

# Confidentiality, Information Sharing and Wellbeing Discussion Paper

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# Confidentiality, Information Sharing and Wellbeing

## Discussion Paper

### Overview

On 12 January 2023 the 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.

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

This discussion paper explores confidentiality, information sharing obligations where there may be danger to health, and wellbeing and witness welfare, including psychological assistance and expense reimbursement.

There has been significant examination of anti-corruption commission inquiries into mental health and well-being across jurisdictions, with both Victoria<sup>2</sup> and New South Wales<sup>3</sup> undertaking inquiries into what is considered best practice to promote witness wellbeing during an inquiry. The New South Wales report notes that their Inspector is aware of two witnesses who appeared before the Independent Commission Against Corruption (ICAC) who later took their own life.<sup>4</sup> Tragically, there have been instances of suicide across other jurisdictions as well, including Victoria.<sup>5</sup> The Independent Broad-Based Anti-Corruption Commission (IBAC) noted during the Victorian inquiry that a person's welfare may be negatively impacted as a consequence of being involved in investigative activities, including IBAC's exercise of coercive powers.<sup>6</sup> This can be further impacted through fear of reputational damage if an investigation report names specific people – even if only involved in the periphery of an investigation – is published.

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 there are points or matters missed, or stakeholders have other proposals they would like the review to consider.

Please provide any feedback via [ICActReviewSecretariat@act.gov.au](mailto:ICActReviewSecretariat@act.gov.au) no later than **COB Friday 2 June 2023**.

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

<sup>2</sup> <https://new.parliament.vic.gov.au/get-involved/inquiries/performance-of-victorian-integrity-agencies-202021>.

<sup>3</sup> <https://www.oipic.nsw.gov.au/assets/oicac/reports/audit-reports/20230222-Inspector-of-the-ICAC-Special-Report-2023-01-Audit-of-the-welfare-of-witnesses-and-other-people-involved-in-ICAC-investigations.pdf>.

<sup>4</sup> <https://www.oipic.nsw.gov.au/assets/oicac/reports/audit-reports/20230222-Inspector-of-the-ICAC-Special-Report-2023-01-Audit-of-the-welfare-of-witnesses-and-other-people-involved-in-ICAC-investigations.pdf> p3.

<sup>5</sup> <https://new.parliament.vic.gov.au/get-involved/inquiries/performance-of-victorian-integrity-agencies-202021> p 210.

<sup>6</sup> <https://new.parliament.vic.gov.au/get-involved/inquiries/performance-of-victorian-integrity-agencies-202021> p 56.

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### Wellbeing and access to mental health care

#### Existing confidentiality requirements

The review is aware that people subject to powers exercised by the Integrity Commission have experienced distress as a result of Commission processes. Distress can be caused by participating in standard practices required by the Commission in exercising functions, such as being examined as a witness, producing documents and other items such as technological devices, or being subject to the terms of a confidentiality notice. Broadly speaking, factors that can cause distress to witnesses include the lack of information available about who and what is under investigation, the requirement to disclose information especially information that is typically protected. Another significant impact on stress is the strict confidentiality requirements which prohibit people from accessing emotional support from their usual network of colleagues, friends, or family. This process can leave witnesses feeling isolated, require withholding information from family and colleagues to abide by the terms of the confidentiality notice, and result in fear about possible exposure. It can also result in excessive concern about a prior act or omission they fear may be under examination (even where this may objectively be trivial or outside jurisdiction of the Commission).

#### Permitted disclosures for confidential information

The IC Act provides a range of permitted disclosures of restricted information covered under confidentiality notices. These include:

- for the purposes of legal representation
- to an interpreter if one is needed to understand the notice
- to an independent person in case of illiteracy
- for minors to tell their parents
- for domestic partners and employers to be alerted to the need for attendance at the Integrity Commission in certain circumstances
- to deal with a claim of parliamentary privilege; and
- to make a complaint to the Inspector of the Integrity Commission.

Disclosures outside of those permitted under the IC Act constitute a breach of confidentiality which attracts a criminal penalty (currently either 50 penalty units, one year imprisonment, or both).

#### Expanding the range of permitted disclosures

The review is seeking views on extending permitted disclosures to health care professionals including general practitioners, mental health counsellors, and treating psychologists. Provisions to allow disclosure to a registered psychologist or health practitioner are not new – the *Independent Commission Against Corruption Act 1988* (NSW) allows for such permitted disclosures, and a recent Victorian Parliamentary Committee inquiry into the wellbeing management of integrity agencies made a recommendation to introduce a similar provision in the *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).

The Victorian Parliamentary Committee provided its report to the Victorian Government on 6 October 2022, and included several recommendations that may be relevant for consideration in the ACT:

- allowing a person who is subject to a confidentiality notice to disclose information to an online or telehealth mental health or counselling service

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- exploring the feasibility of a requirement to seek the consent of a person issued an examination summons to provide their details to a counselling service who would engage with the person directly to inform them of witness support services
- exploring the feasibility, with the person's consent, of regular wellbeing check-ins on the person after their witness examination by a third-party counselling service.

The Integrity Commission has included a similar proposal in its 2021-22 Annual Report.<sup>7</sup> The Commission has indicated that it has varied confidentiality notices to allow for this on a case-by-case basis. However, legislating the exception would allow every recipient of a confidentiality notice the right to support without needing to request it or requiring the Commission to vary each notice.

## Accessing psychological support

There may be issues regarding a person's access to psychological assistance. More often than not, those involved in an Integrity Commission investigation will be employed within the ACT Public Sector (ACTPS) – as that is the Commission's primary jurisdiction. In this scenario, the person will have access to the ACTPS Employment Assistance Program (EAP) which includes counselling, both through telehealth and in-person sessions, but will not be able to use the EAP unless the Commission varies their confidentiality notice to allow the disclosure. There may also be reasons why the employee does not wish to or can't access the EAP, such as if the employee has used their allotment, or is concerned about the impartiality and confidentiality of an employer-supplied counsellor.<sup>8</sup>

Not all people who attend the Integrity Commission for an examination or who are involved in an investigation will be ACTPS employees. The Commission's jurisdiction gives rise to situations where a person who is not employed in the ACTPS may be involved as a witness in an investigation. In this scenario, the individual's employer may not have an EAP program through which the person can access psychological assistance, or the person may not have an employer. In such cases the person may not be in a position to fund their own assistance.

## Access to a support person

Serious workplace disciplinary actions are typically required to allow a person to bring a nominated support person to meetings to provide moral and emotional support. The ability to bring a support person supports the notion of procedural fairness. There are examples where, in workplace disputes, refusal to allow a support person to attend has led to successful unfair dismissal claims.<sup>9</sup> In addition to promoting procedural fairness, permitting a support person to attend is designed to allow the person being interviewed to better engage with what is inevitably an intimidating process.

The IC Act does not expressly allow a support person to attend the Integrity Commission with a person summonsed to appear before it. Section 145 of the IC Act provides that the Commission may allow other persons authorised by the Commission to be present at an examination – arguably this may be

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<sup>7</sup> [https://www.integrity.act.gov.au/data/assets/pdf\\_file/0009/2085129/ACT-Integrity-Commission-2021-22-Annual-Report.pdf](https://www.integrity.act.gov.au/data/assets/pdf_file/0009/2085129/ACT-Integrity-Commission-2021-22-Annual-Report.pdf) p 86.

<sup>8</sup> Employees are automatically designated five EAP sessions per year, with a discretion for additional sessions to be granted by the employer. Getting this permission to attend additional sessions may be logistically difficult if the person is subject to a confidentiality notice and is not able to tell the employer the reason they require the additional sessions.

<sup>9</sup> *Dewson v Boom Logistics Ltd* [2012] FWA 9027 (Cambridge C, 24 October 2012); [2013] FWC 760 (Cambridge C, 5 February 2013).

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used to allow a witness to bring a support person. However, the review is interested to obtain feedback on whether the IC Act should expressly recognise the concept of a 'support person' within as a signpost to witnesses that this option may be available.

There may be a risk of jeopardising an investigation through the presence of a support person, and any knowledge they would gain in that capacity. For example, allowing another person in the room increases the potential for confidential information to be revealed. One way this may be mitigated would be for the Integrity Commission to approve support people before they attend after vetting the person for any conflicts of interest, bearing in mind that this may not be straightforward if the Commission is not aware of an investigation's scope and extent.

### Discussion

1. Should people by default be allowed to speak with a mental health professional without breaching the terms of a confidentiality notice?
2. Should the IC Act include, as a default position, provision for a person to bring a support person to a private and/or public examination conducted by the Integrity Commission?
  - a. If not, should a person be allowed to nominate a friend, relative or spouse to whom they can speak under the terms of the confidentiality notice (assuming that person is not also involved in the investigation)?
  - b. If so, should the IC Act impose any limitations on who may act as a support person and the approval process for a specific identified individual?
  - c. Should there be provision for an appropriate vetting and approval for a support person to attend an examination?
  - d. Does the risk that a witness-selected support person could jeopardise the investigation require the setting up of a dedicated pool of counsellors or other qualified people who may act as a support person for a witness during an examination?

### Access to reimbursement for expenses

The Integrity Commission has requested witnesses be provided with reimbursements for general expenses, such as accommodation and travel, when a witness is requested to appear in an examination before the Commission. This request extends to expenses related to document production; presently it is confined to appearances to give evidence at the Commission. The IC Act currently only allows for expense reimbursement related to an appearance before the Commission, not for costs associated with document production.

Section 172 of the IC Act provides that a witness prescribed by regulation appearing before the Integrity Commission at an examination is entitled to be paid an amount by the Territory for the expenses of the appearance, either in accordance with the Supreme Court scale of costs or the regulations. To date, no regulation has been made and so no witness is entitled to compensation under section 172.

The Territory currently provides reimbursement to witnesses in other matters, such as criminal trials and subpoenas. For witnesses in criminal trials, the Office of the Director Public Prosecutions (DPP) provides reimbursement of expenses in accordance with the Australian Taxation Office's travel and

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incidental expense reimbursement rate.<sup>10</sup> For ACT Civil and Administrative Tribunal matters, witnesses are provided with conduct money (typically \$30) to ensure they can travel to attend the hearing and otherwise comply with the subpoena, and can also have an order made by the Tribunal requiring their reasonable costs to be reimbursed.<sup>11</sup> In addition, both the Magistrates and Supreme Courts provide for conduct money to be paid to people attending or producing documents under a subpoena (if they are not a party to the proceedings). Otherwise, the person does not have to comply with the subpoena.<sup>12</sup>

### Issues

The IC Act mandates attendance at the Integrity Commission for a witness examination if summonsed – people may be subject to an arrest warrant and be held in contempt of the Commission if they fail to appear. Mandatory attendance may be a financial impost on witnesses for the following reasons:

- travel to and from the Commission
- meals when an examination takes place across an entire day
- lost wages if the person does not have relevant leave provisions or is self-employed
- child-care
- travel and accommodation expenses if the person is required to travel from interstate.

There are valid arguments to support enabling incidental expense reimbursement, including:

- to ensure consistency across similar arrangements across the Territory
- as the Territory has enacted a law that compels people to take time out of their day and attend a specific place for a process that can sometimes occur across several days
- in acknowledgement that a witness currently cannot explain to support networks why they may require financial assistance without committing a criminal offence by breaching confidentiality requirements under the IC Act, and
- a witness may need to facilitate childcare arrangements or take time off work to attend the Commission.

Reimbursement of witness expenses is particularly important for vulnerable members of the ACT community, such as people on disability pensions who may not be physically able to comply without assistance. However, in the context of the Integrity Commission, it is likely that most witnesses required to produce documents or attend in person will be ACT public servants, who would be undertaking these tasks as part of their paid employment. It may be that this context makes it less appropriate for some costs to be reimbursed as a default position.

### Discussion

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

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<sup>10</sup> [https://www.dpp.act.gov.au/witness\\_and\\_victim\\_services/claiming-expenses](https://www.dpp.act.gov.au/witness_and_victim_services/claiming-expenses).

<sup>11</sup> *ACT Civil and Administrative Tribunal Procedures Rules 2020* rules 79 and 80.

<sup>12</sup> *Court Procedures Rules 2006* rule 6606.

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4. Should assistance be limited to those appearing before an examination, rather than witnesses who may only be required to produce documents to the Integrity Commission?
5. Should financial assistance be limited to any specific categories (such as travel, costs in preparing documents)?
6. At what rate should reimbursement be provided?
  - For example, current DPP practice utilises the relevant ATO travel determination to calculate allowances. In Victoria, IBAC regulations allow reimbursement of lost wages at \$100 per hour, capped at \$600 per day, and all reasonable childcare expenses.

### Information sharing

#### Information sharing with other agencies

Section 196 of the IC Act enables the Integrity Commission to disclose information to the head of a public sector entity, an integrity body, a law enforcement agency, a referral entity, and a prosecutorial body if the disclosure is relevant to the exercise of the functions of that entity, and the disclosure of the information is considered appropriate. The provision gives the Commission a broad discretion without further guidance from the legislation and explanatory material on what may be considered when determining what is appropriate.

Scenarios where an ACTPS agency may require information obtained by the Integrity Commission to meet a particular function and minimise harm and damage include where the Commission obtains evidence that an employee or contractor is:

- financially abusing a person they are assisting
- mistreating clients
- disposing of waste in a manner that is damaging the environment, or
- abusing a child.

Sharing information in these scenarios would alert the appropriate entity to the need to intervene to stop a potential harm. However, such sharing would need to be done carefully to avoid jeopardising the ongoing corruption investigation.

Stakeholders have also raised the need for increased information sharing with a referral entity where the Commission has referred the matter under section 107 of the IC Act. It may be useful if the Commission provided all relevant information to save the need to re-interview witnesses – which in itself can jeopardise an investigation, cause witness fatigue and frustration.

#### Discussion

7. Should there be mandated situations or criteria where the Integrity Commission is obliged to share information with an appropriate entity?
  - a. In what situations should this obligation exist? For example, where it is needed to prevent harm, to protect a vulnerable person, or the environment.

#### Information Sharing with Witnesses

Under the IC Act, the Integrity Commission is able to withhold the reason for issuing an examination summons if it considers on reasonable grounds that this information would likely prejudice an

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investigation or be contrary to the public interest.<sup>13</sup> The review is interested to explore whether a witness should generally be informed about the purpose of an examination summons, on the basis that withholding this information may affect the mental health and wellbeing of a witness and could also negatively impact the efficiency of the investigation.

When the Integrity Commission decides to omit this information from an examination summons, it is not required to report this to the Inspector of the Commission. However, the Inspector may become aware of its occurrence as the Commission is required to provide a copy of each examination summons to the Inspector.

The ability for an anti-corruption commission to omit the nature of the summons is common practice across Australian jurisdictions. The aim is to ensure the ongoing integrity of an investigation and minimise the risk that evidence may be destroyed, or other known actors within the investigation may become aware that the Commission is investigating a certain matter.

Nonetheless, a person who receives a summons without any information as to what the summons refers may experience anxiety and nervousness and may not adequately prepare for the meeting (for example, by receiving legal advice). The lack of context may also inadvertently hamper the investigation, as people may not disclose relevant information or documents because they are not aware of the specific nature of the investigation. This could be a particular problem for investigations into systemic conduct, as ACTPS employees who work in the area on a daily basis may be able to identify links about which the investigator does not have knowledge.

### Discussion

8. Should a witness generally be entitled to know what matter their examination summons is referring to?
  - a. In what situations should this information be able to be withheld?
  - b. Where the Integrity Commission does withhold this information, should it be explicitly reported to the Inspector as part of the monthly reporting requirements under section 205 of the IC Act?
9. Are there any alternative options to ensure witnesses can be well-prepared for an examination?
  - c. For example, should the Commission be required to inform the Inspector they intend to withhold the information from the witness?
    - i. If so, should the Inspector be required to approve this approach?

### Wellbeing requirements under the IC Act

#### Issues

The IC Act includes no specific witness wellbeing or mental health conditions that the Integrity Commission must consider when it is conducting an investigation.

Subsection 147(2) provides the factors that the Integrity Commission must have regard to when deciding whether it is reasonable to issue an examination summons. Amongst the factors is a requirement to consider the impact the examination summons may have on the person, in particular, due to disability, health, or cultural or linguistic background. The explanatory statement does not

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<sup>13</sup> *Integrity Commission Act 2018* s148(2).



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provide additional insight into the health factors that the Commission is required to consider, for example, whether it relates to a person's inability to physically attend due to declining physical health, or if the appearance would affect their overall mental health and wellbeing.

There is a question of how much the Integrity Commission would know about any specific witness before issuing an examination summons. The IC Act has no provision for the Commission to amend or revoke an examination summons, so once one has been issued it must be complied with, regardless of whether the witness can demonstrate disability or health issues factors that increase the impact of the summons. For example, the Commission may issue an examination summons to a person on the assumption they are healthy enough to attend the Commission. However, that person may alert the Commission they have health issues that restrict their ability to comply with the terms of the notice. (The ability to revoke or amend a summons more broadly is discussed in the discussion paper on operational matters.)

More broadly, the Integrity Commission has workplace health and safety requirements under the *Work Health and Safety Act 2011*. In particular, the Commission is subject to a requirement, so far as reasonably practicable, that the health and safety of other persons (that is, those who are not Commission employees) are not put at risk from work carried out as part of the conduct of the business or undertaking.<sup>14</sup> Under this Act, the definition of 'health' includes both physical and psychological health. The Commission also has a responsibility to report a notifiable incident,<sup>15</sup> which includes the death of a person, a serious injury or illness of a person, or a dangerous incident.<sup>16</sup> The same requirements with regard to workplace health and safety are applicable in inquiries undertaken in Victoria<sup>17</sup> and New South Wales.<sup>18</sup>

It is possible that the Inspector could assist in achieving better wellbeing outcomes for witnesses. The Inspector is required to undertake an annual operational review of the Integrity Commission.<sup>19</sup> As part of this annual review, the Inspector must consider the Commission's management of conflicts of interest, whether the Commission and its staff acted within power and compliance with the IC Act and any other relevant acts, whether the Commission has implemented any previous recommendations made by the Inspector, and any other matters the Inspector considers relevant. This provision could be amended to include a requirement for the Inspector to consider the Commission's management of mental health and wellbeing. This could involve review of the Commission's policies and procedures to manage witness mental health and wellbeing and monitor the Commission's communication effectiveness with witnesses who have requested additional psychological assistance (readers should note this concept is also discussed in the Inspector paper).

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<sup>14</sup> *Work Health and Safety Act 2011* s19.

<sup>15</sup> *Work Health and Safety Act 2011* s38.

<sup>16</sup> *Work Health and Safety Act 2011* s35.

<sup>17</sup> <https://new.parliament.vic.gov.au/493128/contentassets/080a020a40bd44bba387b91aae7223c7/performance-of-the-victorian-integrity-agencies-2020-2021--focus-on-witness-welfare.pdf> p 44.

<sup>18</sup> <https://www.oipic.nsw.gov.au/assets/oiiac/reports/audit-reports/20230222-Inspector-of-the-ICAC-Special-Report-2023-01-Audit-of-the-welfare-of-witnesses-and-other-people-involved-in-ICAC-investigations.pdf> p 7.

<sup>19</sup> *Integrity Commission Act 2018* s280.

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### **Discussion**

10. Does the IC Act adequately provide for witness mental health and wellbeing, and if not, what measures should be included in the IC Act?
11. Should the Inspector be given oversight responsibilities for how the Integrity Commission deals with witness mental health and wellbeing? How could this best be implemented?
12. Should there be a legislative power for the Commission to revoke or amend the examination summons based on the circumstances of the witness, such as those with health or disability issues?