



Speaker

Mr Ian Govey AM

Independent Reviewer, *Integrity Commission Act 2018* and *Public Interest Disclosure Act 2012*

By email: icactreviewsecretariat@act.gov.au

Dear Mr Govey,

Thank you for your letter dated 05 May 2023 inviting me to make a written submission on matters raised in the *Integrity Commission Act 2018* and *Public Interest Disclosure Act 2012* discussion papers.

I wish to make comment specifically relating to discussion paper titled 'Operational Matters' as they relate to subsection 50(2) of the *Integrity Commission Act 2018* (the IC Act) concerning the employment of former ACT public servants, MLAs, and their staff.

This discussion paper looks at the removal/amendment of existing legislative provisions as they apply to the employment of former ACT public servants, it is further inferred in this discussion paper, that any changes to the IC Act as they relate to employment matters, may also extend to former MLA's and their staff. This paper poses the question of either the Inspector, or the Speaker, having some interaction with respect to decision making for employment of former public servants, MLAs and/or their staff.

It is worth noting that I am supportive of removing the existing prohibition on employment of former ACT public servants and note that the ACT is the only jurisdiction with such an exclusion period. I reserve my judgment in relation to the employment of former MLA's and/or their staff.

I wish to raise concerns with the elements of Option 2 of the discussion paper in so far as the Speaker's inclusion in any vetting process. I put to the review team that such inclusion could place the Speaker, whoever that may be at the time, at risk of accusations of political interference in the event decisions are made which are either favourable or unfavourable to former MLA's and/or staff. Additionally, it would be highly unusual for the Speaker to make determinations on the employment of public servants and does not occur in any current context in the role of Speaker.

Presently, the Speaker in making appointments to the position of Integrity Commissioner, is guided by Part 2.2 of the IC Act which articulates the process must be open and accountable and include consultation with party leaders and the relevant committee. To support an open and accountable process, the practice of engaging the Commissioner has included the establishment of an independent panel, supported by an external recruitment consultant, to interview candidates and provide the speaker with a selection report.

This process has allowed the Speaker to consult with party leaders and the committee and provide assurances that the process was open, accountable and arm's length from anything that could be construed or perceived as political interference. Furthermore, even though the IC Act articulates the Speaker must appoint a person as Integrity Commissioner, the process more accurately reflects the appointment is the ACT Legislative Assembly's appointment as per s25(3)(b) which requires a resolution of at least 2/3 of the Assembly members *must* agree to the appointment.

I am concerned that amending the IC Act in such a way that would see the Speaker having oversight, or involvement, in a vetting process as it relates to any other position than that of Commissioner, could lend itself to the suggestion of improper interference.

In respect of section A14 of the same discussion paper, I have as recently as 17 May 2023, re-appointed Mr John McMillan AO to the role of Acting Integrity Commissioner for a further period of six-months. As is relayed in the discussion paper, the same employment conditions which are applied to the position of Integrity Commissioner, are not necessary for the appointment of Acting Commissioner. In my view, this highlights the conditions imposed by the legislation for the position of Commissioner, could be amended to allow consideration of a suitable candidate outside of existing conditions such as occurs with the Acting Commissioner.

Further, the IC Act as it presently stands, places restrictions on the maximum time frame for appointment of Acting Commissioner (six-months), however, it does not restrict re-appointment of the same candidate. This unintentionally creates a process which is administratively burdensome and highlights the maximum timeframe is potentially insufficient. It could be more appropriate to amend the legislation to include a longer timeframe for an acting appointment.

This discussion paper identifies the Integrity Commissioners preference to reduce the existing six-week timeframe provided to persons named in commission reports, be reduced to four-weeks. Pursuant to s 212(3) of the IC Act, the Commissioner identifies the Speaker as a person who has direct interest in reports and may wish to provide comment within the six-week timeframe. Accordingly, the time frame around receipt and reply, whilst unlikely to be impactful on the role of speaker, is one which I have an interest in. I have no objections to the Commissioner's preference to reduce this time frame from six to four-weeks.

In discussion paper titled *Integrity Commission Purpose and Jurisdiction*, the review poses the possibility of legislated reporting on assessment timeframes. I am supportive of this proposal and believe that any amendments which seek to provide transparency, accountability and oversight of Commission investigations and reports, serve to give confidence to the community and the Assembly.

Point 9 of this discussion paper, namely 'Coverage of MLA Conduct', looks at the question of MLA coverage in the event of serious or corrupt conduct, and the extension of such coverage to the IC Act. It is my view this would amount to unnecessary duplication given MLA conduct is covered in existing process.

Continuing Resolution 5 of the Legislative Assembly Standing Orders, sets out the Code of Conduct for all MLA's and further, Continuing Resolution 5AA provides the appointment of a Legislative Assembly Commissioner of Standards, which states:

- (6) If the Commissioner receives a complaint about a Member pursuant to paragraph (5) and the Commissioner believes on reasonable grounds that—
- (a) there is sufficient evidence as to justify investigating the matter; and
 - (b) the complaint is not frivolous, vexatious or only for political advantage;

the Commissioner may investigate the matter and report to the Committee. If the Commissioner considers that the complaint is more properly the purview of the Integrity Commissioner, the Commissioner shall refer the matter to the Integrity Commissioner.

I am confident the process in place sufficiently and explicitly provides appropriate avenue for referral by the Commissioner for Standards to the Integrity Commission in the event such action is warranted.

In discussion paper titled *Integrity Commission Powers*, it is the Commissioner's view that the IC Act should be amended to allow for obtaining material in a person's custody. I am concerned that the extension of this power could inadvertently see a public servant caught up in a matter of privilege through incidentally having possession, custody, or control over a document, which conceivably may have been produced for Assembly related matters and therefore would potentially be privilege information.

Privilege is of course a complex legal issue, and it is not inconceivable to think that a person could have a document or thing in their custody without realising the privilege implications that could be attached to the document.

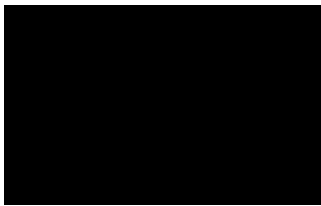
As you would be aware, the Assembly passed amendments to the IC Act in 2022 through the *Integrity Commission Amendment Bill 2022*. The purpose of this amendment was specifically to remove the unintended risks associated with disclosures which could amount to a breach of privilege relating to the Assembly, and to enshrine the protection of privilege afforded to MLAs in their duties. The Commissioner's proposals, in my view, could present the same risks as were anticipated with this amendment.

The Assembly, in creating the legislation to support the Integrity Commission, was very clear with the intentions of the Commission. The Chief Minister in his explanatory statement on the *Integrity Commission Bill 2018* Exposure Draft, stated that the exposure draft "...ensures the functions of the body are delineated and clearly defined and cognisant of existing independent oversight bodies". The Chief Minister further stated, "The new Integrity Commission complements the ACT's existing strong structure of public sector oversight, ensuring a highly transparent and professional territory administration. These existing bodies include ACT Public Sector Standards Commissioner, ACT Legislative Assembly Commissioner for Standards, ACT Legislative Assembly Ethics and Integrity Advisor, ACT Human Rights Commission, the ACT Auditor-General and ACT Ombudsman as well as staff Codes of Conduct and Ministerial Standards".

Notwithstanding the very clear intention of the Assembly to create an Integrity Commission with the legislative scope to investigate, refer and report on matters of corruption and maladministration, the Assembly was also very intentional with the powers afforded and the jurisdictional scope of these powers. I hold concerns that some of the Commission's amendments go beyond this intended scope and should they be adopted and implemented, would fundamentally change the model of Commission that was intentionally created.

Thank you again for the opportunity to contribute to this important review.

Sincerely,



Joy Burch, MLA
Speaker