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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL CRIME AUTHORITY AMENDMENT BILL (No. 2) 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
the Honourable Michael Duffy, MP)



## NATIONAL CRIME AUTHORITY AMENDMENT BILL (No. 2) 1992

### OUTLINE

This Bill amends the *National Crime Authority Act 1984* [the NCA Act] to:

- (a) establish an office of Inspector-General of the National Crime Authority [“the NCA”] to investigate complaints against the NCA or its staff;
- (b) provide a review process in relation to a decision by the NCA that particular information should not be made available to the Parliamentary Joint Committee [“the PJC”] on the NCA by reason of its sensitivity;
- (c) provide the PJC with access to all information held by the NCA which is not sensitive;
- (d) repeal subsections 12(4) and (5) of the NCA Act; and
- (e) provide that a prohibition on disclosure relating to NCA process, under s.29A, while it remains in force, overrides any contrary requirement under the Privacy Act 1988.

The amendments summarised by items (a) to (c) above, will allow implementation of the Government’s response to the November 1991 report “Who is to Guard the Guards?” by the PJC. The response was tabled on 1 June 1992 and has the concurrence of the States and Territories which participate in the Inter-Governmental Committee [“the IGC”] that monitors the NCA. Item (d) arises from a recommendation of the PJC report that any ambiguities in subsection 12 (4) be addressed, and item (e) deals with a drafting oversight that has been identified in recent months.

While established as a separate office under the NCA Act, the office of Inspector-General of the NCA will be able to be held concurrently with another Commonwealth statutory office [e.g. Inspector-General of Intelligence and Security] and staff supporting that office would be able to be used interchangeably in support of both offices. The Inspector-General will be empowered to investigate complaints by members of the public, whether made directly or referred by a member of the IGC or by the PJC.

The Inspector-General will not investigate complaints against individuals working for the NCA where the complaint can satisfactorily be dealt with under existing procedures such as Commonwealth or State legislation or other arrangements for dealing with police complaints. Essentially the office will operate as a “back-stop”, dealing with those matters which cannot be adequately addressed by any of the existing complaints procedures.

## FINANCIAL IMPACT STATEMENT

It is estimated that establishment and operation of the Office of the Inspector-General of the NCA will require additional outlays of approximately \$100,000 in the 1992-93 financial year and per annum thereafter. It is not expected that the other amendments will result in any increased costs to the Commonwealth.

## NOTES ON CLAUSES

### **Clause 1 - Short Title etc.**

This is a formal provision specifying the short title of the Bill and identifying the *National Crime Authority Act 1984* ["the NCA Act"] as the Act amended by the Bill.

### **Clause 2 - Commencement**

Clause 2 makes provision for the commencement of the amendments proposed by the Bill.

### **Clause 3 - Interpretation**

Clause 3 inserts several new definitions into the interpretation section of the NCA Act. The most significant of these are:

- "inquiry", which means an inquiry by the new Inspector-General, as opposed to an investigation conducted by the NCA;
- "Inspector-General", which means the Inspector-General of the National Crime Authority whose office and functions are established under the new Part IIIA of the NCA Act, inserted by clause 10 of this Bill;
- "sensitive information", which means information, disclosure of which might prejudice the safety, reputation or fair trial of a person, the effectiveness of an NCA investigation or the operations of any of the bodies, not including the NCA, defined as law enforcement agencies by section 4 of the NCA Act.

"Sensitive information" is an important concept in relation to the new provisions to be inserted by the Bill. It provides the sole basis on which the Chairperson of the NCA may, under section 55 of the NCA Act, as amended by clause 9 of the Bill, refuse to disclose to the PJC information or documents which that body has requested. It also provides the basis for obligatory exclusion from the Inspector-General's annual report, under the new subsection 55AZH(3), of information which might otherwise be included in accordance with the new subsection 55AZH(2).

### **Clause 4 - Meaning of action taken by the Authority, a member or a member of staff of the Authority**

Clause 4 adds new section 4A to the NCA Act. New subsection 4A (1) is an important definitional provision bearing on the Inspector-General's complaints function. New sections 55AD, 55AG and 55AT empower the Inspector-General to inquire into and report on complaints about actions taken by the NCA, and past and present members and staff members of the NCA. New subsection 4A (1) effectively widens the range of complaints that the Inspector-General can inquire into by providing that, unless a contrary intention appears, a reference in the Act to taking action includes making a decision or recommendation and failing or refusing to take action or to make a decision or recommendation.

New subsection 4A (2) provides that action taken by a member of the NCA is deemed an action of the NCA if it is taken in the member's capacity as member, whether or not the action is within the duties of the member or is taken for, in connection with, or incidental to the performance of NCA functions.

### **Clause 5 - Performance of functions**

Clause 5 repeals subsections 12 (4) and 12 (5) of the NCA Act. Subsection 12 (4) has been the subject of judicial criticism because, in its present form, it appears to assume that police officers derive a "power to interview" from their capacity as police officers. In fact, subject to some fairly limited statutory exceptions, police simply exercise the right of any person to ask another person questions and do not generally have power to insist on answers. As the term "power to interview" has no recognised legal meaning the subsection is ineffective as drafted.

In its report, "Who is to Guard the Guards?", the PJC recommended that consideration be given to the effect of section 12 of the NCA Act and that any ambiguities that may exist in subsection 12 (4) be addressed. In response to the recommendation, a review of the provisions has been conducted and after consultation with the NCA and members of the IGC, it is now considered that no useful meaning can be given to subsection 12 (4) by amendment and that it and subsection 12 (5) should be repealed. If, as it presently stands, subsection 12 (4) is intended to mean that those members and staff of the NCA who are not police may not question a person suspected of an offence about that offence, it is unduly restrictive. It would prevent participation in questioning by expert investigators who were not police in relation to such difficult matters as a complex fraud case, thus hampering the multi-disciplinary approach which is intended to be one of the advantages offered by the NCA and is increasingly being adopted by traditional law enforcement authorities in dealing with organised and white-collar crime. On the other hand, if the subsection is merely intended to indicate that the NCA Act does not confer police-type powers on members and staff of the NCA who are not police, such a provision is unnecessary. A court will not treat an Act as conferring a coercive power in the absence of clear indications of that intention.

In the light of these considerations the Government, with the agreement of the NCA and the IGC, considers that the best course of action is to repeal subsection 12(4) and also subsection 12(5), which was designed to clarify certain implications of subsection 12(4).

### **Clause 6 - Directions and guidelines to Authority**

Clause 6 amends section 18 of the NCA Act by inserting new subsection 18 (3A) which requires that if a direction or guideline made by the Minister administering the NCA Act ["the Minister"], relates to a matter concerning the protection of individual privacy, the Minister must state in the direction or guideline that that is the case. The provision links with new paragraph 55AD (1) (c) and new section 55AW, which empower the Inspector-General to inquire into and report on NCA compliance with Ministerial directions and guidelines relating to the protection of individual privacy [see also new section 55AW].

### **Clause 7 - Disclosure of summons or notice etc. may be prohibited**

Clause 7 adds a new subsection (7) at the end of section 29A of the NCA Act. Subsection (7) addresses a deficiency in the operation of section 29A.

Section 29A was enacted by the *National Crime Authority Amendment Bill 1991* and commenced operation on 21 January 1992. It provides that, in an appropriate case and subject to some restrictions, a summons to a witness issued under section 28 or a notice requiring production of a document or other item of evidence issued under section 29, may include a notation prohibiting disclosure of any information relating to the summons or notice or to any official matter connected with it. Prohibitions ultimately terminate automatically and thereupon the NCA is required to notify the parties on whom the original summons or notice was served. Section 29B makes it an offence to disclose information subject to such a prohibition while it is in force.

Under s.18K(5) of the *Privacy Act 1988* ["the Privacy Act"] a credit reporting agency must, where it discloses information held by it in an individual's credit information file, include in that file a note of the disclosure. Under subsection 18H(1) of the Privacy Act a credit reporting agency in possession or control of an individual's credit information file must take reasonable steps to ensure that the individual concerned can obtain access to that file. There is at present no provision in either the Privacy Act or the NCA Act which would prevent access by an individual under subsection 18H(1) of the Privacy Act to a credit reference file bearing a note of disclosure to the NCA in accordance with subsection 18K(5) of that Act, an event which could adversely affect an NCA investigation.

The new subsection 29A(7) of the NCA Act will provide that, where:

- (a) a prohibition on disclosure of information relating to a section 28 summons or section 29 notice is in force under section 29A of the NCA Act; and
- (b) a body would be required under the Privacy Act to make a record of any disclosure of personal information because of the summons or notice;

no such record may be made so long as the prohibition under section 29A of the NCA Act remains in force.

### **Clause 8 - Secrecy**

Clause 8 amends section 51 of the NCA Act to take account of the secrecy requirements of the new office of the Inspector-General of the NCA which will be established by the Bill. Paragraph (a) of clause 8 amends subsection 51(1) so that the restrictions on disclosure imposed by section 50 will apply to the Inspector-General and his or her staff in addition to applying [as it already does] to members of the NCA and its staff. Paragraph (b) amends subsection 51(3) so that it will continue to apply only to members of the NCA and its staff despite the change to subsection 51(1). The subsection provides that persons to whom it applies must not be required to give documents or information acquired under the NCA Act to a court except in specified circumstances. Disclosure of information or documents by the Inspector-General and his or her staff in the specified circumstances would not be appropriate because this could involve the Inspector-General in prosecutions arising out of NCA investigations and hence forfeit the Inspector-General's perceived neutrality in

relation to NCA investigations. Paragraph (c) inserts a new subsection (3A) which provides that the Inspector-General and his or her staff must not be required to give documents or information to a court except for the purposes of Part IIIA of the NCA Act. The purposes of Part IIIA would principally include ensuring access by the Inspector-General to all available evidence, that all evidence given to the Inspector-General is reliable and that appropriate action is taken in relation to any complaints found to be substantiated.

#### **Clause 9 - Duties of the Committee etc.**

Paragraph 9(a) amends subsection 55(1) of the NCA Act to clarify that the duty of the PJC report to Parliament after examining each annual report of the NCA is a duty to report to both Houses. Paragraph 9(b) amends subsection 55(1) by inserting a new paragraph 55(1)(ca) to provide that the duties of the PJC also include examining and reporting to both Houses of Parliament on annual reports of the Inspector-General. This is a duty arising as a matter of course from the creation of the office of Inspector-General and parallels the Committee's existing duty under paragraph 55(1)(c).

Paragraph 9(c) makes two related but distinct changes. First, it repeals the existing subsection 55(2), which provides that the PJC is not authorised to investigate a matter relating to a relevant criminal activity [i.e. a matter capable of being referred to the NCA, for investigation, by the Commonwealth Minister on the NCA IGC] or to reconsider the findings of the NCA in relation to a particular investigation. Secondly, it substitutes new subsections 55(2) to (6) which provide a new regime for limiting access to NCA-held information. The new subsection (2) provides that the PJC may make a written request to the Chairperson of the NCA ["the Chairperson"] to give it any document or information except to the extent that it contains or is sensitive information as defined in section 4 of the Act, as amended by clause 3 of the Bill. The new subsections (3) to (6) provide that, if the Chairperson refuses the request on the ground that acceptance would require disclosure of sensitive information, the PJC may refer its request to the Minister, who may direct the Inspector-General of the NCA to inquire into the matter and to report to the Minister. Whether or not the advice of the Inspector-General is accepted, the Minister must make a determination [including reasons, unless this would itself disclose sensitive information] as to whether the document or information contains or is sensitive information as defined, and provide copies to the Chairperson, the PJC and the Inspector-General. The effect of these amendments will be to leave the boundary of the PJC's duties to be determined by reference to subsection 55(1) and to make clear provision for granting or denial of access to NCA-held information and for resolution of any associated disputes.

#### **Clause 10 - New Part IIIA - Inspector-General**

Clause 10 inserts a new Part IIIA in the NCA Act, to provide for the office of Inspector-General of the NCA. The new Part comprises new sections 55AA to 55AZH.

## **Division 1 of new Part IIIA - Establishment and Functions of Inspector-General of the National Crime Authority**

### **New section 55AA - Inspector-General of the National Crime Authority**

New section 55AA establishes an office of Inspector-General of the NCA. The Inspector-General is to be appointed by the Governor-General on the recommendation of the Minister, after consultation with the IGC. If the appointee is a judicial office holder of a State, the Australian Capital Territory or the Northern Territory, his or her services may be secured by the Governor-General making appropriate arrangements with the government of the relevant State or Territory. The Commonwealth may reimburse the relevant State or Territory for the appointee's services. The terms and conditions of appointment, remuneration and allowances, leave of absence, resignation and termination are dealt with by new sections 55AY to 55AZC.

### **New section 55AB - Acting Inspector-General**

New section 55AB allows the Minister to appoint an acting Inspector-General during a vacancy in the office of Inspector-General or during any or all periods when the Inspector-General is absent from duty or Australia or is, for any reason, unable to perform the duties of the office. Before appointing an acting Inspector-General, the Minister must consult with the IGC.

### **New section 55AC - Appointment of the holder of a judicial office as Inspector-General etc.**

New section 55AC provides that if a person who is the holder of a judicial office is appointed as Inspector-General, or to act as Inspector-General, neither the appointment nor service under the appointment affects the person's rights or entitlements as holder of that judicial office. The section also provides that for all purposes the person's service as Inspector-General is taken to be service as holder of the judicial office which the person holds. Where a Judge is appointed, new subsection 55AZ(4) states that he or she is not entitled to remuneration under the NCA Act while receiving salary or annual allowances as a judge.

### **New section 55AD - Functions of Inspector-General**

Subsection 55AD(1) provides that the Inspector-General has three functions. First, the Inspector-General inquires into complaints made to him or her about actions taken by the NCA and past and present members and staff members of the NCA. Secondly, where the Minister directs him or her to do so [under new subsection 55(5)], the Inspector-General inquires into the question whether a document or information which is held by the NCA and to which the PJC has sought access under new subsection 55(2), contains or is sensitive information as defined in the amended section 4 of the NCA Act. Thirdly, where the Minister has requested him or her to do so, the Inspector-General is required to monitor NCA compliance with directions or guidelines issued by the Minister under section 18, which he or she has stated, under new subsection 18(3A), as relating to the protection of individual privacy [see new section 55AW].



Subsection 55AD(2) provides that the Inspector-General's function of conducting an inquiry into a complaint does not include inquiring into any matter in so far as that matter directly relates to the terms and conditions of appointment of a member of the NCA or the terms and conditions of employment of an NCA staff member.

## **Division 2 of new Part IIIA - Complaints**

### **New section 55AE**

New section 55AE identifies the types of complaint that may be made under the NCA Act, who may complain and certain restrictions on the manner in which such a complaint may be made.

The section applies to action taken by the NCA and past and present members of the NCA or of its staff if such action was taken in actual or purported performance of powers and functions of the NCA or the person under the NCA Act.

A complaint about such an action may be made either by a person aggrieved by the action or by an individual member of the IGC established under section 8 of the NCA Act [i.e. the Commonwealth Minister administering the NCA Act or a State/Territory Minister nominated by the relevant Premier] or by the PJC established under section 53 of the NCA Act, acting collectively. Whether a person has sufficient interest in the effects of an action to be regarded as aggrieved by it is a question best answered in the light of the facts of the particular case, so the Inspector-General is given power under new section 55AG(2) to refuse to pursue a complaint if he or she considers that the complainant has an insufficient interest in the matter which is the subject of the complaint.

Where a complaint is received by the NCA [including a member of the NCA or of its staff], by a member of the IGC or by the PJC, the complaint must be referred direct to the Inspector-General.

### **New section 55AF - Form of complaints**

Under new section 55AF a complaint may be made to the Inspector-General either orally or in writing. If the complaint is made orally, however, the Inspector-General is entitled to require the complainant to reduce it to writing and to refuse to pursue the complaint until the complainant complies with that requirement. This will enable the Inspector-General to insist that an oral complaint be given a fixed form if its substance as presented orally is not clear to the Inspector-General, thus minimising disagreement about precisely what complaint was made.

### **New section 55AG - Inquiry into complaint**

New section 55AG provides that, if a complaint about an action by the NCA or by a past or present member of the NCA or its staff is made to the Inspector-General, and an inquiry is within the Inspector-General's functions as set out in new section 55AD, the Inspector-General must inquire into the action except in the types of cases set out in subsections 55AG(2) to (5), inclusive. The Inspector-General may, under new section 55AJ, make preliminary inquiries of the Chairperson to determine whether to inquire into a complaint.

Subsection (2) gives the Inspector-General discretions largely of the kind conferred on the Ombudsman under the Ombudsman Act and the Inspector-General of Intelligence and Security under the Inspector-General of Intelligence and Security Act to decide not to inquire, or not to continue inquiring, into a complaint. The subsection confers the discretion if the complainant became aware of the action complained of more than twelve months previously; if the complaint is frivolous, vexatious or not made in good faith; if the complainant has insufficient interest in the subject matter of the complaint; or if an inquiry, or further inquiry, is considered unwarranted by the Inspector-General having regard to all the circumstances.

New subsection 55AG(3) provides that, subject to subsection 55AG (5), the Inspector-General must not pursue a complaint that is being, or has been, reviewed by a court or tribunal, or is otherwise being or has been reviewed or inquired into under a law of the Commonwealth, State or Territory, unless the Inspector-General is of the opinion that there are special reasons for doing so. Similarly, new subsection 55AG(4) provides that the Inspector-General may decide against pursuing an inquiry into a complaint if he or she thinks that the complainant could reasonably exercise, or have exercised, a right to have the action complained of reviewed by a court or tribunal, or otherwise reviewed or inquired into under a Commonwealth, State or Territory law. Subsection 55AG (5) provides that the Inspector-General must not inquire into an action, if the NCA member or staff member complained of is or was a member of the Australian Federal Police or of a State or Territory Police Force and the Inspector-General is satisfied that the complaint can be reviewed or inquired into under a law of the Commonwealth or of a State or Territory that relates to complaints made against members of that police force.

#### **New section 55AH - What will happen if complaint is not pursued?**

New section 55AH sets out the procedures to be followed if the Inspector-General decides not to pursue a complaint. The Inspector-General must inform the complainant, the Minister and the Chairperson of the decision, in writing .

#### **New section 55AI - Special arrangements for persons in custody**

New section 55AI provides for special arrangements where a complainant is in custody. These arrangements are similar to those applying under the Ombudsman Act and the Inspector-General of Intelligence and Security Act.

New subsection 55AI(1) defines the terms "detainee" and "custodian" as used in the new section. A detainee is a person in custody. A custodian is the person who has custody of the detainee or any other person performing duties in connection with the detention of the detainee.

New subsection 55AI(2) provides that a detainee has the right to facilities for preparing a written complaint to the Inspector-General and subsequently to send further relevant written information to the Inspector-General and to have that complaint or information sent to the Inspector-General without undue delay in an envelope sealed by the detainee. The detainee also has the right to receive without undue delay confidential communications related to the complaint in a sealed envelope from the Inspector-General. The custodian has a corresponding duty to facilitate the exercise of these rights on request.

New subsection 55AI(3) ensures the confidentiality of communications between a detainee and the Inspector-General by requiring that a sealed envelope mentioned in new subsection 55AI(2) cannot be opened by anyone other than the addressee or a person acting on behalf of the addressee.

New subsection 55AI(4) authorises the Inspector-General to make arrangements with the appropriate State/Territory authority for identification and delivery of sealed envelopes.

#### **New section 55AJ - Preliminary inquiries**

New section 55AJ provides that, on receipt of a complaint, the Inspector-General may make preliminary inquiries of the Chairperson to determine whether the complaint is within jurisdiction and, if so, whether to inquire into the action complained of. Under new subsection 55AG (5), if the person complained of is or was a member of a police force the Inspector-General will have to determine whether the action can be reviewed or inquired into under relevant Commonwealth, State or Territory law, and if so, he is not authorised to inquire further into the complaint. In other circumstances a decision not to inquire will require an exercise of the discretions set out in new subsections 55AG(2) to (4).

#### **Division 3 of new Part IIIA - Inquiries**

##### **New section 55AK - When may the Inspector-General conduct an inquiry**

New section 55AK provides that the Inspector-General may conduct an inquiry into a matter if it falls within his or her functions set out in new section 55AD.

##### **New section 55AL - Inspector-General to inform Minister and Chairperson before commencing an inquiry**

New section 55AL provides that except where the Minister has directed an inquiry under new subsections 55(5) or 55AW(1), the Inspector-General must, before conducting an inquiry, inform the Minister and the Chairperson that he or she proposes to do so.

##### **New section 55AM - Conduct of inquiries**

New section 55AM sets out the manner in which the Inspector-General must conduct inquiries. For the most part the section parallels the related provisions of the Inspector-General of Intelligence and Security Act and the Ombudsman Act.

Subsection 55AM (1) states that the Inspector-General must conduct inquiries in private and in a manner he or she thinks fit. Subsection 55AM (2) provides that except in the cases specified in subsections 55AM (3) and (4), it is not necessary for a complainant or any other person to be given an opportunity to appear before the Inspector-General or any other person in connection with an inquiry.

Subsections 55AM (3) and (4) apply where the Inspector-General reports critically on the NCA or a person. Subsection 55AM (3) provides that the Inspector-General must not make a report that is expressly or impliedly critical of the NCA without first giving the Chairperson a reasonable opportunity to appear before the

Inspector-General and make oral or written submissions. Subsection 55AM (4) is similar where the Inspector-General proposes to report critically of a person. But in such cases the Inspector-General is not required to give the person an opportunity to appear or to make oral or written submissions if, in the opinion of the Inspector-General, doing so would involve disclosing sensitive information. If the Chairperson or a person is given an opportunity to appear, subsection 55AM (5) provides that the Chairperson or person may, with the approval of the Inspector-General, be represented by another person.

Subsection 55AM (6) allows the Inspector-General to discuss the inquiry with the Minister at any time before completing it and if, during the inquiry, the Inspector-General considers that there is sufficient evidence of a breach of duty or misconduct by the Chairperson, by another member or by a staff member of the NCA, subsection 55AM (7) provides that the Inspector-General must, in the case of the Chairperson, inform the Minister and in the case of any other person, inform the Chairperson.

#### **New Section 55AN - Power to obtain information and documents**

To facilitate an inquiry, the Bill gives the Inspector-General powers to obtain information and documents from witnesses, comparable to the powers conferred on the Inspector-General of Intelligence and Security and the Ombudsman. If the Inspector-General has reasonable grounds for believing that a person has possession or control of information or documents relevant to an inquiry, new subsection 55AN (1) empowers him or her to issue a written notice, requiring the person [which includes a body corporate] to provide the information or documents. Subsection 55AN (2) stipulates that the notice is to specify the information or documents required, the manner and time within which they are to be provided and the effects of new sub-sections 55AQ (1) and (4) [referred to below].

Subsection 55AN (3) allows the Inspector-General to take possession, copy and make extracts of documents produced under subsection 55AN (2) and to retain possession for the duration of the inquiry. But the Inspector-General must permit access to the documents to persons otherwise entitled to access.

#### **New Section 55AO - Power to require a person to attend before the Inspector-General**

In addition to the powers under new section 55AN, the Inspector-General is also empowered in new section 55AO to require a person to attend before him or her to give evidence. Subsection 55AO (1) provides that if the Inspector-General has reasonable grounds for believing that a person is capable of giving evidence relevant to an inquiry, the Inspector-General may, by written notice, require the person to attend to answer questions. Subsection 55AO (2) stipulates that the notice is to specify the place and time at which or within which the person is required to answer questions and the effects of new subsections 55AQ (2), (3) and (4) [referred to below]. Subsection 55AO (3) empowers the Inspector-General to require a person giving evidence to be sworn or to make an affirmation and to administer an oath or affirmation and to examine a person under oath or affirmation.

### **New Section 55AP - Scales of expenses**

New section 55AP allows for the regulations to the Act to provide for scales of expenses to be allowed to persons required to give information or produce documents under sections 55AN or 55AO.

### **New Section 55AQ - Offences**

New section 55AQ creates offences for failing to comply with a valid requirement under new sections 55AN and 55AO. Subsection 55AQ (1) makes it an offence for a person to refuse or fail, without reasonable excuse, to give information or provide documents, if required to under new section 55AN. Similarly, subsections 55AQ (2), (3) and (4) make it an offence for a person to refuse or fail, without reasonable excuse, to be sworn or make an affirmation, if required to under new section 55AO, to refuse or fail, without reasonable excuse, to comply with a notice or answer a question, if required to under new section 55AO or to give answers or information, if required to under new sections 55AN and 55AO, which the person knows are false or misleading in a material particular. Offences against subsections 55AQ (1), (2) and (3) are punishable by a maximum of 6 months imprisonment and an offence against 55AQ (4) is punishable by a maximum of 12 months imprisonment.

### **New Section 55AR - Liability under another law in relation to the giving of information**

New section 55AR provides that a person is not excused from giving information, producing documents or answering questions, if required to under new sections 55AN and 55AO, on the ground that it would contravene a law of the Commonwealth or of a State or Territory, be contrary to the public interest, tend to incriminate the person or make the person liable to a penalty, or would disclose legal advice given to a Minister, a Department or an authority of the Commonwealth. But sub-clause 55AR (2) stipulates that the information and answers given or the production of documents and any further information, document or thing obtained directly or indirectly therefrom are not admissible in evidence against the person in any criminal proceedings except for proceedings arising under new subsection 55AQ (4). Subsection 55AR (3) protects a person from liability to any penalty under Commonwealth, State or Territory law for giving information, producing documents or answering questions as required by new sections 55AN or 55AO.

### **New Section 55AS - Entry to premises of the Authority**

Subsection 55AS (1) empowers the Inspector-General, for the purposes of an inquiry, to enter any premises occupied by the NCA at any reasonable time. But subsection 55AS (2) requires the Inspector-General to notify the Chairperson before exercising the power.

## **Division 4 - Reports**

### **New Section 55AT - Reports**

New section 55AT prescribes a consultative process to be undertaken by the Inspector-General in preparing a final report of his or her inquiry.

Subsection 55AT (1) provides that after an inquiry has been completed the Inspector-General must, except in the case of 55AW inquiries [referred to below], give the Chairperson a draft report setting out the Inspector-General's conclusions and recommendations. If the Chairperson provides comments on the draft report within a reasonable time the Inspector-General must take account of them in preparing the final report and he or she may respond in the final report to any of the Chairperson's comments. The Inspector-General must provide a copy of the final report to the Minister and the Chairperson and subsection 55AT (2) stipulates that it must include the Inspector-General's reasons for any conclusions and recommendations and if the Inspector-General considers that restitution or compensation is warranted, a recommendation to that effect.

### **New Section 55AU - Response to complainant**

If the Inspector-General has conducted an inquiry following a complaint, subsection 55AU (1) requires that he or she give a written response relating to the inquiry, to the complainant and to the body or person that may have referred the complaint under subsection 55AE (4). Subsection 55AU (2) stipulates that the Inspector-General and the Minister must agree that the proposed response will not disclose sensitive information before it is given to the complainant.

### **New Section 55AV - Action as a result of reports**

If the Chairperson takes or proposes to take any action arising from a report of the Inspector-General, subsection 55AV (1) provides that the Chairperson must give the Inspector-General details in writing of the action taken or proposed to be taken. If, however, in the opinion of the Inspector-General, the Chairperson fails to take appropriate action within a reasonable time, subsection 55AV (2) provides that the Inspector-General may discuss the matter with the Minister, prepare a report on the matter and provide a copy of the report to the Minister and the Chairperson.

## **Division 5 - Inspector-General's monitoring function in relation to privacy matters**

### **New Section 55AW - Minister may direct Inspector-General to inquire**

In its response to the PJC report the Government agreed that specific privacy guidelines should be developed, in consultation with the NCA and the Privacy Commissioner, to cover the NCA's activities, and that compliance with the guidelines, once developed, would be monitored by the Inspector-General. Section 55AW gives effect to that undertaking. Subsection 55AW (1) empowers the Minister to direct the Inspector-General to inquire into any matter concerning compliance by the NCA with directions or guidelines which the Minister has stated under new subsection 18 (3A) as relating to the protection of individual privacy. Subsection 55AW (2) allows the Minister to direct that inquiries be conducted periodically, be conducted in respect of particular aspects of the directions or guidelines, or with respect to the NCA's compliance over a specified period. The Minister must specify

the manner in which the Inspector-General is to report on the inquiries and under subsection 55AW (3) the Inspector-General must conduct the inquiries and provide reports to the Minister in accordance with the Minister's direction.

#### **New Section 55AX - Arrangement to obtain information or document**

To assist him in conducting inquiries under new section 55AW, the Inspector-General may make arrangements with the Chairperson for documents or information held by the NCA to be provided to him or her on a regular basis.

### **Division 6 - Administrative matters**

#### **New Section 55AY - Terms and conditions of the appointment**

New section 55AY sets out the terms and conditions of appointment to the office of Inspector-General. The Inspector-General is appointed for a period not exceeding three years and may be re-appointed for one further term. If the person appointed is not a judge, the terms and conditions of appointment, other than those provided by this Bill, will be determined by the Minister. The Inspector-General may be appointed on a full or part-time basis but must not be appointment on a full time basis if the person has already reached the age of 65 or for a period that extends beyond the day the person reaches the age of 65.

#### **New Section 55AZ - Remuneration and allowances**

Subsections 55AZ (1) and (2) provide for the remuneration and allowances to be paid to the Inspector-General. The Inspector-General is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of the Tribunal is in operation, as is prescribed by the regulations. Subsection 55AZ (3) provides that subsections 55AZ (1) and (2) have effect subject to the Remuneration Tribunals Act 1973. Subsection 55AZ (4) provides that, if the person appointed Inspector-General is a Judge or the holder of a full time office created under another Act, the person is not entitled to remuneration or allowances under this Act whilst he or she is receiving a salary or annual allowances as a judge or full time office holder under the other Act. But subsection 55AZ (5) provides an exception to subsection 55AZ (4) in that it permits the Minister to make a determination specifying allowances that are payable to the Inspector-General if he or she is also the holder of another office.

#### **New Section 55AZA - Leave of absence**

Subsection 55AZA (1) provides that unless otherwise provided for under section 87E of the Public Service Act 1922, the Inspector-General's recreation leave entitlements are to be determined by the Remuneration Tribunal. Subsection 55AZA (2) allows the Minister to grant the Inspector-General leave of absence on such terms and conditions as the Minister determines.

#### **New Section 55AZB - Resignation**

The Inspector-General may resign by delivery of a written resignation to the Governor-General.

### **New Section 55AZC - Termination of appointment**

New section 55AZC sets out specific conditions for the termination of the Inspector-General's appointment. Subsection 55AZC(1) allows the Governor-General to terminate the Inspector-General's appointment for misbehaviour or physical or mental incapacity. Under subsection 55AZC (2), the Governor-General must terminate the appointment if the Inspector-General:

- becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit;
- fails, without reasonable excuse, to comply with the disclosure of interests provisions of section 55AZD [see below]; or
- (being a person holding office on a full-time basis) engages, except with the approval of the Minister, in paid employment outside the duties of his or her office [other than duties of another office created by an Act] or is absent from duty, except if on leave, for 14 consecutive days or for 28 days in any twelve month period;

As is customary in Commonwealth legislation, new subsection 55AZC (3) provides that the grounds for termination of appointment, specified in subsections 55AZC (1) and (2), do not apply if the person holding the office of Inspector-General is a Judge. Subsection (4) provides that if the person was a Judge at the time of appointment but ceases to be a Judge, the Governor-General may terminate that person's appointment.

### **New Section 55AZD - Disclosure of interests**

Section 55AZD requires the Inspector-General to give written notice to the Minister of all his or her interests, pecuniary or otherwise, that he or she has or acquires and that could conflict with the proper performance of the position's functions. Failure so to disclose is a ground for termination of appointment under section 55AZC.

### **New Section 55AZE - Staff**

Section 55AZE addresses the appointment of staff to assist the Inspector-General and subsection (1) and (2) provide that his or her staff must be appointed and employed under the Public Service Act and that he or she has all the relevant powers of, or exercisable by, a Secretary under that Act.

Subsections 55AZE (3) and (4) deal with the situation where the person appointed Inspector-General under this Act also holds the office of Inspector-General of Intelligence and Security. In such circumstances, a person may be appointed or employed as a member of the staff to assist the Inspector-General in both capacities.



## **Division 7 - Miscellaneous**

### **New Section 55AZF - Delegation by Inspector-General**

New Section 55AZF allows the Inspector-General to delegate any of the powers of the Inspector-General under new sections 55AN, 55AO and 55AS.

### **New Section 55AZG - Protection from civil actions**

The usual protections from civil actions arising from the proper discharge of duties by the Inspector-General are provided under section 55AZG. Under subsection 55AZG (1), neither the Inspector-General nor a person acting on his or her behalf is liable to an action or other proceedings for damages for or in relation to any act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power conferred under the Act. Under subsection 55AZG (2), a person is not liable to legal action for loss, damage or injury suffered by another person, by reason only of a complaint being made or documents, information or evidence being given to the Inspector-General.

### **New Section 55AZH - Annual reports**

Subsections 55AZH (1), (2) and (3) require that as soon as practicable after each 30 June the Inspector-General must provide the Minister with a report for the year ended on that 30 June, which must include comments on any inquiry conducted by the Inspector-General under paragraph 55AD (1) (a) [ie inquiries arising from complaints]. But the Inspector-General must not disclose sensitive information, as defined under the Act, in the annual report. Subsection 55AZH (4) requires the Minister to cause a copy of the Inspector-General's annual report to be tabled in both Houses of Parliament as soon as practicable.



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