

Integrity Commission Purpose and Jurisdiction Discussion Paper

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Integrity Commission Purpose and Jurisdiction

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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 the Integrity Commission's purpose and function as originally envisaged under the Parliamentary Agreement for the Ninth Legislative Assembly for the Australian Capital Territory (ACT), as well as through stakeholder feedback and input through two select committee inquiries into establishing an independent integrity commission. The paper also assesses whether the IC Act meets the 12 best practice principles for anti-corruption commissions published by Australian anti-corruption commissioners.² Finally, the paper explores proposals put forward by the Integrity Commission and other stakeholders about the Commission's jurisdiction and scope, including the definition of 'corrupt conduct', the interaction of the ACT Public Sector (ACTPS) enterprise agreements, the *Public Sector Management Act 1994* (PSM Act) and the IC Act, strengthening the requirement for the Commission to prioritise investigation of serious and systemic corrupt conduct, and reforms to the complaint referral process.

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, other proposals they would like the review to consider.

Please provide any feedback via ICActReviewSecretariat@act.gov.au no later than **COB Friday 2 June 2023**.

The Integrity Commission and the oversight landscape

The Government formed under the Ninth Legislative Assembly (2016-2020) committed to a range of integrity measures including establishing an independent Integrity Commission, broadly structured on those operating in similarly sized jurisdictions, following a Parliamentary Committee inquiry into the most effective and efficient model for the ACT.³

In order to meet the commitment, the Assembly enacted the *Integrity Commission Act 2018* (IC Act) to establish the ACT Integrity Commission. The Commission joined a range of existing ACT oversight agencies and statutory offices, many with investigative powers, covering an array of public functions. These include the ACT Ombudsman, the ACT Auditor-General, the Judicial Council, the ACT Electoral Commissioner, the ACT Human Rights Commissioner, the ACT Health Services Commissioner, the

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

² https://www.integrity.act.gov.au/_data/assets/pdf_file/0014/2120054/Media-Release-12-Best-Practice-Principles.pdf.

³ http://www.cmd.act.gov.au/_data/assets/pdf_file/0005/1013792/Parliamentary-Agreement-for-the-9th-Legislative-Assembly.pdf p 7.

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Inspector for Corrective Services, the Public Advocate, the Children and Young People Commissioner, the Disability and Community Services Commissioner, the Public Sector Standards Commissioner, and the Teacher Quality Institute. In addition, the Legislative Assembly also has the Clerk and the Legislative Assembly Commissioner for Standards.

Prior to establishing the Integrity Commission, allegations of corrupt conduct in the ACT Public Service were addressed under workplace misconduct processes primarily through the Public Sector Standards Commissioner, and the ACT Police if the matter involved a criminal offence.

Purpose and objectives

The purpose of the Integrity Commission is outlined in section 6 of the IC Act. The Commission is responsible for investigating corrupt conduct using the coercive powers available under the IC Act, and exposing serious and/or systemic corrupt conduct through its investigation reports. The Commission may not include in an investigation report a finding that a person has engaged in corrupt unless it meets the serious and/or systemic threshold.⁴ It was envisaged that this would assist the ACTPS prevent corrupt conduct by identifying gaps in the ACTPS integrity framework through the Commission's investigations and providing recommendations on how to address such gaps. The IC Act's objectives make it clear the Commission's role is to investigate and expose corrupt conduct with prioritisation of serious and/or systemic corrupt conduct, to educate the public sector about the dangers of corruption, and to assist the public sector to improve its capacity to prevent corrupt conduct.

The Commission's role is to fact find and investigate to determine whether corrupt conduct has occurred. Under Part 3.9 of the IC Act, after completing an investigation, the Commission must prepare a report that includes its findings, opinions and recommendations, and its accompanying reasoning. Importantly, the Commission may not include in its report:

- a finding or opinion that a person is guilty of, or has committed, an offence against a law in force in the Territory
- a finding or opinion that a person has engaged in conduct that would be reasonable grounds for termination action against that person
- a recommendation that a person should be prosecuted for an offence
- a recommendation that a person should be subject to a termination action
- a finding or opinion that a person has engaged in corrupt conduct, unless it is considered serious and/or systemic corrupt conduct, or is not described as 'corrupt conduct'
- any information that would compromise another investigation under the IC Act⁵, or
- any information that would prejudice a criminal investigation, criminal proceeding, or other legal proceeding known to the Commission.

Similar to reports prepared by the Auditor-General, the relevant Minister must prepare a response to a Commission report and table that response in the Legislative Assembly within four months of the Commission delivering the report.⁶

⁴ *Integrity Commission Act 2018* s184.

⁵ However, the Integrity Commission may prepare a confidential report and provide it to the relevant Legislative Assembly Committee if it contains information that may prejudice a proceeding.

⁶ *Integrity Commission Act 2018* s191.

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The examination process outlined in Part 3.6 of the IC Act further outlines the Commission's role as a fact-finding unit to investigate and expose corrupt conduct. When conducting an examination to uncover facts about corrupt conduct within the ACTPS, the IC Act provides that the Commission is not bound by the rules of evidence and may inform itself of anything in the way it considers appropriate, though it must comply with the rules of natural justice and procedural fairness.⁷ Further, the IC Act abrogates privileges against self-incrimination and exposure to civil penalty.⁸ However, any information obtained as a result of abrogating those privileges is not admissible in any subsequent civil or criminal proceedings.⁹

Criminal conduct and investigations

By virtue of the powers provided to the Integrity Commission, and the scope of corrupt conduct to include certain criminal offences, it is likely that the Commission will gather information and collect evidence relating to criminal matters.

In recognition of this, the IC Act provides that the Commission may do any of the following:

- at any time, refer a corruption report to a referral entity (including the Chief Police Officer)¹⁰
- at any time, refer a matter to a prosecutorial body (for example, the ACT Director of Public Prosecutions) if the matter is relevant to the exercise of the prosecutorial body's functions, and the Commission considers it appropriate to refer the matter¹¹
- enter into a Memorandum of Understanding (MoU) or agreement with another entity to assist in avoiding the unnecessary duplication of statutory functions, or efficiently managing the interaction of the statutory functions of the parties to the MoU.¹²

As an example of managing the statutory functions, the Commission and the Australian Federal Police can enter into an MoU to assist in managing the statutory functions of each party, noting:

- the Commission has a statutory function to investigate conduct that is alleged to be corrupt conduct and refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action,¹³ and
- the Australian Federal Police has a statutory function for the provision of police services in relation to the ACT¹⁴ (and, where arrangements have been entered into, the provision of those services shall be in accordance with the arrangements).¹⁵

The IC Act compliance with best-practice principles

On 9 December 2022, anti-corruption commissioners from Australian jurisdictions issued a media release outlining the 12 best-practice principles for Australian anti-corruption commissions.¹⁶

⁷ *Integrity Commission Act 2018* s142(1).

⁸ *Integrity Commission Act 2018* s175.

⁹ *Integrity Commission Act 2018* s176(1).

¹⁰ *Integrity Commission Act 2018* s107.

¹¹ *Integrity Commission Act 2018* s111.

¹² *Integrity Commission Act 2018* s56.

¹³ *Integrity Commission Act 2018* s23(1).

¹⁴ *Australian Federal Police Act 1979* (Cth) s8(1)(a).

¹⁵ *Australian Federal Police Act 1979* (Cth) s8(1A).

¹⁶ https://www.integrity.act.gov.au/_data/assets/pdf_file/0014/2120054/Media-Release-12-Best-Practice-Principles.pdf.

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For reference and context, the 12 principles are provided below along with commentary on how the ACT implements the principle.

1. The ability to consider referrals from any third party

The IC Act provides that any person (a complainant) may make a complaint to the Integrity Commission about conduct that may be corrupt conduct (a corruption complaint) – they do not have to be a public official or otherwise from within the ACTPS.¹⁷

2. The ability to commence an investigation on own volition (own motion powers)

The IC Act provides that the Integrity Commission may investigate a matter formally using its coercive powers on its own initiative without the matter previously being referred as a corruption complaint.¹⁸ In addition, the Commission may carry out a preliminary inquiry to decide whether to investigate a matter on its own initiative regardless of if the matter was referred as a corruption complaint.

3. A requirement for the heads of public sector agencies to report allegations of corruption to the anti-corruption commission

The IC Act requires the head of a public sector entity, or a member of the SES, to notify the Integrity Commission about a matter suspected on reasonable grounds involves serious or systemic corrupt conduct.¹⁹

Further, the *Public Sector Management Act 1994* requires all public servants to tell the Head of Service, or their Director-General if the matter involves the Head of Service, about any maladministration or corrupt or fraudulent conduct by a public servant or a public sector member.²⁰

4. The ability to conduct hearings to obtain evidence

The IC Act allows the Integrity Commission, in carrying out an investigation, to issue an examination summons requiring the person to appear before the Commission to do one or more of the following:

- a) give evidence at an examination
- b) produce a document or thing to the Commission.²¹

The IC Act provides that the Integrity Commissioner may require a person to take an oath and administer an oath to a person, and may require them to produce documents or other things in accordance with the examination summons.²²

The IC Act also abrogates common law privileges against self-incrimination and exposure to civil penalty to refuse to:²³

- a) produce a document or other thing as required under an examination summons, or
- b) answer a question or provide information as required:
 - i. under an examination summons; or
 - ii. at an examination.

¹⁷ *Integrity Commission Act 2018* s57.

¹⁸ *Integrity Commission Act 2018* s101.

¹⁹ *Integrity Commission Act 2018* s62.

²⁰ *Public Sector Management Act 1994* s9(4).

²¹ *Integrity Commission Act 2018* s147.

²² *Integrity Commission Act 2018* s157.

²³ *Integrity Commission Act 2018* pt 3.7.

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The IC Act provides that an examination may be in public or private.²⁴ If the Commission intends to hold a public examination, it must, not less than seven days before the day of the public examination, give a written report to the Inspector stating that it intends to hold a public examination, and the reasons why it decided to hold a public examination.²⁵

5. The ability to require the production of information or documents

The IC Act allows the Integrity Commission to issue an examination summons, requiring the person to appear before the Commission to do one or more of the following:²⁶

- a) give evidence at an examination
- b) produce a document or thing to the Commission.

As discussed above, the IC Act abrogates common law privileges against self-incrimination and exposure to civil penalty to refuse to:

- a) produce a document or other thing as required under an examination summons, or
- b) answer a question or provide information as required:
 - i. under an examination summons; or
 - ii. at an examination.

The IC Act affords a derivative use immunity that protects persons who are compelled to provide evidence and information to the Commission.²⁷

6. The ability to refer matters to a prosecuting authority

The IC Act allows the Integrity Commission to, at any time, refer a matter to a prosecutorial body if:

- a) the matter is relevant to the exercise of the prosecutorial body's functions; and
- b) the Commission considers it appropriate to refer the matter.^{28,29}

In deciding whether to make a referral, the Commission must consult the prosecutorial body.³⁰

7. The ability to make recommendations

The IC Act requires the Integrity Commission, after completing an investigation, to prepare a report of the investigation. An investigation report may include the Commission's findings, opinions and recommendations, and reasons for those findings, opinions and recommendations.³¹

The IC Act also allows the Commission to, at any time, prepare a special report for the Legislative Assembly on any matter relating to the exercise of the Commission's functions, including administrative and general policy matters.³² The Commission must provide a copy of the special report

²⁴ *Integrity Commission Act 2018* s143.

²⁵ *Integrity Commission Act 2018* s144.

²⁶ *Integrity Commission Act 2018* s147.

²⁷ *Integrity Commission Act 2018* s176.

²⁸ *Integrity Commission Act 2018* s111.

²⁹ The IC Act defines a prosecutorial body as either the Director of Public Prosecutions, the Director of Public Prosecutions of the Commonwealth, the Director of Public Prosecutions of a State, or another person or body with a prosecutorial function prescribed by regulation.

³⁰ *Integrity Commission Act 2018* s111.

³¹ *Integrity Commission Act 2018* s182.

³² *Integrity Commission Act 2018* s206.

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to the Speaker, and the Speaker must present the special report to the Legislative Assembly the next day.³³ The Commission must publish the report on its website as soon as practicable after giving it to the Speaker, unless it is a confidential special report.³⁴

8. The ability to report on investigations and make public statements

While there is no specific provision for the Commission to make public statements during an investigation, powers are conferred for making and publishing reports.

The IC Act also provides for the Commission to make private recommendations public in an investigation or annual report if a public sector entity does not respond to a recommendation within a stated time, or the Commission disagrees with the stated action of a public sector entity.³⁵

9. A corruption prevention function

The IC Act includes a corruption prevention function as part of the Integrity Commission's functions.³⁶

10. A sufficient and predictable budget

The Integrity Commissioner is considered an independent officer of the Legislative Assembly.³⁷ Consequently, the Speaker must consult the Commissioner about each annual budget appropriation and provide recommendations from that consultation to the Legislative Assembly and the Treasurer.³⁸ If the Government does not allocate the recommended appropriation, the Treasurer must present to the Legislative Assembly a statement of reasons for departing from the recommended appropriation.³⁹

11. Transparency of appointments

The Speaker must make a determination about the criteria that apply to the selection of a person for appointment as Integrity Commissioner, and the process for selecting a person.⁴⁰ In making the selection criteria and process determination, the Speaker must consult the Chief Minister, the Leader of the Opposition, the Leader of a Registered Party if that Party has at least two members in the Assembly, and the relevant Assembly Committee.

The Speaker must ensure the selection process is open, accountable, and competitive, and have regard to any selection criteria determined under the *Supreme Court Act 1933*.

When making the appointment, the Speaker must again consult with the parties listed above, and the appointment must be made in accordance with the selection criteria.

The Speaker must not appoint a person as the Commissioner unless satisfied that the person has extensive knowledge of, and experience in, criminal investigation or criminal adjudication, or law enforcement or the conduct of investigations, or public administration, governance, and government.

³³ *Integrity Commission Act 2018* s213.

³⁴ *Integrity Commission Act 2018* s214.

³⁵ *Integrity Commission Act 2018* s181.

³⁶ *Integrity Commission Act 2018* s23(1)(c),(d) and (e).

³⁷ *Integrity Commission Act 2018* s21.

³⁸ *Financial Management Act 1996* s20AB.

³⁹ *Financial Management Act 1996* s20AC.

⁴⁰ *Integrity Commission Act 2018* s27.

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The Legislative Assembly must approve the appointment by resolution passed with at least two thirds majority.⁴¹

12. Appropriate oversight

Chapter 5 of the IC Act establishes an independent inspector of the Integrity Commission and outlines the roles, powers, and functions of the Inspector of the Commission.

The functions of the Inspector are:⁴²

- a) to assess and report on the Commission's compliance with the IC Act and any memorandums of understanding or agreements entered into under the legislation
- b) to receive, investigate and assess complaints about the Commission and members of staff of the Commission
- c) to make recommendations to the Commission or public bodies about practices or procedures in relation to the performance of functions under the IC Act, and
- d) any other functions given to the Inspector under the Act or any other territory law.

The Inspector has complete discretion in the exercise of its functions.⁴³

The Legislative Assembly has also resolved that the Standing Committee on Justice and Community Safety has parliamentary oversight of the Commission, in particular to monitor, review and report on the performance of the Commission.⁴⁴

Mandatory Corruption Referrals

Section 62 of the IC Act requires senior executives and heads of public sector entities to notify the Integrity Commission about any matter the person suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct. Similar requirements apply to Members of the Legislative Assembly and ministerial chiefs of staff under section 63.

Issues

The underlying objective of section 62 is to mandate notification of serious and/or systemic corrupt conduct to the entity responsible for its investigation.

In practice, section 62 has created some instances of operational inefficiency within the ACTPS by creating a situation where multiple senior executives report the same matter to the Integrity Commission when they do not have any additional knowledge or information about the matter to provide the Commission.

For example, the Head of an Agency, the Senior Executive Responsible for Business Integrity Risk (SERBIR) and the Executive Branch Manager, Governance and Compliance, within one agency might all receive the same email from a staff member reporting an allegation of corruption. Under the legislation each executive will have to report this individually even though they all only have the same original information. This process is inefficient for both the Integrity Commission and the senior executives involved, and may distort the mandatory referral data in the Commission's annual report.

⁴¹ *Integrity Commission Act 2018* s25.

⁴² *Integrity Commission Act 2018* s227.

⁴³ *Integrity Commission Act 2018* s226.

⁴⁴ https://www.parliament.act.gov.au/data/assets/pdf_file/0009/1980873/Resolution-of-establishment-for-the-committee.pdf.

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A similar issue has been dealt with in other ACT legislation, for example the *Children and Young People Act 2008*. Under section 357(1) of that Act, the requirement for mandatory reporting of child abuse does not apply where someone else has already made a report on the same grounds. The IC Act could be amended to provide a similar provision.

Some stakeholders have also raised that they are unsure about the broader application of the provision. For example, if a senior executive becomes aware of a matter through media reporting, it is not clear whether that senior executive is still required to report it to the Commission. Given the criminal implications for failure to report, it may be worth clarifying in the legislation the situations in which mandatory reporting is expected.

Discussion

1. Should the IC Act not require reporting where a report on the same matter is known to have been made to the Commission?

Interaction of reporting requirements under IC Act and *Public Sector Management Act 1994*

The Integrity Commission has suggested there is an incompatibility of reporting requirements under section 9 of the *Public Sector Management Act 1994* (PSM Act) and section 62 of the IC Act. The Commission has also proposed that the term 'public official' be used consistently in both acts, that all public officials ought to have a positive duty to report 'corrupt conduct' (whether to the Commission or the head of a public sector entity), and that corrupt conduct should be defined consistently in both Acts.

Briefly, section 9 of the PSM Act requires all public servants to report suspected fraud and maladministration to the head of service (or their delegate), or if the matter involves the head of service, their Director-General. Section 62 of the IC Act requires all senior executives and heads of public sector entities to report suspected serious and/or systemic corrupt conduct to the Commission.

Issues

The two reporting requirements under section 9 of the PSM Act and section 62 of the IC Act serve different purposes. Reporting under the PSM Act requires all staff to notify the Head of Service (or their delegate) to provide the Head of Service (as the employer) the opportunity to take appropriate action to meet workplace and industrial law requirements. This includes providing a safe workplace and referring a misconduct matter under an enterprise agreement to the relevant entity to address or undertake a workplace investigation such as the head of a public sector entity in which the maladministration is occurring, or the Public Sector Standards Commissioner (PSSC). The misconduct definition is broad and encompasses most, if not all, inappropriate conduct across the ACTPS.⁴⁵

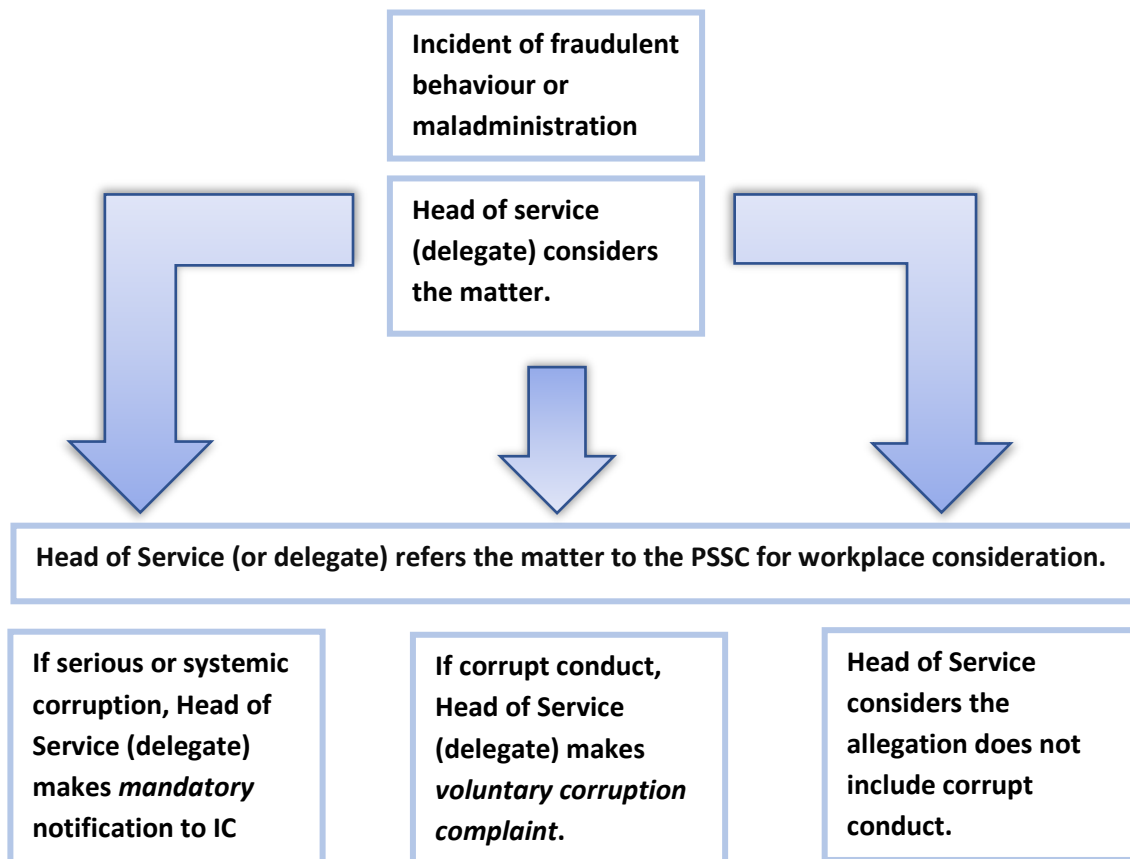
This is not necessarily incompatible with the reporting requirements under section 62 of the IC Act – which requires senior executives and the head of a public sector entity to report suspected serious or systemic corrupt conduct to the Commission. If the Head of Service considers that the matter has reached the serious and/or systemic corrupt conduct threshold, then the Head of Service is required to refer the matter to the Commission for investigation. Importantly, this does not prevent any person

⁴⁵ Clause H6.5 of the ACT Public Sector Administrative and Related Classifications Enterprise Agreement 2021-22 (noting this definition is consistent across all ACTPS enterprise agreements).

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within the ACTPS from voluntarily referring a matter to the Commission. The diagram below illustrates this process.



As mentioned above, the Integrity Commission has also raised that the term ‘public official’ should be used consistently across the PSM Act and IC Act. The PSM Act does not use the term ‘public official’ as it is defined in the IC Act, but refers to ‘public servants’ (as persons employed in an administrative directorate) and public sector members (as ‘public servants’, and those employed in a statutory entity or Territory instrumentality/corporation). Importantly, the terms are defined differently because the two Acts serve different purposes. The PSM Act’s objective is to establish and maintain a public service that assists the Executive to meet the needs of the community and serves the community on behalf of the Executive.⁴⁶ The Act’s intent is limited to governing the public sector as the workforce that carries out the Executive’s intent. The IC Act has a much broader jurisdiction and captures all parts of public administration, including the three separate arms of government: the Executive, the Legislature, and the Judiciary. This is reflected in the IC Act’s definition of ‘public official’ which includes members of all three arms of government. Given the difference in objectives, it may be undesirable to align the definition of ‘public official’ in the IC Act, with the definition of ‘public servant’ and ‘public sector member’ in the PSM Act.

The Integrity Commission has also submitted that all public officials should have a positive obligation to report serious and/or systemic corrupt conduct to the Commission, rather than limiting the

⁴⁶ *Public Sector Management Act 1994* s5.

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obligation to heads of public sector entities and senior executives. Currently, any person may choose to report suspected corrupt conduct to the Commission.

The 2018 Select Committee that inquired into the Bill to establish an Integrity Commission considered this matter and concluded that heads of public sector entities and senior executives was sufficient for mandatory reporting.⁴⁷ As outlined above, for public sector members a mechanism exists that requires all public sector members to mandatorily report fraudulent behaviour or maladministration to the head of their public sector entity. In addition, the *Public Interest Disclosure Act 2012* (PID Act) provides a voluntary mechanism for any person to report suspected wrongdoing, and a mandatory obligation for the disclosure officer to consider the report and action as necessary (which may include mandatory reporting under section 62 of the IC Act).

The Integrity Commission's proposal would provide the Commission with a broader mechanism to receive corruption referrals and possibly obtain more witnesses to instances of suspected serious and/or systemic corrupt conduct. However, failure to mandatorily report attracts a criminal penalty,⁴⁸ and junior officers may be unaware of or unsure about what conduct may meet the threshold for mandatory reporting. A benefit of the current approach is that it allows officers with significant experience and seniority to make an assessment of how a referral is best dealt with.

Discussion

2. Is the current interaction between section 9 of the PSM Act and section 62 of the IC Act incompatible or capable of improvement?
3. Should the IC Act impose a positive duty on all public officials to report corrupt conduct?
4. Should the PSM Act definition of 'public sector member' be aligned with that of 'public official' in the IC Act?

Referrals and assessment of matters

The ACTPS integrity system has multiple entities that can receive and refer integrity related complaints, including (but not limited to) the PSSC, the Integrity Commission, and the ACT Ombudsman. The Auditor-General may also conduct performance audits at its own motion, but is not a complaint handling agency. Each entity has different responsibilities with regard to promoting and upholding integrity – as such, it is important that referrals are provided to the correct entity to ensure that the matter is dealt with in a timely manner to maintain procedural fairness, and appropriately deal with allegations of wrongdoing.

Issues

Stakeholder feedback noted that due to mandatory referral requirements, public officials err on the side of caution when dealing with alleged wrongdoing. This has meant a high number of referrals to the Commission even for matters which may be more appropriately dealt with by another entity such as the PSSC under the misconduct framework. The IC Act provides a framework that allows the Commission to refer corruption complaints to the appropriate entity if it considers it is best dealt with by another office.⁴⁹ Over-reporting resulted in a back-log of unassessed matters and agencies reported

⁴⁷ 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 38.

⁴⁸ *Integrity Commission Act 2018* s65, s66.

⁴⁹ *Integrity Commission Act 2018* s107.

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that a number of serious misconduct matters did not receive timely investigation due to the delay in assessment, and referral back to the ACTPS, to the agency, or to the PSSC. PSSC investigations are undertaken under the ACTPS enterprise agreements, which require a process that encourages ‘practical and expeditious resolution of misconduct issues in the workplace’ in accordance with principles of natural justice and procedural fairness.⁵⁰ These requirements may be compromised if the Commission refers a corruption complaint to the PSSC several months after it was first received.

While more recently the assessment timeframes of the Commission have improved, stakeholders have queried if a legislative response to this risk to natural justice and procedural fairness might be appropriate. Given the Commission’s reported recent improvement in assessment timeframes, it may be appropriate to continue to monitor this situation and defer further consideration until the next statutory review in five years. The Commission is still early in its establishment, and this could be a natural part of its integration into the broader ACTPS framework. ACTPS staff training might assist to enable public officials to feel confident about the matters for referral and reduce over-reporting.

Option 1 – Legislated reporting on assessment timeframes

This option would impose a legislated timeframe within which each referral would have to be assessed by the Integrity Commission. Assessment of matters by the Commission relates to an initial triaging function and is used to determine whether the Commission has jurisdiction, and whether a matter appears suitable for progression to a preliminary inquiry or investigation. It is therefore not itself a preliminary inquiry or investigation. To address the issues raised about timeframes, legislation could require the Commission to assess a corruption complaint within say three months, and if this is not met, it would have to be reported to the Inspector with an explanation about why the referral has not yet been assessed. It could also then be reported individually as part of the monthly reporting. This would provide the Inspector with an additional oversight function to monitor the timely assessment of referrals. An even stricter regime could provide that any matter that has not been assessed within the three months would have to be referred to the PSSC.

Option 2 - Implement a triage system that accepts all maladministration complaints

South Australia has implemented a triage system for maladministration complaints through its Office for Public Integrity (OPI). OPI’s role was recently expanded in 2021 to act as a funnel for all maladministration complaints in South Australia. Under this system, all agencies are required to refer a complaint to the OPI, which assesses the complaint and refers it to the entity best placed (and required) to deal with it, whether that is the SA Independent Commissioner Against Corruption (for corrupt conduct), the Ombudsman (for misconduct), or back to the agency for an internal investigation. A similar statutory entity could be created to accept all public sector complaints in the Territory, and refer each matter to the appropriate entity.

Noting that a new statutory entity may be undesirable in a small jurisdiction with several agencies that include integrity within their remit, such a system could draw on an existing entity, for example, the PSSC (with assistance from the Professional Standards Unit (PSU)) investigates misconduct – which, by its definition, includes behaviour that would constitute corrupt conduct. A triage function could sit within the PSU, which could assess all matters on behalf of the employer in relation to misconduct, and also refer matters to another relevant complaint or reporting agency (e.g. Integrity Commission,

⁵⁰ ACTPS Administrative and Related Classifications Enterprise Agreement, H6.2 6.3 (note: all ACTPS Enterprise Agreements have the same misconduct clauses).

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Ombudsman and others listed at the beginning of this paper). It is important to note that the PSSC could only act as triage for matters that fall within the PSSC's jurisdiction – members of the ACTPS. The PSSC could not act as triage for complaints against (for example) members of the judiciary, or MLAs.

Option 3 – Defer consideration until the next review

Noting the discussion earlier that the stakeholders have suggested the Integrity Commission has improved its assessment timeframe since commencement, it may be desirable to continue to monitor and address this issue at the next statutory review.

Discussion

5. Would any of the above options be worth adopting to streamline the existing process and improve assessment timeframes?
6. Alternatively, are there other mechanisms to seek to ensure timely assessment of referrals made to the Integrity Commission?

Clarifying interaction with clause H7.1 of the ACTPS Enterprise Agreements

The Integrity Commission has raised a concern with the misconduct investigation requirements under clause H7.1 of the ACTPS Enterprise Agreements (ACTPSEA).⁵¹ In particular, the Commission is concerned that the provision gives preference to a misconduct investigation over referring the matters to the Commission for a corruption investigation. Clause H7.1 is common across the several enterprise agreements in operation across the ACTPS.

The ability to conduct a workplace misconduct investigation enables an employer to effectively manage its workforce and provide a procedurally fair process to establish if misconduct has occurred, and if so, what appropriate action the employer may take under industrial relations law (*Fair Work Act 2009* (Cth)). A misconduct investigation process also assists an employer to meet its legislative requirements to provide a safe workplace by allowing staff to bring forward complaints against other staff members about conduct that may be affecting their health and wellbeing.⁵²

Issues

The Integrity Commission believes corruption investigation could be jeopardised if a notification is provided to the PSSC as a workplace misconduct matter. If the PSSC decides to investigate the matter, the investigator is required to alert the employee in writing of the particulars of the alleged misconduct.⁵³ The Commission is concerned that in alerting the employee, it may impede the Commission's ability to conduct a covert investigation before summoning the employee for examination. For example, they may destroy or hide evidence that the Commission intends to summon using coercive powers.

Clause H7.1 of the ACTPSEA provides that, when made aware of alleged misconduct, the head of service must determine whether or not the matter needs to be investigated.⁵⁴ If the head of service determines that an investigation is required, the head of service must refer the matter to the PSSC for

⁵¹ Note: the clause wording is consistent amongst all ACTPS enterprise agreements, but the clause reference may differ.

⁵² *Work Health and Safety Act 2011* s19.

⁵³ ACTPS Enterprise Agreement, clause H9.2.1.

⁵⁴ This includes delegates.

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investigation. The PSSC must then consider the matter, and either accept the matter and appoint an investigator, or refer the matter back to the head of service.⁵⁵

Given the breadth of overlap between the Commission and the PSSC, and noting that each has differing statutory functions, it is important that each is made aware of matters that fall in each entity's jurisdiction. The IC Act includes a requirement for the Commission to liaise with public sector entities and coordinate its activities with the activities of other public sector entities to avoid unnecessary duplication of work.⁵⁶ To achieve this, the IC Act provides the Commission with authority to enter into agreements with another entity to avoid delay and duplication of work, and efficiently manage the interaction of statutory functions.⁵⁷

The provision allows the Head of Service to best determine the appropriate means to deal with the matter. There is considerable overlap between the corrupt conduct and misconduct definitions, and the head of service (as the employer) may be required to make decisions about what is best for the workforce in particular instances. In addition, the PSSC is able to refer matters to the Commission in situations where the PSSC considers a corruption investigation is more appropriate. Ultimately, it is important that each entity is aware of the precise matters that fall within their jurisdiction so that each can appropriately manage their role and responsibility under law (whether by statute or enterprise agreement).

The Commission's concern that a PSSC investigation may jeopardise a corruption investigation may be able to be effectively managed through an agreement or memorandum of understanding under section 56 of the IC Act. The review understands that such an agreement is already in place. The enterprise agreement itself does not stipulate a set time that an employee must be alerted about a misconduct investigation – it only provides that an objective is to provide for an expeditious and procedurally fair process. It is possible that this can best be achieved through coordination between the PSSC and the Commission.

It may be difficult to amend an enterprise agreement given the highly regulated approach to enterprise bargaining, and a requirement that the majority of the workforce must agree to the proposed working condition. This also raises the question of whether it is appropriate to include reference to the Commission in a document that outlines proposed working conditions – the role of the PSSC is required as it directly relates to management of workplace disputes.

Discussion

7. What factors should the review consider in relation to this proposal?
8. Is legislative amendment required to address this issue?

Limiting investigations to serious and/or systemic corrupt conduct

The review is interested to receive feedback on amending the Integrity Commission's jurisdiction to limit its powers to investigating only serious and/or systemic corrupt conduct. This model is utilised under the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act), which empowers the NACC to receive any corruption complaints, but only to investigate if the complaint might involve serious and/or systemic corruption. If the matter does not meet this threshold, the NACC must refer it back to

⁵⁵ ACTPS Enterprise Agreement cl H7.3.

⁵⁶ *Integrity Commission Act 2018* s55.

⁵⁷ *Integrity Commission Act 2018* s56.

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the originating agency for action and the NACC may request updates and reports on how the matter is being dealt with.

Issues

The IC Act includes provisions that indicate it is to prioritise serious and/or systemic corrupt conduct:

- Subsection 23(2) provides that in exercising its functions, the Integrity Commission must prioritise the investigation of and exposure of corrupt conduct which it considers may constitute serious corrupt conduct or systemic corrupt conduct.
- Section 62 requires mandatory notification of only serious corrupt conduct and systemic corrupt conduct.
- Section 184 provides that the Commission may not include a finding of corrupt conduct in an investigation report unless it is serious and/or systemic.⁵⁸

Limiting investigations to serious and/or systemic corrupt conduct may make other proposals for additional powers and investigative tools more appropriate and compatible with human rights as they would only be used in investigation of serious matters; for example, powers under the *Telecommunications (Interception and Access) Act 1979* (Cth), or abrogating legal professional privilege.

In addition, it may assist public officials to decide what matters to refer to the Commission and instil confidence that they are referring matters appropriately.

If this proposal were to be implemented, one point that would need to be considered is confidence in identifying systemic corrupt conduct. At the moment, the Commission receives reports regarding corrupt conduct, and would be able to identify trends which suggest the conduct may be systemic. However, if these less serious corrupt conduct matters no longer fell within the jurisdiction of the Commission, it may need to be the responsibility of the ACTPS to track whether trends in reporting indicate a systemic problem that needs to be investigated by the Commission.

Discussion

9. Should the jurisdiction of the Integrity Commission be amended so that only matters which demonstrate serious or systemic corrupt conduct fall within its remit?

Coverage of MLA conduct

The Integrity Commission has submitted that there is a problem because the current definition of 'corrupt conduct' does not apply to Members of the Legislative Assembly (MLAs) in the same way as it does to other public officials.⁵⁹

The corrupt conduct definition has two limbs: the first is that the conduct could constitute a criminal offence, or a serious disciplinary offence, or reasonable grounds for dismissing or otherwise terminating a public official's services (the three thresholds for the first limb). Once this limb is met, paragraph 9(1)(b) of the IC Act includes all the categories of conduct that are considered 'corrupt

⁵⁸Section 184 also provides that an investigation report may include a finding or opinion about conduct of a stated person that may be corrupt conduct if the statement or opinion does not describe the conduct as corrupt conduct.

⁵⁹ *Integrity Commission Act 2018* s9.

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conduct', generally involving a fraud, dishonesty, misuse of power and other instances of wrongdoing.⁶⁰

A 'serious disciplinary offence' includes any serious misconduct, or any other matter that may constitute grounds for termination under any law, or a significant employment penalty. Serious misconduct is taken to mean serious misconduct as it is defined under clause 1.07 of the *Fair Work Regulations 2009* (Cth) (FW Regulations) which simply adopt its ordinary meaning, and provide workplace examples of serious misconduct.⁶¹

The Commission submits that two of the three corrupt conduct thresholds within the first limb relate to employment concepts – specifically workplace misconduct and termination of employment. As MLAs are not employed under conventional workplace arrangements, the Commission suggests these two thresholds do not apply to MLAs - which leaves only the commission of a criminal offence. A criminal offence is much narrower than the other two thresholds, as there are several workplace misconduct matters that involve (for example) a fraud, but are not considered a criminal offence. The Commission has suggested the adoption of a fourth threshold in s9(1)(a) that specifically refers to an MLA code of conduct so that a broader range of conduct can be captured to consequently meet the remaining elements in the second 'corrupt conduct' limb in paragraph 9(1)(b).

Issues

MLAs' right to hold office, and disqualification from holding office, comes from the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (SG Act). Section 14 of the SG Act outlines when an MLA is disqualified from office and includes if the member:

- at any time after the beginning of the first meeting of the Assembly after a general election, is not qualified to take a seat as a member;
- is absent without permission of the Assembly for a certain number of meetings as required under an enactment (and if no enactment is made, four meetings); or
- takes or agrees to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly (other than usual allowances).

The third point may provide an avenue for the Commission to meet the first corrupt conduct limb in subparagraph 9(1)(a)(iii) – 'otherwise terminating the services of a public official'. For example, there is an argument an MLA who receives a benefit from a person for voting a certain way or taking certain action in the Legislative Assembly is liable to disqualification under the SG Act. However, this is a narrow scope, when compared to the breadth of behaviour that is covered for other public officials.

A 'serious disciplinary offence' – which includes serious misconduct as it is defined under the FW Regulations – may also apply to MLAs. As noted above, the FW Regulations adopt the ordinary meaning of 'serious misconduct' and provide examples to clarify its application. This may not necessarily mean that serious misconduct in itself is tied to a workplace matter – as noted in the FW Regulations explanatory memorandum, the regulation identifies particular kinds of conduct that will amount to serious misconduct for the purposes of the *Fair Work Act 2009* (Cth). Taking its ordinary meaning, 'misconduct' is broadly defined as unacceptable or improper behaviour that is motivated by

⁶⁰ Note: the definition in section 9 is more extensive and provides specific examples of conduct that is considered to be corrupt conduct.

⁶¹ *Fair Work Regulations 2009* (Cth) cl 1.07.

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deliberate purposes or by indifference to one's actions.⁶² 'Serious' implies something that is more significant or substantial beyond ordinary consideration. As such, there may be scope to argue that a 'serious disciplinary offence' continues to apply to MLAs.

The requirement for the conduct to be a criminal offence may not be as restrictive as the Commission suggests. The *Criminal Code 2002* includes 'Abuse of Public Office' as a criminal offence under section 359. The provision creates an offence for a public official (including an MLA) if the official, with the intent to dishonestly obtain a benefit for the official or someone else, or dishonestly cause detriment to someone else:

- exercises any function or influence that the official has as a public official; or
- fails to exercise any function the official has as a public official; or
- engages in any conduct in the exercise of the official's duties as a public official; or
- uses any information that the official has gained as a public official.

This provision codifies the common law offence of misconduct in public office, which has been relied on in other jurisdictions to prosecute public officials, including in New South Wales⁶³ and Victoria⁶⁴ (noting that common law offences do not exist in the ACT).⁶⁵

Elaborating on the Integrity Commission's proposal, the Legislative Assembly has created a process and a code of conduct that MLAs must abide by, and which facilitates mandatory reporting to the Integrity Commissioner.⁶⁶ Under continuing resolution 5AA of the Standing Orders, the Legislative Assembly Standards Commissioner – who is responsible for investigating alleged breaches of the Code of Conduct - must refer matters the Standards Commissioner considers are more properly the purview of the Commission to the Commissioner.⁶⁷

The MLA code of conduct is broader than the definition of 'corrupt conduct' in the IC Act and encompasses behaviour typically not associated with behaviour considered 'corrupt'. For example, the code of conduct includes requirements for MLAs to treat all citizens of the ACT with courtesy and respect diversity of backgrounds. However, referring to the code of conduct in the first limb in section 9 of the IC Act would not allow the Commission to investigate all allegations of a breach of the code of conduct. The allegation would still need to meet the second limb of the corrupt conduct definition in paragraph 9(1)(b) of the IC Act.

Discussion

10. Are the current provisions in the IC Act and other legislation sufficient to ensure broad enough coverage of MLA conduct is captured under the IC Act?

⁶² *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 at 200-201 per Kirby P.

⁶³ See *R v Moses Obeid (No 17)* [2021] NSWSC 858.

⁶⁴ See *R v Quach* [2010] VSCA 106.

⁶⁵ *Criminal Code 2002* s5.

⁶⁶ https://www.parliament.act.gov.au/data/assets/pdf_file/0011/1651619/Member-guide-Tenth-Assembly-April-2021-version.pdf.

⁶⁷ https://www.parliament.act.gov.au/data/assets/pdf_file/0005/2160374/Standing-Orders-as-at-1-January-2023.pdf page 109.