



Submission by the
Commonwealth Ombudsman

**National Integrity Commission Bill 2018,
National Integrity (Parliamentary
Standards) Bill 2018, and National
Integrity Commission Bill 2018 (No. 2)**

Submission by the Commonwealth Ombudsman, Michael Manthorpe

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Introduction and summary

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the National Integrity Commission Bill 2018, the National Integrity Commission Bill 2018 (No. 2) (the National Integrity Commission Bills¹) and the National Integrity (Parliamentary Standards) Bill 2018.

This Office plays a number of roles in the Australian administrative law system, which means its work is likely to intersect with that of an Australian National Integrity Commission (ANIC) in a number of ways. Specifically:

- our primary responsibility is to handle complaints about Australian Government agencies and it appears we would have jurisdiction to investigate complaints about the ANIC under the *Ombudsman Act 1976*
- we are a key part of the existing Australian integrity framework, so anticipate working closely with the ANIC to share information and intelligence about issues of mutual interest
- we have responsibility for inspecting and reporting on enforcement agencies' use of certain covert and intrusive powers. This currently includes the Australian Commission for Law Enforcement Integrity (ACLEI)
- we have responsibilities (along with IGIS) for oversight of the whistleblower scheme established by the *Public Interest Disclosure Act 2013*
- we are an Australian Government statutory office, whose staff may be investigated by the ANIC.

Our comments are largely focused on ensuring appropriate administrative oversight of the ANIC and identifying some technical issues with the Bills, drawing on our oversight roles.

Background

The purpose of the Office is to:

- provide assurance that the organisations we oversight act with integrity and treat people fairly
- influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action

¹ We note that the National Integrity Commission Bill 2018 and the National Integrity Commission Bill 2018 (No.2) are substantively similar and so have considered them together.

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

Comment on the Bills

Oversight of the ANIC

Our Office was originally established, first and foremost, to consider complaints about the administrative actions and decisions of Australian Government agencies. Our role also includes the capacity to undertake 'own motion' investigations, for example when numerous complaints highlight a systemic issue, as well as specific oversight of law enforcement agencies' use of covert powers. In doing this, we also aim to foster good public administration. While this is important for all government agencies, it is paramount for integrity organisations.

We note that the National Integrity Commission Bills propose the establishment of a Parliamentary Inspector of the ANIC, tasked with:

- inspecting the Commission's records to assess if:
 - required authorisations for the exercise of a power have been obtained
 - any practice or procedural guidelines set by the Commission are adequate, and have been strictly complied with
- investigating complaints made against, or concerns expressed about the conduct or activities of the Commission or its staff
- auditing the Commission's systems of governance and risk management relating to control of information including relating to the protection of whistleblowers and human sources
- reviewing alleged incidences of possible unauthorised disclosure of information or other material that, under an enactment, is confidential
- reviewing information given by the Commission to the Parliamentary Joint Committee to verify its accuracy and completeness
- reporting, and making recommendations to the Parliamentary Joint Committee on the results of performing the above functions.

The National Integrity Commission Bills provide that the Parliamentary Inspector must be a judge/former judge or eligible for appointment as a judge of a Federal Court or state or territory supreme court. There is provision for an acting appointment that does not specify any requirement for appointment.

We note that some of the activities listed as falling within the remit of the proposed Parliamentary Inspector of the ANIC are already within the remit of the Ombudsman. This Office already inspects and reports to Parliament on whether law enforcement agencies have secured appropriate authorisations to exercise certain covert and intrusive powers. This Office also has a complaints investigation role and broad powers to undertake own motion investigations into systemic issues that might be apparent from individual complaints.

Thus, we suggest that further consideration is required to avoid the risk of duplication of effort between the Parliamentary Inspector and the Ombudsman. One approach could be to vest the Parliamentary Inspector role in the Ombudsman and his Office. This would obviate the need for a further proliferation of integrity-related bodies. Alternatively, further drafting could be commissioned to differentiate the respective roles of the Parliamentary Inspector and the Ombudsman.

Although the jurisdiction of the ACT is of a different scale and character to that of the Commonwealth it is noted that the Commonwealth Ombudsman, in his capacity as ACT Ombudsman and following the passage of legislation in the ACT Assembly in 2018, will be the Inspector for the ACT Integrity Commission until an alternative person is appointed as Inspector.

Complaints made about the ANIC under the Ombudsman Act

Separately to the above, under the *Ombudsman Act 1976*, this Office would have jurisdiction to oversee the administrative actions of the ANIC as a Commonwealth agency. This is recognised explicitly in s 110(3) for example (which notes that the statutory protections afforded to the National Integrity Commissioner (NIC) do not limit the powers of the Ombudsman to investigate issues of administrative practice in relation to a hearing under Division 2, Part 6). In this regard we note the exception in the confidentially provision in s 238 for information to be disclosed to this Office where appropriate having regard to our functions. This would presumably enable us to obtain information for our oversight role of ANIC.

At this stage it is not possible to estimate the volume of complaints our Office is likely to receive about the ANIC if established. In 2017–18 our Office received five complaints about ACLEI, a body most analogous to the proposed ANIC. However, given the breadth of the ANIC responsibilities, it is reasonable to assume the volume of complaints about the ANIC will be much higher than those about ACLEI, particularly during the early years when the risk of problems in administration is likely to be higher.

Referral and investigation of matters – independence of the Ombudsman

The National Integrity Commission Bills propose to specifically amend the *Ombudsman Act 1976* to provide that the Ombudsman may decide to refer information or allegations that raise a corruption issue to the NIC (s 42 and Schedule 1 clause 6). Such matters can then be returned to our Office for investigation, and the NIC can manage or oversee the investigation (s 46(1)) by providing detailed or general guidance that must be followed (ss 151 and 152). A similar pattern emerges if the Ombudsman refers a disclosure of wrongdoing concerning corruption or a whistleblower protection issue to the Whistleblower Protection Commission (WPC) (s 166(1) and s 165(3)(a)).

The National Integrity Commission Bills also provide the NIC and WPC with directions powers (s 50(5) and s 169(5)) to direct an agency not to investigate a matter referred to them.

As these powers may impact on the independence of the Ombudsman we recommend an exception be considered for independent agencies such as ours. Similar issues may arise in the context of the various reporting requirements in Part 8, Div 3.

We would also support efforts to ensure that avenues for reporting to the ANIC are clear and well publicised, consistent with the Ombudsman's role and the proposed ANIC's position as lead agency on corruption investigations.

Interaction with the PID Act

The National Integrity Commission Bills appear to propose using the PID Act as one of the means by which reports of corruption or disclosures of wrongdoing will be referred to the WPC and NIC. It does this by amending the PID Act to refer to the definition of ‘corruption issue’ in the Bills (Sch 1 clause 7) and including PIDs generally in the definition of ‘disclosure of wrongdoing’ (s 8). Sections 44 and 162 then require a public official to refer an allegation or information about corruption, or a disclosure of wrongdoing concerning a whistleblower protection issue, to the NIC or WPC respectively as soon as practicable after becoming aware of the matter.

In relation to disclosures of wrongdoing, this could occur as part of the allocation decision under the PID Act (the Bills reference a ‘decision’ to refer to WPC under relevant legislation (160(5)(a)) but it could also occur upon receipt of a PID or in the course of a PID investigation. To avoid doubt, it may be worth considering whether the NIC and WPC should be prescribed under the PID Act as investigative bodies to whom a disclosure can be allocated, and to clarify what happens in relation to the various requirements in the PID Act when a referral occurs. For example, agencies may be unsure whether their obligations to ensure allocation of a PID within 14 days (or best endeavours) of receipt, notify the Ombudsman of allocation, or complete a PID investigation within 90 days, continue to apply or are suspended unless and until a referred PID is returned to them by the NIC or WPC. We note that ss 58 and 177 appear to envisage that an agency may continue to take action in compliance with the PID Act after a referral has occurred pending a decision from the NIC or WPC on handling. This may not always be desirable and different approaches by agencies may cause confusion and concern among whistleblowers.

It may also be necessary to consider how to avoid or resolve possible conflict between guidance from the NIC or WPC about the investigation of a PID that has been referred but returned to the agency for investigation, and the requirements of the PID Act and the [PID Standard](#) issued by the Ombudsman.

We note that the Ombudsman would appear to retain the ability to receive and investigate complaints about the handling of a PID investigation (including one subject to management or oversight of the NIC or WPC).

Consideration may also need to be given to the operation of the secrecy provisions in the PID Act (s 65) to ensure that the referral system operates smoothly while protecting disclosers and those managing the handling of a PID. We also note that the definition of corruption issue duplicates other grounds of disclosable conduct in the PID Act (see item 5 of the table at s 29(2)(a) and s 29(2)(a) of the PID Act).

Possible reforms of the PID Act

We also suggest that consideration of reform in this area provides an opportunity to address the shortcomings in the PID Act, identified by [Philip Moss’s 2016 review](#). This would improve the capacity of agencies to ensure that serious allegations raised by whistleblowers are dealt with appropriately and that other matters are directed to the most appropriate body or mechanism for consideration. It would also give this Office better scope to assess whether whistleblowers are being reasonably dealt with and better overall insight into whether whistleblowers are identifying systemic issues that would, in turn, complement the role of the NIC.

In particular, we draw attention to proposals to:

- clarify what type of conduct within the category of conduct ‘that could, if proved, provide reasonable grounds for disciplinary action’ should be captured by the PID Act

- allow for a discretion not to investigate a disclosure under the PID Act where another suitable investigative mechanism exists and the agency is satisfied that there are no further matters concerning the disclosure that warrant investigation
- redefine the scope of disclosable conduct as it relates to matters of personal grievance
- specify additional investigative bodies (e.g. Merit Protection Commissioner) so that matters can be referred to the most appropriate subject matter body for investigation
- require agencies to provide this Office with information about their handling of a PID and a copy of the investigation report to enhance this Office's oversight of agencies' administrative performance and internal integrity systems
- allow the Ombudsman to directly transfer a disclosure to an agency if the conduct relates to that agency and the Ombudsman is satisfied that it is appropriate for that agency to handle the disclosure.