ACT INTEGRITY COMMISSION

Our Ref: REC23/145984

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 *INTEGRITY COMMISSION ACT* 2018

On behalf of the Commissioner, the Hon Michael F Adams, KC, I enclose the Commission's submission in response to the discussion papers relating to the statutory review of the *Integrity Commission Act 2018*.

The Commission intends to upload its submission onto its website. Please let me know if you have any preferences as to the timing of making this submission public.

I note the meeting scheduled with you on 15 June 2023 to discuss the review. In the meantime, if you or your team have any questions about the submission, please feel free to contact me on 60271880.

Yours sincerely

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Chief Executive Officer

7 June 2023

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ACT INTEGRITY COMMISSION

2023

ACT Integrity Commission Response to Statutory Review Discussion Papers

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Introduction

i. As the Review has noted, the *Integrity Commission Act 2018* ('**IC Act**') reflected a lengthy process of consideration that started, from a legislative point of view, with a Parliamentary Agreement for the Ninth Legislative Assembly for the Australian Capital Territory and consideration by two select committees that resulted in the statute's present form. Clearly, there was room for reasonable differences to emerge as to how best to resolve the various issues that the creation of an Integrity Commission ('**Commission**') raised, given especially the inevitable tensions between, for example, rights to privacy on the one hand and the need for intrusive inquiry on the other or the right to non-interference with personal integrity and compulsorily responding to an inquisitorial tribunal, or the protection of personal reputation and the need for transparent accountability. The Act in its present form represents how these – and other issues – were resolved.

ii. The creation of a body such as the Integrity Commission with wide compulsory powers inevitably gives rise to tensions with the human (and civil) rights of those subjected to their exercise. Given that the Commission's powers will be used in varying ways in a wide range of circumstances, the approach of hypothesising their potential impact on human rights and making adjustments in each case is inevitable. This carries the risk of unforeseen consequences, which increases with the level of detail. It is respectfully submitted that, whilst some particular processes are appropriately mandated, this should be regarded as necessary only where a general requirement that the Commissioner is to take account of human rights in the exercise of the powers reposed in him or her is thought to be insufficient.

iii. It is not surprising, given the range of reasonable responses to these (and other organisational) issues, that it was widely accepted that actual operational experience could well lead to the identification of matters that suggested useful changes to the initial solutions could become evident: hence the insertion of s 303 in the Act requiring a review following three years of operation. From the very nature of things, this experience was not available to the authors of the Act.

iv. It seems clear that the proposed review was intended to be thorough-going and no provision of the Act was immune from reconsideration. Whilst, of course, changes require reasonable justification, the fact that they might represent an amendment to the solutions initially arrived at could not of itself suggest that a proposal was or might be less appropriate. That they might be useful is the underlying assumption of the requirement of the Review. Thus, whilst the Commission acknowledges that the Act embodies deliberate decisions made after careful consideration – a point made several times in the Discussion Papers – this ought not to affect objective analysis of the utility of the amendments it proposes. To do so would be to undermine the evident reasons for which the Review was required.

v. The Commission has, since operational inception on 1 December 2018, identified areas of the Act that have proven problematic in practice or appear to have unintended consequences not readily evident when the legislation was first enacted or where more improvements to the efficient exercise of the functions under the Act are evident. These matters have previously been set out in the Commission's Annual Reports and more recently supplemented with correspondence to the reviewer and this submission.

vi. This submission, whilst very detailed in some parts, seeks to clearly articulate the legislative change that is proposed and why such a change would aid the efficacy of the administration of the Act and in doing so, improve the integrity landscape for all ACT residents.

Response to Discussion Paper: Integrity Commission Purpose and Jurisdiction

KEY POINTS

- The "Purpose and Objectives" section of the Paper does not sufficiently reflect the broad scope of work undertaken by the Commission.
- The Paper describes the Commissions function as "fact finding" which is only one aspect of the work undertaken by the Commission.
- The Commission also has functions under the *Public Interest Disclosure Act 2012* ('**PID Act'**)
- The mandatory requirement to keep 3rd party complainants informed of the progress of investigations should be removed.
- The current framework for mandatory reporting of corruption allegations should be maintained.
- The threshold for mandatory reporting should be changed to require reporting of all allegations of corrupt conduct as defined under s 9 of the IC Act.
- The Commission contends that its jurisdiction should not be limited to only matters which demonstrate serious or systemic conduct in order to be able to fulfill its statutory mandate to prevent corruption, through research, the mitigation of risks and education programs.
- The Commission is already required to prioritise the investigation and exposure of serious or systemic corrupt conduct, thereby ensuring that its investigative resources are focused on the most serious matters.

The Integrity Commission and the oversight landscape

Purpose and objectives

1. The Paper states –

   The IC Act's objectives make it clear the Commission's role is to investigate and expose corrupt conduct with prioritisation of serious and/or systemic corrupt conduct, to educate the public sector about the dangers of corruption, and to assist the public sector to improve its capacity to prevent corrupt conduct.

   The Commission's role is to fact find and investigate to determine whether corrupt conduct has occurred.

2. Whilst the first of these paragraphs is a reasonable summary of the objectives of the IC Act, the statement of the Commission's role does not accurately summarise the legislative remit of its work. The functions of the Commission are set out in s 23 of the IC Act –

23 Functions of commission

1) The functions of the commission are to—

a. investigate conduct that is alleged to be corrupt conduct; and

b. refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action; and

c. prevent corruption, including by—

i. researching corrupt practices; and

ii. mitigating the risks of corruption; and

d. publish information about investigations conducted by the commission, including lessons learned; and

e. provide education programs about the operation of this Act and the commission, including providing advice, training and education services to—

i. the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and

ii. people who are required to report corrupt conduct under this Act; and

iii. the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct; and

f. foster public confidence in the Legislative Assembly and public sector.

2) In exercising its functions, the commission must prioritise the investigation and exposure of corrupt conduct which the commission considers may constitute serious corrupt conduct or systemic corrupt conduct.

3) Subsection (2) does not restrict the commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct.

4) In exercising its functions, the commission must take into account the responsibility and role other public sector entities have in the prevention of corrupt conduct.

3. It should be noted that the Commissioner is also given important functions under the PID Act, which include the conduct of investigations (without, however, the use of compulsory powers) where appropriate. The management of this additional work is not resolved, of course, by reference to s 23(2) of the IC Act.

4. As an additional point in relation to the general exercise of the Commission's functions, reference should be made to s 196 of the *Legislation Act 2001* (ACT) which, in effect, gives the Commission those powers which are necessary and convenient to exercise its functions. It is obvious, therefore, that (for example) public statements about its work may be made (outside the statutory reporting framework) if they are relevant to its functions, including that of public education.

The IC Act compliance with best-practice principles

5. The only comment to be made in respect of the best-practice principles concerns the ability to report on investigations and make public statements (principle 8). The Discussion Paper (correctly) notes that, while there is no specific provision for the Commission to make public statements during an investigation, powers are conferred for making and publishing reports. The Commission takes the view that s 196 of the *Legislation Act 2001*, which gives the Commission the "powers necessary and convenient to exercise … [its functions], authorises the Commission to make public statements which are relevant to its work. Thus, it has announced the commencement of certain investigations and, in connection with its educative functions, has convened a significant number of meetings with various public entities and officials to discuss integrity matters.

Mandatory Corruption Referrals

Should the IC Act not require reporting where a report on the same matter is known to have been made to the Commission?

Current Schema of Mandatory Reporting

6. As explained in the Discussion Paper, section 62 of the IC Act requires senior executives and heads of public sector entities to notify the Commission about any matter the person suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct. Similar requirements apply to Members of the Legislative Assembly and ministerial chiefs of staff under s 63.

7. The current provisions create the possibility of multiple reporting of the same conduct, For example, the executive to whom the conduct is escalated may trigger the s 62 reporting obligation and other executives who may become involved in dealing with that conduct, including those in other Directorates, may also report to the Commission. Notwithstanding this possibility it is the Commission's view that the positive obligation on senior executives and heads of agency to report allegations of corrupt conduct is useful and should remain.

8. The current provision requires the reporter to 'stand in the shoes of the Commission' in determining whether they suspect on reasonable grounds that the conduct falls within the definition of serious or systemic corrupt conduct. This requires the reporter to consider two steps: firstly, does the matter fall within s 9 and, secondly, if it does, is it serious corrupt conduct or systemic corrupt conduction within the definitions under s 10 and s 11?

9. Corrupt conduct is defined in s 9 of the IC Act in language which, though not capable of bright line limits, does give some useful guidance how it is to be understood. The added requirement that it be serious or systemic is so generally defined (in s 10 and s 11 – see discussion below) as to cover a wide range of conduct that might reasonably be considered as requiring to be reported. Inconsistency in what is reported is thus virtually guaranteed. An additional problem is that the uncertainty is likely to result in underreporting of matters that ought to be reported to the Commission.

10. The Commission's view is that the current threshold for reporting under s 62 and equivalent provisions should be changed to require the reporting of any matter where there are reasonable grounds to suspect corrupt conduct, within the definition of s 9 of the IC Act. This represents a lowering of the current threshold that is only triggered where serious corrupt conduct or systemic corrupt conduct is suspected. At the same time, conduct that could satisfy s 9, even if not serious or systemic, will be substantially wrongful, It is the Commissioner who is best placed to determine whether the matter falls within the definitions of serious and systemic, not those who report the matter. This approach is reflected in s 41(3) of the recently enacted *National Anti-Corruption Commission Act 2022* ('**NACC Act**') which provides in effect, that the Commissioner's opinion determines whether corrupt conduct is serious or systemic.

Interaction of reporting requirements under IC Act and the *Public Sector Management Act 1994*

Is the current interaction between section 9 of the PSM Act and section 62 of the IC Act incompatible or capable of improvement?

Should the IC Act impose a positive duty on all public officials to report corrupt conduct?

Should the PSM Act definition of 'public sector member' be aligned with that of 'public official' in the IC Act?

11. The Commission accepts that dealing with allegations of corrupt conduct is part of the broader framework for dealing with allegations of misconduct in the ACT public service. The Discussion Paper, at page 10, provides a helpful graphical representation of that framework.

12. Any reform to the current framework, whether in the IC Act or other relevant legislation must ensure that matters of corrupt conduct are reported to the Commission and that there is a positive duty on heads of agencies and SES, as is currently the case, to report that conduct. The positive duty to report corrupt conduct does not absolve the relevant agency from dealing with the matter. The point of the mandatory reporting regime is to ensure the Commission has 'line of sight' over all concerns of corrupt conduct, regardless of who ultimately investigates the matter.

13. The Commission does not press its proposal so far as the difference between public official and public servant is concerned as both appear caught under existing definitions.

Referrals and assessment of matters

Would any of the above options be worth adopting to streamline the existing process and improve assessment timeframes?

Alternatively, are there other mechanisms to seek to ensure timely assessment of referrals made to the Integrity Commission?

14. To the explanation for untoward delays helpfully outlined by the Discussion Paper should be added resourcing issues that were experienced by the Commission in its first two years of active operations. Access to real time databases such as Rego Act and HR21 will assist in reducing time presently taken up by the problems of confirming the identity of those to whom allegations relate and determining jurisdiction, as is later discussed. The Commission supports the suggested approach that timeframes be monitored and further consideration of this issue be deferred until the next statutory review in five years.

Clarifying interaction with clause H7.1 of the ACTPS Enterprise Agreements

What factors should the review consider in relation to this proposal?

Is legislative amendment required to address this issue?

15. The Commission now takes the view that the identified issues are best dealt with by arrangements made between the Commission and the Head of Service and the PSSC, rather than legislative change.

Limiting investigations to serious and/or systemic corrupt conduct

Should the jurisdiction of the Integrity Commission be amended so that only matters which demonstrate serious or systemic corrupt conduct fall within its remit?

16. The Discussion Paper raises the issue of amending the Commission's jurisdiction to limit its powers to only serious and/or systemic corrupt conduct. In short, the Commission is of the view that it is not appropriate to limit the remit of the Commission in this way. This is particularly important when, as previously discussed, the remit of the Commission extends well beyond the investigation of corrupt conduct and includes such activities as prevention and educative activities.

17. The Commission notes that s 23(2) places a mandatory requirement on it to prioritise the investigation and exposure of corrupt conduct that the Commission considers may constitute serious corrupt conduct or systemic corrupt conduct. This requirement is largely consistent with s 8 of the recently enacted NACC Act, which requires that Commissioner to only conduct a corruption investigate (or continue to investigate) if the Commissioner is of the opinion that the corruption issue could involve conduct that is serious or systemic. This approach effectively removes the problem, described below, arising from the uncertainty of the real world boundaries inherent in the definitions of "serious" and "systemic".

18. The most difficult conceptual problem facing the proposal is defining with reasonable precision what is meant by "serious corrupt conduct". The IC Act presently defines "serious corrupt conduct" as *corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration*. This provides no bright line of distinction, not only in respect of the character of the conduct itself but also as to the meanings of *government or public administration* (leaving aside the problem of whether *government* is meant as a noun or an adjective). Thus, for example, it is at least arguable that any non-trivial dishonesty by a public official in the performance of his or her duties could qualify, since it would likely amount to a breach of trust and thus of integrity. Additionally, is it necessary that the conduct brings into question the integrity of government or public administration generally or only in respect of the particular dishonesty? If the answer to this question is the latter, very few acts of even egregious fraud would qualify as serious corrupt conduct. For example, giving a contract to a relative to build a house without declaring a conflict of interest, might well lead to questions about the integrity of contracts agreed by that official with that relation but almost certainly not with government procurements in general. Examples of these difficulties can easily be multiplied. Each case is a matter of fact and degree. The only way to decide questions of seriousness is by the exercise of judgment and common sense as the facts become known,

applying the definition in an indicative rather than prescriptive way. It should also be understood that most of the indicia of corrupt conduct specified in s 9(1) of the IC Act reflect, if they do not repeat, the definition of "serious misconduct".

19. The principal legal consequence of a decision that there is a reasonable suspicion of corrupt conduct having been committed is that the compulsory powers of the Commission become available. Since persons of interest may well not wish to have their activities investigated, they may be motivated to litigate the question whether the precondition of "serious" or systemic" has been satisfied. In principle, there is no jurisdictional reason why, at the point of issuing a report, litigation could not be undertaken to prevent its being passed to the Assembly on the ground that the conduct was not serious or systemic. Leaving aside the cost and inconvenience of any such litigation, the Commission might be compelled (in the first case) in defending the exercise of its decision to investigate, to disclose material that could prejudice its investigation. Given the necessary publicity of litigation, further consequences unfairly adverse to the reputations of persons concerned in the matter – who could not defend themselves as they would not be parties – might result. Nor would a judgment in any particular case be likely to clarify the legal indicia of *serious corrupt conduct* or *systemic corrupt conduct*, since each case must depend on its own facts. Although unlikely (given the state of the present law about standing), it is not impossible that a complainant could sue to procure an investigation when the Commission has decided that it would not qualify.

20. The NACC Act does not attempt to define what might amount to serious or systemic corruption, leaving these terms to be understood in their ordinary English sense. The risk of litigation is dealt with by providing (as mentioned above) in s 41 (3), in effect, that the Commissioner's opinion is determinative of the issue whether the alleged corrupt conduct is serious or systemic.

21. The approach of the IC Act in its present form is to require combined satisfaction of both the thresholds in s 9(1)(a) and also the rather more informative conditions stipulated in s 9(1)(b). This is a reasonable and practical response to the risk of misuse of the powers to investigate. These latter requirements (though generally cast) practically ensure that trivial matters not justifying the use of compulsory powers will not be investigated. It is difficult to think of an example of corrupt conduct that satisfied these provisions that would not be sufficiently serious as to justify investigation. At the end, of course, any decision about seriousness – however it might be defined – should come down to the judgment of the Commissioner. If the Commissioner is entrusted to undertake investigations and produce reports that can have extremely significant consequences, not only for public officials but also for Government, it is difficult to understand why they ought not to be trusted to conscientiously follow the statutory injunction to prioritise the investigation of serious and/or systemic corruption.

22. As should be obvious from the preceding discussion, there appears to be no or almost no practical difference in outcome between the approaches of the IC Act and the NACC Act. At the same time, the simplicity of the latter's scheme appears to afford a reasonable alternative, with the advantage of avoiding the legalistic complications that will arise if the proposed amendment were made.

23. For the reasons already given about the wider work of the Commission in the integrity space, the suggestion that the Commission's entire remit should be limited to serious or systemic corruption should be rejected. The limitation should only apply, if at all, to the use of the Commission's investigative powers. There is a need for the entire range of corrupt or questionable conduct within the public sphere to be available for consideration, for example, to enable a preliminary inquiry capable of ascertaining whether a report discloses corrupt conduct that is potentially serious or systemic or in the context of its general wider role in

respect of public policy and education. As well, some level of inquiry is necessary to enable decisions to be made as to disclosure or referral, not to speak of the Commissioner's responsibilities, under the PID Act.

Coverage of MLA Conduct

Are the current provisions in the IC Act and other legislation sufficient to ensure broad enough coverage of MLA conduct is captured under the IC Act?

24. The Discussion Paper sets out the Commission's concern that the first two limbs of the definition of corrupt conduct may not cover the conduct of MLAs by reason of the nature of their office. The Discussion Paper also sets out an alternative interpretation of these provisions that arguably brings MLAs within the scope of the first two limbs but involves significant departure from their express language. From a policy viewpoint, it appears to be accepted that conduct by MLAs that is not criminal might nevertheless amount to corrupt conduct which ought to be subject to the Commission's jurisdiction. Section 9(1)(a) should be amended to state with clarity the relevant preconditions. From a policy perspective, there seems much to be said in favour of amendment that clearly applies to MLAs the same substantive regime of investigation and reporting that the IC Act applies to public officials and entities.

Response to Discussion Paper: Integrity Commission Powers

KEY POINTS

- The Federal Attorney General, at the request of the Chief Minister, has indicated that he intends to temporarily declare the Commission a "criminal law enforcement agency" under the TIA Act. This declaration gives the Commission access to powers to obtain telecommunications data and stored communications, under the *Telecommunications (Interception and Access) Act 1979* ('**TIA Act**').
- The Commission maintains its position that it should be able to access all powers under the TIA Act, including the power to intercept communications.
- The TIA Act provides a comprehensive regime for the appropriate use of TIA powers, including their use only where investigations relate to serious criminal offences.
- Applications for interception and stored communications warrants are decided by either a judicial officer or member of the AAT who is independent from the Commission.
- The TIA Act has a comprehensive privacy scheme that must be satisfied before interception or other information gathering can be authorised and undertaken.
- The TIA Act also already contains comprehensive compliance requirements with oversight from the Ombudsman.

Telecommunication Interception and Access

25. The Discussion Paper at pages 14-15 sets out four options in relation to the Commission's access to powers under the TIA Act-

    i. *Option 1 – Seek Commonwealth legislation to provide the Integrity Commission the relevant powers as an EA (enforcement agency) and CLEA (criminal law enforcement agency) under the TIA Act*

    ii. *Option 2A – Designation as a CLEA but not an EA, and with no power to receive material intercepted by other agencies*

    iii. *Option 2B – Designation as a CLEA, and request amendment to the TIA Act to allow the Integrity Commission to receive material intercepted by other agencies but not conduct interception itself*

    iv. *Option 3 – Do not seek designation as either a CLEA or EA*

26. The Paper then poses the following questions:

Which of the options set out above are most appropriate for the Integrity Commission?

If the Integrity Commission is able to conduct interception:

a. *Is additional oversight by the Inspector, as provided for by the current Bill, sufficient to cover protections regarding the right to privacy?*

b. *Should a new position of a PIM (or similar) be provided separate to the Inspector?*

c. Is there a cost threshold where the value of interception as an investigative tool is outweighed by the cost to the public to facilitate interception?

Are there further matters that the review should consider in relation to powers under the TIA Act?

27. Whilst the Discussion Paper usefully outlines the legislative structure of the TIA Act, and makes some important points, it does not sufficiently recognise the operational and forensic significance of the ability to obtain interception and telecommunication information. In the context of this review, it is important to also understand the comprehensive statutory controls within the TIA Act that guard against inappropriate use of powers under the TIA Act. These are explained below.

Thresholds for use of TIA Interception Powers – Serious Offence

28. By virtue of s 46 of the TIA Act, the issuing authority must be satisfied "there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service" and information "likely to be obtained … would be likely to assist in connection with the investigation … of a serious offence, or serious offences, in which "the particular person is involved …or (subject to some limits) another person is involved with whom the particular person is likely to communicate using the service", and having regard to "how much the privacy of any person or persons would be likely to be interfered with", the gravity of the conduct, how much the use of the information and the methods "would be likely to assist … the investigation", to what extent other methods of investigation have been used by, or are available, and how much the use of such methods would be likely to prejudice the investigation.

29. "Serious offences" are defined in s 5D of the TIA Act, both by specific reference and general description as offences carrying a maximum penalty of 7 years or more, with certain added criteria. Possibly relevant offences in the integrity area are under s 350 of the *Criminal Code 2002* (false accounting), s 351 (false statement by officer of body), s 356 (bribery), s 655 (recruiting people to engage in criminal activity), s 703 (perjury), s 706 (destroying or concealing evidence), s 707 (corruption in relation to legal proceedings), s 713 (perverting the course of justice) and s 716 (compounding offences). There is therefore no prospect, were the range of matters able to be investigated by the Commission to remain unchanged, that use of TIA Act interception powers would be used otherwise than in serious cases.

30. It is worth noting that the Discussion Paper identifies 7 crimes that may be applicable to the Integrity Commission in the ACT jurisdictional context. However, the Commission has identified a further 11 offences that might well be applicable in the ACT for TIA purposes:
    - s 350 of the *Criminal Code 2002* (false accounting), maximum 7 years imprisonment;
    - s 351 (false statement by officer of body), maximum 7 years imprisonment;
    - s 655 (recruiting people to engage in criminal activity), maximum 7 (recruiting someone) or 10 (recruiting a child) years imprisonment;
    - s 703 (perjury), maximum 7 years imprisonment, and 14 years for aggravated perjury;
    - s 706 (destroying or concealing evidence), maximum 7 years imprisonment;
    - s 707 (corruption in relation to legal proceedings), maximum 7 years imprisonment;
    - s 713 (perverting the course of justice), maximum 7 years imprisonment;
    - s 716 (compounding offences), maximum 7 years imprisonment;

- s 334 (conspiracy to defraud), maximum 10 years imprisonment;
- s 359 (abuse of public office), maximum 5 years imprisonment; and
- s 415 (unauthorised access, modification or impairment of data with intent to commit an offence), at least 5 years imprisonment, however, no maximum imprisonment term specified by offence provision.

Legislative threshold on appropriate use – interception and stored communications

31. The TIA Act mandates a comprehensive scheme for confining the ability to obtain electronic communications to defined purposes and limiting the intrusion into privacy that is necessarily involved. Section 39 of the TIA Act provides for applications for warrants "in respect of a telecommunications service or a person" to be made to an eligible Judge or nominated AAT member. Section 42 requires the application to be accompanied by an affidavit setting out the grounds on which the application is based, the period for which it is requested that the warrant be in force, and why it is considered necessary for the warrant to be in force for that period. Details of the telecommunication services used or likely to be used and information about the number of previous warrants (if any) relating to the service or the person and the use to which the information obtained was put must be provided. The Judge or Member may require further information to be provided: s 44. Section 46 specifies the matters of which the Judge or Member must be satisfied before exercising his or her discretion to issue a warrant. In brief, they comprise compliance with the requirements for the affidavit in support of the application, that "there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service" and information "likely to be obtained … would be likely to assist in connection with the investigation … of a serious offence, or serious offences", in which "the particular person is involved …or (subject to some limits) another person is involved with whom the particular person is likely to communicate using the service", and having regard to "how much the privacy of any person or persons would be likely to be interfered with", the gravity of the conduct, how much the use of the information and the methods "would be likely to assist … the investigation", to what extent other methods of investigation have been used by, or are available, and how much the use of such methods would be likely to prejudice the investigation. Reference has already been made to potentially relevant "serious offences". Detailed provision is made in Chapter 2, Part 2-6 of the TIA Act as to the permitted uses that can be made of gathered information, which is significantly constrained, and for the destruction of restricted records unlikely to be used for a permitted purpose. Part 2-7 deals with keeping and inspection of interception records, with a particular role given to the Ombudsman.

32. Access to stored communications is prohibited in the absence of a warrant, essentially subject to the same requirements as applies to interceptions: ss 108, 109. These warrants may be obtained by a criminal law-enforcement agency: s 110.

33. The *Telecommunications Act 1997* (Cth) Part 13 requires carriers and carriage service providers (and others) to protect the confidentiality of information that relates to the contents of communications that have been, or are being, carried by them: ss 276, 277 and 278.

Legislative threshold on appropriate use – telecommunications data

34. Chapter 4 of the TIA Act outlines the statutory regime for access to telecommunications data (i.e. metadata). Sections 177 and 178 of the TIA Act provide, in effect, that these prohibitions

on disclosure do not apply where “the disclosure is reasonably necessary for the enforcement of the criminal law” or where an “authorised officer of an enforcement agency” authorises the disclosure by a notification as prescribed. However, and this is of crucial importance, s 172 provides that this information must not involve “the disclosure of … information that is the contents or substance of a communication … or a document to the extent that the document contains the contents or substance of a communication”. This is to be expected, since obtaining information of that kind is hedged about by the detailed protections to which reference has already been made. Thus, what can be obtained is very limited, perhaps best described as metadata. In the present context, that would allow the identification of particular mobile service accounts, the times, duration, dates and (to some extent) places of the communications.

35. Section 178 in effect permits the authorised officer of an agency to authorise the disclosure of the metadata where he or she is satisfied that the disclosure is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty but also he or she must be satisfied the disclosure is reasonably necessary for the investigation of a “serious offence” or an offence that is punishable by imprisonment of at least 3 years.

36. The authorising officer must consider whether any interference with the privacy of any person or persons that may result from the disclosure or use is justifiable and proportionate, having regard to the gravity of any conduct being investigated, the seriousness of any relevant offence or pecuniary penalty in relation to which the authorisation is sought, the likely relevance and usefulness of the information or documents, and the reason why the disclosure or use concerned is proposed to be authorised: s 180F. Part 2-4 deals with the requirements concerning records of these authorisations.

37. Section 176A of the TIA Act provides, in effect, that a criminal law enforcement agency is an enforcement agency. Provided, therefore, the Commission is listed in the TIA Act as a criminal law-enforcement agency, there is no need for further amendment or other action to enable it (in the IC Act), in an appropriate case, to access relevant data from carriers and carriage service providers. Section 9(1) of the IC Act defines corrupt conduct as including “conduct … that … could constitute a criminal offence” and satisfies certain other criteria. It is clear that “enforcement of the criminal law” is not confined to the prosecutorial process but includes the gathering of evidence in any investigation of an offence, given the context. The question whether access to the information is “reasonably necessary for the enforcement of the criminal law” is determined at the time when access is sought. Ultimately, of course, the evidence may be insufficient to establish the commission of an offence or, indeed, it might be exculpatory and thus no person be held corrupt or charged or a prosecution commenced. This, however, is immaterial since, in almost every case, whether to make a finding, charge or prosecute cannot be known until after all relevant evidence, including the sought data, has been evaluated.

38. Given the definition of corrupt conduct, the Commission will need on occasions to investigate allegations that a person has committed a criminal offence. Where it finds such an offence, it may – providing certain other matters are established – make a finding of corrupt conduct, although it cannot (by virtue of s 183 of the IC Act) state in a report that a person has committed an offence. It may also refer the matter (including the admissible evidence it has collected) to a prosecutorial body under s 111. An investigation by the Commission of an allegation of criminal conduct is therefore part of the enforcement of the criminal law and justifies the giving of a notification seeking otherwise protected data, providing the offence is punishable by at least three years imprisonment.

Use and effectiveness of Interception Powers

39. Information obtained through the exercise of powers under the TIA Act informs and is informed by the evidence collected by other investigative actions such as surveillance, search warrant, summons, and examinations. Its utility cannot be evaluated as a separate, independent investigative resource. Even one short conversation of itself apparently innocuous, can prove of vital significance when considered with other evidence. Links established by metadata can also be very important, say, when considered in the context of time and place. The examination of witnesses can be usefully informed by this kind of information. Thus, the value that is brought to an investigation by the use of information gathered using powers under the TIA Act can be, and often is, substantially greater than its individual contribution as stand-alone evidence.

40. The Discussion Paper contains, at Table 3, statistics in relation to interceptions warrants applied for, granted and used in evidence in prosecutions, as is required under the TIA Act. It also notes that the reported statistics 'may understate the effectiveness of interception in leading to prosecutions' and notes that the data is limited to those cases where a matter has gone to trial and intercepted material has been entered into evidence for the prosecution.[1] Obviously, this (limited) class of cases does not include the significance of TI in investigations of the much wider field of corrupt conduct. Little significance can therefore be attributed to the apparently small number of cases where a matter has gone to trial and intercepted material has been entered into evidence for the prosecution. The single qualification that this number does not include pleas omits the point that it is notorious that pleas greatly outnumber trials in virtually every area of the criminal law, with no reason to doubt that this is the case in the present context. More significantly, the investigation of corrupt conduct – even where it is proved – will often not result in a criminal proceeding, let alone a conviction. The evidence in an integrity inquiry that could well establish the elements of a criminal offence is very likely to include matter that is not admissible in a trial. For example, it might well rely on evidence compulsorily obtained from the putative defendant. Furthermore, the test of finding corrupt conduct, though high, is not proof beyond reasonable doubt. Yet again, the undertaking of effective (and safe) surveillance or search warrant execution will often depend on intelligence gleaned from TI which, however, might well not be incriminating of itself. The reported usefulness in securing convictions is therefore of little or no use for present purposes and, worse, would be likely to mislead members of the public who are unaware of the operational realities of investigating corruption and the practicalities affecting criminal prosecutions.

41. Thus, the addition of access to TIA, subject as it is to the statutory protections ensuring proper use and appropriate limits, is not *in principle* a significant expansion of the Commission's investigative powers. As a practical reality, however, it is a powerful additional investigative tool.

Implications on not having access to TIA Powers

42. It is of particular importance to note that, the ability of police and the Commission to undertake joint investigations where (as would be likely) the combination of the use of TIA powers and the Commission's compulsory powers would have been useful, is not presently possible. There have already been three cases of very serious criminal conduct that have

[1] The 2020-21 TIA Act requires, under s 102 for interception agencies to report on an annual basis about the effectiveness of warrants, including how many arrests were made on the basis of information that was or included lawfully intercepted information (LII) and the categories of prescribed offences by way of prosecutions being proceedings which LII was given in evidence

come under notice but where any useful contribution by the Commission has been foreclosed by the lack of availability of TIA.

43. The lack of access to TIA powers impacts not only on the ability of the Commission to exercise those powers directly in support of its investigations, but it also prevents other agencies who may, through the use of TIA powers, obtain information of relevance to the Commission, from disclosing that information to the Commission. This means that the Commission is prevented from receiving information that may be directly relevant to its statutory functions, including for example the detection of corrupt conduct that has not been identified through other means.

The right to privacy

44. There can be no doubt that TIA is an intrusion into privacy and its use will collect information that can be exceedingly personal and ultimately of no relevance to any corruption investigation. This issue is explicitly recognised by the requirements stipulated in the TIA Act that must be satisfied before interception or other information gathering can be undertaken, and the comprehensive compliance regime overseen by the Ombudsman.

45. Therefore, the protections provided in the TIA Act are an adequate response to the privacy intrusion that use of the interception and access powers provide. Accordingly, the comparison outlined in the Discussion Paper with the use of surveillance powers under the *Crimes (Surveillance Devices) Act 2010* is not useful. The implicit argument is that, since the ACT (as a human rights jurisdiction) has accepted the legitimacy of covert physical and electronic surveillance despite its intrusion into privacy, by parity of reasoning, it should accept the legitimacy of telecommunication interception and access despite its intrusion. Many would find this a convincing argument. The Discussion Paper, however, suggests that this reasoning is undermined by arguing that the former intrusion is less than the latter. This argument is untenable. It is patent that watching private conduct or interactions or listening to them in place is, *in principle*, no less intrusive into privacy than listening to telephone conversations or reading stored data, let alone having access to metadata. It also depends on the tendentious selection of assumptions such as the possible length of the intrusion and the subject matter of communications. Surveillance can sometimes (and often does) last for days; some telephone conversations can be very brief. The notion that one is likely to be more or less intrusive than the other provides no rational basis for the suggestion for which the Discussion Paper contends. It also ignores other factors: surveillance devices are frequently placed in homes, cars and places of work (where innocent strangers may well be present) and often include video recording that can involve very private interactions indeed.

46. Surveillance is not the only comparator. Another example of intrusion into privacy is the power of the Commission to enter and search private premises. The use of reasonable force to enable this to be done and the examination on the premises of items and documents found there is another example of an invasion of privacy and personal integrity. It is accepted without debate that such a power is necessary. Again, the required production of documents, which are frequently and necessarily identified by reference to dates and parties rather than content (thus requiring examination of the whole to identify the relevant communications) is another such intrusion whose necessity, in light of the functions of the Commission, is not doubted.

Recurrent interception costs

47. The (unanalysed) costings from some other jurisdictions shown in the Discussion Paper are somewhat indicative but obviously do not provide a sound basis for estimating the likely Commission costs of using TIA powers, except to the extent that they indicate the expense is not likely to be prohibitive.

48. The Commission considers that it would not be necessary to set up its own technical interception capability but, rather, would utilise the services of a partner agency, either Federal or State, to provide interception capability under a service/partnering arrangement. No decision has been as to the appropriate partner for such services. Nor has the Commission engaged with the range of potential partners to obtain accurate quotes for the services under a partnering arrangement for interception capability.

49. The Federal Attorney-General has indicated that he intends (subject to proof of technical compliance) to temporarily declare the Commission a "criminal law enforcement agency" under the TIA Act. The Commission is already well advanced in developing standard operating procedures to exercise powers for telecommunications data and stored communications and estimates that 1.5 FTE will be required for compliance and governance associated with the Commission's access to the full suite of TIA powers, when granted.

50. At this point, costings are not readily available and further detailing is beyond the remit of the Statutory Review.

51. Finally, the cost of the Commission's operations needs to be seen against the social and economic cost of corrupt conduct. A single corrupt procurement can cost many millions. It is also necessary to consider the deterrent value of an effectively resourced integrity commission.

Legislative Proposal: *Integrity Commission Amendment Bill 2022 (No 2)*

52. In the present context, the only aspect of the *Integrity Commission Amendment Bill 2022 (No 2)* which the Commission wishes to take up is the proposal to provide the Inspector of the Commission with an entitlement to be notified of any application for a telecommunications service warrant by a Commission investigator and to appeal and make submissions at the hearing for a warrant. This concept is broadly like the public interest monitors in Queensland and Victoria. Were it thought to be appropriate that such a model should be considered, it would be informative first to have discussions with the Queensland and Victorian Commissions and relevant stakeholders as to its actual utility. The Commission questions whether such a role is appropriately vested with the Inspector of the Commission, as it could conflict with the broader oversight role given to the Inspector.

Additional matters

53. Some additional overall points should be made in relation to the Discussion Paper on TIA.

54. Corruption by government agencies or personnel should, itself, be understood as a serious breach of the human rights of the citizen. Virtually all the incidents of corrupt conduct listed in s 9 of the IC Act have real-life victims, who find themselves powerless at the wrong end of the wrongdoing, quite apart from undermining the right of the community to integrity in government. A discussion that omits to recognise this important aspect of the issue is inadequate for the determination of public policy.

55. Secondly, the NACC will have available the full range of interception and access powers, with the consequence that Commonwealth public servants resident in the ACT may be subjected to their exercise but, public servants also resident in the ACT who, as it happens, are employed by the ACT rather than the Commonwealth, are not.

56. ACT Policing frequently exercises TIA powers in its investigation of offences by ACT residents. There seems to be no logic to fence off ACT entities and officials from the use of TIA powers in connection with alleged corrupt conduct involving serious criminal offences.

57. Two contributions from Tasmania, where obtaining of TIA powers was rejected, are cited in the Discussion Paper. On the earlier occasion (2009) the reason given by a parliamentary committee was that there was "no evidence of systemic corruption in Tasmania". Given the systemic corruption found elsewhere in Australia, this finding reflects a somewhat idiosyncratic view of the uniqueness of Tasmanian governance and is accordingly uninformative. The later review by the Tasmanian Government declined acquisition of TIA powers on the ground that access is currently strictly limited to national security and investigation of serious criminal matters. Why the investigation of these should be so limited is unexplained. The Tasmanian example is of little use: there can be no doubt that systemic and serious corruption occurs in the Territory, as elsewhere, and every reason why the full panoply of investigative tools is needed to combat it.

58. Of considerably greater relevance is the fact that in 2012 Victoria, an explicitly human rights compliant State, gave IBAC access to the full range of powers under the TIA Act and, in doing so, expressly considered the privacy and human rights impacts of these investigative tools: see the relevant Human Rights capability statement in the link, *Telecommunications Interception and Other Legislation Amendment (State Bodies) Bill 2012*.

59. The Commission also seeks to correct a misunderstanding in the Discussion Paper that suggests interception warrants provide for interception of live calls or text messages via third-party platforms. While the warrant itself may allow for as much, calls and text messages that are sent between telecommunication providers are all that can be intercepted.

Options and summary of Commission position

60. As noted at the outset of this chapter, the Discussion Paper at pages 14-15 proposes the following options –

(i) enable the Commission to intercept telecommunications, and obtain stored communications and metadata – that is, to be designated both a Criminal Law Enforcement Agency (CLEA) and an Eligible Authority (EA);

(ii) enable the Commission to obtain only metadata – that is, to be designated only a CLEA;

(iii) enable the Commission to obtain metadata and intercepted material from other agencies – that is, to be designated a CLEA and listed as an agency able to receive intercepted information; or

(iv) not to enable any TIA gathering powers.

61. For the reasons outlined above, the Commission's position is that option (i) is the appropriate option. Option (iii) requires comment. A joint investigation in which the AFP exercised its interception powers would be possible under this option. However, the AFP necessarily

applies its own priorities to both the matters which it investigates and the timing and course of the investigation. These decisions will often be made *ad hoc* and, given the different functions and limited resources of each agency, will not always be a useful fit from the Commission's perspective. From a privacy perspective, of course, utilising the powers of the AFP entails the same intrusion that would be required were the Commission to undertake the task. Option (iii) is distinctly less useful than option (i) without any practical advantages and is not considered a viable option.

KEY POINTS

- The Commission seeks the power to compel the immediate production of materials in examinations.
- The Commissioner is the appropriate party to determine questions of legal professional privilege.
- The Commission seeks the broadening of its ability to obtain information statements from public officials.
- The Commission seeks to broaden its ability to issue confidentiality notices.
- The Commission seeks a statutory ability to access relevant employment records without resort to summons.

Obtaining material in a person's 'custody'

Should the IC Act be amended to include material in a person's 'custody' as material that can be compelled for production?

62. The Commission seeks an amendment to compel production of material in a person's possession or control (as is currently the case) and 'custody'. The Commission regards the extent of the proposed amendment of the definition to be a technical clarification. It is sufficient to state that the Commission has sufficient expertise and is well able to determine what is able to be produced and or to adjust any production requirements where necessary.

63. At the same time, a summons for (say) documents often will not require knowledge of content as distinct from communicating parties and dates. Where knowledge of content by the recipient of the Notice is relevant, then its terms can be adjusted to enable compliance.

64. The second issue raised by the Discussion Paper, if such an amendment were made, concerns the ability to make a claim of parliamentary or legal professional privilege. The proposed amendment would not alter the ability for the document provider to make a claim for privilege.

Production in the course of an examination

Should the Integrity Commission be granted additional powers to be able to compel production of material in the course of a hearing or examination?

65. The Commission's proposal is to require immediate production of material in the course of an examination without the requirement for a summons. The Commission is merely seeking to streamline a process that is already available in the IC Act and bring it in line with powers held by other integrity commissions. The IC Act currently provides for the immediate execution of a Notice in certain circumstances, including where there is a likelihood of evidence being lost or destroyed or serious prejudice caused to the investigation: s150(2). The Discussion Paper refers to the requirement of s 150(1) of the IC Act requiring seven days' notice to produce a document, this timeframe affording a witness the opportunity to seek legal advice about the production of the document, or other thing.

66. The proposed amendment would remain governed by s 142(1)(a) which requires examinations to be conducted in accordance with the rules of natural justice and procedural fairness. The procedure that would be followed, in circumstances where immediate production in a examination is required, is that, following production, and before inspection, the witness would be informed of the right to claim privilege and sufficient time given to enable the witness to consider this issue. Were such a claim then made, it would be dealt with in accordance with the IC Act. The additional implicit suggestion that requirements of fairness mean that persons must have advance notice of the character of the particular investigative inquiry does not take account of the fact that this is already required, subject to certain exceptions, to be disclosed in the summons that brings them to the Commission (s 148(2)) and at the outset of the examination (s 156(2)).

67. The Discussion Paper cites the example given by the Commission of a person coming to an examination to give evidence under the terms of the examination notice, only to have their mobile telephone taken from them and forced to leave without it and argues that "this could impact both procedural fairness, and also result in inconvenience of the person by having their mobile phone removed without any notice". As already explained, no issue of procedural fairness arises. The Commission already has access to powers to seize someone's phone and is able to do so by immediate service and execution of a summons under the present arrangements. The Commission is seeking to avoid the administrative burden of this process by allowing the Commissioner to require production by oral direction (with a record of this on the transcript). It is accepted that loss of one's phone without notice can give rise to inconvenience, but steps are taken to reduce this as much as possible. It seems obvious that inconvenience cannot of itself stand in the way of an investigation. More obviously, the proposed amendment does not of itself give rise to this inconvenience or, for that matter, to any issue of procedural fairness since those factors would be present – or not – were the present procedure of issuing a summons with immediate effect to stand. The Inspector would need to be informed of any such directions as part of the monthly disclosure process already in place.

Amendment in relation to service periods

What service period should the IC Act provide for compliance with a summons to produce?

a. Are the current service periods sufficient, too short, or too long, or too inflexible?

Should there be scope in the IC Act for the Integrity Commission to amend or vary service periods to extend or shorten the timeframe? If so, should this need to be agreed by both the notice recipient and the Commission?

68. We believe the current regime is sufficient. Persons subject to summonses to produce are able to request extensions to compliance periods.

Allowing the Integrity Commissioner to determine questions of privilege

Should the Integrity Commissioner be given the power to determine privilege claims? If so, are there safeguards that could be introduced to address procedural fairness concerns?

69. There are two matters that the Commission wishes to bring into this discussion. The first concerns the argument that, as stated in the Integrity Commission Bill 2018 Explanatory Statement's citation of the 2017 Select Committee's report: "due to the inquisitorial nature of the Integrity Commission it was noted that the Integrity Commission would not be able to independently assess the claim of privilege as it would have a vested interest in the subject matter to which the privilege applies". In the Commission's view, this rests on a mistaken understanding of the notion of interest. The *only* relevant interest of the Commissioner is to comply with the requirements of the IC Act and to make such decisions or findings or such reports as are authorised or required by its terms and in this sense to reflect the interests of the community in maintaining and strengthening the integrity of its public institutions. The very nature of the Commissioner's functions means that he or she does not have and does not serve any *personal* interest in the process of investigation. The only interest of the Commissioner is to serve the public interest within the four corners of the IC Act. It may be that a government agency or employee will have an interest, as they would or could be adversely affected – or perhaps even benefited – by a report or recommendation of the Commissioner. A witness who is not at risk but is asked to disclose a privileged communication may have an interest in maintaining its confidentiality. In the case of the Commissioner, there is no other interest except the potential relevance of the confidential information, which is why it is sought, but the interest of the Commissioner is to examine it only if it is not protected by privilege. In short, the decision as to whether the privilege applies to a communication is unaffected by any interest other than applying the law correctly and there is no basis for supposing that the Commissioner has an interest in refusing a just claim.

70. An "interest" in the apprehended bias context is not the kind of interest by which a person will receive some material or other benefit. In the context of a legal proceeding, a prosecutor or other moving party may have been required to form a view of the matter, which is in that sense an interest personal to them. The interest of a prosecutor may be in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment. The issue is to be analysed objectively, and not by reference to any psychological processes to which a person in such a position is subject. It is well accepted that it might reasonably be thought that the person's involvement in the capacity of prosecutor may not enable them to bring the requisite impartiality to decision-making. This is, of course, not to equate such a person with a judge.

71. The Commissioner is an investigator seeking to gather the relevant evidence, in the context where there is no decision to be vindicated. The fact that initiation of an investigation requires a reasonable suspicion of the commission of corrupt conduct merely raises a question to be answered, as distinct from a conclusion to be justified. It is (rightly) not suggested that there is any material interest arising from the initiation of an investigation that might affect the scope of the inquiries or examinations to be made, let alone any findings. The same must apply by parity of reasoning to the determination of any privilege claims.

72. In short, there is nothing about the need to conduct an investigation that affects or is likely to affect the neutrality of any decision about the scope of the potentially relevant material that needs to be made by the Commissioner while doing so.

73. Issues of privilege arise quite commonly in litigation – both criminal and civil – and has been the well accepted and universal practice for at least a century that the court (whether judge or magistrate) conducting the case is the appropriate decider of the issue. Except where there is a jury (which is only in a very small minority of cases) the same judge or magistrate is also the final decision maker. The task of the court is to decide the issues between the parties according to law and, in doing so, determine the intermediary or procedural questions that arise in the course of proceedings. It has never been suggested that the fact that the judge or magistrate constituting the court is also the final decision-maker has any effect on the neutrality of his or her decisions on privilege issues. The very indifference of the court to the outcome is a reflection of its neutrality in considering the privilege claims. The same is true of the Commissioner. The Commissioner is indifferent to the outcome of the investigation and there is no reason to think that, because he or she is directing the investigation and reporting on its outcome, that indifference will not also apply to any claim of privilege. This last point about the indifference of the Commissioner to the outcome of an investigation reflects a fundamental element of the jurisdiction of the Commission. The IC Act prescribes an elaborate scheme to ensure both independence and neutrality. The appointment as Commissioner of a judge or retired judge is obviously designed to provide assurance that the functions and powers of the Commissioner will be exercised in this way.

74. Extensive compulsory powers – some of the most intrusive capable of being exercised in private – which, it is accepted, will be performed appropriately and in light of the applicable relevant principles of civil and human rights, are reposed in the Commissioner, together with the ultimate power indeed, duty, to make reports that are potentially capable of destroying the reputations, not only of individuals but also governments and government agencies. To accept – even as a hypothetical perception – that the Commissioner cannot or ought not be trusted to make unbiased and independent decisions about claims of legal professional privilege seems to be fundamentally inconsistent with the assumption about integrity that that is the essential foundation underlying the creation of the Commission.

75. The Explanatory Note explains that the reason that “the Supreme Court is the appropriate arbitrator [of privilege claims is] because they are a neutral third party that has no vested interest in the Commission’s investigation”. The issue of the Commission’s “interest” has already been dealt with. The point that needs to be emphasised is that the fundamental foundation on which the legitimacy of the Integrity Commission is grounded is precisely its neutrality, its lack of bias and – to take up the language used in this context – its lack of any interest, vested or otherwise, in either the course of its investigations or their outcome.

76. It remains to observe that the Commissioner is well able to disregard any information that is in a privileged communication and disclosed for the purposes of determining a privilege claim. Judges and magistrates are frequently called on to do this when determining the admissibility of evidence in the course of proceedings in which they are the ultimate decision maker.

77. Both the *Royal Commissions Act 1991* (ACT) and the *Inquiries Act 1991* (ACT) have provision for the taking of compulsory evidence and compulsory provision of documents, implicitly subject to legal professional privilege. It necessarily follows that claims of privilege must be decided, no doubt subject to judicial review, by the Royal Commissioner or the Board of Inquiry, as the case may be.

78. The Commission has no issue with providing for a right of appeal to the Supreme Court. The Review notes that, were the Commissioner's decision to disallow a claim overturned, this might give rise to feelings by a witness that they have been unfairly dealt with since the Commissioner would have already seen the information. The assumption that the Commissioner would or could be unable to disregard material ultimately found by the Court to be privileged must be rejected. (This matter will be raised again in the context of deciding claims of public interest immunity.) Such an argument has never been allowed in the civil or criminal litigation context and should not be allowed in this context. Fairness is always objectively assessed and, for obvious reasons, subjective feelings about it are never regarded as relevant. The Commissioner might well be prepared to stay any on-disclosure of the information pending the outcome of any appeal, however. The circumstances relevant to fairness could vary widely so that a stay should not be automatic or mandatory. It should never be overlooked that it might be unjust to another person involved in the investigation either to uphold a claim of privilege or, where the claim is refused, withhold its dissemination.

79. Although the NACC Act abrogates legal professional privilege generally (except for journalists in the course of their work), so that there can be no claim of confidentiality on this ground, there is (quite reasonably) an exception in respect of obtaining legal advice and assistance in connection with the investigation. Such claims are determined by the Commissioner. In Queensland non-production of information or documents is permitted if they are the subject of legal professional privilege or contain "a secret process of manufacture applied by the person solely for a lawful purpose". Claims are determined under a procedure more or less similar to that currently in the IC Act.

80. The Discussion Paper notes that Queensland, South Australia, Tasmania, the Northern Territory and Victoria, require documents or things subject to a claim of legal professional privilege to be sealed and transferred to the Court (expressly prohibiting prior inspection by the Commission), which is to determine the validity of the claim. The Commonwealth, New South Wales and Western Australia do not require this process, so that the claim is determined in the ordinary course by the Commissioner, subject (implicitly) to the conventional rules of judicial review. The Review speculates that, since "these jurisdictions abrogate most common law privileges, such as legal professional privilege, for public officials under their anti-corruption legislation – consequently, there is not an apparent need to provide a process to determine privilege claims". This explanation is unsatisfactory. In Western Australia, legal professional privilege held by private persons and, so far as the NACC is concerned, in respect of legal advice obtained by journalists in the course of their work, is not abrogated and, in all cases, the privilege remains in respect of communications related to involvement in the investigation itself. It should be borne in mind that, in these cases, the possibility that the exceptions apply must still be regarded as a live possibility.

81. The Commission argues that, on analysis, the reasons for automatic referral to the Court of legal professional privilege claims do not carry weight and the position adopted for the NACC, reflecting by far the most recent governmental consideration of this issue, should be adopted.

Practical issues arising from referral to the Court

82. There is another good reason for not continuing with the present process, essentially resulting from the unforeseen practical consequences where the claim of legal professional privilege is made in respect of the contents of a computer or mobile phone. If a matter is to be determined by the Supreme Court, considerable inconvenience could be experienced by the witness because their physical phone or computer would need to be surrendered to the court for the duration of the Supreme Court's consideration. If the Commission had the power to

make such determinations, the amount of inconvenience experienced by the witness would be reduced.

83. These practical inconveniences were exposed in recent litigation in the ACT Supreme Court. A mobile telephone was required to be produced. A claim for privilege was made and the device delivered to the Supreme Court. In the conventional situation, a person making a claim of privilege must identify the particular document to which the privilege is claimed to apply. The phone was no longer in the custody of the claimant and, for obvious reasons, could not be accessed by them for this purpose. However, of course, the Court needed to access the content of the device to identify privileged communications (which, it was conceded by the Commission, may well have been contained in it). This is very different to examining a file of documents, since the information is electronically recorded in what might be called machine language and is not readable. A readable transcript needs to be prepared to enable the privileged parts to be identified. This requires specialist skills, firstly to extract the information from the device and, secondly, to convert it into readable form, that are both technically complex, requiring very costly specialist software and a high degree of technical experience, and likely to produce long delay. In this particular case, a figure of $100,000 was suggested by a well-known third-party provider in this space, with no certainty of success and no useful time prediction, for various reasons associated, inter alia, with the age of the device. In the end, the Chief Justice ordered that the task in the first instance was to be undertaken by the specialist technician within the Commission, subject to certain undertakings to protect confidentiality. Because of the age and type of the phone, the programmes used to extract readable text needed to be adjusted, which could only be done if the technician could access some at least of what had been downloaded. The process of acquisition of the readable data, therefore, could simply be performed “blind”. In the result, this was permitted (by consent) and, with significant difficulty, the data was eventually extracted and, also complicated, converted into readable product. This was provided to the claimant to enable identification of the communications which was the subject of the claim. Ultimately, the parties were able to agree on the claim. Had agreement not occurred, it would have been necessary for the Court to examine the extracted product for itself, which involved many thousands of documents. Although a search confined simply to communications between two identified persons (say, the witness and the solicitor) privilege also attaches to documents or communications made for the purpose of obtaining the legal advice, which cannot be so easily identified. The possibility of giving the extracted product to the witness who is a person of interest is highly undesirable, even if they created or were a party to creating the material in the first place. The reasons for this are obvious but include the necessity, so far as possible, to prevent any hindsight concoction or even innocent reconstruction of events to deal with what might be perceived as uncomfortable evidence. However, to require the Court to examine the product, which is almost in every case likely to be voluminous, would constitute an impractically large burden. The appointment of an independent assessor might overcome this particular problem but, as is obvious, the expense of such an arrangement will necessarily be high - say experienced counsel (even if not Senior Counsel) at a daily rate of at least $5000. This, however, would move a vital part of the task from the Court to a non-judicial officer and undermine one, at least, of the policy purposes of the referral. The cost of the proceedings – much reduced by consent orders – was in the order of $55,000 for the Commission, not taking into account its internal costs and those payable to the other side estimated at about $110,000. Had the case been fully litigated, the legal costs would have been very significantly higher, without taking into account the cost to the Court of an assessor. Allowing the Commissioner to determine privilege claims substantially obviates this problem.

Approaches to determining public interest immunity claims

84. As foreshadowed, it is necessary to consider the procedure of determining claims of public interest immunity, the elements of which have been set out above. Under s 162 of the IC Act in its present form, such claims must be referred to the Supreme Court for determination. As noted, unlike legal professional privilege – which confers absolute confidentiality aside from the exceptions for impropriety – public interest immunity applies in accordance with s 130 of the *Evidence Act 2011* (ACT) ('**Evidence Act**') which, in substance, requires weighing the public interest in disclosing the privileged material against the public interest in preserving secrecy. This requires identifying, on the one hand, the character of the public interest and, on the other, the public interest in disclosing the material and then a process of balancing one public interest against the other. Section 130 lists a number of non-exclusionary matters to be taken into account. Those relevant to the first issue are obvious. Amongst those listed as relevant to the second issue, the most relevant would seem to be "the importance of the information or the document in the proceeding". The proceeding here should be understood as the investigation. Importance is to be assessed in the sense both of the evidentiary significance to key findings and the overall significance of the investigation to issues of corruption. Clearly, the possibility of disclosure could only arise in the context of an investigation into serious and/or systemic corruption but that would not, by itself, justify disclosure. The problem faced by a court in dealing with such a claim is that, as the Commission is unable to access the material, it can only provide limited information at a high level of generality about the second issue. Clearly, the claimant will be unable to assist in this regard. It will be necessary for the Commission to provide detailed evidence as to the investigation. Since the claimant – necessarily the Government – is a party and, potentially, its officials (or Ministers) persons of interest, this exposure of the investigation will be likely to prejudice the integrity of the investigation. It has long been accepted that nothing used by police in their pursuit of criminals should be disclosed, nor useful information concerning continuing inquiries which may impede or frustrate the police in that pursuit or which may reveal matters to the prejudice of future police activities. By analogy, these considerations must apply to the Commission. It is frequently the case that the Court will not give access to the privileged material to the other party but, at least, it will have the assistance of the claimant's submissions as to the countervailing considerations militating in favour of disclosure, since the underlying material will, in way or another, be available at all events – for example, the party issuing the subpoena or asking the question is required to explain with precision the legitimate forensic purpose to which the inquiry is directed. In the present context, it will almost certainly not. This problem would be obviated by allowing the Commission to conduct the balancing process. A mid course is to permit the Commission access to the material to enable it to assist the Court. It is frequently the case that material subject to a public interest immunity claim will be significantly prejudicial to the interests of a party. It remains necessary, however, for the Court to consider that material in order to weight the relevant public interest. It has always been accepted that, should the immunity prevail, the Court would disregard it in considering its ultimate judgment. The same approach should be adopted in the case of the Commissioner.

85. There is, in the Commission's view, good reason not to require automatic referral of the issue to the Court. The Commission's submissions made in respect of legal professional privilege are adopted to the extent that they deal with the Commission's functions and the position of the Commissioner.

Amendment to enable the Integrity Commissioner to request information from public officials

Should section 89 should [sic] be broadened to include a larger range of public officials, or is the existing scheme sufficient (noting that the head of a public sector entity may seek assistance to comply with a notice)?

- *a. If so, which public officials should be captured under section 89? For example, should section 89 be limited to members of the senior executive service?*
  - *i. If section 89 is broadened to capture a larger group of public officials, should the Integrity Commission be required to report section 89 use to the Inspector?*
- *b. If section 89 were to be broadened, should section 89 be repealed and section 90 extended to compel information, documents, items and other things from any public official?*

Should there be an equivalent provision to section 89 for an investigation?

- a. *If so, should it also be broad and include* all public officials?

86. The Commission proposes that it should be able under s 89 to address a request for information held by an entity to any relevant public official rather than only to its head. One of the objections suggested to the Commission's proposal is that "the change could … result in junior records officers receiving requests for a range of matters that may be beyond their level of authority, delegation, and broader knowledge without any management oversight as to accuracy and appropriateness". However, the point of directing the inquiry at the first level of information is to ensure so far as practicable that the relevant information can be directly obtained. In short, this reflects the fundamental rule of investigating that original sources should be used as much as possible. If this cannot be assured, then secondary sources as close as possible to the original should be approached. Another important point is that the inquiry is the Commission's, not management's. Thus, the opinion expressed by the Discussion Paper that "central to this question is the *right* of the head of an agency to direct and inform responses to engagement by the Integrity Commission to ensure the most *appropriate* response [italics added]" is mistaken. The key point is not that the "most *appropriate* response" is provided but rather that it is the most *accurate* response. Nor is there a "*right*", as posited (that is, against the Commission), whether "central" or peripheral. In particular, there is no right to decide what the Commission is told. From the Commission's point of view, there is only a duty of candour. The only right is to procedural fairness. The response to a request must, to the best of the responder's ability, omit no relevant information. No change is proposed in allowing the head of the entity – as well as the subordinate official, if the amendment were made – to decline compliance with the request upon making a "reasonable excuse" for doing so. There is no objection to requiring the Inspector to be informed of the request.

87. It is not proposed that the present power to request the head of a public sector entity to provide information should be removed. This is a significant and useful power that aids the Commission in the efficient exercise of a preliminary inquiry.

88. The Review suggests that, were this proposed amendment made to s 89, a question would arise whether s 90 still had work to do "as the practical difference between the two would be minimal". This seems based on the assumption that "information held by the public sector

entity" is the same as "a document or thing" production of which can be required by a notice under s 90. However, "information" is a wide term that is not limited in this way but would include any matter known to or ascertainable by the head of the entity. The sanction for non-compliance with a lawful requirement of the Commissioner (including under s 89 and s 90) is s. 296(1) of the IC Act, which creates the offence of obstructing the Commission in the exercise of its functions, in particular of failing to comply with a lawful requirement. Section 196(2) provides the defence of having a "reasonable excuse" – which applies equally to both s 89 and s 90. The effect is that the same legal basis is provided for declining to comply with a request under s 89 and, as well, for a failure to comply with a lawful requirement of the Commissioner (e.g., under a summons). The reasonable excuse must depend on some legally available ground, such as, such as legal professional privilege or a legislative secrecy requirement or practical inability to comply.

Power to require statements

89. Further to the discussion above about processes for obtaining information, the Commission proposes a further amendment to compel the completion of statements relevant to the work of the Commission by appropriate officials. This proposal is to expand the means presently available to the Commission when conducting either a preliminary inquiry or an investigation. At present, in the former case the Commission's only means of obtaining relevant information is by summons requiring a document or thing or a request for information under s 89 and, in the latter, (in addition to a summons to produce) requiring a person to attend for examination or voluntary interview. A useful, less cumbersome and very much more convenient course is to empower the Commission, by serving a notice to that effect, to require a public entity or public official to prepare and produce a statement of information. This procedure could avoid the need for an examination or significantly reduce its scope and be especially useful where the evidence is thought to be uncontroversial. The notice would specify or describe (envisaged to be in the form of a list of questions) the information concerned, fix a time and date for compliance and must specify the person (being the Commissioner any other officer of the Commission) to whom production is to be made. The notice could provide that the requirement may be satisfied by some other person acting on behalf of the public entity or official may, but need not, specify the person or class of persons who may so act. The notice would point to the ability to claim privilege in respect of any particular question. The timeframe would permit considered answers outside of the examination process. This procedure is provided, for example, by s 54 of the *Law Enforcement Conduct Commission Act 2016*, and s 21 of the *Independent Commission Against Corruption Act 1988* (NSW); see also s 72 of the *Crime and Corruption Act 2001* (Qld). Since the official could, at all events, be summonsed if an investigation were on foot, this would be consistent with the compulsory powers already conferred on the Commission and thus involve no issues of principle. It is acknowledged that this would expand the present s 89 procedure in the case of preliminary inquiries. The Commission also points to the fact that the s 89 procedure is not available in respect of investigations, which appears an illogical omission and would seek to have this also available in these cases.

Amendments to the preliminary inquiry framework

Should the IC Act be amended to remove the ability to claim secrecy during a preliminary inquiry?

90. Section 95 enables the recipient of a preliminary inquiry notice to rely on a secrecy requirement under a law in force in the Territory to resist producing a document/thing to the

Commission. This avenue, which has no reasonable policy basis, is not available to recipients of a summons to produce documents/things issued under s 147, and its inclusion in s 95 creates an unnecessary incoherence in the Act and the Commission's powers. It hampers, without good reason, the Commission's ability to obtain relevant information for the purposes of deciding whether to dismiss, refer or investigate a corruption report, or investigate a matter of its own initiative. It cannot be justified, at least as far as public officials or public entities are concerned. The Commission does not suggest any change to the availability of public interest immunity.

91. The extent of the privilege to resist production of a communication in a preliminary inquiry should be the same as that which applies in the investigative context. The public interest is the same even though the threshold for investigation has not been reached. The confidentiality can be maintained by ensuring there is no further dissemination of the material. Whilst the policy lying behind the denial of the Commission's use of full range of compulsory powers and investigative tools is not unreasonable, as a reasonable suspicion that corrupt conduct has occurred has not been arrived at, there is no greater public interest served by permitting a public official or public entity to maintain the confidentiality of communications (subject to legal professional privilege and public interest immunity) than any other communication that must be disclosed. This should be a matter of substance, not form. The reasons that militate strongly in favour of disclosure have already been provided in the discussion of this subject in the investigative context.

Should the Integrity Commission have the ability to issue a confidentiality notice to any person during a preliminary inquiry?

Are there any other considerations for the preliminary inquiry framework?

92. The essential reason, in the preliminary inquiry or the investigative context, why a confidentiality notice may be necessary in wider circumstances than when a person is summonsed to produce a document or thing is that, before the summons is issued it is very often the case that inquiries – in addition to a request, for example under s 89 – have been made, disclosure of which could seriously prejudice either a potential preliminary inquiry or investigation. Accepting that a requirement to keep the Commission's interest confidential may be a source of stress for some individuals, it is difficult to see how this should outweigh the very significant public interest in the effective inquiry into complaints of corruption or subsequent investigation should it appear that there is a reasonable suspicion of corruption having occurred. Thus, where a person is interviewed in the course of the exercise by the Commission of its functions – whether in the assessment, preliminary inquiry or investigative stage – it should be empowered to ensure that its approach remains confidential by issuing an appropriate notice.

Arrest warrant for witness not likely to appear

Should the Integrity Commission be able to seek an arrest warrant for a witness prior to that witness failing to appear for their examination?

If the proposed amendment was made, should the ability to seek the warrant prior to the notice's expiry be reliant on evidence that the person intends to abscond?

a. *Alternatively, should it be sufficient to shown that the person does not intend to appear before the Commission (regardless of whether they intend to remain in the ACT)?*

93. Whilst arresting a person in the posited circumstances certainly involves a significant interference with personal integrity, this is also the case, to a greater or lesser degree, with the exercise of all the compulsory powers conferred on the Commission. In the end, the question is whether the objectives the Commission was created to serve justify these impositions. The Commission's role points to the need for the power to adequately undertake its functions and the potential consequence, in the particular instance, if the power is not conferred. The compulsory examination of witnesses is the major tool available to the Commission in its investigations of suspected corrupt conduct. If this could be frustrated by avoiding appearance then, to that extent, the Commission's work is unable to proceed. Of course, it would be necessary to consider all the issues set out in s 159 (in relation to issuing an arrest warrant for someone who has failed to appear). They appear to cover the ground and, if satisfied, appear to justify the invasion of personal integrity that arrest would entail.

Warrant to search premises and authorise a search for items on a person

Noting the current distinctions in the ACT framework, is it appropriate to provide a capacity for Integrity Commission investigators to conduct a frisk search on a person while executing a search warrant?

Are there any implications in relation to the HR Act if the Commission's proposals were implemented?

Should the IC Act provide the capacity for a Magistrate to consider authorising a Commission investigator to conduct a frisk search in the warrant's terms?

a. *If yes, should criteria be specified when a frisk search is authorised? For example, should the Commission need to provide evidence to the Magistrate that the subject of the warrant has previously been uncooperative with the Commission or other agencies.*

Are there any other options to ensure occupier compliance with search warrants? For example, should there be a penalty if the occupier or any person assisting the occupier knowingly withholds items that are captured under the search warrant?

94. The concern here may be simply stated: it is a matter of a moment to pocket an incriminating USB drive or a mobile phone. Section 120(1)(a) of the IC Act authorises the investigator who enters premises pursuant to a warrant to require the occupier "to give the investigator reasonable help to exercise the powers" conferred by the warrant, which includes inspection or examination of anything on the premises. Section 120(2) requires such a person to "take all reasonable steps to comply with … [this] requirement". This appears not to extend to the inspection or examination of anything on the person as distinct from the premises. Section

194 of the *Crimes Act 1900* (ACT) ('**Crimes Act**') enables an issuing officer to issue a warrant authorising an ordinary and/or frisk search of a person if the officer is satisfied of the same things that enable a warrant to search premises. Given the ease of concealing, say, a USB drive or a mobile phone, it seems reasonable that the investigator could, at least, require the person, for example, to remove their coat or empty their pockets.

95. The same criteria should apply as those presently applicable to obtaining Crimes Act warrants.

96. As mentioned, s 120(2) imposes an obligation of cooperation and s 296 creates the offence of hindering a member of staff of the Commission in the exercise of a function or power under the IC Act or failing to comply with a lawful requirement of the staff member. It does not seem necessary to replicate this consequence of non-compliance.

Enabling the Integrity Commission to access employment records

Should the Integrity Commission have direct access to Chris21 employment records?

a. *Could confidence be adversely impacted if the framework were amended to allow the Commission access to HR21? If so, to what extent is this a problem?*

b. *Are there any alternative options t*hat would be feasible? For example, the Commission could enter into an MOU with the PSSC so that the PSSC is required to provide certain information to the Commission, such as residential addresses.

97. There can be no doubt that employment details of persons employed by the ACT public service are relevant in every case being considered by the Commission. Its jurisdiction to investigate will almost always depend on the fact of public sector employment by a person of interest. Relevant witnesses are also likely to be public servants. Direct access to employment related information, which is collectively held on HR21, is therefore needed to efficiently assess allegations received by the Commission without the need to issue a summons. Ready access to relevant employment records can also reveal information of an exculpatory nature (i.e. confirm that a person has not been employed in a particular role of Directorate) that will allow the allegation to be quickly dismissed.

98. The Commission contends that such access provides efficiency benefits, alleviates the risk of compromise of Commission investigations and is surely less intrusive to one's privacy than the Commission having to summons information from a public official or undertake enquiries that create the risk of compromise. The intended uses of personnel related data are detailed below.

Intended Uses of Employment Records – Service of Summons

99. The methods currently used (and explained in detail below) create the risk of the compromise of Commission activities, including its most sensitive investigations. To mitigate these risks and to ensure the confidentiality of Commission activities, statutory arrangements are necessary for direct access by Commission staff to a relevant set of data held on information systems, including the HR21 database and ACT Registration databases, with access arrangements to be covered under appropriate memoranda of understanding (MOU).

100. When seeking to serve a summons on a person who is a government employee, Commission investigators do so electronically by email to the person's ACT Government email account, either without speaking to the person in the first instance or by utilising the ACT Government Directory to obtain a phone number for the person's work desk phone and, if successful in speaking with the person, to arrange service either electronically or in person.

101. The risks associated with this process are that other staff may inadvertently become aware of the Commission's interest in that person, through either answering the phone of the colleague of interest of the Commission, overhearing a phone conversation between a colleague and Commission staff, observing missed calls from Commission staff, and or in circumstances where work email accounts are shared with others, including executive assistants, becoming directly aware of the Commission's interest in that person.

102. In all the above scenarios, the Commission's work is compromised through persons becoming aware of Commission activities, and potentially sharing that knowledge with others, before the Commission has the opportunity to put into place relevant confidentiality notices.

103. Further, in circumstances where only the work phone number of a person relevant to the Commission's activities is known (which is most cases), certain witnesses cannot always be contacted simply because they are not in the office. The inability to expeditiously contact relevant witnesses and to obtain address details to prepare and serve summons creates unacceptable delays to Commission investigations. Some of these risks have recently been observed during current investigations.

Intended Uses of Employment Records - Assessment and Confirmation of Jurisdiction

104. The current method used by Commission staff to confirm whether a person mentioned in corruption reports and or relevant to Commission activities is or was an ACT Government employee is by accessing the ACT Government Directory to see if the person is listed. This is an ineffective mechanism to establish the jurisdictional 'status' of a person. The directory may not be accurate, nor current, two or more persons with the same surname may be listed, and the ACT Government Directory does not contain the names of past ACT Government employees. This information could be sought by the Commission through the compulsory processes provided for in the IC Act – for example under s 90 (preliminary enquiry notice to attend Commission and produce document) or s147(1)(b) (summons to attend Commission to give evidence). These avenues require the use of time and resources taken up with the need to draft and serve requests, notices and summonses, and then receive the information. This causes significant (and unnecessary) delays in the assessment of corruption reports as well as in undertaking preliminary inquiries and investigations. This is not simply a matter of bureaucratic convenience but poses a real risk to the timely and effective assessment and completion of the Commission's functions under the IC Act. On occasions it may be necessary to ascertain whether an official was working in a particular position or was on leave. Again, it should be possible to obtain this information without a formal process requiring a personal communication of one kind or another.

Access to Employment Records – Access under other legislation

105. Section 110 of the Public Sector Management Standards 2016 gives PSSC powers for investigation. Section 110(c) enables the PSSC to *access records about employment in the service*. Presumably this information is obtained by accessing HR21.

106. Further, under the ACT Government's Union Encouragement Policy certain employee data is given to the relevant employee association (union) under an opt out arrangement (i.e., unless an employee indicates in a tick box that they do not consent, that information is provided to the relevant union). This information includes first and surname, ACT Government contact information (email address and telephone number), the person's position and Directorate.

Safeguards and Limitations

107. The Commission is well versed in protecting and securing sensitive information obtained from a variety of sources. These same protections would be in place for information obtained under this proposal. The Commission is currently in the process of uplifting its information management systems and processes to the 'protected' level under the Federal Protective Security Framework. Once implemented, this provides an additional layer of assurance that sensitive information held by the Commission will be handled appropriately. Regular auditing of access to and use of HR 21 information will be undertaken and the Inspector of the Commission could provide assurance about its appropriate use under its independent oversight of the Commission.

108. The limitation on the right to privacy envisaged by this proposal should therefore be regarded as reasonable, necessary, and proportionate. It may be worth noting that the information is provided by employees as an incident of their employment with government in relation to that employment. Being subject, where appropriate, to the Integrity Commission must be seen as an incident of government employment. This is explicit in the IC Act.

109. The IC Act presently provides lawful authority for obtaining information relevant to the Commission's activities, for example under s 195 (public sector entity may disclose information to Commission), s 89 (power to request information from head of public sector entity). What is now sought is an administratively efficient process to enable access to the information required for the Commission's work without the risks and inconvenience associated with the current processes that compromise the confidentiality of its investigations. It is the Commission's view that this could be achieved through direct and real time access to the ACT Shared Services HR 21 database, which the Commission understands contains information provided by ACT Government employees when they commence, including for example, name(s), address, and date of birth; private email and telephone number(s) and certified copies of identification documents.

110. The Discussion Paper expresses the concern that, were the Commission to have easier access to an employee's residential address than it has at present, this would facilitate notice service to an employee's residential address and might become the Commission's default approach. The Paper noted that this may have broader wellbeing impacts on ACTPS staff if notices are sent directly to a residential address by letter and this were opened by a partner, child, friend, or housemate. That notices must be served, one way or another, on a public official is an essential and unavoidable part of the inquiry and investigative scheme provided by the IC Act. There are good investigative reasons why the Commission would wish this to be done confidentially. Sending a notice by mail would not satisfactorily achieve this, let alone the need to be certain that it was received by the subject of the notice. Sensitivity to remote risks is not a good reason for denying to the Commission information that it can at all events compulsorily acquire, though with considerable resource cost and delay, and is readily available to the PSSC. Nor would requiring the Commission to seek the information from the PSSC ameliorate the concern raised. It would simply impose an additional burden on the

PSSC without real advantage. No sensible case can be made for suggesting that what is directly available to the PSSC ought not to be directly available to the Integrity Commission.

111. Additionally, the Commission seeks direct and real time access to the RegoACT database to be able to access current residential address details of ACT drivers licence holders. This would assist in identifying addresses for service of summonses on persons who are no longer employees of the ACT public service and/or other persons relevant to the Commission's investigations.

Response to Discussion Paper: Inspector role and other oversight mechanisms

KEY POINTS

- The Integrity Commissioner is an independent statutory authority, and this cannot be diluted.
- The Inspector's role is properly restricted to being an oversight body and should not have the ability to make recommendations in relation to public examinations.

Information the Integrity Commission must provide the Inspector

Should section 205 be amended to explicitly require that the Integrity Commission must provide information to support its reasons for issuing a notice?

112. The Commission contends that section 205 in its current form provides an extensive regime for the disclosure, on a monthly basis, of materials to the Inspector, including the details of all notices issued by the Commission. Section 265 provides authority for the Inspector, on its own initiative, to investigate the conduct of the Commission or Commission personnel. In other words, a legislative framework already exists for the Inspector to seek information relating to the reasons for issuing a notice.

Should legal professional privilege be available to the Commission as a ground for refusing to provide information requested by the Inspector?

a. *If no, should clarification be provided in the IC Act that the Inspector should have full access to information of the Commission,* including information subject to a claim of legal professional privilege?

b. *If no, should clarificatio*n be provided in the IC Act that legal professional privilege is not taken to be waived by the Commission in circumstances where the Commission provides such information to the Inspector for the purpose of the Inspector's functions?

113. For the same reasons as those given for the abrogation of legal professional privilege in respect of communications made by public officials or entities, the Commission agrees that it is appropriate for the Inspector to have access to such communications where the privilege is owned by the Commission. There must be an exception, however, where a privileged communication is (necessarily voluntarily) provided to the Commission by a third party (other than a public official or entity) on condition that its privilege is not more widely waived. As mentioned, the Commission has adopted the practice of waiving any professional privilege attaching to communications where the Inspector has so requested.

14 days' notice for a public hearing

Should the IC Act require the Integrity Commission to provide the Inspector with at least 14 days' notice of any intended public examination to give the Inspector increased time to consider a notice from the Commission?

Should the sequencing ensure the Inspector receives notice before the Integrity Commission provides the notice to the recipient?

a. If so, should the Inspector have powers to obtain additional information from the Commission and powers to recommend that a public examination not occur or to challenge the need for a public hearing?

114. Section 144 of the IC Act, in its present form, requires the Commissioner to give seven days' notice to the Inspector of an intention to hold a public examination, together with the reasons for that decision. The Discussion Paper suggests that the Inspector could be given the power to obtain additional information from the Commission, and then if the Inspector does not believe a public hearing is necessary, make a public or private recommendation to that effect. The Paper poses the question whether the Inspector should be given the power to challenge the need for a public hearing.

115. Public examinations are part of the investigative apparatus available to the Commission. For good reasons, the Inspector does not have any role in the conduct of investigations except to ascertain whether the relevant statutory requirements are met and make appropriate reports. It is not possible for the Inspector to place himself or herself in the position of the Commissioner for the purpose of making any judgments about whether (lawful) approaches to the conduct of investigations, including hearings, are desirable or otherwise. Whatever the Inspector may read and whomever he or she consults cannot be a substitute for the active conduct of the work of the Commission or the conduct of investigations. Nor can it reflect the statutory responsibility entrusted to the Commissioner to make the public interest judgments required by the IC Act. There are many matters upon which reasonable persons might reasonably differ but to require, in effect, the Commissioner to consider the opinion of the Inspector or to consult with the Inspector as a condition of the exercise of any power is to fundamentally challenge the independent role of the Commissioner.

116. The issues required by s 143 of the IC Act to be considered in connection with whether examinations should be public or private are the public interest, human rights (presumably of the witness or person affected), the nature of the alleged corrupt conduct, the benefit of informing the public of corrupt conduct and the seriousness of the matter being investigated. None of these issues can be considered hypothetically but necessarily are closely related to the nature of the investigation itself and public policies – such as transparency of the Commission's work – which relate more widely to the integrity environment in the Territory. For example, the notions of public interest and human rights are protean terms, the essential elements of which might be agreed, but there is no bright line as how they should be applied in a particular case. No doubt the Inspector would consider reasons given and would be justified in asking for any other relevant information. However, it would be a fundamental change in the relationship of the Inspector and the Commissioner to permit the Inspector to do more than ascertain whether the Commissioner had addressed the statutory conditions. Merely that the Inspector might, as it happened, have a different view as to how he or she would exercise the relevant judgment were he or she to have responsibility for doing so is and should be irrelevant. This is not to say that in an appropriate case the Commission and the Inspector ought not to consult from time to time. In the end, either the

Commissioner is responsible for exercising the powers entrusted to him or her under the IC Act or not. It is not a partnership with the Inspector. The Commissioner readily accepts the value, in terms of public confidence, of oversight by the Inspector to ensure that the statutory requirements for the exercise of the Commissioner's powers are complied with. But substantive issues about the appropriate course of investigations must be for the Commissioner to determine and it is not appropriate that he or she should be required, in effect, to consult with the Inspector about them. This is not the position in any other State or Territory.

Inclusions in the annual operational review

Should the annual operational review scope by the Inspector be expanded to include other mandatory matters?

a. If so, what other matters should the Inspector review?

117. The Commission contends that the existing legislation is sufficient to enable the Inspector to undertake whatever reviews it sees fit in relation to the operation of the Commission.

Review of the *Integrity Commission Act 2018*

Should the IC Act be amended to make specific provision for the reviewer to be able to access information about the operation of the legislation, process and procedure of the Integrity Commission?

If so, should there be any limitations on access and use of information to ensure the integrity of ongoing investigations? For example:

a. Should the reviewer be subject to a form of confidentiality notice?

118. The Commission considers that it would be most undesirable to revisit with any witness who has not been released from their summons any part of their experience with the Commission. There are serious risks to the integrity of an investigation when a witness, before their evidence is completed, is asked about any of the matters to which questions might be directed. Persons summonsed to given evidence or produce material to the Commission are obliged to keep their communications with the Commission confidential. It is argued that "*it would be informative for the reviewer to obtain views of witnesses who have been summoned by the Commission to produce evidence and/or appear for an examination. This information would provide the reviewer with insight into any potential operational efficiencies for witnesses, as well as the impact an examination may have on witnesses' mental health and wellbeing."* The Commission has no difficulty with a reviewer interviewing persons whose only interaction with the Commission has been the provision of documents or things. Nor – subject to appropriate on-confidentiality requirements – to interviewing persons who have been interviewed by or given evidence to the Commission providing their interaction with the Commission has been brought to an end. Although the reviewer might seek to insulate any discussion from the issues in the investigation or about which they were questioned, this must necessarily be almost impossible to guarantee and certainly impossible to evaluate without knowing the entire context in which their interaction with the Commission occurred. Moreover, considering that the Review is concerned with statutory provisions and not the conduct of particular questioning or inquiries, it is most unlikely that procedural issues

not already evident to a person with experience of questioning in an official context would be exposed. Of course, absent that experience, the discussions would not be less likely to be relevantly enlightening.

Response to Discussion Paper: Operational Matters

KEY POINTS

- The current prohibitions in relation to employment of ACT public servants should be removed.
- Immunity from use of inconsistent statements should be removed.
- The Commission seeks greater discretion in who must be consulted and the timeframe for which consultation occurs in relation to draft investigation reports.

Allowing former ACT public servants to work at the Integrity Commission

119. This Discussion Paper proposes three options to address the question of whether public servants should be allowed to work at the Commission.

v. *Option 1 – remove the current five-year restriction.*

vi. *Option 2 – amend the existing provision to provide flexibility in appointing former public servants.*

vii. *Option 3 – Maintain the existing provision.*

120. The Paper then poses the following questions:

Should the prohibition on the Integrity Commission hiring staff who are, or have been in the last five years, public servants be removed? Which of the options listed above would be preferable?

a. *If the proposal is accepted, what protections should be put in place to ensure that conflicts of interest are adequately addressed?*

Are there categories of employees that should be restricted from employment at the Integrity Commission, such as MLAs or their staff?

If so, should the restriction apply only for a limited time and/or only to high-level positions?

121. The Commission has publicly noted its concern that the existing legislative provision that prohibits employing individuals who have worked in the ACT public service in the past five years, is unnecessarily restrictive and impedes the ability of the Commission to employ suitable individuals. It should also be noted that by virtue of the definition of *staff of the commission* in section 47 of the IC Act, the restriction extends to consultants and contractors.

122. The Commission's preference is option 1 – the complete removal of the prohibition to employ people who have been employed in the ACT public service in the past five years or have been contractors or consultants within the current definition. Other conflicts of interest

might arise from former employment of one kind or another. These can be adequately dealt with as they arise in accordance with the Commission's conflict of interest procedures.

Amendment to extend time in which arrested person can be held

Should the Integrity Commission's proposal be dealt with through legislative amendment to allow for the detention of people subject to a warrant until they can be brought before the Commission, or should it be dealt with through the Commission's operational practices?

a. *For example, is it preferable that the Commission coordinate the arrest warrant's execution with ACT Police to ensure the person is capable of being brought immediately before the Commission for examination at time of execution?*

b. *Is it preferable for the Commission to convene after hours rather than detaining a person?*

c. *Could keeping a person in detention be allowed only where there are grounds for believing the person may leave the jurisdiction or destroy evidence?*

If the proposal is implemented, should there be a time-limit on the person's detention in police custody?

a. *If so, what is the appropriate amount of time of detention?*

123. The first point to be made is that conferring a power of arrest is essential to ensure that examinations – an essential element of most, if not all investigations – will not be frustrated by a witness' refusal to obey the summons. It follows that the entire purpose of the process is the actual production of the witness to the Commission for the examination to be conducted. Mere physical presence of the witness in the Commission's premises is, though essential (since otherwise the examination cannot proceed) scarcely a sufficient justification for the process. However, it is that immediate requirement, satisfaction as to which by the arresting police officer is necessary to avoid immediate release, which is the only explicit statutory requirement.

124. It follows from giving primacy to the reason for the arrest that – in addition to the practical issues for the Commission mentioned below – it would be necessary to allow for the possibility that, for reasons of fairness, the examination should not continue immediately upon a person's physical arrival at the Commission, for example, having regard to the sobriety or the physical and mental condition of the witness or the time of day. The Discussion Paper fairly characterises the Commission's proposal as effectively creating "a power of detention in the IC Act as the police would detain the subject of the arrest warrant until the Integrity Commission is in a position to undertake the examination". However, being in a position to undertake the examination meant actually to undertake the examination – not commencing to undertake the examination.

125. Of course, the Commission must take preparatory steps to ensure an examination can proceed. Mere availability of the Commissioner is not sufficient: it is also necessary to have present members of the Commission's staff, responsible for example for recording the hearing, the relevant investigator, Counsel Assisting and his or her instructing solicitor. An additional complication arises from the witness' potential need for legal assistance, which is a matter beyond the control of the Commission. These or cognate practical requirements are implicit in the effective use of the power.

126. It follows that merely producing a person to the Commission for the conduct of an examination will likely leave a number of significant issues to be resolved that cannot be addressed without delay – potentially substantial – in undertaking the examination which is the purpose of the arrest. It is not practical, for obvious reasons, for the person to be released into the custody of the Commissioner or Commission staff.

Loss of immunity for prior inconsistent statement

Should the circumstances where a witness would lose derivative use immunity for a prior inconsistent statement, be expanded? If so, how and with what limitations?

a. *In particular, are there any other risks or consequential issues if the proposal were implemented that would make a change unnecessary or* undesirable?

127. The Commission brings to the Review's attention the legislation in Western Australia on this matter. Section 145(1) of the *Corruption, Crime and Misconduct Act 2003* (WA) provides that a statement or disclosure made by a witness in answer to a question that witness statement is not admissible in criminal proceedings but is otherwise admissible in disciplinary proceedings or proceedings under the that Act. Sub-section 145(1A) adds exceptions where the proceedings are under the *Criminal Property Confiscation Act 2000* (WA) or any civil proceeding. Sub-section 124(3) enables the evidence to be used in both criminal and civil proceedings in accordance with s 21 of the *Evidence Act 1906* (WA) in cross-examination as to, and proof of, prior inconsistent statements. The Commission supports amendments to the IC Act in line with this legislation in Western Australia.

Who must receive a draft copy of an Integrity Commission report?

Is the current framework outlining who should receive a copy of an investigation or special report adequate?

a. If not, what are the appropriate limitations on who should receive a copy of a report? For example, should provision of the report be limited to those directly named in a report?

b. Alternatively, should a broader range of people be sent a copy of the report, but not be permitted to provide comment unless they have a direct interest in the report (for example, as in practice in Victoria)?

128. The Discussion Paper adequately sets out the Commission's views that the current provision (section 188) is too broad, in that it requires the Commission to consult with a person or public sector entity to whom the proposed report 'relates to'.

129. The Commission's position is that, in line with considerations of procedural fairness, draft copies should only be given to people who may be adversely affected by the report. The public interest is served by giving those individuals a right to respond to the draft copy and the Commission seeks a narrowing of s 188 to those where adverse findings are proposed to be made against them.

130. This is similar to the position of the NACC Act s 157, which applies to reports which are 'critical' (expressly or impliedly) of persons.

131. The essential purpose of providing a copy of a proposed report is to give persons who are the subject of adverse comment the opportunity to respond before publication. No public interest is served by requiring the draft proposed report to be provided to persons selected by the arbitrary criterion that they happen to be named, let alone simply because something in the report might relate to them.

132. As the Discussion Paper points out, in some cases, a report might contain some recommendation or matter upon which it would be useful to have the comments of an interested or affected entity. Selecting the potential source of this input by reference to the fact that they are named is plainly arbitrary. It ought to be assumed that the Commissioner would ensure that these were sought and taken into account as part of the investigative or reporting process. It is not necessary or desirable to make statutory provision for matters that are reasonably implicit in the due exercise by the Commissioner of his or her functions. This would be tantamount to a statutory requirement not only that the Commissioner should perform his or her functions competently but instruct him or her as to how it should be done. This would be plainly inappropriate. In short, the Commissioner should be trusted to perform the Commission's work competently.

133. As an aside, the Discussion Paper makes the observation that the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), in connection with a comment or an opinion in a report about any person which is not adverse to the person, "[t]he relevant material must … be provided … but for information only as they cannot provide comment in relation to the material in which they are named", citing in support s 162(4). In fact, whilst s 164(4) does not give the person a right to comment, it does not prohibit it and, plainly, the Commissioner could, in any particular case, invite comment or agree to a request to make one.

Shortening timeframe to comment on reports

Is the current six-week timeframe an appropriate amount of time to comment on a report, or could it be reduced to say four weeks without unfairly limiting the ability to consider a report?

Should the IC Act afford greater scope for flexibility within the response timeframe?

a. *For example, should the legislation require that the Integrity Commission provide a reasonable amount of time to respond to the report*

134. The Discussion Paper adequately sets out the Commission's reasoning for its proposal to reduce the minimum period for which a person can response to a draft report, from six weeks to four weeks, with a discretion to extend that timeframe where appropriate.

135. The six week period is arbitrary and well capable of having capricious and undesirable consequences. Some aspects of some reports might need more time for a response and some less, depending on the issues and the role of the person. Since the reasonableness of the time frame is so dependent on highly variable circumstances, the imposition of a mandated minimum period for response is inappropriate micro-management of an inherently uncertain expectation of reasonable necessity. The appropriate response is to leave the time frame to the judgment of the Commissioner with the power to increase the period if the justice of the case requires and, where it happens, in response to a request for extension. There is no basis for any starting assumption that, absent a statutory mandate, the Commissioner will apply an unjust or unfair limit.

Interaction between *Corrections Management Act 2007* and *Integrity Commission Act 2018*

Should the IC Act be amended to give effect to Option 1 or Option 2?

Are there any other relevant matters to be considered in relation to detainees appearing before the Integrity Commission?

136. Leaving aside the security and management issues that might affect the provision of transport – which the Commission accepts is a legitimate concern – the Commission prefers the personal attendance as it places the witness in the same situation as the other witnesses who are required by the Commission to give evidence. This includes the Commission's control of the surroundings and persons present, so as to promote witness candour. (However, there have been occasions when non-controversial witnesses have given evidence remotely, pursuant to the Commission's inherent and implied powers). Where there are practical or security reasons for not transporting a witness to the Commission, remote means can be used and the Commission has no objection to this course. Nevertheless, whatever might be implied from the obligations created by a summons, it would be useful to have a legislative obligation to appear by remote means where the Commission agrees.

Limit the scope of disclosure to a court

Should the scope of disclosure to a court be further limited under the IC Act to reflect the Integrity Commission's proposal?

137. The Commission does not press this proposed amendment.

Extending disclosure protections for complainants beyond initial corruption complaint

Does the IC Act currently provide satisfactory protections for complainants?

Are there unintended consequences of extending continued immunity to complainants beyond the initial disclosure?

Alternatively, should the IC Act be amended to reflect the apparent intent outlined in the explanatory statement, in that immunity would apply only once the Integrity Commission assesses the complaint as genuine?

138. Clarification of s 288 as suggested is useful. However, some further clarification might be desirable. Section 288(a)(iii) provides that making a complaint will not be a "breach of professional conduct". Lawyers are under a professional obligation to keep confidential communications with their clients that are covered by the rules relating to legal professional privilege. A disclosure in breach of this obligation would be capable of amounting to serious professional misconduct. Of course, if the communication were made in circumstances where the exceptions applied, it would not be required to be kept confidential because the privilege would not be available. However, the public policy reasons that justify legal professional privilege strongly suggest that the protection given by s 288(a)(iii) should not extend to a

breach of the duty of confidentiality protected by the privilege and this should be made express. For the reasons previously given, however, this should not apply to legal professional privilege otherwise attaching to communications by officials or public entities.

Amendment to enable exercise of power to issue production or attendance notice where 'reasonably required' rather than when 'necessary'

Should the wording in sections 90 and 147 of the IC Act be changed to 'reasonably required' rather than 'necessary'?

139. The Discussion Paper suggests that, given an apparent intent to protect human rights, "it may be that 'necessary' was used deliberately to ensure coercive powers were only used where absolutely appropriate". It is difficult to accept that production or attendance which is reasonably required for the exercise of the Commission's functions would not be appropriate. Moreover, a requirement that exercise of a power must be "absolutely appropriate" is simply incapable of practical application and inevitably give rise to litigation. If that occurred, the Commission would be required to disclose why the notice was "absolutely appropriate", which would almost certainly compromise the integrity of its investigation. It should be noted that there is ample legal authority that "necessary" or "essential" means "reasonably required". However, this is all context driven and the Commission considers that it is appropriate that the statutory language should more closely describe the requisite condition.

Commission must keep people informed

140. In the course of this Review the Commission has identified a further operational matter which would benefit from amendment. The IC Act places a requirement on the Commission to keep the complainant informed about its decision on how the reported matters will be dealt with, including if the matter is dismissed (s 72 1(a)), referred to another entity (s 72(1(b)), investigated (s 72 (1)(c)), discontinued (s 72(1)(d)) or completed (s 72(1)(e)).

141. The Commission is also required, under s 72(1)(c), to keep the complainant informed of 'the progress of the investigation at least once every 3 months". The Commission notes that s 75 provides an appropriate framework for non-disclosure of the progress of an investigation by enabling the Commission to not tell a person about a matter if doing so would adversely affect a person's safety, an investigation, or identify another person.

142. The operation of s 72(1)(c) has proven problematic in practice. It has clearly created an inherent expectation in the minds of some complainants of a perceived 'right' to very detailed explanations from the Commission of the progress of the matter they reported, including matters heard in private examinations and the expected timeframes for the conclusion of investigations. This includes situations where the actions of the complainant might be subject to that same investigative process.

143. It is also evident in situations where the complainant of the matter is not directly impacted by the allegations (i.e., they are not the person against whom the alleged misconduct is directed and/or the harmed party) but is simply a reporter of behaviours or actions they have observed.

144. From a policy perspective these ‘third party’ complainants, albeit having done the right thing in reporting their concerns, have no more of a right to be informed of the progress of the investigation than the broader public. Accordingly, the Commission should not have a mandatory obligation to keep such persons updated on the status of any ensuing investigation. In almost every case at all events, it would be inappropriate to provide information about the substance of the investigation whilst it is current because of the risk it might be prejudiced. On this basis, the Commission seeks to have the mandatory requirement to keep complainants informed of the progress of investigations changed to give the Commission discretion as to whether, how and with what frequency complainants should be kept informed of the progress of investigations that relate to their complaint.

Minor Operational Proposals

145. Of the minor operation proposals noted in the Discussion Paper, further commentary is provided below.

146. In relation to proposal 10 regarding disclosure of information to a court that might prejudice an investigation, the Commission now considers that it is sufficient to provide it must have notice – as a precondition of admissibility – of any proposed disclosure, so that, if appropriate, application can be made under s 130 of the Evidence Act for public interest immunity. Notice is necessary since it is not in every case that the information will be required from the Commission: it may be sought from someone bound by a confidentiality or non-disclosure notice.

147. In relation to proposal 14 the Commission notes the different prerequisites for appointment of a Commissioner and an Acting Commissioner could be justified if it were considered that each should have a different function. As they have the same functions, a choice should be made as to what qualifications are required. This is not to suggest that the criteria presently applying to appointment of an Acting Commissioner are not appropriate. However, it is difficult to see how the particular qualifications considered by the legislature to be essential for the Commissioner are not also necessary for appointment of a person to act in his or her place. Consistency is not a principle of public policy but it has a role to play in legislation.

Response to Discussion Paper: Legal Representation and Privilege

KEY POINTS

- A witness appearing before the Commission at an examination may be entitled to be paid an amount by the Territory for legal assistance in connection with the person's appearance in accordance with the Supreme Court scale of costs; or as prescribed by regulation. There are no regulations in force.
- Officials should not be able to claim legal professional privilege in respect of communications made or obtained for the purpose of undertaking public duties or functions or has been paid for with public funds.
- No change is sought concerning the privilege available for private persons.

The current legal assistance framework

What arrangements should exist for legal assistance where a witness is summonsed to appear before the Integrity Commission?

Should a person be entitled to seek their own legal assistance using public funds through the ACT Government? Should this extend to all people, including members of the public?

a. *Should there be limitations or caps on assistance in these scenarios?*

b. *If a request for assistance is denied, or if the funding provided is limited, should there be an avenue for review?*

Should a witness provided with assistance be found to have committed an offence by a court be required to pay back any or all legal assistance funding provided by the Territory?

a. *Alternatively, if the Integrity Commission makes a finding that a person has engaged in serious and/or systemic corrupt conduct, should that person be required to repay legal assistance?*

148. The Commission notes that enactment of regulations to provide for the reimbursement of witness legal assistance expenses has not yet occurred. This prevents the reimbursement of legal expenses occurred by witnesses who are not able to access legal assistance provided or facilitated by the Solicitor-General.

149. The Commission agrees that the policy questions identified above are important and require resolution at a policy level. The Commission notes that a problem with the obligation to repay legal costs where corruption is found is that the risk is greatest for persons of interest and, the more they are at risk of adverse findings, the greater is the risk of requiring repayment. This may well have the undesirable effect of deterring the retaining of legal assistance.

150. As a matter of principle, the Commission supports access to legal assistance and reimbursement of expenses. Access to legal assistance for witnesses facilitates

communication between the Commission and the witness about issues connected with appearing, and gives assurance to the Commission that the witness understands their legal rights and obligations. Where potentially contentious issues arise, such as whether there should be a public examination or other procedural matters, there is significant advantage in a professional contradictor able to inform the questions appropriately. Legal submissions on relevant issues, including potential findings, are also capable of considerable utility.

151. Somewhat different issues arise where the proceedings in relation to which legal fees are expended and legal assistance may be sought are not in the Commission but in the Supreme Court, say, for judicial review of some aspect or other of the investigation or the Commission's procedures. Those costs should be paid in accordance with orders of the Court, as is the case with conventional litigation. If the party loses, the Commission should be able to seek an order for costs in the ordinary course and there is no reason in policy why the Territory should allay that expense. The risk otherwise is that pointless litigation might be undertaken because there is no risk as to costs.

152. The Commission however believes that the current regime envisaged by the IC Act (the Supreme Court Scale of Costs) was created for another purpose and is not fit for the full range of compulsory powers available to, and witnesses interactions with, the Commission. The Scale of Costs is insufficient in scope of what might be eligible for legal assistance.

153. The Commission notes the financial assistance framework recently put into place for the Board of Inquiry – Criminal Justice System 2023.[2]

2 https://www.cjsinquiry.act.gov.au/financial-assistance

Legal Professional Privilege

Should the IC Act to abrogate legal professional privilege of the Territory where the advice was obtained as part of a public official's duties (and not for the purpose of Commission proceedings)?

a. If the answer is yes:

i. Are there situations where privilege should be maintained? For example, the IC Act could provide factors to retain privilege and the Supreme Court adjudicates whether those factors are present.

ii. Should privilege be maintained over information that was created prior to the amendment, or should legal advice provided previously also be abrogated?

iii. Should restrictions apply on republication or other disclosure of information that is compelled by the Commission and that is otherwise subject to legal professional privilege?

iv. Noting that section 270 of the IC Act mirrors the privilege abrogation provisions in section 175 in respect an investigation undertaken by the Inspector, should this also be amended to match any amendments to section 175 in respect of legal professional privilege?

Abrogation of legal professional privilege

154. The Commission argues that public officials, public sector or ACT public service entities ("officials") should not be able to claim legal professional privilege in respect of communications made or obtained or purporting to be made or obtained for the purpose of undertaking public duties or functions or which has been paid for with public funds. Privilege affecting legal communications occurring, in substance, to obtain advice about or connected with any proceedings in the Commission – such as responding to a summons for documents or for examination would remain unaffected. No change is sought concerning the privilege available for private persons.

155. The object of the IC Act is to ensure a full and independent investigation in the public interest of corrupt conduct that could involve the commission of criminal offences or serious misconduct. For this reason, the Commission must be able to have access to all relevant facts in the hands of the public officials or public entities concerning the issues under examination. Some reference to context may be helpful. As is obvious, officials obtain legal assistance for the purpose of being properly informed of legal issues that arise in the course of their employment or public business. Sometimes it will involve the use of the lawyers (most commonly, the Government Solicitors Office) to conduct a transaction – say, a purchase or sale of real estate – on behalf of the Territory. Sometimes, it entails obtaining advice as to whether any proposed course of action is authorised by relevant legislation. Sometimes it will involve advice about responding to claims or litigation and the conduct of that litigation. The potential relevance of legal advice is as wide as virtually the entire undertaking of government. This is necessarily so since it is potentially possible for corrupt conduct to have taken place across this space. Privilege attaches to all communications made for appropriate reasons for the purpose of obtaining legal advice. In some cases, legal advice can be a crucial factor in justifying one or other course of action. Where that advice is followed, it would be likely that only in the exceptional case would it attract some suggestion of wrongdoing providing, of course, that the information given to the lawyer reflected the true situation and was not skewed, deliberately or otherwise, to procure a "useful" response. Sometimes, even

where the advice is based on adequate instructions and is followed, the instructions will reveal information that is relevant for other aspects of an investigation. Where advice is not followed, that is capable of reflecting on the propriety of the ensuing conduct. On occasions government may act on the basis of advice from officials that legal advice has been followed in respect of some action or transaction under consideration when this may not have been the case, or the advice was not based on candid instructions. It is not unusual, for example, for legal advice to be obtained as to specific selected terms of a proposed contract, but not as to others, yet an assurance is given to government that the contract was approved by the lawyers, without disclosing their limited involvement. (This problem has already been identified in the course of an investigation.)

156. Officials obtain advice from a range of relevant persons, often not lawyers and not involving legal advice. Those communications are not privileged. There is no good reason of public policy why communications that happen to be with lawyers should be any less available for examination. The public policy that underlies the privilege – in substance, that complete candour is a necessary quality of legal communications, which might not occur if they could be subject to third party examination, is not far different from the candour that should be attached to all communications between officials when advice is being sought. There is another public policy that is relevant in this context, namely, the need to ensure the integrity of official conduct and official decisions. It is important to note that the privilege here is not the personal privilege of the particular official who has sought or relied on the advice. His or her duty of candour is legally required by the very function they are performing; performance of this duty is not enhanced by the possibility that the communication might ultimately be exposed to the Commission. Certainly, it is not privileged from disclosure to another official who requires the information for the performance of their duties. If this is so, what is the public interest in preventing its disclosure to the Commission?

157. Of course, the Territory is able waive its privilege in any particular instance. Leaving aside questions of fundamental state interests – at all events capable of protection from disclosure by public interest immunity – it is difficult to think of any case in which waiver would not be appropriate. A refusal to waive must necessarily be justified by appropriate reasons which, clearly, could not include embarrassment, the protection of an official's reputation or that of a Minister or the maintenance of some political policy or position. It is not enough simply to make a privilege claim because it is legally available. It seems self-evident that the Territory has a very significant interest in the investigation of potential corrupt conduct which would, in virtually every case, be greater than its interest in maintaining its privilege from disclosure simply because it can do so. It should be noted that, at all events, mere disclosure in an unprivileged environment (say to the Commission) that a decision was influenced by a legal communication and was, accordingly, justified would amount to a waiver by operation of the general law. In a practical sense, therefore, it is difficult to hypothesise circumstances in which an official obtained legal advice or entered into legal communications that affected decision-making where waiver of legal privilege had not occurred in the circumstances or otherwise would not be required on public interest grounds.

158. The fact that privilege would or should be waived, either because of the circumstances or by decision by the "owner" of the privilege, in almost every case strongly suggests that there is little to be gained in any practical sense by allowing the Territory a hypothetical right to claim legal professional privilege, quite apart from the principle attaching to the need to provide the Commission with all information that is or might be relevant to an investigation.

159. The Review refers to s 125 of the Evidence Act which deals with the admissibility of privileged communications. By s 4 of that Act, it applies only to ACT courts. The Dictionary defines "ACT court" as "the Supreme Court or Magistrates Court, and includes an entity that, in exercising a function under a territory law, is required to apply the laws of evidence". As the Commission is not bound by the rules of evidence (s 142(b)), the Evidence Act does not apply. However, "privilege" is defined in s 174(a) of the IC Act as meaning "any privilege a person is entitled to claim in a proceeding before a court or tribunal". This should be understood as applying to the substantive common law right.

160. There is an important (and potentially significant exception), often referred to as the "fraud exception" – which is arguably wider than the notion used in this context by the Evidence Act. This exception may abrogate confidentiality both in relation to communications by public officials and where they are made by or to person in connection with the investigative process. It applies to a wide species of fraud, criminal activity or actions taken for illegal or improper purposes, extending to "trickery" and "shams" and, as it is based on public policy, is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest, in substance, where the confidential relationship between lawyer and client is abused. Government is necessarily involved in a very wide range of transactions, many of which are properly confidential – even where the reasons for this are political rather than operational. Many such transactions present litigation risks which allow for exposure through discovery and other procedural modalities. It is not unknown for legal advice to be sought, not for the dominant reason of seeking such advice, but to enable potentially embarrassing information to be protected from disclosure by legal professional privilege. Communications made for this reason would not attract the privilege, as a matter of substantive limitation as distinct from exception. The issue in an exception case – where, indeed, the dominant purpose is to obtain legal advice – would be whether the communication which is the subject of the claim for privilege was made in furtherance of, or as a step preparatory to, wrongdoing. More than a mere assertion or allegation of wrongdoing is needed: there must be reasonable grounds for believing that the relevant communication was for an improper purpose and some prima facie evidence that the allegation of improper purpose has some foundation in fact, although it is not necessary to prove an improper purpose on the balance of probabilities.

161. In substance, the exercise of public responsibilities requires accountability, including in relation to assisting the Commission in the exercise of its functions of investigating possible cases of corrupt conduct. Communications with lawyers are most appropriately regarded as simply part of the executive functioning of government which ought not be kept secret from the body charged with the responsibility of ensuring integrity.

162. The Discussion Paper points to fact that, differing from a Court, the Commission "is an agency of the legislature that is required to make findings of fact as to whether corrupt conduct has occurred within its definition under the IC Act … [and] may not make findings of guilt or determine whether a criminal offence has occurred". It goes on to suggest that "[given] that the Commission is not a judicial body, to give it similar powers to abrogate legal privilege than exist in criminal matters may have an impact on due process and natural justice (noting that the Evidence Act permits evidence privileged in certain circumstances, whereas this proposal relates to a complete abrogation of Territory owned privilege in relation to corrupt conduct investigations)". The point being made appears to be that, under the Evidence Act (and under the general law), there are exceptions to the extent of the privilege which are available in a court proceeding but the Commission is seeking total abrogation of Territory legal professional privilege. This, of course, is correct, as far as it goes. However, it should also be noted, when considering the different functions of a Court and the Commission, that

the Court is considering evidence collected by the parties and tendered for the purpose of determining the issues between them, whilst the Commission has the duty of gathering relevant evidence and investigating the conduct of officials and government agencies. As already noted, the fundamental justification for the privilege is the public interest and this may not be identical in every context. For example, the public interest in ensuring that possibly innocent persons are not convicted justified the abrogation of the privilege at the suit of a defendant in criminal proceedings, *vide* s 123 of the Evidence Act.

163. Therefore, the relevant question is, in substance, whether the public interest in maintaining the Territory's privilege should outweigh the public interest in identifying corrupt conduct in government. Comparison between the functions of a court and the Commission would therefore appear to support, rather than weaken, the case for abrogating the Territory's legal professional privilege. It is worth making the additional point that, although "due process" might be impacted, this seems to apply only to the variation of the conventional position itself and has no wider significance. The Discussion Paper notes that, if ACT Government officials and ACT Government Solicitor ('**ACTGS**') are aware there are circumstances in which legal communications will be legally required to be given to the Commission, it might be argued that this may impact the ACTPS' approach to seeking legal advice, and the ACTGS's approach to giving such advice. The answer to this point is that it would not be proper for an official to take into consideration whether or not legal advice should be obtained – with the consequential need for candour as to relevant matters – because the communication would not be confidential as against the Commission in conducting an investigation in which the communication would or might be relevant. It is also difficult to see how such a consideration could appropriately affect the legal advice itself, since that advice is always subject to disclosure by waiver.

164. The Discussion Paper notes the ACTGS' concern about disclosure of comments about, say, a commercial entity or that discloses commercially sensitive or in confidence information. From an investigative point of view, of course, such matters might be relevant and informative. Moreover, leaving aside the issue of the confidentiality that results from legal professional privilege, commentary about an outside entity, commercially sensitive or in confidence information are not themselves grounds for declining to produce a document or give evidence about them (unless it is subject to public interest immunity, which gives limited confidentiality – and is briefly dealt with below). It is always possible for government to request the Commission to limit public exposure of such sensitive material and, if this could be done without prejudice to the integrity of an investigation or a Report, the Commission would do so. The Discussion Paper observes that the risk of this information being made public could be mitigated with a requirement that the information remain confidential and may not be included in any subsequent Report. This would need careful adjustment to avoid cutting across the public interest functions underlying by the IC Act.

165. The Review suggests that "an alternative solution may be to defer decisions about abrogation to the Supreme Court and outline a list of factors that the Court must consider when deciding whether to release the information to the Integrity Commission" and gives, as examples, material used to inform Cabinet considerations, relating to advice between State and Territory or Commonwealth governments, or where disclosure to the Commission would otherwise be contrary to the public interest. Public interest immunity, which appears to cover these grounds, might confer confidentiality on these communications and it seems inconsistent and incoherent to permit them to justify non-disclosure in the context of legal professional privilege, particularly, where the test is not or might not be completely congruent with the immunity. Applying the same test to avoid this problem makes it more evident that it is unnecessary.

166. Section 174 of the IC Act permits a claim to made of public interest immunity as provided in the Evidence Act. Section 130(1) of the Evidence Act gives the Court the discretion to exclude evidence on this ground "if the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document". Subsection 130(4) includes, as relating to "matters of state" evidence that would prejudice the security, defence or international relations of Australia, damage relations between the Commonwealth and a State or between 2 or more States, prejudice the prevention, investigation or prosecution of an offence or the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought in relation to, other contraventions of the law or disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State or prejudice the proper functioning of the government of the Commonwealth or a State. Subsection 130(5) stipulates a number of the matters the Court must take into take into account in exercising its discretion which, except for that in paragraphs 130(5)(a) (d) and (e) ("the importance of the information or the document in the proceeding", "the likely effect of presenting evidence of the information or document, and the means available to limit its publication" and "whether the substance of the information or document has already been published") would not apply to IC Act investigations.

167. Thus, unlike legal professional privilege, the protection of immunity requires the Court to weigh, on the one hand, the public interest in disclosure and, on the other, the public interest in secrecy. The Commission does not seek any amendment in the application of this immunity to production or disclosure. If, as it happened, communications which would not be protected if the amendment sought were made, were subject to public interest immunity, then the result would be that their confidentiality would remain protected if the public interest so required. It is submitted that there is no need to apply the public interest immunity test as some subset of protection in the context of legal professional privilege.

168. Given the public policy underlying legal professional privilege – in substance, the importance of ensuring that persons are not deterred from seeking legal assistance by the need for candour and the fear of disclosure if they do not remain confidential – it would not be proper conduct (as pointed out above) for an official to allow a concern that the Commission might obtain access to a legal communication to affect a decision whether or not to seek legal advice which it is otherwise necessary or desirable to obtain. It is also difficult to see how the abrogation being sought might (as the Discussion Paper suggests) "have an impact on … natural justice", in the sense of procedural fairness, since communications would now become disclosable to the Commission though they were believed to be protected at the time. Although this is not a recognized aspect of the notion of procedural fairness, changing the rules *ex post facto* may in some contexts be regarded as unfair. Since public policy is constantly under challenge and frequently affected by legislative change, it would be strange were it the case that reliance on constancy could be a relevant factor in the present context. Given that the Territory, not any official, is the owner of the privilege and can, at all events, waive it in the form and for the reasons proposed by the Commission, this problem is more apparent than real. The fact that an assumption of confidentiality has been disproved by events does not make the change unfair.

Response to Discussion Paper: Confidentiality, Information Sharing and Wellbeing

Key Points

- The Commission has embedded a witness welfare aware approach across the entirety of its operations.
- The Commission's current processes enable witnesses who are subject to confidentiality notices to access health professionals of their choosing.
- The IC Act already contains protections for vulnerable witnesses who are summoned to appear (s 153).

Wellbeing and access to mental health care & Wellbeing requirements under the IC Act

Should people by default be allowed to speak with a mental health professional without breaching the terms of a confidentiality notice?

Should the IC Act include, as a default position, provision for a person to bring a support person to a private and/or public examination conducted by the Integrity Commission?

a. *If not, should a person be allowed to nominate a friend, relative or spouse to whom they can speak under the terms of the confidentiality notice (assuming that person is not also involved in the investigation)?*

b. *If so, should the IC Act impose any limitations on who may act as a support person and the approval process for a specific identified individual?*

c. *Should there be provision for an appropriate vetting and approval for a support person to attend an examination?*

d. *Does the risk that a witness-selected support person could jeopardise the investigation require the setting up of a dedicated pool of counsellors or other qualified people who may act as a support person for a witness during an examination?*

Does the IC Act adequately provide for witness mental health and wellbeing, and if not, what measures should be included in the IC Act?

Should the Inspector be given oversight responsibilities for how the Integrity Commission deals with witness mental health and wellbeing? How could this best be implemented?

Should there be a legislative power for the Commission to revoke or amend the examination summons based on the circumstances of the witness, such as those with health or disability issues?

169. The Commission readily accepts that any investigative process, whether by an integrity commission, a law enforcement agency or a compliance or regulatory agency, can

create stress for those involved in the investigative processes. Those stresses can be amplified where a person is compelled to give evidence and is also subject to a confidentiality notice that prohibits the person from talking to others. The length of time taken to finalise corruption investigations (whereby considerable time can elapse from the giving of evidence under compulsion and the finalisation of the investigation) can add to a person's anxiety.

170. The Commission is aware of these issues and consciously seeks to mitigate potential adverse impacts on witnesses. For example, as noted below, it is the Commission's standard practice to include in a confidentiality notice issued to a witness an exception to enable the witness to access medical practitioners. In respect of witnesses who are current or previous members of the ACT public service, access to Employee Assistance Programs (EAP) are also available.

171. The Commission has taken the view that s 81(h) reposes in the Commissioner an implied power to add to the list of permitted disclosures and, for some time now, the list includes permission to disclose "to a registered medical practitioner or registered psychologist in relation to the provision by that health practitioner of medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling)". It is also the practice of the Commissioner to inform witnesses, when reminding them of the importance of compliance with their confidentiality notice, in substance, that they are able to consult a professional person for assistance in relation to anxiety arising from the proceedings.

172. The Commission sees no difficulty in adding to the list of matters of which disclosure is permitted (*vide* s 81 of the IC Act) the ability to consult a professionally qualified person in connection with anxieties or mental issues raised by the need to attend the Commission.

173. As to a support person being present at an examination, in most cases there would be no issue about giving a direction under s 146 of the IC Act allowing this to occur. The person would have to be identified and the Commissioner would need to be satisfied that he or she were an appropriate person to perform that function, for example, not a person who might potentially be a witness.

174. Whilst witnesses need to be informed that they may seek mental or other support if it is needed, it is the Commission's view that it should not itself provide a welfare service because of the conflict this might entail but rather facilitate access to such welfare services. This could include providing to witnesses a comprehensive list of relevant service providers with contact details.

175. This matter is not capable of more than very general stipulation and it is submitted is not a matter for legislative mandate.

176. The Commission is in the process of developing and updating a suite of materials that will be available to all witnesses who attend the Commission. This includes:

- A WHS policy and WHS procedure for all visitors to the Commission.
- A plain English pamphlet enclosed with Summons to attend the Commission.
- Information for witnesses and links to EAP and other counselling services available on the internet.
- Advising witnesses in the above materials of their right to request specific measures be put in place for them while attending the Commission e.g. taking regular breaks, being accompanied by a support person or assistance animal where these would otherwise not be permitted as a matter of course.

- A register which will record requests made by witnesses, including whether or not these requests are allowed by the Commission and the reasons for refusal (if applicable). It is anticipated that the Inspector will be provided with the opportunity to inspect this register as part of the Commission's regular reporting obligations to the Inspector.
- Mandatory training for all Commission staff in mental health first aid.

177. The Inspector is provided with copies of confidentiality notices and transcripts of examinations (where witnesses are informed that they may seek professional help). He or she will have responsibilities if a witness makes a complaint about welfare. Absent legislative change imposing further responsibilities in this area, there is no need for any additional role.

178. There is no need to provide an express power to revoke an examination summons in the posited circumstances or, indeed, whenever there is no need for its continuation. Revocation or amendment is well within the Commission's inherent or implied powers.

Access to reimbursement for expenses

Should a regulation be made to trigger section 172 of the IC Act and implement the witness expense reimbursement scheme?

Should assistance be limited to those appearing before an examination, rather than witnesses who may be required to produce documents to the Integrity Commission?

Should financial assistance be limited to specific categories (such as travel, costs in preparing documents)?

At what rate should reimbursement be provided?

- *For example, current DPP practice utilises the relevant ATO travel determination to calculate allowances. In Victoria, IBAC regulations allow reimbursement of lost wages at $100 per hour, capped at $600 per day, and all reasonable childcare expenses.*

179. The Commission notes that the IC Act already envisages the reimbursement of reasonable expenses incurred by witnesses appearing before the Commission at an examination but that the regulations giving effect to this provision are not yet enacted. There can be no doubt that the reimbursement of reasonable costs incurred by witnesses is necessary for the administration of the IC Act. The lack of regulations hampers the ability of the Commission to give effect to the intent of this provision. Reimbursement of expenses based on ATO determinations seems appropriate.

Information sharing

Other agencies

Should there be mandated situations or criteria where the Integrity Commission is obliged to share information with an appropriate entity?

a. In what situations should this obligation exist? For example, where it is needed to prevent harm, to protect a vulnerable person, or the environment.

180. The circumstances in which the Commission may disclose information identified in s 196(1) of the IC Act is appropriately broad, given the range of information that the Commission might collect and its potential utility for wider governance. However, imposing an *obligation* on the Commission to do so will give rise to a substantial risk of litigation as to whether, in particular circumstances – incapable of bright line definition – the circumstances arose and the disclosure was adequate, apart from the difficult question of the extent to which the prerequisite circumstance has been demonstrated.

181. There is an issue, however, with the limitation of recipients of information to an "information sharing entity", as defined in s 196(3). These comprise other integrity bodies, a law enforcement agency, a prosecutorial body, the head of a public sector entity, other entities with which a MOU has been entered into under s 56 and bodies to whom investigation reports may be provided. The power to disclose to other persons should also be available where the Commissioner considers it to be in the public interest to make the disclosure, for example, where a complainant or member of the public provides information to a member of the Commission's staff of a situation that requires an urgent or immediate response and disclosure to an entity as distinct from a responsible person risks undue delay. Sometimes it might be necessary to communicate with a private individual as distinct from an official. It is not possible to cover adequately by description either the type of information or the person to whom it should be conveyed. On occasions, an investigation might obtain information that it is desirable to disclose to a person within a public entity rather than its head because of its nature and it is relevant to current operations, the integrity of which might otherwise be compromised, or which needs correction. Determining what the public interest requires in the particular circumstances should be left to the Commissioner. Of course, it may be appropriate to provide that such disclosures should be reported to the Inspector.

182. A related issue requiring attention concerns permitting information to be disclosed to entities with which the Commission has an MOU under s 56. These entities are not confined to government entities. The identification of such entities as appropriate recipients of information, in effect, imposes an arbitrary limit to those with which the Commission has happened to enter a MOU. Whilst it is appropriate to impose conditions on the use that might be made of disclosed information, this can be done in each case as the situation arise – the wide variation in such situations needing particular provision at all events. The Commission proposes that the simpler and more effective course is to permit disclosure to any entity or person where, in the opinion of the Commission, this is justified in the public interest.

183. The Commission has taken the view that the range of permitted disclosures under s 199(f) includes those permitted by the Commissioner pursuant to the Commissioner's implied powers under the Legislation Act. Usually this will be responsive to a request, but not necessarily. The importance of permitting disclosure where it is in the public interest to do so requires this to be explicitly permitted under the IC Act.

Witnesses

Should a witness generally be entitled to know what matter their examination summons is referring to?

a. *In what situations should this information be able to be withheld?*

b. *Where the Integrity Commission does withhold this information, should it be explicitly reported to the Inspector as part of the monthly reporting requirements under section 205 of the IC Act?*

Are there any alternative options to ensure witnesses can be well-prepared for an examination?

a. *For example, should the Commission be required to inform the Inspector they intend to withhold the information from the witness?*

i. *If so, should the Inspector be required to approve this approach?*

184. Section 148(2) in effect limits the need to disclose the nature of the matters about a person is to be questioned to information that the Commissioner considers on reasonable grounds will not prejudice the conduct of an investigation or is not contrary to the public interest to disclose. The Commission regards this qualification on the obligation of disclosure as reasonable. The interests here sought to be balanced are between fairness to the witness on the one hand and prejudice to the conduct of an investigation or being contrary to the public interest on the other. If there are reasonable grounds for considering that disclosure could result in either of the last possibilities, then it must follow that this must outweigh the extent to which fairness suggests that disclosure is desirable.

185. Whilst it is acknowledged that giving evidence may be stressful, maintaining the integrity of investigations must have priority unless the circumstances are exceptional. Whether in any particular case significant anxiety or stress is likely to be caused by ignorance of the matter about which the person is to be examined or from the mere fact of being summoned to give evidence is speculative, whilst the potential prejudice that disclosure might cause to an investigation is reasonably predictable (including destruction of evidence, falsification of evidence and collusion). Each case must turn on its own facts, requiring that the Commissioner must retain a discretion whether and the extent to which the subject matter is to be disclosed. It is fair to say, however, that in most cases, if the witness is a person of interest, they are likely to have a reasonable idea of why they are summonsed.

186. The Commission has no objection to bringing the Inspector's attention the fact that a summons does not make a disclosure of subject matter and that the Commissioner has considered there are reasonable grounds for doing so within s 148(2). However, it would undermine the appropriate responsibility of the Commissioner for decisions entrusted to him or her to require the decision to be justified to the Inspector. This is an operational matter in respect of which the Commissioner's independence must be paramount. Investigations are not undertaken by a committee made up of the Commissioner and the Inspector.