

Inspector role and other oversight mechanisms

Discussion Paper

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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](#).¹

This discussion paper will consider the role of the Inspector of the Integrity Commission (Inspector) and oversight of the Commission. As well as outlining the existing oversight of the Commission, it discusses reform proposals including information the Commission must provide to the Inspector, a requirement for the Commission to provide advance notice to the Inspector if it intends to hold a public hearing, items the Inspector must assess as part of its annual operational review of the Commission, and enabling provisions for future reviews of the IC Act.

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 no later than **COB Friday 2 June 2023**.

Inspector's role, functions, and appointment under the *Integrity Commission Act 2018*

The Inspector is an independent statutory role created under the *Integrity Commission Act 2018* (IC Act). The Inspector is appointed in one of two ways under the IC Act:

- under section 229, the Ombudsman for the ACT (who is also the Commonwealth Ombudsman) is the Inspector until an appointment is made under section 230
- under section 230, the Speaker may appoint a person as Inspector if that person was either a judge of a superior court, or a lawyer with at least 10 years' experience, and the Speaker is satisfied that the person has knowledge or experience in:
 - criminal investigation or criminal adjudication
 - law enforcement or the conduct of investigations; or
 - public administration, governance, or government.

There are also broad consultation requirements that the Speaker must undertake prior to making an appointment under section 230. The Inspector's functions are outlined in section 227 of the IC Act, and include:

- to assess and report on the Integrity Commission's compliance with the IC Act and any Memorandum of Understandings (MoU) entered into under the IC Act
- to receive, investigate and assess complaints about the Commission and its staff members

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

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- to make recommendations to the Commission or public bodies about practices and procedures in relation to the performance of functions under the IC Act.

The Inspector's powers are outlined in section 228 of the IC Act, which provides that the Inspector:

- may investigate any aspect of the Integrity Commission's operations or any conduct of the Commissioner or staff members
- is entitled to full access to the Commission's records and to take or make copies of the records
- may require the Commissioner or staff members to provide information or produce documents or other things about any matter, or any class of matters, relating to
 - the Commission's operations; or
 - the conduct of the Commissioner or staff members
- may refer matters relating to the Commissioner or staff members to another public sector entity or public official for consideration
- may recommend disciplinary action or criminal prosecution against the Commissioner or staff members.

The Speaker has not made an appointment under section 230 of the IC Act; consequently, the Ombudsman has been the Inspector in accordance with section 229 since commencement.

Inspector's oversight under the IC Act

The IC Act provides the Inspector with powers which allow that person to oversee the Integrity Commission's operations to ensure it is acting within the IC Act framework and limits.

Anyone may make a complaint to the Inspector, including about current or former staff members at the Commission, as well as the Integrity Commissioner.² Without limiting what someone may make a complaint about, the IC Act provides that complaints may be made about the conduct of staff that was against the law, unreasonable or unjust, based on improper motives, an abuse of power, or otherwise improper. The IC Act provides the Inspector with the power to compel information, documents, and other things from the Commission to investigate a complaint,³ and also abrogates privileges against self-incrimination or exposure to civil penalty.⁴

The Inspector may also make recommendations about practices and procedures in relation to exercising a function under the IC Act to the head of a public sector entity, the Commission, or the relevant Legislative Assembly Committee.⁵

Section 205 requires the Integrity Commission to provide the Inspector with a report at the end of each month that includes:

- a copy of each confidentiality notice issued for preliminary inquiries and investigations
- a copy of each notice that revokes a confidentiality notice
- a copy of each notice that extends a confidentiality notice
- details of preliminary inquiry notices issued under section 90, including the person's name and the reasons the notice was issued

² *Integrity Commission Act 2018* s257.

³ *Integrity Commission Act 2018* s269.

⁴ *Integrity Commission Act 2018* s270.

⁵ *Integrity Commission Act 2018* s272.

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- for public examinations: the investigation the matter relates to, the name of the person issued the notice, and the reasons the notice was issued
- a copy of each report given to the Inspector that outlines the reasons why a public examination was conducted rather than a private examination
- for each examination notice issued under section 14: the person's name to whom it was issued, and the reasons it was issued
- a copy of video recordings and transcripts of examinations conducted
- for each arrest warrant issued: the person's name to whom it was issued, and the reasons it was issued
- for contempt applications: the person's name to which it relates and a copy of the contempt certificate
- for each legal advice direction issued under section 193: a copy of the direction, the reasons for the direction, and the factors taken into consideration when issuing the direction.

Under section 280 of the IC Act, the Inspector must assess the Integrity Commission's compliance with the IC Act on an annual basis (an annual operational review report). The annual operational review must include:

- the Commission's management of conflicts of interest, including:
 - any conflicts of interest reported to the Inspector under section 31 of the IC Act
 - the conflicts of interest register under section 32
 - any suspension of a Commissioner under section 35 that relates to a conflict of interest; and
 - any ending of a Commissioner's appointment under section 38 that relates to a conflict of interest
- whether the Commission and staff members acted within power and compliance of the IC Act and any other relevant legislation
- whether the Commission has implemented any previous recommendations made by the Inspector
- any other matters the Inspector considers relevant.

The Inspector must prepare an annual report that outlines annual statistics on various matters, including the data collated from monthly reports provided by the Commission, complaints made to the Inspector, and the Commissioner's conflict of interest management.⁶

Parliamentary oversight of the Integrity Commission

The Integrity Commission is also oversighted by the Standing Committee on Justice and Community Safety (JACS Committee). The JACS Committee was established by resolution of the Legislative Assembly on 2 December 2020. Under the terms of the resolution, the JACS Committee shall:

'Monitor, review and report on the performance of the Integrity Commission and the Inspector of the Integrity Commission or the exercise of the powers and functions of the Integrity Commission and the Inspector of the Integrity Commission, including examination of annual

⁶ *Integrity Commission Act 2018* div 5.4.3.

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*reports of the Integrity Commission and the Inspector of the Integrity Commission and any other reports made by the Commission.*⁷

Under that resolution, each standing committee is required to consist of three members, nominated by each of the represented party whips (three in total), with the chair of each committee agreed by the members of that committee. This process ensures that each political party represented in the Assembly is reflected in committee membership. The resolution also allows the JACS Committee to commence own-motion inquiries.

To date, the JACS Committee has not initiated any own motion inquiries into the Integrity Commission or the Inspector – however, the Committee has commenced an inquiry into the Integrity Commission Amendment Bill 2022 (No 2) (further discussion on this Bill is in the Discussion Paper on the IC's powers). Monitoring, reviewing, and reporting on the performance of the Commission and the Inspector have been achieved through standard inquiries into annual and financial reports.

Select Committee process and recommendations

The requirements for oversight of the Integrity Commission were considered in two Legislative Assembly select committee inquiries into establishing an independent integrity commission.

The first select committee concluded that an accountability and oversight regime for the Integrity Commission must include oversight by both a relevant Assembly standing committee and an inspector/inspectorate type mechanism. The committee proposed that a parliamentary committee provide broad oversight and would have a mandate to monitor and report on the functions of the Commission. Separately, the inspector would be able to receive and investigate complaints concerning any aspect of the Commission's operations or conduct of its officers.

The second select committee, which inquired into two separate Bills put forward to establish an Integrity Commission, supported the proposed model in the ACT Government's exposure draft – which included an Inspector and the ability for the ACT Ombudsman to perform the inspector function. The committee did recommend that any provision that required automatic reporting of the Commission's use of its powers to the Inspector be removed.⁸ This was subsequently amended to require monthly reporting, with a further requirement to immediately notify the Inspector if the Commission intended to hold a public hearing.

Information the Integrity Commission must provide the Inspector

As noted earlier in this paper, the Integrity Commission must provide the Inspector at the end of each month a report outlining certain activities undertaken by the Commission for that month. Amongst the reporting requirements are the reasons a particular notice was issued (for example, an examination summons, a preliminary notice, or a public examination).⁹ The Inspector's 2021/22 annual report noted that the Commission had identified a legal issue with providing the Inspector with information about reasons for issuing notices. The Inspector has since noted that this issue has been resolved and the Commission is subsequently providing the information, if requested by the Inspector. However,

⁷ https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1980873/Resolution-of-establishment-for-the-committee.pdf.

⁸ https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/1271959/REPORT-INQUIRY-INTO-THE-ESTABLISHMENT-OF-AN-INTEGRITY-COMMISSION-FOR-THE-ACT.pdf.

⁹ *Integrity Commission Act 2018* s205.

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legislative certainty may be desirable to remove any doubt – for example, an overarching requirement in section 205 that the Commission must provide information to support its reasons.

Issues

While section 205 of the IC Act requires the Integrity Commissioner to provide reasons that a particular summons is issued, there is no mention of a requirement to provide information that supports the reasons the summons was issued. Arguably, the requirement is implied because it is difficult for the Inspector to adequately fulfill its legislative functions without the information to support the Commission's reasoning. Further, the IC Act already states the Commission must provide the Inspector with substantial information that is subject to confidentiality requirements, including transcripts and recordings of examinations, as well as the content of mandatory production notices as part of the monthly report.

Providing clarification in the IC Act that the Inspector should have full access to information of the Commission, including information subject to a claim of legal professional privilege, would align with the Inspector's role as an oversight body. There is a strong likelihood that information contained in legal advice or documents prepared for the purpose of obtaining legal advice would provide the Inspector with relevant facts to assist with its oversight function.

There may be arguments that as the information was created under a privilege, there are existing entitlements to allow withholding production. Readers should not there is a full discussion of legal professional privilege in the Legal Representation and Legal Matters Discussion Paper. Regardless of the merits of this argument, the IC Act already requires the Integrity Commission to provide substantial confidential information to the Inspector, including transcripts and recordings of examinations. Further, it is likely that the information – including that which may be subject to a privilege - would remain protected under existing confidentiality provisions. Clarification could be provided in the IC Act that legal professional privilege is not taken to be waived by the Commission in circumstances where such information is provided to the Inspector for the purpose of the Inspector's functions.

Discussion

1. Should section 205 be amended to explicitly require that the Integrity Commission must provide information to support its reasons for issuing a notice?
2. Should legal professional privilege be available to the Commission as a ground for refusing to provide information requested by the Inspector?
 - a. If no, should clarification be provided in the IC Act that the Inspector should have full access to information of the Commission, including information subject to a claim of legal professional privilege?
 - b. If no, should clarification be provided in the IC Act that legal professional privilege is not taken to be waived by the Commission in circumstances where the Commission provides such information to the Inspector for the purpose of the Inspector's functions?

14 days' notice for a public hearing

The Inspector has proposed that the Integrity Commission be required to provide at least 14 days' (10 business days) notice to the Inspector for any intended public examination. Currently, the IC Act requires that the Inspector is provided seven days' notice.

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Issues

The IC Act generally requires the Commission to provide at least seven days' notice to a person who is required to appear for public examination. Readers should note there is a broader discussion on notice periods for recipients of a notice in the Operations Discussion Paper, and are encouraged to review that discussion paper.¹⁰ This is the same notice required to be provided to a person to attend a private examination, or to produce documents, items, or other things to the Commission. Similarly, for a public examination, the Commission is required to provide the Inspector notice that it intends to hold a public examination at least seven days before the examination. There could be a situation where the person is notified before the Inspector, if the Commission provides a notice to the person that the public examination will be held in say 10 days' time, and then provides notice to the Inspector seven days prior to the hearing. In this scenario, the oversight capacity of the Inspector is limited as the individual has already been notified that the public examination will occur, and the Inspector has no capacity to raise any concerns with the Commission prior to the witness receiving their notice.

There appears little in the IC Act that the Inspector can do with regard to scrutiny and oversight of public examinations – the Inspector's role is limited to receiving notification and provision of reasons for a public examination. For example, the Inspector is unable to prevent the public examination if it is not satisfied with the Commission's justification for the examination. Reforms could provide the Inspector with powers to respond in circumstances where the Inspector considers a public hearing may not be appropriate. For example, the Inspector could be given the power to obtain additional information from the Commission, and then if the Inspector doesn't believe a public hearing is necessary make a recommendation to that effect. This recommendation could either be made privately or published with appropriate redactions to protect the integrity of the investigation.

The *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) outlines a slightly different approach to the IC Act. Notably, Victoria, like the ACT, is considered a human rights jurisdiction. If the IBAC proposes to hold a public hearing, it must provide the Victorian Inspectorate at least 10 business days' notice along with a statement of reasons for holding a public examination.¹¹ The IBAC may not publicly advertise a public hearing until it has provided that notice to the Inspectorate.¹² The notification to the Inspectorate appears largely for visibility purposes as the IBAC Act is silent on anything the Inspectorate may do to challenge the need for or validity of a public hearing.

Discussion

3. Should the IC Act require the Integrity Commission to provide the Inspector with at least 14 days' notice of any intended public examination to give the Inspector increased time to consider a notice from the Commission?
4. Should the sequencing ensure the Inspector receives notice before the Integrity Commission provides the notice to the recipient?
 - a. If so, should the Inspector have powers to obtain additional information from the Commission and powers to recommend that a public examination not occur or to challenge the need for a public hearing?

¹⁰ *Integrity Commission Act 2018* s150.

¹¹ *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s117(5).

¹² *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s117(5A).

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Inclusions in the annual operational review

As discussed above, the Inspector is required to complete an annual operational review of the Integrity Commission.¹³ Broadly, this review focusses on the Commission's compliance with the IC Act, along with any other matters the Inspector considers relevant. Some elements of the Commission's operations not presently required to be considered by the Inspector may benefit from mandatory consideration as part of the annual operational review even though the Inspector has a discretionary power to consider other matters as part of this review.

Issues

The review is interested to receive feedback on any other matters that the IC Act should require the Inspector to review as part of the annual operational review. For example, section 280 could require the Inspector to review the Commission's witness wellbeing policies and measures (these matters are discussed in detail in the information sharing and witness wellbeing Discussion Paper). Given the recent focus on witness wellbeing during anti-corruption inquiries in New South Wales and Victoria it may be appropriate to include an annual review of the Commission's policies and processes that seek to promote and protect witness wellbeing.

Additionally, the IC Act could require the Inspector to review the Commission's data protection and ICT security framework. This may be important given the sensitive information the Commission would gather and hold during an investigation, particularly when the information is gathered coercively and privileges otherwise available are abrogated – as well as in light of public concern with data breaches in other bodies. For example, the Commission is required to record all examinations and provide the recording to the Inspector; there could be serious consequences if this data was breached.

Discussion

5. Should the annual operational review scope by the Inspector be expanded to include other mandatory matters?
 - a. If so, what other matters should the Inspector review?

Review of the *Integrity Commission Act 2018*

Section 303 of the IC Act requires the responsible Minister, in consultation with the Speaker, to review the operation of the IC Act as soon as practicable three years from first commencement, and subsequently every five years after the first review.

Issues

The IC Act is silent on what information the reviewer may access during the review. Consequently, due to the strict confidentiality requirements under the IC Act, information that would be valuable to the reviewer cannot be accessed unless the Integrity Commissioner provides for this by way of a modified confidentiality notice or notices. For example, it would be informative for the reviewer to obtain views of witnesses who have been summoned by the Commission to produce evidence and/or appear for an examination. This information would provide the reviewer with insight into any potential operational efficiencies for witnesses, as well as the impact an examination may have on witnesses' mental health and wellbeing. In most cases, these witnesses will be subject to confidentiality notices that constrain

¹³ *Integrity Commission Act 2018* s280.

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them, meaning that if they speak and provide feedback to the reviewer, they would be in breach of their notices and risk a criminal penalty.

Confidentiality is of paramount importance for matters under investigation to ensure they are not compromised. For this reason, it might be considered necessary to limit the nature of matters people can discuss with the reviewer to matters about the operation of the legislation, process and procedure - and not the substance of material relevant to their participation in an investigation.

Discussion

6. Should the IC Act be amended to make specific provision for the reviewer to be able to access information about the operation of the legislation, process and procedure of the Integrity Commission?
7. If so, should there be any limitations on access and use of information to ensure the integrity of ongoing investigations? For example:
 - b. Should the reviewer be subject to a form of confidentiality notice?