Integrity Commission Powers
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 considers proposals for new powers for the Integrity Commission, including examining the adequacy of existing investigative powers in response to calls from the Commission for enhanced powers under the *Integrity Commission Act 2018* (IC Act) and the *Telecommunication (Interception and Access) Act 1979* (Cth) (TIA Act), and draft legislation introduced into the ACT Legislative Assembly by the Canberra Liberals to facilitate requirements for the Commonwealth to consider provision of telecommunication intercept capabilities. Other additional powers this paper considers include extending circumstances where a witness may be subject to an arrest warrant, broadening mandatory production requirements, restricting the preliminary inquiry framework to remove reliance on privilege and secrecy, allowing the Integrity Commissioner to determine privilege claims, and changes to the Commission's access and disclosure requirements for certain information.

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**.

Existing powers and investigative tools under the *Integrity Commission Act 2018*

Anti-corruption commissions are typically afforded a range of covert and coercive powers to investigate and expose corrupt conduct. These powers typically go beyond that of standard policing powers in recognition that they are not law-enforcement agencies, but fact-finding commissions designed to provide the community a level of assurance that there is strict oversight and accountability in the public sector. For example, public officials may not rely on common law privileges such as the privilege against self-incrimination during anti-corruption commission proceedings – however, there is typically a derivative use immunity so that any information and evidence obtained by commissions using coercive powers may not be used in subsequent criminal proceedings.

The ACT is a human rights jurisdiction by virtue of the *Human Rights Act 2004* (HR Act). The powers currently afforded to the Integrity Commission were considered against the impact to human rights

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

under the HR Act with the aim of achieving a balance between protecting human rights and providing the Commission with adequate powers to sufficiently investigate and expose corrupt conduct.

Before exploring proposals for additional powers and investigative tools, it is useful to consider the existing powers available under the IC Act and other legislation. The Commission has the following powers to investigate corrupt conduct allegations:

- Require mandatory attendance at an examination.
    - Section 140 of the IC Act allows the Commission to hold an examination. Section 143 provides that that an examination may either be public or private; however, to hold a public examination the Integrity Commissioner must consider whether a public examination is in the public interest and whether a public hearing can be held without infringing a person's human rights.
    - Section 147 of the IC Act allows the Commissioner to issue an examination summons for compulsory attendance. If the witness fails to attend, the Commissioner may apply to a Magistrate for an arrest warrant to allow police to arrest the witness and bring them to the Commission.
- Abrogation of privileges against self-incrimination and exposure to civil penalty.
    - Section 175 of the IC Act abrogates the privilege against self-incrimination and exposure to a civil penalty so that a person may not withhold a document or information from the Commission during an investigation on grounds that it may incriminate or expose that person to civil penalty. Other common law privileges, such as legal professional privilege, are retained.
- Search and seizure powers with warrant.
    - Section 122 of the IC Act allows investigators to apply for a search warrant to search premises (such as home or office) and seize items listed in the warrant. This can include a mobile telephone, tablet, computer, or other communication device. Once seized, investigators may store the information contained on the device.
- Use surveillance devices with warrant.
    - The Commission can apply for surveillance device warrants under the *Crimes (Surveillance Devices) Act 2010* to investigate suspected corrupt conduct. If the Commission is investigating a 'relevant offence' under the Act, the offence must attract a penalty of at least three years imprisonment. A surveillance device includes a listening device, tracking device, or optical device, or a device that is a combination of the three. Surveillance devices typically require manual installation on the suspect's personal property. The warrants authorise the agency to use covert means to install the surveillance device.
- Issue confidentiality notices.
    - Sections 78 and 79 of the IC Act specify certain conditions which, if met, allow the Commission to issue a confidentiality notice restricting a person from disclosing 'restricted information' as defined in section 76 (with certain exceptions including for discussions with their legal representative). A person may face up to 100 penalty units, one year imprisonment, or both if they breach a confidentiality notice.

The Integrity Commission's annual reports show it has yet to apply for a search warrant or a surveillance device warrant. The Commission primarily relies on mandatory examination summons to collect information. It issued 57 summonses during the 2021-22 financial year, including 10 for private examinations.

The ACT Government has requested the Commonwealth Attorney-General make a legislative instrument to temporarily declare the Integrity Commission a 'criminal law enforcement agency' (CLEA) under the TIA Act. This matter continues to progress with the Australian Government while the review considers the merits of an ongoing designation of the Commission as a CLEA and/or an 'eligible authority' - see below for a discussion about a CLEA and an eligible authority.

Telecommunication interception and access

The Integrity Commission has requested the ability to:

- seek telecommunication interception warrants;
- seek stored communication warrants; and
- directly approach telecommunication providers to request telecommunication metadata (such as call records and call logs).[2]

According to the Commission, these powers would be useful to assist in current investigations, and indeed are critical investigatory tools. This would require the Commission to be designated as both a CLEA and an EA.

Benefits of telecommunication interception and other TIA Act powers

Telecommunication interception may provide valuable information and evidence to assist an agency investigate suspected criminal activity. For example, telecommunication interception may:

- provide firsthand evidence of a person discussing their involvement in criminal activity;
- outline a network of broader criminal activity to expose other individuals who may be involved, or have knowledge of, criminal activity;
- provide evidence that clears an individual of any involvement with suspected criminal activity;
- outline other avenues of investigation, for example, uncover criminal activity that is unrelated to activity outlined in the warrant; and
- allow the investigation to operate covertly to avoid the suspect destroying evidence including incriminating material.

In addition, in certain circumstances, the Integrity Commission may be able to conduct investigations more efficiently using interception as an investigative tool when compared to using other investigative techniques or tools currently available.

Allowing the Commission to access telecommunication data may also provide a more efficient means to obtain important data that may assist an investigation. For example, the Commission could directly access relevant account holder information and establish a historical network of contacts that may lead to other sources of information.

[2] 2021-22 ACT Integrity Commission Annual Report, page 75.

Telecommunication Interception Framework

Telecommunication interception and other telecommunication access powers are governed under the TIA Act. This Act creates exceptions to the general law prohibition of interception of and access to communications transmitted across a telecommunication service without the knowledge of the parties involved in the communication.[3] These exemptions include allowing prescribed State and Territory agencies to apply for telecommunication interception warrants and access to other telecommunication data.

This includes:

- Interception warrants: authority to seek a warrant to intercept any live telecommunication over a particular telecommunication service including calls, text messages, and use of third-party messaging platforms such as WhatsApp.[4]
- Stored communication warrants: authority to seek a warrant to obtain stored communications such as email, SMS, or voice messages stored on a carrier's server. Preservation warrants require a telecommunication provider to preserve the communications of a particular named person in the warrant for a stated time period.
- Telecommunication data requests: authority to directly approach a telecommunication provider and request metadata, but not the content of the communication. This includes information such as the call records of an account (including the phone numbers that account has communicated with), the length of calls, the email address from which a message was sent, the time the message was sent.

If granted these powers, the Integrity Commission would need to apply for warrants to a judge of a court created by the Commonwealth Parliament (for example, the Federal Court), or members of the Administrative Appeals Tribunal (AAT) nominated by the Attorney-General. Only these authorities can grant interception warrants and stored communication warrants.[5] Additionally, there is a threshold of seriousness that matters must meet before a warrant will generally be granted. For an interception warrant, the investigation must relate to an offence that carries a maximum penalty of seven or more years' imprisonment. A telecommunication data request or stored communication warrant may only be sought to assist investigation of an offence that carries a maximum penalty of three or more years' imprisonment.

As mentioned above, the mechanism for providing these powers to the Integrity Commission requires that the Commonwealth Parliament legislate to prescribe it as either (or both) a CLEA or EA. Designation as either CLEA or EA provides access to certain powers.[6] The table below outlines CLEA and EA powers under the TIA Act.

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[3] *Telecommunication (Interception and Access) Act 1979* (Cth) s7.

[4] Comprehensive Review of the Legal Framework of the National Intelligence Community https://www.ag.gov.au/system/files/2020-12/volume-2-authorisations-immunities-and-electronic-surveillance.PDF p 229.

[5] *Telecommunication (Interception and Access) Act 1979* (Cth) s6D and s6DA.

[6] Section 34 of the TIA Act allows, subject to certain preconditions, the (Cth) Minister to (at the request of the Premier of a State) declare an EA of that state to be an agency for the purposes of the TIA Act. Section 110A of the TIA Act lists the agencies that are prescribed CLEAs, which the Commonwealth Parliament may amend to include other state or territory agencies.

Table 1 – Breakdown of CLEA and EA powers

TIA Powers	CLEA	EA
Telecommunication Interception (warrant required)	No	Yes
Access to information obtained via interception by other agencies	No	Yes
Access to stored communications (warrant required)	Yes	No
Access to telecommunication data (call records and account information)	Yes	No
Request provider to preserve stored communications	Yes	No

The Commonwealth Attorney-General may facilitate temporary designation as either an CLEA or EA via a legislative instrument. The Attorney-General is unable to make a legislative instrument to temporarily declare an ACT entity an EA under the definition of 'state' in the TIA Act which does not extend to the ACT. However, the TIA Act does allow the Attorney-General to make a legislative instrument to temporarily declare an ACT entity as a CLEA. The legislative instrument is only valid for 40 sitting days of the Commonwealth Parliament but may be renewed upon expiry. As mentioned above, the ACT Government has requested that the Commonwealth make a temporary declaration of the ACT as a CLEA.

Agency Status and Designation Across Australia

The table below provides an overview of state, territory, and federal government investigative agencies designations under the TIA Act.

	Table 2 – Overview of Agencies and Designated Status	CLEA	EA
Commonwealth	**Australian Federal Police (and ACT Policing)**	✓	✓
	Australian Commission for Law Enforcement Integrity	✓	✓
	Australian Criminal Intelligence Commission	✓	✓
	Australian Securities and Investment Commission	✓	×
	Australian Competition and Consumer Commission	✓	×
	Department of Immigration and Border Protection	✓	×
	Sport Integrity Australia	×	×
States	**Independent Commission Against Corruption (SA)**	✓	✓
	Independent Commission Against Corruption (NSW)	✓	✓
	Independent Broad-Based Anti-Corruption Commission (IBAC) (VIC)	✓	✓
	Corruption and Crime Commission (WA)	✓	✓
	Crime and Corruption Commission (QLD)	✓	✓
	Law Enforcement Conduct Commission (NSW)	✓	✓
	Independent Commissioner Against Corruption (NT)	×	×
	Integrity Commission (TAS)	×	×
	Integrity Commission (ACT)	×	×

Most state anti-corruption bodies are designated as both CLEA and EA (NSW, QLD, SA, VIC, WA). The forthcoming National Anti-Corruption Commission will also be designated as both a CELA and an EA. These powers provide the ability for these bodies to apply for direct access to communications in order to examine their substance, and relationships between investigation targets and witnesses.

Anti-corruption commissions in Tasmania and the Northern Territory have no designation under the TIA Act. However, it is understood that the Northern Territory is currently seeking those powers for its ICAC. It has a broader jurisdiction than the ACT Integrity Commission as it may also investigate police officers.[7]

Tasmania has twice considered whether to seek powers under the TIA Act to its Integrity Commission, first through a parliamentary committee review of the *Integrity Commission Act 2009* (TAS) in 2009, and secondly through an independent review of this Act in 2016. In the first review, the committee concluded that 'as there had been no evidence of systemic corruption in Tasmania, an extension of powers to the Commission as a law enforcement agency [in the TIA Act context] is not required'.[8] As part of the Committee's review, it stated that Tasmania Police did not believe there was any demonstrated need for the Commission to be granted law enforcement agency access in the context of the TIA Act.[9]

In the second review, the reviewer concluded that the Tasmanian Government should ask the Commonwealth to amend the TIA Act so as to grant the Integrity Commission CLEA status.[10] From the report of the reviewer, it appears that consideration was only given to designation as a CLEA, as the report does not refer to consideration of an EA designation. In its response to the second review, the Tasmanian Government considered the recommendation and stated that it was not considered appropriate that the Tasmanian Integrity Commission have access to intercepted materials and data as such access is currently strictly limited to national security and investigation of serious criminal matters.[11]

Use and Effectiveness of Interception

Each year, the responsible Australian Government Minister publishes an annual report that details TIA Act power usage throughout the previous financial year. The report includes the number of interceptions applied for by each agency, the total granted, and the perceived effectiveness of the information obtained.[12] The table below outlines interception use by other jurisdictions' anti-corruption commissions from 2018/19 to 2020/21 (the latest available report). The table is limited to state agencies that only investigate public sector corruption. The Crime and Corruption Commission (Qld) and Corruption and Crime Commission (WA) may seek an intercept warrant to investigate matters not involving public sector corruption.

Table 3 – Breakdown of interception warrants applied for and granted

[7] The ICAC (NT) is included in the *Telecommunication (Interception and Access) Act 2001* (NT), but the federal legislation is yet to be updated to include the ICAC (NT).

[8] https://www.parliament.tas.gov.au/ctee/Joint/Integrity/Reports/Final%20Report%203%20Year%20Review%20-%20Tabled%20version.pdf page 217.

[9] https://www.parliament.tas.gov.au/ctee/Joint/Integrity/Reports/Final%20Report%203%20Year%20Review%20-%20Tabled%20version.pdf page 155

[10] https://www.integrityactreview.tas.gov.au/__data/assets/pdf_file/0006/347649/Report_of_the_Independent_Review_of_the_Integrity_Commission_Act_2009_-_May_20162.pdf page 7

[11] https://www.integrity.tas.gov.au/__data/assets/pdf_file/0015/532122/Response-to-recommendations-of-the-Independent-Reviewer_Tasmanian-Government_2016.pdf

[12] This figure provides the cases where a matter has gone to trial and intercepted material has been entered into evidence for the prosecution [note: information gained through interception that is subject to a privilege remains inadmissible as evidence].

		2018-19	2019-20	2020-21
IBAC VIC intercept warrants	**Applied for**	20	26	12
	Granted	17	24	10
	Used in evidence for prosecutions	9	9	3
ICAC NSW intercept warrants	**Applied for**	19	7	11
	Granted	19	7	11
	Used in evidence for prosecutions	0	0	0
ICAC SA intercept warrants	**Applied for**	4	23	10
	Granted	4	23	10
	Used in evidence in prosecutions	2	1	5

The 2020-21 TIA Act Annual Report notes that the data may understate the effectiveness of interception in leading to successful prosecutions, as prosecutions may be initiated, and convictions recorded, without the need to give intercepted information in evidence:

> *"In particular, agencies continue to report that telecommunications interception effectively enables investigators to identify persons involved in, and the infrastructure of, organised criminal activities. In some cases, the weight of evidence obtained through telecommunications interception results in defendants entering guilty pleas, eliminating the need for intercepted information to be admitted into evidence."*[13]

Applicability of ACT criminal offences for telecommunication interception warrants

The table below outlines offences under the *Criminal Code 2002* that the Integrity Commission may investigate in relation to a corrupt conduct matter, and whether that offence meets the threshold to rely on interception and other powers as either a CLEA or EA.

Table 4 – Overview of crimes that may be applicable for the Integrity Commission

Crime	Penalty	CLEA	EA
Obtaining financial advantage by deception (s332 of the *Criminal Code 2002*)	Maximum penalty: 1,000 penalty units, 10 years imprisonment, or both.	Yes	Yes
Bribery (s356 of the *Criminal Code 2002*)	Maximum penalty: 1,000 penalty units, 10 years imprisonment, or both.	Yes	Yes
General dishonesty (s333 of the *Criminal Code 2002*)	Maximum penalty: 500 penalty units, 5 years imprisonment, or both.	Yes	No
Abuse of public office (s359 of the *Criminal Code 2002*)	Maximum penalty: 500 penalty units, 5 years imprisonment, or both.	Yes	No
Making false statements on oath or in statutory declarations (s336A of the *Criminal Code 2002*)	Maximum penalty: 500 penalty units, 5 years imprisonment, or both.	Yes	No

[13] https://www.ag.gov.au/sites/default/files/2022-10/telecommunications-interception-access-act-1979-annual-report-20-21.pdf p 17.

Crime	Penalty	CLEA	EA
Obtaining financial advantage from the Territory (s335 of the *Criminal Code 2002*)	Maximum penalty: 100 penalty units, 1 year imprisonment, or both.	No	No
Giving false or misleading information (s338 of the *Criminal Code 2002*)	Maximum penalty: 100 penalty units, 1 year imprisonment, or both.	No	No

The IC Act allows the Integrity Commission to refer corruption complaints to the Chief Police Officer[14] and the Director of Public Prosecutions.[15] Alternatively, the Commission may investigate the matter using the investigative tools and methods currently available under the IC Act and other legislation.

The right to privacy

Section 12 of HR Act provides that everyone has the right not to have their privacy, family, home, or correspondence interfered with unlawfully or arbitrarily. Privacy is considered a fundamental human right as it allows an individual to develop and share their personality with the people they trust without fear of embarrassment, reputational harm, intimidation, discrimination, and other types of harm that may come from a broad distribution of their personal information.

Public servants, political staff, Members of the Legislative Assembly, and statutory office holders, as with other members of the Canberra community, typically use telecommunication services for communications for a mix of working, family, and personal matters including health and life administration. Many people use their private mobile interchangeably with their work phones and generally an intercept warrant will seek access to all carrier services used by an investigation target.

The substance of phone calls, text messages, and voice mails can be highly sensitive. Content intercepted, or accessed may be commercial in-confidence, or subject to privilege, such as legal professional privilege. Calls and texts may include information about personal and confidential sensitive health matters including reproductive services, mental health treatment, or drug and alcohol referrals. Furthermore, contact made in the context of intimate relationships may reveal highly sensitive personal information revealing sexual preferences, gender identity, or content which is in some way consensually explicit between two parties.

Criminal activity often requires communication between parties, which is most conveniently done over telecommunication services. Telecommunication interception powers recognise the high investigative value of directly accessing both metadata, and content of phone calls and messages, made and received by a target without their knowledge. Where an interception warrant allows for the lawful interception of all telecommunications on a particular service it will not discriminate between communications that may implicate a person in suspected criminal activity, or other personal matters. The substance of communication is monitored, recorded, and stored, and analysed for its relevance to investigations.

The right to privacy, as with all rights in the HR Act, can be limited by laws that can be demonstrably justified in a free and democratic society.[16] A number of factors would need to be considered when contemplating whether limitations on privacy imposed by telecommunication interception powers were warranted, including whether any less restrictive means were reasonably available.

[14] *Integrity Commission Act 2018* s107.
[15] *Integrity Commission Act 2018* s111.
[16] *Human Rights Act 2004* s28.

The Integrity Commission already has the authority to make applications for warrants under the *Crimes (Surveillance Devices) Act 2010* to plant listening, tracking, optical and other surveillance devices. In considering the impact on privacy for targets of interception, there are some comparisons between surveillance device warrants and telecommunication interception warrants. Audio surveillance device warrants listen to and record conversations between people, and may capture personal conversations, much like a telecommunication interception warrant.

While there are some similarities between the two, arguably interception has a greater impact on privacy than a listening device planted in a specific area:

- A surveillance listening device is limited to one particular area, for example, a car, an office, or a house (or each at the same time), whereas an interception warrant authorises access to a person's primary means of communicating with others. Interception would record gaps in surveillance that a surveillance device could not capture such as walking through a public place (shopping centre, park, streets). Indeed, it would be logistically impossible for an agency to plant listening devices that would capture all conversations. The rapid advancement of technology and change in working habits has created a situation where people are reliant on telecommunication devices more than ever. Consequently, telecommunication devices are used more frequently and for multiple purposes. An interception warrant is likely to capture more material than that which a listening device planted in one specific location could access.
- Planting a listening device is a highly co-ordinated operation that requires resourcing to plan and implement, targeting specific areas where it is known a suspect converses with someone about suspected criminal activity. A telecommunication interception warrant is easier to implement and authorises access to all conversations a person has on their device – a situation where it is more likely that someone may disclose personal private information, rather than in a specific place where there may be a planted listening device. Noting that both interception and surveillance devices require additional resourcing to listen to recorded conversations, interception remains a less-resource intensive process and likely to be used in more scenarios than listening devices. In turn, this can lead to additional members of the community unknowingly disclosing private information to someone subject to an interception warrant.

Legislative threshold on appropriate use

The TIA Act includes several legislative mechanisms that aim to safeguard information and privacy and ensure appropriate record keeping and auditing of an agency's interception use.

An EA must seek an interception warrant from a judge[17] or a nominated member of the AAT.[18] An application for a warrant must include an affidavit that includes the facts and information to support the warrant, and the judge or AAT member must be satisfied there are reasonable grounds for suspicion, and that information obtained by the warrant would assist in the investigation. In granting the warrant, the judge or nominated AAT member must have regard to (amongst other items) the impact on privacy, the gravity of the conduct constituting the offence, and the extent to which other investigative methods have been used or considered prior to seeking the interception warrant.[19]

[17] Section 6D of the TIA Act requires this to be a Judge who is a Judge of a court created by the Parliament.
[18] The Attorney-General (Cth) may nominate, in writing, certain members of the AAT to hear warrant applications.
[19] See section 46 of the TIA Act for the issuing of an interception warrant.

The TIA Act also requires EAs to retain certain records such as when a communication was intercepted, and to whom that information was shared for record keeping and audit purposes.[20] As part of the Commonwealth Government's assessment of whether to bring forward amendments to grant powers under the TIA Act, the agency seeking the designation is typically required to prepare appropriate policies and standard operating procedures, and also prepare a Privacy Impact Assessment for the consideration by the Privacy Commissioner.

Victoria and Queensland are Human Rights jurisdictions and have both created a role of Public Interest Monitor (PIM) as an additional oversight for interception warrants. These PIMs are independent and may make submissions to the judge or AAT member on public interest grounds when an interception warrant application is being requested. They are required to prepare an annual report that details agency compliance with interception warrant requirements and provide a broad overview of its activity for the previous financial year. In Victoria, the enabling legislation requires the PIM to be an Australian lawyer. While the enabling legislation in Queensland does not require this, the current Queensland PIM is a barrister.

It is worth noting that the ACT has a PIM panel, though the mandate of this panel is limited to specific functions under the *Terrorism (Extraordinary Temporary Powers) Act 2006*; specifically, to advocate during hearings relating to a preventative detention order for terrorism matters, and to provide submissions on whether the communications of a person under a preventative detention order with their lawyer should be monitored by the police.[21] Under the ACT's PIM scheme, the legislation requires an appointee to the PIM panel to be a lawyer, have qualities and experience making the person suitable to be a PIM, and have an appropriate security clearance.[22]

Ongoing audits and recommendations

The TIA Act requires a state or territory to appoint a statutory oversight body to oversee interception use in that jurisdiction. This body must conduct two audits each financial year and provide the results of those audits to the responsible Minister in that jurisdiction. The body may make recommendations to ensure privacy is safeguarded.

The reports of the audits are not made public, but the oversight body may make broad statements in its annual report to provide commentary on its activity during the financial year. For example, the Victorian Inspectorate in its most recent annual report stated that it made five recommendations connected to IBAC interception processes.[23] In South Australia, the ICAC SA Reviewer in its annual report concluded that it was satisfied the ICAC SA complied with requirements of the legislation.[24]

At the Commonwealth level, interception audits are undertaken by the Commonwealth Ombudsman. The Commonwealth Ombudsman provides some detail on the audits in the TIA Act annual report prepared by the responsible Minister. While typically outlining positive results, in the 2020/21 annual report (the latest available) the Commonwealth Ombudsman reported the following instances of non-compliance:

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[20] See section 80 and 81 of the TIA Act for further detail.
[21] *Terrorism (Extraordinary Temporary Powers) Act 2006* ss14 and 56.
[22] *Terrorism (Extraordinary Temporary Powers) Act 2006* s62.
[23] https://www.vicinspectorate.vic.gov.au/sites/default/files/2022-12/Victorian-Inspectorate-2021-22-Annual-Report.pdf pg. 41.
[24] https://www.inspector.sa.gov.au/documents/pdfs/annual-reviews/ICAC-Reviewer-Annual-Report-21-22.pdf pg. 11.

- **Properly destroying records:** Four instances of non-compliance by the Australian Federal Police (AFP).
- **Warrant applications properly made and in correct form:** The Australian Criminal Intelligence Commission (ACIC), the Australian Commission for Law Enforcement Integrity (ACLEI), and the AFP were generally compliant with minor exceptions.
- **Interceptions conducted in accordance with warrant and unlawful information properly dealt with:** Both the ACIC and AFP had two instances of non-compliance.

The impact on the right to privacy may be mitigated with ongoing audits to provide independent assessment of privacy safeguards and ensure that all processes remain up to date and best-practice. Conversely, the audits are retrospective rather than proactive – if an agency has a less than satisfactory process the oversight body will not uncover this until after the process is implemented and in use, which may lead to privacy impacts prior to the audit.

Legislative Proposal – Integrity Commission Amendment Bill 2022 (No 2)

On 20 October 2022, the Canberra Liberals introduced the Integrity Commission Amendment Bill 2022 (No 2) (the Bill) which seeks to implement the necessary preconditions for the Australian Government to consider designating the ACT Integrity Commission as an EA under the TIA Act.

The Bill addresses necessary requirements under the TIA Act for the Australian Government to consider bringing forward amendments to the TIA Act to declare the Integrity Commission an EA. The Bill also expands the role of the Inspector of the Commission (currently filled by the ACT Ombudsman) to oversee warrant applications made to the courts, in a similar capacity to a PIM. For example, the Bill provides for the Inspector to attend warrant application hearings and ask questions of any person giving information to the judge and make submissions to the judge about various matters (including the extent to which other powers have been used to obtain the evidence), and the impact to the person's privacy.

Recurrent interception costs

Initial consultation has suggested that establishment costs for interception are very high, and (should the Integrity Commission obtain interception powers) the most cost-effective means to conduct interception would be to utilise existing facilities at another agency declared as an eligible authority. If the Commission were to establish its own interception capability, the establishment costs would include the technology infrastructure to undertake telecommunication interception – which would require a significant outlay. The Commission has advised it does not intend to establish its own intercept capability, but instead would utilise existing interception capacity through partnering with other eligible authorities. In this situation, there may be costs to establish a dedicated server/access between the agencies to undertake interception (depending on the arrangements).

Other establishment costs include staff training and resource development to ensure the Commission could meet the required governance requirements under the TIA Act (including developing standard operating procedures and protocols) and establishing dedicated IT resources that meet data protection requirements.

The estimated recurrent interception costs are reported as part of the TIA Act Annual Report.[25] The report notes that, as agencies do not necessarily treat or record particular items of expenditure in the same way, caution should be exercised in comparing costs incurred by individual agencies. Nonetheless, it is useful to observe the reported recurrent interception expenses for jurisdictional anti-corruption agencies to provide an approximation of the costs that the ACT could incur.[26]

Table 5 – Breakdown of reported recurrent costs of interception

	2018/19	2019/20	2020/21
IBAC (Vic)	$882,457	$825,484	$703,303
ICAC (SA)	$218,248	$227,450	$138,342
ICAC (NSW)	$502,749	$736,489	$472,202

South Australia shows a cost range from $135,000 to $227,450. Of the three anti-corruption commissions provided in the table above, South Australia is the smallest jurisdiction, and the data suggests that ICAC SA may utilise interception facilities of other eligible authorities. The 2020/21 TIA Act Annual Report provides data that shows that of the 10 interception warrants granted to ICAC SA, the Western Australian Corruption and Crime Commission (CCC WA) carried out all 10 of those interception warrants. This also occurred in 2019/20, where the CCC WA carried out all 23 of the ICAC SA's granted interception warrants. However, the IBAC obtained 26 interception warrants in 2019/20, and its reported costs were approximately three times higher than ICAC SA.

Recurrent oversight costs also require consideration. At a minimum, the Territory would be required to amend the existing agreement with the Commonwealth Ombudsman for Territory ombudsman services to include the prerequisite minimum oversight conditions in the TIA Act. The Territory would incur additional costs for any further oversight that may be required to ensure compliance with human rights obligations under the HR Act – noting that the two other human rights jurisdictions in Australia provide for a PIM to act on behalf of the public interest with regard to interception warrants. The Territory could require an existing statutory office holder, such as the Human Rights Commission, to act in a public interest capacity when the Integrity Commission seeks an interception warrant. Nevertheless, additional costs would be involved.

Options

The following options are outlined for consideration:

Option 1 – Seek Commonwealth legislation to provide the Integrity Commission the relevant powers as an EA and CLEA under the TIA Act.

This option would provide the Integrity Commission with the suite of powers under the TIA Act, including seeking telecommunication interception warrants, stored communication warrants, and requesting telecommunication data from telecommunication providers. The Commission would receive additional investigative tools to investigate corruption allegations. However, there are high establishment and recurrent costs to undertake interception which are likely to be incurred even if interception is used sparingly.

[25] 2020/21 TIA Act Annual Report - https://www.ag.gov.au/sites/default/files/2022-10/telecommunications-interception-access-act-1979-annual-report-20-21.pdf.

[26] These figures include salaries, administrative support, capital expenditure, and interception costs.

Option 2A – Designation as a CLEA, but not an EA, and with no power to receive material intercepted by other agencies.

This option recognises that designation as an EA has a greater impact on human rights compared to a CLEA, while also providing the Integrity Commission access to useful investigative tools under the TIA Act. The data from TIA Act annual reports suggest requests for telecommunication data are more frequently used than interception warrants and provide useful information for agencies to develop communication networks when investigating suspected criminal activity.

This option is used by a number of agencies, including the Australian Competition and Consumer Commission, the Department of Immigration and Border Protection, and the Australian Securities and Investment Commission (ASIC). There remain cost implications under this option, given the need to ensure data is appropriately stored and protected. However, the costs would be significantly less than under Option 1, as this would not include telephone interception. As a result, this option would result in less resource intensive staffing requirements (interception requires staff to listen to recorded conversations), and there would be no need to establish interception itself, which would be costly due to the ICT requirements.

Option 2B – Designation as a CLEA, and request amendment to the TIA Act to allow the Integrity Commission to receive material intercepted by other agencies but not conduct interception itself.

This option would involve the ACT Government requesting the Australian Government to bring forward amendments to the TIA Act to allow an agency that may conduct interception to share intercepted material with the Integrity Commission, without declaring the Commission an EA. Section 68 of the TIA Act provides authority for the chief officer of an agency to share information lawfully obtained through interception and lists the agencies that may receive that information. For example, ASIC may not conduct interception, but it is listed in section 68 as an agency that may receive lawfully intercepted material from other agencies.

According to information from the Integrity Commission, the AFP has previously intercepted material that may be relevant for the Commission but has been restricted from sharing that information due to the TIA Act. This option would remove that restriction. This may also increase the Commission's ability to enter into joint investigations with ACT Police, or another integrity body or law enforcement agency. This option would incur similar cost to option 2A, though potentially slightly more, as additional ICT capabilities would be required to appropriately store interception material the Commission received from other agencies.

Option 3 – Do not seek designation as either a CLEA or EA.

This option would maintain the Integrity Commission's existing investigative tools. Further consideration of the powers could be deferred possibly until the next review, five years after the completion of this review.

Discussion

1. Which of the options set out above are most appropriate for the Integrity Commission?
2. If the Integrity Commission is able to conduct interception:
    a. Is additional oversight by the Inspector, as provided for by the current Bill, sufficient to cover protections regarding the right to privacy?
    b. Should a new position of a PIM (or similar) be provided separate to the Inspector?

c. Is there a cost threshold where the value of interception as an investigative tool is outweighed by the cost to the public to facilitate interception?

3. Are there further matters that the review should consider in relation to powers under the TIA Act?

Obtaining material in a person's 'custody'

Under the IC Act, the Integrity Commission may compel production of material in a person's 'possession or control'. The Commission has asked for the language to also include 'custody', so as to become something that is in a person's 'possession, custody or control'.

Issues

The wording in sections 91 and 148 the IC Act is consistent with other anti-corruption commission legislation, such as the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) and the *Independent Commission Against Corruption Act 2012* (SA). Other legislation, such as the *Independent Commission Against Corruption Act 1988* (NSW), uses various combinations of the two, such as custody and control.

The terms 'possession', 'custody', 'power', and 'control' are interpreted as follows:[27]

- Possession: means physical or corporal holding of a document pursuant to the legal right to deal with it.
- Custody: means the mere actual physical or corporal holding of a document or thing, regardless of connected legal rights which are (or might be) implied.
- Power: means an enforceable right to inspect or obtain possession or control of the document from the person who ordinarily has it in fact.
- Control: if referring to a document, means possession, custody, or power.[28]

There is a possible operational benefit to the Integrity Commission if 'custody' is included as a third production requirement under the IC Act. For example, the Commission may be able to issue production notices to ACT Public Sector (ACTPS) staff who have custody of records, but do not possess or control them in terms of the substance of the material.

There are two possible risks, or unintended consequences, associated with the proposal. The first is that the quality of production is likely to be lower where the search officer has less familiarity with documents requested under the notice. This is likely to be compounded if the Integrity Commission also lacks familiarity with Directorate practices, terminology, roles, and responsibilities. Ideally, for the best search results the document would be in the respondent's possession and/or control, as this would mean they have the best knowledge of its contents, context and relevance to the notice to produce. In this sense, it may be beneficial for the Commission to approach the person with custody and to request the identity of the person who has control over the document so that they may direct the notice to that person.

The second is that a person could have custody of a document and not be aware that it contains privileged content. While recent records should have a Dissemination Limiting Marker (DLM)

[27] https://www.alrc.gov.au/publication/managing-discovery-discovery-of-documents-in-federal-courts-alrc-report-115/4-overview-of-discovery-laws/federal-court-of-australia/#:~:text=For%20the%20purposes%20of%20discovery,right%20to%20inspect%20or%20obtain.

[28] *Federal Court Rules 2011* (Cth), sch 1.

indicating legal privilege, not all documents will have this marking. It will also not be clear for documents that may have other privileges attached (such as parliamentary privilege) and where there may need to be further consideration prior to production. This risk may still be present for documents that are in a person's possession or control. However, the risk is higher when the person has 'custody', as the person does not necessarily have any legal right to know the contents of the document, which is more likely to attach to a person who has possession or control.

Discussion

4. Should the IC Act be amended to include material in a person's 'custody' as material that can be compelled for production?

Production in the course of an examination

The Integrity Commission has submitted that it should have the power to order a person being examined to produce any document or thing in their possession during that examination that is relevant to the investigation. Examples given were notes of what they intend to say, information from another witness, or a mobile telephone.

Section 35 of the *Independent Commission Against Corruption Act 1988* (NSW), which is broadly equivalent to section 147 of the IC Act, gives the ICAC power to summons a witness and take evidence and also empowers the ICAC to order the production of a document or thing in the course of a hearing/examination, as matters arise. The Integrity Commission contends that the IC Act should provide it with the same power. It argues that this will involve no additional intrusions into privacy as the same result could be obtained by serving a summons. The Commission cites both the inconvenience and delay in serving a summons as the rationale in seeking this amendment.

Issues

The proposal would allow the Integrity Commission to gather additional information and evidence from witnesses during an examination. This may allow the Commission to explore other avenues of questioning during the examination and assist in completing a timely investigation. Provision could be made to allow the person being asked to produce documents or information during an examination to claim privilege or request legal advice if they believed that any of the material requested was subject to privilege or secrecy provisions.

At present, the IC Act requires seven days' notice to produce a document. This timeframe affords a witness the opportunity to seek legal advice about the production of the document, or other thing. Eliminating this opportunity could potentially have an impact on the level of procedural fairness afforded by the system. While staff exercising functions under the IC Act may want to promote procedural fairness, creating a default power which, in the absence of urgent circumstances, removes the general right of a person to have time to deliberately consider and respond to a request for information could result in procedural unfairness. In the example given by the Integrity Commission, a witness could arrive at the Commission to give evidence under the terms of the examination notice, only to have their mobile telephone summonsed from them and forced to leave without it. This could impact both procedural fairness, and also result in inconvenience to the person by having their mobile phone removed without any notice.

The IC Act does enable the Integrity Commission to seek immediate production of a document or other thing if the delay will result in evidence being lost or destroyed; the commission of an offence;

the escape of a person who is summonsed; or serious prejudice to the investigation.[29] Use of these provisions allows for immediate production limited only to necessary circumstances in order to avoid adverse impacts to procedural fairness.

Discussion

5. Should the Integrity Commission be granted additional powers to be able to compel production of material in the course of a hearing or examination?

Amendment in relation to service periods

Several stakeholders have raised concerns with the periods given to comply with a notice issued under the IC Act. The IC Act includes three provisions that provide a service period:

- Section 89 – Request for Information from the Head of a Public Sector Entity
    - Section 89 provides that the head of a public sector entity must comply with a notice given under this section in a reasonable period, being not more than 7 days. However, the head of the entity does not need to comply with the request if they advise the Integrity Commission of a reasonable excuse for not doing so.
- Section 90 – Preliminary Inquiry Notice
    - A notice under section 90 requires mandatory compliance. Under section 93, the Integrity Commission must provide at least seven days' notice for the person to comply with the notice.
- Section 147 – Examination Summons
    - A notice under section 147 requires mandatory compliance. Under section 150, the Integrity Commission must provide at least seven days' notice for the person to comply with the notice.

The *Legislation Act 2001* provides that the date of service and date of production are excluded when calculating a minimum service period, and if the day would otherwise fall on a weekend it is taken to be the next business day.[30] The effect is that recipients are provided at least seven clear days to be in a position to respond to the notice period. The table below outlines how to calculate the notice period.

Table 6 – Overview of notice periods

Notice	Date of Service (not included)	Required Days	Date of Production
Section 89	Wednesday 10 May 2023	7 (must be completed by)	Thursday 18 May 2023
Section 90	Tuesday 13 June 2023	7 (minimum)	Wednesday 21 June 2023
Section 147	Friday 7 July 2023	7 (minimum)	Monday 17 July 2023

The IC Act authorises the Integrity Commission to excuse a person from their notice if they produce the document or other thing to the Commission before the stated time of production in the notice.[31]

[29] *Integrity Commission Act 2018* s150(2).
[30] *Legislation Act 2001* s151.
[31] *Integrity Commission Act 2018* s90(5), s147(4).

Issues

The Integrity Commission has raised a concern that the minimum required period is too long in certain situations. For example, if the Commission becomes aware of a certain document or information during an examination, it will have to issue another examination summons and wait at least another eight days for the information – potentially causing delay to the overall investigation. The Commission has requested that ideally it should be able to require documents in a period shorter than the minimum seven days but allow for a longer period of time outside of immediate production.

Other stakeholders commented that the minimum seven-day notice period is not long enough. As noted above, under the rules for interpreting periods of time, the seven days for production will include a weekend, which is essentially time lost to those complying with the notice. Notices to produce can be broad and request a substantial number of documents and other items – for example, the Integrity Commissioner commented during an August 2022 estimates hearing that a preliminary 'netting' exercise to gather documents for a Canberra Institute of Technology matter provided well in excess of a million documents.[32] Stakeholders advised that one consequence of this timeframe for extensive search requests is that a significant number of officers need to be involved in undertaking the searches, increasing the number of people who are aware of the investigation within the agency.

The minimum notice period also involves action beyond gathering the required items to produce to the Integrity Commission and meet the notice's terms. The recipient of a notice may need to use this time to seek legal assistance to understand the terms and requirements for compliance, and any legal considerations that are relevant when producing the items (for example, is there a legal professional privilege, or any other privilege, claim over the document). They may also need to make appropriate arrangements to attend the Commission (for example, child or other carer arrangements, give leave notices to an employer, and make travel arrangements if attending from another state or territory).

Further, there is no scope or authorisation under the IC Act provisions to amend an existing notice to produce to vary the production date. The recipient of a notice may require an extension of time to meet the notice's terms. For example, the recipient may face an unexpected family emergency or medical event. In this situation, both the Integrity Commission and the recipient may agree that additional days are required to meet the production date. There is no authorisation under the IC Act to facilitate this other than a mutual understanding between the Commission and the recipient that the Commission will not hold the person in contempt, or for the Commission to issue a new summons and restart the minimum seven-day notice period.

Minimum service periods for notices to produce vary across jurisdictions. For example, the National Anti-Corruption Commission will require at least 14 days, and production may only occur earlier if the Anti-Corruption Commission considers the standard notice period could seriously jeopardise the investigation.[33] Tasmania also provides a 14-day compliance period for notices to produce issued by its Integrity Commission.[34] Victoria provides a similar 7-day notice period for notices issued by the IBAC.[35] Other jurisdictions do not prescribe a minimum time period for compliance – which, without direction otherwise, would indicate this is left to the discretion and reasonable judgement of the Commission.

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[32] https://www.hansard.act.gov.au/Hansard/10th-assembly/Committee-transcripts/est04.pdf page 299.
[33] *National Anti-Corruption Commission Act 2022* (Cth) s59.
[34] *Integrity Commission Act 2009* (Tas) s54.
[35] *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) s59I, ss124(1).

More broadly, court service documents typically require 7 to 14 days of compliance. For example, the *Service and Execution Act 1992* (Cth) provides that, unless otherwise authorised, a subpoena requires 14-days for compliance.[36] The Federal Court rules require at least 10 days' notice for production of documents, and at least seven days' notice for attendance at court.[37]

Discussion

6. What service period should the IC Act provide for compliance with a summons to produce?
    a. Are the current service periods sufficient, too short, or too long, or too inflexible?
7. Should there be scope in the IC Act for the Integrity Commission to amend or vary service periods to extend or shorten the timeframe? If so, should this need to be agreed by both the notice recipient and the Commission?

Allowing the Integrity Commissioner to determine questions of privilege

The IC Act currently requires the Supreme Court to determine privilege claims over material summonsed by the Integrity Commission. The Legal Representation and Privilege paper examines a proposal from the Commission to abrogate legal professional privilege in certain circumstances.

The Integrity Commission has proposed that the Commissioner could determine privilege claims over material summonsed by the Commission. This argument is advanced on the basis that the Commissioner is a former Supreme Court judge and is familiar with the law relevant in determining privilege claims,[38] and that it would result in operational efficiency by avoiding potentially lengthy proceedings before the Supreme Court.

Issues

The second Select Committee considered this issue as part of its inquiry into the two Bills proposed to establish an independent integrity commission. The former Canberra Liberals Leader, Mr Alastair Coe, submitted to the inquiry that 'the key issue here, or the key distinction, is that because the integrity commission is not a court, because it is not making findings of guilt or innocence, because it is simply establishing facts, I do not think that the same judicial rules are required. I think that if we go too far down that path of requiring a judicial standard for everything, you have actually defeated the whole purpose of having an investigation or an investigative body'.[39]

The Select Committee considered the matter and concluded that it understood Mr Coe's intent to ensure the Integrity Commission does not get caught in ongoing legal claims designed to frustrate its work. However, the Select Committee considered it important to ensure that some basic protections (in reference to referral to the Supreme Court) remain in place.

The Integrity Commission Bill 2018 Explanatory Statement provides additional guidance on current framework's policy intent. The explanatory statement refers to the 2017 Select Committee's report which outlined that, 'due to the inquisitorial nature of the Integrity Commission it was noted that the

[36] *Service and Execution Act 1992* (Cth) s30.
[37] *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* s16.03.
[38] Under section 26 of the IC Act the Integrity Commissioner may be a former judge of a Supreme Court, the Federal Court or the High Court, or may be a person who has been a lawyer for 10 years, so any appointee would have legal knowledge.
[39] https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/1271959/REPORT-INQUIRY-INTO-THE-ESTABLISHMENT-OF-AN-INTEGRITY-COMMISSION-FOR-THE-ACT.pdf p 50.

Integrity Commission would not be able to independently assess the claim of privilege as it would have a vested interest in the subject matter to which the privilege applies'.[40]

Noting the policy intent and views outlined in the Explanatory Statement, there may be valid arguments that the Integrity Commissioner could have a conflict of interest (real or perceived) if able to determine privilege claims. Section 20 of the IC Act provides that the Commission consists of the Commissioner – thereby the Commissioner is to meet the functions of the Commission. It is therefore arguable that procedural fairness would be adversely impacted if the Commissioner were to rule against the claim. To offset this impact, a right of appeal to the Supreme Court could be provided. This right of appeal may in turn negate at least some of the efficiency benefit gained by the Commissioner deciding privilege, as witnesses may well appeal decisions made against them. Further, if the Supreme Court were to overturn the Commissioner's decision, witnesses may feel they have not been afforded a fair process because the Commissioner will have already seen the information.

Jurisdictional approaches

The majority of jurisdictions defer privilege claims in anti-corruption commission matters to the Supreme Court for independent adjudication. Queensland,[41] South Australia,[42] Tasmania,[43] the Northern Territory[44] and Victoria are in this category.[45]

The Commonwealth, New South Wales and Western Australia do not provide a process that specifically outlines how privilege claims are dealt with. However, these jurisdictions abrogate most common law privileges, such as legal professional privilege, for public officials under their anti-corruption legislation – consequently, there is not an apparent need to provide a process to determine privilege claims. The pending National Anti-Corruption Commission (NACC) legislation – which maintains journalist privilege –expressly allows a journalist to refuse to answer certain questions that may reveal a source of information if the source acted in confidence. The NACC will not be able to challenge this refusal.[46]

Discussion

8. Should the Integrity Commissioner be given the power to determine privilege claims? If so, are there safeguards that could be introduced to address procedural fairness concerns?

Amendment to enable the Integrity Commission to request information from public officials

The Integrity Commission has proposed that section 89 of the IC Act be amended to broaden the sources the Commission may seek information from. Under this section, the Commission may request information from the head of a public sector entity, which includes the Head of Service, Directors-General, and statutory office holders. The Commission would like this changed to encompass any

[40] https://www.legislation.act.gov.au/View/es/db_59287/20181127-70136/html/db_59287.html
[41] *Crime and Corruption Act 2001* (Qld) s81.
[42] *Independent Commission Against Corruption Act 2012* (SA) s4, sch3.
[43] *Integrity Commission Act 2009* (Tas) s92(5).
[44] *Independent Commissioner Against Corruption Act 2017* (NT) s89.
[45] *Independent Broad-based Anti-Corruption Commission Act 2011* (VIC) s59M.
[46] *National Anti-Corruption Commission Act 2022* (Cth) s31.

public official. The Commission has also requested the equivalent of section 89 for an investigation as well as for preliminary inquiries.

'Information' is not defined in the IC Act; as such, its ordinary meaning is inferred. Information is generally defined as 'facts provided or learned about something or someone.' This would mean that the Commission could contact any public servant to seek information from them.

Section 89 enables the head of a public sector entity to decline to comply with the notice if they advise the Commission of a reasonable excuse to do so. They may also seek staff assistance to comply with the notice.

Issues

The proposal would allow requests for information from a source who may be more familiar with the subject matter than the head of a public sector entity. An example could be the Integrity Commission contacting all Chief Finance Officers for information on procurement practices, or all Directors with freedom of information responsibilities for information about how open information access works in their agency.

This change could also result in junior records officers receiving requests for a range of matters that may be beyond their level of authority, delegation, and broader knowledge without any management oversight as to accuracy and appropriateness. Accordingly, central to this question is the right of the head of an agency to direct and inform responses to engagement by the Integrity Commission to ensure the most appropriate response.

There is no requirement for the Integrity Commission to report on the use of section 89 to the Inspector. This is likely because there is no direct compulsion power. It is more an enabling provision akin to section 195. This means if the Commission uses section 89 to garner information there is no oversight by management within an agency, nor by the Inspector.

If section 89 were to be amended in line with the Integrity Commission's proposal, a broader question arises whether both sections 89 and 90 are required as the practical difference between the two would be minimal. Section 90 allows for the Commission to issue preliminary inquiry notices, which are more stringent than requests under section 89, both in terms of what the Commission has to consider before issuing a notice, and in the requirements for production.

With regard to including an equivalent section 89 for investigations, there may likely be an operational efficiency for both the Commission and witnesses to be able to provide information through a more flexible means than an examination summons under section 147 of the IC Act

Discussion

9. Should section 89 should be broadened to include a larger range of public officials, or is the existing scheme sufficient (noting that the head of a public sector entity may seek assistance to comply with a notice)?
    a. If so, which public officials should be captured under section 89? For example, should section 89 be limited to members of the senior executive service?
        i. If section 89 is broadened to capture a larger group of public officials, should the Integrity Commission be required to report section 89 use to the Inspector?

b. If section 89 were to be broadened, should section 89 be repealed and section 90 extended to compel information, documents, items and other things from any public official?

10. Should there be an equivalent provision to section 89 for an investigation?
    a. If so, should it also be broad and include all public officials?

Amendments to the preliminary inquiry framework

Broadening confidentiality during a preliminary inquiry

When the Integrity Commission is holding either a preliminary inquiry or an investigation, it may issue people providing information with a confidentiality notice.[47] A confidentiality notice informs the person producing information that they may not disclose 'restricted information' unless allowed under the legislation. Disclosing such information in breach of a confidentiality notice is a criminal offence under the IC Act. This can have significant impacts for those subject to notices in limiting their ability to discuss involvement with their support network and can lead to difficult practical considerations about attendance at the Commission, and activities associated with the preliminary inquiry being kept secret. A confidentiality notice only expires when it is revoked by the Commission, or after a lapse of three years.

The confidentiality notice framework under the IC Act is structured so that the Integrity Commission may only issue a confidentiality notice to a person during a preliminary inquiry if that person is served with a preliminary inquiry notice under section 90.[48] During an investigation the Commission may issue a confidentiality notice to any person if the Commission considers on reasonable grounds that the disclosure of restricted information would be likely to prejudice an investigation, or the safety or reputation of a person, or the fair trial of a person who has been, or may be, charged with an offence.[49] This means that any person can be asked to keep information confidential, regardless of whether the Commission is asking them to appear or produce documents in relation to the matter.

The Integrity Commission has proposed that, in line with its power during an investigation, it should be able to issue a confidentiality notice to any person during a preliminary inquiry, rather than just those persons who are issued a preliminary inquiry notice.

Removal of ability to rely on secrecy requirement during a preliminary inquiry

The IC Act currently allows a witness to rely on a secrecy provision relating to documents and information during a preliminary inquiry.[50] This means that, where a person claims that a document cannot be produced due to a legislative secrecy provision (such as a confidentiality requirement under the *Health Records (Privacy and Access Act*) *1997*), the Integrity Commission must consider whether to withdraw the claim for the document. If the Commission chooses to maintain the request, if it elects to do so, the documents are provided to the Supreme Court to have the matter decided.[51]

[47] *Integrity Commission Act 2018* pt 3.2.
[48] *Integrity Commission Act 2018* s78.
[49] *Integrity Commission Act 2018* s79.
[50] *Integrity Commission Act 2018* s95(1).
[51] *Integrity Commission Act 2018* s96 and 97.

A claim that a secrecy provision applies is not available if a matter reaches the investigation stage. The Commission has proposed that the existing ability to rely on a secrecy requirement during a preliminary inquiry be removed.

Issues

It is important to consider the purpose of a preliminary inquiry in order to understand the difference in approach to secrecy requirements and confidentiality notices between a preliminary inquiry and an investigation.

The Integrity Commission Bill 2018 Explanatory Statement states that the purpose of a preliminary inquiry is to examine a complaint to determine if a full investigation using coercive powers is warranted. The Select Committee, established by the Legislative Assembly in 2017 to consider options for an independent integrity commission, recommended that the Commission have the ability to conduct a preliminary inquiry that does not include the use of coercive authority.[52] Along with the restrictions on whom the Commission may issue a confidentiality notice (that is, only on those issued with a preliminary inquiry notice to produce documents or other items to the Commission), preliminary inquiries also allow people to claim privilege over information, and coercive notices are limited to production rather than examination attendance at the Commission.

Benefits of the proposal

The purpose of a confidentiality notice is to protect the ongoing integrity of an investigation by minimising risk that subjects of the investigation become aware that the Integrity Commission is investigating their conduct. There is a range of risks stemming from this knowledge such as destroying evidence, colluding with co-conspirators to form a defensible case-theory, or intimidating possible witnesses. It also serves to protect the reputations of people under investigation, or associated with investigations from unnecessary speculation about involvement in corruption.

There may be circumstances where a person becomes aware of a preliminary inquiry but is not required to produce any information to the Integrity Commission to trigger the availability of a confidentiality notice. For example, the Commission could be conducting a preliminary inquiry into low level fraud occurring across a grants management program and wish to alert a senior staff member about this. In this situation, there may be an operative need to issue a confidentiality notice on that senior staff member to protect the preliminary inquiry's ongoing integrity. The Commission would have stronger investigation capacity if a person could no longer rely on a secrecy requirement (or other privilege) to withhold information during a preliminary inquiry to allow it more easily to assess whether a corruption complaint required a formal investigation.

Risks of the proposal

However, it would appear that the structure and intent of a preliminary inquiry was a deliberate choice of the Legislative Assembly to create a tiered framework where coercive powers are only used once the Integrity Commission is satisfied there is a reasonable suspicion of corrupt conduct. This is outlined in the Integrity Commission Bill 2018 statement of compatibility with human rights when explaining the impact to the right to privacy. It noted that it is important there is a preliminary assessment of allegations to ensure they are substantiated prior to any subsequent invasion of a

[52] https://www.parliament.act.gov.au/__data/assets/pdf_file/0008/1123388/9th-Select-Committee-on-IIC-Final-print-version.pdf p 16.

persons' privacy during the coercive investigation stage This approach is used in Victoria (another human rights jurisdiction) under its IBAC legislation. Alternatively, New South Wales under its ICAC legislation does not distinguish the powers available to the ICAC between a preliminary inquiry and an investigation.[53]

There may be possible wellbeing impacts for the person compelled to reveal information, and those whose information is revealed, especially if the preliminary inquiry results in no investigation taking place due to a lack of evidence of any corrupt conduct.

Discussion

11. Should the IC Act be amended to remove the ability to claim secrecy during a preliminary inquiry?
12. Should the Integrity Commission have the ability to issue a confidentiality notice to any person during a preliminary inquiry?
13. Are there any other considerations for the preliminary inquiry framework?

Arrest warrant for witness not likely to appear

The Integrity Commission proposes that it be able to apply for an arrest warrant for a witness where it is likely that person will not comply with their examination summons to appear before the Commission for examination and/or to produce documents. Currently, the Commission may only apply for an arrest warrant where the person has failed to meet the notice – that is, the Commission may only seek an arrest warrant after the fact, rather than before.[54]

Once the person has failed to appear under the terms of the examination summons, the Integrity Commission may apply to a Magistrate for an arrest warrant to bring that person immediately before the Commission. In considering the application, the Magistrate must determine if it is in the interests of justice to issue the arrest warrant. Subsection 159(3) of the IC Act requires the Magistrate to determine whether the arrest warrant is 'in the interests of justice' which includes (but is not limited to): the importance of the evidence; whether the evidence could be obtained by other means; the urgency of the matter; and the reason (if any) given by that person for not attending.

Issues

The proposal seeks to address concerns a witness may abscond to another jurisdiction (whether domestic or international) after the Integrity Commission issues an examination summons, but before that person is required to attend the Commission. For example, this power could be used where the Commission becomes aware that an important witness intends to (or has) left the ACT to avoid attending the Commission under an examination summons. In this situation, the Commission must wait until the examination summons notice period expires before it may apply to a Magistrate for an arrest warrant. From an operational perspective, it may frustrate an investigation by losing several days waiting for the notice period to expire before seeking an arrest warrant. If the person absconds to another state or territory jurisdiction, the Commission would need to use the *Service and Execution of Process Act 1992* (Cth) to execute an arrest warrant in another jurisdiction (see Part 5 of that Act).

[53] *Independent Commission Against Corruption Act 1988* (NSW) s20A.
[54] *Integrity Commission Act 2018* s159.

The commissions in Victoria,[55] Western Australia,[56] South Australia,[57] Queensland[58] and New South Wales[59] are able to seek an arrest warrant prior to the summons' expiry if there is demonstrable evidence that the subject intends to avoid appearance. This will also be the position for the Commonwealth.[60] Likewise, the Australian Crime Commission may apply for an arrest warrant for a witness where the person has absconded or is likely to abscond.[61] Tasmania and the Northern Territory do not provide the ability for their commission to apply for an arrest warrant. Similarly, the ACT Supreme Court[62] and Magistrates Court[63] do not have this power, even in criminal matters.

There are procedural fairness and human rights concerns with allowing the arrest of a person who has been served purely as a witness to a matter when they have not done anything wrong. Under section 13 of the HR Act, people have the right to leave the ACT. For this right to be abrogated because a person has a future responsibility to attend the Integrity Commission without weighty evidence demonstrating an unlawful intent would be problematic. If this power were to be included in the IC Act, careful consideration would need to be given to the circumstances in which it could be used, and what threshold should be met before the powers would be available.

Nonetheless, there is an operational benefit to allow the Integrity Commission to seek an arrest warrant before a witness has failed to appear where there is clear evidence that the witness has absconded or intends to abscond. For example, the Commission may have evidence that a witness has purchased a one-way airline ticket for travel the next day; at present it is unable to take any action until after the person has failed to appear for their examination.

Discussion

14. Should the Integrity Commission be able to seek an arrest warrant for a witness prior to that witness failing to appear for their examination?
15. If the proposed amendment was made, should the ability to seek the warrant prior to the notice's expiry be reliant on evidence that the person intends to abscond?
    a. Alternatively, should it be sufficient to shown that the person does not intend to appear before the Commission (regardless of whether they intend to remain in the ACT)?

Warrant to search premises and authorise a search for items on a person

The Integrity Commission has raised a concern that the IC Act does not specifically say that an investigator, in executing a search warrant, may search/frisk a person on the premises in search of items that fit the criteria of those listed in the warrant. Consequently, the Commission is concerned

[55] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s141C.
[56] *Corruption, Crime and Misconduct Act 2003* (WA) s148.
[57] *Independent Commission Against Corruption Act 2012* (SA) sch2 s9.
[58] *Crime and Corruption Act 2001* (Qld) s167.
[59] *Independent Commission Against Corruption Act 1988* (NSW) s36.
[60] *National Anti-Corruption Commission Act 2022* (Cth) s91.
[61] *Australian Crime Commission Act 2003* (ACT) s27.
[62] Section 70A of the *Supreme Court Act 1993* provides that the Supreme Court may only issue an arrest warrant when a witness fails to attend, or remain in attendance, in accordance with a subpoena.
[63] Section 64 of the *Magistrates Court Act 1930* provides that the Magistrates Court may issue an arrest warrant when a witness fails to attend in accordance with a subpoena.

that someone may conceal physical evidence on their person during a search, and the investigator would have no power to seize those items.

Search and seizure matters are dealt with under part 3.5 of the IC Act. Section 120 of the IC Act outlines the general powers an investigator has on entry to a premises, including doing one or more of: inspect or examine anything at the premises; take measurements or conduct tests; take samples; make sketches, drawings or any other kind of record (including photographs, films, audio, video, or other recordings); and require the occupier, or anyone at the premises, to give the investigator reasonable help to exercise a power under this section.

Issues

There is no uniform approach across jurisdictions with regard to investigator powers while executing a search warrant. Legislation in Victoria allows an officer executing a warrant to arrest a person who is concealing evidence,[64] legislation in South Australia and New South Wales provides that ICAC officers can search a person for items listed on the search warrant.[65] The Commonwealth will allow NACC officers to separately apply for a warrant that would allow the officer to conduct a frisk search.[66] Tasmania has similar provisions to the IC Act and does not specifically say that an officer may search a person on the premises, but does include a requirement for the occupier or any other person to comply with any reasonable request for assistance.

Lack of mention about frisk searches in the IC Act indicates that an investigator is not authorised to do so under the IC Act, nor can a Magistrate authorise this under the warrant's terms. Specific provision to conduct a frisk search is included in paragraph 195(1)(f) of the *Crimes Act 1900*, which provides that the executor may, if the warrant allows, conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or an assisting officer suspects on reasonable grounds that the person has any evidential material in their possession. The search warrant provisions in the IC Act largely mirror the frameworks provided in other ACT regulatory frameworks, including the *Waste Management and Resource Recovery Act 2016*, the *Resource Recovery Act 2016*, and the *Public Unleased Land Act 2013.*

There is a broader question of whether the Integrity Commission requires the ability for its investigators to conduct a frisk search on a person whilst executing a search warrant. The IC Act allows an investigator to require the occupier, or anyone at the premises, to give the investigator reasonable help to exercise the following powers when in relation to the premises or anything at the premises to:[67]

- inspect or examine;
- take measurements or conduct tests;
- take samples; and

[64] *Magistrates' Court Act 1989* (Vic) s78 (note that ss91(6) of the IBAC Act provide that the search warrant rules under the *Magistrates' Court Act 1989* (Vic) apply).
[65] *Independent Commission Against Corruption Act 1988* (NSW) s41, and *Independent Commission Against Corruption Act 2012* (SA) s31.
[66] *National Anti-Corruption Commission Act 2022* (Cth) s124.
[67] *Integrity Commission Act 2018* ss120(1).

- make sketches, drawings, or any other kind of record (including photographs, films, audio, video and other recordings).

A person must take all reasonable steps to provide the investigator with such help, otherwise may attract a 50-penalty unit penalty.[68] Applying this practically, it is useful to envisage a situation where an Integrity Commission investigator is executing a search warrant that authorises search and seizure of items and documents that relate to a corrupt conduct allegation. If the occupier of the premises is withholding relevant items in their pocket (for example, a USB thumb drive), it is not clear if the investigator can require the person to provide the USB thumb drive, or alternatively, if there is an applicable penalty to apply to the occupier for withholding relevant items.

This proposal has no operational data to support it as, to date, the Integrity Commission is yet to apply for, or conduct, a search warrant. Foreseeably, the proposal would have a benefit to the Commission as it would afford greater powers to discover and gather evidence noting that if the proposal is implemented there may be a need to safeguards its use. Such safeguards could include requiring the Commission to provide evidence that the subject of the warrant has previously been uncooperative in support of an additional power to frisk.

Discussion

16. Noting the current distinctions in the ACT framework, is it appropriate to provide a capacity for Integrity Commission investigators to conduct a frisk search on a person while executing a search warrant?
17. Are there any implications in relation to the HR Act if the Commission's proposals were implemented?
18. Should the IC Act provide the capacity for a Magistrate to consider authorising a Commission investigator to conduct a frisk search in the warrant's terms?
    a. If yes, should criteria be specified when a frisk search is authorised? For example, should the Commission need to provide evidence to the Magistrate that the subject of the warrant has previously been uncooperative with the Commission or other agencies.
19. Are there any other options to ensure occupier compliance with search warrants? For example, should there be a penalty if the occupier or any person assisting the occupier knowingly withholds items that are captured under the search warrant?

Enabling the Integrity Commission to access employment records

The Integrity Commission has requested direct access to employment records held in Chris21 (HR21) – the ACTPS human resources management system. Access to HR21 for investigation purposes is currently limited to the Public Sector Standards Commissioner (PSSC). The Commission has submitted that access to records about employment in the ACTPS are central to its work, including identifying whether someone is or has been a public servant or identifying a residential address for notice service.

Issues

The HR21 system contains an employee's personal information such as birth date, residential address, bank details, emergency contact details, and diversity details. Some of this information, such as ethnicity, is considered 'sensitive information' under the *Information Privacy Act 2014*. Public sector agencies that collect sensitive information are obliged to protect that information and may only

[68] *Integrity Commission Act 2018* s120(2).

disclose it in certain circumstances, including when requested by the Integrity Commission.[69] If the Commission requested this information under section 89 or 90 of the IC Act, a public sector entity is required to comply with the notice. However, this is distinct from the Commission's request for direct access – the Commission wants to be able to access this information itself.

As noted, the PSSC may access this information himself – to conduct an investigation or assess whether an investigation is in the interests of the service.[70] The PSSC's functions are outlined under section 144 of the *Public Sector Management Act 1994* (PSM Act), and include conducting investigations under an industrial instrument, and providing advice to the Chief Minister about matters arising from an investigation conducted by the PSSC.

If granted, the Integrity Commission could also use the information to map employees who worked together in an agency at a specific point in time, as part of a case-theory, and to facilitate notice service to an employee's residential address – which the Commission has raised as a purpose it would be used for. Again, the Commission is currently able to request this information through other powers under the IC Act, but this proposal would provide easier facilitation to access this data. Given the ease of access, service to a residential address may become the Commission's default approach This may have broader wellbeing impacts on ACTPS staff if notices are sent directly to a residential address. For example, if a letter arrives at the household and a partner, child, friend, or housemate might open it.

The PSSC's role relates to investigating a broader range of public sector conduct and standards across the ACTPS that may require access to sensitive personal information available through HR21.The Integrity Commission is focussed on corrupt conduct, which in itself, would not ordinarily require direct access to sensitive personal information where there is an expectation it is protected by the directorate. Nonetheless, there is a clear operational benefit for the Commission if it were to have direct access to HR21, as it would receive a full picture of officers working with one another at a point in time and also be able to access residential addresses and contact phone numbers.

Discussion

20. Should the Integrity Commission have direct access to Chris21 employment records?
    a. Could confidence be adversely impacted if the framework were amended to allow the Commission access to HR21? If so, to what extent is this a problem?
    b. Are there any alternative options that would be feasible? For example, the Commission could enter into an MOU with the PSSC so that the PSSC is required to provide certain information to the Commission, such as residential addresses.

[69] *Information Privacy Act 2014* sch1 pt1.3.
[70] *Public Sector Management Standards 2016* s110.