

# **NATIONAL ANTI-CORRUPTION COMMISSION REGULATIONS 2023**

## **REPLACEMENT EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The *National Anti-Corruption Commission Act 2022* (Act) establishes the National Anti-Corruption Commission (NACC) as an independent agency responsible for detecting, preventing, investigating and reporting on serious or systemic corrupt conduct in the Commonwealth public sector. The Act received Royal Assent on 12 December 2022 and commenced on 1 July 2023.

Paragraph 280(1)(a) of the Act provides that the Governor-General may make regulations prescribing matters that are required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 4 of the *Acts Interpretation Act 1901* (Acts Interpretation Act) provides authority for legislative instruments, including regulations like the *National Anti-Corruption Commission Regulations 2023* (Regulations), to be made before the commencement of the relevant enabling legislation. Subsection 4(2) of the Acts Interpretation Act enables the Governor-General to make the Regulations as if the Act has already commenced.

The purpose of the Regulations is to:

- prescribe arrangements for allowances for travel and other expenses incurred by a witness appearing at a hearing under the Act to be paid by the Commonwealth;
- specify persons prescribed as legal aid officers for the purposes of section 98 of the Act;
- prescribe arrangements for the payment of legal financial assistance to parliamentarians and non-parliamentarians engaging with the NACC; and
- prescribe information that must be included in annual reports prepared by the National Anti-Corruption Commissioner (Commissioner) and the Inspector of the NACC (Inspector).

#### *Allowances for witness travel and other expenses*

Section 93 of the Act provides that a witness appearing at a hearing is entitled to be paid by the Commonwealth any allowances for travelling and other expenses that are prescribed by the regulations.

The Regulations establish arrangements for witnesses to apply for allowances for travel, accommodation and meal expenses incurred as a result of attending a hearing under the Act. These allowances will be paid by the Commonwealth, up to a maximum amount. The Regulations prescribe the requirements of an application to the NACC for the payment of allowances and expenses, the decision-maker for the purposes of an application, the criteria of which a decision-maker must be satisfied when granting an application, and the maximum allowance available for travel, accommodation and meals.

### Legal aid officers

Subsection 98(1) of the Act provides that a person commits an offence if they disclose information about a notice to produce or private hearing summons that includes a non-disclosure notation. However, paragraph 98(3)(c) provides that the offence does not apply if the disclosure is to a legal aid officer for the purpose of seeking assistance in relation to the notice or summons or any other matter arising under the Act.

Paragraph 98(5)(b) of the Act provides that the Regulations may prescribe a class of persons as ‘legal aid officers’ for the purposes of the Act. The Regulations prescribe that ‘legal aid officers’ for the purposes of the Act include persons responsible for receiving or assessing applications for legal financial assistance or involved in assessing or making decisions in relation to such applications. This applies in relation to the schemes established by Parts 4 and 5 of these Regulations or another scheme operated in a Commonwealth agency (other than a parliamentary office).

This ensures that persons who have received a notice to produce or a private hearing summons which includes a non-disclosure notation can disclose information relating to that notice or summons for the purpose of applying for legal financial assistance, without committing an offence under subsection 98(1) of the Act.

### Legal financial assistance

Paragraph 280(2)(a) of the Act provides that the Regulations may prescribe arrangements for the Commonwealth to provide financial assistance in respect of:

- a person’s representation at a hearing by a legal practitioner;
- an application, or proposed application, to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) for an order of review in respect of a matter arising under the Act; or
- any other matter arising under, or in relation to, the Act.

The Regulations establish two schemes to provide legal financial assistance to persons engaging with the NACC. The Regulations create a general scheme available to any person engaging with the NACC in particular circumstances and a second scheme available to current and former parliamentarians where their involvement in the matter arose because of their current or former role as a parliamentarian.

The general scheme enables persons to apply for legal financial assistance in relation to their legal representation at a NACC hearing or in relation to an application for judicial review. The general scheme is administered in accordance with the *Commonwealth Guidelines for Legal Financial Assistance 2012* (Commonwealth Guidelines), which previously governed the legal financial assistance scheme under the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).

The parliamentary scheme enables current and former parliamentarians to apply for legal financial assistance in relation to any matter arising under or in relation to the Act, if the matter relates to their parliamentary role and it is appropriate to provide the assistance. The parliamentary scheme largely aligns with the existing legal financial assistance scheme for current and former Ministers and Assistant Ministers under the *Parliamentary Business Resources Regulations 2017* (PBR Regulations), with some differences to account for the particular operating environment of the NACC.

The financial impact of these arrangements on the Commonwealth is limited as the Government provided the Attorney-General’s Department (the Department) with ongoing funding in the 2022-23 Budget to provide legal financial assistance under the general scheme. Paragraph 280(3) of the Act also provides that the Consolidated Revenue Fund is appropriated for the purposes of making financial assistance payments to, or for the benefit of, parliamentarians.

### Annual reporting

The Act establishes the Commissioner of the NACC. The Commissioner's functions include detecting, preventing, investigating, and reporting on serious or systemic corruption in the Commonwealth public sector. The Commissioner has broad powers to investigate corruption issues, including the power to conduct hearings in public or in private, summon witnesses to attend and give evidence at a hearing, and compel the production of information or documents.

The Act also establishes the Inspector of the NACC as an independent officer of the Parliament. The Inspector is responsible for overseeing the operations of the NACC, including investigating allegations of serious or systemic corruption within the NACC, handling complaints of agency maladministration or officer misconduct within the NACC and auditing the NACC's compliance with laws of the Commonwealth.

Sections 198 and 271 of the Act require the Inspector and the Commissioner respectively to each prepare an annual report on the performance of their functions during the financial year.

Subsection 198(3) and paragraph 271(2)(a) of the Act permit the Governor-General to make regulations prescribing the required content for these annual reports.

The Governor-General's regulation making power in relation to annual reports prepared by the Commissioner is confined to issues covered in subparagraphs 271(2)(a)(i)-(vii) of the Act. This includes particulars about:

- corruption issues referred to, dealt with and investigated by the Commissioner;
- public inquiries conducted by the Commissioner; and
- certificates issued by the Attorney-General under sections 235 and 236 of the Act.

In relation to the Inspector, the Governor-General may prescribe particulars about any of the Inspector's functions under section 184 of the Act.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on 1 July 2023.

Details of the Regulations are set out in the **Attachment A**.

### **DOCUMENTS INCORPORATED BY REFERENCE**

Section 7 of Part 2 of the Regulations incorporates the rates set out in Table 6A and 6B of the *Remuneration Tribunal (Official Travel) Determination 2022* (the Determination) as in force on 1 July 2023 for the purposes of determining the maximum accommodation and meals allowance available to a witness appearing at a hearing under the Act. The Determination is made under the *Remuneration Tribunal Act 1973*.

### **CONSULTATION**

Targeted consultation was undertaken on the draft regulations between April-May 2023. In particular, the following agencies and persons were consulted:

- the Australian Commission for Law Enforcement Integrity (ACLEI) in relation to the entire instrument as ACLEI's functions will transition to the NACC once it commences on 1 July 2023;

- the Department of Finance in relation to the legal financial assistance scheme in Part 5 as this scheme has an unquantifiable financial impact supported by a special appropriation established by section 280 of the NACC and confers certain decision-making powers on the Minister for Finance;
- the Australian Public Service Commission (APSC) in relation to the witness travel allowances in Part 2 which incorporates by reference a Remuneration Tribunal determination for which the APSC is responsible;
- the Department of the Prime Minister and Cabinet in relation to the legal financial assistance scheme in Part 5, which confers certain decision-making powers on the Prime Minister;
- the designate NACC statutory office-holders appointed by the Governor-General under the Act in relation to the reporting obligations imposed on those office-holders under Parts 6 and 7 of the Regulations.

All agencies and office-holders consulted were supportive of the Regulations. ACLEI provided input on the operational implications of the Regulations. The Department of Finance provided input on the parameters of the legal financial assistance scheme for parliamentarians, which has an unquantifiable financial impact to the Commonwealth. Where appropriate, this input was incorporated and both agencies are supportive of the Regulations in the form proposed.

## **REGULATION IMPACT STATEMENT**

The Office of Impact Analysis (OIA) advised that a Regulatory Impact Statement is not required as the Regulations are unlikely to have more than a minor regulatory impact, as the changes will not affect businesses, individuals or community organisations (OBPR23-04255).

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the legislative instrument**

The Regulations support the operation of the Act and establishment of the NACC, which is a specialist investigatory agency that works to prevent, detect, investigate and report on serious or systemic corruption in the Commonwealth public sector.

The NACC will strengthen corruption prevention across the Commonwealth public sector by undertaking public inquiries and providing advice on corruption risks and vulnerabilities and strategies to address them.

Part 2 of the Regulations supports the operation of the Act by creating arrangements to facilitate payment by the Commonwealth of allowances for travel, accommodation and meal expenses incurred by a witness who appears at a hearing under the Act. The Regulations prescribe the process for making an application, the relevant criteria that must be satisfied before an allowance may be granted and the maximum allowances available.

Part 3 of the Regulations supports the operation of the Act by specifying persons who will be prescribed as legal aid officers for the purposes of section 98 of the Act. This ensures that persons who have received a notice to produce or a private hearing summons that includes a non-disclosure notation, can disclose information relating to that notice or summons for the purpose of applying for legal financial assistance, without committing an offence under subsection 98(1) of the Act.

The Regulations further support the operation of the Act by establishing two schemes to provide legal financial assistance to persons engaging with the NACC. Part 4 of the Regulations establishes a general legal financial assistance scheme available to any person engaging with the NACC in particular circumstances. Part 5 of the Regulations establishes a legal financial assistance scheme available for current and former parliamentarians, where their involvement in the matter under the Act arose because of their current or former role as a parliamentarian.

Under the general scheme, the Regulations prescribe arrangements for the Commonwealth to provide legal financial assistance in relation to a person's representation by a legal practitioner at a hearing under the Act or an application for administrative review in respect of a matter under the Act. Under the parliamentary scheme, the Regulations prescribe arrangements for the Commonwealth to provide legal financial assistance in relation to any eligible matter arising under the Act. The parliamentary scheme is largely modelled on the PBR Regulations, which provides legal financial assistance to current and former Ministers and Assistant Ministers. The Regulations prescribe the process for making an application under each scheme, the eligibility criteria and associated reporting requirements.

Part 6 and Part 7 of the Regulations prescribe content that must be included in an annual report prepared by the Commissioner or the Inspector under the Act. The Regulations establish robust reporting requirements to promote transparency and increase oversight of the exercise of powers and functions by the Commissioner and the Inspector.

## **Human rights implications**

### ***Right to an effective remedy contained in article 2(3) of the ICCPR***

Article 2(3) of the ICCPR guarantees the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities. The content of the right also includes an obligation to ensure that the competent authorities enforce such remedies when they are granted.

The Regulations promote the right to an effective remedy for violations of the rights and freedoms under the ICCPR by ensuring eligible people have access to legal financial assistance and travel allowances in relation to eligible matters arising under the Act (section 280).

### ***Legal financial assistance and allowances for travel***

The Regulations promote the right to an effective remedy by allowing persons to access legal financial assistance in relation to matters arising under, or in relation to, the Act (subsection 280(2)(a)), and by facilitating payment by the Commonwealth of allowances for travel and other expenses incurred by witnesses who appear at hearings under the Act. Legal financial assistance is available under the Regulations in relation to a person's representation at a hearing by a legal practitioner, or an application under the ADJR Act (for example, when seeking judicial review of findings made in an investigation report), or, for parliamentarians, any matter related to an eligible matter as defined by the Regulations in section 17. Allowances for travel and other related expenses are available to witnesses appearing at a NACC hearing up to a maximum amount, unless the NACC has met the cost of some or all of the relevant expenses, as prescribed in Part 2 of the Regulations.

The provisions in the Regulations setting out the schemes for legal financial assistance and witness travel allowances promote the right to an effective remedy by ensuring people are not denied access to the justice system on the basis of financial means.

### ***Right to a fair trial and fair hearing contained in article 14(1) of the ICCPR***

Article 14(1) of the ICCPR protects the right to a fair and public criminal trial, and public hearing in civil proceedings. It provides that all persons shall be equal before the courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

The Regulations promote and protect the right to a fair trial and the right to a fair hearing by ensuring people have access to allowances for travel and legal financial assistance in relation to matters arising under the Act.

#### *Legal financial assistance and allowances for travel*

The Regulations promote the right to a fair trial by allowing persons to access legal financial assistance in relation to matters arising under, or in relation to, the Act and ensuring that allowances for travel and other related expenses are available to persons who appear as a witness at a hearing under the Act. This includes expenses associated with any reasonable adjustment that may be required to accommodate a health or disability requirement of the person, as provided in paragraph 6(2)(g) of the Regulations. This assists in enabling a person with disability or a health condition to participate in a NACC hearing and ensures they do not experience financial detriment because of any reasonable adjustments required to accommodate their health or disability.

The Regulations also provide the circumstances in which legal financial assistance may be required and can be accessed, as well as the conditions and eligibility requirements for different persons in the NACC's jurisdiction. These provisions in the Regulations promote the right to a fair hearing by ensuring that people required to interact with the NACC are not denied an opportunity to access fair representation at a hearing or an opportunity to review a decision made under the Act on the basis of financial means.

### ***Prohibition on interference with privacy and attacks on reputation contained in article 17 of the ICCPR***

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks.

The Regulations may interfere with a person's privacy in certain circumstances and limit this right. However, the right to privacy may be limited where the limitation is lawful and not arbitrary. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted 'reasonableness' to imply that any limitation must be proportionate and necessary to achieve a legitimate objective.

#### *Legal financial assistance*

The Regulations provide for the disclosure of information, which may include personal information, in the form of reporting to the Parliament on each decision to pay financial assistance to a parliamentarian, including a consolidated statement of this expenditure each year. These provisions engage and may limit the right to privacy by publishing the identity of parliamentarians approved to receive a grant of legal financial assistance related to an eligible matter under the Act through reporting of public expenditure.

To the extent the provision may limit the right to privacy, it is reasonable, necessary and proportionate to a legitimate objective. The provision is reasonable because it contains, in subsections 25(2) and (3) of the Regulations, limitations on the disclosure of certain information by the Attorney-General to the Parliament. These provisions regulate and restrict access to some information relating to public expenditure on legal financial assistance for parliamentarians. These provisions are necessary to ensure sensitive matters, including information that could affect the reputation of a person or prejudice or compromise another matter, are not publicised inadvertently or inappropriately.

The potential limitation on the right to privacy is necessary and aimed at the legitimate objective of promoting transparency and scrutiny of the expenditure of public money and ensuring funds committed are used appropriately. Public reporting on grants of assistance to parliamentarians is an important accountability mechanism for the payment of public money to democratically elected officials.

Further, the Regulations are proportionate to this legitimate objective as they provide for consultation on, and, where necessary as determined by the Commissioner and the Inspector, prevention of, the disclosure of information in circumstances where it could prejudice or compromise another matter.

### **Conclusion**

The Regulations are compatible with human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that measures in the Regulations limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

## NOTES ON SECTIONS

### Part 1—Preliminary

#### Section 1 – Name

This section provides that the title of the Regulation is the *National Anti-Corruption Commission Regulations 2023* (Regulations).

#### Section 2 – Commencement

This section provides for the Regulations to commence on 1 July 2023.

#### Section 3 – Authority

This section provides that the Regulations will be made under the *National Anti-Corruption Commission Act 2022* (Act).

#### Section 4 – Definitions

This section sets out the Dictionary for the Regulations and define the following terms.

*Agency maladministration* has the same meaning as in section 184 of the Act.

*Approving official* means, for the purposes of an application for financial assistance under section 18 of the Regulations, the person defined in section 19 of the Regulations.

*Commissioner’s annual report* for a financial year is defined in section 26 of the Regulations.

*Eligible matter* is defined in section 17 of the Regulations.

*Finance Minister* means the Minister administering the *Public Governance, Performance and Accountability Act 2013*.

*Inspector’s annual report* for a financial year is defined in section 33 of the Regulations.

*Officer misconduct* has the same meaning as in section 184 of the Act.

*Official travel determination* means the *Remuneration Tribunal (Official Travel) Determination 2022*, as in force on 1 July 2023.

*Secretary* means the Secretary of the Attorney-General’s Department.

The note to this section also provides that the following terms are defined in the Act and have the same meaning for the purposes of the Regulations:

- Commissioner;
- Commonwealth agency;
- corruption investigation;
- corruption issue;
- Inspector;
- NACC Act process;
- NACC complaint investigation;
- NACC corruption issue;
- parliamentarian;
- staff member.



## **Part 2—Allowances for travelling and other expenses for witnesses**

Section 93 of the Act provides that witnesses appearing at a hearing are entitled to allowances for travel and other expenses, as prescribed by the Regulations. This Part of the Regulations provides for the payment of these allowances.

Section 7 of the Act defines ‘witness’ as, among other things, a person who is required to comply with a notice to produce, or who is summoned to attend a hearing, or who gives evidence at a hearing. For the purposes of the Regulations, the phrase ‘a witness who appears at a hearing’ encompasses a person who is summoned to attend a hearing or who gives evidence at a hearing. It does not encompass a person complying with a notice to produce, unless that person also appears at a hearing. Nothing in this Part limits the ability of the NACC to directly cover a witness’s expenses for the purposes of appearing at a hearing.

### **Section 5 – Purpose of this Part**

This section provides that the purpose of this Part is to prescribe the allowances for travel and other expenses that a witness appearing at a hearing is entitled to be paid by the Commonwealth.

The note to this section provides that this Part applies to a witness appearing at a hearing, regardless of whether the witness is summoned to attend the hearing.

### **Section 6 – Allowance for travel**

This section provides that a witness appearing at a hearing is entitled to be paid the expenses of travel that the witness undertakes in order to appear, up to the maximum travel allowance worked out under subsection 6(2) of the Regulations.

As outlined above, in accordance with the definition of ‘witness’ under section 7 of the Act, subsection 6(1) of the Regulations is expressed to allow a person appearing at a hearing to receive the prescribed allowance whether or not they appeared at a hearing due to a summons or for some other reason.

Subsection 6(2) provides that the maximum travel allowance a witness is entitled to receive is the cost of the most economical form of transport that is reasonable. In determining what is reasonable, a decision-maker should have regard to:

- the distance required to be travelled;
- the time spent travelling;
- the forms of transport reasonably available to the witness for the purpose of the travel;
- the directness and practicality of the route;
- the safety of the witness;
- any need to maintain the confidentiality of a hearing;
- any reasonable adjustments that may be required to accommodate the health or disability requirements of the witness.

What constitutes the most economical form of transport that is reasonable in the circumstances may vary depending on the factors that are relevant in each case. For example, if a witness is required to travel a long distance to appear, it may be more economical for them to drive, but it may be reasonable for them to take a flight because of the time it would take to drive, and the directness or otherwise from where they need to travel.

Although this provision gives the decision-maker some discretion in determining what is reasonable in the circumstances, the discretion is sufficiently confined as the decision is predominantly administrative in nature. The relevant considerations may vary, but in each case the decision-maker cannot disregard the actual cost that was, or will be, incurred of the most economical form of transport for the relevant travel. This discretion is nonetheless important in order to account for real-life considerations relevant to a witness in undertaking the travel.

Subsection 6(3) provides that a witness who is entitled to be paid expenses under subsection 6(1) of the Regulations may apply to the NACC for the payment of the expenses.

Subsection 6(4) provides the details that must be included in an application for the payment of expenses. This includes:

- evidence that the travel was or will be undertaken for the purposes of appearing as a witness at the hearing;
- evidence of the expenses incurred or likely to be incurred by the witness;
- evidence as to why a particular mode of transport was or is required;
- evidence of any health or disability requirements, or adjustments required to accommodate those requirements, that affected, or will affect, the cost of the travel.

This evidence will allow the decision-maker to determine whether the costs incurred are associated with the most economical form of reasonable travel. It also ensures that only costs incurred as a result of travel required to appear as a witness at a hearing could be claimed.

The form that the evidence can take is not prescribed. It could include, for example, receipts, copies of tickets, medical certificates or letters from health professionals, or a statutory declaration explaining why the witness was required to take a particular mode of transport.

Subsection 6(5) provides who the decision-maker may be for the purposes of granting an application for a travel allowance. An application under this section of the Regulations may be granted by the Chief Executive Officer (CEO) of the NACC, or a staff member of the NACC who is an Australian Public Service employee and is an SES employee, or an acting SES employee, or classified as Executive Level 2 or equivalent, or higher, or someone acting in such a role. This is an appropriate level of seniority within the organisation to approve the disbursement of potentially significant costs; for example, in circumstances where a witness has to undertake travel over an extended period of time or travel a significant distance. This is consistent with the administration of similar travel allowance arrangements in the Commonwealth.

A decision-maker is only able grant an application if they are satisfied that the application complies with the evidentiary requirements in subsection 6(4) of the Regulations. This ensures that applications for an allowance can only be granted if they include an appropriate level of evidence.

If the decision-maker grants the application but is not satisfied that the expenses applied for were equal to, or less than, the maximum travel allowance, the decision-maker must reduce the amount payable to the witness to the amount of the maximum travel allowance. This ensures that a decision-maker cannot approve an amount that is unreasonably high, as they are constrained by the definition of the maximum travel allowance in subsection 6(2) of the Regulations.

Subsection 6(8) provides that allowances for travel are payable in accordance with the grant, subject to the Regulations.

Decisions to grant applications made under section 6 are excluded from merits review because they are characterised as ‘automatic’ or ‘mandatory’ decisions, as defined in the Administrative Review Council’s *What decisions should be subject to merits review?* guide. Once all the conditions set out in section 6 of the Regulations are met, the decision-maker is required to approve the application, because subsection 6(1) provides that the witness is entitled to receive the allowance.

Once a person’s entitlement has been determined, subsection 6(7) requires the decision maker to assess whether the amount claimed by the witness is equal to or less than the ‘maximum travel allowance’ set out in subsection 6(2), and if necessary must reduce the amount payable to the maximum amount. While subsection 6(7) requires the decision-maker to assess whether the amount paid is less than or equal to the maximum travel allowance allowed under subsection 6(2), it does not affect the witness’s entitlement to the allowance. Therefore, there is no scope for merits review to operate on the decision to grant an application where entitlement to the allowance has been established.

While merits review of decisions is not appropriate, the Regulations do not preclude the NACC from implementing relevant internal review processes in respect of travel allowances. The implementation of any internal review is a matter for the NACC.

The NACC may also arrange and pay the costs associated with travel for the witness directly, without the witness needing to claim these expenses. In these circumstances, no allowance is payable under this section (see section 8 of the Regulations).

### **Section 7 – Allowance for accommodation and meals**

This section applies to a witness appearing at a hearing who needs to travel and be absent from their home overnight for one or more nights in order to appear at the hearing and, in doing so, stays in commercial accommodation for at least one of those overnight absences.

This section provides that such a witness is entitled to be paid the expenses that they incur, or are likely to incur, for accommodation and meals up to the maximum allowance worked out under subsection 7(2) of the Regulations. The witness is entitled to be paid the expenses for each night they stay in commercial accommodation. Commercial accommodation means accommodation in a commercial establishment such as a hotel, motel or serviced apartment.

This means that only a witness who needs to be absent from their home overnight in order to appear at the hearing is entitled to claim an accommodation and meals allowance. Further, a witness who does not incur accommodation costs (for example, because they stay in private accommodation) is not entitled to claim for an accommodation and meals allowance. This is because it is presumed that staying in private accommodation will not incur additional costs to the witness.

Subsection 7(2) provides that the maximum accommodation and meals allowance for an overnight absence is the rate set out in Table 6A and 6B of Part 6 of the *Remuneration Tribunal (Official Travel) Determination 2022* (the Determination), as in force on 1 July 2023, for a tier 3 office holder who undertakes the same travel as the witness. This ensures that the allowance is capped in order to prevent a witness from claiming for unreasonable costs. A witness is entitled to claim only their actual costs. If those costs are less than the maximum accommodation and meals allowance, they are not entitled to claim an amount above their actual costs simply because they have not reached the cap. Similarly, if their actual costs exceed the cap, they are only entitled to the capped amount.

The Determination is incorporated into this provision as it provides an independent assessment of the reasonable allowances and entitlements for travel to capital cities and country centres in Australia for certain Commonwealth office holders, and allows witnesses to claim costs equal to those of certain public officials. The Determination takes into account travel allowance rates set by other determinations, including the Australian Taxation Office for employees generally.

As the Regulations only incorporate Table 6A and 6B of the Determination, it is incorporated as in force at the date that the Regulations came into force. This ensures that any changes to the Determination that could result in the table references changing will not affect the operation of Regulations. It is intended that the Government will take steps to amend the Regulations to incorporate any updates to the relevant rates set in the Determination made after 1 July 2023.

This section provides that no expenses are payable to a witness for travel that does not require the witness to be absent from their home overnight. This is appropriate as a witness who is not required to stay overnight away from home in order to attend a hearing will not necessarily incur accommodation and meals expenses. This is consistent with the approach under the Determination, which provides that an office holder is not entitled to expenses in circumstances where travel does not require an overnight absence. The witness will still be entitled to claim expenses for their travel under section 6 of the Regulations.

Subsection 7(4) provides that a witness who is entitled to be paid expenses under subsection 7(1) of the Regulations may apply to the NACC for the payment of expenses.

Subsection 7(5) provides the details that must be included in an application for the payment of expenses. This includes:

- evidence that the witness was or will be absent overnight in order to appear as a witness at the hearing; and
- evidence of the expenses incurred or likely to be incurred by the witness.

This evidence ensures that only costs incurred from overnight travel to appear as a witness at a hearing can be claimed.

This section also provides who the decision-maker is for the purposes of granting an application for an accommodation and meals allowance. An application may be granted by the CEO of the NACC, or a staff member of the NACC who is an Australian Public Service employee and is an SES employee, or an acting SES employee, or classified as Executive Level 2 or equivalent, or higher, or someone acting in such a role. This is an appropriate level of seniority within the organisation to approve the disbursement of potentially quite significant costs; for example, in circumstances where a witness has to undertake travel over an extended period of time or travel a significant distance. This is also consistent with the administration of similar travel allowance arrangements in the Commonwealth.

A decision-maker is only able to grant an application if they are satisfied that the application complies with the evidentiary requirements in subsection 7(5) of the Regulations. This ensures that applications for an allowance are only granted if they include an appropriate level of evidence.

If the decision-maker grants the application, but is not satisfied that the expenses applied for are equal to, or less than, the maximum allowance, the decision-maker must reduce the amount payable to the witness to the amount of the maximum accommodation and meals allowance. This ensures that a decision-maker cannot approve an amount that is unreasonably high, as they are constrained by the maximum amount listed in the Determination.

Subsection 7(9) provides that allowances for accommodation and meals are payable in accordance with the grant, subject to this instrument.

Decisions to grant applications under section 7 of the Regulations are excluded from merits review because they are characterised as ‘automatic’ or ‘mandatory’ decisions, as defined in the Administrative Review Council’s *What decisions should be subject to merits review?* guide.

Once all the conditions set out in section 7 are met, the decision-maker is required to approve the application, because subsection 7(1) provides that the witness is entitled to receive the allowance. Under subsection 7(8), the decision-maker is required to limit the expenditure to a pre-determined maximum accommodation and meals allowance set by a determination of the Remuneration Tribunal. This requirement is not a discretion as to whether or not to grant the allowance as once a witness meets the conditions in this section, the decision-maker's assessment is limited to whether the expenses incurred or likely to be incurred are equal to or less than the set amount in the determination.

The decision under subsection 7(8) is mandatory following a decision to grant an allowance under subsection 7(1), leaving no scope for merits review to operate.

While merits review of decisions is not appropriate, the Regulations do not preclude the NACC implementing relevant internal review processes in respect of accommodation and meals allowances. The implementation of any internal review is a matter for the NACC.

The NACC may also arrange and pay the cost associated with accommodation and meals for the witness directly, without the witness needing to claim these expenses. In these circumstances, no allowance is payable under this section (see section 8 of the Regulations).

### **Section 8 – No allowances payable where costs are met by the NACC**

This section provides that no amounts are payable under this Part to a witness appearing at a hearing if the NACC meets some or all of the travel, accommodation or meal expenses of the witness for the hearing. This is intended to cover circumstances where the NACC arranges and pays for travel and accommodation for the witness directly, without the witness needing to claim those expenses.

### **Part 3—Legal aid officers**

This Part of the Regulations ensures that persons who have received a notice to produce or a private hearing summons which includes a non-disclosure notation can disclose information relating to that notice or summons to relevant persons for the purpose of applying for legal financial assistance, without committing an offence under section 98(1) of the Act.

#### **Section 9 – Purpose of this Part**

This section provides that the purpose of this Part is to prescribe, for the purposes of paragraph 98(5)(b) of the Act, classes of persons who are legal aid officers for the purposes of the Act.

Subsection 98(1) of the Act provides that a person commits an offence if they disclose information about a notice to produce or private hearing summons that includes a non-disclosure notation. However, paragraph 98(3)(c) provides that the offence does not apply in relation to disclosure to a legal aid officer for the purpose of seeking assistance in relation to the notice or summons or any other matter arising under, or in relation to, the Act.

Subsection 98(5) of the Act provides that the Regulations may prescribe a class of persons as ‘legal aid officers’ for the purposes of the Act. This Part prescribes that persons involved in receiving or assessing applications for legal financial assistance in relation to matters arising under the Act under the schemes established by these Regulations or another scheme operated in a Commonwealth agency (other than persons involved in receiving or assessing applications in relation to a parliamentary office) are ‘legal aid officers’ for the purposes of the Act.

#### **Section 10 – Legal aid officers—certain staff members of agencies that provide financial assistance under this instrument**

This section provides that the following persons are legal aid officers for the purposes of the Act:

- staff members of a Commonwealth agency who are responsible for receiving applications for financial assistance made under Part 4 or 5 of this instrument; or
- staff members of a Commonwealth agency who are involved in assessing or making decisions in relation to such applications.

This means that staff members of the agency that is responsible for the administration of the legal financial assistance schemes established under the Act are legal aid officers if their duties involve receiving, assessing or making decisions in relation to applications for legal financial assistance under either the general scheme in Part 4 or the parliamentary scheme in Part 5 of these Regulations.

Persons who receive a notice to produce or hearing summons that includes a non-disclosure notation are able to disclose information relating to that notice or summons to such persons for the purposes of applying for legal financial assistance under Part 4 or 5 of these Regulations without triggering the offence in subsection 98(1) of the Act.

Further disclosures may be permitted by the non-disclosure notation issued by the Commissioner.

#### **Section 11 – Legal aid officers—certain staff members of agencies that provide other financial assistance**

This section provides that some staff members of Commonwealth agencies that are responsible for providing legal financial assistance in relation to a matter arising under the Act are legal aid officers for the purposes of paragraph 98(5)(b) of the Act. The staff members are those who are responsible for receiving applications for legal financial assistance in relation to matters arising under the Act or who are involved in assessing or making decisions in relation to such applications.

This section allows persons to disclose information relating to a notice to produce or hearing summons that contains a non-disclosure notation for the purpose of applying for legal financial assistance under other Commonwealth schemes. For example, this allows staff members of non-corporate Commonwealth entities and Ministerial staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act) to apply to their employing body (or in the case of MOPS Act staff, the Department of Finance) for legal financial assistance under Appendix E of the *Legal Services Directions 2017* (Appendix E), and staff members of corporate Commonwealth entities to apply to their employing body for any available assistance. This is appropriate as the guidelines developed to administer the general scheme established in Part 4 of the Regulations provides that relevant persons must first seek assistance under Appendix E before seeking assistance under the general scheme.

There may be circumstances where a larger agency may deliver corporate functions of smaller portfolio agencies, including the administration of the provision of legal financial assistance under Appendix E. This section also allow persons within the smaller agency to disclose information relating to a notice or summons with a non-disclosure notation to relevant staff members of the larger agency for the purpose of applying for legal financial assistance. Similarly, Ministerial staff employed under the MOPS Act are able to disclose information relating to a notice or summons with a non-disclosure notation to relevant staff members of the Department of Finance, which administers legal financial assistance arrangements under Appendix E for those staff.

This section does not apply to parliamentary offices. Under the Act, parliamentary offices are considered to be Commonwealth agencies. However, in the case of arrangements for legal financial assistance this is not appropriate because a separate scheme for parliamentarians is established by Part 5 of these Regulations. All parliamentarians should apply for legal financial assistance in relation to their interactions with the NACC using the scheme in Part 5, rather than any other schemes for which they may be eligible. This is to ensure consistency in eligibility and reporting requirements. Further, Ministerial staff employed under the MOPS Act should apply to the Department of Finance for legal financial assistance under the arrangements in Appendix E (in accordance with existing arrangements), instead of applying through their parliamentary office.

## **Part 4—Financial assistance (general)**

This Part of the Regulations establishes a scheme to provide legal financial assistance to persons appearing at a hearing of the NACC or the Inspector or who are making, or proposing to make, an application for administrative review of a matter arising under the Act. Any person is able to apply for legal financial assistance under this general scheme. The Attorney-General has discretion to grant legal financial assistance if they are satisfied that:

- it would involve substantial hardship to the person to refuse the application; or
- the circumstances of the case are of such a special nature that the application should be granted.

Payments of legal assistance under this Part will be made from finite administered funding allocations appropriated to the Department for this purpose. Applications for legal financial assistance under the general scheme will be assessed in accordance with the Commonwealth Guidelines, which require decision makers to have regard to the total amount of funding available in considering each application. The general scheme is means-tested and subject to an assessment of costs as provided for in the Commonwealth Guidelines. For the avoidance of doubt, payments provided under this scheme are not grants for the purposes of the *Commonwealth Grants Rules and Principles 2024*.

The Commonwealth Guidelines also contain safeguards and limitations on a decision-maker's discretion under this Part, as well as specified criteria the relevant decision-maker will be required to consider when exercising discretion, including requirements to:

- assess the applicant's financial means to meet the cost of the legal action;
- have regard to the availability of funds and reasonableness of the amount requested;
- assess the application on the basis of the information submitted by the applicant or on their behalf; and
- accord with the Department's financial management obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The decision maker may decide the weight that should be given to each matter relevant to the circumstances of the case (section 5.1(3) of the Commonwealth Guidelines).

These factors limit the scope of the discretionary powers conferred under Part 4.

An assessment of whether refusing the application would cause serious financial difficulty to the person involves considering whether the applicant is eligible for or has received financial assistance under another legal financial assistance scheme. In particular, persons eligible under Appendix E are required to access any assistance for which they are eligible under that scheme prior to accessing assistance under this Part of the Regulations.

The Regulations do not provide for merits review in relation to decisions made under this Part. Payment of legal financial assistance under this Part will be made from a finite allocation of administered funds provided to the Department for this purpose. As the number of applicants that will be eligible and approved for funding under Part 4 is unquantifiable, the funding allocation will need to be carefully managed to ensure that all approved grants can be accommodated, while also ensuring these allocations of funds are distributed equitably and consistently. If a decision under Part 4 was overturned or changed as the result of merits review, this would have a direct and significant impact on the ability of the Department to maintain consistency and fairness for other applicants. This would impact on the financial certainty for all recipients of assistance under this Part and may result in applicants in similar circumstances receiving vastly different entitlements.



However, the provisions in Part 9 of the Commonwealth Guidelines relating to review of decisions will apply to decisions made under this Part of the Regulations. This allows an applicant to apply for internal review of a legal financial assistance decision within 28 days after notification of the decision.

### **Section 12 – Purpose of this Part**

This section provides that the purpose of the Part is to prescribe, for the purposes of paragraph 280(2)(a) of the Act, arrangements for the Commonwealth to provide financial assistance in respect of the following:

- a person’s representation at a hearing by a legal practitioner;
- an application, or proposed application, to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the ADJR Act for an order of review in respect of a matter arising under the Act.

### **Section 13 – Financial assistance for representation at hearing by legal practitioner**

This section provides that a person who is summoned to attend a hearing by either the NACC or the Inspector may apply to the Attorney-General for financial assistance in respect of their representation at the hearing by a legal practitioner.

It also provides that a person who is not giving evidence at a hearing and is being represented at the hearing by a legal practitioner with the consent of the Commissioner may also apply to the Attorney-General for financial assistance in respect of that representation.

The Attorney-General is able to authorise the Commonwealth to provide an applicant with financial assistance in the above circumstances if they are satisfied that:

- refusing the application would result in serious financial difficulty for the person; or
- the circumstances of the case are of such a special nature that the application should be granted.

It is anticipated that persons called to appear at a hearing of the NACC or the Inspector may require legal representation, which often comes at a significant cost. It is appropriate that the Commonwealth provides financial assistance in relation to this cost to ensure engaging with the NACC does not result in significant hardship to witnesses or delays to NACC processes. It will also enable the NACC and the Inspector to effectively carry out their functions by ensuring persons are supported to participate in hearings.

In accordance with the Commonwealth Guidelines, applications under this section will be assessed in accordance with specified criteria. This includes an assessment of the applicant’s financial means to meet the cost of the legal action, the availability of funds and reasonableness of the amount requested. The reference to ‘serious financial difficulty’ is consistent with the Commonwealth Guidelines.

The Commonwealth Guidelines require officials to establish ongoing monitoring and management arrangements to ensure a payment of relevant money is being appropriately managed.

Subsection 13(4) provides that financial assistance is payable in accordance with the authorisation, subject to this instrument. For example, the financial assistance payable will be subject to the additional conditions and eligibility criteria provided for in this Part.

## **Section 14 – Financial assistance for applications for administrative review**

This section provides that a person who has applied, or proposes to apply, to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the ADJR Act for an order of review in respect of a matter arising under the Act may apply to the Attorney-General for financial assistance in respect of the application or proposed application.

The Attorney-General is able to provide financial assistance under this section if they are satisfied that:

- refusing the application would result in serious financial difficulty for the person; or
- the circumstances of the case are of such a special nature that the application should be granted.

It is important that persons engaging with the NACC or the Inspector have access to procedural fairness. The provision of legal financial assistance to support persons to seek review of decisions that impact them is appropriate to ensure the potential cost of judicial review does not represent a significant barrier to access to justice.

In accordance with the Commonwealth Guidelines, applications under this section will be assessed in accordance with specified criteria. This includes an assessment of the applicant's financial means to meet the cost of the legal action, the availability of funds and reasonableness of the amount requested. The reference to 'serious financial difficulty' is consistent with the Commonwealth Guidelines.

Subsection 14(3) provides that financial assistance is payable in accordance with the authorisation, subject to this instrument. For example, the financial assistance payable will be subject to the additional conditions and eligibility criteria provided for in this Part.

## **Section 15 – Conditions on financial assistance**

This section provides that financial assistance provided under this Part is subject to any conditions determined by the Attorney-General. This is consistent with the discretion available to the Attorney-General under section 6.11 of the Commonwealth Guidelines

## **Part 5—Financial assistance for parliamentarians**

This Part of the Regulations establishes a scheme to provide legal financial assistance to current and former parliamentarians in relation to certain matters arising under, or in relation to, the Act.

This Part provides a legal basis for the Commonwealth to provide legal financial assistance to current and former parliamentarians in relation to certain eligible matters arising under the Act. It provides a transparent list of criteria and procedures that can be predictably and consistently applied. It also provides for regular monitoring and reporting on expenditure, with appropriate safeguards to protect against interference with the NACC's investigations.

The scheme is similar to the scheme available to current and former Ministers and Assistant Ministers under Division 2 of Part 5 of the PBR Regulations. The scheme provides all parliamentarians with a similar level of assistance in relation to certain matters arising under the Act as would otherwise be available to Ministers and Assistant Ministers under the PBR Regulations and as is available to eligible persons under Appendix E.

Section 82A of the PBR Regulations prevents Ministers and Assistant Ministers eligible under the parliamentary scheme established by this Part of the Regulations from accessing assistance under the PBR Regulations. in relation to that matter. This is intended to ensure consistency in the assistance provided in relation to NACC processes and reporting obligations, and also provide clarity about which scheme Ministers and Assistant Ministers would be required to apply under.

For constitutional reasons, it is appropriate for financial assistance to parliamentarians to be provided by way of a statutory entitlement rather than an agreement between a parliamentarian and the Commonwealth and that any financial assistance that is prescribed for the benefit of parliamentarians is supported by a legislated standing appropriation. Together with subsection 280(3) of the Act, these Regulations establish a clear statutory entitlement to legal financial assistance for current and former parliamentarians. This is consistent with the approach in section 59 of the *Parliamentary Business Resources Act 2017*, which appropriates the Consolidated Revenue Fund for, among other things, payments for legal assistance to Ministers under Division 2 of Part 5 of the PBR Regulations.

Decisions made under this Part are not subject to merits review. This is consistent with the approach taken to legal financial assistance paid under the PBR Regulations and is appropriate as the use of Commonwealth money to provide legal financial assistance to parliamentarians attracts significant public interest. The Regulations provide a clear process that ensure decisions to grant legal financial assistance under this scheme are made consistently and predictably. The approving official is also subject to accountability mechanisms through the requirement for the Attorney-General to report any expenditure under this Part to the Parliament.

### **Section 16 – Purpose of this Part**

The section provides that the purpose of this Part is to prescribe, for the purposes of paragraph 280(2)(a) of the Act, arrangements for the Commonwealth to provide financial assistance in respect of certain matters arising under, or in relation to, the Act to current and former parliamentarians.

### **Section 17 – Eligible matter**

This section provides that, for the purposes of the Regulations, an eligible matter is:

- any matter arising under the Act, other than a prosecution for an offence against the Act;
- an application that any person has made, or proposes to make, to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) under the ADJR Act for an order of review in respect of a matter arising under the Act.

The range of eligible matters in relation to which a parliamentarian may seek financial assistance is broader than those available under the general scheme. For example, an eligible matter may include:

- a corruption investigation;
- a preliminary investigation conducted under Division 1 of Part 6 of the Act;
- a public inquiry conducted under Part 9 of the Act;
- advice in relation to referring corruption issues to the NACC; or
- advice in relation to reporting on corruption investigations.

In particular, parliamentarians may seek financial assistance in respect of matters arising at all stages of a corruption investigation; for example, if they are served with a direction or a notice to produce. They are also eligible to receive assistance in relation to engagement with the Inspector of the NACC.

Parliamentarians are not entitled to seek legal financial assistance in respect of a prosecution for an offence against the Act. This is appropriate to avoid undermining the deterrent effect of offences in the Act by making the parliamentarian, rather than the Commonwealth, bear the financial cost of defending a prosecution for their own conduct. For example, a parliamentarian will not be able to apply for legal financial assistance in relation to a prosecution brought against them for an offence of failing to comply with a notice to produce or summons under sections 60 and 68 of the Act.

The approach to eligible matters is intended to broadly align with the approach to financial assistance available to Ministers under the PBR Regulations in respect of ‘proceedings’, which is similarly broadly defined.

### **Section 18 – Application for financial assistance**

This section provides that a parliamentarian or former parliamentarian may apply, in writing, to the Department for financial assistance under section 20 of the Regulations in relation to an eligible matter.

The requirement for an applicant to apply to the Department, rather than to the approving official, is appropriate to ensure consistency and prevent a person from inadvertently applying to the wrong approving official; for example, in circumstances where the Commissioner issues a certificate that someone other than the Attorney-General is the approving official under section 19 of the Regulations.

### **Section 19 – Approving official**

This section establishes a process to determine the approving official in relation to an application for legal financial assistance under this Part. The default approving official is the Attorney-General, subject to this section.

This section requires the Secretary of the Department to provide the Commissioner with a copy of an application for legal financial assistance under this Part. The Commissioner may then issue a certificate providing that the approving official for that application is the Secretary, the Prime Minister or the Finance Minister, instead of the Attorney-General.

This process ensures that the Attorney-General, or other possible decision-makers, are not able to approve assistance in relation to a matter where they may be involved, may have a conflict of interest, where the particular Minister’s knowledge of a matter may interfere with an ongoing NACC investigation, or for any other reason. The ability for the Commissioner to determine the appropriate decision-maker recognises there may be circumstances where the details of a particular investigation or a potential decision-maker’s involvement in an investigation may not be known outside of the NACC. This mechanism ensures the appropriate person is making a decision in relation to the provision of legal financial assistance and protects the integrity of NACC investigations.

This approach is based on a similar approach set out in the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

The Secretary is able to delegate their duty under this section to provide the Commissioner with a copy of the application for legal financial assistance to an SES employee, or acting SES employee, within the Department (see section 43 of the Regulations). This is appropriate to ensure the effective and efficient processing of applications. However, the Secretary is not able to delegate their functions as an approving official under this section.

## **Section 20 – Financial assistance to an applicant**

This section outlines what assistance is available to an applicant for legal financial assistance under this Part, and what the approving official must be satisfied of before approving a grant of assistance.

This section provides that, subject to this Part, the approving official may, if they consider it appropriate to do so, approve payment of the costs of an applicant's legal representation in relation to an eligible matter, disbursements in relation to an eligible matter, and the costs awarded against an applicant in an eligible matter.

Subsection 20(2) also provides that before giving the approval, the approving official must be satisfied that:

- the applicant's involvement in the eligible matter arose only because the applicant is, or has been, a parliamentarian, or the eligible matter relates to the performance or non-performance by the applicant of the applicant's duties as a parliamentarian; and
- it is appropriate to give the assistance.

These criteria link the availability of assistance to the applicant holding (or having held) a parliamentary role, in addition to circumstances where the parliamentarian's involvement in a matter relates to the performance or non-performance of their duties. This means a parliamentarian may be eligible for legal financial assistance under this scheme where a NACC investigation relates to the conduct of a staff member of the parliamentarian or other circumstances where the parliamentarian's involvement in or knowledge of the matter only arises because the parliamentarian holds that role. The parliamentarian will only be eligible in circumstances where there is a connection between the conduct being investigated or the parliamentarian's involvement in the matter, and their parliamentary role.

However, these criteria do not allow for legal financial assistance to be provided where the parliamentarian's involvement did not arise from the parliamentarian's role *as a parliamentarian*. For example, where a parliamentarian had knowledge of particular matters through personal connections (such as in relation to the conduct of a family member or friend) and is called to a hearing to provide evidence, and there is no other connection between the matter and their parliamentary role, the parliamentarian will not be eligible for legal financial assistance under this Part. A former parliamentarian will not be able to access the parliamentary scheme if they are called to give evidence due to knowledge obtained in a new role, unrelated to their former parliamentary role. In these circumstances the person may be eligible for legal financial assistance under the general scheme established by Part 4.

This section provides that financial assistance is payable in accordance with the approval provided by the approving official, subject to this instrument. This provides the statutory basis on which a payment of legal financial assistance can be made to a parliamentarian.

In addition, this section provides that the approving official may:

- reduce the amount of assistance payable if the approving official is satisfied that the applicant has breached this instrument or a condition of approval; and
- defer making a decision whether to approve payment of assistance in whole or in part until the eligible matter reaches a point at which the approving official considers it appropriate to make the decision.

In making the decision to approve or not approve an application, the approving official may have regard to whether there has been unreasonable delay in applying for assistance.

The discretions conferred on decision-makers under this section align with those under the PBR Regulations. These discretions are necessary to ensure that parliamentarians can access assistance that is broadly equivalent to that available to non-corporate Commonwealth entity employees and ministerial staff under Appendix E, which would otherwise be available to current and former Ministers and Assistant Ministers under the PBR Regulations.

### **Section 21 – General conditions**

This section provides the conditions that apply to a grant of legal financial assistance for parliamentarians made under this Part. The approving official has broad discretion to impose conditions on the approval at any time.

The section also provides that the costs of an applicant's legal representation and other related costs will only be paid so far as they are certified by the Secretary to be reasonable. The Secretary is also required to inform the approving official if they consider that the proposed expenditure is unreasonable (see section 24 of the Regulations). This ensures there is accountability and appropriate monitoring of costs to be paid.

The Secretary is able to delegate this function to an SES employee or acting SES employee in the Department (see section 43 of the Regulations). The delegation power is necessary to ensure that an application for legal financial assistance can be quickly assessed and a timely decision made. While the Regulations do not require the Secretary to delegate their duty to certify costs, in practice the ability to delegate to a senior officer may also operate as a safeguard on the exercise of the Secretary's discretionary powers, particularly in instances where the Secretary is certified as the approving official, by enabling the costs to be certified by another senior officer with the appropriate delegation.

### **Section 22 – Other conditions—recovery of costs, etc.**

This section prescribes specific conditions that apply to all grants of legal financial assistance for parliamentarians made under this Part.

The section specifies that grants of legal financial assistance are subject to the condition that, if an award of costs is made in the applicant's favour in an eligible matter, the person must take all steps directed by the Commonwealth to recover the costs and must pay to the Commonwealth any costs recovered. This condition will be most relevant where the eligible matter is a legal proceeding, such as an application under the ADJR Act for an order of review. It is appropriate that recipients of legal financial assistance repay any costs awarded in legal proceedings to the Commonwealth. Not all eligible matters are legal proceedings in which the applicant may apply for costs; for example, in a corruption investigation it will not be possible to seek a costs order.

This section prevents a recipient of legal financial assistance from receiving legal financial assistance and the costs awarded as a windfall. This approach is consistent with analogous conditions on legal financial assistance for Ministers under the PBR Regulations.

The section further specifies that grants of legal financial assistance are subject to the condition that the applicant must repay financial assistance to the Commonwealth they were ineligible to receive if

they made materially false or misleading statements in their application (see section 23 of the Regulations). This is consistent with the mechanism for recovering costs under the Commonwealth Guidelines.

This condition puts applicants on notice to ensure their application for legal financial assistance contains honest and accurate information and protects the integrity of the legal financial assistance scheme.

### **Section 23 – Ineligibility for financial assistance—false or misleading application**

This section provides that a person is ineligible to receive financial assistance under this Part if they include false or misleading information in their application.

The information must be false or misleading in a material particular. For example, a material particular of a person’s application could be whether their involvement in the eligible matter arose only because the applicant is a current or former parliamentarian.

It is a condition under section 22 of the Regulations that a person must repay an amount of legal financial assistance they are ineligible to receive because they included materially false or misleading information in their application.

It is appropriate that persons who include materially false or misleading information in their application be required to repay the Commonwealth. It is important that approving officials are able to decide whether it is appropriate to award financial assistance to an applicant based on accurate and honest information. This section puts potential applicants on notice to ensure they apply for financial assistance in good faith and do not provide false or misleading information.

### **Section 24 – Monitoring**

This section requires the Secretary to monitor strategies adopted by an applicant in eligible matters for which assistance under this Part has been approved and, if the approving official is not the Secretary, inform the approving official if the Secretary considers that proposed expenditure is unreasonable. This ensures there is accountability and appropriate monitoring of costs paid to parliamentarians under this Part.

The Secretary is able to delegate their monitoring functions under this section to an SES employee or acting SES employee in the Department (see section 43 of the Regulations). This is appropriate to ensure the effective and efficient monitoring of expenditure and can act as a safeguard where the Secretary is the approving official.

### **Section 25 – Reporting**

This section outlines the reporting requirements under this Part. The Attorney-General is required to:

- inform each House of the Parliament of each decision to pay assistance under this Part, including reasons for the decision and any limits on expenditure, as soon as possible; and
- within 3 months after the end of each financial year, table in each House of the Parliament a consolidated statement of expenditure under this Part for that year, specifying the expenditure for each matter.

This section also provides for consultation requirements to ensure that public reporting does not interfere with the NACC’s investigations or other processes. Prior to disclosing information to the Parliament in the above circumstances, the Attorney-General is required to consult with the Commissioner and the Inspector about whether disclosing the information may compromise a NACC Act process. A NACC Act process has the same meaning as in section 7 of the Act and includes a corruption investigation, a NACC complaint investigation, a NACC corruption investigation or a public inquiry.

If the Commissioner or the Inspector considers that disclosing the information would compromise a NACC Act process, the Attorney-General is required not to disclose that information to the Parliament. This is appropriate to prevent interference with NACC investigations and other processes and ensure NACC operations can be conducted effectively.

The Commissioner and the Inspector, as relevant, are required to inform the Attorney-General if they no longer consider that disclosing the information may compromise a NACC Act process. If the Attorney-General is so informed, they must give the information to each House of the Parliament as soon as possible after being informed. The Attorney-General is only required to give the information after being so informed by the official or officials who considered that disclosing the information would compromise a NACC Act process (the Commissioner or the Inspector, or both as appropriate).

If information relating to expenditure was excluded from a consolidated statement of expenditure for a financial year (tabled under subparagraph 25(1)(b) of the Regulations), and is subsequently appropriate for release, the Attorney-General must include that information in the next consolidated statement. As the intervening period may span multiple financial years, the Attorney General is required to specify the financial year in which the expenditure occurred. This ensures all expenditure is accounted for in a consolidated statement, when it is appropriate to do so.

The Department will receive all applications for legal financial assistance, even where the Attorney-General is not the approving official (see section 18 of the Regulations). The Department will then be able to facilitate the consultation requirements with the NACC to ensure the Attorney-General can meet the reporting obligations in circumstances where they are not the approving official.

These reporting requirements are an important transparency and accountability measure in relation to grants of legal financial assistance made under this Part. These provisions ensure there is appropriate balance between scrutiny on the expenditure of public money, while protecting against undue interference in the NACC's investigations and other processes.

Depending on the consultation with the Commissioner or Inspector, the reporting requirements may require publication of personal information including an applicant's name and the fact they are involved in a NACC matter. This is appropriate to ensure accountability over the payment of public money to parliamentarians.

Further, it is likely that a recipient's name will be publicly reported in circumstances where the NACC matter is already public knowledge (for example, if a prosecution has been commenced) or where an investigation has been completed and reported on publicly. In other circumstances, the Commissioner or Inspector may require the Attorney-General not to publicly disclose such information if it would compromise a NACC Act process.



## **Part 6—Annual report by Commissioner**

This Part of the Regulations sets out the details that must be included by the Commissioner in their annual report for a financial year, in addition to what is already required under the Act.

Section 271 of the Act requires the Commissioner to give the Minister an annual report on the performance of the Commissioner's functions during each financial year. Section 17 of the Act sets out the functions of the Commissioner, which include detecting, investigating and reporting on serious or systemic corruption, and undertaking education and prevention activities to enhance awareness and prevention of corruption across the Commonwealth public sector. Annual reports are intended to provide general information on the operations of the Commissioner, rather than detailed information on particular corruption investigations.

Subsection 271(2) of the Act sets out a range of matters that must be included in the Commissioner's annual report. This includes the particulars prescribed by the Regulations in relation to the matters set out in subparagraphs 271(2)(a)(i)-(vii) of the Act, which relate to corruption issues referred to and dealt with by the Commissioner, public inquiries conducted by the Commissioner, and any certificates issued by the Attorney-General during that year (under section 235 or 236 of the Act). Paragraphs 271(2)(b)-(g) of the Act set out additional requirements for the Commissioner's annual report including, among other things, a description of any patterns and trends of corruption in the Commonwealth public sector, any recommendations for changes to the laws of the Commonwealth, and the extent to which corruption investigations have resulted in prosecution and confiscation proceedings.

The purpose of this Part of the Regulations is to promote transparency and enable oversight of the operations of the NACC, including the exercise of the Commissioner's powers and functions. For example, the contents of the Commissioner's annual reports will assist the Parliamentary Joint Committee on the NACC (Committee) in its oversight of the NACC and the Commissioner. It is a function of the Committee under section 117 of the Act to examine information appearing in the Commissioner's annual report and report to both Houses of the Parliament on matters arising out of these reports.

Nothing in this Part prevents the Commissioner from including in their annual report for a financial year any other information that the Commissioner considers appropriate to include. Subsection 271(4) of the Act allows the Commissioner and the CEO of the NACC to jointly submit an annual report to the Minister to satisfy the annual reporting requirements under the Act and section 46 of the PGPA Act.

### **Section 26 – Purpose of this Part**

This section provides that the purpose of this Part is to prescribe the information that must be included in Commissioner's annual report for a financial year for the purposes of paragraph 271(2)(a) of the Act.

The note to this section includes a cross-reference to section 272 of the Act which requires certain material to be excluded from annual reports prepared by the Commissioner under Division 4 of Part 12 of the Act. The Commissioner must exclude information that the Attorney-General has certified under section 235 of the Act would be contrary to the public interest to disclose and information that the Commissioner is satisfied is sensitive information as defined under section 227 of the Act.

## **Section 27 – Particulars about corruption issues referred to the Commissioner**

This section requires the Commissioner’s annual report for a financial year to include the number of corruption issues that were referred to the Commissioner during the financial year as a result of a:

- voluntary referral under Division 1 of Part 5 of the Act;
- mandatory referral under Division 2 of Part 5 of the Act.

A corruption issue is defined in section 9 of the Act as an issue of whether a person has engaged, is currently engaging in, or will engage in corrupt conduct.

Part 5 of the Act provides for the Commissioner to receive voluntary referrals of corruption issues from any person as well as mandatory referrals from Commonwealth agency heads and staff members of Commonwealth agencies with certain responsibilities under the *Public Interest Disclosure Act 2013* (PID Act).

This section ensures information about the volume of referrals that the Commissioner receives during a financial year which raise a corruption issue is included in the Commissioner’s annual report.

## **Section 28 – Particulars about corruption issues dealt with by the Commissioner**

This section requires the Commissioner’s annual report for a financial year to include the total number of corruption issues that the Commissioner dealt with under Division 1 of Part 6 of the Act during the financial year.

The Commissioner may deal with a corruption issue if it is referred to them under Part 5 of the Act or if the Commissioner becomes aware of the corruption issue in any other way, including on their own initiative (see section 40 of the Act). The Commissioner has a broad discretion to deal with corruption issues under section 41 of the Act by:

- investigating the issue;
- investigating the issue jointly with a Commonwealth agency or a State or Territory entity;
- referring the issue to a Commonwealth agency for investigation;
- referring the issue to a Commonwealth agency or a State or Territory entity for consideration; and
- deciding to take no action.

This section of the Regulations requires the Commissioner’s annual report for a financial year to include the number of corruption issues that the Commissioner dealt with in each of these ways.

## **Section 29 – Particulars about corruption investigations**

This section requires the Commissioner’s annual report for a financial year to include the number of corruption investigations that were completed by the Commissioner during the financial year and the number of corruption investigations that remain ongoing at the end of the financial year.

The Commissioner may decide to investigate a corruption issue under paragraph 41(1)(a) of the Act if the Commissioner is of the opinion that the issue could involve serious or systemic corrupt conduct. Investigating corruption issues is one of the Commissioner’s functions under section 17 of the Act.

A corruption investigation is complete when the Commissioner decides that there are no more reasonable investigative steps required to fully investigate the matter and that all other processes associated with the corruption investigation are complete. In practice, there may be circumstances where there is a significant period of time between an active corruption investigation ceasing and the Commissioner deciding that the investigation is complete. For example, there may be circumstances where it is appropriate to defer the completion of a corruption investigation to avoid prejudicing the outcome of a related criminal, disciplinary or administrative process.

A corruption investigation is ongoing in circumstances where the Commissioner commenced an investigation during or before the relevant financial year and the investigation was not completed by the end of the relevant financial year.

This section ensures that information about the Commissioner's performance of their investigative function is included in the Commissioner's annual report.

### **Section 30 – Particulars about corruption issues referred to Commonwealth agencies for investigation**

This section requires the Commissioner's annual report for a financial year to include information in relation to corruption issues that the Commissioner refers to a Commonwealth agency for investigation under paragraph 41(1)(c) of the Act.

Section 17 of the Act provides that it is a function of the Commissioner to refer corruption issues to, and oversee corruption investigations conducted by, Commonwealth agencies.

This section requires the Commissioner's annual report to include the number of corruption issues referred to a Commonwealth agency for investigation during the financial year, where:

- the Commonwealth agency investigated the corruption issue; and
- the Commissioner is aware that the agency completed their investigation during the financial year.

The Commissioner may decide to deal with a corruption issue under paragraph 41(1)(c) of the Act by referring the issue to a Commonwealth agency for investigation. This enables the Commissioner to refer less serious corruption issues to the relevant Commonwealth agency and to require the agency to conduct an internal investigation. The issue would need to relate to the Commonwealth agency and the Commissioner would need to be satisfied that the Commonwealth agency has the appropriate capabilities to investigate the issue for a referral to be made.

The Commissioner may become aware that a Commonwealth agency has completed their investigation of a corruption issue referred to them by the Commissioner under paragraph 41(1)(c) of the Act by requesting a report under section 52 of the Act. The Commissioner may also become aware a completed investigation in any other way, for example, where the Commonwealth agency proactively informs the Commissioner that their investigation is complete.

This section also requires the Commissioner's annual report to include the number of corruption issues referred to a Commonwealth agency for investigation during the financial year, where:

- the Commonwealth agency investigated, or is investigating the issue; and
- the Commissioner oversaw, or is overseeing, the investigation.

Section 50 of the Act enables the Commissioner to oversee an investigation conducted by a Commonwealth agency following a referral from the Commissioner under paragraph 41(1)(c) of the Act. The ability to oversee such an investigation allows the Commissioner to manage the NACC's resources and focus on the most serious or systemic corruption issues, while still providing support to agencies to investigate other corruption issues.

This section ensures information about how the Commissioner deals with corruption issues and manages its resources during a financial year is included in the Commissioner's annual report.

### **Section 31 – Particulars about public inquiries**

This section requires the Commissioner's annual report for a financial year to include the number of public inquiries that were completed by the Commissioner during the financial year and the number of public inquiries that remain ongoing at the end of the financial year.

This section also requires the Commissioner's annual report to include a description of the kinds of corruption risks, corruption vulnerabilities and measures to prevent corruption that public inquiries considered.

Conducting public inquiries is a function of the Commissioner under section 17 of the Act. Section 161 of the Act empowers the Commissioner to conduct public inquiries into corruption risks, vulnerabilities and measures to prevent corruption in Commonwealth agencies. Public inquiries will ensure the Commissioner can consider broader systemic corruption issues in the Commonwealth, assess the effectiveness of corruption prevention arrangements and make recommendations about enhancing these arrangements. Public inquiries are not corruption investigations and must not be conducted for the purposes of investigating or inquiring into a particular corruption issue.

A public inquiry is complete when the Commissioner decides that there are no more reasonable steps required to inquire into the relevant corruption risks, vulnerabilities and measures to prevent corruption and that all other processes associated with a public inquiry are complete. An ongoing public inquiry is an inquiry that was commenced by the Commissioner during or before the financial year and was not completed by the end of the financial year.

This section ensures information about the Commissioner's performance of their public inquiry function and broader systemic corruption issues in the Commonwealth public sector are included in the Commissioner's annual report.

### **Section 32 – Particulars about certificates**

This section requires the Commissioner's annual report for a financial year to include the total number of Attorney-General's certificates issued under section 235 of the Act during the financial year. A section 235 certificate provides that further disclosure of certain information or documents that have been obtained by the Commissioner would be contrary to the public interest.

This section also requires the Commissioner's annual report for a financial year to include the total number of international relations certificates issued by the Attorney-General under section 236 of the Act during the financial year. A section 236 certificate provides that certain information or documents communicated in confidence by a foreign government or international organisation under a legally-binding instrument cannot be disclosed to the Commissioner because it would be contrary to the public interest to do so.

This section ensures that information is included in the Commissioner's annual report about the extent to which certificates under sections 235 and 236 of the Act have been used.

## **Part 7—Annual report by Inspector**

This Part of the Regulations sets out details that must be included by the Inspector in their annual report for a financial year.

Section 198 of the Act requires the Inspector to prepare an annual report as soon practicable at the end of each financial year relating to the performance of the Inspector's functions during the financial year. Section 184 of the Act sets out the functions of the Inspector, which include detecting, investigating and reporting on corruption issues within the NACC, investigating complaints of agency maladministration and officer misconduct in relation to the NACC, and auditing the operations of the NACC. Section 198(3) of the Act provides that the annual report must include the information prescribed in the regulations.

Annual reports are intended to provide general information on the operations of the Inspector, rather than detailed information on particular NACC corruption investigations or NACC complaint investigations.

The purpose of this Part of the Regulations is to promote transparency and facilitate oversight of the operations of the Inspector, including the exercise of their powers and functions. For example, the contents of the Inspector's annual reports will assist the Committee in its oversight role of the Inspector. It is a function of the Committee under section 117 of the Act to examine information appearing in the Inspector's annual report and report to both Houses of the Parliament on matters arising out of these reports.

Nothing in this Part prevents the Inspector from including, in their annual report for a financial year, any other information that the Inspector considers appropriate to include.

### **Section 33 – Purpose of this Part**

This section provides that the purpose of this Part is to prescribe the information that must be included in Inspector's annual report for a financial year for the purposes of subsection 198(3) of the Act.

The note to this section includes a cross-reference to section 199 of the Act which requires certain material to be excluded from annual reports prepared by the Inspector under Division 2 of Part 10 of the Act. The Inspector must exclude information that the Attorney-General has certified under section 235 of the Act would be contrary to the public interest to disclose and information that the Inspector is satisfied is sensitive information as defined under section 227 of the Act.

### **Section 34 – Information about referrals and complaints**

This section requires the Inspector's annual report for a financial year to include the number of NACC corruption issues referred to the Inspector during the financial year as a result of a:

- voluntary referral under section 202 of the Act;
- mandatory referral under sections 203 or 204 of the Act.

A NACC corruption issue is defined under section 201 of the Act as an issue of corrupt conduct that occurs within, is connected to, or adversely affects the NACC.

Subdivision B of Division 3 of Part 10 of the Act provides for the Inspector to receive voluntary referrals of NACC corruption issues from any person, as well as mandatory referrals of NACC corruption issues from the Commissioner and staff members of the NACC with certain responsibilities under the PID Act.

This section also requires the Inspector's annual report to include the number of complaints of agency maladministration or officer misconduct received by the Inspector during the financial year.

It is a function of the Inspector under paragraph 184(1)(e) of the Act to investigate complaints of agency maladministration or officer misconduct made in relation to the NACC or a staff member of the NACC.

This section ensures information about the volume of referrals and complaints that the Inspector receives about the NACC or staff members of the NACC during a financial year is included in the Inspector's annual report.

### **Section 35 – Information about NACC corruption issues dealt with by the Inspector**

This section requires the Inspector's annual report for a financial year to include the total number of NACC corruption issues that the Inspector dealt with under Subdivision C of Division 3 of Part 10 of the Act during the financial year.

The Inspector may deal with a NACC corruption issue if it is referred to the Inspector under Subdivision B of Division 3 of Part 10 of the Act, either as a voluntary referral from any person (see section 202 of the Act) or as a mandatory referral from the NACC (see sections 203 and 204 of the Act). The Inspector may also, on their own initiative, deal with NACC corruption issues they become aware of in any other way.

The Inspector has a broad discretion to deal with NACC corruption issues under section 210 of the Act by:

- investigating the issue;
- investigating the issue jointly with a Commonwealth agency, the NACC or a State or Territory entity;
- referring the issue to the NACC for investigation;
- referring the issue to a Commonwealth agency, the NACC or a State or Territory entity for consideration; and
- deciding to take no action.

This section of the Regulations requires the Inspector's annual report for a financial year to include the number of NACC corruption issues that the Inspector dealt with in each of those ways.

This section ensures that information about the Inspector's discretion to decide how to deal with NACC corruption issues and the volume of issues that the Inspector deals with during the financial year are included in the Inspector's annual report.

### **Section 36 – Information about NACC corruption investigations**

This section requires the Inspector's annual report for a financial year to include the number of NACC corruption investigations that were completed by the Inspector during the financial year and the number of NACC corruption investigations that remain ongoing at the end of the financial year.

The Inspector may investigate a NACC corruption issue alone or jointly with Commonwealth agency, the NACC or a State or Territory government entity under paragraphs 210(1)(a)-(b) of the Act if the Inspector is of the opinion that the issue could involve serious or systemic corrupt conduct. Such an investigation, including a joint investigation, is defined as a NACC corruption investigation under section 201 of the Act.

A NACC corruption investigation is complete when the Inspector decides that there are no more reasonable investigative steps required to fully investigate the matter and that all other processes associated with the NACC corruption investigation are complete.

A NACC corruption investigation is ongoing in circumstances where the Inspector commenced an investigation during or before the relevant financial year and the investigation was not completed by the end of the relevant financial year. In practice, there may be circumstances where there is a significant period of time between an active NACC corruption investigation ceasing and the Inspector deciding that the investigation is complete. For example, there may be circumstances where it is appropriate to defer the completion of a NACC corruption investigation to avoid prejudicing the outcome of a related criminal, disciplinary or administrative process.

This section ensures that information about the Inspector's performance of their function to investigate NACC corruption issues is included in the Inspector's annual report.

### **Section 37 – Information about complaint investigations**

This section requires the Inspector's annual report for a financial year to include the number of reportable complaint investigations that were completed by the Inspector during the financial year and the number of reportable complaint investigations that remained ongoing during the financial year.

A reportable complaint investigation is a NACC complaint investigation into a complaint of agency maladministration and officer misconduct in relation to the NACC. It is a function of the Inspector under paragraph 184(1)(e) of the Act to investigate complaints of agency maladministration and officer misconduct the Inspector receives in relation to the conduct or activities of the NACC or a staff member of the NACC.

The terms agency maladministration and officer misconduct have the same meaning as in section 184 of the Act. Agency maladministration means an act or omission engaged in by the NACC that is unlawful conduct. It also includes conduct that is not unlawful, but:

- is corrupt conduct; or
- is unreasonable, unjust, oppressive or improperly discriminatory in its effect; or
- arises from:
  - improper motives; or
  - a decision that has taken irrelevant matters into consideration; or
  - a mistake of law or fact;
- is conduct of a kind for which reasons should have, but have not, been given; or
- is in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

Officer misconduct means conduct engaged in by a staff member of the NACC which would amount to agency maladministration if that conduct were engaged in by the NACC.

A NACC complaint investigation is complete when the Inspector decides that there are no more reasonable investigative steps required to fully investigate the matter and all other processes associated with the NACC complaint investigation are complete. A complaint investigation will be ongoing in circumstances where the Inspector commenced an investigation during or before the relevant financial year, and the investigation was not completed by the end of the relevant financial year.

This section ensures that information about the Inspector's performance of their function to investigate complaints of agency maladministration or officer misconduct related to the NACC is included in the Inspector's annual report.

### **Section 38 – Information about audits by the Inspector**

This section requires the Inspector's annual report for a financial year to include a description of:

- the findings of audits in relation to the NACC’s compliance with the laws of the Commonwealth;
- the kinds of agency maladministration and officer misconduct detected by the Inspector as a result of an audit, if any; and
- any recommendations made to the NACC on the outcome of an audit.

Section 184 of the Act provides that the Inspector may audit the operations of the NACC to monitor the NACC’s compliance with laws of the Commonwealth and to detect agency maladministration and officer misconduct.

This section ensures that information about the Inspector’s performance of their audit function is included in the Inspector’s annual report. It also strengthens transparency and oversight of the NACC’s compliance with the laws of the Commonwealth, for example the lawful exercise of the Commissioner’s powers, by requiring information about the findings of an audit and any relevant recommendations to be reported publicly.

### **Section 39 – Information about judicial review and other court proceedings**

This section requires the Inspector’s annual report for a financial year to include the number and results of:

- applications made to the Federal Court or Federal Circuit and Family Court of Australia (Division 2) under the ADJR Act for orders relating to matters arising in connection with the Inspector’s performance of their functions or exercise of powers; and
- other court proceedings involving the Inspector.

This requirement is consistent with the annual reporting requirements for the Commissioner under paragraph 271(2)(g) of the Act.

### **Section 40 – Information about certificates**

This section requires the Inspector’s annual report for a financial year to include the total number of Attorney-General’s certificates issued under section 235 of the Act during the financial year. A section 235 certificate would provide that further disclosure of certain information or documents that have been obtained by the Inspector would be contrary to the public interest.

This section also requires the Inspector’s annual report for a financial year to include the total number of international relations certificates issued by the Attorney-General under section 236 of the Act during the financial year. A section 236 certificate would provide that certain information or documents communicated in confidence by a foreign government or international organisation under a legally-binding instrument cannot be disclosed to the Inspector because it would be contrary to the public interest to do so.

This section ensures that the Inspector’s annual report includes information is included in the Inspector’s annual report about the extent to which certificates under sections 235 and 236 of the Act have been used.

### **Section 41 – Financial information**

This section requires the Inspector’s annual report for a financial year to include details about the Inspector’s budgeted and actual expenditure for the financial year.

It also requires the Inspector’s annual report to compare the Inspector’s budgeted and actual expenditure for the financial year against the Inspector’s budgeted and actual expenditure for the previous financial year. The Inspector is not be required to include such a comparison in the Inspector’s inaugural annual report.



The Inspector is not an accountable authority for the purposes of the PGPA Act. This means that the Inspector is not required to adhere to financial annual reporting requirements under the PGPA Act and the *Public Governance, Performance and Accountability Rule 2014*.

This section requires the Inspector to report basic financial information in the form of budgeted expenditure and actual expenditure for a financial year. This strengthens transparency and accountability of the financial performance of the Inspector by providing public information about the resources available to and used by the Inspector during a financial year. These requirements are similar to financial information included in annual reports prepared by Inspectors of state and territory anti-corruption bodies, including the New South Wales Office of the Inspector of the Independent Commission Against Corruption.

Prescribing the inclusion of financial information in the Inspector's annual report also improves oversight of the Inspector's performance of their functions by the Committee. Under section 177 of the Act, the Committee is responsible for monitoring the Inspector's performance of their functions and may examine and report to the Parliament on any matter appearing in, or arising out of the Inspector's annual report.

## **Part 8—Delegation**

### **Section 42 – Delegation by the Attorney-General of certain functions, powers and duties under this instrument**

This section provides that the Attorney-General may, in writing, delegate all or any of the Attorney-General's functions, powers or duties under Part 4 of this instrument to:

- the Secretary;
- an APS employee in the Department who is:
  - an SES employee;
  - an acting SES employee;
  - classified as Executive Level 1 or equivalent, or higher; or
  - acting in a position usually occupied by an APS employee who is so classified.

The note to this section indicates that sections 34AA to 34A of the Acts Interpretation Act contain provisions relating to delegations, which apply to this section.

This section allows the Attorney-General to delegate their functions, powers and duties in relation to granting legal financial assistance to applicants under the general scheme in Part 4. The delegation power is necessary to ensure that an application for legal financial assistance can be quickly assessed and a timely decision made. A person may receive a summons to attend a hearing on short notice (for example, within a few days) and it is important that the person is able to access legal financial assistance for legal representation at that hearing. The ability to delegate the functions, powers and duties in Part 4 ensures there are a sufficient number of decision-makers to facilitate the timely provision of legal financial assistance.

The delegation would be limited to Executive Level 1 officers and above. It is also expected the delegation instrument will specify that the functions, powers and duties are delegated to relevant persons within the area of the Department that is responsible for the administration of legal financial assistance schemes. These persons are appropriately trained and supported to carry out these functions. This is consistent with other delegations of functions, powers and duties for other existing legal financial assistance schemes.

Persons exercising functions, powers and duties under Part 4 will be required to apply the relevant guidelines. The application of these public guidelines ensures that applications are consistently assessed and decided.

This section also provides that in performing or exercising a function, power or duty delegated under this section, the delegate must comply with any written directions of the Attorney-General. This provides an additional safeguard in relation to the consistency of a delegate's exercise of functions, powers and duties under Part 4.

### **Section 43 – Delegation by the Secretary of certain functions, powers and duties under this instrument**

This section provides that the Secretary may, in writing, delegate all or any of the Secretary's functions, powers or duties under the following provisions to an SES employee, or an acting SES employee, in the Department:

- section 19 (not including any functions, powers or duties the Secretary has as an approving official);
- sections 21, 22 and 24.

The note to this section indicates that sections 34AA to 34A of the Acts Interpretation Act contain provisions relating to delegations, which apply to this section.

The effect of this provision is to allow the Secretary to delegate the following functions, powers and duties:

- to provide the Commissioner with a copy of an application for legal financial assistance (under section 19 of the Regulations);
- to certify that the costs of an applicant's legal representation and disbursements are reasonable (under section 21 of the Regulations);
- to recover costs in relevant circumstances (under section 22 of the Regulations); and
- to monitor strategies adopted by an applicant and inform the approving official if the Secretary considers the proposed expenditure is unreasonable (under section 24 of the Regulations).

The delegation of these functions, powers and duties is limited to SES and acting SES employees. This ensures that the functions, powers and duties are delegated to persons with appropriate qualifications, skills and experience, while ensuring that workflow can be efficiently managed. Further, the section provides that in performing or exercising a function, power or duty delegated under this section, the delegate must comply with any written directions of the Secretary. This ensures consistency and predictability in the exercise of these functions, powers or duties.

The section does not limit section 277 of the Act. Section 277 provides that the head of a Commonwealth agency may delegate all or any of the head's functions powers or duties of the Act to an SES staff member or acting SES staff member or a staff member who is concerned in, or takes part in, the management of the agency. This section of the Regulations provides clarity in relation to the Secretary's ability to delegate their powers under these Regulations.