

A2346900

7 July 2023

Mr Ian Govey AM
Independent Reviewer, *Integrity Commission Act 2018*

By email: icactreviewsecretariat@act.gov.au

Dear Mr Govey

Review of the *Public Interest Disclosure Act 2012* – Discussion paper

Thank you for the opportunity to provide a written submission on the discussion paper developed to consider amendments proposed to the *Public Interest Disclosure Act 2012 (PID Act)*.

As the ACT Ombudsman (**Ombudsman**) and Inspector of the ACT Integrity Commission (**Inspector**), I make the following comments on the topics most relevant to my positions as the Ombudsman and Inspector.

Discussion questions 12 and 13: Whether decisions by the Integrity Commission about PIDs are reviewable

This part raises the issue of whether decisions of the Integrity Commissioner as to whether a disclosure is a public interest disclosure (**PID**) should be subject to review, including:

- whether the current regime of judicial review under the *Administrative Decisions (Judicial Review) Act 1989 (AD Act)* is sufficient
- whether a process of internal review by the Integrity Commission should be established, and
- whether such decisions should be subject to merits review, and if so, whether the Ombudsman would be an appropriate option for undertaking such merits review.

I support the capacity for a person to seek judicial review under the AD Act, and suggest this be retained.

Internal review processes work most effectively where the reviewer's position is senior to (or at level but independent of) the person who made the initial decision. Accordingly, an internal review mechanism may be worth considering, should the Integrity Commissioner be willing and able to delegate the power to make initial decisions on disclosable conduct. In this regard, I note that internal review, supported by internal guidance material, operates effectively in the Commonwealth PID regime, which I oversee as Commonwealth Ombudsman. Disclosers may or may not agree with the outcome of an internal review, but the internal review process does provide an opportunity for a better explanation of a decision to be given to a discloser, for a decision that is defective to be corrected, and to identify whether first instance decision-makers need to be given additional guidance.

As Inspector, I have the capacity to investigate any aspect of the Integrity Commission's operations or any conduct of the Integrity Commissioner or staff of the Integrity Commission under s 228 of the *Integrity Commission Act 2018 (IC Act)*. This includes the Integrity Commission's operations with respect to handling disclosures under the PID Act. I consider my existing powers under the IC Act provide an appropriate mechanism for oversight of the Integrity Commission's PID handling operations.

Given these existing mechanisms for oversight of the Integrity Commission's administrative handling of PIDs, I do not consider it necessary to amend the PID Act to allow for external merits review. I note also that providing merits review may simply result in disclosers automatically pursuing it if they are dissatisfied with any aspect of the Integrity Commission process. On the other hand, judicial review is a more significant procedural process and would not be lightly undertaken, and also involves a higher threshold to overturn a decision. Should the concept of external merits review be progressed, however, it would be necessary to amend the legislation to enable the lawful dissemination of information to an external reviewer.

Discussion question 23: Appropriate investigative entity for the Ombudsman

This part considers whether it is appropriate for the Integrity Commissioner to investigate disclosable conduct that relates to the Ombudsman, given the Ombudsman acts as the Inspector of the Integrity Commission under the IC Act. Section 19(3) of the PID Act currently provides that the Integrity Commissioner must investigate a disclosure that relates to the Ombudsman if it is taken to be a public interest disclosure under ss 17A(3) or 27(4).

I have no concern with the investigation of PIDs against the Ombudsman. Should allegations of disclosable conduct be made against the Ombudsman or their staff, however, I do not consider it appropriate for an entity overseen by the Ombudsman to be responsible for assessing or investigating those allegations. This includes the Integrity Commissioner and the Integrity Commission. For this reason, I consider the PID Act should be amended to remove the requirement that the Integrity Commissioner must investigate a public interest disclosure that relates to the Ombudsman.

Noting the Ombudsman's broad oversight of the ACT public service and their role as Inspector, I support the premise of the Speaker appointing a special investigator to assess, and if necessary investigate, disclosures of disclosable conduct that relate to the Ombudsman or their staff. It may be appropriate to engage a similar model to the existing framework under the IC Act, which permits the Speaker to appoint a special investigator to investigate an allegation of corrupt conduct made against the Integrity Commissioner or Inspector.

In any investigation of disclosable conduct related to the Ombudsman or their staff, whether undertaken by a special investigator or otherwise, consideration will need to be given to the limitations on ACT officials in applying sanctions to Commonwealth officials exercising Territory functions. For example, if the disclosure related to the conduct of staff of the Ombudsman, it may be necessary to provide for a special investigator to report their findings and recommendations to the Ombudsman. If the disclosure related to the conduct of the Ombudsman, the special investigator could report their findings and recommendations to the Speaker, who may then refer the report to the Commonwealth Attorney-General.

I would be happy to provide you with further information or answer any questions about the points raised in this submission.

Yours sincerely



Iain Anderson
Inspector of the ACT Integrity Commission
ACT Ombudsman