

Public Interest Disclosure Act 2012

Discussion Paper

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Overview

On 12 January 2023, Chief Minister Andrew Barr MLA, announced a review of the ACT *Integrity Commission Act 2018* (IC Act) to be led by Mr Ian Govey AM. The IC Act has been operational for three years and the review is considering whether the IC Act is functioning efficiently to enable the Integrity Commission to deter, and investigate allegations of corruption, while also strengthening confidence in ACT public sector governance. Additionally, any review of the IC Act must be done simultaneously with a review of the operation of the *Public Interest Disclosure Act 2012* (PID Act). Mr Govey is also leading this review.

As part of the IC Act and PID Act reviews, a series of discussion papers have been developed to consider amendments proposed by the Integrity Commission and other stakeholders. These papers and the terms of reference for the reviews can be found on the review's [website](#).¹

The terms of reference for the PID Act review require consideration of the operation of the PID Act in relation to other reporting mechanisms for maladministration, and dangerous conduct threatening public health, or safety, or the environment in the Australian Capital Territory; whether the recommendations of the review of the PID Act conducted in 2019, as agreed by Government, were implemented; and any other matter the reviewer considers pertinent.

The review encourages feedback on the matters raised, in particular where the review has raised multiple options or otherwise asked specific questions for feedback. Additionally, the review encourages feedback if stakeholders consider points or matters have been missed, or stakeholders have other proposals they would like the review to consider.

Please provide feedback via ICActReviewSecretariat@act.gov.au no later than **COB Friday 7 July 2023**.

Public Interest Disclosure Framework

The object of the PID Act is to promote trust in government by:

- providing a way for people to report disclosable conduct
- ensuring people who make public interest disclosures (PIDs) are protected and treated respectfully
- ensuring PIDs are properly investigated and dealt with, and
- ensuring appropriate consideration is given to the interests of people who make PIDs and the people who are the subject of the disclosures.²

In specified circumstances, the scheme protects reporters from criminal and civil liability for making disclosures publicly, and provides general protections against retribution, reprisal, or retaliatory actions. It also sets out a process for people to follow prior to making public accusations which may otherwise unfairly damage the reputations of those accused of maladministration, or inappropriately disclosing sensitive government material.

Disclosable conduct is defined as an action or policy, practice or procedure of a public sector entity, or public official for a public sector entity, that is maladministration, or results in a substantial and

¹ <https://www.cmtedd.act.gov.au/office-of-industrial-relations-and-workforce-strategy/review-of-the-acts-integrity-commission-act-2018>.

² *Public Interest Disclosure Act 2012* s6.

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specific danger to public health or safety, or the environment.³ A public sector entity includes an ACT Legislative Assembly entity (such as Members of the Legislative Assembly (MLAs) and their staff, and members of the Office of the Legislative Assembly), and an ACT Public Sector entity (such as the public service (ACTPS), statutory office holders, a Territory authority or Territory-owned corporations). Other than the Northern Territory, all Australian jurisdictions, including the Commonwealth, have public interest disclosure legislation.

PEG Review

On 3 April 2019, the ACT Legislative Assembly passed a resolution in relation to an independent review of the PID Act taking into consideration relevant provisions of IC Act. PEG Consulting were engaged on 6 May 2019 to comprehensively review the PID Act. A key aspect of the PEG review was to consider the inter-relationships between existing integrity agencies in the Territory and the new Integrity Commission, including the sharing of information and the referral of complaints, oversight, and accountability mechanisms, and identifying gaps in the framework.

The PEG review made 35 recommendations, most of which the ACT Government accepted and implemented through the Public Interest Disclosure Amendment Bill 2020.⁴ A table is provided at Attachment A showing the recommendations and how they have been dealt with.

Section 48 of the PID Act requires that the Act be reviewed at the same time and in conjunction with the reviews required under section 303 of the IC Act. Given the comprehensiveness of the PEG review, the current review terms of reference focus on the appropriateness and implementation of recommendations from the PEG review.

One of the significant amendments in 2020 required that all PID Act disclosures accepted by the disclosure officer be provided to the Integrity Commissioner for overarching visibility of and responsibility for maladministration disclosures. Prior to the PEG review, the PID Act required that disclosable conduct be referred to the Public Sector Standards Commissioner (PSSC) to manage. The PEG review found that 'any matters that may come within the jurisdiction of the Integrity Commissioner should be reported to the Integrity Commissioner including all matters disclosed under the PID Act'.⁵ The report ultimately recommended that responsibility of PIDs be transferred to the Integrity Commissioner.⁶ Stakeholders have raised whether the PID function is more appropriately aligned with the PSSC's legislative responsibilities, and whether this function should return to the PSSC. This matter is discussed in this paper.

Reporting and investigation for misconduct, maladministration, and corruption

A public servant is obliged to tell the ACTPS Head of Service about any maladministration or corrupt or fraudulent conduct by a public servant of which they become aware under section 9(4) of the *Public Sector Management Act 1994* (PSM Act). No obligation is placed on members of the broader

³ *Public Interest Disclosure Act 2012* s8.

⁴ <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2213.

⁵ https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 39.

⁶ https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 46 (recommendation 6).

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community to make such reports. Where a person suspects or believes that maladministration or corrupt or fraudulent conduct has occurred, a public servant, or a member of the public may wish to draw public attention to the matter. The PID scheme provides a framework for reporting, protections for people who make reports, and gives visibility and responsibility to the Integrity Commissioner for all matters of maladministration. This visibility allows oversight of matters of alleged maladministration which may indicate areas for further action in relation to fraud or corruption risks. Clause H7.1 of the Territory Enterprise Agreements provides that, where the Head of Service determines that investigation of an alleged misconduct matter is required,⁷ the Head of Service must refer the matter to the PSSC for investigation. The PSSC is established under the PSM Act. One of the PSSC's main functions is to conduct investigations under an industrial agreement,⁸ which is supported by 'misconduct procedures'.⁹ The PSSC may conduct the investigation or may delegate an investigation function to a public servant or another person.¹⁰

As a disclosure officer under the PID Act, the Head of Service must also give this information to the Integrity Commissioner if satisfied that it is disclosable conduct in line with the requirements in section 17 of the PID Act.

Section 152(3)(b) of the PSM Act permits a public sector employer (a statutory office holder or Chief Executive Officer) to exercise a function under an industrial instrument in relation to a staff member, as if the public sector employer were the Head of Service. Additionally, relevant Head of Service functions under the Enterprise Agreements are delegated to heads of agencies and as appropriate to other relevant staff for action on industrial matters.¹¹

Role of the Integrity Commission

The Integrity Commission is established under the IC Act.¹² The Commission's functions under the IC Act are to:¹³

- investigate conduct that is alleged to be corrupt conduct
- refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action
- prevent corruption, including by research and mitigating corruption risks
- publish information about investigations conducted by the Commission, including lessons learned
- provide education programs about the operation of the IC Act, and
- foster public confidence in the Legislative Assembly and public sector.

Corrupt conduct is defined in section 9 of the IC Act. In summary, it covers behaviour which could constitute a criminal offence, or a serious disciplinary offence or reasonable grounds for dismissing or otherwise terminating a public official's services and which is also dishonest, partial, breaches public

⁷ Note the definition of 'misconduct' at H6.5 of Territory Enterprise Agreements.

⁸ *Public Sector Management Act 1994* s144(1)(a)(ii).

⁹ *Public Sector Management Act 1994* dictionary, 'misconduct procedure'.

¹⁰ *Public Sector Management Act 1994* s144(3).

¹¹ Instrument of Delegation (HOS2021-9) (Delegation Instrument).

¹² *Integrity Commission Act 2018* s19.

¹³ *Integrity Commission Act 2018* s23.

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trust, or constitutes fraud. Some misconduct, such as bullying, or destruction or misuse of a government asset, does not constitute corrupt conduct under the definition in section 9 of the IC Act. While the IC Act covers only corrupt conduct, it empowers the Commission to investigate a broader range of people than are captured by the misconduct provisions in ACTPS enterprise agreements administered by the PSSC, as the IC Act captures individuals employed outside the ACTPS who perform a duty or function on behalf of the Territory. The IC Act and PID Act also capture allegations against MLAs and their staff.¹⁴

In addition, the Commission has an oversight function of all decisions under the PID Act, which includes those made by ACT Government agencies. Its primary functions under the PID Act are to:

- make procedures for dealing with PID Act disclosures¹⁵
- decide whether a disclosure qualifies as a PID, and
- where a disclosure does qualify as a PID, decide which public sector entity (including the Commission) is best placed to investigate it.

It can review, at any time:

- decisions to end investigations of disclosures¹⁶
- actions taken in relation to PIDs or disclosures about disclosable conduct¹⁷
- actions proposed to be taken in relation to PIDs or disclosures about disclosable conduct,¹⁸ and
- measures implemented by investigating entities to protect disclosers, witnesses, or respondents.

In reviewing such actions or decisions, the Commission can ask anyone to provide information relevant to the review, including protected information.¹⁹ Public officials must comply with all requests by the Commission.²⁰ The Commission may, following a review:

- amend a decision or action taken under the PID Act²¹
- set aside a decision and substitute a new decision made under the PID Act,²² or
- take no action.²³

The Commission may issue directions to an official or public sector entity to take, or not take, action in respect of any disclosable conduct subject to review.²⁴ Where the Commission exercises any of the powers described above (except where the Commission chooses to take no action), the Commission must advise the discloser of the proposed action and provide reasons for the decision.²⁵ The Commission

¹⁴ *Integrity Commission Act 2018* s12, *Public Interest Disclosure Act 2012* s9,10.

¹⁵ *Public Interest Disclosure Act 2012* s33.

¹⁶ *Public Interest Disclosure Act 2012* s29(1)(a).

¹⁷ *Public Interest Disclosure Act 2012* s29(1)(b).

¹⁸ *Public Interest Disclosure Act 2012* s29(1)(b).

¹⁹ *Public Interest Disclosure Act 2012* s29(2).

²⁰ *Public Interest Disclosure Act 2012* s29(3).

²¹ *Public Interest Disclosure Act 2012* s29(4)(a).

²² *Public Interest Disclosure Act 2012* s29(4)(b).

²³ *Public Interest Disclosure Act 2012* s29(4)(c).

²⁴ *Public Interest Disclosure Act 2012* s29(5).

²⁵ *Public Interest Disclosure Act 2012* s31.

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may also prepare a report in respect of a public sector entity's handling of a PID for the Minister, who is obliged to table the report within nine sitting days of receiving it.²⁶ The Commission is also responsible for annual reporting required by the PID Act.²⁷

The Commission is responsible for publishing guidelines and providing education in respect of the PID Act. To date, it has published the following material on PID processes:

- Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021 (the Guidelines)
- Public Interest Disclosure (Integrity Commission – Handling Public Interest Disclosures as a Member of the Legislative Assembly) Guidelines 2021, and
- contact details for all disclosure officers.

Determining maladministration

Under the PID Act, 'maladministration' is defined as a conduct, a policy, practice, or procedure that:

- results in a substantial mismanagement of public resources or public funds, or
- involves substantial mismanagement in the performance of official functions.²⁸

The Guidelines describe 'maladministration' as follows:

'maladministration' requires 'substantial mismanagement'. For example, should a manager be making poor decisions resulting in wastage of hundreds of thousands of dollars, it would amount to substantial mismanagement. Alternatively, where the report is about the limited private use of a government vehicle by a public official, this would be unlikely to amount to substantial mismanagement. Committing, or allowing another person to commit, racial or sexual discrimination could well also amount to substantial mismanagement.

Amongst the matters which may be considered when deciding whether the alleged maladministration is substantial is whether the conduct:

- is one-off or systemic
- has caused significant financial damage
- has caused significant personal damage or injury, or
- has created significant reputational or litigation risks.

This is an indicative, not exhaustive, list demonstrating the wide reach of the PID scheme.

Substantial and specific danger to public health or safety, or the environment

'Substantial and specific danger' refers to a situation where the conduct of a public official, or a policy, practice or procedure, risks damaging 'public health or safety' or the environment. 'Public health or safety' refers to the health or safety of people:

- under lawful care or control
- using community facilities or services or
- in workplaces.²⁹

²⁶ *Public Interest Disclosure Act 2012* s30.

²⁷ *Public Interest Disclosure Act 2012* s45.

²⁸ *Public Interest Disclosure Act 2012* s8(3).

²⁹ *Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021*.

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As with maladministration, the report must relate to ‘substantial’ danger. In this context ‘substantial’ is determined not only by how likely it is to occur, but also by its potential consequences. For example, any conduct which puts even one person’s life in danger or at risk of serious injury is substantial. Conduct that puts many people at a risk of minor injury may also be substantial (for example, releasing a mild irritant into a communal waterway).

‘Specific’ requires that the conduct be capable of a reasonably precise description. This means that vague or imprecise reports of dangers to public health or safety, or the environment will probably not amount to disclosable conduct. For example, were a discloser to allege imminent unspecified dangers due to a proposed project but is unable to provide any useful information as to what those dangers are, this is unlikely to be disclosable conduct.³⁰

For clarity, the Review has depicted the PID process in the flowchart below. It is important to note that there are ongoing obligations for the investigating entity to keep the discloser informed during an investigation.³¹ In addition, if the Integrity Commissioner refers the matter to a public sector entity for investigation, the public sector entity must keep the Integrity Commissioner informed about the investigation.³²

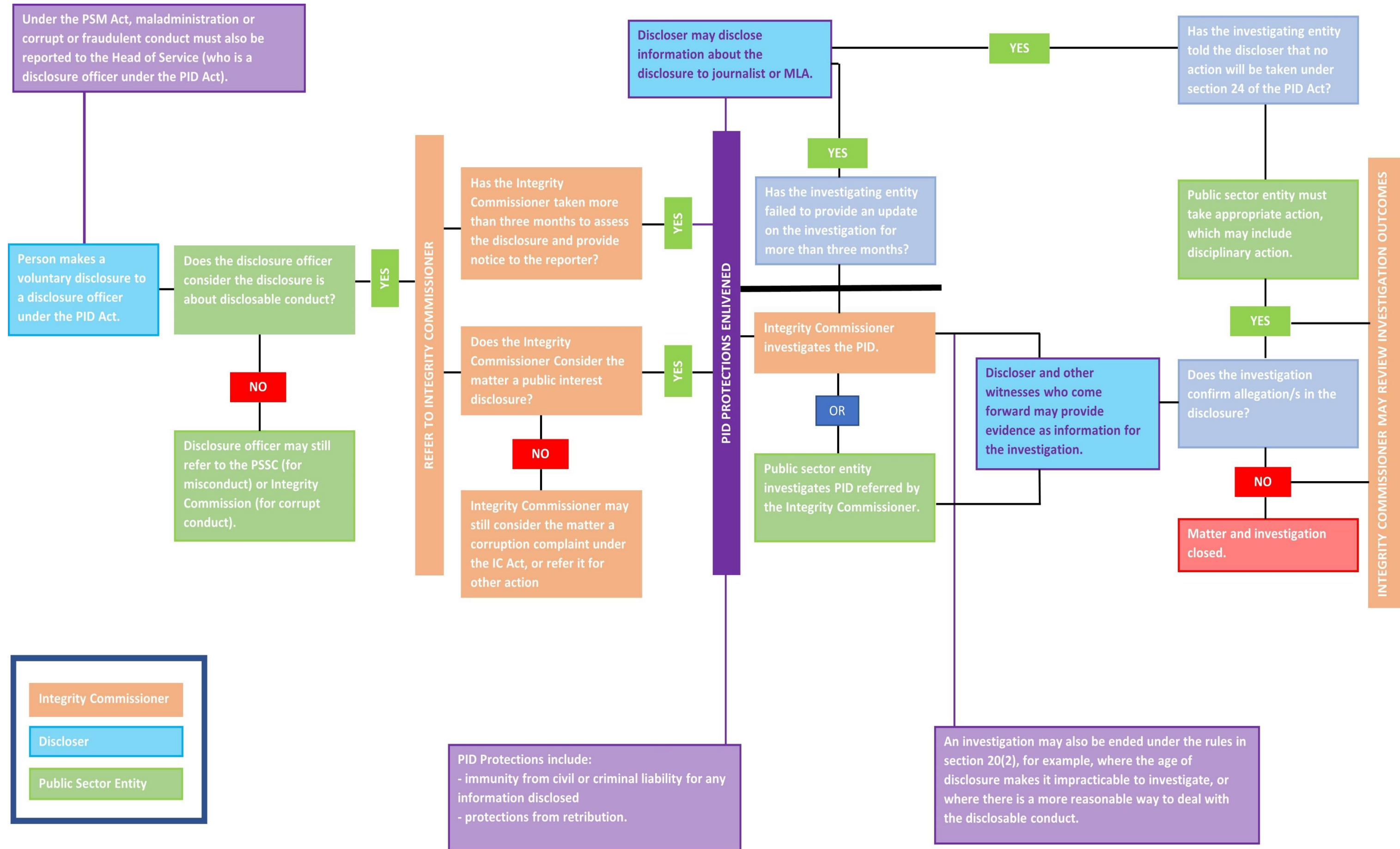
³⁰ *Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021.*

³¹ *Public Interest Disclosure Act 2012 s23.*

³² *Public Interest Disclosure Act 2012 s25.*

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Substantive Policy Matters for the PID Act Review

PID responsible entity

Prior to the PEG review, the powers that the PID Act currently confers on the Integrity Commission were exercised by the PSSC. The PEG review concluded that ‘any matters that may come within the jurisdiction of the Integrity Commissioner should be reported to the Integrity Commissioner including all matters disclosed under the PID Act’.³³

Amendments were made in 2020 in the *Public Interest Disclosure Amendment Act 2020* to transfer the PID assessment, investigation, and oversight functions to the Integrity Commissioner. In addition, specific funding was provided to the Integrity Commission in the 2021/22 budget for an additional 6.4 FTE for the responsibility of assessing and managing PIDs.³⁴

A number of stakeholders have suggested that the Review consider management of PIDs returning to the PSSC on the grounds that the functions and role of the PSSC are more aligned to consideration of maladministration and other PID conduct, thereby streamlining the process and allowing the Commission to focus on significant and complex corruption matters.

Issues

The Integrity Commission is one of multiple integrity agencies in the ACTPS integrity framework, each with their own specific purpose and remit. They include the Auditor-General, the ACT Ombudsman, the ACT Human Rights Commission, and the ACT Public Sector Standards Commissioner. The Assembly itself also has the Commissioner for Standards and the Ethics and Integrity Adviser.

Role of the Public Sector Standards Commissioner

The PSSC is appointed under the PSM Act to deal with misconduct in the ACTPS.³⁵ The PSSC’s functions are to:

- conduct investigations about matters declared by the Chief Minister; and investigations under an industrial instrument
- to provide advice to the Chief Minister about matters arising from an investigation conducted by the Commissioner
- in connection with an investigation conducted by the Commissioner, to promote and provide advice about the public sector values, the public sector principles and the conduct required under the PSM Act, and
- to exercise any function given to the Commissioner under legislation.³⁶

ACTPS industrial instruments outline procedures for the PSSC to conduct investigations into allegations of misconduct against persons who are subject to an ACTPS industrial agreement.³⁷ Generally, this is a

³³ https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 39.

³⁴ https://www.treasury.act.gov.au/_data/assets/pdf_file/0011/1870193/2021-22-ACT-Budget-Statement-A.pdf p. 28.

³⁵ *Public Sector Management Act 1994* s142.

³⁶ *Public Sector Management Act 1994* s144.

³⁷ See for example clause H7.3 of the ACTPS Administrative and Related Classifications Enterprise Agreement. (<https://www.hansard.act.gov.au/hansard/9th-assembly/2018/PDF/20181129.pdf>).

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broad range of people, but excludes MLAs and members of the judiciary, unless declared by the Chief Minister.

Under the PSM Act, misconduct is defined as a failure to comply section 9 of the PSM Act, and further explained in ACTPS industrial agreements.³⁸ In brief, misconduct encompasses behaviours such as failure to manage a conflict of interest, failure to act with due care and diligence, failure to obey Territory laws, not treating people with courtesy and respect, inappropriately taking a personal benefit through a person's position as a public servant, improperly using a Territory resource, and bringing the ACTPS into disrepute.

The scope of disclosable conduct

As outlined earlier, 'disclosable conduct' is defined as an action or policy, practice or procedure of a public sector entity, or public official for a public sector entity, that is maladministration, or results in a substantial and specific danger to public health or safety, or the environment.³⁹ Stakeholders have raised that many 'disclosable conduct' matters will be types of misconduct that are not corrupt conduct. For example, actions endangering public health or safety, or the environment, are unlikely to engage elements of corrupt conduct, unless it is also serious misconduct. Such actions are more likely to be aligned with bringing the ACTPS into disrepute or lacking due care and diligence as forms of misconduct under the legislation.

During the 2021 Justice and Community Safety Committee hearing into the Integrity Commission's 2019/20 annual report, the Integrity Commissioner noted that PIDs often relate to non-corruption matters⁴⁰ and that the Commission would only investigate a PID itself if there was either patently a corruption allegation or potentially a real risk of likelihood of a corruption element.⁴¹ The Commissioner further emphasised the Commission's supervisory role, and its responsibility to refer matters to the appropriate entity for investigation.⁴²

The latest data on disclosable conduct from the Integrity Commission's 2021/22 annual report provides a breakdown of disclosable conduct the Commission assessed for that and the previous financial year.⁴³

| | 2020-21 | 2021-22 |
|---|---------|---------|
| Section 17 disclosable conduct provided to the Integrity Commissioner | 5 | 11 |
| Disclosures taken to be corruption complaints under section 59A of the IC Act | 1 | 6 |
| Disclosable conduct considered to be a PID | 1 | 2 |
| Disclosable conduct not considered to be a PID | 4 | 9 |
| PIDs referred to another entity for investigation | 0 | 2 |

³⁸ <https://www.hansard.act.gov.au/hansard/9th-assembly/2018/PDF/20181129.pdf> Clause H6.5.

³⁹ *Public Interest Disclosure Act 2012* s 8.

⁴⁰ <https://www.hansard.act.gov.au/Hansard/10th-assembly/Committee-transcripts/jacs02a.pdf> p 97.

⁴¹ <https://www.hansard.act.gov.au/Hansard/10th-assembly/Committee-transcripts/jacs02a.pdf> p 98.

⁴² <https://www.hansard.act.gov.au/Hansard/10th-assembly/Committee-transcripts/jacs02a.pdf> p 97.

⁴³ https://www.integrity.act.gov.au/_data/assets/pdf_file/0009/2085129/ACT-Integrity-Commission-2021-22-Annual-Report.pdf p 20.

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The data confirms the Integrity Commissioner's view that the Commission would only investigate a PID if it were alleged to involve corruption. In 2020-21, the only disclosable conduct determined to be a PID was considered a corruption referral under the IC Act, and in 2021-22 the two instances of disclosable conduct determined to be a PID were referred back to the ACTPS. Section 59A of the IC Act provides that disclosures made under the PID Act that are not considered disclosable conduct may still be considered as corruption complaints under the IC Act. In 2021-22, six instances of disclosable conduct were considered by the Commission to be more appropriately categorised under the statutory elements of 'corruption complaints' under the IC Act rather than as PIDs.⁴⁴

Benefit of PSSC responsibility – Efficiency in administrative process and responsibilities

As noted above, some stakeholders have questioned the efficiency of the assessment processes sitting with the Integrity Commission if it only investigates PIDs that relate to corruption, and otherwise refers matters back to the service. To illustrate, where the Head of Service (or delegate) determines that a matter does not constitute corruption but is disclosable conduct under the PID Act, they are required to refer the matter to the Commissioner for assessment. The Commissioner is then required to dedicate resources to assess the disclosable conduct – and to refer the matter back to the Head of Service (as a referral entity), the head of a public sector entity or the PSSC to investigate the matter if they agree it does not involve corruption. This process has been taking considerable time in many instances, which may impact the legislative timeframes in the PID Act, particularly regarding the timeframe for responding to a matter and provision of updates to the complainant (at least every three months).⁴⁵ Particularly lengthy delays in referring matters may result in the misconduct investigation needing to be abandoned due to procedural fairness issues and difficulties with evidence.

It may be more efficient for the PSSC to resume responsibility for assessment of PIDs – thereby lessening the circular referral process outlined above. The PSSC could assess each matter to determine the most appropriate means for managing the complaint. Where serious or systemic corrupt conduct is indicated, mandatory referral to the Integrity Commission is required under section 62 of the IC Act – and, to remove doubt or confusion, a similar requirement could be written into the PID Act.

Another matter to be considered is the PSSC and Integrity Commissioner's education and oversight functions. The Integrity Commissioner is responsible for setting guidelines on the scheme and is able to substitute PID decisions or outcomes. Given that the Commission is not investigating PID matters unless they reach the threshold of the corruption jurisdiction, it seems unusual that the oversight and substitution power vests with the Commission. Consideration might also be given to returning these to the PSSC for non-corruption related PIDs.

Benefit of existing arrangements – Corruption oversight

The benefit of PID responsibility remaining with the Integrity Commissioner is that it allows the Commission to consider the complaint for both public interest disclosure eligibility, and corrupt conduct, eliminating the possibility a corruption complaint goes unseen by the Commission. For example, during 2021-22 there were six instances of disclosable conduct provided to the Integrity Commissioner that did not meet the PID threshold but were considered corruption complaints. The

⁴⁴ Section 59A of the *Integrity Commission Act 2018* provides that disclosures made under the PID Act that are not considered disclosable conduct may still be considered as corruption complaints under the IC Act.

⁴⁵ *Public Interest Disclosure Act 2012 s23*.

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risk of something related to corrupt conduct not being reported to the Commission is somewhat reduced by the mandatory requirement for heads of public sector entities and senior executives to report reasonably suspected instances of serious or systemic corrupt conduct to the Commission.⁴⁶ If the PSSC was provided responsibility for PIDs, this risk could be mitigated by requiring the PSSC in assessing PID disclosures to refer any suspected corruption directly to the Commission.

Risks of continued movement of responsibility

Changing the system at this point may create additional confusion among ACTPS staff, as the current system has been operating for two years. Ensuring staff awareness of processes, rights and responsibilities is a significant challenge and another change risks creating confusion and inaction – an issue which has been raised by some stakeholders who are concerned many staff lack knowledge about PIDs and their obligations.

In addition, it is important to consider the ongoing stability and consistency in the administration of integrity schemes. The Integrity Commission will continue to develop and grow as an agency as it still remains relatively young – particularly when it was established shortly before the onset of the Covid-19 pandemic, which would have made establishing a new agency difficult in a largely remote environment. Allowing a period of consolidation and process maturation may result in greater efficiencies and progress than shifting the function, or components of it.

Discussion

1. Where should responsibility for PIDs sit? In particular, should a distinction be drawn between those involving corruption allegations and those that do not?
2. Are matters of education, oversight and decision substitution appropriately allocated to the Integrity Commission in light of the operation of the legislation?

Timeframe for disclosure officer to assess disclosure

The Integrity Commission has suggested that that a time-limit should be imposed on a disclosure officer to assess whether a disclosure is about disclosable conduct and disclosed in good faith, and to provide that disclosure to the Commissioner, where appropriate.⁴⁷ The Commission suggests the current position is problematic as it can result in someone who makes a disclosure disclosing the disclosable conduct to a journalist or MLA within three months of making the complaint before the Commission has time to review it.⁴⁸

Issues

The PID Act allows a person who has reported disclosable conduct to a person under section 15 of the Act to provide information in relation to that disclosable conduct to a journalist or MLA if they do not receive certain statutory notifications from the Integrity Commissioner about the intent to investigate, refer or provide an outcome of an assessment.⁴⁹ This provides a person with a means to publicly

⁴⁶ *Integrity Commission Act 2018* s62.

⁴⁷ *Public Interest Disclosure Act 2012* s17.

⁴⁸ *Public Interest Disclosure Act 2012* s27, s35, s36.

⁴⁹ *Public Interest Disclosure Act 2012* s27.

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‘whistleblow’ using protections under the PID Act if there has been no communication regarding the progress of the matter.

The three-month timeframe commences when the person first makes a disclosure under section 15 of the PID Act. The Integrity Commission’s proposal would require that disclosures be provided to the Commissioner in a satisfactory time for the Commission to make proper assessment prior to the three-month whistleblower provision being enlivened. This would have the added benefit of ensuring the discloser’s matter progresses in a timely manner. However, consideration is required of the consequences if the disclosure officer fails to meet that deadline, and how the time limit would be enforced. The only person who would normally be aware the disclosure officer hasn’t met the deadline would be the person who made the disclosure. The only point at which the Commission would become aware that a disclosure officer has not met their deadline, is when they have been notified late, or when the discloser provides the disclosure to an MLA or journalist and the disclosure is made public.

It is important that matters not be hindered at the initial assessment stage to the point where a considerable length of time has passed, and the disclosure officer has yet to determine the qualifying threshold for disclosable conduct. This would unnecessarily delay reporting of the matter to the Commission and may negatively impact investigations as there would have been more time in which the evidence could have been lost or witness memories deteriorated. One solution may be to provide a timeframe but give the Commissioner power to extend that time in a particular matter, perhaps with a cap on the length of the extension.

Whilst the discloser must be informed when the disclosure officer provides the disclosable conduct to the Integrity Commissioner,⁵⁰ and the Commission must notify the discloser if the report was assessed as not being disclosable conduct by the Commission,⁵¹ the PID Act does not require the disclosure officer to tell the person who made the disclosure that it was assessed as not being disclosable conduct. However, the Guidelines provide that a disclosure officer must notify the discloser of any assessment.⁵² If a disclosure officer was in fact unaware of the requirement in the Guidelines, they could consider the disclosure, conclude that it does not relate to disclosable conduct, and not inform the person who made the disclosure. If the person remains uninformed about the outcome of the disclosure and provides the disclosure to an MLA or journalist⁵³ the matter may then be made public, which could then jeopardise a future investigation into the matter – such as compromising evidence or impacting the ability to conduct a procedurally fair investigation. Whilst a disclosure officer should be aware of the Guidelines, it may be beneficial to include the requirement in the enabling legislation.

Discussion

3. Should the PID Act impose a time limit on a disclosure officer to assess a disclosure and if they determine it is disclosable conduct pass it on to the managing PID entity?
4. Should the PID Act include a requirement that a disclosure officer inform someone who has made a disclosure that the disclosure officer did not consider it to be disclosable conduct?

⁵⁰ *Public Interest Disclosure Act 2012 s17(2)*.

⁵¹ *Public Interest Disclosure Act 2012 s17B*.

⁵² *Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021*.

⁵³ *Public Interest Disclosure Act 2012 s27*.

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Requirement to declare a conflict of interest

During debate of the Public Interest Disclosure Amendment Bill 2020 in the ACT Legislative Assembly, the ACT Liberals raised several matters for consideration as part of the next legislative review of the PID Act. They included consideration of whether to introduce a requirement for a disclosure officer to make a declaration with regard to a conflict of interest (real, potential, or perceived) when assessing whether a disclosure is disclosable conduct.

When raising the proposal, former MLA Ms Vicki Dunne stated:

*'Whilst disclosures can be made directly to the Integrity Commission, it is generally expected that they would pass through the process with a disclosure officer within an agency before they are referred or not to the Integrity Commission. There is potential, albeit small, for this process to create a conflict of interest. There is potential for retaliatory action to be taken against the discloser before the matter gets into the hands of the Integrity Commission.'*⁵⁴

Similarly, the PID Act does not require an investigating entity to declare a conflict of interest when the Integrity Commissioner refers a public interest disclosure to it to investigate. One argument is that it is always inappropriate for a Directorate to investigate alleged PID conduct within that particular Directorate. However, it could also be argued that it is important for that Directorate to investigate the conduct, as it is best placed in terms of familiarity with the particulars relating to allegations, the business operations, and personnel, and also that it should be aware of maladministration that is occurring within the Directorate.

Issues

Disclosure officer conflicts of interest

The proposal would place a specific statutory obligation under the PID Act for a disclosure officer to state whether they have a conflict of interest when assessing a disclosure. Other jurisdictions do not include a positive requirement in their PID Act for a disclosure officer to make such a declaration. It should be noted that all ACT public sector members have a legislatively prescribed duty in all situations to take all reasonable steps to declare and avoid a conflict of interest or manage a conflict of interest that cannot reasonably be avoided.⁵⁵

Despite the existing requirement for a public official to either declare or manage a conflict of interest, including an additional statutory requirement under the PID scheme may provide disclosers added comfort that their disclosure will be independently assessed. It could also create a specific offence for a disclosure officer who fails to declare a conflict of interest where they may be involved in the alleged conduct that is disclosed – which may act as an additional deterrent of that behaviour. Some thought would need to be given to the whether creating a specific requirement under the PID Act would add any value, given the requirement already exists under the PSM Act, with consequences for failure to abide by those PSM Act obligations.

If the PID Act included a requirement for a disclosure officer to declare a conflict of interest, a possible means for oversight would be for conflict-of-interest reports to be made to the Integrity Commission,

⁵⁴ <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2211.

⁵⁵ *Public Sector Management Act 1994* s9.

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which could then either assess how to manage the conflict, and possibly take over responsibility for the complaint, or refer it elsewhere. This assessment would offer an objectively impartial standpoint. Including an additional statutory requirement to declare a conflict of interest, and subsequently manage that conflict of interest, would likely create additional work and reporting that could impact the public sector's timeliness to address the allegations. For example, a disclosure officer who is a Deputy Director-General (DDG) might declare that they have a conflict. Under the current system, the DDG would need to manage any perceived conflict of interest but would not need to report it to the Commissioner. In the event that the legislation was changed to mandate reporting to the Commissioner, it would take some time for the Commission to review the conflict to determine whether the DDG is in fact conflicted. This is particularly important when the PID Act requires disclosure officers, the Commissioner, and the investigating entity to provide three monthly updates to avoid the discloser providing the disclosure to a journalist or an MLA.

Alternatively, PID disclosures could be required to be reported directly to the Commission, eliminating the role for disclosure officers in applying the threshold tests. This would give the Commission immediate visibility of all matters, but change may risk increasing the Commission's workload as it may receive trivial or vexatious disclosures and there would be no disclosure officer to filter the disclosures that ultimately were sent on to the Commission. This risk is unknown as it isn't possible to assess the number of PIDs which fail the threshold, as this is not reported under the PID Act.

Investigating entity conflicts of interest

The PID Act provides that, in deciding whether to refer a PID to another authorised entity for investigation, the Integrity Commissioner must consult the entity.⁵⁶ No other provisions in the PID Act outline what must occur as a result of that consultation – only that the Commissioner may then refer the public interest disclosure to that entity for investigation. Consequently, it would seem that the Commissioner could decide whether any issues raised during consultation may require another entity to investigate the PID.

The existing provisions that require the Integrity Commissioner to consult with an entity prior to referring a matter provide scope for an entity to declare a conflict of interest at this point in the process. It is difficult to envisage that an entity would not raise issues, such as a conflict of interest, at this point in the process, particularly when the Integrity Commissioner has an oversight function in the PID Act and may substitute their own decisions once an investigation is completed. Nonetheless, it is not a specific statutory requirement, and an entity may not necessarily be aware that a conflict of interest exists within the entity if it were to agree to accept the matter for investigation. Including a statutory requirement for an entity to declare a conflict of interest may promote greater transparency in the PID process as the Commissioner would be aware of all conflicts of interest, real or perceived. In addition, as part of the consultation process, the PID Act could also require the referral entity to provide a conflict-of-interest management plan if there are any real or perceived conflicts of interest. The Commissioner could then assess the management plan and decide whether another entity is better placed to investigate the public interest disclosure.

Conversely, the requirement may create an overly risk-averse approach that slows the investigation down and creates an inefficient process.

⁵⁶ *Public Interest Disclosure Act 2012 s19(4)*.

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As a related issue, it has been identified that where a matter has been referred by the Integrity Commission to an investigating entity which may have a conflict of interest, the Commission has been unable to refer the matter to an alternative investigating entity. Section 19(2) of the PID Act provides that the Commissioner may only refer a PID to one of the investigating entities. There may be a need to amend the section to enable the Commissioner to reallocate the matter to another investigating entity if the first entity has a conflict of interest. The same issue arises if the first entity declines or is otherwise unable to investigate the matter. Alternatively, consideration could be given to the investigating entity having the ability to refer the matter to another entity in consultation with the Commission, thereby lessening the administrative processes and timeframe for reallocation.

Discussion

5. Should the PID Act include a requirement for a disclosure officer to declare a conflict of interest when assessing a disclosure?
 - a. If yes, what would be the best method for managing such a scheme? Should conflicts be reported to the Commission or managed by the relevant agency?
6. Should the role of disclosure officer be removed from the scheme with reports made directly to the Integrity Commission?
7. Should the investigating entity be required by the PID Act to declare an actual or perceived conflict of interest prior to investigating a PID?
 - a. If so, should the investigating entity also be required to prepare a conflict of interest management plan?
8. Should the PID Act clarify that the Integrity Commissioner may reallocate a PID investigation to another investigating entity if the initial entity is unable or declines to investigate?
 - a. Alternatively, should the PID Act enable the investigating entity to refer the matter to another entity in consultation with the Commission?

Conflicts of interest under section 24 – requirement to take action

Section 24 of the PID Act requires the head of a public sector entity to take action if they believe on reasonable grounds that disclosable conduct has occurred, is likely to have occurred, or is likely to occur – including disciplining any person responsible for the disclosable conduct. This may become problematic if the disclosable conduct relates to a statutory office holder – as under the PID Act the office holder is both the entity and the head of the entity.

Issues

There would be a conflict of interest where a statutory office holder, as the head of a public sector entity, is required to take action under section 24 when the disclosure relates to their own conduct. In addition, for statutory officer holders and the Head of Service, the only person authorised to initiate any disciplinary action is the responsible Minister. For these senior positions, the PID Act does not provide a mechanism to enable disciplinary action to occur under section 24 as Ministers, who are the only people who may propose disciplinary action, are not within the definition of head of a public sector entity.

It is arguable that the requirements in section 24 are met if the head of a public sector entity writes to the responsible Minister to request disciplinary action in relation to the matter. However, there is a

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risk that the person will commit an offence under section 44 which prevents disclosure of protected information obtained under the PID Act. The person may be covered by the exception under section 44(3)(b) which allows disclosure in relation to the exercise of a function under the PID Act; however, this is uncertain.

A possible solution would be a new provision that provides for disclosure to the responsible Minister at the conclusion of an investigation where a statutory office holder or the Head of Service is found to have been involved in 'disclosable conduct'. This would provide legislative certainty to the process and ensure that heads of public sector entities do not commit an offence under the PID Act by disclosing certain information to initiate appropriate disciplinary action.

Discussion

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

Are provisions to end an investigation working as intended?

Another matter raised by the Canberra Liberals in the debate of the Public Interest Disclosure Amendment Bill 2020 for this review to consider was the operation of section 20 of the PID Act, which sets out how an investigating entity ends an investigation. Former MLA Ms Dunne noted concern that section 20(2)(d) could provide for subjective decision-making to quickly end an investigation that could lead to adverse outcomes of matters not being investigated properly.⁵⁷

Issues

Section 20 of the PID Act provides that an investigating entity must investigate a public interest disclosure and comply with the rules of natural justice and procedural fairness. It also sets out the circumstances under which an investigation may be ended. The section of concern for Ms Dunne, section 20(2)(d), provides that the investigating entity may end the investigation if it is reasonably satisfied that:

- the disclosed information is wrong in a material way and investigation is not warranted; or
- the age of the disclosed information makes it impracticable for the disclosure to be investigated, or
- there is a more appropriate way reasonably available to deal with the disclosable conduct that is the subject of the public interest disclosure.

Importantly, an investigating entity must be provided with a legislative means to end an investigation to avoid the risk that the investigation will continue perpetually if, for one reason or another, the matter is stalled indefinitely.

The three criteria outlined above for ending an investigation arguably provide the required flexibility for an investigating entity to appropriately deal with the subject of the PID. For example, it may be decided that the matter is better dealt with through a workplace misconduct investigation to avoid conducting two investigations on the same matter. Alternatively, the Integrity Commissioner may

⁵⁷ <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2212.

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decide there are elements of corruption after uncovering additional evidence and investigate the matter under the IC Act.

To address concerns that the provisions may be used to prematurely end an investigation, the PID Act includes safeguards that allow the Integrity Commissioner, at any time, to review a decision by another investigating entity to end its investigation of a PID under section 20(2).⁵⁸ In addition, a person may complain to the Ombudsman about an action, and the Ombudsman may review the way in which the entity dealt with or investigated the disclosure of disclosable conduct or public interest disclosure.

Discussion

8. Are the oversight and review mechanisms sufficient to manage any risks arising from the current mechanism for deciding to end an investigation? If so, how should they be addressed?

Scope of disclosable conduct - maladministration

The scope of disclosable conduct has not been specifically raised by stakeholders but is important to consider as it was included in the scope of the 2019 PEG review of the PID Act and this review's terms of reference include a requirement to assess whether the recommendations of that review were implemented. Disclosable conduct refers to the matters that are serious enough to be considered in the public interest to be disclosed. A comparison of jurisdictional approaches to 'disclosable conduct' is at Attachment B for reference.

Issues

The PEG review recommended that a more expansive definition of maladministration be adopted, with consideration given to models in use in other jurisdictions.⁵⁹ At the time, the PID Act defined maladministration as a matter of administration that was:

- contrary to a law in force in the ACT
- unreasonable, unjust, oppressive or improperly discriminatory
- negligent, or
- based wholly or partly on improper motives.

The PEG review received feedback that agencies would benefit from further clarification of the meaning of 'maladministration'. The example provided was where a delegate makes a decision they reasonably understood was consistent with the law, but upon review (for example, by the ACT Civil and Administrative Tribunal or the Supreme Court) it is held to be unlawful. This may include, for example, a decision relating to a building permit or granting of a liquor licence.⁶⁰

To implement that recommendation, the definition of maladministration was amended to mean conduct, a policy, practice, or procedure that:⁶¹

⁵⁸ *Public Interest Disclosure Act 2012* s29.

⁵⁹ https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 50.

⁶⁰ https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 50.

⁶¹ *Public Interest Disclosure Act 2012* s8(3).

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- results in a substantial mismanagement in the performance of official functions, or
- involves substantial mismanagement in the performance of official functions.

It is not entirely clear what the PEG review was referring to when it recommended an ‘expansive’ definition of maladministration. The feedback at the time was that the definition required clarification, and the explanatory material for the Public Interest Disclosure Amendment Bill 2020 described the amendment as a clarification.⁶² The term ‘expansive’ would suggest a broader application of scope – however, given the final outcome, it may have also referred to further guidance for what is captured to provide further assistance to those assessing disclosures to determine if the matter is a PID.

In other jurisdictions the scope varies (see Attachment B for a detailed breakdown of variations in jurisdictional approaches) – for example, some jurisdictions include committing an offence to come within the scope of a PID. The review has received no feedback to suggest the current definition of maladministration causes problems, although, as mentioned above, feedback has raised concerns about ACTPS staff understanding the scheme, including this definition.

Discussion

9. Is the current material on the definition of disclosable conduct under the PID Act clear and easy to understand?
10. Are there any gaps in the current definition of disclosable conduct?
 - a. If so, what should be captured?

Single disclosure scheme under one Act

The PEG review stated, ‘we would recommend that the ongoing need for a standalone PID Act be the focus of a future review, once the operation of the IC Act has commenced and any recommendations of this report are adopted’.⁶³ This was recommended as the proposed changes to the PID Act from the review were made before there was any experience of an operating Integrity Commission.

Issues

Who has responsibility for PIDs may be relevant to considering this question. If it is determined that the Integrity Commissioner should have responsibility, consideration could be given to whether single reporting legislation that combines the IC Act and the PID Act would be desirable. If the PSSC resumed responsibility for PIDs, it may well be better for the legislation to remain separate. Those Australian jurisdictions with a public interest disclosure scheme (i.e. all except Northern Territory), have done so in a separate Act.⁶⁴

In looking at this issue, it is important to understand the principles and objectives of the IC Act and the PID Act to identify any synergies between the two that may lead to efficiencies in combining them. The purpose and objective of the IC Act is discussed in detail in the [Review’s Integrity Commission Purpose and Jurisdiction paper](#). In brief, the IC Act establishes the Integrity Commission as a fact-finding and investigating entity to identify and expose corrupt conduct in the public sector. Corrupt conduct is

⁶² https://www.legislation.act.gov.au/View/es/db_61781/20200220-73332/html/db_61781.html.

⁶³ https://www.cmtedd.act.gov.au/data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 83.

⁶⁴ See for example, *Public Interest Disclosures Act 2012* (Vic), *Public Interest Disclosures Act 2022* (NSW), *Public Interest Disclosure Act 2013* (Cth), *Public Interest Disclosure Act 2018* (SA).

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defined in the IC Act, and importantly, is a distinct concept and different in nature to ‘disclosable conduct’ as defined in the PID Act.

The objective and nature of the PID Act is to protect people in whistleblowing ‘disclosable conduct’ – broadly defined as maladministration or substantial and specific danger to public health or safety, or the environment.⁶⁵ The PID Act enables a person to call attention to a significant concern through public disclosure by affording protections to that person if they disclose the matter to a journalist or MLA after there has been no action to address the matter within three months of disclosure to a specified official or the Integrity Commission.⁶⁶ The journalist or MLA may then alert the public to the matter. The act of going public stands in contrast to the strict confidentiality requirements routinely made in relation to Commission matters due to their sensitive nature and the need to protect investigations. As noted, no other jurisdiction has combined their legislation to cover both schemes. The table below sets out the protections and obligations under both schemes.

⁶⁵ *Public Interest Disclosure Act 2012* s8.

⁶⁶ *Public Interest Disclosure Act 2012* s15, 17A, s27, s27A.

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| | Protections and Obligations | Public Interest Disclosure Act 2012 | Integrity Commission Act 2018 |
|--|---|--|--|
| Protections for witnesses and disclosers | Disclosure to journalists and MLAs | Under sections 27 and 27A, a PID discloser may disclose information about disclosable conduct to a journalist or an MLA if: <ul style="list-style-type: none"> they have not been notified of the outcome of the PID assessment within three months, or they have been notified the PID will be investigated, but have not been informed about the progress for more than three months, or the matter has been investigated, there is clear evidence that one or more instances of the disclosed conduct has occurred or was likely to have occurred, but the investigating entity has advised that no action will be taken in relation to the disclosable conduct. | There is no equivalent protection under the IC Act. |
| | Protection against detrimental action | Section 40 makes it an offence if a person takes detrimental action because of a public interest disclosure. The maximum penalty for this offence is 100 penalty units, 1 year imprisonment, or both. The PID Act allows for damages to be awarded to anyone who suffers detriment as a result of detrimental action (section 41), and also allows for the Supreme Court to make an injunction to prevent detrimental action (section 42). | Section 293 makes it an offence if a person takes detrimental action because of an IC Act complaint or investigation. The maximum penalty for this offence is 100 penalty units, 1 year imprisonment, or both. The IC Act allows for damages to be awarded to anyone who suffers detriment as a result of detrimental action (section 294), and also allows for the Supreme Court to make an injunction to prevent detrimental action (section 295). |
| | Immunity from liability | Under section 35 of the PID Act, a discloser does not incur civil or criminal liability only because of the making of a PID. If the discloser is a public official, they are also protected from administrative action. Making a PID does not count as a breach of professional ethics or conduct rules. If the PID is made in relation to an MLA, the making of the PID does not constitute contempt of the Assembly. This includes a defence of absolute privilege for publishing the information disclosed in a proceeding for defamation (section 36). | Under section 288 of the IC Act, the complainant does not incur civil or criminal liability only because of the making of the complaint. If the complainant is a public official or a member of staff of a MLA, they are protected from administrative action. Making a complaint does not count as a breach of professional ethics or conduct rules. This includes a defence of absolute privilege for the publishing of the information in a complaint in a proceeding for defamation (section 289). |
| | Protections for witnesses | A person is not subject to criminal or civil liability because the person gives relevant information in relation to a PID at the request of the investigating entity unless the information relates to their own conduct (section 42A). | Under section 165 of the IC Act, a witness at an examination has the same protections and immunities as a witness has in a proceeding in the Supreme Court, unless the information relates to their own conduct (section 291). |
| | Protections for lawyers | There is no equivalent under the PID Act. | Under section 165 of the IC Act, a lawyer representing a person at an examination, or assisting the commission at an examination, has the same protections and immunities as a lawyer representing a party in the Supreme Court. |
| | Offence - disclosure of protected information | Under section 44 of the PID Act, it is an offence if any person with a function under the PID Act recklessly uses or divulges protected information about someone else. Information is allowed to be used or divulged where it is allowed under a Territory law, in the exercise of a function under the PID Act, or in a court proceeding. | Under section 297 of the IC Act, it is an offence if any person with a function under the IC Act recklessly uses or divulges protected information about someone else. Information is allowed to be used or divulged where it is allowed under a Territory law, in the exercise of a function under the IC Act, in a court proceeding, or with the consent of the person whose information is being used or divulged. |
| Obligations | Loss of Protections | Under section 37 of the PID Act, the discloser generally loses their protections under the Act if a court is satisfied that either: <ul style="list-style-type: none"> the discloser knowingly gave false or misleading information about the disclosure, or as part of the disclosure the disclosure, or part of the disclosure, is vexatious. | Under section 290 of the IC Act, the complainant generally loses their protections under the Act if a court is satisfied that either: <ul style="list-style-type: none"> the complainant gave false or misleading information to the person investigating the complaint the complaint is vexatious. |
| | Liability for own conduct | Under section 38 of the PID Act, a person's liability for their own conduct is not affected by the person's disclosure of that conduct under the Act. | Under section 291 of the IC Act, a person's liability for their own conduct is not affected by the person's disclosure of that conduct under the Act. |
| | Confidentiality Notice | There is no equivalent under the PID Act. | Part 3.2 of the IC Act allows the Integrity Commission may issue a confidentiality notice to a person involved in an investigation that restricts that person from disclosing any restricted information. |

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Discussion

11. Should the PID Act and IC Act remain separate, or be combined into one piece of legislation?

Whether decisions by the Integrity Commissioner about PIDs are reviewable

A further question raised by the Canberra Liberals during debate for the Public Interest Disclosure Amendment Bill 2020 was whether the PID Act should include a mechanism to review a decision of the Integrity Commissioner as to whether a disclosure of disclosable conduct is a public interest disclosure.

Issues

The Justice and Community Safety Committee (Legislative Scrutiny Role) (Committee) for the Ninth Legislative Assembly noted concern in its scrutiny report on the Bill that there was no avenue for merits review of a decision made by the Integrity Commissioner as to whether a disclosure was a PID.⁶⁷ The Government, in its response, stated that, given the nature of the Commissioner's role, combined with the fact that the Commissioner's decisions under the IC Act were not reviewable, it would not be appropriate to include provisions in the Bill for review of the Commissioner's decision that a matter was or was not disclosed in the public interest.⁶⁸ It should be noted that the Inspector of the Integrity Commission does have capacity to scrutinise actions of the Commission.⁶⁹

The PID Act and the IC Act do not have a mechanism for internal merits review of a decision made under those Acts. However, there are mechanisms to lodge a complaint about the conduct of the Commission⁷⁰. Administrative decisions made under each Act are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989*, as neither piece of legislation is excluded from judicial review under that Act. This would likely include a decision by the Commission that a disclosure was a disclosure made under the public interest.

In considering the proposal, thought needs to be given as to who would conduct a merit review of a decision made by the Integrity Commissioner on whether a matter was a public interest disclosure. An appropriate option may be the Ombudsman; however, the Ombudsman is already a disclosure officer under the PID Act and exercises certain review functions under section 34 of the PID Act, such as the conduct of an investigation (but does not have the power to substitute decisions or outcomes under section 34). The *Public Interest Disclosures Act 2022* (NSW) may provide some guidance on this matter, as it provides that a maker of a disclosure may apply to an agency for internal review of a decision by the agency that a disclosure is not a public interest disclosure.⁷¹

Discussion

12. Should decisions by the Integrity Commissioner about whether a matter is a PID be subject to review?

⁶⁷ https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1541079/Report-41.pdf p 17.

⁶⁸ https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1539666/Response-Public-Interest-Disclosure-Amendment-Bill-2020.pdf p 3.

⁶⁹ *Integrity Commission Act 2018* s228.

⁷⁰ *Integrity Commission Act 2018* s257.

⁷¹ *Public Interest Disclosures Act 2022* (NSW) s60.

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13. Is it sufficient to have the ability to apply for review under the Administrative Decisions (Judicial Review) Act or should an internal review process within the Integrity Commission be added?

Definition of work-related grievances

Debate during the Public Interest Disclosure Amendment Bill 2020 also questioned the definition of ‘personal work-related grievance’ in section 8 of the PID Act.⁷²

Section 8 defines what is disclosable conduct, and specifically excludes matters that relate to a personal work-related grievance of the person disclosing the conduct. An example provided for what constitutes ‘personal work-related grievance’ is a decision relating to the employment, transfer, or promotion of the person.⁷³

In raising the proposal for consideration, former MLA Ms Dunne stated:

‘There have been significant PIDs related to employment and promotion, including the recruitment of a senior official in the Canberra Hospital, that I have spoken of in the past. In that case the person making the disclosure did not stand to make any personal gain, so it is not clear whether such a disclosure qualifies for a PID under the current provisions of this bill.’⁷⁴

Issues

Without knowledge of PID matters to which Ms Dunne was referring, it is difficult to consider the merits of the specific circumstances being raised.

It remains open for someone who is not the personal subject of a transfer or promotion decision to make a disclosure about transfer or promotion where they consider, as an example, nepotism is involved, and that it constitutes a form of maladministration. If it met the public interest test, an example would be a person who was involved in engaging their child to an SES position. Conversely, an employee disclosing the decision to terminate their own employment would not meet the criteria for disclosable conduct, as it directly relates to that person’s employment. Some of these decisions are non-reviewable decisions under the existing legislation, and the question arises whether it is appropriate to allow a review of the decision by the Integrity Commissioner when other usual review systems are specifically excluded. The distinction may be that the Commissioner would not be reviewing the decision on the merits but would instead be examining the making of the decision for any disclosable conduct that occurred in the decision-making process.

Discussion

14. Does the provision on work-related grievances (section 8) require further clarification?

Point of application of privilege and immunity

The final point raised by the Canberra Liberals in the debate of Public Interest Disclosure Amendment Bill 2020 was the issue of whether privileges and protections should apply to a person who in good faith makes a disclosure that is not considered to be a PID. During the debate, former MLA Ms Dunne

⁷² <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2212.

⁷³ Public Interest Disclosure Act 2012 s8.

⁷⁴ <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2212.

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noted that this ‘raises whether the discloser faces a risk of action for damages by making the disclosure in good faith in the first place.’⁷⁵

Issues

The protections for disclosers and witnesses only apply when disclosable conduct is accepted as a PID by the Integrity Commissioner.⁷⁶ No such protections or immunities enliven when a person makes an initial disclosure.

Limiting protections to the stage it has been accepted as a PID by the Integrity Commissioner may make some people hesitant to make a disclosure if they are uncertain about whether their matter will qualify. This is particularly relevant where the discloser is providing confidential or privileged material in support of their disclosure and may be subject to offences for disclosing confidential information.

Alternatively, enlivening protections upon initial disclosure could create a culture of over-reporting and sharing confidential information in support of minor or trivial disclosures, including workplace matters which do not qualify. This risk is somewhat mitigated if the protections only apply to disclosures that are made in good faith. However, good faith can be a difficult test to apply. Victoria,⁷⁷ South Australia⁷⁸ and the Commonwealth⁷⁹ give immunity from liability at the initial disclosure point with exceptions meaning no protections exist for vexatious or knowingly misleading claims.

Discussion

15. Are the current thresholds for protections and immunities in Part 7 of the PID Act sufficient?
16. Do those who make a disclosure require additional protections, especially from retribution or employment related consequences?
 - a. If so, what sort of protections should be available?

Application of section 44 offence to MLAs and journalists

The Integrity Commission has sought an amendment to clarify whether section 44 of the PID Act, which creates offences related to disclosure of protected information under the PID Act, applies to journalists and MLAs. Journalists and MLAs may receive information about disclosable conduct if a person has not been notified of an outcome of their disclosure within three months.⁸⁰ The Commission has suggested it does not appear that the provision applies to MLAs and journalists, and that this conclusion seems inconsistent with the legislative intention and policy position of allowing disclosures to MLAs and journalists.

Issues

Section 44 creates an offence for persons to whom the section applies for reckless disclosure and use of protected information under the PID Act. Protected information means information about a person that is disclosed to, or obtained by, a second person to whom the section applies because of the

⁷⁵ <https://www.hansard.act.gov.au/hansard/9th-assembly/2020/PDF/20200827.pdf> p 2212.

⁷⁶ *Public Interest Disclosure Act 2012* pt 7.

⁷⁷ *Public Interest Disclosures Act 2012* (Vic) s38.

⁷⁸ *Public Interest Disclosure Act 2018* (SA) s5.

⁷⁹ *Public Interest Disclosure Act 2013* (Cth) s10.

⁸⁰ *Public Interest Disclosure Act 2012* s27, s27A.

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exercise of a function under the PID Act by the second person or someone else. A person to whom the section applies includes a person who is or has been the Integrity Commissioner, or the Ombudsman, or a disclosure officer, or an investigating entity other than the Commissioner, or anyone else who has exercised a function under the PID Act.⁸¹

It is highly likely that section 44 does not apply to MLAs or journalists as they do not fit any of the categories of people to whom the section applies (as outlined above). There may be some argument that they are people who exercise a function under the PID Act, but this is doubtful as they are not exercising a function themselves by receiving information that a person who has made a disclosure chooses to provide them. The *Public Interest Disclosure Act 2010* (Qld), which includes similar disclosure provisions to a member of parliament or journalist, includes similar offence provisions that relate to people who exercise administrative functions under the Act.⁸²

The question raised by the Integrity Commission is whether section 44 should apply to journalists or MLAs. To apply this provision to MLAs and journalists may be contrary to the policy intent of allowing disclosure to them if a person who has made a disclosure has not received notification within three months. Allowing disclosure to a journalist or MLA facilitates a form of whistleblowing by providing for the disclosure at a point in time where there has been a lack of action, to a person who has the reach to publicly report on the matter in the public interest. This brings accountability to the timeframe for responding to a PID and reporting back the discloser.

Applying the disclosure offence provision to MLAs and journalists would restrict their ability to bring to light matters of alleged maladministration that are in the public interest. If they receive a report lawfully under the PID legislation, applying this provision to journalists and MLAs could limit certain information being publicised in the Assembly or by the media. However, questions arise as to whether the offence would apply if the disclosure by an MLA is covered by parliamentary privilege. Nonetheless, restricting certain disclosures may be desirable, for example, protected information is information about a person as opposed to an alleged maladministration so that specific people would not be identified at that stage. This may go some way to protecting the integrity of ongoing investigations, and avoiding reputational damage if the allegations are not substantiated.

Discussion

17. Should section 44 be amended to apply to journalists and MLAs?
18. Should any provisions be put in place to protect individuals from the risk of reputational damage if a public disclosure is made to a journalist or an MLA before the matter is investigated?

Requirement for head of entity to take action – Legislative Assembly

The Office of the Legislative Assembly has raised for consideration the interaction between the definition of head of a public sector entity, and the requirement for a public sector entity to take action under section 24 of the PID Act.

Section 24(1) requires that, where the head of public sector entity believes on reasonable grounds that disclosable conduct has occurred, is likely to have occurred or is likely to occur, the entity must:

⁸¹ *Public Interest Disclosure Act 2012* s44(6).

⁸² *Public Interest Disclosure Act 2012* (Qld) s65.

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- take action necessary and reasonable to prevent the disclosable conduct continuing or occurring in the future, and
- if an investigation of a public interest disclosure in relation to the disclosable conduct has been completed, the entity must discipline any person responsible for the disclosable conduct.

For the Office of the Legislative Assembly, MLAs and their staff, the head of the relevant public sector entity is the Clerk of the Legislative Assembly. This means that it becomes the function of the Clerk to determine whether conduct has occurred, is likely to have occurred, or is likely to occur.

Issues

Unlike other heads of public sector entities, the Clerk has neither an employment nor supervisory relationship with MLAs or their staff. This raises the question of the appropriateness of the arrangement for the Clerk to be considered the head of a Legislative Assembly entity for the purposes of PID Act obligations. These obligations include taking action to prevent the disclosable conduct occurring in the future, and taking appropriate disciplinary action if it is found the disclosable conduct occurred.⁸³

Outcomes determined by the Clerk under these provisions could raise issues about perceptions of the Clerk's impartiality and complicate other aspects of the Clerk's role.

At present, when MLA staff are alleged to have engaged in misconduct, the MLA will consider whether any disciplinary action is required following an investigation as the MLA is the person directly responsible for the staff member.⁸⁴ However, there may be situations in which it is inappropriate for the MLA to be making the determination about whether the disclosable conduct occurred and, if it did, what the repercussions should be.

Options for carrying out the obligations under the PID Act in relation to MLA staff could include the Standing Committee on Administration and Procedure (Standing Committee) or the Commissioner for Standards, currently Mr Ken Crispin, KC. The Commissioner for Standards is appointed by resolution of the Legislative Assembly to deal with complaints against MLAs and the Speaker, and to provide reports to the Standing Committee. As the entity responsible for making determinations about conduct matters involving MLAs, it may be appropriate that the outcome of a PID investigation for MLA staff be referred to the Standing Committee for determination and implementation. Unlike the Clerk, the Commissioner for Standards does not fulfill another government function, and all MLAs have agreed to be bound by the authority of the Commissioner for Standards through their acceptance of Continuing Resolution 5AA of the Legislative Assembly. This would result in less likelihood of a conflict of interest, and increased transparency. In order to adopt this solution, legislative change to the PID Act and a change to Continuing Resolution 5AA would be needed by the Legislative Assembly.

With regard to MLAs, a similar approach could be adopted, with the Integrity Commissioner either referring a PID about an MLA to the Commissioner for Standards or to the Standing Committee. The Committee could then report to the Assembly recommending any action to be taken consistent with section 24 of the PID Act. As for MLA staff, if either of these options was preferred for MLAs, legislative change to the PID Act and a change to Continuing Resolution 5AA would be required by the Legislative Assembly.

⁸³ *Public Interest Disclosure Act 2012 s24.*

⁸⁴ 'ACT Legislative Assembly Members' Staff Enterprise Agreement 2021-2022' section H.

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It may still be appropriate for the Clerk to investigate PIDs relating to the Office of the Legislative Assembly and its staff, given that the Clerk is the head of this entity.

Discussion

19. How should PIDs, particularly in relation to any disciplinary action, be handled for MLAs and their staff?
20. Should the head of a public sector entity be redefined to exclude the Clerk as the responsible entity with regard to MLAs and their staff?

Power to disclose information to third parties

The Integrity Commission has raised that the PID Act has no provision allowing for the dissemination of disclosed information to third parties for either information or intelligence purposes, even where it is manifestly in the public interest to do so.

Issues

Under section 44 of the PID Act, it is an offence for a person who has exercised a function under the PID Act to use protected information about a person or divulge protected information about a person. This offence does not apply where the information is used or disclosed:

- in accordance with the PID Act or another territory law
- in relation to an exercise of a function under the PID Act or another territory law
- in a court proceeding, or
- where the information is used or disclosed with the person's consent.

The closest equivalent power in the PID Act is section 19, which allows the Integrity Commissioner to refer the complaint to another entity for investigation. In addition, section 19 only applies to matters that have already been evaluated to be a PID under subsection 17A(3) or 27(4).

One important function of the secrecy provisions in the PID Act is to protect whistleblowers' privacy, so any amendments to allow the disclosure of information would need to be carefully implemented to maintain this core aspect of the legislation. However, in urgent circumstances where the life or safety of a person may be at risk, it may be important for the Commissioner to have the power to disclose particulars included in the complaint as soon as the information is received.

Discussion

21. Should there be a power in the PID Act to allow for the disclosure of information to third parties?
 - a. If yes,
 - i. in what circumstances should this power be enlivened?
 - ii. should the PID Act define which third parties may receive the disclosure of information?

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Reporting outcome of investigation to head of a public sector entity

The PID Act requires that the Integrity Commissioner must either investigate a PID themselves or refer the disclosure to an investigating entity for investigation.⁸⁵ An investigating entity includes the head of a public sector entity, the Head of Service, the Ombudsman, or the PSSC. The PID Act also requires the head of a public sector entity to take action necessary and reasonable to prevent a particular disclosable conduct continuing or occurring in the future, and if an investigation of a public interest disclosure is completed, discipline any person responsible for the disclosable conduct. However, the PID Act does not seem to allow the investigating entity to inform the head of a public sector entity to take this action if another investigating entity undertakes the investigation – that is, the head of a public sector entity would be unaware the disclosable conduct is occurring in their entity due to restrictions on information sharing.

Issues

Section 44 of the PID Act creates an offence if a person who has a function under the Act discloses protected information – that is, information about a person that is disclosed to, or obtained by, a person because of the exercise of a function under the Act. This may create issues if the Integrity Commissioner, or another investigating entity, undertakes an investigation into a matter that is unrelated to their particular public sector entity.

For example, the Integrity Commissioner may complete an investigation, but the Director-General of a Directorate is responsible (as head of the public sector entity) for implementing outcomes under section 24 of the PID Act. There is no clear provision in the PID Act that allows the Commissioner, without committing an offence under section 44, to share the outcome of the investigation with the Director-General so they may meet their obligations to take action under section 24 of the PID Act.

The PID Act places obligations on the investigating entity to keep the discloser⁸⁶ and the Integrity Commissioner⁸⁷ informed on the progress and outcome of an investigation, including any proposed action to be taken under section 24 of the PID Act. However, no clear provision exists for the relevant public sector entity to be informed of the outcome of the investigation so that the entity may meet its obligations under section 24. Disclosure may be authorised under section 44(3)(b), which allows disclosure in relation to the exercise of a function – noting that the investigating entity has a responsibility to inform the Commissioner and the discloser about action taken or proposed to be taken in response to the disclosable conduct,⁸⁸ and they may not do this unless they seek that input from the relevant public sector entity. However, this would require a function to be implied under the Act and this seems unlikely.

Discussion

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

⁸⁵ *Public Interest Disclosure Act 2012* s19.

⁸⁶ *Public Interest Disclosure Act 2012* s23.

⁸⁷ *Public Interest Disclosure Act 2012* s25.

⁸⁸ *Public Interest Disclosure Act 2012* s23(1)(b), s25(1)(c).

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Appropriate investigative entity for the Ombudsman

Stakeholders have raised whether it is appropriate for the PID Act to enable the Integrity Commissioner to investigate disclosable conduct in relation to the Ombudsman when, under the IC Act, the Ombudsman acts as the Inspector of the Integrity Commission.

Issues

The Ombudsman is covered by the definition in the PID Act of 'ACTPS entity', which includes a statutory office holder.⁸⁹ Consequently, if a person discloses disclosable conduct about the Ombudsman, the PID Act provides that the Integrity Commissioner may investigate the matter.⁹⁰

As the Inspector of the Integrity Commission, the Ombudsman has many functions in relation to overseeing the Commission, which include, to:

- receive, investigate, and assess complaints about the Commission and members of staff of the Commission⁹¹
- investigate any aspect of the Commission's operations, or any conduct of the Commissioner, or staff of the Commission,⁹² and
- recommend disciplinary action or criminal prosecution against the Commissioner or the staff of the Commission.⁹³

There may be an inherent conflict of interest (real or perceived) and it may be administratively inappropriate for the Integrity Commissioner to undertake an investigation under the PID Act into disclosable conduct against the Ombudsman (or a member of staff of the Ombudsman's office). However, it may also not be appropriate for another entity to undertake an investigation about disclosable conduct relating to the Ombudsman, as the Ombudsman has broad oversight of the ACTPS. In addition, there may be a broader issue concerning whether it is appropriate for investigations to be conducted by Territory entities into Commonwealth officers, and what jurisdiction should be responsible for any consequences flowing from such an investigation. It should be noted that while the Ombudsman is a Commonwealth officer, as the ACT Ombudsman and Inspector of the Integrity Commission, they are performing Territory functions.

A somewhat similar matter arises under the IC Act, which resolves the matter by requiring the Speaker to appoint a special investigator if an allegation of corrupt conduct is made against the Inspector, the Integrity Commission, or a member of staff of either entity.⁹⁴ This solution may also work for the PID Act, as it provides flexibility for the Speaker, or whoever is appropriate, to appoint an independent investigator to undertake the investigation.

⁸⁹ The Commonwealth Ombudsman is appointed as the ACT Ombudsman by virtue of s 28(3) of the *A.C.T. Self-Government (Consequential Provisions) Act 1988* (Cth).

⁹⁰ *Public Interest Disclosure Act 2012* s19.

⁹¹ *Integrity Commission Act 2018* s227(1)(b).

⁹² *Integrity Commission Act 2018* s228(a).

⁹³ *Integrity Commission Act 2018* s228(e).

⁹⁴ *Integrity Commission Act 2018* s286.

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Discussion

23. Who is best placed to undertake an investigation into disclosable conduct relating to the Ombudsman?
- a. Should the PID Act include a similar provision to the IC Act to allow a special investigator to be appointed for matters related to the Ombudsman?
 - i. If so, who should make the appointment?

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

The Integrity Commission has raised that section 27A(1)(b) may be confusing, as it is not clear that all three criteria listed in section 27A(1)(b) must apply to enliven the provision. Due to the potentially ambiguous wording, it may be thought that only one of the criteria under subsection (1)(b) need apply. As raised by the Commission, it is clear that the legislative intent in section 27A(1)(b) is that all three elements must apply to enliven the provision.

Issues

The current construction is understood to be a drafting convention in the ACT. Nonetheless, the Integrity Commission considers this paragraph would be improved by a small amendment to insert the word 'and' after subparagraphs (i) and (ii) to make it clear that s 27A(1)(b) is a tripartite requirement, and not a series of three alternatives.

Discussion

24. Should section 27A(1)(b) be amended to make it clear that all three elements are required, and that is not a list of three separate alternatives?

Complaints under both the PID Act and the IC Act

Some uncertainty exists as to whether a matter can be simultaneously classified as a PID under the PID Act and a corruption complaint under the IC Act. At present, when the Integrity Commissioner assesses a disclosure under the PID Act as not being a PID, the Commissioner may instead take the complaint to be a corruption complaint.⁹⁵ However, there is no specific provision either allowing or prohibiting the Commissioner from accepting a corruption complaint which has already been reported under the PID Act, or vice versa.

Issues

The absence of a specific provision on whether a matter may be both a PID and a corruption complaint may lead to situations where it is accepted under both schemes and classified as both. This could lead to issues in the interaction between the two Acts. For example, if a matter is accepted as a corruption complaint under the IC Act, the Commission may issue a confidentiality notice requiring the person to keep specific information confidential. This is enforceable through an offence provision. However, if the person also then recorded the same matter as a PID, they would be able (in specific circumstances)

⁹⁵ *Integrity Commission Act 2018* s59A.

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to disclose the information to a journalist or MLA and potentially protected from any civil or criminal liability.⁹⁶

It would also require that investigators comply with both sets of legislation – which could prove cumbersome and inefficient. In order to resolve these potential dilemmas, it may be appropriate to specify in the legislation that a matter cannot be both a PID and a corruption complaint, but that the discloser should identify under which Act they are making the complaint, or the investigator should identify under which legislation they are investigating.

A potential consequence of this would be that a person making a corruption complaint might not be covered by the protections in the PID Act, making it more difficult for whistleblowers to take complaints to another forum in the event that the investigating body either does not investigate the matter in a timely way, or does not take any action in the face of proven misconduct.

Discussion

25. Should the legislation be amended to specify that a complaint can only be investigated under either the PID Act or the IC Act, but not both?
 - a. If no, should a person be able to claim the protections under the PID Act in relation to disclosure made contrary to a requirement under the IC Act?

⁹⁶ *Public Interest Disclosure Act 2012* s27, 27A and 35.

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Attachment A – Table of 2019 PEG Report Recommendations

| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|---|---|---------------------|--|
| 1 | That the PID Act be amended as soon as possible to make clear its relationship to the IC Act and to provide that where matters and processes described in the IC Act are in conflict with the PID Act, the IC Act takes precedence. | The amendments in the <i>Public Interest Disclosure Amendment Act 2020</i> (Amendment Act) put in place a new system for dealing with disclosures under the <i>Public Interest Disclosure Act 2012</i> . They provide that the Integrity Commissioner is to receive reports of disclosable conduct and is then to either investigate those reports or refer them to an investigating entity. The amendments also allow the Commissioner to make guidelines and procedures, but do not specify how these procedures should interact with any guidelines and procedures made under the <i>Integrity Commission Act 2018</i> . See Recommendation 2 regarding the changes made to separate the jurisdictional reach of the PID Act and the IC Act. | Partially | The PEG Report does not make any specific suggestions for how this could be accomplished. The report states that ‘There would be benefit if people were clear when the Integrity Commission Act applies versus when the PID Act does. This is confused at present as the IC Act potentially covers a wider range of conduct than the PID Act, with substantial overlap’. This is dealt with by the changes made in relation to Recommendation 2 below. |
| 2 | Remove s 8(1)(a) from the definition of disclosable conduct in the PID Act as this conduct is covered by the IC Act. | Clause 5 of the Amendment Act inserts a new section 8 into the <i>Public Interest Disclosure Act 2012</i> . The Explanatory Statement notes that ‘The meaning of the term <i>disclosable conduct</i> in section 8 of the PID Act has been amended to remove overlap with the definition of <i>corrupt conduct</i> as set out in the IC Act. The focus of <i>disclosable conduct</i> is now on maladministration and substantial and specific | Yes | This implemented the PEG Report recommendation. |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|---|--|---------------------|-------|
| | | <p>dangers to public health or safety, or the environment.'</p> <p>The result of the amendment is that 'disclosable conduct' no longer includes 'conduct of a person that could, if proved –</p> <ul style="list-style-type: none"> (a) be a criminal offence against a law in force in the ACT; or (b) give reasonable grounds for disciplinary action against the person.' | | |
| 3 | <p>Amend the PID Act to provide that disclosure officers must only notify:</p> <p>3.1. the Integrity Commissioner of a disclosure under the PID Act, unless the disclosure relates to the Integrity Commissioner or Integrity Commission in which case the process in Part 5.2 of the IC Act applies.</p> <p>3.2. the discloser (if the discloser's identity is known) that the matter has been referred to the Integrity Commissioner.</p> | <p>Clause 11 of the Amendment Act inserts a new Part 3 into the <i>Public Interest Disclosure Act 2012</i>. This includes a substitution of section 17. While previously section 17 required the disclosure officer to tell various entities (including the Public Sector Standards Commissioner) about the disclosure, under the amended section 17, the disclosure officer now only has to give a copy of the disclosure to the Integrity Commission and inform the person who disclosed the conduct that this has been done (if the report was not made anonymously). This only applies where the disclosure is not about the Commission. The note to new section 17(1) refers the reader to section 26A for complaints that are made about the Commission.</p> <p>Clause 26 of the Amendment Act inserts new section 26A, which provides that, where a complaint is made about the Integrity</p> | Yes | |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|---|--|--|--|
| | | <p>Commission, the receiver of the complaint must give a copy of the disclosure to the Inspector of the Commission. New section 26A(3) states that a disclosure given to the Inspector is taken to be a complaint about the Commission which the Inspector can investigate under section 257 of the <i>Integrity Commission Act 2018</i>.</p> | | |
| 4 | <p>A disclosure officer need not refer a matter to the Integrity Commissioner if they have reasonable grounds to believe the matter does not come within the jurisdiction of the IC Act or the PID Act.</p> | <p>Under the previous section 17, a disclosure officer had to give notice of the disclosure to various entities. Clause 11 of the Amendment Act inserts a new Part 3 into the <i>Public Interest Disclosure Act 2012</i>, including new section 17. Under the new section 17, a disclosure officer must give a copy of the disclosure to the Integrity Commissioner only where the disclosure officer is satisfied on reasonable grounds that the disclosure is (a) about disclosable conduct, and (b) disclosed in good faith.</p> <p>The Explanatory Statement states 'A disclosure officer is required to satisfy themselves, on reasonable grounds, that the disclosure is about disclosable conduct (i.e. maladministration or substantial and specific dangers to public health or safety, or the environment) and that it has been disclosed in good faith'.</p> <p>The schedule to the Amendment Act, [1.4] inserts new section 59A into the <i>Integrity Commission Act 2018</i>. This new section provides that, where a</p> | <p>Partially – this has been superseded by policy direction regarding the Integrity Commissioner's jurisdiction at the assessment phase.</p> | <p>The recommendation is for a disclosure officer to consider whether the matter comes within the jurisdiction of the PID Act or the IC Act, while the implementation requires the disclosure officer to consider whether it is about disclosable conduct and is made in good faith. It is arguable that the need to consider whether the disclosure is about 'disclosable conduct' means the disclosure officer has to consider whether the report falls under the jurisdiction of the PID Act.</p> <p>It is the role of the Integrity Commissioner under the legislation to assess the complaint. If it falls under the IC Act definition of 'corrupt conduct', instead of the PID Act, the y Commissioner can still investigate it.</p> |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|--|--|---------------------|--|
| | | disclosure under the PID Act has been assessed by the Integrity Commissioner and found not to be a public interest disclosure, but instead may be corrupt conduct, it is taken to be a corruption complaint under section 57 of the IC Act. | | |
| 5 | Amend the PID Act to mirror s 70 IC Act to enable the Integrity Commissioner to dismiss, investigate, or refer to others with the ability to investigate an assessed PID matter. | Section 70 of the <i>Integrity Commission Act 2018</i> provides that the Integrity Commission must r dismiss, refer, or investigate each corruption report it receives. Clause 11 of the Amendment Act inserts new section 17A into the <i>Public Interest Disclosure Act 2012</i> , which allows the Integrity Commissioner to decide whether they are satisfied that the disclosure is a public interest disclosure. Clause 13 substitutes section 19, which allows the Commissioner to refer or investigate a disclosure, and section 20, which requires the investigating entity to investigate the disclosure, and specifies the grounds for the entity to end an investigation. | Yes | While section 70 of the IC Act isn't exactly mirrored in the PID Act, the elements are all contained within the legislation. |
| 6 | The Integrity Commissioner be given the responsibility to: 6.1. assess if something is a public interest disclosure under the PID Act. | Clause 11 of the Amendment Act inserts a new Part 3 into the <i>Public Interest Disclosure Act 2012</i> . Under new section 17A(2), the Integrity Commissioner must assess whether a disclosure referred to it is about disclosable conduct. Section 17A(3) then provides that if the Commissioner is satisfied of the criteria in | Yes | |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|--|--|---------------------|-------|
| | | subsection (2), the disclosure is taken to be a public interest disclosure. | | |
| | 6.2. determine if the IC wishes to investigate or otherwise take carriage of the response to the notification / complaint under the PID Act or the IC Act. | Clause 13 of the Amendment Act inserts new sections 18, 19 and 20 into the <i>Public Interest Disclosure Act 2012</i> . Section 18 provides that an 'investigating entity' for a complaint is the Integrity Commissioner, or an entity that the complaint is referred to by the Commissioner. For general complaints, new section 19(2) states that the Commissioner must either investigate the disclosure or refer it. Section 19(3) states that the Commissioner must investigate a disclosure related to a Legislative Assembly entity. The schedule to the Amendment Act [1.4] inserts new section 59A into the <i>Integrity Commission Act 2018</i> . This new section provides that where a disclosure under the PID Act has been assessed by the Integrity Commissioner and found not to be a public interest disclosure, but instead may be corrupt conduct, it is taken to be a corruption complaint under section 57 of the IC Act. | Yes | |
| | 6.3. either transfer the obligations to keep a person informed to the referral body, or to require the referral body to report to the Integrity Commission if the Integrity Commission is to be the point of contact for the person who made the notification. | Clause 13 of the Amendment Act inserts new section 19A into the <i>Public Interest Disclosure Act 2012</i> . Section 19A states that where a disclosure is to be investigated, the Integrity Commissioner must tell the discloser who the investigating entity for the complaint will be. In addition, | Yes | |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|--|---|---------------------|---|
| | | <p>clause 14 inserts new section 23, which provides that the investigating entity must keep the discloser informed of specific matter.</p> | | |
| | <p>6.4. advise the person who made the notification and the disclosure officer whether further communication is the responsibility of the Integrity Commission or the referral agency.</p> | <p>New section 19A states that where a disclosure is to be investigated, the Integrity Commissioner must tell the discloser who the investigating entity for the complaint will be. In addition, clause 14 of the Amendment Act inserts section 23 which provides that the investigating entity must keep the discloser informed of specified matters.</p> <p>New section 17B provides that where a disclosure is taken not to be a public interest disclosure, the Commissioner must inform the disclosure officer and the person making the disclosure.</p> | <p>Partially</p> | <p>No provision requires the disclosure officer to be informed where a matter is taken to be a public interest disclosure and then investigated. This may be a gap in the legislation, given that it requires the disclosure officer to be notified where a matter is taken not to amount to a public interest disclosure, but not whose responsibility further communication is.</p> <p>The amendments to the PID Act require that the discloser of the information be informed when a matter is investigated by the Integrity Commission or referred by the Commission to another investigating entity and is then required to be kept informed of the progress of the matter. However, the legislation does not specifically provide that the discloser be advised whose responsibility communication is. It seems to be assumed that the responsibility is with the investigating agency.</p> |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|--|--|---------------------|--|
| 7 | Amend s 18 of the PID Act so that the obligations on the head of a public sector entity to deal with the matter only arise once the matter is referred by the Integrity Commissioner. | Clause 13 of the Amendment Act inserts new sections 18 and 19 into the <i>Public Interest Disclosure Act 2012</i> . section 18 provides that the Integrity Commission is the investigating entity for a disclosure unless the Commission refers the investigation to another entity under section 19(2). Section 19(2) states that (for a disclosure about an entity other than a Legislative Assembly entity) the Commissioner must either investigate the matter or refer it for investigation to either the head of a public sector entity, the Head of Service, the Ombudsman, or the Public Sector Standards Commissioner. Subsection 19(4) requires the Commissioner to consult with the entity before referring a matter, and subsection 19(5) states that a copy of the disclosure and the details of the referrer must be given to the referred entity. | Yes | |
| 8 | There should be an obligation on those to whom the Integrity Commissioner refers matters to investigate consistent with Part 4 of the PID Act - with amendment to recognise that these obligations will only apply if a PID matter has been assessed by the IC and referred for investigation. | Part 4 of the <i>Public Interest Disclosure Act 2012</i> sets out how a public interest disclosure is to be dealt with and investigated. Clause 13 of the Amendment Act inserts new sections 18 and 20 into the PID Act. Section 18 creates the concept of an 'investigating entity' that will investigate a public interest disclosure, which will be either the Integrity Commissioner or a referred entity under new section 19(2). New section 20(1) provides that an investigating entity must (a) investigate | Yes | While not specifically worded as such, the creation of a new category of 'investigating entity' and linking the powers and responsibilities in Part 4 to the 'investigating entity' meets the intention of the PEG Report. |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|---|--|---------------------|---|
| | | the disclosure and (b) comply with the rules of natural justice and procedural fairness in relation to investigating the disclosure. Clause 14 inserts section 23, which provides that the investigating entity must provide certain updates to the discloser. | | |
| 9 | If the proposed role of the Integrity Commissioner under the PID Act is not adopted, if the Integrity Commissioner is dealing with a matter under the IC Act, he should be exempted from the requirement to notify the relevant agency head and others under s 17 of the PID Act. | N/A | N/A | Not applicable because the Amendment Act implemented most of the recommendations in relation to the role of the Integrity Commissioner. |
| 10 | A more expansive definition of maladministration be adopted, with consideration given to models in use in other jurisdictions. | Clause 5 of the Amendment Act inserts a new section 8 into the <i>Public Interest Disclosure Act 2012</i> , including a new definition of 'maladministration'. The new definition 'means conduct, a policy, practice or procedure that: (a) results in a substantial mismanagement of public resources or public funds; or (b) involves substantial mismanagement in the performance of official functions.' Under the previous legislation, 'maladministration' was defined as being 'an | No | The PEG Report recommendation calls for an expanded scope of conduct captured under maladministration in the PID Act. However, the amendments somewhat reduce the number of situations where the Act applies. The definitions in other States and Territories appear to be more expansive, sometimes significantly more so, than the newest ACT definition ⁹⁷ - |

⁹⁷ Tasmania's *Public Interest Disclosures Act 2002* (Tas) does not contain a definition of 'maladministration', though maladministration is part of the definition of 'improper conduct'. Northern Territory's *Independent Commissioner against Corruption Act 2017* (NT) and Western Australia's *Public Interest Disclosure Act 2003* (WA) do not refer to 'maladministration'.

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|----------------|---|---------------------|--|
| | | <p>action about a matter of administration that was—</p> <p>(a) contrary to a law in force in the ACT; or</p> <p>(b) unreasonable, unjust, oppressive or improperly discriminatory; or</p> <p>(c) negligent; or</p> <p>(d) based wholly or partly on improper motives.’</p> <p>The Explanatory Statement says ‘As maladministration is one of the main focuses of the PID Act, its meaning has been clarified in the amended section 8 to emphasise that it involves a substantial mismanagement of public resources or public funds or a substantial</p> | | <p>see Commonwealth,⁹⁸ NSW,⁹⁹ Queensland,¹⁰⁰ and South Australia.¹⁰¹</p> |

⁹⁸ *Public Interest Disclosure Act 2013* (Cth), section 29 – ‘maladministration’ includes conduct that is ‘(a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent’.

⁹⁹ *Public Interest Disclosures Act 2022* (NSW), dictionary – ‘serious maladministration’ means ‘conduct, other than conduct of a trivial nature, of an agency or a public official relating to a matter of administration that is— (a) unlawful, or (b) unreasonable, unjust, oppressive or improperly discriminatory, or (c) based wholly or partly on improper motives’.

¹⁰⁰ *Public Interest Disclosure Act 2010* (Qld), dictionary – ‘maladministration’ is defined as administrative action that ‘(a) was taken contrary to law; or (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or (c) was in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances; or (d) was taken— (i) for an improper purpose; or (ii) on irrelevant grounds; or (iii) having regard to irrelevant considerations; or (e) was an action for which reasons should have been given, but were not given; or (f) was based wholly or partly on a mistake of law or fact; or (g) was wrong.’

¹⁰¹ *Public Interest Disclosure Act 2018* (SA) refers to the definition of ‘maladministration in public administration’ in the *Ombudsman Act 1972* (SA), section 4 of which says it ‘(a) means— (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and (b) includes conduct resulting from impropriety, incompetence or negligence; and (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions’.

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| | | mismanagement in the performance of official functions’. | | |
| 11 | Amend Part 6 of the PID Act so that the functions of the Public Sector Standards Commissioners generally become functions of the Integrity Commissioner. | <p>Clauses 28 to 44 of the Amendment Act amend Part 6 of the <i>Public Interest Disclosure Act 2012</i> to change the functions from those of the Public Sector Standards Commissioner to the Integrity Commissioner.</p> <p>The Explanatory Statement for clause 28 states ‘These functions were previously assigned to the Public Sector Standards Commissioner, however, they are to be assigned to the Integrity Commissioner to reflect the Commissioner’s position as the pre-eminent integrity body in the ACT’.</p> | Yes | |
| 12 | Amend Section 13 (b) of the PID Act so that the functions that sit with the head of an entity under the PID Act are not assigned to the Clerk of the Legislative Assembly but rather the Integrity Commissioner, who may refer matters to the Parliamentary Standards Commissioner as appropriate. | <p>This was a request from the submission of the Clerk of the Legislative Assembly to the Select Committee on an Independent Integrity Commission in 2017.</p> <p>The PEG Report said, ‘We agree that the Clerk of the Legislative Assembly is not the appropriate investigating body for disclosures about the conduct of Members of the Legislative Assembly’ and said that the role should be taken by the Integrity Commissioner, who could refer to the Parliamentary Standards Commissioner or the Speaker as appropriate.</p> <p>However, a new section 18 provides that the Integrity Commission is the investigating entity</p> | Mostly outstanding – see discussion at page 27 and 28 of this discussion paper. | While section 13(b) of the Act was not amended, the substance of the recommendation was carried out as the investigation is no longer undertaken by the Clerk of the Legislative Assembly. The wording of section 13(b) may have been left unchanged as it includes the Clerk of the Legislative Assembly in the definition of ‘head’ of a public sector entity - however, this is unknown. As noted in the previous column, this review is considering the proposal and interested to receive stakeholder feedback. |

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| | | <p>for a disclosure unless the Commission refers the investigation to another entity under section 19(2). New section 19(3) then states that 'If the public interest disclosure relates to a Legislative Assembly entity, the integrity commissioner must investigate the disclosure.' Under the previous legislation, section 18(1) stated that 'If a disclosure officer receives a public interest disclosure, the head of the public sector entity to which the disclosure relates must investigate the disclosure.'</p> <p>The changes to section 19(2) were made following Government amendments to the Bill. The Supplementary Explanatory Statement provides 'The amendment to section 19(2) removes the provision that enables the Integrity Commissioner to refer a disclosure relating to a Legislative Assembly entity to the Legislative Assembly commissioner for standards (formerly referred to as Parliamentary Standards Commissioner). The amendment to section 19(2) provides clarification that if a disclosure relates to a Legislative Assembly entity, it must only be investigated by the Integrity Commissioner and must not be referred.'</p> | | |

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| 13 | The PSSC not be notified of a disclosure under s 17 that relates to a Member or staff of the Legislative Assembly. | Clause 11 inserts new Part 3 into the <i>Public Interest Disclosure Act 2012</i> . This includes a new section 17. While previously section 17 required the disclosure officer to tell various entities (including the Public Sector Standards Commissioner) about the disclosure, under the amended section 17 the disclosure officer now has to give a copy of the disclosure to the Integrity Commission and inform the person who disclosed the conduct that this has been done. | Yes | |
| 14 | The Head of Service is removed of the power to investigate disclosures under the PID Act about the Clerk. This power should be vested in the Integrity Commissioner, who may refer these matters to the Parliamentary Standards Commissioner. | New section 18 provides that the Integrity Commission is the investigating entity for a disclosure unless the Commission refers the investigation to another entity under section 19(2). New section 19(3) states that 'If the public interest disclosure relates to a Legislative Assembly entity, the integrity commissioner must investigate the disclosure.' The definition of 'Legislative Assembly entity' in the dictionary includes 'the Office of the Legislative Assembly'. Section 5 of the <i>Legislative Assembly (Office of the Legislative Assembly) Act 2012</i> states that the Office of the Legislative Assembly includes the Clerk. Therefore, any investigation about the Clerk must be undertaken by the Integrity Commission under section 19(3). The changes to section 19(2) were made following Government amendments to the Bill. | Yes | |

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| | | <p>The Supplementary Explanatory Statement provides ‘The amendment to section 19(2) removes the provision that enables the Integrity Commissioner to refer a disclosure relating to a Legislative Assembly entity to the Legislative Assembly commissioner for standards (formerly referred to as Parliamentary Standards Commissioner). The amendment to section 19(2) provides clarification that if a disclosure relates to a Legislative Assembly entity, it must only be investigated by the Integrity Commissioner and must not be referred.’</p> | | |
| 15 | <p>Amend the PID Act to introduce a public interest test so that the wrongdoing that is disclosed must affect others and be made genuinely in the public interest.</p> | <p>In the <i>Public Interest Disclosure Amendment Act 2020</i>, clause 5 of the Amendment Act amends section 7 so a ‘public interest disclosure’ is defined by reference to the conduct in set out in amended sections 17A(3) or 27(4). New section 17A(3) provides that where the Integrity Commissioner is satisfied that the disclosure is disclosed in the public interest and is not frivolous or vexatious (under 17A(2)), the disclosure is taken to be a public interest disclosure and ‘the protections in part 7 are taken to apply to the discloser for the public interest disclosure from the day the conduct was disclosed’.</p> | Partially | <p>The recommendation says that the wrongdoing disclosed ‘must affect others’, while the amendments to the Act only require it not relate to the personal work-related grievance of the discloser. The amendment also reflects the discussion of recommendation 15 in the PEG Report, which focussed on the possibility that a person may report conduct to derail disciplinary matters.</p> |

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| | | New section 8 specifies that ‘disclosable conduct’ does not include an action, policy or practice that ‘relates to a personal work-related grievance of the person disclosing the conduct’. | | |
| 16 | Amend s 7(1) of the PID Act to make it clear that disclosures made in good faith that the Integrity Commissioner assesses to be a public interest disclosure is afforded the protections of the Act. | As stated above, section 7 now defines a ‘public interest disclosure’ by reference to the conduct set out in amended sections 17A(3) or 27(4). New section 17A(3) provides that where the Integrity Commissioner is satisfied that the disclosure is disclosed in the public interest and is not frivolous or vexatious (under 17A(2)), the disclosure is taken to be a public interest disclosure and ‘the protections in part 7 are taken to apply to the discloser for the public interest disclosure from the day the conduct was disclosed’. | Yes | While the amendment does not specifically mention ‘in good faith’, the requirement for the Integrity Commissioner to see that that the disclosure was in the public interest and was not either frivolous or vexatious covers off on the intent of this recommendation. |
| 17 | Amend the Act so that protections are enlivened for both disclosers and witnesses if the Integrity Commissioner assesses a matter as a public interest disclosure. | Under newsection17 (2) and (3), if the disclosure is a) about disclosable conduct, b) disclosed in the public interest and c) not frivolous or vexatious, then the disclosure is taken to be a public interest disclosure. This assessment occurs before referral of the disclosure to an investigating entity (which occurs under new section 19). Clause 52 of the Amendment Act inserts new section 42A , which provides for protection of witnesses. The section applies where a person provides information ‘at the request of the | Partially | New section 42A, which provides for witness protections, doesn’t apply as soon as something is assessed as being a public interest disclosure under section 17A, but instead comes into effect when a) the matter has been referred to an investigating entity and b) the investigating entity has then made a request for information. Section 35 of the PID Act, which provides for immunity from liability, applies to a person who makes a public interest |

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| | | investigating entity for the public interest disclosure’. | | disclosure, so would apply immediately upon that determination being made. The same applies to section 36 (Protection from defamation action) and section 40 (Offence – taking detrimental action). |
| 18 | Amend s 7 (2) of the PID Act to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing. | Clause 5 of the Amendment Act inserts new sections 7 and 8. Some material was removed from section 7 and relocated in section 8, so while the recommendation refers to section 7(2) the amendment is actually found in section 8(2). The Explanatory Statement notes that ‘The meaning of <i>disclosable conduct</i> has also been amended to exclude personal work-related grievances which can be dealt with through other existing mechanisms.’ The result of this amendment was that the following was added: ‘However, disclosable conduct does not include an action or a policy practice or procedure of a public sector entity, or a public official for a public sector entity, that— | Partially | The amendment excludes conduct that ‘relates to a personal work-related grievance of the person disclosing the conduct’ – the recommendation was that this be solely related to the personal employment grievances (the new section does not specify solely), and that there be an exception for systemic wrongdoing (which is not included in the amendment). The PEG Report recommendation is in line with the wording used in the Moss Review recommendation for the Commonwealth PID Act ¹⁰² . The amendment is also much broader than the recommendation due to |

¹⁰² In 2016 Mr Philip Moss AM conducted a review of the *Public Interest Disclosure Act 2013* (Cth) (Moss Review). The Moss Review considered a similar issue in the Commonwealth context in relation to whether work-related grievances are in scope of a PID Scheme. The Moss Review concluded that PID Act (Cth) should redefine the scope of disclosable conduct to focus on fraud, serious misconduct, and corrupt conduct. This was not to suggest that agencies should ignore other forms of wrongdoing or workplace conflict. The Moss Review noted that such matters are better resolved through less formal processes available through existing administrative and statutory schemes, such as performance management, merits review, or disciplinary conduct procedures (<https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF>).

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| | | <p>(a) relates to a personal work-related grievance of the person disclosing the conduct; or (b) is to give effect to a policy of the Territory about amounts, purposes or priorities of public expenditure.'</p> | | <p>subsection 8(2)(b), which also excludes conduct which gives 'effect to' public expenditure policies of the ACT.</p> |
| 19 | <p>Part 7 of the PID Act is expanded to encompass protection for disclosers and those assisting disclosure investigation in appropriate circumstances.</p> | <p>Clause 52 inserts new section 42A which provides that a person is not subject to criminal or civil liability for giving information, producing a document, or answering a question in relation to a public interest disclosure where they have done so at the request of the investigating entity and the information is relevant. Subsection (2) states that this does not apply where the information relates to the person's own conduct.</p> <p>The Explanatory Statement says 'Section 42A has been inserted to extend the protections under the Act to witnesses, where those witnesses are called upon to assist an investigation. Section 42A protects a person from criminal or civil liability when they assist an investigation at the request of an investigating entity'.</p> <p>Clause 44 of the Amendment Act substitutes new section 34, which deals with the role of the Ombudsman. Under subsection (4), the Ombudsman is allowed to exercise the power in relation to a complaint of 'ensuring just outcomes for people who make public interest disclosures, including preventing and remedying</p> | Partially | <p>The PEG Report suggested in its discussion of this recommendation that the PID Act should confer a responsibility for a function of providing support to a discloser or a witness in an investigation as the circumstances require. This has not been included in the legislation, apart from the function being given to the Ombudsman, in some circumstances, to 'ensure just outcomes' for witnesses and disclosers. No additional powers are provided to the Ombudsman to carry out that function, either in the PID Act or the <i>Ombudsman Act 1989</i>.</p> |

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| | | <p>the effect of detrimental action taken against disclosers or witnesses because of a public interest disclosure'. However, under subsection (1), the Ombudsman is only entitled to act where the action taken in relation to the disclosable conduct is taken by the head of a public sector entity, the Head of Service or the Public Sector Standards Commissioner.</p> <p>In addition, none of the detrimental action powers under Part 7 apply to witnesses as subsection 40(2) says that, for the purposes of the Act, a person is considered to take detrimental action only if they take, or threaten to take, detrimental action against someone (a) the person has made, or intends to make, a public disclosure, or (b) the retaliator believes that a person has made or intends to make a public interest disclosure.</p> | | |
| 20 | <p>If the Integrity Commissioner has assessed something as a public interest disclosure, for a prosecution to succeed in relation to the disclosure of information under section 27, a burden lies with the prosecution to show that a disclosure was not in the public interest.</p> | <p>Clause 27 of the Amendment Act inserts new sections 27 and section 27A into the <i>Public Interest Disclosure Act 2012</i> which limit the circumstances in which a person may disclose disclosable conduct to a Member of the Legislative Assembly or a journalist. The previous section 27 allowed for disclosure in circumstances where 'an investigating entity has refused or failed to investigate the disclosure', but the new sections tie the right of disclosure to</p> | No | <p>The criminal offence which would most likely be used for prosecuting the release of information would be section 153 of the <i>Crimes Act 1900</i>, which makes it an offence to publish/communicate information that came into their possession by virtue of them being an office of the Territory. This offence applies if the information is published 'except to some person to whom he or</p> |

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| | | <p>time limits based around the communication of information from the Integrity Commission. The other criteria for disclosure are retained (though now split between sections 27 and 27A). The recommendation refers to when the Integrity Commissioner has assessed something as a public interest disclosure – this is provided for under new section 17A. Under subsections (2) and (3), if the disclosure is a) about disclosable conduct, b) disclosed in the public interest and c) not frivolous or vexatious, then the disclosure is taken to be a public interest disclosure. This assessment occurs before referral of the disclosure to an investigating entity (which occurs under new section 19). However, new sections 27 and 27A refer to disclosure about disclosable conduct, not a public interest disclosure (which was a prerequisite of the old section 27).</p> | | <p>she is authorised to publish or communicate it’.</p> <p>Under new sections 27 and 27A, a person is authorised to disclose the information if either the person ‘has not received the notice mentioned in section 17B or 19A within 3 months after the day the person disclosed the disclosable conduct’, or ‘the discloser is told under section 19A that the disclosure will be investigated, but is not told about the progress of the investigation under section 23 for more than 3 months’, or if there was an investigation which showed disclosable conduct occurred or was likely to have occurred and ‘the discloser is told by the investigating entity that no action will be taken in relation to the disclosable conduct under section 24 (Public sector entity must take action)’.</p> <p>There is nothing in either the Crimes Act or the PID Act which would suggest that the prosecution has a burden to show that a disclosure was not in the public interest for the prosecution to succeed.</p> |

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| 21 | Relevant provisions in the IC Act regarding natural justice are replicated in the PID Act. | <p>Clause 13 inserts new section 20 which provides that an investigating entity for a public interest disclosure must 'comply with the rules of natural justice and procedural fairness in relation to investigating the disclosure'.</p> <p>Section 188 of the <i>Integrity Commission Act 2018</i> specifically sets out that if a report relates to a person or public sector entity, the person or public sector entity must be given a copy of the report and must provide them with six weeks to give comments on the proposed report.</p> | Yes | <p>In the PEG Report recommendation discussion, the point was made that specifically the provisions of section 188 of the IC Act should be replicated in the PID Act.</p> <p>While the amendments to the PID Act don't specifically set out that an affected person is to be given the report or that they a set time to provide comments, new section 20 states that the investigating entity must comply with the rules of natural justice and procedural fairness. The Australia Law Reform Commission, in its report 'Procedural Fairness: The Duty and its Content'¹⁰³ states that procedural fairness usually consists of two rules: the rule against bias, and the fair hearing rule. The fair hearing rule includes prior notice that a decision that may affect a person's interests will be made, disclosure of the critical issues to be addressed, and a substantive hearing with a reasonable opportunity to present a case. This would seem to incorporate the substance of section 188 of the IC Act.</p> |

¹⁰³ <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/14-procedural-fairness-2/procedural-fairness-the-duty-and-its-content/>

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| 22 | Section 37 of the PID Act should be amended to provide that the protection provided by s 36 is forfeited in respect of any part of the disclosure that is made dishonestly or vexatiously. | Clauses 48,49 and 50 of the Amendment Act amend section 37 of the <i>Public Interest Disclosure Act 2012</i> so that the loss of protection which applies when a person makes a false, misleading or vexatious complaint also applies if only part of the disclosure was false, misleading or vexatious. | Yes | |
| 23 | The PID Act assign a function of capture and reporting of public interest disclosure matters. This be undertaken in a coordinated, whole of service function, and deliver agency specific insights and trends. | Clause 58 of the Amendment Act inserts new section 45 into the <i>Public Interest Disclosure Act 2012</i> , which sets out the annual reporting obligations of the Integrity Commissioner. New section 45(1)(a) provides for the number of disclosures to the Integrity Commissioner under section 17 to be reported. | Partially | While the PID Act captures all matters reported to the Integrity Commission, it does not provide for reporting by disclosure officers who make the first assessment as to whether a matter should proceed to the IC under section 17(1)(b). This means we don't know how many matters are reported internally but never make it to the IC. As the recommendation points out, implementing this would allow us to analyse agency specific trends and better target educational material. However, there would be an administrative cost in setting up the data collection process and a staff time cost in ensuring the capture of the data. |
| 24 | The Integrity Commissioner, if assigned the roles recommended above, take carriage of these reporting responsibilities. | New section 45 into the <i>Public Interest Disclosure Act 2012</i> , which sets out the annual reporting obligations of the Integrity Commissioner. | Partially | The Integrity Commissioner is given the obligation of reporting data under the PID Act annually, but not necessarily all the reporting responsibilities mentioned in the PEG Report. These omissions are dealt |

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| | | | | with in other specific recommendations, so no action is required here. |
| 25 | The PID Act (or Regulations as appropriate) require the following to be reported with regard to information being presented as non-identifying and maintaining confidentiality: 25.1. Under which part of the definition of disclosable conduct in s 8 is a report made. | Clause 58 of the Amendment Act inserts new section 45 into the <i>Public Interest Disclosure Act 2012</i> , which sets out the annual reporting obligations of the Integrity Commissioner. | No | None of the required reporting elements include which element of ‘disclosable conduct’ the report was made under. The PEG Report in its discussion of recommendation 25 said this lack of information was most concerning, because it was not clear what types of disclosable conduct were being reported. |
| | 25.2. For each matter: 25.2.1. was the matter dismissed, referred or investigated 25.2.2. for investigations, which entity investigated 25.2.3. what was the outcome or determination of investigations 25.2.4. whether the report was made anonymously, by an ACTPS member or external person 25.2.5. were the requirements to keep relevant parties informed met. | As noted above, new section 45 sets out the annual reporting obligations of the Integrity Commissioner. 25.2.1. – New section 45(1)(c) provides for the number of disclosures not taken to be public interest disclosures under section 17(3) be reported; (1)(e) provides for the number referrals made by the Integrity Commissioner under section 19 to be reported; (1)(f) provides for the number of investigations under section 20 to be reported. 25.2.2. – New section 45(1)(e) provides for the number of referrals made by the Integrity Commissioner under section 19 to be reported but does not provide for reporting of which entity investigated each matter. | 25.2.1. Yes 25.2.2. Partially 25.2.3. Yes 25.2.4. No 25.2.5. No | If it is considered that the missing elements of the reporting could be useful in evaluating the effectiveness of the PID Act, then we would need to discuss with the Integrity Commission how additional data might be captured and what impost that might have upon the Commission administratively. |

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| | | <p>25.2.3. – New section 45(1)(f) provides for the number of investigations undertaken under section 20 to be reported, including whether the public interest disclosure was about disclosable conduct, and the number of investigations ended under section 20 and the grounds for ending each investigation.</p> <p>25.2.4. – There is no provision in new section 45 for the reporting of which category of person made a report.</p> <p>25.2.5. – There is no provision in new section 45 for the reporting of whether the requirements to keep parties informed were met.</p> | | |
| | <p>25.3. How often the following sections of the Act are used:</p> <p>25.3.1. s 27 (3) - disclosure to an MLA or journalist (if known)</p> <p>25.3.2. s 40 - offence detrimental action</p> | <p>As noted above, new section 45 sets out the annual reporting obligations of the Integrity Commissioner.</p> <p>25.3.1. – There is no provision in new section 45 for the reporting of how often disclosures to MLAs or journalists were made.</p> <p>25.3.2. – New section 45(1)(k) provides for the reporting of how many prosecutions were undertaken under section 40 for the offence of taking detrimental action.</p> | <p>25.3.1. No</p> <p>25.3.2. Yes</p> | <p>If it is considered that the missing elements of the reporting could be useful in evaluating the effectiveness of the PID Act, then we would need to discuss with the Integrity Commission how additional data might be captured and what impost that might have upon the Commission administratively. For this particular missing element, it could be that it would be too burdensome to capture as the disclosures to MLAs or journalists would be made by the discloser, not the</p> |

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| | | | | Integrity Commission, and it may not even be reported to the Integrity Commission. |
| 26 | Reporting occurs both in aggregate and at the ACTPS administrative unit or other public entity as defined in s 9 of the Act level. | New section 45 sets out information that must be included in the Integrity Commissioner's annual report for each year. No other provisions require reporting by any other entity. | No | There are no provisions in the amendments which require reporting at the ACTPS administrative unit or public entity level, but only by the Integrity Commissioner. Given that most matters have to be reported to the Integrity Commissioner, it may be redundant to have reporting at the ACTPS level as well, though it would be good to at least capture the number of matters reported that don't then get referred to the Integrity Commissioner. |
| 27 | Remove s 11 (2) and (3) which requires a disclosure officer to be declared via a notifiable instrument. Replace this with a requirement for the information to be publicly available on an agency website, in annual reports, and provided to the Integrity Commissioner for central publication. | Clauses 8 and 9 of the Amendment Act amend section 11 of the <i>Public Interest Disclosure Act 2012</i> . Section 11 now provides that disclosure officers can be notified instead of declared. In the previous incarnation of the Act, a declaration was a notifiable instrument under section 11(3). Section 11 also provides that each public sector entity must nominate at least one person to be a disclosure officer, must publish the disclosure officer's contact details on the entity's website, and must give the person's details to the Integrity | Partially | While the legislation provides for the disclosure officer details to be publicly available on the agency website, and provided to the Integrity Commissioner for central publication, the legislative amendments do not require the information to be available in annual reports. |

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| | | Commissioner. The Commissioner must then publish those details on their website. | | |
| 28 | The Integrity Commissioner be empowered to issue guidelines (s 32) and procedures under the PID Act instead of the Public Sector Standards Commissioner. | <p>Clauses 42 and 43 of the Amendment Act respectively amend the heading and content of section 32 of the <i>Public Interest Disclosure Act 2012</i>. The changes state that the Integrity Commissioner must make guidelines about certain topics.</p> <p>The Explanatory Statement provides 'Under this section, the Integrity Commissioner is required to issues guidelines. This was previously the role of the Public Sector Standards Commissioner. The change reflects the role the Integrity Commission will have under the Act. As well as addressing the way in which public sector entities with disclosures of disclosable conduct and public interest disclosures, the guidelines must also address the way public interest disclosures are investigated.'</p> <p>The Supplementary Explanatory Statement, which was issued after Government amendments were made to the Bill, notes that amendments were made to section 32 to provide that the Integrity Commissioner must make guidelines for members of the Legislative Assembly dealing with giving disclosure of disclosable conduct and PID conduct to MLAs and journalists.</p> | Yes | <p>The content of new section 32(1) is broader than the PEG recommendation, in that it adds in guidelines about the way investigating entities investigate public interest disclosures and guidelines for the way MLAs are to deal with disclosures to MLAs and journalists.</p> <p>It's worth considering whether this should stay with the Integrity Commissioner if the PIDs are relocated back to the Public Sector Standards Commissioner. One argument is that subsections (a) and (c) do not sit well with the PSSC, and the Integrity Commissioner has expertise in this area that can be utilised in making the Guidelines.</p> |

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| 29 | Amend s 33 to provide that the standard procedures issued by the Integrity Commissioner are the procedures of an agency unless the Commissioner approves alternative guidelines. | <p>Clause 44 of the Amendment Act inserts new section 33 which requires the Integrity Commissioner to make procedures for dealing with disclosures of disclosable conduct and public interest disclosures. These procedures must include clear obligations on public sector entities and their public officials to take action to protect disclosers for public interest disclosures, and risk management steps for assessing and minimising detrimental action.</p> <p>The Explanatory Statement says 'Section 33 requires the Integrity Commission to make procedures for dealing with disclosures of disclosable conduct and public interest disclosures. This was previously the responsibility of heads of public sector entities and the heads of public sector entities were required to obtain approval for their entity's guidelines from the Public Sector Standards Commissioner. To streamline the process and provide consistency in process across public sector entities, public sector entities will adopt the procedures issued by the Integrity Commissioner'.</p> | Partially | The recommendation is that section 33 provide that the procedures issued by the Integrity Commissioner are by default the procedures of the agency. However this isn't explicitly stated in the legislation. Instead, the Explanatory Statement says that the intention is that 'public sector entities will adopt the procedures issued by the Integrity Commissioner'. There doesn't really need to be a legislative requirement for a public sector entity to adopt a specific procedure, so as long as this is happening at a practical level. |
| 30 | The conduct of MLAs and their staff remain within the PID Act scope, with matters considered by the Integrity Commissioner in the first instance with | Clause 5 inserts section 8 into the <i>Public Interest Disclosure Act 2012</i> , which defines what disclosable conduct is covered by the Act. Disclosable conduct is defined as 'an action or a | Partially | While the conduct of MLAs and their staff remains within the scope of the PID Act, the changes to section 19 meant that the investigation into complaints of that nature must be carried out by the |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
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| | the ability to refer to the Parliamentary Standards Commissioner as appropriate. | <p>policy, practice or procedure of a public sector entity, or public official for a public sector entity'. 'Public Sector Entity' is defined in section 9 of the PID Act as including 'a Legislative Assembly entity'. 'Legislative Assembly entity' is defined in the Dictionary as including a member of the Legislative Assembly, the Office of the Legislative Assembly, or a staff member or officer of the Legislative Assembly.</p> <p>Clause 13 of the Amendment Act substitutes new sections 18, 19 and 20 into the PID Act. New section 18 provides that the Integrity Commission is the investigating entity for a disclosure unless the Commission refers the investigation to another entity under section 19(2). New section 19(3) then states that 'If the public interest disclosure relates to a Legislative Assembly entity, the integrity commissioner must investigate the disclosure'.</p> | | Integrity Commissioner. The legislation does not provide the ability for the Integrity Commissioner to refer to the Parliamentary Standards Commissioner. In the PEG Report discussion of recommendation 13, the Report noted that the Clerk of the Legislative Assembly had raised a potential separation of powers issues with investigations being carried out by the PSSC, because the PSSC also has investigative functions and provides advice to the Chief Minister under the <i>Public Sector Management Act 1994</i> . |
| 31 | The intended coverage of the private sector in the PID Act is clarified. | New section 8 removes the part of the definition of 'disclosable conduct' that refers to conduct of a person that could give rise to disciplinary action against the person. The definition of 'disclosable conduct' now only refers to 'an action or a policy, practice or procedure of a public sector entity, or public official for a public sector entity'. | Yes | The PEG Report recommendation discussion notes that the definition of 'disciplinary action' extends to non-employees of the ACT Public Services given its reference to 'terminating the person's contract for services'. Given the reference to disciplinary action has now been removed (given the individual conduct section of the definition of |

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| No | Recommendation | Actions taken following recommendation | Recommendation Met? | Notes |
|----|---|---|---------------------|---|
| | | | | 'disclosable conduct' has been removed), it seems clear that the Act does not apply to those in the private sector. |
| 32 | The requirement to provide integrity training and awareness be strengthened by requiring reporting under the Act to include information about integrity education, awareness and training opportunities offered and taken up. | New section 45 <i>provides</i> that the Integrity Commissioner must include in the annual report for each year 'information about education and training programs about disclosable conduct and public interest disclosures undertaken or coordinated by the integrity commissioner.' | Partially | Though technically the recommendation calls for the reporting of opportunities 'offered <u>and taken up</u> ', but the section only requires the reporting of programs undertaken or coordinated. This means that it is not possible to measure the impact of the outreach on a year to year basis by number of people attending. |
| 33 | The obligations that attach to a disclosure officer under section 17 should attach to anyone to whom a disclosure may be made. | N/A | N/A | The discussion for this recommendation in the PEG Report says that if the person to whom the disclosure is made is not a disclosure officer, they have no obligation to do anything with the disclosure. However, under the original Act, section 15 stated that disclosures could be made to people who weren't 'disclosure officers', but that then those people must give a copy of the disclosure to the disclosure officer, which in turn triggers section 17. |
| 34 | The PID Act be amended to include a clause for statutory review that aligns to the review of the IC Act, and that these Acts be reviewed concurrently, due to their significant interface. | Clause 60 of the Amendment Act inserts new section 48 into the <i>Public Interest Disclosure Act 2012</i> which requires the Minister, in consultation with the Speaker, to review the operation of the | Yes | |

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|----|--|---|---------------------|--|
| | | PID Act at the same time as, and in conjunction with, the review of the IC Act. | | |
| 35 | A future review of the PID Act consider the ongoing need for the matters dealt with in the PID Act to sit in separate legislation to the IC Act. | N/A | No | The PEG Report says 'Even with the extensive amendments we have suggested to the PID Act, we have not recommended that the PID Act be repealed and integrated into the IC Act given the IC Act is not yet operating and the importance of the Parliament in demonstrating a strong commitment to disclosing wrongdoing in the ACT. However, we would recommend that the ongoing need for a standalone PID Act be the focus of a future review, once the operation of the IC Act has commenced and any recommendations of this report are adopted'. |

Attachment B – Breakdown of Jurisdictional PID Scope

| Jurisdiction | Term | Definition |
|--------------|---------------------------------|--|
| Vic | Improper conduct ¹⁰⁴ | <p>Means:</p> <ul style="list-style-type: none"> • corrupt conduct, or • conduct by a public officer or body that constitutes: <ul style="list-style-type: none"> ○ a criminal offence, or ○ serious professional misconduct, or ○ dishonest performance of functions, or ○ an intentional or reckless breach of public trust, or ○ an intentional or reckless use of information or material acquired in the course or the performance of official duties, or ○ substantial mismanagement of public resources, or ○ a substantial risk to the health or safety of one or more persons, or ○ a substantial risk to the environment, or • conduct of any person that <ul style="list-style-type: none"> ○ adversely affects the honest performance of a public function, ○ is intended to adversely affect the effective performance by a public officer of the functions or powers of the public officer and results in the person, or an associate of the person, obtaining: <ul style="list-style-type: none"> ▪ a licence, permit, approval or other entitlement ▪ a statutory appointment ▪ a financial benefit or a real or personal property ▪ any other direct or indirect monetary or proprietary gain |

¹⁰⁴ *Public Interest Disclosure Act 2012* (Vic) s4.

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| Jurisdiction | Term | Definition |
|--------------|---|--|
| SA | Appropriate disclosure ¹⁰⁵ | The public officer reasonably suspects that the information raises a potential issue of corruption, misconduct or maladministration in public administration (maladministration is defined under the <i>Ombudsman Act 1972</i> (SA) ¹⁰⁶ . Environmental and health information means information that raises a potential issue of a substantial risk to the environment or to the health or safety of the public generally or a significant section of the public. |
| Qld | Public Interest Disclosure ¹⁰⁷ | Information about: <ul style="list-style-type: none"> • The conduct of another person that could, if proved, be <ul style="list-style-type: none"> ○ corrupt conduct, or ○ maladministration that adversely affects a person's interests in a substantial or specific way, or • a substantial misuse of public resources (other than alleged misuse based on mere disagreement over policy that may properly be adopted amounts, purposes or priorities of expenditure) • a substantial and specific danger to public health or safety, or • a substantial and specific danger to the environment |

¹⁰⁵ *Public Interest Disclosure Act 2018* (SA) s5.

¹⁰⁶ Maladministration means— (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and (b) includes conduct resulting from impropriety, incompetence or negligence; and (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions'.

¹⁰⁷ *Public Interest Disclosure Act 2010* (Qld) s 13.

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| Jurisdiction | Term | Definition |
|--------------|--|--|
| NSW | Serious Wrongdoing ¹⁰⁸ | Means one or more of the following: <ul style="list-style-type: none"> • Corrupt conduct • A government information contravention • A local government pecuniary interest contravention • serious maladministration • a privacy contravention a serious and substantial waste of public money |
| WA | Public Interest Information ¹⁰⁹ | <ul style="list-style-type: none"> • improper conduct, or • an act or omission that constitutes an offence under a written law, or • a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources, or • an act done or omission that involves a substantial and specific risk of <ul style="list-style-type: none"> ○ injury to public health, or ○ prejudice to public safety, or ○ harm to the environment • a matter of administration that can be investigated under section 14 of the <i>Parliamentary Commissioner Act 1971</i>. |

¹⁰⁸ *Public Interest Disclosures Act 2022 (NSW) s13.*

¹⁰⁹ *Public Interest Disclosure Act 2003 (WA) s3 (definitions).*

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| Jurisdiction | Term | Definition |
|--------------|------------------------------------|---|
| Cth | Disclosable conduct ¹¹⁰ | <ul style="list-style-type: none">• Conduct that contravenes a law of the Commonwealth, a State or a Territory• Conduct, in a foreign country, that contravenes a law that is in force in the foreign country, and is applicable to the agency or official, and corresponds to a law in force in the ACT• Conduct that perverts or attempts to pervert the course of justice• Conduct that constitutes maladministration, including conduct that is based in whole or part on improper motives, is unreasonable or unjust or oppressive, or is negligent• Conduct that is an abuse of public trust• Conduct that results in the waste of relevant money or relevant property• Conduct that unreasonably results in a danger to the health or safety of one or more persons, or unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons• Conduct that results in a danger to the environment, or results in, or increases, a risk of danger to the environment |

¹¹⁰ *Public Interest Disclosure Act 2013* (Cth) s29.