



**Alistair Coe MLA**

Australian Capital Territory

**Leader of the Opposition**

**Shadow Treasurer  
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Ms Ingrid Haythorpe and Dr Tahnya Donaghy  
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Dear Ms Haythorpe and Dr Donaghy

Thank you for this opportunity to provide a written submission to the independent review of the *Public Interest Disclosure Act 2012* (the PID Act).

As we discussed at our meeting on 4 July 2019, I think the current public interest disclosure (PID) process is not working as well as it could be. I called for a review of the PID process as part of the suite of integrity measures I announced in my Budget Reply during 2017. As I said at the time, "...we need disclosure officers that are outside the bureaucracy, and we need mechanisms other than a PID for reporting wrong doing." The need for reform was also recommended during the two later inquiries relating to the creation of the ACT Integrity Commission and the establishing legislation. There is no reason why Canberra, the heart and home of the public service in Australia, should not have the best whistle-blower protections for reporting poor behaviour in government. I believe the ACT should be a jurisdiction renowned for its integrity; however, we are currently falling well short of that goal.

The PID process is lengthy, complex and lacks clarity about what matters fall within its remit. There is also confusion about responsibilities under the PID Act, as well as outcomes and protections associated with whistle-blowing. I do not believe it should be necessary to engage a lawyer before a PID is made; however, that is the situation most whistle-blowers find themselves in. I believe this complexity, the potential for reprisal and the financial imposition of hiring legal representation acts as a deterrent to reporting wrongdoing. We would have a better culture within the ACT public service if the PID process was streamlined, clear and protections were enforced.

#### Role of the Integrity Commission

I am aware that the overlap across legislation leads to potential confusion about whether matters fall under the PID Act, *Public Sector Management Act 1994* (the PSM Act), or the new *Integrity Commission Act 2018* (the IC Act). It is my view that the Integrity Commission was intended to be the paramount integrity body within the ACT and therefore should have a role in investigating any matters it sees fit. The additional powers afforded to the Integrity Commission also make it the most appropriate body for disclosures which are serious or systemic.

I believe it would be prudent to include the Integrity Commission on a foundational basis as part of any new proposed PID scheme. The Integrity Commission should be kept informed of PIDs and corruption complaints to aid in identifying where conduct may be systemic across the public service. It will also assist in determining the seriousness of a disclosure and where it may be more suitable for an independent body to investigate the matter with superior powers. This is in line with the objects of the IC Act.

I note that the Integrity Commission has the power to refer matters to other entities and to request reports from the referral entity about the results of investigations along with any actions taken or proposed to be taken. The Integrity Commission may also withdraw a referral and investigate the matter itself if it so chooses. I believe these are important powers that should be preserved and utilised. They allow the Integrity Commission to have an overarching role in handling complaints without requiring substantial use of the Commission's resources to investigate the matters itself.

#### Distinctions between legislation and thresholds

As previously identified, it can be unclear whether conduct breaches the PID Act or whether it more appropriately falls under the PSM Act. This issue will be compounded once the Integrity Commission begins taking complaints later this year. The definitions across legislation overlap significantly which makes it difficult to determine where or how a complaint should be made.

There needs to be greater clarity about the types of conduct and matters which are best dealt with under each piece of legislation, as well as what processes, outcomes and protections disclosers can expect. This should be in an accessible document with multiple examples and clearly delineated processes using flowcharts or other diagrams. Regular training and reminders should be provided to the public service about their rights and responsibilities in identifying poor conduct to improve culture and awareness.

I believe that the Integrity Commission should deal with the most serious matters as the premier integrity body in the ACT. The PID process should be used to handle less-serious matters or those the Integrity Commission does not have the resources to deal with. Finally, the PSM Act should manage minor misconduct complaints. There should be a hierarchical approach, but it would be prudent for a central entity to have records and be kept informed of investigations to avoid unnecessary duplication and enable an appropriate response. For example, if a serious corruption matter was alleged as part of the PID process and referred directly to the Integrity Commission, the Integrity Commission would be best placed to assess and investigate the matter. The Integrity Commission would also be an entity which could provide advice and monitor progress of PIDs to determine whether directorates are compliant with the relevant legislation.

There will be instances where corrupt conduct is referred to the Integrity Commission, but resource constraints and legislative priorities will mean that only the most serious matters are able to be investigated. There needs to be an intermediate process between the IC Act and the PSM Act which enables an investigation and any outcomes to carry more authority. It would be inappropriate for suspect conduct to only or primarily be handled under the PSM Act which can be limiting.

There are instances where conduct could be a PID or alternatively fall under the PSM Act; however, I believe it would be prudent to treat these matters as PIDs until proven otherwise. While the PSM Act also deals with matters that may give grounds for disciplinary action, it does not have the significance of a PID. Minor misconduct matters should continue to be dealt with by the PSM Act; however, where a matter may constitute a PID it should be treated as such. There is also the added difficulty that if a person leaves the public service before an investigation is concluded, there is no real penalty that can be imposed.

#### Difficult process and reprisal

During my time as an elected member I have had limited direct involvement with the PID process. I have had discussions with constituents who made PIDs and they had extremely negative experiences. The process was lengthy, unclear, difficult, complex and left the complainants frustrated. There was also a question of partiality given the small jurisdiction of the ACT. There is often more at stake for the whistle-blower than there is for the person or entity engaging in the poor behaviour. The whistle-blower carries personal professional risk and financial risk if they need to engage independent counsel. I believe it would have benefitted the complainants to have been fully informed of the procedures and processes and been given the opportunity to discuss matters confidentially with an independent individual who had expertise navigating the PID scheme.

I also wish to note the recent media reports regarding PIDs in relation to ACT Health and Canberra Health Services. In this case, three disclosures by separate individuals over several months were treated by the ACT Government as one request which took more than eleven months to finalise. It was reported that the complainants faced reprisals from ACT Health which they believe were linked to the disclosures. The doctor who made the initial disclosure was accused of misconduct by ACT Health soon after lodging the PID. The reports stated that the doctor believed ACT Health knew about the disclosure and then began an assessment. A doctor was also reported to have lost their senior role in the hospital after making a disclosure. A copy of the disclosure was provided to *The Canberra Times* by one of the doctors after they received legal advice that ACT Health had not complied with the statutory regulations. These events undermine the confidence public servants can have in the whistle-blowing process and the practical enforcement of the associated protections.

I am aware that other complainants have similarly engaged legal counsel to ensure their compliance with the relevant legislation, which is a financial burden they should not have to bear. It is not acceptable that employees feel the need to retain a lawyer before they can call out corrupt or unethical behaviour in the public service.

There also appears to be a lack of awareness of the responsibility of disclosure officers. I understand there have been incidents where a disclosure has been made but there was a delay in actioning it by the disclosure officer. This needs to be addressed to ensure the ACT Government is compliant with its own statutory obligations. This review represents an opportunity for the role of disclosure officers to be examined, their responsibilities reviewed, and for alternate avenues for reporting to be considered. There may be instances where a disclosure officer could be the person committing corrupt conduct, and the prospect of reporting of such behaviour to their peers could be a disincentive. It would be beneficial to have an independent avenue outside of the bureaucracy where misconduct could be reported and investigated.

I believe the PIDs should be more streamlined and better communication should occur with complainants throughout the process. There should be greater emphasis on ensuring appropriate protections are provided and enforced. The ACT Government needs to take steps to ensure it fulfils its own legal responsibilities, including the appropriate training of disclosure officers and completing PIDs within legislative timeframes.

A clearly delineated hierarchical structure is necessary for addressing corruption complaints. This approach would need to be accompanied by a simple document explaining the tiered nature of complaints with examples and diagrams, the expectations disclosers should have about the procedures and protections, and potential outcomes after making a PID. It would be beneficial to have the Integrity Commission positioned as the central independent entity coordinating or being informed of these investigations.

It is important any new legislation or procedures are comprehensive and clear. Unfortunately, the current scheme is not conducive to encouraging reporting. If a cultural change is to occur, there needs to be clarity and awareness. As I have previously stated, I believe there is a real opportunity for periodic training and information sessions to be provided to improve consciousness and confidence in the PID process. It is only when people are adequately protected and supported that poor conduct will be identified and eliminated.

Thank you again for this opportunity to contribute to the review. I would be happy to discuss these matters further or be consulted on proposed changes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alistair Coe'.

Alistair Coe MLA  
19 July 2019