ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

[redacted]
Executive Branch Manager,
Secretariat, Integrity Commission Act Review
Via ICActReviewSecretariat@act.gov.au

14 June 2023

Dear [redacted],

ACT Human Rights Commission further submission to independent review of *Integrity Commission Act 2018* – Discussion Papers

Thank you for inviting the ACT Human Rights Commission to provide feedback in relation to the independent review of the *Integrity Commission Act 2018* (IC Act).

This further feedback primarily reflects my views and advice as President and Human Rights Commissioner. My functions include advising government on the impact of laws and government services on human rights, promoting community discussion, and providing education and information, about the HRC Act, the *Human Rights Act 2004* (ACT) (HR Act) and human rights generally.

Given the substantial scope of proposals canvassed across the six discussion papers and the timing of consultation, I regret that I have been unable to give detailed consideration to the proposals set out in each discussion paper. My feedback below is therefore limited to the ACT Human Rights Commission's general views in relation to select proposals and ought to be read in conjunction with my earlier submission. The following views should not be understood to endorse any proposed measure or approach as likely to be consistent with the HR Act.

Should you wish to discuss any of the content of this submission further or provide feedback regarding our advice, the contact in my office is [redacted], who may be reached on [redacted].

Yours sincerely

[redacted]

Dr Helen Watchirs OAM
President and Human Rights Commissioner

1. One preliminary observation relates to the importance of the test, outlined under s 28 of the HR Act, by which a limit on a human right may be found to be permissible. Section 28 of the HR Act generally recognises that most rights, having regard to their nature in IHRL, may be subject only to *reasonable* limits set by laws that can be demonstrably justified in a free and democratic society. In this regard, we note discussion of the right to privacy in the context of telecommunications interception appears not to refer to the requirement that limitations be reasonable; meaning necessary and proportionate to achieving a legitimate aim.

Integrity Commission Powers

Telecommunication interception and access

2. Consistent with our earlier submission, the ACTHRC does not oppose the Commission being authorised to seek telecommunications interception warrants, stored communication warrants and telecommunications data for the purpose of its functions. Our qualified support is, however, premised on there being effective and adequate safeguards against arbitrary or unlawful interferences with personal privacy, as required by s 12 of the HR Act.

3. As outlined in our earlier submission, it is not apparent that the *Telecommunications (Interception and Access) Act 1979* (Cth) ('TIA Act') provides sufficient safeguards against arbitrary or unlawful interferences with personal privacy insofar as Chapter 4 enables 'Commonwealth law enforcement agencies' (CLEA) to self-authorise access to telecommunications metadata retained by providers "for enforcement of the criminal law" (TIA Act, s 178). As we have noted, by reference to analysis of the Parliamentary Joint Committee on Human Rights, the breadth of sensitive personal information in retained telecommunications metadata that may be accessed without judicial oversight or the subject person's awareness (such as would facilitate their access to remedy), presents a real risk of arbitrary and unreasonable limitation of the right to privacy.

4. We are accordingly concerned that the options canvassed in the *Integrity Commission Powers* Discussion Paper, other than preserving the status quo (Option 3), contemplate the Commission being declared a CLEA without further constraints or safeguards regarding how it may request access to metadata retained by telecommunications providers.

5. By contrast, the framework for an 'enforcement agency' (EA) to apply for an interception warrant or otherwise receive intercepted information appears to feature stricter safeguards against arbitrary or unlawful interferences with a person's privacy. Such safeguards should, in our view, be further supported by the participation of a Public Interest Monitor in applications for interception warrants, and close review of what on-disclosures of intercepted information are permitted.

6. Accordingly, the Review may wish to consider an option by which the Commission is designated an enforcement agency (or otherwise is authorised only to receive interception information) and a CLEA for the purposes of seeking stored communications warrants under Part 3-3 only.

Amendment in relation to service periods

7. The ACTHRC is unlikely to support reducing minimum periods for an individual to comply with a notice issued under ss 90 (Preliminary Inquiry Notice) or 147 (Examination Summons) of the IC Act. Due to the confidentiality that necessarily accompanies Commission investigations, the Commission does not have insight into how these notice periods have operated in practice.

8. We note, however, that minimum service periods of at least 7 days aim to safeguard a recipient's right to fair trial (including their equality of arms) by ensuring they receive adequate time to access independent legal advice (and representation, if necessary) regarding the notice. As the *Commission Powers* Discussion Paper identifies, such advice may be necessary to enable an individual to exercise various human rights supported by a statutory or common law privilege that may be exist with respect to the document.

9. A minimum service period also ensures a recipient of a notice is afforded time to make arrangements to comply with the notice, which presently requires them to attend the Commission in person, and may support various human rights such as education (HR Act, s 27A), work (HR Act, s 27B), family (HR Act, ss 11-12) and equality (HR Act, s 8).

10. The stakeholder concerns identified in the Discussion Paper raise questions about whether the current service period guarantees adequate time to make such arrangements, including in cases where there is an intervening weekend. It is concerning in this regard that, unlike Victoria, the notice period is not framed with respect to 'a reasonable period', which would allow consideration of the quantity of documents, or logistical or legal complexity, associated with a production notice or summons. Though we appreciate the need for timely investigation of corrupt conduct, it is pertinent that equivalent service periods by the National Anti-Corruption Commission and in similarly sized, Tasmania, accommodate a 14-day minimum period. These tend to suggest that less rights restrictive timeframes may be reasonably available for the investigation and examination of alleged corruption.

11. The ACTHRC agrees that the IC Act should enable the Commission discretion to extend the minimum service period in circumstances where recipients require additional time to comply due to their personal circumstances or where necessary to ensure adequate access to legal advice. As a failure to comply within the minimum service period may constitute a contempt of the Commission or a criminal offence, it is concerning that compliance with inflexible service periods may present a disproportionate burden for some recipients based on their personal circumstances without scope for reasonable adjustments. Such flexibility is necessary, in our view, to ensure that production notices and summons are issued in ways that uphold human rights, including the right to equality.

Allowing the Integrity Commissioner to determine questions of privilege

12. To the extent claims of privilege, including assertions of client legal privilege, journalist source privilege, public interest immunity and professional confidential privilege protect various human rights, the right to fair hearing requires that they be recognised by law and decided by a competent, independent and impartial court or tribunal after a fair and public hearing (HR Act, s 21). As we have previously advised, the ACTHRC agrees that determination of privilege

by the Integrity Commissioner may involve a conflict of interest (whether real or perceived) with the inquisitorial role of the Commission, irrespective of the Commissioner's experience or expertise with respect to determining questions of privilege.

13. We note that this proposal may have less impetus should the IC Act be amended to abrogate legal professional privilege to the extent it vests in the Territory as a body politic, which is unlikely, in our opinion, to have appreciable human rights implications.

Arrest warrant for witness not likely to appear

14. We commend our earlier advice on this proposal to the Review; in particular, we endorse the Victorian approach modelled by s 194(2) of the *Evidence Act 2008* (Vic) as a means of authorising arrest of a witness for an anticipated failure to *appear* based on evidence that the person has been served the summons and is unlikely to appear. We have, in this regard, considered the equivalent construction in the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* (s 141C), but maintain that s 194(2) reflects a protective approach that ought to be favoured.

15. We note the proposal that a first instance warrant might be limited to situations in which it is evidenced that a person intends to abscond (as opposed to fail to appear). While this reflects a less rights-restrictive approach, whether it achieves the stated aim will substantially depend on advice from the ACT Integrity Commission.

Broadening confidentiality during a preliminary inquiry

16. The ACTHRC supports the proposed amendment to allow a confidentiality notice to be issued to any person where the Commission reasonably considers that the disclosure of 'restricted information' (per s 76) would likely prejudice and investigation or the safety or reputation or a person, or the fair trial of a person who has been, or may be, charged with an offence. The effect of a confidentiality notice is, however, to restrain a person's freedom of expression with respect to certain matters defined in s 76. These categories of information appear, in our view, suitably circumscribed to the risks that a confidentiality notice may be intended to respond.

17. In supporting this proposal, the ACTHRC takes note of the existing and proposed purposes for which restricted information may be disclosed (under s 81 of the IC Act).

Enabling the Integrity Commission to access employment records

18. The ACTHRC notes that employment records held within the Chris21 database and accessible solely by the Public Sector Standards Commissioner are expansive in terms of their sheer coverage of individuals employed within the ACT public service (27,132 people as at 2021-22), the vast majority of whom are unlikely to be the subject of, or a relevant person, in an Integrity Commission investigation. The Chris21 database also includes a wide range of potentially sensitive personal information, including personal health information, race, including Aboriginal and Torres Strait Islander status, family or domestic violence leave, disability and sexuality, for each individual.

19. Authorising the ACT Integrity Commission to access this database for the purposes of and may permit significant scope for unauthorised access, use or further disclosure. While we recognise the value to the Commission of being able to map employees who have worked at an agency together at a particular time, it is unclear why this purpose cannot appropriately be achieved by way of request to the relevant agency. To the extent this proposal is presented as enabling notice to an employee's residential address, absent safeguards, such means of service may give rise to unreasonable limitations of a person's right to family or reputation where a notice is received and opened by a housemate or family member. These stated aims are unlikely, in our view, to provide sufficient justification such as to merit the scope of the limitation canvassed.

20. The ACTHRC would not, however, be opposed to a narrower authorisation; such as to permit an API to, on request, access the personal email addresses of relevant employees and to perform searches of those working in a particular team or workspace at a relevant date. In this regard, we recommend the Review vigilantly consider options to ensure the least restrictive limitation of human rights necessary to achieve the intent of the Commission's proposals.

Operational matters

Allowing former ACT public servants to work at the Integrity Commission

21. As noted in our previous submission, permitting former ACT public servants to work for the ACT Integrity Commission is likely to support the right to work (HR Act, s 27B), equality and non-discrimination (HR Act, s 8) and right of equal access to appointment within the public service (HR Act, s 17(c)). We refer to our earlier submission with respect to this proposal, noting that robust conflict of interest procedures should be prioritised as a less restrictive option than a blanket restriction on eligibility.

Loss of immunity for prior inconsistent statement

22. Enabling evidence of prior inconsistent statements made to the ACT Integrity Commission in later criminal or civil proceedings must be considered by reference to the presumption of innocence and the entitlement outlined in s 22(2)(i) of the HR Act that a person charged with a criminal offence must not be compelled to testify against themselves.

23. We refer to our previous advice in this regard, noting that evidence taken by the Integrity Commissioner under oath (including an admission) could be decisive in the later criminal prosecution of a person, including where the impugned conduct is identified during an examination and referred for prosecution under s 111 of the IC Act. The presumption of innocence and closely related privilege against self-incrimination, as recognised in international human rights law, presupposes that a prosecution in a criminal case must seek to prove their case against an accused without recourse to evidence obtained by means of compulsion. It must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from investigating authorities on an accused.

24. In assessing whether the right is improperly limited, one must consider the nature and degree of compulsion used to obtain the evidence. The European Court of Human Rights considers situations in which a suspect is obliged to testify under threat of sanctions and testifies as a result or is sanctioned for refusing to testify may give rise to concerns with respect to the privilege against self-incrimination (eg *Saunders v the United Kingdom*, Grand Chamber, App No. 19187/91, 17 December 1996).

25. Generally, the presumption of innocence and privilege against self-incrimination will be enlivened only where a person is subject to 'a criminal charge', which has an autonomous meaning and may capture the period of investigation of an offence by authorities. The ACT Legislature has indicated, in the explanatory statement accompanying the Integrity Commission Bill 2018, that it considers rights in criminal proceedings (including the privilege against self-incrimination) to be engaged by the ACT Integrity Commission's powers to compel responses or information.

26. In particular, the relevant section of the explanatory statement (pp. 23-24) states:

> "On the other hand, it may be unfair to not provide derivative use immunity to persons investigated by the Commission. No difference can be meaningfully drawn between the harm that may flow from evidence directly obtained under compulsion, and incriminating evidence that was indirectly derived from this information. Derivatively obtained information can be as damaging as the original self-incriminating information. The person has still been forced to assist the Crown to discharge the burden of proof in both cases.
>
> Permitting derivative use immunity is therefore inappropriate in the ACT as it is a human rights jurisdiction. The Bill's approach implements partial derivative use immunity, in that indirectly obtained evidence is inadmissible in Court where the evidence could not have been obtained, or the significance for which could not have been appreciated, but for the compulsorily obtained evidence. Should prosecution later occur based on an investigation and brief of evidence referred by the Commission, the prosecution will have to prove that any derivatively evidence could have been obtained, or its significance could have been appreciated, without the compulsorily obtained evidence. This implements the measured approach to derivative use immunity recommended by Warren CJ in *Major Crime (Investigative Powers) Act 2004* [2008]. This approach respects human rights whilst also permitting enough derivatively obtained evidence to effectively prosecute criminal charges laid following an investigation by a body with compulsory information gathering powers. As per her Honour's judgement, it is the least restrictive means available."

27. Based on this information, the proposed approach would appear to depart from this stated intention by assisting the Crown to discharge the burden of proof in criminal proceedings, and so should be carefully considered in order to be human rights compatible.

Shortening timeframe to comment on reports

28. The ACTHRC does not have a firm view as to the timeframe for which, provided the relevant period is adequate in the circumstances to ensure natural justice. We note there is presently no ability, under s 188 of the IC Act, for the Commission to present an investigation report to the ACT Legislative Assembly unless the person (or public sector entity) to whom it relates has been given no less than 6 weeks to provide written comments on the report.

29. There are a range of approaches across Territory legislation to ensuring adequate time for affected persons to comment on reports by statutory bodies. Reviews by the ACT Inspector of Correctional Services, which relate to triennial examination and reviews of a correctional centre, must be provided to the relevant Minister and Director-General for comments at least 6 weeks before the report is provided to the Speaker (*Inspector of Correctional Services Act 2017*, s 29). Section 18(5) of the *Auditor-General Act 1996*, by contrast, provides that where the Auditor-General gives all or part of a proposed report to a person, the person must also be given 14 days from the day the notice is given to provide written comments.

30. Where the ACTHRC reports on a commission-initiated consideration (ie an own-motion investigation), s 84(2) of the HRC Act prevents us from including an adverse comment in relation to a person unless they have been given "a reasonable opportunity to respond to the proposed comment."

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

31. The ACTHRC would be reticent to support a variation of the threshold for the Commission to issue a production notice to 'reasonably required'. The use of the term 'necessary' seeks to align with the requirement under the HR Act that any limitation of rights, including those contemplated by the compulsion of information or attendance, are the least rights restrictive measures reasonably available in the circumstances to achieve the intended objective.

32. We appreciate, however, that the current framing may set an unduly high threshold where the Integrity Commission is unaware of, or merely suspects, the content and probative value of a document or other thing. Accordingly, the ACTHRC would not oppose the inclusion of the phrase 'reasonably necessary', noting this would provide further scope for purposive interpretation consistent with human rights as permitted by s 30 of the HR Act.

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

33. Prescribing additional entities, whether by way of regulation or in the IC Act, should be preferred over establishing a broad discretionary power for the Commission to disclose information as it considers appropriate. Limits on human rights, including the right to privacy and reputation, must be set by laws that are sufficiently precise, certain and accessible such that a person may, with advice if necessary, understand the circumstances in which their rights may be limited and adjust their conduct accordingly.

34. This means that discretions should not be unfettered and should clearly indicate the scope of that discretion and how it should be exercised. Absent further criteria and a defined list of potential recipient agencies, the proposed discretion to disclose information with an undefined range of third parties where relevant to the receiving entity's functions and where appropriate may enable unreasonable limitations of the right to privacy.

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

35. The ACTHRC supports the proposal to allow a person other than the recipient of a production notice to comply with its terms where the recipient and the Commission agree. Beyond administrative efficiencies, we foresee situations in which such a proposal would facilitate reasonable adjustments for recipients with disabilities or others for whom personal production may prove unduly challenging.

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

36. Explanatory materials supporting the 'exemption' of information in the possession of the Commission from disclosure under the *Freedom of Information Act 2016* (FOI Act) acknowledged their limitation of the right to freedom of expression (HR Act, s 16) as necessary to avoid jeopardising investigations, ensure procedural fairness and protect the reputation of the person under investigation. The identified inconsistency between the definition of 'contrary to the public interest information' in s 16, as recently updated by the *Freedom of Information Amendment Bill 2023*, and Sch 1.1B of the FOI Act therefore appears to have a significant unintended effect.

37. While we appreciate that the strong policy intent of the FOI ACT is to ensure transparency of government information, including that which reveals corruption or excess of authority, the ACTHRC considers the public disclosure of information alleging or inferring unsubstantiated corrupt conduct by identifiable public servants may unreasonably limit the right to privacy and reputation (HR Act, s 12) and the right to fair trial (HR Act, s 21).

38. As the FOI Act authorises an Information Officer to release information in accordance with the FOI Act *despite the operation of any secrecy provision of law*, it is concerning that information and allegations being investigated by the ACT Integrity Commission would not be presumed contrary to the public interest to release in accordance with the procedures outlined in the IC Act. We therefore support the proposed recommendation to clarify that Schedule 1.1B should operate notwithstanding s 16(2) of the FOI Act.

Confidentiality, Information Sharing and Wellbeing

Accessing psychological support

39. As noted in our previous submission, the ACTHRC strongly supports the proposed amendments to authorise disclosures of restricted information identified in a confidentiality notice to enable access to counselling and psychological support by witnesses and ACT Integrity Commission staff.

40. This proposal would, if endorsed and implemented, promote rights to security of person (HR Act, s 18 – which include positive duties to proactively safeguard people against foreseeable risks to their mental integrity) and just and favourable conditions of work (HR Act, s 27B). We also welcome that it acknowledges, consistent with the right to equality and non-

discrimination, that witnesses may not always be able to access counselling through the ACTPS Employment Assistance Program or fund their own access to mental health support.

Jurisdiction

41. We acknowledge that the jurisdictional scope of the ACT Integrity Commission is appropriately a matter to be resolved by the ACT Government. There is, however, significant value from a human rights perspective in confining investigations (and the associated application of coercive powers) to serious and/or systemic conduct; narrowing the scope of conduct for which the Integrity Commission's powers may be exercised provides a further safeguard against their arbitrary or disproportionate application and resultant limits on human rights. As the Discussion Paper acknowledges, any such amendment would need to be accompanied by effective means of identifying patterns of corrupt conduct or behaviours that give rise to systemic concerns.