

Ombudsman Amendment (Prescribed Authorities) Regulations 2024

Explanatory Statement

Issued by the Authority of the Attorney-General

Ombudsman Act 1976

Ombudsman Amendment (Prescribed Authorities) Regulations 2024

The *Ombudsman Act 1976* (the Act) establishes the office of the Commonwealth Ombudsman (the Ombudsman) to investigate administrative actions of departments and prescribed authorities and to perform other specialised functions.

Section 38 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The definition of ‘prescribed authority’ for the purposes of the Act (subsection 3(1)), provides that the regulations may prescribe persons and bodies that are not to be taken to be a prescribed authority.

The Ombudsman’s functions under the Act do not include investigating any person or body listed in regulation 6 (Bodies not to be taken to be prescribed authorities for the purposes of the Act), or regulation 7 (Persons not to be taken to be prescribed authorities for the purposes of the Act), of the Ombudsman Regulations 2017.

The Ombudsman Amendment (Prescribed Authorities) Regulations 2024 (the Regulations) amend the Ombudsman Regulations to remove the Australian Security Intelligence Organisation (ASIO) and the Director-General of Security from the lists of bodies and persons not to be taken to be prescribed authorities for the purposes of the Act, and include the Inspector of the National Anti-Corruption Commission (NACC Inspector) in the list of persons not to be taken to be a prescribed authority for the purposes of the Act.

Removal of ASIO and the Director-General of Security from the lists of bodies and persons not to be taken to be prescribed authorities for the purposes of the Act

The *National Security Legislation Amendment (Comprehensive Review and Other Measures No.2) Act 2023* (the 2023 Amendment Act) amended the Ombudsman’s functions under the Ombudsman Act (section 5) to provide that the Ombudsman is not authorised to investigate intelligence agencies, including ASIO. As a consequence, the reference to ASIO in regulation 6 of the Ombudsman Regulations and the reference to the Director-General of Security in regulation 7 are no longer necessary. The removal of these references are therefore merely technical amendments to remove provisions from the Ombudsman Regulations made redundant by the 2023 Amendment Act.

The insertion of paragraph 5(2)(e) in the Act by the 2023 Amendment Act formalised in the Act the position under which the Ombudsman did not investigate actions taken by ASIO, both by convention and in accordance with the Ombudsman Regulations. This recognises that ASIO is overseen by the Inspector-General of Intelligence and Security (IGIS), Australia’s

dedicated intelligence oversight body, which possesses the capabilities and technical expertise to provide specialised intelligence oversight.

Inclusion of the NACC Inspector in the list of persons not to be taken to be prescribed authorities for the purposes of the Act

The Regulations amend the Ombudsman Regulations to include the NACC Inspector in the list of persons not to be taken to be a prescribed authority for the purposes of the Act (regulation 7). The exclusion of the NACC Inspector from the Ombudsman's jurisdiction is consistent with the treatment of the Auditor-General, who like the NACC Inspector is an independent officer of the Parliament and is exempted from Ombudsman oversight by their inclusion in regulation 7.

The NACC Inspector would continue to be subject to oversight by the Parliamentary Joint Committee on the NACC, which has functions to monitor and review the performance of functions by the Inspector and to report to the Parliament on any matter connected with the performance of the Inspector's functions.

Consultation on the Regulations was undertaken with ASIO, the IGIS, and the Office of the Commonwealth Ombudsman, and no concerns were raised.

Details of the Regulations are set out in the Attachment.

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 the day after registration.

Authority: Section 38 of the *Ombudsman Act 1976*

Statement of Compatibility with Human Rights

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

Ombudsman Amendment (Prescribed Authorities) Regulations 2024

This Disallowable Legislative Instrument is 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 Disallowable Legislative Instrument

The *Ombudsman Act 1976* (the Act) establishes the office of the Commonwealth Ombudsman (the Ombudsman) to investigate administrative actions of departments and prescribed authorities and to perform other specialised functions.

Section 38 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The definition of ‘prescribed authority’ for the purposes of the Act (subsection 3(1)), provides that the regulations may prescribe persons and bodies that are not to be taken to be a prescribed authority.

The Ombudsman’s functions under the Ombudsman Act do not include investigating any person or body listed in regulation 6 (Bodies not to be taken to be prescribed authorities for the purposes of the Act) of the Ombudsman Regulations, or regulation 7 (Persons not to be taken to be prescribed authorities for the purposes of the Act).

The Ombudsman Amendment (Prescribed Authorities) Regulations 2024 (the Regulations) amend the Ombudsman Regulations to remove ASIO and the Director-General of Security from the lists of bodies and persons not to be taken to be prescribed authorities for the purposes of the Act, and include the Inspector of the National Anti-Corruption Commission (NACC Inspector) in the list of persons not to be taken to be a prescribed authority for the purposes of the Act.

Human rights implications

This Disallowable Legislative Instrument engages the following right:

- The right to an effective remedy - Article 2 of the International Covenant on Civil and Political Rights (ICCPR)

The right to an effective remedy (ICCPR Article 2)

Article 2 of the ICCPR provides that persons whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. It also provides that a person claiming such a remedy shall have their rights determined by competent judicial, administrative or legislative authorities.

The Ombudsman Regulations engage this right by supporting the effective operation of the Commonwealth Ombudsman, who has broad jurisdiction to investigate complaints by members of the public about matters of administration in the Commonwealth Government public sector. The Ombudsman may make recommendations following an investigation into action taken by a prescribed authority, but does not have the power to issue or compel a remedy. The Regulations remove the ability for individuals to make complaints about the NACC Inspector to the Ombudsman.

However, substantive avenues remain for a person to seek an effective remedy where their rights are affected by actions of the NACC Inspector. Decisions by the NACC Inspector under Subdivision B of Division 4 of Part 10 (reporting on NACC corruption investigations and NACC complaint investigations), including any findings or recommendations made by the NACC Inspector, remain reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. Further, a person is able to seek judicial review under the *Judiciary Act 1903* or in the High Court’s original jurisdiction.

The exclusion of the NACC Inspector from Ombudsman oversight is consistent with the treatment of the Auditor-General who, like the NACC Inspector, is an independent officer of the Parliament and is exempted from Ombudsman oversight by the Ombudsman Regulations.

The NACC Inspector would remain subject to oversight by the Parliamentary Joint Committee on the NACC, which has functions to monitor and review the performance of functions by the Inspector and to report to the Parliament on any matter connected with the performance of the Inspector's functions.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it supports the effective operation of the Ombudsman Act and, to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

ATTACHMENT

Details of the *Ombudsman Amendment (Prescribed Authorities) Regulations 2024*

Section 1 – Name of Regulations

This regulation provides that the title of the Regulations is the Ombudsman Amendment (Prescribed Authorities) Regulations 2024.

Section 2 – Commencement

This regulation provides for the Regulations to commence the day after registration.

Section 3 – Authority

This regulation provides that the Ombudsman Amendment (Prescribed Authorities) Regulations 2024 are made under the *Ombudsman Act 1976*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Ombudsman Regulations 2017

Item 1 – Subsection 6(a)

This item would repeal the paragraph to remove the Australian Security Intelligence Organisation (ASIO) from the list of bodies not to be taken to be a prescribed authority for the purposes of the Ombudsman Act.

As a consequence of this amendment, ASIO will be a 'prescribed authority' within the meaning of the Act. However, paragraph 5(2)(e) of the Act provides that the Ombudsman is not authorised to investigate actions of ASIO.

This item is a technical amendment to repeal a redundant provision. It is consequential to the *National Security Legislation Amendment (Comprehensive Review and Other Measures No.2) Act 2023*, which inserted paragraph 5(2)(e) into the Ombudsman Act.

Item 2 – Subparagraph 7(b)(v)

This item would repeal the subparagraph and substitutes ‘Inspector of the National Anti-Corruption Commission’ to remove the Director-General of Security from the list of persons not to be taken to be a prescribed authority for the purposes of the Ombudsman Act, and to include the Inspector of the National Anti-Corruption Commission (NACC) in the list.

The removal of the Director-General of Security by this item is consequential to Item 1. As ASIO will be a ‘prescribed authority’ within the meaning of the Ombudsman Act, the Director-General of Security will not be taken to be a prescribed authority, per paragraph 3(3)(c) of the Act, by virtue of holding an office established by an enactment for the purposes of a prescribed authority. Any action taken by the Director-General of Security will be deemed, under subsection 3(3) of the Act, to have been taken by ASIO. Paragraph 5(2)(e) of the Act, which prevents the Ombudsman from investigating action taken by ASIO, will therefore also prevent the Ombudsman from investigating action taken by the Director-General of Security.

The item would insert the Inspector of the NACC into the list of persons not to be taken to be a prescribed authority for the purposes of the Ombudsman Act. This means that the Ombudsman’s functions under the Ombudsman Act will not include investigating action taken by the Inspector of the NACC.