that information.

Similarly, it is possible for the proposed new integrity framework and operations of the proposed Commission and office holders to not affect the performance of Auditor-General functions or the Auditor-General's independent reporting to Parliament.

The ANAO is concerned about the potential impact of subclauses 50(5), 53(6), 169(5) and 172(6) of the NIC Bill on the independent conduct of Auditor-General functions if the Auditor-General is required to stop an audit or review activity if it is considered to be an investigation into an allegation or information that raises a public sector corruption issue. The Auditor-General's ability to perform Auditor-General functions and report independently to Parliament would be curtailed if the Auditor-General is required to negotiate with the National Integrity Commissioner or Whistleblower Protection Commissioner in order to report to Parliament.

Section 37 of the Auditor-General Act requires the Auditor-General to not include particular information in public reports if the Auditor-General is of the opinion that disclosure of the information

would be contrary to the public interest for any of the reasons set out in subsection 37(2) of the Auditor-General Act. While the reasons set out in subsection 37(2) do not include prejudice to an investigation by the AFP or any other integrity body, the Auditor-General nonetheless has careful regard—in the preparation of reports to Parliament—to possible impacts on investigations or other sensitivities that are brought to the ANAO's attention. These judgements are typically made following the receipt of advice from responsible entities and a process of consultation.

It may be worthwhile to consider introducing a mechanism for the National Integrity Commissioner, Whistleblower Protection Commissioner, Parliamentary Inspector, Parliamentary Integrity Adviser and Parliamentary Standards Commissioner to formally bring any concerns to the attention of the Auditor-General relating to the disclosure of particular information in Auditor-General reports, while retaining the Auditor-General's authority to exercise independent judgement regarding the content of reports to Parliament.

This approach would also help guard against the risk of third parties seeking to abuse the new integrity framework and Commission processes—by raising spurious corruption allegations—so as to delay the completion of ANAO audits or the presentation of Auditor-General reports to Parliament.

As discussed in the context of Issue 1 above, section 235 of the proposed NIC Bill (which provides a discretion to the National Integrity Commissioner to exclude information from the Commission's annual report) should not extend to material appearing in the Auditor-General's Independent Auditor's Report to the responsible Minister on the Commission's annual financial statements, or in the future, the Auditor-General's independent report on the Commission's annual performance statements.

Issue 9: Operation of the proposed Parliamentary Inspector function

Clause 260 of the draft NIC Bill provides that the proposed Parliamentary Inspector may exercise any of the National Integrity Commissioner's powers as prescribed by the regulations. This would include the ability to require any person to answer questions, provide information or produce documents following receipt of a written notice. As discussed in the context of Issues 2 and 3 above, the application of this section to the Auditor-General and staff of the ANAO performing an Auditor-General function would be inconsistent with the independent exercise of the Auditor-General's functions and the operation of subsection 36(1) of the Auditor-General Act relating to the confidentiality of information obtained in the course of performing an Auditor-General function. Further, such information is subject to Parliamentary privilege and cannot be used as evidence in court and tribunal proceedings.

We note that the majority of information collected in the course of performing Auditor-General functions is from Commonwealth entities. The Parliamentary Inspector would be able to source such information directly from entities.

Paragraph 254(1)(c) of the NIC Bill provides the Parliamentary Inspector with the role of auditing the Commission's systems of governance and risk management relating to control of information. It appears that this function is intended to enhance oversight of the Commission, and the audit power should not be drafted in a manner that would prevent the Auditor-General from conducting audit and review activity on behalf of the Parliament.

Some lessons from recent audit findings

The proposed NIC Bill will create a National Integrity Commission with jurisdiction significantly expanded compared to the current remit of ACLEI. The new Commission will have jurisdiction over all Commonwealth agencies and public officials including the Governor-General, Ministers, Parliamentarians and persons employed under the *Members of Parliament (Staff) Act 1984*.

Looking forward to the operations of the proposed Commission, there would be merit in considering the key findings and recommendations of our performance audit No.4 of 2018-19, *Operational Efficiency of the Australian Commission for Law Enforcement Integrity*.

The ANAO found that: ACLEI had not established appropriate performance measures to inform itself, the Parliament and stakeholders (including law enforcement agencies) of how efficient its activities are in detecting, investigating and preventing corrupt conduct; and ACLEI's case selection and prioritisation decisions had not fully supported the efficient use of resources.

The ANAO also observed that in 2016–17, investigations into 14 corruption issues (5.8 per cent) were concluded out of a total of 242 that were open at the time. If no new investigations were to be commenced and this rate of completion continued, it would take a further 16 years for the remaining 228 investigations to be concluded.

The ANAO recommended that ACLEI:

- develop performance measures focussed on the efficiency of its operations and collect additional data to report on its performance against those measures;
- investigate whether it could introduce a more structured review process to support the prioritisation of available resources on a risk basis to the highest value investigations, including time or milestone based intervals to trigger decisions on the ongoing allocation of resources; and
- periodically compare and benchmark its operational efficiency against comparable organisations including other anti-corruption bodies, and with its own performance over time, to determine whether changes to its current processes are required.

These findings and recommendations would be of relevance to any new integrity agency operating in a large and complex jurisdiction. In the case of the proposed Commission, there is an opportunity to undertake early benchmarking to enable an assessment of its performance, given the existence of comparable integrity commissions in other Australian jurisdictions.