

Legal Representation and Privilege

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 mechanism to provide legal assistance to those who are summonsed by the ACT Integrity Commission to appear for examination and/or to produce documents, items, or other things. The paper will also consider the Integrity Commission's proposal to partially abrogate legal professional privilege and the implications of the proposed model with reference to other jurisdictions' approaches.

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**.

The current legal assistance framework

Section 171 of the IC Act provides that the responsible Minister may make regulations for legal assistance to be provided to a witness appearing before the Integrity Commission. No regulations have been made under this provision.

Legal assistance to current and former ACT Public Sector (ACTPS) employees is provided for by the ACT Government Solicitors Office (ACTGS). This is allowed for under section 26(3) of the *Law Officers Act 2011*, which provides that ACTGS may act for a person if they are, or were, a public employee, combined with paragraph 13 of the *Law Officers Legal Services Directions 2023* (Directions). The Directions sets out a framework for handling requests for assistance from the Territory by public sector (PS) employees 'in relation to legal, investigation or disciplinary proceedings, or proceedings associated with an employee's professional obligations or qualifications, in which the actions or omissions of that employee are under scrutiny'.²

The Directions may be relied on by current and former ACTPS employees to seek legal assistance in relation to appearing before the Integrity Commission for examination, or producing information, documents, items, or other things under compulsory notices. In executing this role, ACTGS has been using a model of legal representation for individuals via the external panel of legal service providers, as

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

² *Law Officers Legal Services Directions 2023* paragraph 13.1.

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chosen by the client. This minimises conflicts of interest in representation, and ensures employees, and former employees have appropriate legal representation.

The ACTGS may provide legal assistance to current or former individual public employees in relation to legal, investigation or disciplinary proceedings, or proceedings associated with an employee's professional obligations or qualifications, in which the actions or omissions of that employee are under scrutiny. ACTGS may in some circumstances assist ACT Ministers and Members of the Legislative Assembly (MLAs) in relation to legal proceedings.³

In matters involving the Commission, ACTGS facilitates approval of legal assistance without reference to the employing agency. The Directions anticipate this circumstance by providing that 'whether a public employee receives assistance depends on the decision of the employing agency in consultation with the Chief Solicitor, other than where it is not appropriate for the employing agency to be engaged in this decision-making process'.

How the approvals for assistance are implemented depends on the complexity or potential for conflict identified by the matter. A legal service provider, other than ACTGS, drawn from the Territory Legal Panel is often utilised to provide legal assistance. To maintain confidentiality a limited number of firms (generally three) are nominated for selection by the public employee approved for assistance. The current framework and arrangements aim to minimise conflicts of interest and ensure those approved for legal assistance have appropriate legal representation.³

Where after consideration of an application the Chief Solicitor decides against providing legal assistance there is no specified avenue to appeal this decision or request a form of review. A scheme that may provide a useful example of a mechanism to appeal a decision to deny assistance, or the terms on which assistance is provided, are applications for a grant of legal aid.⁴ As the functions of ACTGS in relation to ACT legal work do not enable provision of legal assistance to those who are not, and have never been, ACT public officials or employees, a regulation pursuant to the IC Act and scheme is required for witnesses who are not public official or employees.

ACTGS has advised that the Chief Solicitor considers applications for assistance in line with the Salmon principles. Those principles provide that those involved in an inquiry should be given adequate opportunity to prepare their case, be assisted by their legal advisor and that the legal expense should be met out of public funds. In addition, the Chief Solicitor considers whether:

- the applicant's personal interests are at real risk of being exposed to prejudice as a result of appearing; or
- the applicant is, or is likely to be, involved in the proceedings in a significant way; or
- significant examination of the applicant may be likely.

ACTGS also advise that where an employee is approved for legal assistance, it will generally be on condition (on behalf of the Territory) that the ACTGS reserves the right to recover expenses for legal assistance in the event that it is established that the employee has acted other than in the course of their employment, or acted in bad faith.

³ *Law Officers Legal Services Directions 2023* clause 12.1.

⁴ <https://www.legalaidact.org.au/what-we-do/legal-representation>.

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Some people required to engage with the Integrity Commission may not avail themselves of legal representation. People who are not entitled to free legal representation under the current arrangements may be influenced in their decision not to have legal representation by the prohibitive cost, or the belief that legal advice will not assist.⁵ A comparative analysis of legal assistance schemes for anti-corruption matters in other jurisdictions shows there are three high level considerations when establishing a legal assistance scheme. Each is discussed below.

Who administers schemes in other jurisdictions?

Legal assistance schemes for anti-corruption matters are typically administered through the jurisdiction's Legal Aid commission, the State Solicitor's Office (SSO) (or equivalent), or a combination of both. In particular, there may be administrative restrictions on an SSO facilitating legal assistance for a person who is not considered a public official. In this circumstance, it would be appropriate for an entity such as Legal Aid to facilitate assistance arrangements for relevant witnesses.

However, as detailed above, a framework currently exists for legal assistance for public officials which is coordinated through the ACTGS, however there is no legal assistance available for those who are not (or were not) ACT public officials or employees. A suitable alternative may be creating a legal assistance scheme that is managed through Legal Aid ACT. Legal Aid ACT may be appropriate to provide legal assistance to non-public officials, and in addition, may also be appropriate to manage all legal assistance. Facilitating legal assistance through Legal Aid ACT rather than ACTGS may assist to minimise risk of any potential conflict of interest where ACTGS – which is responsible for providing legal advice to the Territory – is facilitating assistance for those who may have acted against the interests of the Territory.

Legal assistance models

Questions of procedural fairness arise where the subject of an anti-corruption investigation experiences barriers, such as a lack of legal assistance, for their examination. In some circumstances serious consequences may stem from findings and recommendations delivered by an anti-corruption investigation report. The IC Act requires the Integrity Commission to provide findings as to whether a person has engaged in serious corrupt conduct or systemic corrupt conduct. Publication of names in these circumstances may result in criminal proceedings, loss of reputation, significant personal embarrassment, and damage to future employment opportunities. Given the potential for such significant consequences, it is important to ensure those subject to an investigation are afforded a procedurally fair process.

Means and/or merit testing for legal assistance aim to manage overall costs for assistance arrangements by providing legal assistance to those who genuinely cannot afford it, and/or where their particular case warrants a form of subsidised assistance – for example, to assist in circumstances where the particular person is not at fault.

In any event, providing legal assistance to non-ACTPS people who are summonsed to appear before the Commission without a means or merits test might be considered appropriate in view of the nature of the Commission's role. While the costs associated with such legal assistance would be higher than

⁵ <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf> p 57.

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arrangements with a means or merit test, it seems unlikely that there would be many non-ACTPS witnesses, given the focus of the Commission on public sector corruption.

In addition, several options would be available to manage the overall cost of a universal scheme including: capping assistance at a certain amount of time/hours with a role for Legal Aid or the ACTGS to extend the approved level where appropriate; establishing a panel of legal practitioners who have agreed to provide assistance at lower than normal commercial rates; and developing pro-forma advice that can be provided to people upon application where the assistance is for a specific issue (for example, the rights and obligations under certain legislation).

Repayment where corruption is found or successfully prosecuted

In matters before anti-corruption inquiries, alleged conduct would typically include use of taxpayer funds for an improper purpose. It may be desirable for a legal assistance scheme to include a clause that requires the recipient to pay back funds used for legal assistance if that person is subsequently found guilty by a court for a corruption related offence, or potentially, where the Integrity Commission finds serious or systemic corruption allegations about the person sustained. All other jurisdictions that have a pay-back requirement set this threshold at a finding of guilt before a court to encourage people to seek legal assistance due to the unique powers of anti-corruption commissions which abrogate privileges and use coercive powers. Pay-back requirements reduce further taxpayer funds being used to support a person who has breached public trust by using public funds for an improper purpose.

Under the current ACTGS arrangements, there is no requirement to repay funds received for legal assistance if the recipient is subsequently found guilty by a court, or the Commission makes a corrupt conduct finding. While there may not be a requirement for Territory officials or public employees to repay funds, ACTGS generally approves assistance on condition (on behalf of the Territory) that the ACTGS reserves the right to recover expenses for legal assistance in the event that it is established that the employee has acted other than in the course of their employment, or acted in bad faith.

A requirement to pay-back funds for legal assistance could present a barrier to accessing legal assistance to ensure due and proper process. Other legal assistance schemes, for example, Legal Aid in criminal matters, do not require the applicant to pay-back assistance received if they are subsequently found guilty. They are premised on the right to a fair process in adversarial proceedings. Some may argue that Integrity Commission proceedings are different and more akin to a Coroner's Court, because the proceedings are centred around fact finding and that this makes legal representation, especially for minor witnesses and informants less critical in achieving procedural fairness. However, the powers and secretive nature of the Commission arguably puts them in a different position.

Recovering legal representation costs comes with an administrative and budgetary burden. People brought before the Integrity Commission may incur difficulty repaying costs where such a finding requires it, especially if they have lost their employment. A fee recovery process including a payment plan would be required, along with staff to administer this function.

Discussion

1. What arrangements should exist for legal assistance where a witness is summonsed to appear before the Integrity Commission?

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2. Should a person be entitled to seek their own legal assistance using public funds through the ACT Government? Should this extend to all people, including members of the public?
 - a. Should there be limitations or caps on assistance in these scenarios?
 - b. If a request for assistance is denied, or if the funding provided is limited, should there be an avenue for review?
3. Should a witness provided with assistance be found to have committed an offence by a court be required to pay back any or all legal assistance funding provided by the Territory?
 - a. Alternatively, if the Integrity Commission makes a finding that a person has engaged in serious and/or systemic corrupt conduct, should that person be required to repay legal assistance?

Legal Professional Privilege

Legal professional privilege exists to protect confidential communication between a client and their legal practitioner. Its purpose is to promote the administration of justice by encouraging legal practitioners and their clients to have frank and honest dialogue so that lawyers can provide legal advice that best assists the client. Legal professional privilege applies to communications brought into existence for the dominant purpose of the lawyer giving legal advice or pertaining to actual or contemplated court proceedings. It covers documents prepared by the client, the lawyer, or (in limited circumstances) a third party. Privilege can generally be 'waived' by the client, with the effect that the document or advice no longer attracts the protection of the privilege. In addition, privilege can be 'abrogated' (that is, cancelled or repealed so it has no effect) by specific legislative provisions, but typically it may still be relied upon in other (unrelated) proceedings.

The Integrity Commission's proposal

The Integrity Commission has proposed that the IC Act should abrogate legal professional privilege where the legal advice was obtained in the ordinary course of a public official's duties, or public funds were used to receive the advice. The Commission submits that:

'[t]he object of the [IC] Act is to ensure a full and independent investigation in the public interest of corrupt conduct that could involve the commission of criminal offences or serious misconduct. For this reason, the Commission must be able to have access to all relevant facts in the hands of the public officials or public entities concerning the issues under examination.'

The Commission has cited accountability in requesting that:

's 175 should be amended so that a public official, public sector entity or ACT public service entity cannot rely on legal professional privilege in respect of communications made or obtained or purporting to be made or obtained for the purpose of undertaking public duties or functions or has been paid for with public funds.'

The Integrity Commission notes this should not include communications with lawyers 'for the purpose of obtaining advice concerning the legal obligations attending on the notices or summonses that have been served or for obtaining assistance connected with involvement in the examination itself should remain confidential'.

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The current framework

As an overarching principle within the ACT statutory framework, legal professional privilege is preserved and upheld unless expressly abrogated. Section 171 of the *Legislation Act 2001* provides that an Act or a statutory instrument must be interpreted to preserve the common law privilege in relation to legal professional privilege. Consequently, legal privilege is assumed to be maintained in the absence of a specific provision that authorises disclosure of legally privileged information.

The IC Act expressly abrogates common law privileges that protect against self-incrimination and exposure to civil penalty. However, this applies only where a person is producing information under an examination summons, or at an examination.⁶ Given the IC Act only abrogates these privileges, legal professional privilege is taken as preserved. Consequently, a person is entitled to claim legal professional privilege over a document or information requested by the Integrity Commission.⁷ The IC Act provides that when a person claims privilege (any common law privilege not expressly abrogated in the IC Act), the Commission may choose to either withdraw the request or refuse to withdraw the request. If the Commission declines to withdraw the request, it must seal the information in an envelope and provide it to the Supreme Court to determine whether the information is subject to a privilege.⁸

If the Supreme Court determines the information is subject to a privilege, it will order its return to the person who claimed privilege. Otherwise, if the Court determines the information is not subject to privilege, it will order its delivery to the Commission.

Paragraph 11 of the Directions provides that privilege in relation to any document or advice provided in the course of any Territory legal work belongs to the Territory and may not be waived, except with the express approval of the Attorney-General or the Chief Solicitor on behalf of the Attorney-General. Consequently, the Territory's privilege cannot be waived by a Territory employee. Recognising this, the Commission has from time to time requested the Chief Solicitor to share with the Commission information or documents subject to Territory privilege that may be relevant in the context of examining whether behaviour may be corrupt conduct. The Chief Solicitor has been willing to do so on a confidential basis, that is without waiving privilege. However, it leaves the decision in the discretion of the Chief Solicitor or the Attorney-General.

The current approach in the IC Act is consistent with other legislative approaches in the ACT. For example, the *Inquiries Act 1991* – the Territory's equivalent to a royal commission – only abrogates the privilege against self-incrimination and exposure to civil penalty.

The *Evidence Act 2011* outlines when evidence otherwise subject to legal professional privilege is admissible in court. As an overarching provision, evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of a communication between a client and a lawyer.⁹ However, several exceptions exist, predominantly in situations where the client consents to the disclosure or to assist in enforcement of wills and estate.¹⁰ Section 125 of the Evidence Act contemplates disclosure of evidence to the court of information between a lawyer

⁶ *Integrity Commission Act 2018* s175.

⁷ *Integrity Commission Act 2018* s127, 161.

⁸ *Integrity Commission Act 2018* division 3.5.3 and 3.6.2.

⁹ *Evidence Act 2011* s118.

¹⁰ *Evidence Act 2011* division 3.10.1.

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and client where that information demonstrates furtherance of the commission of a fraud or an offence, or a deliberate abuse of power.

Approaches in other jurisdictions

Across federal, state and territory jurisdictions there is no uniform approach on abrogating legal professional privilege in the context requested by the Integrity Commission.

The Integrity Commission's proposal aligns with provisions in the *Independent Commission Against Corruption Act 1988* (NSW) where a public official may only claim legal professional privilege over communications between themselves and their legal representative in relation to their appearance at an ICAC examination. The ICAC may compel other legally privileged information, such as legal advice sought in the course of the public official's employment duties.

Victoria's Independent Broad-based Anti-Corruption Commission (IBAC), Western Australia's Corruption and Crime Commission, the Northern Territory, and the recently established National Anti-Corruption Commission abrogate legal professional privilege for public officers in the same manner. Victoria introduced this measure in 2019 – seven years after IBAC first commenced. Explanatory material for the proposal highlighted its importance to assist IBAC uncover corruption and fulfill its role as a fact-finding organisation.

South Australia provides that a legal practitioner may refuse to answer a question or produce information on the basis that the information is legally privileged. However, the legal practitioner must provide the Commission the name and address of the person who owns the privilege – and the legislation provides that this does not affect the law relating to legal professional privilege.¹¹ The subject of a search warrant may also claim a privilege, which is then referred to the South Australian Supreme Court for adjudication as to whether a privilege exists.¹²

Tasmania and Queensland would appear to maintain legal professional privilege in relation to corruption investigations and allow persons summonsed to the commission to withhold production or answers based on legal professional privilege owned by the Executive, as there does not appear to be an express provision that would abrogate it in such circumstances.

Impacts of the proposal

Abrogating legal professional privilege aligns with the Integrity Commission's role as a fact-finding commission. There is a strong likelihood that information contained in legal advice or documents prepared for the purpose of obtaining legal advice would assist the Commission with relevant facts about an investigation. For example, accessing legal advice could assist the Commission to understand whether a person properly understood the risks and consequences of actions that led to instances of corrupt conduct, while documents prepared for the purpose of obtaining legal advice could set out the intention, state of mind, and confirm or disprove parts of a case theory on one of the person being investigated. It could also show that a legal officer assisted or was a party to the corrupt conduct in question, whether intentionally or inadvertently – leading the Commission to other investigative avenues.

¹¹ *Independent Commissioner Against Corruption Act 2012* (SA) schedule 2 cl 8(6).

¹² *Independent Commissioner Against Corruption Act 2012* (SA) Schedule 3.

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As outlined at beginning of this section, legal professional privilege exists to promote administration of justice by allowing a free-flowing dialogue of frank and honest advice between a legal practitioner and their client to best assist the client in their particular legal circumstances. ACTGS provides advice on the basis that legal professional privilege exists and is maintained. If ACT Government officials and ACTGS are aware there are circumstances in which legal communications will be legally required to be given to the Integrity Commission, it might be argued that this may impact the ACTPS' approach to seeking legal advice, and the ACTGS's approach to giving such advice.

An ACTPS entity may obtain ACTGS comment or advice on matters where ACTGS believes that the Territory's interests require that the advice remain confidential. For example, an ACTPS entity may seek legal advice on contract terms to manage a contract with a commercial entity. ACTGS may provide advice that engages with, and comments on, actions of the commercial entity and include commercially sensitive information. There is also a risk that the legal advice may contain information that is subject to other privileges or in-confidence information. The risk of this information being made public could be mitigated with a requirement that the information remain confidential and may not be included in any subsequent reports that are published by the Integrity Commission.

An alternative solution may be to defer decisions about abrogation to the Supreme Court based on a list of factors within the IC Act that the Court must consider when deciding whether to release the information to the Integrity Commission. For example, the default position in the IC Act could be that legal privilege is abrogated but provide factors for the Court to determine that privilege is maintained, such as where material was used to inform Cabinet considerations, relates to advice between state and territory or Commonwealth governments, or disclosure to the Commission would otherwise be contrary to the public interest. No other jurisdiction has outlined this process in their respective legislation. However, the Northern Territory includes similar reasons for a person to withhold information or refuse to answer a question from its anti-corruption commission.¹³

Further consideration may be required about whether any abrogation of privilege should be retrospective. For example, people being investigated have thus far been able to claim legal privilege and refuse production of information based on legal privilege owned by the Territory which may have impacted investigations (noting that, as explained earlier, the Integrity Commission may approach the Solicitor-General to share the legal advice). There may be questions of procedural fairness if investigations commenced before the amendment are subject to the abrogation partway through the process. Similar considerations may apply if the Commission is able to reinvestigate a previously closed matter due to access to information that was previously unavailable.

Arguments may be put forward that there are some parallels between section 125 of the Evidence Act and the Integrity Commission's proposal. Section 125 expressly considers the position when allowing into evidence privileged communication that may have furthered a fraud, and the Commission is responsible for investigating alleged corrupt conduct in the ACTPS.

The main distinction between the two situations is that, with regard to the Evidence Act, the information is presented to the court to assist its functions as the judiciary – to facilitate determination of guilt or innocence after a law enforcement agency has investigated and provided a brief of evidence to the Director of Public Prosecutions, which is then tested by a judicial officer. The Integrity Commission is an agency of the legislature that is required to make findings of fact as to

¹³ *Independent Commissioner Against Corruption Act 2017* (NT) s79(2).

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whether corrupt conduct has occurred within its definition under the IC Act – the Commission may not make findings of guilt or determine whether a criminal offence has occurred. Given that the Commission is not a judicial body, to give it similar powers to abrogate legal privilege that exist in criminal matters (noting only in terms of that allowed by the Evidence Act) may have an impact on due process and natural justice (noting that the Evidence Act permits evidence privileged in certain circumstances, whereas this proposal relates to a complete abrogation of Territory owned privilege in relation to corrupt conduct investigations).

Nonetheless, much like the information that is obtained under the Evidence Act, the material sought by the Integrity Commission may be highly useful and relevant to an investigation into corrupt conduct. The Commission already has coercive powers that are not available during judicial processes, and the IC Act already provides that in certain contexts the Commission is not bound by the rules of evidence.¹⁴ There are also questions as to whether the disclosure of information should be left to a member of the executive arm of government, when it may be the conduct of a member of the executive that is being examined (noting that the Commission may investigate members of the judiciary and legislature).

Discussion

4. Should the IC Act to abrogate legal professional privilege of the Territory where the advice was obtained as part of a public official's duties (and not for the purpose of Commission proceedings)?
 - a. If the answer is *yes*:
 - i. Are there situations where privilege should be maintained? For example, the IC Act could provide factors to retain privilege and the Supreme Court adjudicates whether those factors are present.
 - ii. Should privilege be maintained over information that was created prior to the amendment, or should legal advice provided previously also be abrogated?
 - iii. Should restrictions apply on republication or other disclosure of information that is compelled by the Commission and that is otherwise subject to legal professional privilege?
 - iv. Noting that section 270 of the IC Act mirrors the privilege abrogation provisions in section 175 in respect an investigation undertaken by the Inspector, should this also be amended to match any amendments to section 175 in respect of legal professional privilege?

¹⁴ *Integrity Commission Act 2018* s142(1)(b).