Integrity Commission Operational Matters
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 paper explores operational proposals from the Integrity Commission and other stakeholders aimed at improving and/or clarifying the provisions in the IC Act. This includes employment eligibility requirements for Commission staff, timeframes for arrests, the referral process, interaction with other legislation such as the *Corrections Management Act 2007,* and a discussion on information sharing provisions. The paper also explores several other proposals considered minor.

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**.

Allowing former ACT public servants to work at the Integrity Commission

Subsection 50(2) of the IC Act provides that the Commissioner must not appoint a person as a member of staff of the Integrity Commission if the person is or has, in the five years immediately before the day of the proposed appointment, been a public servant.

The IC Act adopts the 'public servant' definition from the *Legislation Act 2001* as 'a person employed in the public service', where 'public service' is defined as 'the Australia Capital Territory Public Service'. Consequently, the prohibition outlined in subsection 50(2) of the IC Act applies only to ACT public servants, and not public servants previously engaged in public service for other jurisdictions, for example the Australian Public Service.

The Integrity Commission has requested that this employment limit be removed from the legislation, or significantly reduced, a proposal that is supported by the vast majority of stakeholders to date. The Commission has found that this requirement shrinks the pool of otherwise appropriately qualified applicants in a tight labour market, and has created substantial difficulty with recruitment. The Commission has stated that some restrictions may still be required; for example, it may not be appropriate for the Commission to engage a former judge or Member of the Legislative Assembly in a way that could permit them to scrutinise the action of their judicial or political colleagues.

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

As an overall safeguard to the proposal – that is, the proposal to employ former public servants and disqualifying former judges or MLAs, the Commission suggests that it may be worthwhile that the Commission must consult the Inspector and/or the Speaker about such a proposed appointment.

Issues

The policy intent behind this restriction was to minimise a conflict of interest risk for Commission staff, and to eliminate both the risk that a person who moved from the Public Service or Ministerial offices to the Commission might not be seen as objective or might seek to influence the conduct of an investigation.

The ACT is the only jurisdiction with an employment exclusion period for public servants to work at the Commission. Even within the ACT, neither the *Auditor-General Act 1996* nor the *Ombudsman Act 1989* prevent former public servants from working at these offices.

Stakeholders have agreed with the Integrity Commission that this recruitment exclusion has likely hampered the Commission's efficacy. The ACT Government has provided a range of support and resources to the Commission, but stakeholders largely agree that having staff with direct knowledge of structure, systems and processes would be of considerable value. This is not only for managing processes linked to investigations, but also for Government processes that the Commission participates in, such as budget bids, Information and Communications Technology (ICT) negotiations, reporting requirements, effective collaboration, joint investigations, and referral mechanisms. More generally, it limits the Commission's ability to recruit the best person for the job, often in a tight employment market.

Conflicts of interest in the public sector are typically managed through conflict of interest policies and governance. Further, the IC Act itself envisages effective personal conflict of interest management by the Integrity Commissioner. The Commissioner must keep a conflict of interest register that the Inspector may view at any time.[2] Under section 31 of the IC Act, the Commissioner must disclose a real or perceived conflict of interest to the Speaker and the Inspector. The Commissioner must not participate in the matter without the Speaker's approval and must do so under any conditions imposed by the Speaker. Of note, the Commission has already published conflict of interest protocols for staff as a notifiable interest – see *Integrity Commission (Personal Interest) Guidelines* 2020. Nonetheless, this is not a mandatory requirement, and such conflict of interest disclosure requirements could be legislated to include a process for disclosing and recording prior work areas, professional relationships, and managing these so as to avoid any actual or perceived conflicts.

The following options are available for stakeholder consideration and feedback.

Option 1 – remove the current five-year restriction.

This option would involve completely removing the current prohibition against hiring existing or former public servants. To address issues around perceived and actual conflicts of interest, this option could also involve amending section 32 to require the Integrity Commission to maintain a conflict of interest register for all staff including separate recordings of relevant ACT Government agency experience and recent close working relationships such as direct reporting line relationships.

[2] *Integrity Commission Act 2018* s32.

Option 2 – Amend the existing provision to provide flexibility in appointing former public servants.

This option would include an exception that allows employment of current or former ACT public servants if certain oversight entities agree (options include Speaker and/or Inspector).

In relation to the risk of a person moving to the Integrity Commission and improperly interfering in Commission matters, this could be addressed by a vetting process involving appropriate people such as the Inspector and/or Speaker, as proposed by the Commission.

Conflict of interest management could be addressed by internal protocols, governance, and decision-making models within the Commission.

If the Commission is able to employ certain categories of persons perhaps this should be subject to restrictions - such as former Members of the Legislative Assembly (MLAs) and their staff, noting that such restrictions apply to the Chief Executive Officer and Commissioner positions. If restrictions are considered desirable, there could be a time limit on their operation.

Option 3 – Maintain the existing provision.

This option would involve no legislative change and keeping the existing requirements in the IC Act.

Discussion

1. Should the prohibition on the Integrity Commission hiring staff who are, or have been in the last five years, public servants be removed? Which of the options listed above would be preferable?
    a. If the proposal is accepted, what protections should be put in place to ensure that conflicts of interest are adequately addressed?
2. Are there categories of employees that should be restricted from employment at the Integrity Commission, such as MLAs or their staff?
    a. If so, should the restriction apply only for a limited time and/or only to high-level positions?

Amendment to extend time in which arrested person can be held

The Integrity Commission has proposed an amendment to section 160(5)(c) of the IC Act to enable a person who is named in an arrest warrant to be brought before the Commission 'as soon as practicable', as opposed to 'immediately'. This would allow for a person who is arrested after-hours to be brought to the Commission the next morning, rather than require the Commission to (in practice) convene outside business hours.

Issues

The legal definition of 'immediately' was considered in *Dorsman v Nichol* where the Court held that 'immediately' is defined as 'as soon as practicably may be'.[3] In this sense, there still may be uncertainty in the Integrity Commission context as to what 'practicable' may mean – as noted in *Hart v MacDonald*, the term 'immediately' takes its meaning from the context in which it used.[4] Given that police must release the person if they can't be brought before the Commission immediately, it may be

[3] *Dorsman v Nichol* (1978) 20 ALR 231 at 30.
[4] *Hart v MacDonald* (1910) 10 CLR 417 at 421-2.

that police are unable detain a witness in custody if the Commission is unable to conduct a hearing. In any event the position is not clear.

The Commission's proposal effectively creates a power of detention in the IC Act as the police would detain the subject of the arrest warrant until the Commission is in a position to undertake the examination. The Integrity Commission Bill 2018 explanatory statement states that section 159 of the IC Act is not a power of detention, and its only purpose is to allow the police to take the subject of an examination summons directly to the Commission to give evidence. The first and second select committee inquiries into establishing an independent Commission did not consider whether the legislation should include detention powers.

As a human rights jurisdiction, the ACT Government must ensure it adheres to the obligations under the HR Act, or otherwise justify why a proposed law to that would impinge on human rights is necessary. Two provisions in the HR Act are relevant:

- Subsection 18(1) – Everyone has the right to liberty and security of person. In particular, no one may be arbitrarily arrested or detained.
    - The ACT Human Rights Commission has suggested that consideration is required as to whether detaining a person for an undefined period (that is, 'as soon as practicable for the Integrity Commission to convene a hearing') is arbitrary.
- Subsection 18(6) – Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.

The fact that the person summonsed is not accused of a crime is a very relevant consideration in evaluating this proposal. Further, the proposal may risk witnesses being subject to detention for uncertain periods while the Integrity Commission prepares itself for examination. For example, the proposal could create a situation where a witness is arrested in the afternoon of Easter Thursday, and then detained for four days until the following Tuesday to account when the Commission isn't available. This risk could be mitigated by imposing a time-limit on detention (for example 24 hours) to ensure timely facilitation of examination – a similar approach is used in the *Bail Act 1992*, which requires an accused to be brought before the court within 48 hours after an application of bail is refused.[5]

On the other hand, the Integrity Commission's concern with the current provision is understandable – if the police are unable to bring the subject of the arrest warrant 'immediately' to the Commission, or if the Commission is not in a position to undertake the examination at the time the warrant is executed, the police must release the subject of the warrant. Realistically, this requires the warrant to be executed during business hours as it would be logistically difficult, and operationally undesirable, to conduct an examination after-hours in a potentially rushed manner. For example, there would be issues of convening administrative and security staff, and it may also be difficult for the arrested person to access legal representation for the examination.

The Integrity Commission would not usually have control over when ACT Policing execute a warrant, which may lead to it being executed after-hours - at which point the person would need to be released

[5] *Bail Act 1992* s17.

if they could not be brought before the Commission. This could then provide the opportunity for the subject of the examination summons to leave the jurisdiction, or to destroy evidence. There may be scope for this to be addressed operationally through the Commission and ACT Policing entering into a memorandum of understanding where the two parties will coordinate execution of an arrest warrant to ensure the witness can be brought before the Commission immediately.

The risks identified are present throughout the seven-day notice period required for an examination summons – if a person is inclined to destroy evidence or flee the jurisdiction, they may take that action upon receiving the notice. In addition, a person continues to expose themselves to criminal penalty if they fail to attend the Commission for examination.[6]

Discussion

3. Should the Integrity Commission's proposal be dealt with through legislative amendment to allow for the detention of people subject to a warrant until they can be brought before the Commission, or should it be dealt with through the Commission's operational practices?
    a. For example, is it preferable that the Commission coordinate the arrest warrant's execution with ACT Police to ensure the person is capable of being brought immediately before the Commission for examination at time of execution?
    b. Is it preferable for the Commission to convene after hours rather than detaining a person?
    c. Could keeping a person in detention be allowed only where there are grounds for believing the person may leave the jurisdiction or destroy evidence?
4. If the proposal is implemented, should there be a time-limit on the person's detention in police custody?
    a. If so, what is the appropriate amount of time of detention?

Loss of immunity for prior inconsistent statement

The IC Act abrogates privileges against self-incrimination and exposure to civil penalty for people who are provided an examination summons to attend the Integrity Commission for examination or to produce evidence.[7] As these privileges are available during ordinary court proceedings, the IC Act includes a derivative use immunity that provides that any information, document, or other thing obtained directly because of the abrogation may not be used against the person in civil or criminal proceedings, or a disciplinary process .

The Integrity Commission has submitted that the derivative use immunity should not apply in a separate proceeding if it would reveal that a person is providing a contradictory statement to that which was provided to the Commission. The Commission argues this proposal would avoid bringing the administration of justice into disrepute and avoids an injustice to another party to the proceeding in a civil or criminal proceeding.

Issues

The IC Act includes several exceptions to derivative use immunity, including proceedings for an offence in relation to the falsity or misleading nature of the answer, document or information, or an offence

[6] *Integrity Commission Act 2018* s172.
[7] *Integrity Commission Act 2018* s175.

against administration of justice offences.[8] Consequently, the Integrity Commission's proposal would expand these exceptions to all proceedings – civil or criminal.

The operation of derivative use immunity in practice may motivate a witness who has engaged in corrupt conduct to be forthcoming with evidence and material stemming from their admission if they know it can't be relied on in subsequent criminal or civil proceedings.

The derivative use immunity affords a blanket safeguard and protection for witnesses to ensure their full engagement with an investigative process that abrogates rights and privileges typically available during a court process. However, there may be circumstances where the witness under examination genuinely believes they are telling the truth at the time, based on their understanding of the situation, only to later be contradicted. This may lead to confusing, and possibly damaging, interactions in future legal proceedings where a party tenders evidence of the other party's previous inconsistent statement made to the Integrity Commission, when that party made that statement to the Commission in good faith.

Nonetheless, providing that derivative use immunity is lost for an inconsistent statement would avoid denying justice to another party in a proceeding where it can be proven that a witness is providing a statement inconsistent with one they made before the Commission. For example, the current legislation may encourage situations where a party to a civil proceeding makes a false statement in that proceeding, knowing that the accurate evidence they previously provided to the Commission is inadmissible.

Discussion

5. Should the circumstances where a witness would lose derivative use immunity for a prior inconsistent statement, be expanded? If so, how and with what limitations?
    a. In particular, are there any other risks or consequential issues if the proposal were implemented that would make a change unnecessary or undesirable?

Who must receive a draft copy of an Integrity Commission report?

The Integrity Commission has raised a concern with the scope of people who must be given an opportunity to comment on an investigation or special report.

Sections 188 and 212 of the IC Act provide that, if a proposed investigation or special report (respectively), or parts of it, relate to a person, the Integrity Commission must give the draft report (or parts of it) to that person, and if it relates to a public sector entity, to the head of the public sector entity. The Commission must also provide a copy to anyone it considers has a direct interest.

The Commission considers that the phrase 'relates to' is too broad. The Commission has suggested that a preferable approach would be either to limit the requirement to those adversely affected by the report, or to leave it the Commission's discretion.

Issues

The explanatory statement for the Integrity Commission Bill 2018 simply stated that the Commission must provide the draft report to relevant persons and/or entities for comment.

[8] *Integrity Commission Act 2018* s176(3).

There is an argument that the construction 'relates to' is too broad. It is useful to illustrate the issue with a hypothetical example of a draft report about an isolated serious corrupt conduct perpetrated by a Senior Director. In this example, no adverse finding is made against the Executive Branch Manager (EBM) who manages the Senior Director. Nonetheless, the report could be said to relate to the EBM because the corrupt conduct occurred in their branch. More broadly, there could even be a reasonable argument that the report relates to the Director-General, as the incident occurred within their organisation. If the corruption was facilitated by a gap in ICT infrastructure, the responsible ICT manager may also be considered to be related to the report.

There is obvious benefit in casting a wide net to allow people directly involved in an Integrity Commission matter to comment on a draft report. This includes refuting findings where a rebuttal through other evidence is available, providing further context and explanation to a finding, or correcting errors of fact. Limiting the recipients of a draft report to those the Commission considers are adversely impacted, or leaving it to the discretion of the Commission, may increase the likelihood of errors and incomplete information being published as fact. This may have serious consequences for people reputationally and erode confidence in the Commission. In addition, advance notice of a report that may affect a person's interest would assist wellbeing by allowing the person to prepare for the report's release, rather than being taken by surprise when made public without notice.

Regardless of the wording, the Integrity Commission is still required to afford natural justice to those affected by the report – which would afford an avenue of judicial review to the Supreme Court if the Commission were not to provide the report to a person it was required to (for example, a person may apply for judicial review under the *Administrative Decision (Judicial Review) Act 1989* (ACT)). As noted in *Annetts v McCann*,[9] the rules of natural justice are not fixed and immutable, and 'the authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise'.[10]

There would be an operational benefit for the Integrity Commission if the IC Act could provide more specificity on who should, and should not, reasonably be provided an opportunity to comment on a report. This could also affect those who are mentioned and genuinely impacted by the report by unnecessarily drawing out the investigation process longer than may otherwise be required. A more direct approach is used in the *Auditor-General Act 1996*, which lists the specific people who must receive a copy of the report (such as the head of a public sector entity), or those who have a direct interest in the report.[11] In Victoria (a human rights jurisdiction, like the ACT), the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (IBAC Act) provides that a copy of the report must be provided to any person where an adverse finding is proposed to be made, with an opportunity for comment.[12] The relevant material must also be provided to any person named in the report, but for information only as they cannot provide comment in relation to the material in which they are named.[13]

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[9] *Annetts v McCann* (1900) 170 CLR 596 at 18.
[10] *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 312.
[11] *Auditor-General Act 1996* s18.
[12] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s162(3).
[13] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s162(4).

Discussion

6. Is the current framework outlining who should receive a copy of an investigation or special report adequate?
    a. If not, what are the appropriate limitations on who should receive a copy of a report? For example, should provision of the report be limited to those directly named in a report?
    b. Alternatively, should a broader range of people be sent a copy of the report, but not be permitted to provide comment unless they have a direct interest in the report (for example, as in practice in Victoria)?

Shortening timeframe to comment on reports

The Integrity Commission has stated that the current six-week timeframe to comment on both investigation and special reports is too long and has suggested it be reduced to four weeks with a provision to allow the Commission to extend the timeframe when considered appropriate.

Issues

Other jurisdictions do not prescribe a set minimum period for a person to respond to a draft report,[14] the legislation and case law provide some flexibility and rely on what is considered a reasonable opportunity to respond. The common law principle of natural justice (explained earlier under the discussion of who should receive a report) would provide an avenue of judicial review to the Supreme Court under the Administrative Decisions (Judicial Review) Act if someone was not satisfied with the length of time afforded by the Commission if there was no set time stipulated in the IC Act.

A person may wish to seek legal advice on the content of the report and the context in which they are mentioned. Allowing time for a person to seek legal advice and consider relevant material may take several weeks. Responding to the report, which may be many hundreds of pages (as evidenced by reports from other anti-corruption commissions), will inevitably take considerable time.

In this regard, the six-week minimum timeframe does not distinguish between a person who is mentioned a few times in a minor manner within a report, and someone who may be the main subject of the report. Realistically, these two examples do not require the same amount of time to be afforded a procedurally fair process. This may be of relevance where the Integrity Commission is finalising a report before including additional material that may be minor, but requires another six-week period for comment if someone else is included (even if minor in nature). There may be scope for flexibility that allows a person to agree to a reduced response timeframe if they are satisfied with their opportunity for review earlier than the minimum six-weeks.

The practical impact of allowing this length of time is to lengthen the time between the Integrity Commission having completed a draft report and being able to finalise it. This has an impact for people awaiting the outcome of the investigation. The benefit of a shorter period for the Commission would be the ability to finalise an investigation quicker. Some witnesses may also prefer the matter to be finalised in a timelier manner so it can be put to rest – alternatively, others may wish for more time to

[14] *National Anti-Corruption Commission Act 2022* (Cth) s153, *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s162, and *Independent Commissioner Against Corruption Act 2017* (NT) s50.

more rigorously engage with the material, particularly if it may involve potential criminal conduct or affect their reputation.

Discussion

7. Is the current six-week timeframe an appropriate amount of time to comment on a report, or could it be reduced to say four weeks without unfairly limiting the ability to consider a report?
8. Should the IC Act afford greater scope for flexibility within the response timeframe?
    a. For example, should the legislation require that the Integrity Commission provide a reasonable amount of time to respond to the report?

Interaction between *Corrections Management Act 2007* and *Integrity Commission Act 2018*

The Integrity Commission has raised a concern that section 217A of the *Corrections Management Act* 2007 (CM Act) may prevent the relevant Director-General with administrative responsibility (currently Justice and Community Safety Directorate) from producing a detainee to the Commission under a mandatory attendance notice if the detainee does not consent to the movement.

Section 217A of the CM Act provides authority for the Director-General to arrange a detainee's movement to the Commission to meet the requirements of a mandatory attendance notice (e.g. section 90 or section 147 of the IC Act) – but only if the detainee consents to the movement.

Issues

The legislative interaction between the IC Act and CM Act requires clarification to either require a detainee's mandatory attendance at the Integrity Commission if summonsed for examination, or outline the process if a detainee exercises their right to refuse consent to transport under section 217A of the CM Act. It is unclear whether a detainee may be held in contempt under section 166 of the IC Act if they refuse to provide their consent to the Director-General to bring them before the Commission where they have been issued with a mandatory attendance notice.

It is important to note this is not a question of whether a detainee should provide their consent to participate in an examination – it is clear that a detainee should be required to participate in an examination when compelled to do so (as others are). The discussion is focussed on whether a detainee should be required to provide their consent to transport, and if so, what arrangements should be in place to ensure the detainee can meet the terms of the examination summons so as to not be held in contempt of the Integrity Commission.

In support of mandatory attendance

The IC Act requires attendance of all persons summonsed to the Commission (with exceptions for persons under 16 years old). In principle, it seems right that detainees should be subject to the same requirements as others to provide assistance in exposing corrupt conduct.

For criminal justice proceedings, such as attendance at Court for testimony, section 204 of the CM Act provides authority for the Director-General to facilitate detainee transport without their consent. Section 204 includes an explanatory note stating that section 204 may be used to transport a detainee to a place to assist police or a criminal justice entity in relation to the administration of justice.

Alternatively, the Court may be able to receive evidence from a detainee via audio-visual link at its own motion, or by application from any party to the proceeding.[15]

In support of requiring consent

Section 19 of the *Human Rights Act 2004* (HR Act) provides that anyone (including a detainee) deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. In respecting this dignity, some may consider there is a distinction between summons to court and the Integrity Commission – a Legislative Assembly office responsible for making findings of fact with regard to public officials. In this scenario, there may be valid arguments that it is incumbent on the Commission (as a fact-finding agency) to facilitate the necessary arrangements for a detainee to provide their compelled evidence where it is impossible for the detainee to attend on their own accord. This may include the Commission either attending the correctional facility to conduct the examination, or receive the evidence via audio-visual link.

Option 1 – amend the CM Act to clarify the existing requirement for a detainee to provide consent

This option would involve amending section 217A of the CM Act to clarify that a detainee is not in contempt of the IC Act if they refuse to provide consent to transport to appear before the Integrity Commission. The provision would also clarify that alternative arrangements to facilitate examination are required – such as audio-visual link or conducting the examination at a correctional facility – to ensure the detainee participates without physically attending and not be held in contempt if they refuse transport.

Option 2 – remove the requirement of a detainee to provide consent to transport

This option would remove a detainee's ability to refuse to consent to transport to appear before the Integrity Commission by amending section 217A to remove an appearance at the Commission from the definition of a 'civil proceeding'. If an amendment mandated attendance before the Commission by detainees, the Director-General could use existing leave directions under section 204 of the CM Act.

Discussion

9. Should the IC Act be amended to give effect to Option 1 or Option 2?
10. Are there any other relevant matters to be considered in relation to detainees appearing before the Integrity Commission?

Limit the scope of disclosure to a court

The Integrity Commission has raised a concern regarding section 202 of the IC Act which provides for a court to require the Commission to make evidence available to the court if it is considered to be in the interests of justice. Section 202 also requires that the Commission be first given a reasonable opportunity to make representations about the evidence sought by the court.[16] The Commission has requested that the section be limited to exclude the requirement to disclose information where it would prejudice a Commission investigation or threaten the health and safety of a witness.

[15] *Evidence (Miscellaneous Provisions) Act 1991* s32(1).
[16] *Integrity Commission Act 2018* s202.

Issues

It is important to consider what is meant by the words 'in the interests of justice'. The term is commonly used in other legislation, for example, section 14ZZZB of the *Taxation Administration Act 1953* (Cth) which provides that a person may be required to disclose certain information to a court or tribunal if the court or tribunal considers it in the interests of justice. Section 103 of the *National Anti-Corruption Commission Act 2022* (Cth) is similarly worded. Section 113 of the *Independent Commission Against Corruption Act 1988* (NSW) provides that, in relation to a criminal proceeding before a court, the court may order production of restricted evidence if it considers it is in the interests of justice.

The High Court recently explored the term in *Deputy Commissioner of Taxation v Ze Neng Shi* (Shi).[17] The Court stated that 'what the interests of justice require in a particular case is to be weighed having regard to the proceeding in which the question arises… the factors to be balanced in determining whether the interests of justice require the information to be disclosed are not and cannot be prescribed but may include the nature of the information, the likelihood of an offence being prosecuted and any resulting unfairness to a party'.[18]

The Court's interpretation in Shi is broad and includes consideration of any unfairness to a party. It would arguably enable a court to consider the matters raised by the Commission as justification for the amendment, but it would leave consideration of those matters in the hands of the court.

The amendment sought by the Commission would arguably limit a court's ability to allow evidence that may be of evidentiary value in a court proceeding even where the High Court's test is satisfied. There are existing avenues for the Commission to protect information disclosed to a court that it considers may prejudice an investigation. For example, the Commission could apply for an order to prohibit publication of evidence under section 111 of the *Evidence (Miscellaneous Provisions) Act 2011*, which also allows the court to remove people from the courtroom while the evidence is produced.

Discussion

11. Should the scope of disclosure to a court be further limited under the IC Act to reflect the Integrity Commission's proposal?

Extending disclosure protections for complainants beyond initial corruption complaint

The Integrity Commission has raised a concern that immunity from civil and criminal liability under section 288 of the IC Act is limited to disclosures made during an initial complaint to the Commission. The Commission considers that the IC Act should extend a complainant's immunity to any further voluntary disclosures made during an investigation.

Issues

The explanatory statement for section 288 suggests the intent was for the immunity to apply once the Integrity Commission had assessed the complaint as a genuine corruption complaint. It stated: 'This clause makes it clear that the usual secrecy, confidentiality or other ethical, professional and legal

[17] *Deputy Commissioner of Taxation v Zu Neng Shi* [2021] HCA 22.
[18] *Deputy Commissioner of Taxation v Zu Neng Shi* [2021] HCA 22.

requirements do not apply once an assessment is made that a person has brought forward a genuine corruption complaint'.[19]

This is inconsistent with the literal application of section 288, which applies immunity once the person makes a complaint to the Integrity Commission – rather than after the Commission has assessed it as a genuine complaint as described in the explanatory statement. However, section 290 provides that a person forfeits that immunity if a court is satisfied that the complaint is vexatious or misleading.

The Integrity Commission's proposal would likely encourage a culture of continued reporting and disclosure to the Commission, which may lead to further information and evidence to assist the Commission.

Discussion

12. Does the IC Act currently provide satisfactory protections for complainants?
13. Are there unintended consequences of extending continued immunity to complainants beyond the initial disclosure?
14. Alternatively, should the IC Act be amended to reflect the apparent intent outlined in the explanatory statement, in that immunity would apply only once the Integrity Commission assesses the complaint as genuine?

Amendment to enable exercise of power to issue production or attendance notice where 'reasonably required' rather than when 'necessary'

Sections 90 and 147 of the IC Act, which provide for mandatory production notices, require that the Integrity Commission must consider the production 'necessary' for the preliminary inquiry/investigation before issuing the notice. The Commission has proposed that this threshold be amended to provide that the production be 'reasonably required' for the preliminary inquiry/investigation.

Issues

The proposal may effectively lower the threshold requirement for the Integrity Commission to use its coercive powers to require a person to attend the Commission to produce documents and/or for examination. The change may be necessary as the Commission may not know whether the material is technically 'necessary', in that the investigation could not proceed without it, but may know it is reasonably required. Nonetheless, it remains within the Commission's discretion as to what information is considered necessary for an investigation – for example, in practice there may be little operational difference between 'necessary' and 'reasonably required' as it could be argued that all information is necessary for the Commission to effectively undertake its function to investigate corrupt conduct.

The explanatory statement outlines the ACT Government's intent to ensure coercive powers were compatible, and balanced, with human rights. Given the intent, it may be that 'necessary' was used deliberately to ensure coercive powers were only used where absolutely appropriate. The IC Act also

[19] https://www.legislation.act.gov.au/View/es/db_59287/20181127-70136/html/db_59287.html.

requires that notices to produce (sections 90 and 147) be reported on a monthly basis to the Inspector for oversight.[20]

As a point of reference, the IC Act provisions are structured in the same way as the IBAC Act[21] in Victoria (also a human rights jurisdiction). In New South Wales, there does not appear to be a threshold that must be satisfied for the Independent Commission Against Corruption to issue a notice.[22]

Discussion

15. Should the wording in sections 90 and 147 of the IC Act be changed to 'reasonably required' rather than 'necessary'?

[20] *Integrity Commission Act 2018* s205.
[21] *Independent Broad-Based Anti-Corruption Commission 2011* (Vic) s59E.
[22] *Independent Commission Against Corruption Act 1988* (NSW) s21,22.

Minor Operational Proposals

This part briefly discusses proposals that are minor in nature, including administrative efficiencies, and amendments that would make clear the intent of certain provisions.

A1 - Include 'restricted information' in the 'protected information' definition

Section 297 of the IC Act creates an offence for Integrity Commission and Inspector staff to disclose protected information, defined as 'information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act'. Alternatively, 'restricted information' – defined in section 76 of the IC Act for confidentiality notice purposes - is much broader and includes information that isn't limited to a particular person, but extends to any information relating to an investigation or preliminary inquiry.

The Integrity Commission Bill 2018 explanatory statement indicates that the intent of section 297 was to include more information than captured under the definition: 'This is an important provision intended to protect the privacy of persons about whom the Commission has collected information. It is also intended to prevent inappropriate disclosure of information about secretive investigative techniques and methods used by the Commission'.[23]

Section 297 could be amended to include reference to the 'restricted information' definition outlined in section 76. The explanatory statement appears to provide that the provision was intended to capture this information.

A2 - Insert a general exception to secrecy requirements to allow the Integrity Commission to share information where appropriate

Section 196 of the IC Act outlines the circumstances in which the Integrity Commission can disclose information to other agencies that it has obtained in the exercise of its functions.

Disclosure is limited to agencies included in section 196, including an integrity body, a law enforcement agency, a prosecutorial body, a referral entity, the head of a public sector entity, and an agency with which the Commission has an MoU in place under section 56 of the IC Act.

Notably, there are Commonwealth agencies which may not meet the criteria in section 196 but which may hold information useful to the Integrity Commission, that they can only release if the Commission can share information about the matter. This applies in particular to the Australian Taxation Office and Australian Transaction Reports and Analysis Centre (AUSTRAC).

The review considers there are several options to address this matter, including:

- amending section 196 to include a regulation making power to enable the Minister to specify other entities to which the Integrity Commission may disclose information;
- amending section 196 to list additional entities to which the Integrity Commission may disclose information;
- amending section 196 to include a broad discretionary power for the Integrity Commission to disclose information where appropriate (and report to the Inspector when this power is used).

[23] https://www.legislation.act.gov.au/View/es/db_59287/20181127-70136/html/db_59287.html.

A3 - Expand the range of permitted disclosures under section 199 to include persons assisting the person to whom the notice applies

Section 199 of the IC Act outlines the permitted disclosures a person may make when subject to a non-disclosure notice (section 198). A non-disclosure notice is distinct from a confidentiality notice (section 77) and applies only to certain processes under the IC Act, including notifying and updating a complainant on the status of their complaint, and providing draft copies of reports to relevant people named in that report.

Currently, a permitted disclosure under a non-disclosure notice only includes disclosure, in essence:

- to an interpreter
- to an independent person if the person is illiterate or has a mental, physical or other impairment which prevents them from understanding the notice
- to a parent, guardian or independent person if the person is under 18 years old
- in relation to seeking legal advice
- in relation to information otherwise publicly available
- to the Inspector when made by the person in making a complaint to the Inspector, and
- as otherwise authorised by the IC Act.

A person named in a report may require assistance from a colleague to appropriately comment on the draft report. For example, to clarify if their recollection of events or actions that a public sector entity took that they were both involved in are described accurately. As outlined, this is currently prohibited under a non-disclosure notice.

A permitted disclosure in the confidentiality notice context (section 77) allows disclosure that is necessary for the person to comply with a production notice. Arguably, the proposal to amend permitted disclosure in the non-disclosure notice context would simply align it with the permitted disclosures under a confidentiality notice. Alternatively, the IC Act could be simplified by removing non-disclosure notice provisions and using the existing confidentiality notice regime to govern all non-disclosure practices under the IC Act.

There is a case that this amendment would enhance procedural fairness by allowing a person appropriate assistance to respond to a draft report. However, there remains risk that disclosure could jeopardise an ongoing investigation, for example, if assistance is sought from someone involved in the investigation/matter. This risk could be mitigated by requiring the person to seek prior permission from the Integrity Commission about who they may share the report with for the purposes of assistance.

A4 - Amendment to s221(a) to require the Integrity Commission not to publish information that would jeopardise an investigation under the IC Act

Section 218 of the IC Act provides, among other things, that the Integrity Commission must include in its annual report a description of the corruption complaint it is investigating. Section 221 of the IC Act provides that the Commission must not include in an annual report any information that would compromise another investigation under the IC Act.

The word ‘another’ in section 221 suggests the restriction is limited to where the information would relate to a different and separate investigation under the IC Act – rather than where the information

would jeopardise the particular investigation the information relates to. The review considers it may be unnecessarily restrictive to limit non-disclosure requirements to circumstances where it affects two or more investigations – there may be situations where the Commission is conducting an own-motion investigation where publication of investigative details in the annual report may compromise the investigation.

Amending section 221 to replace 'another' with 'an' would enable the Integrity Commission not to publish information that may jeopardise a single investigation.

However, this would not remove the requirement for the Commission to disclose that it is investigating that particular matter – even if no detail is provided about the matter itself. It is useful to know the total number of investigations that the Commission is currently undertaking – even if no detail is provided about what the investigations relate to.

A5 - Amendment providing for notice that transmission prior to attendance is permitted

The IC Act allows the recipient of a notice to comply with the terms prior to the stated production time.[24] If this is done, the Integrity Commission may excuse that person from attending the Commission at the time stated in the notice.[25] It may be appropriate for the IC Act to require the Commission to include this information in the production notice (given under section 90 and section 147).

Recipients may not otherwise be aware that it may be beneficial for them to comply with the notice at an earlier time – particularly if the notice is for a specific and non-controversial document. Further consideration may be required as to whether discretion is still afforded to the Integrity Commission as to whether to excuse the person from attending the Commission if production requirements are met earlier. Currently, the IC Act provides that the Commission 'may' excuse the person from attending. It would be superfluous to require the person to attend when the production requirements are met – perhaps this could be amended to 'must'.

A6 – Electronic lodgement of privilege claims

The Integrity Commission has submitted that the IC Act does not provide an efficient method to deal with privilege claims during a lockdown where social distancing and other measures are required. This proposal would clarify how to deal with privilege claims – which require the Commission to place an item in an envelope and deliver it to the Supreme Court[26] – where social distancing is required.

There is merit in exploring this proposal to ensure privilege claims can continue and not delay an investigation during a lockdown or other state of emergency. More significantly, there appears to be merit in broadening the existing arrangements to allow a digital means of producing evidence with asserted privilege directly to ACT Courts to avoid the need for paper/envelope-based processes. This would also give respondents confidence that the Commission could not have seen material that is subject to a privilege claim.

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[24] *Integrity Commission Act 2018* s90(5), s147(4).
[25] *Integrity Commission Act 2018* s147(4).
[26] *Integrity Commission Act 2018* s95, s127, div 3.6.2.

A8 - Amendment to require reputational repair where the person cleared of any wrongdoing

During debate for the Integrity Commission Bill 2018, it was proposed that the Integrity Commission be required to make and use reputational repair protocols, and who (and in what situations) those repair protocols would apply to. All parties agreed on the principle of requiring reputational repair protocols (which the Commission has enacted), the question was towards when the repair protocols would be enlivened. The review is considering this proposal due to the Government's commitment during that debate to consider that matter at a later date.

Paragraph 204(1)(b) of the IC Act provides an exhaustive list of circumstances where reputational repair protocols are required. The alternative approach discussed during debate was to replace this provision with a general one that requires reputational repair protocols to operate when a person has been subsequently cleared of any wrongdoing. The provision was not clear on what this would involve, for example, who is responsible for clearing the person of wrongdoing (such as a Court), and how would this be known if not necessarily made public.

The existing provision in the IC Act is arguably broader than what is proposed. For example, the existing provisions cover a situation where a matter is referred to the Director of Public Prosecutions (DPP), but the DPP decides against pursuing charges. Applying this situation to the alternative proposal, this particular circumstance does not necessarily clear the person of any wrongdoing as the DPP only decided not to pursue charges, but may still warrant action under the reputational repair protocols. Alternatively, the DPP may only choose not to pursue charges due to insufficient usable evidence – the person may still have engaged in corrupt conduct but there is not enough proof to reach a criminal threshold of beyond reasonable doubt.

A9 - Frequency of reports to the Inspector

During debate of the Integrity Commission Bill 2018, there were alternative approaches raised about the frequency of reports provided to the Inspector by the Integrity Commission. It was decided to consider the proposal to reduce the frequency (from monthly to quarterly) at a later date.

Section 205 of the IC Act requires the Commission to provide monthly reports to the Inspector about various aspects of operations, including (but not limited to) the examination summons' and preliminary inquiry notices it has issued. The provision's intent is to ensure regular oversight of the Commission to minimise the risk that its coercive and covert powers are used inappropriately.

The review is looking at this proposal due to the Government's commitment during that debate to consider that matter at a later date.

A10 - Remove the requirement to disclose information to a court in compliance of another law in force in the Territory, and provide the Commissioner discretion to disclose protected information if in the public interest

Section 297 of the IC Act creates offences in relation to the improper use or disclosure of protected information (see proposal 1 for reference to 'protected information'). Section 297 provides that a person is required to divulge protected information if it is to a court and for the purposes of the IC Act or another law in force in the Territory. The Integrity Commission proposes that this requirement be

removed, and that protected information should not be disclosed in these circumstances so as to ensure the integrity of an ongoing investigation.

On the other hand, allowing the Integrity Commission, or any other person appearing before a court, to refuse to disclose information even when required under another law would in essence prioritise investigations under the IC Act above other legislative objectives in the Territory. For example, disclosure of certain information may be required under the *Children and Young People Act 2008*,[27] in fact the information may be of critical importance in a proceeding under this Act. If the Commission is concerned about the information jeopardising an investigation, it is able to seek suppression or other non-publication orders over that information.

A11 - Clarifying the Commissioner/CEO 'head of service' powers for the purposes of the Public Sector Management Standards 2016

The Integrity Commission has raised a possible oversight in the *Public Sector Management Act 1994* (PSM Act). Section 152 of the PSM Act provides that certain office holders have management powers under the PSM Act. Where a management provision under the PSM Act refers to the 'Head of Service', that reference is taken to mean the public sector employer. In the case of the Commission, this would be the Integrity Commissioner or the Chief Executive Officer.

However, the 'management provision' definition in section 152 specifically carves out section 251 of the PSM Act, which provides that the Head of Service may make management standards. The Head of Service has issued the *Public Sector Management Standards 2016* (PSM Standards) under section 251. It appears the intent of carving out section 251 was to restrict public sector employers from creating their own management standards, in addition to the management standards made by the Head of Service. However, the language and structure used in section 152 appears to remove the PSM Standards entirely, so that the standards do not apply to public sector employers. This has the effect of limiting a public sector employer's management ability, for example, the ability to recognise prior service for the purpose of long service leave (included in section 88 of the PSM Standards).

One possible way to address this may be to amend the PSM Act to clarify that the PSM Standards apply to public sector employers, but that public sector employers may not create their own management standards.

A12 - Introduction of a provision to allow a person other than the notice recipient to comply with the notice

The Integrity Commission may issue a production notice during a preliminary inquiry[28] and investigation[29] requiring the stated person to produce a document, item, or other thing, to the Commission at a stated time. The terms of the notices are inflexible, and the Commission is not able to vary or revoke a notice once it is issued – even if there is an operational benefit to all parties. It would seem logical to give the Commission this power.

The Commission has also proposed that the IC Act should allow someone other than the recipient of the notice to comply with the terms of production. This proposal would provide an operational benefit

[27] For example, *Children and Young People Act 2008* s870 (confidential reporter may give evidence).
[28] *Integrity Commission Act 2018* s90.
[29] *Integrity Commission Act 2018* s147.

to both the Commission and recipients of a production notice. It is logical that a senior executive (or any other person) may wish to send another person to produce the documents to the Commission. This may, for example, be the officer who led the search and collation of material. This is allowed for production requirements under subpoena to the Federal Circuit and Family Court of Australia.

Some may consider there is a risk to the chain of custody because the documents could be tampered with or destroyed by the person delivering the documents. However, the risk is considered low especially as the contempt provisions under the IC Act would expose that person to a criminal offence.

Production notice provisions could be amended to provide that someone other than the person named in the notice can meet production requirements when agreed by both the Integrity Commission and the person named in the notice. An additional amendment may be required to allow the Commission to either modify an existing notice to specifically name the authorised person without reissuing the notice and restarting the minimum seven-day notice period, or to agree by other means to provide more flexibility.

A13 - Electronic document transmission to the Integrity Commission

The IC Act contemplates mandatory attendance at the Integrity Commission to physically deliver documents and other items requested under a compulsory notice (for example, section 90 and section 147). Stakeholders have suggested the IC Act should allow people to provide documents electronically to the Commission rather than physically attend the office (see also A7 for discussion of this matter).

Electronic production of documents is already contemplated under the *Electronic Transactions Act 2001*, which provides that if, under a Territory law, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if:[30]

- the person produces, by means of electronic communication, an electronic form of the document
- the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information in the document
- at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be usable for subsequent reference, and
- the person to whom the document is required to be produced consent to production by means of electronic transmission.

They key requirement in this case is the consent of the person to whom the document is to be produced. Given the framework for electronic transmission already in place, if electronic transmission of documents is not occurring it is likely because the Integrity Commission is not consenting to it, for one reason or another.

One option may be that the Integrity Commission's consent should not be required to provide documents electronically (noting this would require an authorising provision in the IC Act).

[30] *Electronic Transactions Act 2001* s10.

A14 - Eligibility for Integrity Commissioner and Acting Integrity Commissioner

The Integrity Commission has submitted that the requirements for appointment as acting Integrity Commissioner do not match the requirements for the ongoing Commissioner. In particular, an acting Commissioner is not required to have experience as either a judge and/or legal practitioner. Section 40 of the IC Act only requires that the Speaker appoint a person who has extensive knowledge or experience in criminal investigation or criminal adjudication, law enforcement or the conduct of investigations, or public administration, governance, or government.

The Integrity Commissioner, whether acting or ongoing, must preside at an examination and this function may not be delegated. Given the legal nature of an examination, and the requirement to abide by the legislation in conducting an examination to ensure natural justice and procedural fairness, it is important that the Commissioner has experience as a legal practitioner.

The Speaker has previously appointed Mr John McMillan AO (who has an extensive legal background) as the acting Integrity Commissioner.[31] A future appointment for a person as the acting Commissioner would involve the making of another Appointment by the Speaker, in consultation with the relevant Assembly committee, and could not be for a period of longer than six months.[32]

Separately, the review is also interested to receive stakeholder views on the current eligibility and appointment requirements for the ongoing Integrity Commissioner role. As discussed above, the IC Act requires that the appointee is legally trained (with at least 10 years' legal experience). However, there is a requirement to appoint a former judge of a superior court who is suitable over other candidates even if another candidate is assessed as more suitable.[33]

The Integrity Commission is of course an office of public administration, not a judicial body. Removing the requirement to prioritise the appointment of a judge over others who are legally trained would allow the panel convened to assess all candidates on merit. Given the career path which ordinarily precedes appointment as a judge, prioritising this experience over others imposes limits on the candidate who may be put forward, even when another candidate may be regarded as more suitable, for example because of their experience in public sector and organisational management. Several stakeholders have supported removing this requirement in favour of a merit-based test for all candidates, providing that a minimum of 10 years legal practice experience, is maintained.

A15 - Amendments to the *Freedom of Information Act 2016*

The Integrity Commission has raised a concern about the preamble to Schedule 1 of the *Freedom of Information Act 2016* (FOI Act). Schedule 1 provides what disclosures are taken to be contrary to the public interest, and also the grounds for denying an FOI request – including information in possession of the Commission or Inspector. This would seem to allow the Commission (or others who may hold information relevant to an ongoing Commission investigation) to deny FOI requests on the basis that it is against the public interest to disclose that information. However, the preamble to Schedule 1 provides that it is not against the public interest to disclose this information if it 'identifies corruption or the commission of an offence by a public official'.

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[31] *Integrity Commission (Acting Commissioner) Appointment 2021 (No 3)*.
[32] *Integrity Commission Act 2018* s40.
[33] *Integrity Commission Act 2018* s26(2).

The explanatory material for Clause 1.1B in Schedule 1 makes it clear that the intent was to exempt the Integrity Commission from FOI Act requirements when it is exercising its investigative functions, but it must continue to apply them for its administrative functions.

The provision's intent may not be achieved in the FOI Act's current form. For example, if the Integrity Commission receives an FOI request for an unreleased investigation report it may be unable to rely on Schedule 1 if the information identified corruption and/or the commission of an offence by a public official. This is contrary to the intent outlined in the explanatory statement.

As a related issue, there is a possible conflict where a decision maker under the FOI Act could find themselves in a position where they have to choose between committing an offence under the FOI Act or the IC Act, where a person who is subject to a confidentiality notice is also the decision maker under the FOI Act. Under the FOI Act it is an offence to purport to make a decision under the Act knowing that it is a decision that cannot be made under the Act,[34] so the decision maker must make an appropriate decision under the FOI Act, even if that decision is to release information. However, under section 85 of the IC Act it is an offence to disclose restricted information when the person has been given a confidentiality notice.

A possible solution may be to omit (or amend) the preamble to schedule 1 to clarify that this is not intended to capture ongoing Integrity Commission investigations, Alternatively, an amendment could make it clear that 'permitted disclosure' under a confidentiality notice under the IC Act includes a disclosure 'otherwise authorised or required under this Act'.[35]

[34] *Freedom of Information Act 2016* s89.
[35] *Integrity Commission Act 2018* s81(i).