ACT INTEGRITY COMMISSION

Our Ref: REC23/203062
Your Ref: CM23/34252

Mr Ian Govey, AM

Independent Reviewer, Integrity Commission Act 2018

Chief Minister, Treasury and Economic Development Directorate

GPO Box 158 Canberra ACT 2601

Via email icactreviewsecretariat@act.gov.au

Dear Mr Govey

INDEPENDENT REVIEW OF *THE PUBLIC INTEREST DISCLOSURE ACT 2012*

I refer to a letter dated 5 June 2023 from [redacted] on behalf of yourself, requesting feedback from the Commission on the discussion paper for the review of the *Public Interest Disclosure Act 2012*. Thank you for the opportunity to comment.

The Commission has considered the issues raised in the discussion paper, with the Commission's views outlined in the attachment. The Commission has no problem with the publication of this document on the review's website.

Yours sincerely

[redacted]

Judy Lind
Chief Executive Officer

5 July 2023

Contact
P (02) 6205 9899
E info@integrity.act.gov.au

Postal Address
GPO Box 1949
CANBERRA ACT 2601

integrity.act.gov.au

ACT INTEGRITY COMMISSION

2023

ACT Integrity Commission Response to the Discussion Paper on the Statutory Review of the Public Interest Disclosure Act 2012

Contents

Preamble

i. This submission contains the response of the ACT Integrity Commission ('Commission') to the *Public Interest Disclosure Act 2012* Discussion Paper. Drawing from knowledge and insight the Commission holds by virtue of the functions it holds under the *Public Interest Disclosure Act 2012* ('PID Act'), the submission sets out discussion and analysis of the key issues arising from the review of the PID Act.

Response to Discussion Paper

PID responsible entity

Where should responsibility for PIDs sit? In particular, should a distinction be drawn between those involving corruption allegations and those that do not?

Are matters of education, oversight and decision substitution appropriately allocated to the Integrity Commission in light of the operation of the legislation?

1. It appears to the Commission that there are no policy issues of fundamental importance raised by these questions. Many matters that might fairly be regarded as raising questions of corrupt conduct within the meaning of the *Integrity Commission Act 2018* ('IC Act') could also amount to disclosable conduct under the PID Act. Thus, conduct that involves a substantial mismanagement of official functions could well constitute a "serious disciplinary offence" or "reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official" within the meaning in s 9(1)(a)(iii) IC Act and fall within one or other of the characterisations in s 9(1)(b). Every case depends upon its own facts and a bright line is not always discernible. For example, the Discussion Paper states that "[s]ome misconduct, such as bullying or destruction or misuse of a government asset does not constitute corrupt conduct under the definition in section 9 of the IC Act". However, this depends on the circumstances in which this conduct occurs. Bullying for the purpose of retribution for making a complaint about an employment issue may well be misconduct that falls within s 9 and whether it serious or systemic will be a matter of degree; destruction or misuse of a computer to avoid transparency or accountability might also be so. This potential for common application of the notions of disclosable conduct and corrupt conduct suggests strongly that there should be a single arbiter of how the particular report should be treated. Aside from other considerations, it seems obvious that having the decision made following one assessment as distinct from several by different decision-makers is more efficient and more likely to produce consistency.

2. Responsibility for appropriate outcomes of PID investigation is primarily that of the relevant government entity. This will include appropriate education about the issues that come to light. The advantages of the Commission's present role are that it gives assurance to the community (and to whistleblowers) that there is independent oversight of the appropriateness of the response and it is useful to have a single body with overall information about problems – both corruption and maladministration – that may affect more than one directorate. This is not to suggest that the PSSC could not adequately perform the role in relation to the latter class but simply to point out that there does not appear to be any obvious advantage in changing this arrangement.

3. At the same time, there is an important distinction to be made between those reports that disclose possible corrupt conduct and those that do not, which essentially is that the former can justify the Commission's use of its intrusive coercive powers, because of their inherent seriousness, whilst the latter have been understood as adequately dealt with by conventional administrative methods. (Whilst s 29(2) of the PID Act requires compliance by public sector entities and public officials with requests for information, this is no more than the normal obligation of public officials to comply with

lawful requests made in the course of their employment.) The Review does not propose, and the Commission does not suggest, such a major change to the present structure.

4. The Commission also notes at page 10 of the Discussion Paper, an incorrect reference to the level of funding and FTE provided to the Integrity Commission in the 2021/22 budget for the responsibility of assessing and managing public interest disclosures. Of the overall budget allocation to the Commission in the 21/22 budget, only 3 of the additional 6.4 FTE relate to the functions of assessing and managing public interest disclosures.

Timeframe for disclosure officer to assess disclosure

5. The Commission has nothing to add to its submission and has no comment on the discussion.

Requirement to declare a conflict of interest

Should the PID Act include a requirement for a disclosure officer to declare a conflict of interest when assessing a disclosure?

a. If yes, what would be the best method for managing such a scheme? Should conflicts be reported to the Commission or managed by the relevant agency?

Should the role of disclosure officer be removed from the scheme with reports made directly to the Integrity Commission?

Should the investigating entity be required by the PID Act to declare an actual or perceived conflict of interest prior to investigating a PID?

a. If so, should the investigating entity also be required to prepare a conflict of interest management plan?

Should the PID Act clarify that the Integrity Commissioner may reallocate a PID investigation to another investigating entity if the initial entity is unable or declines to investigate?

a. Alternatively, should the PID Act enable the investigating entity to refer the matter to another entity in consultation with the Commission?

6. In light of the comprehensive commentary in the Discussion Paper, only a few additional points may need to be made. It may be helpful to note that the most likely conflict of interest is that the disclosure officer is part of the management or administrative structure responsible for the issue about which a complaint is made. The advantage of this is that he or she is likely to have relevant and useful knowledge to bring to bear; the disadvantage is that his or her assessment of the disclosure may be or be reasonably thought to be affected by the possible outcome of the process. Another possibility is that the disclosure officer was involved in some way in the impugned decision or conduct. Other more remote possibilities are open but do not require discussion for present purposes. The first of these instances will almost certainly be patent and seems inescapable unless

the rule is that disclosures are to be considered in every case by a disclosure officer in another directorate. This seems impractical. As to the other instances, the integrity of the process suggests that a conflict of interest needs to be acknowledged and managed, usually by referring the disclosure to another disclosure officer not involved in the issue. In principle, it seems reasonable that this should be managed by the directorate.

7. Where a PID is sought to be made by the employee of the directorate whose conduct or decision is impugned, that directorate must almost inevitably have a conflict of interest in dealing with it. One, rather awkward, solution is that the process should be managed by another directorate. Where the decision is that the disclosure is of disclosable conduct and, hence, it is referred to the Commission, it would follow that the conflict has not led to any adverse outcome and, hence has been appropriately managed. (The Commission would need to carefully consider how any ensuing investigation might be undertaken, but that is a given and needs no further discussion.) If, on the other hand, the decision is that the disclosure is not of disclosable conduct, it maybe that the conflict risk can be managed by referring the matter to the Head of Service. A disclosure about decisions or conduct of the Head of Service or a Minister needs to be assessed directly by the Commission.

8. Each directorate needs to have a PID conflict of interest protocol in place, prepared in consultation with the Commission.

9. The PID Act does not contemplate the possibility that an entity directed by the Commission to undertake an investigation can decline to do so. However, situations where the directorate directly involved in the impugned decision or conduct ought not to conduct an investigation may well arise. In such a case, either the Commission must itself conduct the investigation or, by agreement with the Head of Service, allocate the task to another directorate.

Conflicts of interest under section 24 – requirement to take action

Independent statutory office holders

Should the PID Act include an avenue to allow disclosure to the responsible Minister if a statutory officer holder or the Head of Service is found to have been involved in disclosable conduct?

10. Section 19(2) of the PID Act provides that, where a disclosure of disclosable conduct is taken to be a public interest disclosure, the Integrity Commissioner must either investigate it or refer it to one of a number of specified entities for investigation. These are identified in s 19(2) as the head of a public sector entity, the Head of Service, the Ombudsman and the Public Sector Standards Commissioner. Although the following list of considerations is not exhaustive, the lack of any element related to or suggestive of corruption, the lack of any basis for the exercise of the Commission's compulsory powers and the requirement in s 23(2) of the IC Act to prioritise the investigation and exposure of serious or systemic corrupt conduct will, unless the circumstances are exceptional, lead to a decision to refer the matter for investigation. Where the relevant entity has independent status, such as some statutory officeholders, it would most likely be appropriate to refer the disclosure to the Head of Service for investigation.

11. For the reasons given below in connection with Question 24, the Commissioner may disclose to the head of a public sector entity an investigatory outcome that disclosable conduct has occurred or is likely to occur. If part of the process of correction reasonably requires – or the regime under which the statutory office holder stipulates – on-dissemination to the Minister to enable the correction to be undertaken, then both the Commissioner's and the statutory office-holders dissemination is permitted.

Are provisions to end an investigation working as intended?

12. The Commission has nothing add to the discussion in the Paper.

Scope of disclosable conduct – maladministration

13. The Commission has nothing add to the discussion in the Paper.

Single disclosure scheme under one Act

14. The Commission has nothing add to the discussion in the Paper.

Whether decisions by the Integrity Commissioner about PIDs are reviewable

15. The Commission has nothing add to the discussion in the Paper.

Definition of work-related grievances

16. The discussion rightly notes the difficulty that is raised by conduct that "relates to a personal work-related grievance of the person disclosing the conduct" where that conduct involves serious problems of a wider kind. Thus, where a work-related decision, for example, is made for sexist or racist reasons which (of their very nature) have wider implications than the decision itself, it is difficult to see why disclosure should not attract the protections of the Act. On the other hand, such a decision may well constitute corrupt conduct and therefore come within the Commission's jurisdiction under the IC Act. Thus, despite the somewhat anomalous position created by the very wide reach of the phrase "relates to", it is difficult to propose more precise terminology that effectively deals with the problem at which the exception is targeted whilst leaving undoubtedly bad conduct outside the definition of disclosable conduct. The fact that the report of a third party is disclosable, but that of the "victim" does not, highlights the anomalous result of the present provision. However, the availability of the protections offered by the IC Act in cases of wrongful decisions which are other than purely employment related affords a practical solution.

Point of application of privilege and immunity

17. Section 17(1) of the PID Act requires the disclosure officer to consider whether a disclosure is about disclosable conduct and made in good faith and, amongst other things, pass it on to the Integrity Commissioner. It may be that an appropriate compromise is to provide that the protections apply from that point, whatever the Commissioner determines, as to its being a PID.

Application of section 44 offence to MLAS and journalists

18. It is important to note that the concomitant of the freedom from legal sanction provided by the PID Act to disclosers is the intrusion into the legal protections of individuals whose reputations may be adversely and unjustly affected by disclosures that turn out to be unjustified. The fundamental purpose of the PID Act is to ensure that questions of maladministration are investigated and dealt with and, for this purpose, to protect disclosers from (amongst other things) the risk of defamation actions by persons whose reputations are adversely affected by their information. However, it is one thing to allow such information to be published within the public entity context and altogether different to allow general publication, in short to permit a free-kick public denigration of persons who may simply be doing their duty. MLAs are limited in what can be said under privilege by the Standing Orders of the Legislative Assembly – which self-limiting ordinance is what ordinary members of the public rely on for protection, whilst the media is subject only to the laws of defamation and, in the age of the internet, even this is of scant use. Furthermore, the responsibility for ensuring timely dealing with a disclosure is not in the hands of the individual whose reputation may be at stake. Removing his or her rights of legal protection from public defamation because of bureaucratic delay (which may be without fault) seems difficult to justify.

19. Accordingly, there appear to be good grounds for making the amendment proposed by the Commission.

Requirement for head of entity to take action – Legislative Assembly

20. The Commission has nothing add to the discussion in the Paper.

Power to disclose information to third parties

Should there be a power in the PID Act to allow for the disclosure of information to third parties?

a. If yes,

i. in what circumstances should this power be enlivened?

ii. should the PID Act define which third parties may receive the disclosure of information?

21. The Commission proposes that it should be possible to disseminate information that is brought to attention by disclosers wherever it is in the public interest to do so and not only in emergency situations. Such information can cover a wide range of issues. Even where no wrongdoing (in the widest sense), is alleged, this information might well be useful for policy, administrative or governance purposes. In short, it should be regarded as a resource and not wasted. By way of hypothetical example, if the Territory is involved in litigation and the information is, or may be, relevant to its conduct or the issues in controversy (either supporting the Territory's position or not), it is difficult to see the policy reasons that should prevent its on-disclosure to the relevant entity. Another possibility could be where the information could correct a mistake or aid efficiency. It should be understood that it is at all events lawful, as the matter presently stands, for any employee to make suggestions to management or government – though not outside if it involves confidential information – about issues of which they become aware and (rightly) no impediment in place to prevent this, even where such advice may be for some reason unwelcome.

22. The suggested objection in the PID context, namely, that it might endanger the discloser's privacy, is a reasonable but relatively minor consideration. It seems reasonable to suggest that government employees have a general responsibility – if not a contractual obligation – to assist in good governance and management if they are practically able to do so, and it seems obvious that they should be encouraged to contribute if they can. At all events, the privacy issue can be overcome by requiring the discloser's permission or by confining the information to that which does not reveal the source. The proposed dissemination only applies to disclosable conduct, so a vetting process would already have taken place as to the significance of the information and the statutory protections therefore apply.

23. The proposed dissemination would apply only to government entities.

Reporting outcome of investigation to public sector entity

Should the IC Act expressly provide that an investigating entity is able to provide information and updates to a public sector entity that is required to take action under section 24?

24. The Discussion Paper expresses the opinion (by way of example) that there is no clear provision in the PID Act that allows the Commissioner, without committing an offence under s 44, to share the outcome of the investigation with a relevant Director-General to enable the obligations to take action under s 24 of the PID Act. Section 44(3)(b), which excepts from the offence provisions in s 44(1) and (2) the divulging of information, "in relation to the exercise of a function, by a person to whom

this section applies, under this Act or another territory law" does not appear to do so in the posited example as the Director-General in contemplation is the one who is required *to exercise* a function under the Act as distinct from someone who *has exercised* such a function (vide the definition of *person to whom this section applies* in s 44(6)). This may need clarification.

25. However, under ss 18 and 19, the Integrity Commissioner must either investigate the PID or refer it for investigation to the designated persons (head of a public service entity, the Head of Service, the Ombudsman and the PSSC). It is not necessary that the referee be the official with direct responsibility for the disclosed matter. Under s 24, the consequence of a *belief* (as distinct from a *finding*) of the head of a public sector entity that disclosable conduct has occurred is to take necessary corrective action. It is clear that such a belief can be – indeed, must be – based on information received from the investigating body, including the PSSC, the Ombudsman or the Commission, who may pass on that information without any offence under the exception in s 44(3), and that the corrective task may well need to include informing, for example, the Head of Service and, perhaps, a Minister. In short, where the information is used "under this Act" for the purpose of correction, its being divulged and its use do not constitute offences under s 44(1) or (2).

26. The above reasoning that allows what seems to be, at all events, the necessary outcome of an investigation which discloses something requiring correction, does appear to be unnecessarily complicated and tortuous. It seems that expressly specifying the sequence of responsibility following an investigation would be a clearer approach.

Appropriate investigative entity for the Ombudsman

27. The Commission has nothing add to the discussion in the Paper.

Section 27A(1)(b) – clarification of conjunctive requirements

28. The Commission has nothing add to the discussion in the Paper.

Complaints under both PID act and the IC Act

29. Whilst it is correct that the same matter may involve both disclosable conduct and corrupt conduct, there is no reason in principle why investigations under both the PID Act and the IC Act cannot be conducted in tandem, with potential conflicts being managed cooperatively by the Commission and the head of the other investigating body. This is rendered more manageable because ultimate control is in the hands of the Commissioner under both regimes. Thus, whilst it is correct that, where an investigation is under way, a confidentiality notice covering the production of documents or things or an examination, if the disclosable conduct has also been referred for investigation by, say, the PSSC, the notice can be adjusted to permit disclosure the PSSC. The practical reality, however, is that if the Commission has decided to deal with the matter under the IC Act, this decision would be within s 20(2)(d)(iii) of the PID Act that "there is a more appropriate way reasonably available to deal with the disclosable conduct that is the subject of the … disclosure". It seems, therefore, that

amendment to avoid conflict is unnecessary, at least whilst responsibility for administering the PID scheme remains with the Commissioner.