Review of the *Public Interest Disclosure Act 2012* (ACT)

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Ms Ingrid Haythorpe and Dr Tahnya Donaghy
Peg Consulting
www.pegconsulting.com.au

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Version control

Version	Description	Date
0.1	Draft for feedback from Project Sponsor and Integrity Commissioner	6 September 2019
0.2	Final	30 September 2019

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ABBREVIATIONS USED IN THIS REPORT

ACT	Australian Capital Territory
ACTPS	public service of the Australian Capital Territory (see ACTPS definition in PID Act)
discloser	a person who makes a public interest disclosure by providing information about wrongdoing or suspected wrongdoing
IC	Integrity Commission
IC Act	Integrity Commission Act 2018 (ACT)
MLA	Member of the Legislative Assembly
PID	a public interest disclosure under the PID Act
PID Act	Public Interest Disclosure Act 2012 (ACT)
Guidelines	Public Interest Disclosure Guidelines 2019 issued by the PSSC
PSM Act	Public Sector Management Act 1994 (ACT)
PSSC	Public Sector Standards Commissioner
s	section (of Act)

EXECUTIVE SUMMARY

Clarity on what constitutes wrongdoing - and what can be done about it - is critical to the success of an integrity framework. In the motion to instigate this review the Legislative Assembly noted:

> *"...current PID processes are sometimes complex, lengthy, and often require legal expertise to navigate…"* - 3 April 2019

Having reviewed the PID Act, we agree with this statement. Neither those seeking to disclose conduct, or the agencies who might receive and act upon a disclosure, find the PID Act easy to understand or apply.

Primarily this is due to the way the PID Act creates a "threshold" for something to come within its ambit, using definitions that can include a level of subjective judgement. A person receiving a disclosure may consider it to come within the terms of the Act, but a later assessment may determine that the disclosure does not meet the "threshold". People wanting to make a disclosure - or rely on protections in the Act - have difficulty in knowing if in fact the Act will apply to them. This is a major problem.

If people do not understand how the legislation works because the system is so complex, the system will fail and the legislation will not be used. The limited data that is available suggests the PID Act is not used widely, and when it is, it is not used consistently, or disclosures often fail to meet the criteria in the PID Act.

The new Integrity Commission Act will create further confusion for people trying to understand how to take action to report or address wrongdoing. The Integrity Commission's mandate is to address the most serious and systemic corrupt conduct. This type of conduct is also disclosable under the PID Act, and potentially under other legislation as well, such as to the Auditor-General or the police.

Establishing an Integrity Commission for the ACT has been an extensive process. We have interpreted from various sources that the Integrity Commission is expected to be the pre-eminent integrity body for the ACT. Its establishment has been the subject of two

parliamentary committee inquiries. These processes rightly identified that the PID Act would need review. The commencement of the substantive provisions of the Integrity Commission Act has been postponed once and is now imminent.

This new Act brings added complexity to the ACT integrity framework, and it is our view that the PID Act will create interpretive and logistical implications for the Integrity Commission.

For example, the PID Act threatens to conflict the Integrity Commissioner in his duties. As it stands, the Integrity Commissioner - as a disclosure officer under the PID Act - will be obliged to notify the agency head, the Public Sector Standards Commissioner and the head of service of complaints the Integrity Commissioner receives under the IC Act about public servants that also meet the definition of disclosable conduct under the PID Act. Whilst he need not do so if it is likely to adversely affect an investigation, we expect Parliament would have intended that the IC Act govern what happens when a complaint is made to the Integrity Commissioner.

There are also overlaps in definitions under the IC Act and PID Act, but different processes can apply. For example, under the PID Act there are (albeit limited) circumstances when a discloser can rely on s 27 of the PID Act to reveal information about disclosable conduct to a journalist. However, it seems likely that all conduct matters captured by s 8(1)(a) of the PID Act will come within the jurisdiction of the IC Act. It is unclear if in this circumstance a PID Act disclosure process would enable the discloser to go to the media, conflicting with an IC investigation process which may require strict confidentiality. Whilst there might be a legal interpretation capable of resolving this conflict, this does nothing to assist people to understand the legislation.

The approach to assessing PID and IC matters also differs. For example, the Integrity Commissioner is the single point of contact for IC Act matters, while PID matters are mostly devolved and dealt with by different agency processes.

As these examples show there is not clear connectivity between the Acts, they conflict in part, and have multiple areas of overlap.

If establishing a public interest disclosure regime from inception, our advice would be to establish one comprehensive legislative regime that achieves process and role clarity for allegations to be addressed. However, that is not the situation that exists in the ACT, or

the scope of this review. Our assessment is that there would be little appetite for extensive amendments to the IC Act at this time and so the PID Act should be amended to better work alongside the IC Act.

We therefore focus our recommendations on amendments that might be made to improve the current operation of the PID Act and make the two Acts work better together in the short term, with the PID Act accommodating a dominant role for the IC Act. If there can not be one all-encompassing regime, then the legislation needs to work with reduced complexity. This is no simple task and we caution that our proposed reforms may not achieve a perfect operating state.

We acknowledge that there are other approaches that could be taken. Our consideration of the issues and context have led us to recommend an approach that will provide clarity to disclosers and disclosure officers. It will ensure that the Integrity Commissioner has awareness of matters that may be relevant to his primary jurisdiction without others attempting inquiries that might prejudice any inquiry the Integrity Commissioner may wish to make. That would be a risk if the Integrity Commissioner only becomes aware of matters later or via some secondary process.

Our recommended approach is that the Integrity Commissioner receives all disclosures under the PID Act - either directly or from a disclosure officer. The Integrity Commissioner can then determine if he wishes to deal with a matter, or dismiss it, or refer it to another body if appropriate. This will create a single point of oversight for serious wrongdoing disclosures. This will deliver improvements to the integrity framework, including a triage approach to receiving disclosures, consistent assessments and application of the law by appropriately skilled officers, and a whole-of-system data collection. This will enable the scheme to be both reactive and proactive – reactive by systematic and thorough responses; and proactive through improved whole of system analysis and identification of risk.

We recommend that the PID Act disclosure regime be constrained to maladministration, misuse of public funds (where not a fraud); and substantial and specific dangers to public health, safety or the environment to reduce duplication with the IC Act. Of the areas covered by the PID Act, these are less likely to come within the ambit of the Integrity Commissioner's primary jurisdiction under the IC Act. We recommend that part of the definition of 'disclosable conduct' that directly overlaps with the IC Act is removed from the PID Act.

With the Integrity Commissioner at the apex of the integrity framework, we recommend that the Integrity Commissioner also assume responsibility for a number of functions that reside with others under the PID Act where this creates a conflict for their roles or impacts upon separation of powers between the legislature and the executive.

We also make recommendations for improvements to the PID Act. There was significant anecdotal and some data evidence that disclosures that are made are often not matters of "public interest" but rather related to personal employment issues. This creates a tension between performance management and PID issues, and as much as possible those two things should not be conflated. Measures to ensure that disclosures made under the PID Act are matters of public interest, and not related solely to personal employment grievances, are recommended.

We recommend enhancements to the protections afforded by the PID Act for disclosers and witnesses, including it being clearer to disclosers if they are protected by the Act. There seems no reason to not extend protections to witness if trying to create a proactive and pro-disclosure culture. However, this may require consideration of related legislation such as the PSM Act.

Ensuring that education, awareness and data capture are contributing to a robust integrity framework are also important recommendations that we make to improve a pro-disclosure culture and enable the integrity framework to operate successfully in both a reactive and proactive environment.

We recommend these changes be made as soon as possible. Should the Integrity Commissioner wish to further delay the Commission receiving disclosures so that those matters which create the greatest confusion and potential conflicts can be resolved, there would be good reasons to support this request.

We would caution against any of our recommendations being considered in isolation, as there is a strong interdependency between them. The key changes proposed have in-built assumptions which presume a hierarchy of reform. If a higher priority recommendation is not adopted, this will have implications for later recommendations. In considering recommendations, care should be taken to understand if they are reliant or presume that that earlier reform recommendations have been adopted.

Matters will continue to evolve as the operations of the Integrity Commission progress and further changes will likely be desirable. In this respect this is very much a report for its time. We recommend in the medium term that the PID Act is subject to a further review at the same time as the Integrity Commission Act in order that one comprehensive regime might be achieved. It might be that provisions of the PID Act can be incorporated within the IC Act and other legislation and processes and will not be needed as standalone legislation. This would be a much more extensive exercise and our assessment was that this is a step too far at this point.

The ACT will soon have a comprehensive integrity framework with a number of independent bodies playing important roles, including the Integrity Commissioner, the Auditor-General, the Ombudsman and the Parliamentary Standards Commissioner. There is every reason to be confident that this will deliver the objectives of a public interest disclosure regime, if changes are made to make roles and processes under the PID Act clearer, and these independent bodies work together productively as has been the case to date.

LIST OF RECOMMENDATIONS

Scope of the PID Act
1. That the PID Act be amended as soon as possible to make clear its relationship to the IC Act and to provide that where matters and processes described in the IC Act are in conflict with the PID Act, the IC Act takes precedence. 2. Remove s 8(1)(a) from the definition of disclosable conduct in the PID Act as this conduct is covered by the IC Act.
Process under the PID Act
3. Amend the PID Act to provide that disclosure officers must only notify: 3.1. the Integrity Commissioner of a disclosure under the PID Act, unless the disclosure relates to the Integrity Commissioner or Integrity Commission in which case the process in Part 5.2 of the IC Act applies. 3.2. the discloser (if the discloser's identity is known) that the matter has been referred to the Integrity Commissioner. 4. A disclosure officer need not refer a matter to the Integrity Commissioner if they have reasonable grounds to believe the matter does not come within the jurisdiction of the IC Act or the PID Act. 5. Amend the PID Act to mirror s 70 IC Act to enable the Integrity Commissioner to dismiss, investigate, or refer to others with the ability to investigate an assessed PID matter. 6. The Integrity Commissioner be given the responsibility to: 6.1. assess if something is a public interest disclosure under the PID Act. 6.2. determine if the IC wishes to investigate or otherwise take carriage of the response to the notification / complaint under the PID Act or the IC Act. 6.3. either transfer the obligations to keep a person informed to the referral body, or to require the referral body to report to the Integrity

Commission if the Integrity Commission is to be the point of contact for the person who made the notification.

6.4. advise the person who made the notification and the disclosure officer whether further communication is the responsibility of the Integrity Commission or the referral agency.

7. Amend s 18 of the PID Act so that the obligations on the head of a public sector entity to deal with the matter only arise once the matter is referred by the Integrity Commissioner.

8. There should be an obligation on those to whom the Integrity Commissioner refers matters to investigate consistent with Part 4 of the PID Act - with amendment to recognise that these obligations will only apply if a PID matter has been assessed by the IC and referred for investigation.

9. If the proposed role of the Integrity Commissioner under the PID Act is not adopted, if the Integrity Commissioner is dealing with a matter under the IC Act he should be exempted from the requirement to notify the relevant agency head and others under s 17 of the PID Act.

Maladministration

10. A more expansive definition of maladministration be adopted, with consideration given to models in use in other jurisdictions.

Assignment of other roles and functions

11. Amend Part 6 of the PID Act so that the functions of the Public Sector Standards Commissioners generally become functions of the Integrity Commissioner.

12. Amend Section 13 (b) of the PID Act so that the functions that sit with the head of an entity under the PID Act are not assigned to the Clerk of the Legislative Assembly but rather the Integrity Commissioner, who may refer matters to the Parliamentary Standards Commissioner as appropriate.

13. The PSSC not be notified of a disclosure under s 17 that relates to a Member or staff of the Legislative Assembly.

14. The Head of Service is removed of the power to investigate disclosures under the PID Act about the Clerk. This power should be vested in the Integrity Commissioner, who may refer these matters to the Parliamentary Standards Commissioner.

Promoting a proactive disclosure culture

15. Amend the PID Act to introduce a public interest test so that the wrongdoing that is disclosed must affect others and be made genuinely in the public interest.

16. Amend s 7(1) of the PID Act to make it clear that disclosures made in good faith that the Integrity Commissioner assesses to be a public interest disclosure is afforded the protections of the Act.

17. Amend the Act so that protections are enlivened for both disclosers and witnesses if the Integrity Commissioner assesses a matter as a public interest disclosure.

18. Amend s 7 (2) of the PID Act to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing.

19. Part 7 of the PID Act is expanded to encompass protection for disclosers and those assisting disclosure investigation in appropriate circumstances.

20. If the Integrity Commissioner has assessed something as a public interest disclosure, for a prosecution to succeed in relation to the disclosure of information under section 27, a burden lies with the prosecution to show that a disclosure was not in the public interest.

21. Relevant provisions in the IC Act regarding natural justice are replicated in the PID Act.

22. Section 37 of the PID Act should be amended to provide that the protection provided by s 36 is forfeited in respect of any part of the disclosure that is made dishonestly or vexatiously.

Data Capture and Insights

23. The PID Act assign a function of capture and reporting of public interest disclosure matters. This be undertaken in a coordinated, whole of service function, and deliver agency specific insights and trends.

24. The Integrity Commissioner, if assigned the roles recommended above, take carriage of these reporting responsibilities.

25. The PID Act (or Regulations as appropriate) require the following to be reported with regard to information being presented as non-identifying and maintaining confidentiality:

    25.1. Under which part of the definition of disclosable conduct in s 8 is a report made.

    25.2. For each matter:
    - 25.2.1. was the matter dismissed, referred or investigated
    - 25.2.2. for investigations, which entity investigated
    - 25.2.3. what was the outcome or determination of investigations
    - 25.2.4. whether the report was made anonymously, by an ACTPS member or external person

    were the requirements to keep relevant parties informed met.

    25.3. How often the following sections of the Act are used:
    - 25.3.1. s 27 (3) - disclosure to a MLA or journalist (if known)
    - 25.3.2. s 40 - offence detrimental action

26. Reporting occur both in aggregate and at the ACTPS administrative unit or other public entity as defined in s 9 of the Act level.

Reduce red tape

27. Remove s 11 (2) and (3) which requires a disclosure officer to be declared via a notifiable instrument. Replace this with a requirement for the information to be publicly available on an agency website, in annual reports, and provided to the Integrity Commissioner for central publication.

28. The Integrity Commissioner be empowered to issue guidelines (s 32) and procedures under the PID Act instead of the Public Sector Standards Commissioner.

29. Amend s 33 to provide that the standard procedures issued by the Integrity Commissioner are the procedures of an agency unless the Commissioner approves alternative guidelines.

Other matters

30. The conduct of MLAs and their staff remain within the PID Act scope, with matters considered by the Integrity Commissioner in the first instance with the ability to refer to the Parliamentary Standards Commissioner as appropriate.

31. The intended coverage of the private sector in the PID Act is clarified.

32. The requirement to provide integrity training and awareness be strengthened by requiring reporting under the Act to include information about integrity education, awareness and training opportunities offered and taken up.

33. The obligations that attach to a disclosure officer under section 17 should attach to anyone to whom a disclosure may be made.

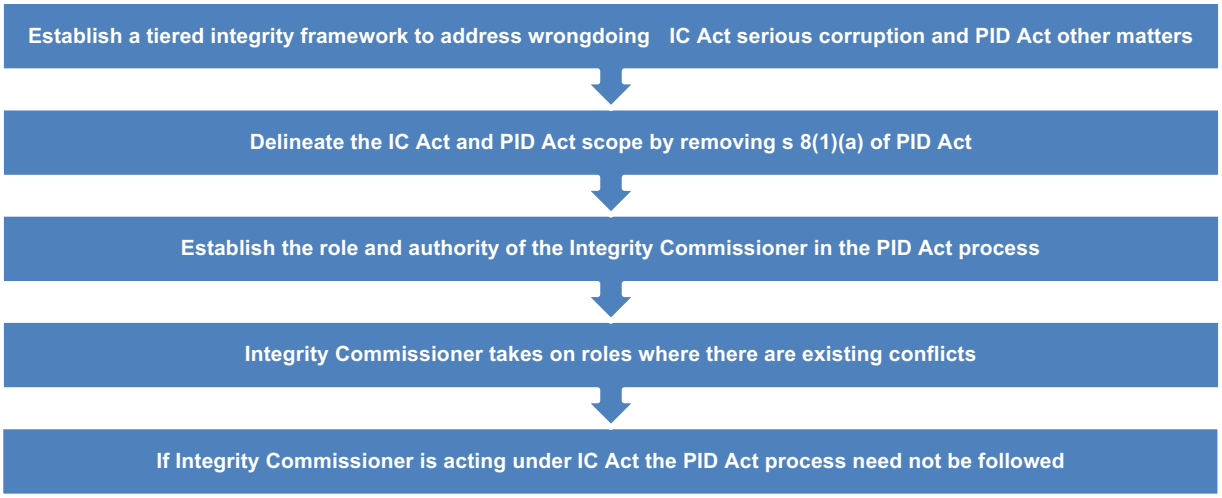
34. The PID Act be amended to include a clause for statutory review that aligns to the review of the IC Act, and that these Acts be reviewed concurrently, due to their significant interface.

35. A future review of the PID Act consider the ongoing need for the matters dealt with in the PID Act to sit in separate legislation to the IC Act.

OVERVIEW

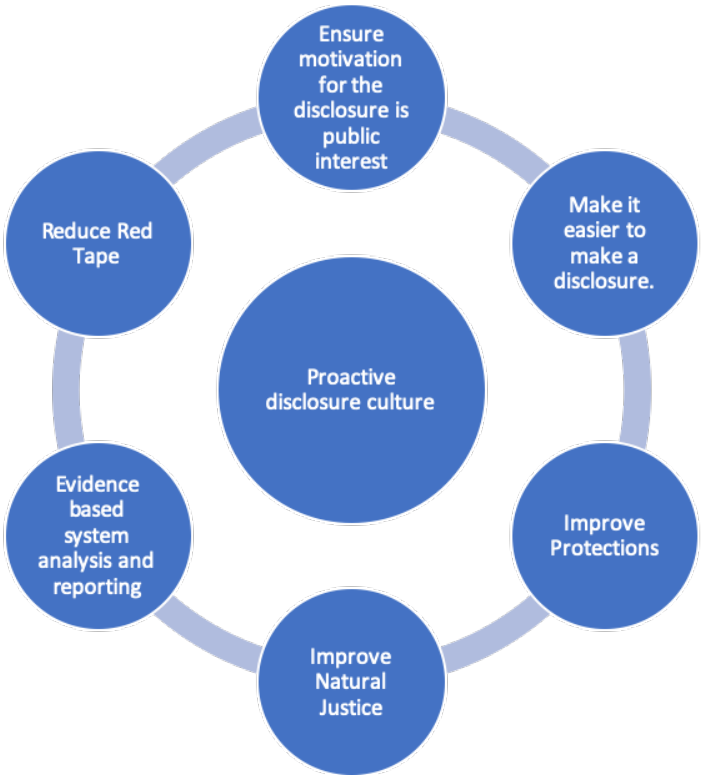
Section one of this report provides the context for this review and a summary of the parts of the PID Act and IC Act relevant to this review. This provides context for the subsequent analysis and reform recommendations.

Section two explores the PID Act and IC Act interface and a proposed role for the Integrity Commissioner in managing this interface. In this section the key changes proposed have an interdependence which presume a hierarchy of reform. If a higher priority recommendation is not adopted, this will have implications for later recommendations. The hierarchy of five reforms proposed to reconcile the IC Act and the PID Act are outlined at a high level below. A detailed discussion providing context, analysis and reasoning for the recommendations is provided in the body of the report.



Section three discusses some standalone opportunities to improve the PID Act. These changes are proposed to promote a proactive culture of disclosing wrongdoing as a core principle and are important for a successful integrity framework.

While these issues can be categorised as standalone PID Act reforms, many remain interrelated and the discussion in this section presumes that the principal reforms in section 2 are adopted. If section 3 reforms were adopted in isolation, their impact and effectiveness would be limited.



Section four explores other matters raised or identified including through consultations.

SECTION 1: REVIEW SCOPE, CONTEXT AND CURRENT LEGISLATIVE FRAMEWORK

Context for the Review

The PID Act has been in operation since 2013 - or for just over five years. The objects of the Act are:

- to provide a way for people to make public interest disclosure;
- to ensure that those people who do are protected and treated respectfully;
- to ensure disclosures are properly investigated and dealt with; and
- to ensure appropriate consideration is given to the interests of people who make public interest disclosures and the people who are the subject of the disclosures.

The PID Act replaced the *Public Interest Disclosure Act 1994* (ACT). When the Bill was considered by the Legislative Assembly, the then Chief Minister indicated that it replaced outdated legislation and "*creates a best practice model for managing disclosures and protecting genuine whistleblowers*".[1] She further noted:

> this bill achieves a high-water mark in the history of whistleblowing laws in this country. That should reassure members that what we have before us today will be a significant improvement on what is currently in place and sets a new benchmark in terms of public interest disclosure laws in Australia. [2]

Public interest disclosure legislation is an element of an integrity framework. The other elements of an integrity framework in the ACT during the operation of the PID Act have included the Ombudsman, the Public Sector Standards Commissioner, the Auditor-General, the Human Rights Commissioner and the police.

[1] Chief Minister Katy Gallagher *Hansard* 23 August 2012 p 336 http://www.hansard.act.gov.au/hansard/2012/pdfs/20120823a.pdf.

[2] Chief Minister Katy Gallagher *Hansard* 23 August 2012 p 339 http://www.hansard.act.gov.au/hansard/2012/pdfs/20120823a.pdf.

There is now also an Integrity Commissioner for the ACT. Some sections of IC Act have already commenced, the Integrity Commissioner has been appointed, and the remainder of the Act is due to come into operation on 1 December 2019.

The addition of the Integrity Commissioner to the integrity framework is one of the key factors that has led to this Review. The interface between the Integrity Commission Act and the PID Act is considered in detail in this report.

Terms of Reference and Review Process

On 3 April 2019 the Legislative Assembly passed the following motion:[3]

> "That this Assembly:
>
> (1) notes:
>
> (a) the need for a strong public interest disclosure (PID) framework in the ACT;
>
> (b) that current PID processes are sometimes complex, lengthy, and often require legal expertise to navigate;
>
> (c) that integrity and confidence in public administration is a high priority for the ACT Government;
>
> (d) the ACT Government has consistently demonstrated its commitment to transparency and integrity in public administration through reforms to Freedom of Information rules, the establishment of the ACT Integrity Commission, and reforms to political donation laws;
>
> (e) the need for a review of the effectiveness of the Public Interest Disclosure Act 2012 (the PID Act) has been raised and agreed to during this Assembly;
>
> (f) the Government agreed to hold a review into the PID Act in response to Recommendation 78 of the Select Committee on an Independent Integrity Commission's report tabled on 31 October 2017, *Inquiry into an Independent Integrity Commission*, and the Government agreed that the issues for consideration in that review would include:
>
> ○ relationships between existing integrity bodies in the ACT, including the sharing of information and the referral of complaints; oversight and accountability mechanisms; and identifying gaps in the current framework to determine solutions; and
>
> (g) recommendation 78 of the Inquiry into an Independent Integrity Commission report

[3] Minutes of Legislative Assembly, Wednesday 3 April 2019, pp 1367-1369 https://www.parliament.act.gov.au/in-the-assembly/minutes_of_proceedings.

states:

the Committee recommends that the ACT Government appoint an independent person to conduct a statutory review of the Public Interest Disclosure Act 2012 (the PID Act). The Review, amongst other things, should consider:

(a) any potential conflict of interest (real or perceived) as it concerns decision makers and disclosure officers under the PID Act;

(b) the findings of the Moss Review examining the operation of the Commonwealth Public Interest Disclosure Act 2013 as it concerns the strengthening of that legislation to achieve the Act's integrity and accountability aims;

(c) the matters raised in submission No. 3 (as detailed in paragraph 3.162) to the Inquiry as it concerns the PID Act;

(d) application of the PID Act to any future ACT Anti-Corruption and Integrity Commission (ACIC)—in particular, its articulation with any protected disclosure provisions that may apply to any informants providing assistance to the ACIC or anyone consequently at risk; and

(e) the suitability of an ACT ACIC for the purposes of receiving disclosures pursuant to the PID Act;

(h) the Government acknowledged that the PID Act should be reviewed in response to Recommendation 54 of the Inquiry into the establishment of an integrity commission for the ACT, that the review would need to be conducted in the context of the Integrity Commission Bill and the new ACT Integrity Commission, and any legislative amendments would be subject to an assessment of legislative priorities;

(i) recommendation 54 of the *Inquiry into the establishment of an integrity commission for the ACT* states:

(1) the Committee recommends that the ACT Government establish a comprehensive review of the Public Interest Disclosure Act 2012 as soon as is possible with the aim of having changes implemented by 2020; and

(2) further notes the ACT Government has already commenced the process for selecting an appropriately qualified person to lead an independent review of the existing PID framework in the ACT; and

(3) calls on the Government to:

(a) implement a phased approach to updating the existing PID framework in the ACT, which includes:

(i) commencing an independent review of the existing PID framework in the first half of the 2019 calendar year which takes into consideration the relevant recommendations of the Moss Review and the practical operation of the ACT Integrity Commission which commences on 1 July 2019;

> (ii) working with the reviewer to develop an appropriate timeline for the review that allows for proper consultation with all interested parties, including the ACT Integrity Commissioner, and the ability to take submissions from the public on the operation of the existing PID framework;
>
> (iii) updating the ACT Legislative Assembly before the end of the 2019 calendar year on the progress of the independent review;
>
> (iv) consulting on draft legislation reflecting the recommendations of the independent review, including with the relevant Assembly Committee; and
>
> (v) presenting final legislation reflecting the recommendations of the independent review to the ACT Legislative Assembly by June 2020."

This Review commenced in May 2019. On 7 June 2019 correspondence was sent to people and organisations identified as having an interest in the Review to notify them of the Review and inviting submissions. On 8 June 2019 an advertisement appeared in the Canberra Times advising of the Review and inviting submissions to the Review. This information was also made available on the internet site of the Chief Minister's Directorate. We met with a number of stakeholders and with officials of the ACTPS to discuss the Review and the PID Act. We have consulted with the Integrity Commissioner.

We have been assisted in our thinking by reviews of whistleblowing legislation in other jurisdictions. Our terms of reference required us to consider the Moss Review.[4] We have also had regard to reviews of legislation elsewhere in Australia and internationally, and the legislative frameworks of other Australian jurisdictions.[5] During the course of the Review, *Whistling While They Work 2 - Key Findings and Actions* was released by Griffith University, including *Clean as a Whistle - A Five Step Guide to better whistleblowing policy and practice in business and government*.[6]

Our recommendations have focused on amendments to the PID Act which will support the achievement of pro-disclosure culture and system. However, as the Moss Review

[4] Review of the *Public Interest Disclosure Act 2013*: An independent statutory review conducted by Mr Phillip Moss AM, 15 July 2016; https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf.

[5] Including: A Review of the *Whistleblowers Protection Act 1993* (SA) by the Hon Bruce Lander QC, September 2014; Review of the Public Interest Disclosure Act 2010 : A review pursuant to s. 62 of the Public Interest Disclosure Act 2010, Queensland Ombudsman January 2017.

[6] http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf.

noted,[7] while legislation can play a normative role, for cultural change to occur public sector agencies have to commit to a pro-disclosure culture that goes beyond legislation. This includes leading by example, promotion of education on notification obligations and protections, a commitment to transparency, and investment to ensure appropriately skilled investigations occur. The commencement of the IC Act and Integrity Commissioner - as well as any amendments to the PID Act - provides a renewed opportunity for improved processes and greater effort this space.

What does the Public Interest Disclosure Act do?

The PID Act provides the ability for any person to make a **public interest disclosure** about **disclosable conduct**.[8] A public interest disclosure is defined in section 7 of the Act. That definition is inextricably connected to the definition of disclosable conduct in section 8 of the Act, which creates the 'threshold' for conduct that can be the subject of a disclosure.

This threshold is significant as the obligations and protections under the Act are only enlivened if the revelation of information meets the definition of a public interest disclosure. The obligations include how a disclosure must be responded to by a disclosure officer, and what a person disclosing the information can expect, and what protections they receive.

For a disclosure about the conduct of a person, this threshold is that the conduct

> *could, if proved -*
> *(i) be a criminal offence against a law in force in the ACT; or*
> *(ii) give reasonable grounds for disciplinary action against the person.*[9]

"Disciplinary action" is also defined in section 8. Ordinarily this term would be understood in a wide sense, particularly in the context of the public sector, which has a relatively sophisticated employment and industrial framework providing a range of consequences for inappropriate or improper conduct - from a warning or reprimand to suspension and ultimately termination. However, for the purposes of the PID Act, the term "disciplinary

[7] Review of the *Public Interest Disclosure Act 2013*: An independent statutory review conducted by Mr Phillip Moss AM, 15 July 2016 p 20 https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf.
[8] s 14 PID Act.
[9] s 8(1)(a) PID Act.

action" is limited to serious disciplinary matters and is defined by the potential consequence of termination or the ending of employment or appointment.

For a disclosure about action of **a public sector entity or public official for a public sector entity** disclosable conduct means any of the following:

> action of a public sector entity or public official for a public sector entity that is any of the following:
>
> (i) maladministration that adversely affects a person's interests in a substantial and specific way;
>
> (ii) a substantial misuse of public funds;
>
> (iii) a substantial and specific danger to public health or safety;
>
> (iv) a substantial and specific danger to the environment.[10]

Maladministration is defined as follows:

> ***maladministration*** means an action about a matter of administration that was—
>
> (a) contrary to a law in force in the ACT; or
>
> (b) unreasonable, unjust, oppressive or improperly discriminatory; or
>
> (c) negligent; or
>
> (d) based wholly or partly on improper motives.[11]

[10] s 8(1)(b) PID Act. PID guidelines issued by the PSSC state a disclosure under s 8 (1)(b)(iii) and (iv) needs to meet the threshold of "a substantial danger to the health or safety of the community or environment - is someone doing something that will adversely affect people's health or damage the environment?".
[11] s 8(2) PID Act

Disclosure Officers

A disclosure under the PID Act must be made to those set out in the Act. This can be a disclosure officer. The relevant disclosure officers are:[12]

For the Public Service	For the Legislative Assembly
for a disclosure that relates to an ACTPS entity	for a disclosure that relates to a Legislative Assembly entity—
(i) the commissioner; or (ii) the head of service; or (iii) the auditor-general; or (iv) the ombudsman; or (v) the head of an ACTPS entity; or (iva) the integrity commissioner (vi) a person declared under subsection (2) for an ACTPS entity;	(i) the clerk of the Legislative Assembly; or (ii) the auditor-general; or (iii) the ombudsman; or (iiia) the integrity commissioner (iv) a person declared under subsection (2) for a Legislative Assembly entity.

A disclosure may also be made to a Minister.

Internal disclosures (ie those by a public official for a public sector entity) may also be made to a supervisor or manager, a [relevant] board member, or a person who "*has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information*".[13] Thus, there is a wide category of people to whom a disclosure may be made.

What does a disclosure officer do about the disclosure?

The disclosure officer has obligations to report the disclosure to a number of people. The people to be notified by the disclosure officer are:

[12] s 11 PID Act.
[13] s 15 PID Act.

(a) the head of each public sector entity to which the disclosure relates; and

(b) the commissioner; and

(c) for a disclosure that relates to the head of service—the ombudsman; and

(d) for a disclosure that relates to the public service—the head of service.[14]

However, if telling someone information in relation to a public interest disclosure would be likely to adversely affect an investigation relating to the disclosure, or a persons safety, the person need not be told.[15]

Who investigates

The head of the public sector entity[16] to whom a disclosure relates must investigate the disclosure.[17] There are grounds for the disclosure to not be investigated, to be referred to another entity, or for the investigation to end, set out in s 19 and 20 of the Act.[18]

The PID Act itself does not provide a framework or powers for an investigation. This is done in accordance with other applicable laws or procedures, including Enterprise Bargaining Agreements in the ACTPS.

Obligations to discloser

Generally speaking the investigating entity must tell the discloser what is happening with the investigation and keep the discloser informed at least once every three month.[19] If this obligation is not complied with, and certain criteria are met, the Act provides protection for a discloser to further reveal the disclosable conduct to a journalist or a member of the Legislative Assembly.

[14] s 17 PID Act.
[15] s 26 (1) PID Act.
[16] As defined in s 13. This includes the Clerk of the Legislative Assembly.
[17] s 18(1) PID Act.
[18] Query if the head of the entity has not been notified by the disclosure officer in accordance with s 26 as it may prejudice the investigation, the obligation to investigate or arrange an investigation would fall to the head of the service, but unless the disclosure actually relates to the head of that entity this is not explicit from s 18.
[19] s 23.

Protections in the PID Act

Section 27 of the PID Act sets out the basis on which a discloser may make a disclosure of information about the disclosable conduct to a member of the Legislative Assembly or a journalist. A disclosure must disclose sufficient information to show that the conduct is disclosable conduct, but not more than is reasonably necessary to show that the conduct is disclosable conduct.[20] The basis on which such a further disclosure may be made in s 27(1) and (2):

> (1) This section applies if a discloser has made a public interest disclosure to a person mentioned in section 15 and—
>
> (a) an investigating entity has refused or failed to investigate the disclosure; or
>
> (b) the discloser has not been told within 3 months after the day the disclosure is made whether or not the disclosure will be investigated or dealt with; or
>
> (c) the discloser has been told the disclosure will be investigated but has not been told about the progress of the investigation for a period of more than 3 months; or
>
> (d) the following applies:
>
> (i) the disclosure has been investigated
>
> (ii) there is clear evidence that 1 or more instances of disclosable conduct mentioned in the disclosure has occurred, or was likely to have occurred;
>
> (iii) the discloser has been told by the investigating entity that no action will be taken in relation to the disclosable conduct.
>
> (2) This section also applies if a person honestly believes on reasonable grounds that—
>
> (a) the person has information that tends to show disclosable conduct; and
>
> (b) there is a significant risk of detrimental action to the person or someone else if a disclosure is made to a person mentioned in section 15; and
>
> (c) it would be unreasonable in all the circumstances for the person to make a disclosure to a person mentioned in section 15.

[20] S 74(4)(a) PID Act.

Part 7 of the Act provides extensive protections to a person who makes a public interest disclosure. This includes stipulation that the making of a public interest disclosure is not a breach of confidence or professional obligations. The discloser incurs no civil or criminal liability and if the discloser is a public official the disclosure is not liable to any administrative action (including disciplinary action) only because of the making of the disclosure. A person commits an offence if they take detrimental action against a person because of a public interest disclosure, and damages may also be awarded.

These protections are of course dependent upon the information that is revealed being a "public interest disclosure". A discloser forfeits the protections under the Act if the discloser gives information that they know is false or misleading, or the disclosure is vexatious.

Oversight of public interest disclosures

Part 6 of the PID Act sets out the functions of the Public Sector Standards Commissioner under the PID Act. These are quite extensive. The powers include giving advice, monitoring the management of disclosures by the public sector, ensuring just outcomes for people who make disclosures and to facilitate training and education about public interest disclosures.

The Commissioner has the power to review decisions of investigating agencies about investigations. The Commissioner may also review action taken by a public sector entity in relation to disclosable conduct and has the power to amend or overturn a decision about an investigation. The Commissioner may direct a public sector entity about action to be taken in relation to disclosable conduct. [21]

[21] The Commissioner advises that his office has regularly engaged with disclosure officers and investigating entities regarding decisions and actions taken on public interest disclosures, and has provided advice and guidance in the handling of PIDS by various public sector entities. Additionally, the office of the PSSC has undertaken reviews of decisions and actions taken on PIDs at the request of disclosers who were dissatisfied with responses received from entities. The PSSC has not had reason to apply s 29(4)(a) or (b) of the Act to amend or set aside a decision of an entity.

The Commissioner may also report to the Minister about how a public interest disclosure is dealt with by a public sector entity. The Minister must present this report to the Legislative Assembly.

The Commissioner must also make guidelines about the way in which public sector entities deal with public interest disclosures. [22]

The Ombudsman may receive complaints about an action taken by a public sector entity in exercising a function under the Act. The Ombudsman has the same powers of the Commissioner if such a complaint is made. [23]

[22] s 32 PID Act. The Commissioner has recently released updated guidelines.
[23] s 34 PID Act.

Use of the PID Act to date

Financial Year	PID's recorded	Not meet PID criteria	Investigated	Not investigated per s 20	Not investigated – other reasons	Substantiated finding of disclosable conduct*	Remedial Action taken
2012-13	5						
2013-14	3	0	3	0	0	0	0
2014-15	12	3	6	4		0	0
2015-16	12	1	6	4	1		
2016-17	17	8	7		2		
2017-18	12	11[25]	1				

* May reflect findings on PIDs received in previous years.
Where there is no entry, this indicates data was not collected

Based on analysis of published data in annual reports and raw (redacted) data provided by the Public Sector Standards Commissioner's office we have concluded that there is limited meaningful data captured, analysed or reported about public interest disclosures in any system-wide manner. Information in annual reports is sparse, lacks consistency and comparative analysis limited. It provides little transparency into the effectiveness of the Act, or insights into trends or the integrity health of organisations. The table is a summary of the information revealed in ACTPS State of Service reports:[24]

The office of the PSSC also provided us with a redacted spreadsheet of information that had been recorded on their Register about public interest disclosures for the period from July 2016[26] - July 2019. Again, this information provided limited insight into the use and

[24] Annual Reports of CMTEDD.
[25] The *State of Service Report 2017-18*, PSSC Report, page 36 states "During 2017-18, the Commissioner received 12 Public Interest Disclosures (PIDS). After assessment, 11 of the 12 were determined not to be disclosable conduct under the Public Interest Disclosure Act 2012 (PID Act).
[26] During 2016-17 under the amendments to the PSM Act, the office of the Public Sector Standards Commissioner was replacing the office of the Commissioner. Misconduct procedures and Public Interest Disclosure (PID)

application of the PID Act, but the following provides a summary of what we could conclude:

- In the period July 2016 - July 2019 there were 36 matters captured on the PID register.
- The highest number of disclosures in this period related to Health (19%) and Justice and Community Safety (17 %), with the remaining 48% of matters spread over nine separate entities.
- Of the 36 matters - 28 were closed and 8 were pending. Of those closed:
    - 36% were closed with no explanation recorded
    - 21% were recorded as closed for not being a PID matter
    - 21% were closed under section 20
    - 11% were recorded as investigated and unsubstantiated
    - 11% did not proceed due to being withdrawn or a lack of evidence.

responsibilities transferred to the Public Sector Standards Commissioner, with the remainder of Commissioner responsibilities transferring to the Head of Service.

What does the Integrity Commission Act do?

The IC Act provides a comprehensive framework for the establishment and operation of the Integrity Commission. The parts of the Act that are particularly relevant in terms of the PID Act are discussed below - but of course there is much more in the IC Act than can be canvassed in this report.

Purpose

The objects of the IC Act are set out as follows:

> **6 Objects of Act**
>
> The objects of this Act include—
>
> (a) providing for the identification, investigation and exposure of corrupt conduct; and
>
> (b) providing for the commission to prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct; and
>
> (c) achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation; and
>
> (d) assisting in the prevention of corrupt conduct; and
>
> (e) cooperating with other integrity bodies; and
>
> (f) educating public officials and the community about the detrimental effects of corrupt conduct on public administration and the community and the ways in which corrupt conduct can be prevented; and
>
> (g) assisting in improving the capacity of the public sector to prevent corrupt conduct.

The definition of corrupt conduct in s 9 of the IC Act is detailed. There are two limbs to be satisfied.

Firstly, the conduct

is conduct—

(a) that could—

(i) constitute a criminal offence; or

(ii) constitute a serious disciplinary offence; or

(iii) constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official; **and**

The **second limb** of corrupt conduct in the IC Act requires that - in addition to satisfying the first limb - the conduct must also be:

(b) … any of the following:

(i) conduct by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not honest or is not impartial;

(ii) conduct by a public official or former public official that—

(A) constitutes a breach of public trust; or

(B) constitutes the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person;

(iii) conduct that adversely affects, either directly or indirectly the honest or impartial exercise of functions by a public official or a public sector entity;

(iv) conduct that—

(A) adversely affects, either directly or indirectly the exercise of official functions by a public official or public sector entity; and

(B) would constitute, if proved, an offence against a provision of the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences);

(v) conduct that involves any of the following:

(A) collusive tendering;

(B) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety, protect the environment or facilitate the management and commercial exploitation of resources;

(C) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;

(D) defrauding the public revenue;

(E) fraudulently obtaining or retaining employment or appointment as a public official;

(vi) conduct engaged in by a person in relation to conduct mentioned in subparagraphs (i) to (iv) (the ***primary conduct),*** that would constitute an offence against the Criminal Code, part 2.4 (Extensions of criminal responsibility) on the basis that the primary conduct is an offence, whether or not the primary conduct is in fact an offence.

It appears this second limb of the definition is expected to operate to limit the type of conduct that might otherwise be captured by application of the first limb only - for example, the type of criminal offences that are intended to be captured by the IC Act.[27]

The use of the term "serious disciplinary offence" in s 9(a)(ii) is notable as it is different language than used in the PID Act which talks about "disciplinary action". However, closer examination suggests that "serious disciplinary offence" in the IC Act actually covers a wider range of conduct than "disciplinary action" in the PID Act.

[27] The PID Act definition of "disclosable conduct" including criminal offences does not include a second limb. However, "conduct" is further defined as relating to the honest and impartial exercise of a function of a public sector official or entity.

IC Act	PID Act
serious disciplinary offence includes— (a) any serious misconduct[28]; or (b) any other matter that constitutes or may constitute grounds for— (i) termination action under any law; or (ii) a significant employment penalty.	***disciplinary action***, against a person, means action— (a) terminating the person's employment; or (b) ending the person's appointment; or (c) terminating the person's contract for services.

The IC Act includes conduct that may result in a significant employment penalty in the definition of serious disciplinary action. This term is not defined but must include a penalty that is lesser than termination, otherwise there would be no reason to include it. The PID Act does not capture such conduct (unless it is otherwise captured under s 8(1)(b) of the definition of disclosable conduct).

Making a complaint

Any person may make a complaint to the Integrity Commission about conduct that may be corrupt conduct.[29] The form the complaint may take is the same as a disclosure under the PID Act - it can be made orally or in writing and anonymously. If a relevant entity, such as the Speaker, the Auditor-General, the Ombudsman, or a statutory office holder, receives a complaint about conduct that may be corrupt conduct the relevant entity may refer the complaint to the Integrity Commission. [30]

[28] "*Serious misconduct*" is defined in the IC Act by reference to the Commonwealth Fair Work Regulations, which includes being intoxicated at work.
[29] s 57 IC Act
[30] s 59 IC Act

What happens with a complaint

The Integrity Commission must dismiss, refer or investigate corruption reports.[31] The Integrity Commission may also conduct an investigation on its own initiative if the Commission suspects on reasonable grounds that the matter involves corrupt conduct.[32] The Commission has similar obligations to keep a complainant informed under the IC Act as an investigating entity has under the PID Act - that is once every three months if the matter is being investigated. The Commission must also keep the head of public sector entity informed if the Commission receives a mandatory notification from them.[33]

Mandatory Notification

Division 3.1.2 of the IC Act sets out a regime of mandatory notification that applies to the head of a public sector entity, SES members, members of the Legislative Assembly, and chiefs of staff - if there is knowledge of conduct that is serious corrupt conduct or systemic corrupt conduct. It is an offence for them to fail to notify the Integrity Commission about such conduct. For example:

> **62 Mandatory corruption notifications—heads of public sector entities and senior executives**
>
> (1) The following people must notify the commission about any matter the person suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct:
>
> (a) the head of a public sector entity;
>
> (b) an SES member.
>
> (2) However, the following heads of public sector entities need only notify the commission under subsection (1) if the matter involves the conduct of a public official for the public sector entity for which they are the head, and the conduct relates to the public official's duties for the public sector entity:
>
> (a) the auditor-general;
>
> (b) the ombudsman;
>
> (c) the electoral commissioner;

[31] s 70 IC Act.
[32] s 101 IC Act.
[33] This obligation does not extend to keeping other mandatory notifiers informed.

(d) the clerk of the Legislative Assembly.

Serious corrupt conduct is defined[34] as

> ***serious corrupt conduct*** means corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration.

Systemic corrupt conduct is defined[35] as

> ***systemic corrupt conduct*** means instances of corrupt conduct that reveal a pattern of corrupt conduct in 1 or more public sector entities.

Confidentiality and the IC Act

The Integrity Commission Act provides numerous limitations and mechanisms for information under that Act to be treated confidentially in parts 3.9 and 3.10 of the Act. These are significant - for example, in some circumstances the Integrity Commissioner can issue a notice restraining a person from seeking legal advice from a particular legal practitioner.[36]

[34] s 10 IC Act.
[35] s 11 IC Act.
[36] s 193 IC Act.

SECTION 2: PID AND IC ACT INTERFACE

The Interface between the Acts is complex and unclear

The IC Act represents the most recent expression of the will of the Legislative Assembly in relation to the integrity framework for the ACT. It is an important task for this Review to identify areas of overlap between the PID Act and the IC Act. There are significant areas of overlap. A key criticism of the PID Act is that "current PID processes are sometimes complex, lengthy, and often require legal expertise to navigate".[37] It is clear that the commencement of the IC Act will significantly add to this confusion. This was one of the motivations for this review; it was recognised by a number of people who made submissions; and it is clear when provisions of the Acts are compared side by side.[38]

It is not helpful to have legislation that traverses similar areas, but in slightly different terms, with the result being that it is not easy to discern what conduct is covered by what legislation. It does not further the objectives of having public interest disclosure legislation.

As we understand the intent of the Legislative Assembly, it was that the Integrity Commission is to be the pre-eminent integrity body for the ACT. This view is reflected in a number of the submissions we received.[39] The powers that have been given to the Commission are also indicative of this. The Assembly gave the Integrity Commission a wide jurisdiction to ensure that it had the capacity to investigate matters the Commissioner thinks should be investigated. The recommendations which follow are based on the principle that the IC Act is intended to be the pre-eminent Act within the integrity framework for the ACT.

There would be benefit if people were clear when the Integrity Commission Act applies versus when the PID Act does. This is confused at present as the IC Act potentially covers a wider range of conduct than the PID Act, with substantial overlap.

[37] Minutes of Legislative Assembly, Wednesday 3 April 2019, pp 1367.
[38] See the example of the definition of disciplinary action in the PID Act compared to the IC Act above.
[39] See the submissions of Mr Skehill and Mr Coe.

We recognise the imperatives and the journey that has seen the IC Act passed and scheduled for commencement without any significant consequential amendments being made to the PID Act. In our view this is regrettable, as until changes are made to the PID Act the confusion about how the Act works will undoubtedly escalate. We also have concerns that the smooth operation of the Integrity Commission may be compromised.

In our view it would be ideal for amendments to be made to the PID Act prior to the Integrity Commission commencing substantive operation. This would achieve clarity, for the benefit of the optimal functioning of the Integrity Commission, for those wishing to make a disclosure under the PID Act that does not come within the jurisdiction of the Integrity Commission, and for the ACTPS and those with roles under the PID Act.

Of course, there are other impacting considerations - most notably that the Integrity Commission has had a long gestation. Further, an election will be held for the ACT in October 2020 so there will be practical considerations about the ability to consider legislative changes in the time remaining for this Parliament. During the period of this review the date for substantial commencement of the IC Act has already changed from 1 July 2019 to 1 December 2019.

We are therefore recommending changes to the PID Act that might be accommodated in the short term to improve the interaction between the Acts. We are proceeding in this way in order to try to reconcile the objectives of having an Integrity Commission with a focus on serious and systemic corrupt conduct; as well as a regime for public interest disclosures of a wider range of matters, including misuse of public funds, maladministration, and substantial and specific dangers to public health, safety or the environment. If the Integrity Commissioner wishes to further delay the commencement of the Commission receiving disclosures so that those matters which create the greatest confusion and potential conflicts can be resolved as a matter of priority, there would be good reasons to support this request.

Of course, the bulk of the IC Act is not yet in operation and the Integrity Commission itself will begin operating after this review is completed. There remain many matters about how the Integrity Commission will operate in practice that are yet to be determined. The IC Act provides that the Integrity Commission must liaise with public sector entities, and coordinate its activities with the activities of public sector entities to avoid unnecessary duplication of work.[40] Notably, the Integrity Commission can enter into cooperation

[40] s 55 IC Act.

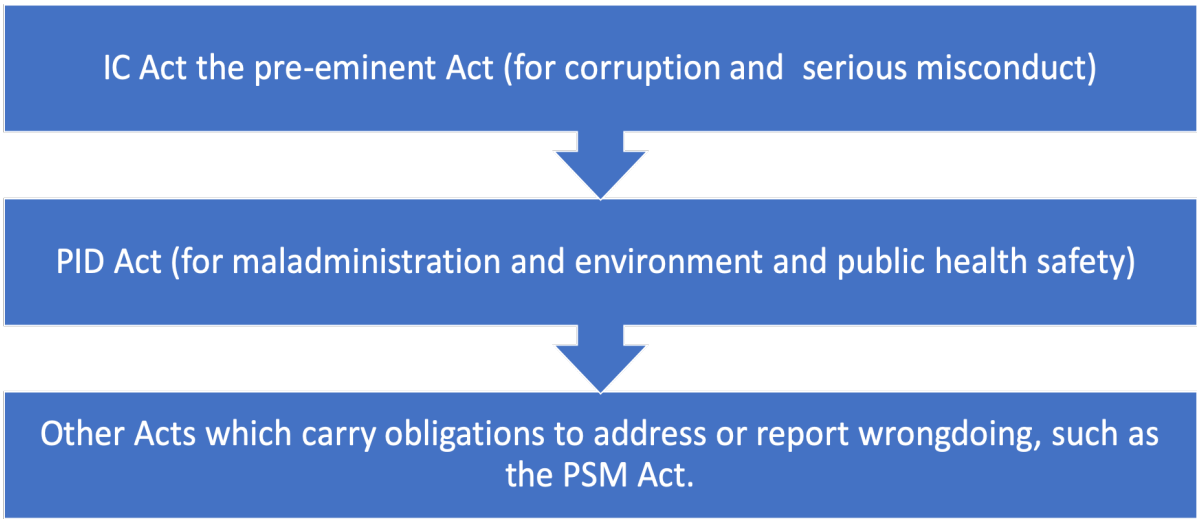
arrangements with other entities; may refer matters to other entities; and make guidelines about how information is dealt with under the Act and mandatory notification under the Act.[41] The exercise of these and other powers by the Integrity Commissioner may highlight - in addition to the matters canvassed in this report - areas of interaction between the two Acts that need further refinement.

For these reasons, the recommendations that we make about amendments can be viewed as "first phase" amendments and we recommend a further review of the PID Act in conjunction with the IC Act in the medium term.

Recommendation

1. That the PID Act be amended as soon as possible to make clear its relationship to the IC Act and to provide that where matters and processes described in the IC Act are in conflict with the PID Act, the IC Act takes precedence.

Establish a tiered integrity framework to address wrongdoing



[41] As indicated in the submission from the PSSC, there is potential for duplication of effort across a number of integrity bodies and protocols will need to be developed. The Auditor-General noted in his submission that these will need to take account of the independence of integrity bodies including that of the Auditor-General.

Delineate the IC Act and the PID Act scope

We propose that the scope of the IC Act and the PID Act be delineated by removing duplication between the PID Act definition of 'disclosable conduct' and the IC Act definition of 'corrupt conduct'.

The PID Act definition of disciplinary action for disclosable conduct is quite narrow - the disciplinary action it captures must be capable of ending a person's appointment or employment. This is a very high threshold. The definition of "conduct" further limits the type of conduct that is disclosable to "*conduct of, or involving the person, that adversely affects ….the honest and impartial exercise of a function of a public official*..", by which we assume it is not all criminal offending.

As set out in section one of this report, the relevant IC Act definition refers to a "significant employment sanction" and therefore includes other types of sanction to termination (for example, this might include suspension). It is not clear to us that the second limb of the definition of corrupt conduct in s 9(1)(b) of the IC Act practically will serve to limit the definition in any significant way in this context.

Thus, it appears the same type of conduct is covered under s 8(1)(a) of the PID Act as the IC Act and potentially a wider range of conduct comes within the jurisdiction of the Integrity Commissioner. There may in fact be some difference between the scope of the two definitions, but this is not readily identifiable to us, and appears unlikely to have been intended. The difficulty in ascertaining any practical difference serves to illustrate the wider difficulty in reconciling the two Acts.

We note that conduct of that type, if it is serious corrupt conduct, when it comes to the attention of a head of a public sector entity or an SES member of the ACTPS, must be notified to the Integrity Commissioner pursuant to the mandatory notification provisions in Division 3.1.2 of the IC Act.

We therefore recommend that the duplicative part of the conduct definition in s 8(1)(a) of the PID Act is removed.

Without this change, the same type of conduct can potentially be the subject of notification under the PSM Act, the PID Act and the IC Act. The PID Act stipulates that a disclosure officer must notify the head of service, the PSSC, the head of each public sector entity to

which the disclosure relates. The head of the agency will be obliged to investigate under the PID Act. This is confusing for everyone.

This conduct must be reported to the Integrity Commission in any event. The Integrity Commissioner is the appropriate authority to determine what course of action should be taken to investigate an allegation of this type. Of course, the Integrity Commissioner will need to work with the head of agency or head of service in many circumstances (for example, if a person should properly be suspended by the head pending the investigation).

Recommendation

2. Remove s 8(1)(a) from the definition of disclosable conduct in the PID Act as this conduct is covered by the IC Act.

Establish the role and authority of the Integrity Commissioner in the PID Act process

In the course of this review multiple stakeholders described that their experience with the PID Act is that people making a disclosure tend to make it to multiple parties - a manager, the head of the agency, the head of service, perhaps also the Auditor-General. There is no limit on the number of disclosure officers a discloser can approach to report wrongdoing.

The diagram below shows how a discloser has a wide range of options, including a number of independent integrity officers, to whom they may simultaneously make a disclosure. The framework of the Act leaves the process open to multiple, simultaneous disclosure assessments and potential investigations.

The PSSC Guidelines describe that it is the responsibility of each disclosure officer to:

> receive the disclosure, determine if it is within the correct entity, and assess the allegations to determine if it qualifies as a PID. Subject to appropriate delegations from the investigating entity (or head of the entity), they may also decide whether an investigation is required, develop terms of reference for the investigation, keep the discloser and Commissioner informed, and ensure compliance with other requirements of the Act."[42]

With the introduction of the IC Act there is now another body which can receive disclosures of wrongdoing. The introduction of mandatory notification under the IC Act is likely to further complicate the number of disclosure officers notified of serious wrongdoing - noting mandatory notification obligations do not relieve disclosure officers of their responsibilities under the PID Act.

[42] P21 "Public Interest Disclosure Guidelines 2010" https://www.legislation.act.gov.au/View/ni/2019-281/current/PDF/2019-281.PDF.

Mandatory Notification

When the IC Act commences operation, it is difficult to envisage that a mandatory notifier under that Act will not notify the Integrity Commissioner about any conduct that has been the subject of, or met the threshold for, a public interest disclosure.

A mandatory notifier will need to form the view that the conduct that could warrant the termination of services is not "serious corrupt conduct" - the definition of which is that the conduct is not "likely to threaten public confidence in the integrity of government or public administration". This may be influenced by any directions that the integrity commissioner may choose to issue under s 64 of the IC Act.

It is an offence if an SES member or the head of a public sector entity fails to notify the integrity commission about the conduct.[43] Unless those directions do limit what is the subject of a mandatory notification, the identifiable acts of individuals that warrant a public interest disclosure can be expected to be the subject of a mandatory notification to the integrity commissioner (as well as the head of service, the public sector standards commissioner, and potentially the police).

There is also no exception to the obligation to make a mandatory notification provided for in the IC Act - for example, if the person is aware that the Integrity Commissioner already knows about the matter.

In our view, if the Integrity Commission is the pre-eminent element of the integrity framework, any matters that may come within the jurisdiction of the Integrity Commissioner should be reported to the Integrity Commissioner including all matters disclosed under the PID Act. The exception should be matters about the Integrity Commission which should be reported to the Inspector under the IC Act. Matters within the primary jurisdiction of the Auditor-General or Ombudsman would continue to be dealt with in accordance with those Acts and the IC Act.

Given that it is difficult to draw lines between different categories of conduct when it is first revealed, we recommend that the role of disclosure officers should be to notify the Integrity Commission of the disclosures that have come to the attention of the disclosure officer, unless the disclosure officer has reasonable grounds to believe that the matter is not one that either comes under the IC Act or the PID Act (for example, trivial matters).

[43] ss 65 - 68 IC Act.

We suggest that there should be direct communication between the disclosure officer (or discloser) and the Integrity Commission rather than this going through the head of the agency. This is suggested in order to best protect the privacy of the person making the disclosure and in order to put the Integrity Commissioner in the best position to investigate; and to make the process as simple as possible.

This will also mean that the Integrity Commission is in a position to put sophisticated processes in place for the making and receiving of notifications from disclosure officers as the expert central body, compared with the current dispersed approach in the PID Act.

This suggested approach may not be feasible for larger jurisdictions, but given the size of the ACT, the low number of disclosures under the PID Act, and that this number will likely be further reduced by removing part 8(1)(a) of the definition of disclosable conduct, we suggest it as a sound approach for the ACT.

The reform model we propose would provide a triage model of assessment for wrongdoing, which is considered best practice.[44] It will reduce confusion about which legislation applies and will help ensure that multiple investigations do not occur concurrently, under multiple Acts.

Further, it would ensure a consistent approach in the first assessment of a disclosure, which research shows is critical to meeting both regulatory requirements and responding to the new evidence from research that shows the initial failure to properly recognise a disclosure, and manage the full range of issues raised is often the first step towards bad outcomes for whistleblowers and cost and damage to the organisation.[45] It would address the current inconsistency of assessments that come from having a wide range of disclosure officers tasked with making an assessment to determine if disclosed matter meets the definition of a public interest disclosure.

Finally, it will also address the potential conflict and confusion of responsibilities that mandatory notifications are likely to create.

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[44] Triage – a strategy for ensuring wrongdoing concerns are fully assessed for the subjects potentially involved, by appropriately experienced staff, before allocation for response; with oversight and coordination by a sufficiently senior staff member. http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf.

[45] P 15 http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf.

How would this work in practice?

The Integrity Commission sits at the apex of PID regime. All matters are referred to the Integrity Commission by disclosure officers or directly by a complainant. The Integrity Commission considers and determines whether to investigate. The IC can refer a matter at any stage to the Ombudsman, the Auditor-General, the head of agency, the Parliamentary Standards Commissioner or the PSSC for investigation. The IC must keep in contact with the discloser or provide notice to the referring entity and the discloser that it is now the obligation of the referring entity.

Disclosure officers who receive information that comes within the category of information described by the PID Act or the IC Act report that information to the Integrity Commission. If a disclosure officer has reasonable grounds to believe that information does not meet the types of information contemplated by the PID or IC Act, they do not have to do this. If an informant has declared the information to be a public interest disclosure and the disclosure officer knows the identity of the informant, and the disclosure officer does not agree that it is a public interest disclosure, the disclosure officer should advise the informant of this and the reasons for it.

The informant may take the disclosure directly to the IC and a report must have been made to the IC (either by the discloser directly or by a disclosure officer on their behalf) if the discloser wants to take information to a journalist or MLA under section 27. The informant needs to wait for a prescribed period before acting.

An alternative approach would be for the disclosure officer to advise the head of the agency who in turn notifies the Integrity Commission. One reason why this might be a good idea is that the agency head will have contextual information not available to the Integrity Commission. However, we prefer the approach of direct notification to the Integrity Commission who can then determine if/when/how to advise the head of the agency.[46]

Another alternative would be for conduct that might fall within the jurisdiction of the Integrity Commission to be reported there, and other conduct (such as that under s 8(1)(b)(iii) and (iv) of the PID Act) to be reported somewhere else, such as to the head of

[46] A further alternative is that allegations about conduct on the part of only certain people must be referred directly to the Integrity Commission but that all conduct may be notified to the Commission. This is the approach taken in the Victorian *Protected Disclosure Act 2012* which provides that disclosures about specified officers must be made to the IBAC (and for others the Inspectorate, and others the Ombudsman), but also that any disclosure may be made to the IBAC.

an agency or even to a single repository such as the PSSC. We do not recommend this as:

- We do not consider that this alternative would achieve the aim of simplifying the PID Act regime.
- It would keep a burden on a disclosure officer to determine what should be done with the disclosure (that is, make an assessment as to who to report it to).
- It will not always be clear without some further inquiry whether a matter is one that is of interest to the Integrity Commission – limited information might be available to the discloser or disclosure officer. The Integrity Commission has powers and processes available to it under the IC Act that others do not have.

In proposing the model we have, we recognise that this may see some matters initially being referred to the Integrity Commission that are not within the Integrity Commissioner's mandate to investigate "serious and systemic" corrupt conduct. However, provided the Integrity Commissioner has the necessary ability to refer matters to others or to dismiss them, this function should not have a material impact on the Commissioner's workload for the following reasons:

- Mandatory notification responsibilities and past experience suggests many matters disclosed as PID will be reported and considered by the Integrity Commissioner in any event.
- If section 8(1)(a) is removed from the PID Act, there will likely be significantly less PID disclosures as these will be IC Act reports instead.
- If the recommendations in Section 3 of this report are also adopted, there will be greater definition of what is and is not a PID matter and this should further reduce the number of disclosures which are made but assessed as not meeting the PID criteria.

Notification and investigation

If the Integrity Commissioner is to triage all serious wrongdoing disclosures[47], then the timing and obligation to notify others of the disclosure under s 17 of the PID Act should be amended, as should the requirement under s 18 on an agency head to investigate the disclosure.

[47] Exceptions will apply for matters reported to the Auditor-General or Ombudsman under their Acts.

Currently, the PSSC Guidelines Step 1[48] for disclosure officers includes reference to the obligations under s 17 of the PID Act that they must provide a copy of a PID to the head of each public sector entity to which the disclosure relates; and the commissioner; and for a disclosure that relates to the head of service—the ombudsman; and for a disclosure that relates to the public service — the head of service.

It is not until Step 3 that an assessment is being made as to whether or not the information meets the PID criteria. As the interface with the IC Act is so strong (even if there is better delineation between the Acts as recommended above), it is likely that careful consideration will be required by the IC to determine if a disclosure meets the criteria of the IC Act, the PID Act or another Act.

The IC Act places a high value on confidentiality. If the Integrity Commissioner receives information that a disclosure officer thinks is a PID matter, but the IC assess it to be matter for investigation under the IC Act, it would be undesirable for the notification under s 17 of the PID Act to have occurred prior to consideration by the Integrity Commissioner.

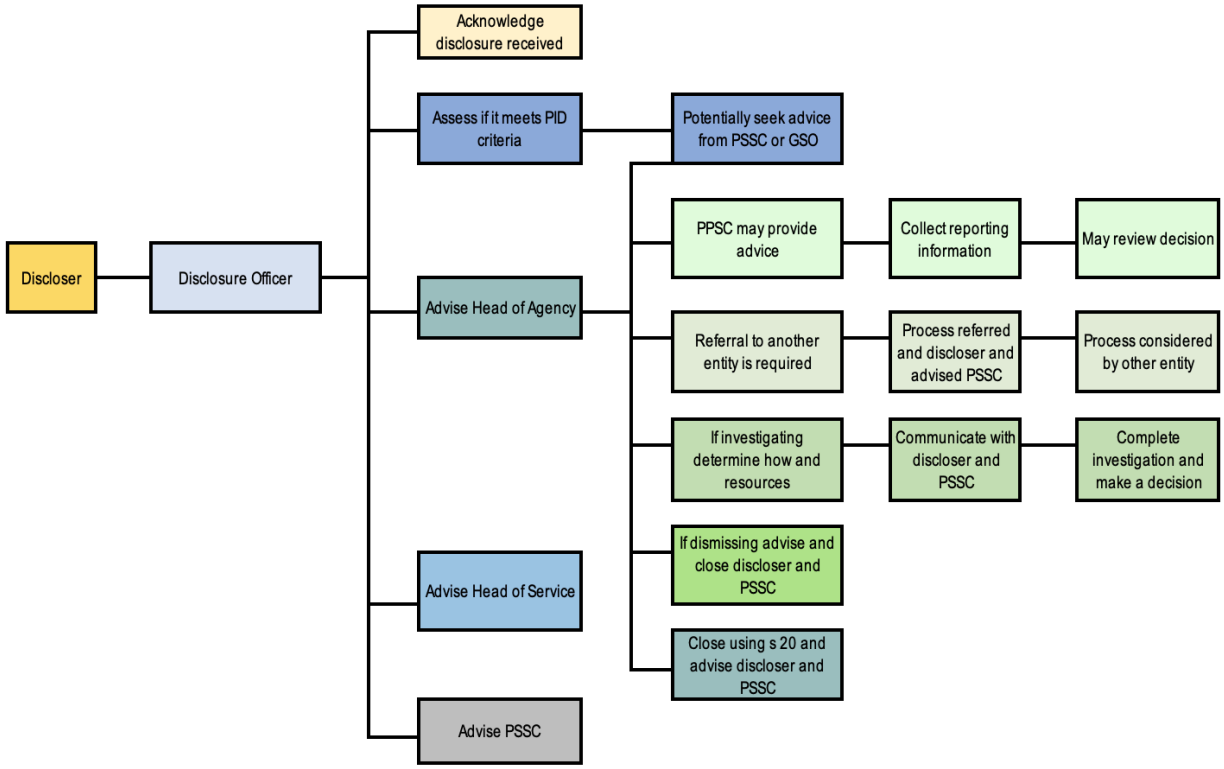
It is therefore recommended that the notification requirements in s 17 of the PID Act only apply after an assessment has been made by the Integrity Commissioner (or delegate) that the disclosure meets the criteria of a PID and will be investigated, referred or dismissed under the terms outlined in the PID Act. The obligation on an agency head to investigate (or otherwise deal with the matter in accordance with s 18) should only arise following referral by the Integrity Commissioner. It might be that the ACTPS determines that there is benefit in referrals from the Integrity Commissioner being managed through a central process, for example under the auspices of the PSSC, especially if some expert investigative resources were available. Provided the legislative framework did not prevent this, it could be achieved through policy and practice.

The responsibility to further notify others about the disclosure should sit with the Integrity Commissioner (or delegate) following this assessment, and should no longer sit with the disclosure officer.

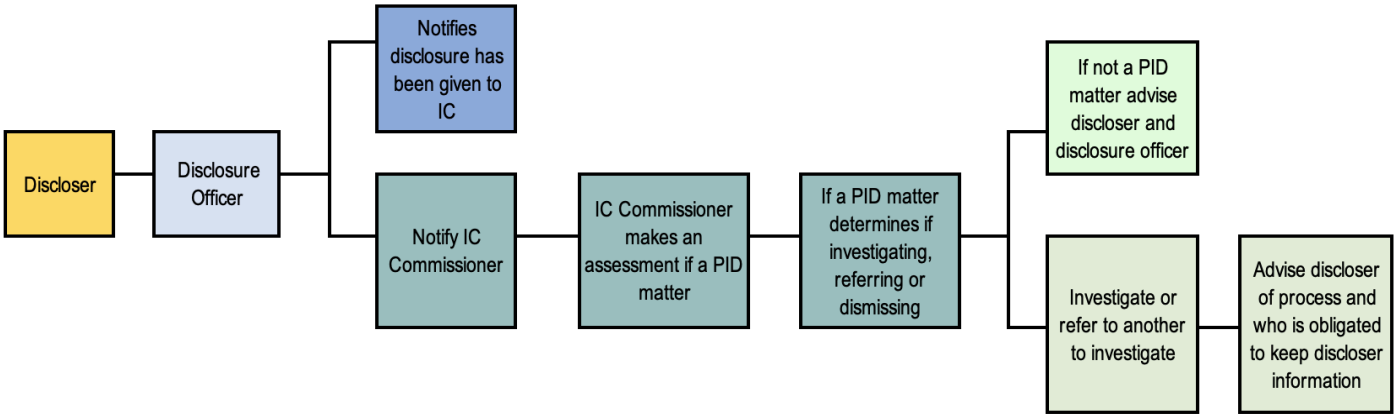
These amendments will improve consistency in assessments and streamline the current process significantly, as indicated by the two charts below.

[48] P 22 https://www.legislation.act.gov.au/View/ni/2019-281/current/PDF/2019-281.PDF.

The following diagram provides an example of the complexity of the current decision responsibilities:



This is the process we propose:



Recommendations

3. Amend the PID Act to provide that disclosure officers must only notify:

    3.1. the Integrity Commissioner of a disclosure under the PID Act, unless the disclosure relates to the Integrity Commissioner or Integrity Commission in which case the process in Part 5.2 of the IC Act applies.

    3.2. the discloser (if the discloser's identity is known) that the matter has been referred to the Integrity Commissioner.

4. A disclosure officer need not refer a matter to the Integrity Commissioner if they have reasonable grounds to believe the matter does not come within the jurisdiction of the IC Act or the PID Act.

5. Amend the PID Act to mirror s 70 IC Act to enable the Integrity Commissioner to dismiss, investigate, or refer to others with the ability to investigate an assessed PID matter.

6. The Integrity Commissioner be given the responsibility to:

    6.1. assess if something is a public interest disclosure under the PID Act.

    6.2. determine if the IC wishes to investigate or otherwise take carriage of the response to the notification / complaint under the PID Act or the IC Act.

    6.3. either transfer the obligations to keep a person informed to the referral body, or to require the referral body to report to the Integrity Commission if the Integrity Commission is to be the point of contact for the person who made the notification.

    6.4. advise the person who made the notification and the disclosure officer whether further communication is the responsibility of the Integrity Commission or the referral agency.

7. Amend s 18 of the PID Act so that the obligations on the head of a public sector entity to deal with the matter only arise once the matter is referred by the Integrity Commissioner.

8. There should be an obligation on those to whom the Integrity Commissioner refers matters to investigate consistent with Part 4 of the PID Act - with amendment to recognise that these obligations will only apply if a PID matter has been assessed by the IC and referred for investigation.

Circularity - The Integrity Commissioner as a disclosure officer

The IC Act explicitly amends the PID Act by adding the Integrity Commissioner as a disclosure officer for disclosures relating both to an ACTPS entity and the Legislative Assembly in s 11(1)(a) and (b).

We understand that the PID Act would also oblige the Integrity Commissioner to notify each of the officials specified in s 17 of every complaint made to the Integrity Commission under the IC Act that meets the definition of disclosable conduct, unless it is likely to adversely affect a person's safety or an investigation relating to a disclosure.[49]

The head of the entity would need to (separately) form a view as to whether it is disclosable conduct under the PID Act. If the head of the entity knew the Integrity Commissioner was investigating, the head of the entity would likely deal with the matter under s 20(g) of the PID Act. This adds unnecessary complexity and administrative burden.

Even if the amendments proposed above to put the Integrity Commissioner at the apex of the PID Act are not accepted, it is our view the Integrity Commissioner should not have the same obligations a disclosure officer under the PID Act for conduct reported to the Commissioner that the Commissioner intends to investigate under the IC Act. The Commissioner's obligations as to what to do with that notification should primarily be governed by the IC Act, not the PID Act. The Integrity Commissioner may at some later point determine that the matter should be dealt with in accordance with the PID Act.

[49] s 26 PID Act. See also s 75 of the IC Act in relation to IC Act notification requirements.

Recommendation

9. If the proposed role of the Integrity Commissioner under the PID Act is not adopted, if the Integrity Commissioner is dealing with a matter under the IC Act he should be exempted from the requirement to notify the relevant agency head and others under s 17 of the PID Act.

Section 8 (1)(b)(i) - Maladministration

We propose that the primary application of the PID Act will be for disclosures of conduct that the Integrity Commissioner considers does not meet the objectives of the IC Act (investigation of serious or systemic corrupt conduct - see Section 1 above), and for matters involving a substantial and specific danger to public health or safety and the environment or substantial misuse of public funds.

If the PID Act is to be the "second tier" legislation and maladministration is considered under the PID Act, then a review of the definition of maladministration is recommended.

To come within the definition of disclosable conduct under the PID Act an act of maladministration must "adversely affect a person's interests in a substantial and specific way".

The Moss Review noted that as part of that review process, "some agencies suggested there was benefit in defining the term 'maladministration' as a kind of disclosable conduct to avoid including more minor examples and provide greater clarity". The Moss Review was not persuaded by this view, but noted maladministration is included as a form of disclosable conduct in the New South Wales, Queensland, the ACT, Tasmania, and Northern Territory legislation[50].

The PID Act definition of maladministration in s 8 is:

> Maladministration means an action about a matter of administration that was -
>
> (a) contrary to a law in force in the ACT; or

[50] Maladministration in the Commonwealth Public Interest Disclosure Act 2013 is simply described as: *Conduct that constitutes maladministration, including conduct that: (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.*

(b) unreasonable, unjust, oppressive or improperly discriminatory; or
(c) negligent; or
(d) based wholly or partly on improper motives

The definitions in the corresponding South Australian and Queensland Acts are more expansive (see below) and may provide a guide for consideration:

South Australia	Queensland
Independent Commissioner Against Corruption Act 2012 - section 5 (4) (the *Public Interest Disclosure Act 2018* applies this definition)	*Public Interest Disclosure Act 2010* - Schedule 4
Maladministration in public administration— (a) means— (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and (b) includes conduct resulting from impropriety, incompetence or negligence; and (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.	***maladministration*** is administrative action that— (a) was taken contrary to law; or (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or (c) was in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances; or (d) was taken— (i) for an improper purpose; or (ii) on irrelevant grounds; or (iii) having regard to irrelevant considerations; or (e) was an action for which reasons should have been given, but were not given; or (f) was based wholly or partly on a mistake of law or fact; or (g) was wrong.

The submission from the Environment, Planning and Sustainable Development Directorate also suggests that agencies would benefit from further clarification around the meaning of maladministration.

The submission highlights that instances may arise "where a decision-maker makes a decision on reasonable grounds under a law, but subsequently finds that their decision is inconsistent with a law in force in the ACT. This could be particularly relevant on planning decisions where an interpretation of development code is found to be incorrect through an appeal in the Administrative Civil Appeals Tribunal or to the Supreme Court".

We believe there is benefit in a more expansive definition of maladministration to make the scope of the PID Act clear, as if our other recommendations are adopted the primary application of the PID Act will be to facilitate disclosures of wrongdoing that relate to maladministration or a substantial misuse of public funds. The models in use in other jurisdictions may be of assistance.

Recommendation

10. A more expansive definition of maladministration be adopted, with consideration given to models in use in other jurisdictions

Oversight of public interest disclosures

If the Integrity Commissioner is to be responsible for assessing and triaging disclosures under the PID Act, we think it would logically flow for the Integrity Commissioner to also be responsible for the majority if not all of the functions currently assigned to the Public Sector Standards Commissioner under Part 6 of the PID Act. The education functions are similar to those that the Integrity Commissioner has under s 23 of the IC Act.

We think that there are additional functions appropriately allocated to the PSSC to support witnesses and disclosers, these are discussed later in this report. It might be that some elements of s 28(1)(d) are appropriate functions and powers for the PSSC, and also that other elements of s 28(1) are appropriate having regard to the functions of the PSSC under other legislation that are not within the scope of this Review.

We suggest that further consultation occur with the Integrity Commissioner and the PSSC to determine whether there are any functions that would more appropriately remain with the PSSC.

Recommendation

11. Amend Part 6 of the PID Act so that the functions of the Public Sector Standards Commissioners generally become functions of the Integrity Commissioner.

The Integrity Commissioner takes on roles where there is currently a conflict of roles

Matters raised by the Clerk of the Legislative Assembly

Our Terms of Reference include "matters raised in the submission of the Clerk of the Legislative Assembly to the Select Committee on an Independent Integrity Commission 2017" (which we will call "the Clerk's 2017 Submission"). In summary, these matters are:

(a) provisions which make the clerk responsible for investigating MLAs or staff employed under the *Legislative Assembly (Members' Staff) Act 1989* should be removed;
(b) consideration be given to removing the conduct of MLAs from the definition of disclosable conduct (i.e. disapplying the application of the PID Act to MLAs);
(c) consideration be given to removing the provisions which give the Commissioner for Public Sector Standards an oversight role in relation to MLAs and their staff; and
(d) consideration be given to the appropriateness of provisions in s 35 and 37 relating to contempt (derogation from parliamentary privilege).

In addition, the Clerk raised the following issue in his submission to this Review:

(e) the role of the Head of Service in receiving disclosures about the Clerk.

Points (a), (c) and (e) are dealt with in this section of the report and the other matters are dealt with in later sections.

Clerk's role re MLAs and their staff – s 13(b) PID Act

In the Clerk's 2017 Submission he wrote:

> ...the statutory function of the Clerk is provided for in s 6 of the Legislative Assembly (Office of the Legislative Assembly) Act 2012, and indeed the traditional role of parliamentary clerks more generally, is directed towards the provision of administrative and procedural advice and support to the legislature, its committees and its members. Investigative functions of the type provided for [in] the PID Act have the potential to conflict with the exercise of the Clerk's and the Office's, advisory and support functions.[51]

The Chief Minister and the Parliamentary Standards Commissioner also referenced this issue in their submissions to this Review. The Parliamentary Standards Commissioner suggests that complaints about members could be made to the Commissioner for Standards and that the Integrity Commissioner is also empowered to investigate such disclosures. The Parliamentary Standards Commissioner suggests that the Integrity Commissioner should also have a discretion to decline to investigate for reasons such as those set out in s 20 or to refer the disclosure to an investigating entity if satisfied that this would be appropriate.

We agree that the Clerk of the Legislative Assembly is not the appropriate investigating body for disclosures about conduct of Members of the Legislative Assembly. We agree with the Clerk's submission[52] that the Integrity Commissioner should assume this role in the first instance, with the ability to refer matters to the Parliamentary Standards Commissioner or Speaker as appropriate. We further note that for certain types of conduct, the definition in s 8(1)(a)(ii) "give reasonable grounds for disciplinary action against the person" is likely not applicable for Members in any event, given the operation of parliamentary privilege.

[51] Page 29 of the Clerk's Submission to the 2017 Select Committee on an Independent Integrity Commission.
[52] Submission number 3 to the 2018 Select Committee Inquiry into an Independent Integrity Commission p 32.

Recommendation

12. Amend Section 13 (b) of the PID Act so that the functions that sit with the head of an entity under the PID Act are not assigned to the Clerk of the Legislative Assembly but rather the Integrity Commissioner, who may refer matters to the Parliamentary Standards Commissioner as appropriate.

Role of the PSSC in relation to MLAs and their staff

The Clerk raised this issue in his submission to this review and in his submission to 2018 Independent Integrity Commission Bill inquiry.

> The Public Sector Standards Commission is established under s 142 of the Public Sector Management Act 1994 (PSM Act) and is appointed by the Chief Minister. Section 144 of the PSM Act provides, inter alia, that the Commissioner has certain investigative functions, provides advice to the Chief Minister, and promotes and advises on public sector values, public sector principles and the conduct required under the PSM Act.
>
> Under the PID Act the Commissioner performs oversight functions, including in relation to PIDs that are received about non-executive MLAs and their staff. Separation of powers issues are potentially engaged by the relevant provisions given the Commissioner's proximity to, and reporting relationship with, executive government.[53]

The oversight functions the Clerk references are sections in Part 6 of the PID Act and also s 17(b) of the PID Act requiring a disclosure officer giving a copy of a disclosure to the PSSC.

We agree that this is an issue. One solution would be to sever the nexus between the PSSC and executive government to create more independence. However, this may be undesirable given other elements of the PSSC role.

[53] P 3 of the Clerk's Submission to this review, Submission 2.

This issue will be partially resolved if our earlier recommendation about the functions of Part 6 being assigned to the Integrity Commissioner rather than the PSSC are adopted; and if the disclosure officer is not obliged to notify the PSSC of a disclosure.

Recommendation

13. The PSSC not be notified of a disclosure under s 17 that relates to a Member or staff of the Legislative Assembly.

Role of the head of service vis a vis the Clerk

The Clerk points out in his submission to this review that pursuant to s 18(2) of the PID Act, the Head of Service is responsible for investigating disclosures relating to the head of a public sector entity, which includes the Clerk of the Legislative Assembly by virtue of s 13(b) of the PID Act. The Head of Service leads and manages the ACT public service under s 17 of the PSM Act and is answerable to the Chief Minister.

We agree that the Head of Service is not the appropriate body to investigate disclosures under the PID Act about the Clerk. We are of the view that this power be vested in the Integrity Commissioner in the first instance. The Integrity Commissioner may consider it appropriate to be able to refer these matters to the Parliamentary Standards Commissioner.

Recommendation

14. The Head of Service is removed of the power to investigate disclosures under the PID Act about the Clerk. This power should be vested in the Integrity Commissioner, who may refer these matters to the Parliamentary Standards Commissioner.

SECTION 3: IMPROVING THE PID ACT TO ENCOURAGE PROACTIVE DISCLOSURE

Section 2 recommendations are strongly interdependent and have been framed on the assumption that earlier recommendations will enable and provide the framework for later recommendations in that section. What follows in Section 3 is less strictly hierarchical in regards to the relationship between each of the recommendations, some of which might be adopted in isolation to others. Taken together, however, we believe they will encourage a more proactive disclosure culture.

Determining what is a public interest disclosure

The most pervasive issue raised with us during the course of the review is the assessment that is required to determine if something meets the definition of a public interest disclosure is too complex.

The PSSC guidelines describe disclosable conduct under the PID Act the following way:

> Disclosable conduct is more serious than a technical breach of policy or procedures: it is action (or inaction) that has, or has the potential to create a significant or widespread negative impact.[54]

The submissions and interviews consistently raised that understanding if a matter met the definition was a difficult and confusing task for both disclosers and disclosure officers. The Leader of the Opposition asserted in his submission that whistleblowers find themselves having to engage a lawyer before a public interest disclosure is made.[55] The definitions provided in the Act are not easily interpretable, and in some cases, require multiple Acts to be referred to, in understanding whether the PID threshold has or has not been met.

As a result, matters are being disclosed that frequently do not meet the definition of a public interest disclosure. This is demonstrated in the data for the 2016-2017 where it was reported that 8 of the 17 disclosures were assessed as failing to meet the criteria of a public interest disclosure[56], and in 2017-18 where the PSSC data reveals 92% of disclosures were not considered disclosures under the Act.

The problem often described was summarised by the PSSC who noted that it was a common that a disclosure is labelled as a PID by the discloser, often in the genuine belief that it is. However, on assessment by the relevant entity, the matter is determined not to be disclosable conduct.[57] Sometimes, on receipt of a disclosure that claimed to meet the PID criteria the agency would seek legal advice to confirm the assessment. This issue is discussed in the submission of the ACT Ombudsman and the Public Sector Standards Commissioner.

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[54] https://www.legislation.act.gov.au/View/ni/2019-281/current/PDF/2019-281.PDF.
[55] Submission 7 to this Review, pp 1 & 3.
[56] 2016-17 State of the Service Report http://www.cmd.act.gov.au/__data/assets/pdf_file/0019/1113049/State-of-the-Service-2016-17.pdf.
[57] The PSSC in their submission noted this occurred most often because the allegations being made under the PID Act relate to minor grievances among individuals or dissatisfaction over managerial decisions.

This means that more appropriate dispute resolution processes are being delayed; disclosers are not covered by the protections they believe they have under the PID Act; and the intent of the PID Act is not being appropriately met. Government agencies are not confidently promoting or consistently responding to disclosures as they require legal support to interpret the PID Act.

Even if there is greater consistency and skill achieved through this assessment role sitting with the Integrity Commissioner, it is our view there is value in improving the clarity of what a PID is, and is not. This is because:

- disclosure officers will still be required to make a determination if a matter needs to be provided to the Integrity Commissioner;
- disclosers will be more likely to pursue the correct avenue for a disclosure or report; and
- it will help avoid the release of information by those with an incorrect view it meets a threshold that affords protections under the PID Act.

The significant amendments discussed in section 2 of this report, specifically amendments to s 8 of the PID Act and how matters are assessed, will go some way in addressing this. In addition we recommend that a public interest test is introduced; that the wording of s 7(1)(a) is refined and that personal grievance matters are specifically excluded. Each of these is discussed below.

Ensure motivation for the disclosure is public interest

S 7 (1) : Insert a Public Interest Test

In his submission the Chief Minister referenced comparable Canadian legislation that explicitly “is not intended to address matters of a personal nature, including individual harassment complaints or individual workplace grievances as there are other ways to address these issues.”

Another submission referenced the Act being used for tactical purposes where there was related action, for example in compensation or unfair dismissal cases. It is not beyond comprehension that an employee who may be subject to disciplinary action of some kind

seeks to attract the protections of the PID Act - in particular those relating to the taking of detrimental action to complicate disciplinary action being taken.

Comparable legislation in the United Kingdom also makes it clear that wrongdoing must affect others.[58] This means the whistleblower will not be solely or personally be affected by the disclosure matter. Complaints about personal grievances aren't covered by whistleblowing law, unless the case is in the public interest. Therefore in the UK disclosures are considered to be "raising a concern" which are intentionally distinguished from from making a complaint or raising a grievance. The benefit of this approach is that it seeks to:

- limit the abuse of whistleblowing legislation by aggrieved individuals;
- protect genuine whistleblowers from abusive colleagues; and
- assist in addressing the problem of needing to engage in actions which may breach of employment conditions to evidence a disclosure.

The redacted data provided by the PSSC could not definitively inform us how many matters would have been ruled out if a public interest test had been applied. However, on the information available it appears conservatively that at least 50% of matters raised would likely not have met such a threshold based on the details of the complaints which were closed as not meeting the PID criteria. Moreover, this issue was raised consistently as an issue in interviews as an example of the misuse of the PID Act.

Recommendation

15. Amend the PID Act to introduce a public interest test so that the wrongdoing that is disclosed must affect others and be made genuinely in the public interest.

S 7(1) - forming a requisite belief to make a public interest disclosure

A public interest disclosure is defined in s 7(1):

> **7 Meaning of *public interest disclosure***
> (1) For this Act, a ***public interest disclosure***—

[58] *Public Interest Disclosure Act 1998* - s 43B " (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following…".

(a) is a disclosure of information by a person about disclosable conduct that—

(i) the person honestly believes on reasonable grounds tends to show disclosable conduct; or

(ii) tends to show disclosable conduct regardless of whether the person honestly believes on reasonable grounds the information tends to show the conduct; and

(b) includes any assistance given by the discloser during an investigation of the information mentioned in paragraph (a).

The submission of the Parliamentary Standards Commissioner Mr Crispin QC, states that for something to be a public interest disclosure under that section, "*a discloser would need to establish, not only that he or she had an honest belief that disclosable conduct had actually occurred, but also that there were reasonable grounds for that belief*". The discloser is relieved of this obligation if the disclosed information "*tends to show*" disclosable conduct. As Mr Crispin points out, the meaning of that phrase may not be entirely clear. This contributes to the confusion as to whether or not information disclosed or assessed will meet the threshold of a PID and afford a discloser the protections under the Act.

Mr Crispin suggests, and we agree, that:

> a discloser should not have to have sufficient information to indicate that the wrongdoing has happened or is happening. It should not be necessary for him or her to conclude that there are no alternative explanations for the conduct or activities observed that can be easily thought of. Nor … should a potential discloser be encouraged to embark upon his or her own enquiries. On the contrary, … a discloser should be to disclose any information that provides reasonable grounds for suspicion that some disclosable conduct might have occurred or might occur in future. Any decision about whether the information is sufficiently cogent to warrant investigation should be made by the person to whom the disclosure is made.
>
> …
>
> Someone who notices that an officer dealing with public funds or tenders for government contracts has suddenly [begun] to adopt a financially extravagant lifestyle should feel [free] to disclose his or her suspicion that it might reflect some dishonesty in the performance of the officer's duty. It should not be necessary for the discloser to attempt to discover whether the officer may have misappropriated government funds or taken bribes."

There are risks from a framework that encourages whistleblowers to conduct their own inquiries. It is not unheard of for charges to be brought against a whistleblower stemming

from their attempts to gather evidence to support their allegations of wrongdoing - for example, by making audio recordings or taking copies of documents.

A proactive disclosure culture should encourage people to alert others to suspected wrongdoing. This culture could be encouraged by amending the objects of the PID Act to promote a pro-disclosure culture and reference related legislation, such as the public service values in the PSM Act.[59] As in the UK, the role of the discloser should be as a messenger or raising a concern, not proving it. [60]

If a public interest test is introduced, and personal grievances are excluded from the PID Act, the whistleblower should rarely have a personal interest in the outcome of any investigation into their concern beyond wanting wrongdoing addressed. As a result this enables the risk of the Act being used to pursue personal grievances or malice to be limited. Therefore reducing the threshold of how a discloser should need to satisfy themselves wrongdoing has occurred is appropriate.

In addition, we recommend the protections under the Act are enlivened if the Integrity Commissioner assesses that something is a public interest disclosure.

Recommendation

16. Amend s 7(1) of the PID Act to make it clear that disclosures made in good faith that the Integrity Commissioner assesses to be a public interest disclosure is afforded the protections of the Act.

17. Amend the Act so that protections are enlivened for both disclosers and witnesses if the Integrity Commissioner assesses a matter as a public interest disclosure.

S 7 (2) Employee grievances

In addition to introducing a public interest threshold, it is proposed that the Act specifically excludes solely personal employment-related grievances under s 7(2). This would clearly establish which matters are, and are not, within the scope of a public interest disclosure.

[59] As suggested in the Submission of the Chief Minister.
[60] This is very different from a complaint. When someone complains, they are saying that they have personally been poorly treated. This poor treatment could involve a breach of their individual employment rights or bullying and the complainant is seeking redress or justice for themselves. The person making the complaint therefore has a vested interest in the outcome of the complaint and, for this reason, is expected to be able to prove their case. http://www.whistleblowing.org.uk/individual-advice/faqs/faq-answers.

The benefit of specifically excluding personal employee grievances is that it would provide increased clarity of scope and assist with earlier and timely decisions on the appropriate avenue for personal matters to be dealt with. It would address the number of concerns raised about the misuse of the PID Act for personal use.

Specifically, the issue raised in a number of submissions was that the PID Act may be used by ACTPS employees to litigate employment related disputes, rather than the type of conduct that the PID Act is intended to capture.

The PSSC said in his submission,

> "The meaning of "disclosable conduct" can be construed in many ways, resulting in allegations being made under the PID Act which relate to minor grievances amongst individuals or dissatisfaction over managerial decisions".

The PSSC has attempted to address this in its guidelines, which state:

> Matters that affect only personal or private interests are unlikely to be a PID. Complaints relating to individual employment and industrial matters, isolated allegations of bullying or harassment, personnel matters, individual performance management concerns and individual workplace health or safety concerns would generally not be considered a PID and are best dealt with through other means… A PID is not a mechanism for solving a personal grievance. It is a process within government to deal with matters of a serious nature which if resolved would increase trust and confidence in the integrity and probity structures that underpin the ACT's system of representative democracy.[61]

The Ombudsman referenced the Moss Review, "which highlighted that the overwhelming majority of disclosures in the Commonwealth scheme concerned employment-related grievances or minor allegations of wrongdoing".[62]

The Moss Review also recommends separating out personal grievances from the PID process, finding that:

> "...while the PID Act is helping to bring to light allegations of serious wrongdoing, these disclosures are in the minority. Most PIDs concern matters that are better understood as personal employment-related grievances, for which the PID Act framework is not well suited."[63]

[61] https://www.legislation.act.gov.au/View/ni/2019-281/current/PDF/2019-281.PDF.
[62] P 30 https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf.
[63] P 7 Moss Review https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf .

The Moss Review recommended that the definition of 'disclosable conduct' in the Commonwealth PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing."

We support the findings of the Moss Review and believe they should be applied to the ACT PID Act.

The recent research from Whistling While They Work 2[64] found not all staff concerns can be neatly separated into integrity or public interest matters on one hand, and personal grievances on the other. It was found that miscategorising such a complaint as 'simply' a personal grievance can lead to the wrong investigation path being chosen, confidentiality being breached or an attempt to sweep the entire matter under the carpet – deliberately or accidentally.

A critical way to manage this is to ensure the first stage assessment is robust enough to determine if a disclosure is solely an individual's workplace grievance or policy disagreement. This requires established assessment processes and skilled assessor - which would be achieved if all PID matters are assessed by the Integrity Commissioner as recommended earlier in this report.

Recommendation

18. Amend s 7 (2) of the PID Act to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing.

Improve Protections

Part 7- Strengthen Protections for witnesses and those assisting with investigations

Adequate protections are central to confidence in the integrity system as those coming forward to report matters, and those asked to provide evidence about matters, need to

[64] Whistling While They Work 2 www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf.

feel no fear of detriment. This is articulated in both the Moss Review findings and the recent report Whistling While They Work 2.

The submission of the CPSU stated:

> Currently, when a disclosure is made under the PID Act, the person disclosing the action is protected from any adverse action and identification, where possible.
>
> However, it is the CPSU's understanding that this protection does not extend to the other parties that are involved in the proceeding investigations once the disclosure has been made. This would include witnesses to the disclosed action, or other parties that are providing information on the disclosed action.
>
> This has the significant risk of inadvertently being able to identify the discloser by omission. An example of this can be seen when a disclosure is made in a small team of five Public Servants, for an action taken by the team's director. If the other team members are identified as witnesses, it is clear that by omission of the fifth person, that the remaining public servant is the person who has made the disclosure.
>
> Another issue with not providing protections to witnesses, is the recourse available against that witness/es for making an adverse testimony in support of the disclosure. While it is of course both unethical and prohibited to take adverse action against these witnesses, it is the CPSU's experience that retribution against cooperating witnesses is not uncommon in these scenarios.
>
> It should also be noted that Section 9 of the Public Sector Management Act, 1994 confers and obligation to Public Servants to report any maladministration or corrupt or fraudulent conduct to the head of service or another Director-General.
>
> While it is appropriate for some matters to be dealt with through this process rather than escalating it through the PID process, the protections are not apparent. While these are implied, section 9 of the Public Sector Management Act, 1994 does not explicitly confer the same protections to disclosers of such conduct.

Based on submissions, past reviews, inter-jurisdictional practice, and research we believe there is a sound basis for the protections afforded to disclosers to be extended to witnesses, where those witnesses were called upon to assist an investigation. For example, the Commonwealth *Public Interest Disclosure Act 2013* provides protection for any person (including the discloser) who provides information when requested by a person conducting a PID investigation. These protections include immunity from criminal or civil liability and protection from detriment and reprisal. This protection obligation extends to witnesses, and other officials who may be suspected to have made disclosures.

While outside of the scope of this review and the PID Act, it is noted that in addition to legislative provisions to provide protections, the internal policy and processes of

organisations are also critical in disclosers coming forward and feeling safe. It is noted that in Whistling While They Work 2 the ACT government ranked second-to-last (equal 17th of 19) in the jurisdictions and industries who provide an active support strategy to disclosers.[65]

The PID Act should confer a responsibility for a function of providing support to a discloser or a witness in an investigation as the circumstances require, as the Victorian Public Sector Commission has. The PSSC might be an appropriate body to provide this support, as long as there is no conflict with other functions of the PSSC and the necessary resources are available. The Integrity Commissioner or the Public Sector Standards Commissioner should also have the power to take precautions to prevent its ACTPS employees from taking detrimental action in reprisal for a protected disclosure.[66] For reasons discussed earlier in this report, the Integrity Commissioner or the Parliamentary Standards Commissioner might be more appropriate bodies to have this power in relation to the staff of MLAs, although this is also likely to raise further issues of parliamentary privilege.

Whilst it is beyond the scope of this review, consideration could also be given to the protection of witnesses in other Acts that might intersect with the PID Act, such as the Public Sector Management Act.

Recommendation

19. Part 7 of the PID Act is expanded to encompass protection for disclosers and those assisting disclosure investigation in appropriate circumstances.

Detrimental Action / Recrimination

It has been suggested that people making disclosures need further protection than that which is available under any existing legislative framework. Some have suggested that for a prosecution to succeed in relation to the disclosure of information, a burden should

[65] Table 7- Whistling While They Work 2 WWTW2-Strength-of-whistleblowing-processes-report-Australia-New-Zealand-Griffith-University-August-2017.pdf.
[66] See discussion above re Part 6.

lie with the prosecution to show that a disclosure was not in the public interest. [67] This is attractive at one level - but we consider this should be with the strong proviso that the protection is only available once the disclosure has been assessed and confirmed as meeting the PID criteria by the Integrity Commissioner. As the submission of Mr Skehill discusses: [68]

> Sometimes, the only way true accountability may be insured is when a government insider "blows the whistle" and publicly disseminates otherwise hidden information or documents. Appropriate protection for genuine "whistleblowers" in respect of disclosures they make (both internally to government and externally to parliamentarians or to the public via journalists) is thus an important safeguard for the community interest in the integrity of government.
>
> At the same time, there can be legitimate reasons why it is in the public interest for some government information to remain publicly unavailable. These include protecting national security or personal privacy, and ensuring the effectiveness of law enforcement methodologies.
>
> There is thus a need for a delicate balance to be struck between information security and whistleblower protection. This is no easy task. Allowing government claims to information protection to too readily override the ability of a whistleblower to release information simply creates an opportunity for corruption and abuse contrary to the public interest. Equally, protecting whistleblowers too readily may detrimentally affect community interest through inappropriate disclosure of information that should remain protected.
>
> …
>
> In extreme cases, including some of current controversy, a person claiming to be a bona fide external whistleblower is prosecuted for breaching their obligations of confidentiality or is otherwise liable to civil or criminal liability. There are no winners in these circumstances:
> - While prosecution or other action may be successful, the public interest has nevertheless been adversely affected by the disclosure of information that should not have been released into the public domain; and
> - where prosecution or other adverse action fails, not only does the government suffer embarrassment and potentially loss of public confidence but also the whistleblower is subject to at least stress and possibly other serious disadvantage because of the action taken against them.

[67] See for example the quotes attributed to Paul Murphy, head of the Australian journalists union on the ABC Media Watch program of 10 June 2019, following the Australian Federal Police executing search warrants at the Australian Broadcasting Corporation.
[68] Submission 1 to this Review, p1-2.

Recommendation

20. If the Integrity Commissioner has assessed something as a public interest disclosure, for a prosecution to succeed in relation to the disclosure of information under section 27, a burden lies with the prosecution to show that a disclosure was not in the public interest.

Natural Justice

In his submission Mr Crispin suggested that more consideration could be given in the PID Act to protecting unwarranted damage to reputations and careers. He notes particularly that some of the protections afforded to public servants, for example, under the PSM Act, are not afforded to others, such as private contractors, who may be accused of complicity and whose livelihoods may be affected by adverse decisions.

Mr Crispin recommended that the Act be amended to incorporate a requirement that anyone who may be adversely affected by a decision taken in response to a disclosure should be given a reasonable opportunity to respond to the imputations against them unless this would adversely affect a person's safety; an investigation relating to the disclosure; or an investigation conducted by the police or the Integrity Commission

The IC Act provides in s 188 that if the Integrity Commission is preparing an investigation report that relates to a person (or a public sector entity), the commission must give the proposed report or relevant part of it to the person. The Commission must also give the person at least six weeks to provide written comments about the proposed report. [69]

Similar provisions should be incorporated in the PID Act for matters that are to be dealt with under the PID Act.

[69] s 204 IC Act also requires the Integrity Commission to make reputational repair protocols, which address how the Commission will manage damage to a person's reputation.

Recommendation

21. Relevant provisions in the IC Act regarding natural justice are replicated in the PID Act.

The rights of others

In his submission Mr Crispin QC also drew attention to the breadth of the defence available in s 36 of the PID Act.

> These provisions extend far beyond the defence of qualified privilege that would otherwise be available to disclosers, in that is shields them from liability in relation to disclosures made negligently, irresponsibly or even attended by dishonesty. It is difficult to understand why someone who has garnished an otherwise valid disclosure with knowingly false statements should be wholly relieved of liability for them or, more importantly, why anyone should be denied a remedy for any loss as a consequence of lies.[70]

He contrasts this with the potential liability of those charged with investigating or otherwise responding to disclosures pursuant to s 43, and notes that any remedy that would lie against an official may be obtained against the ACT; whereas a person unable to sue for defamation by reason of s 36 will be effectively denied any remedy. Mr Crispin suggests that there should be a more consistent approach to the protection of people who suffer loss due to the disclosure of incorrect information and we agree.

Recommendation

22. Section 37 of the PID Act should be amended to provide that the protection provided by s 36 is forfeited in respect of any part of the disclosure that is made dishonestly or vexatiously.

[70] See submission of Mr Crispin QC, Submission 8, p 8.

Evidence based system analysis and reporting

The PID Act reflects the Parliament's expectations on how whistleblowing in the ACT can occur and how it will be dealt with. Parliament's expectations of what this legislation will achieve (along with other legislation which outlines obligations for reporting wrongdoing) reflect the United Kingdom's National Audit Office[71] description:

> a culture open to whistleblowing is likely to deter wrongdoing; demonstrate the organisation's accountability; reduce the risk of anonymous and malicious leaks; and minimise costs and compensation from accidents, investigations, litigation and regulatory inspections.

A strong whistleblowing framework, underpinned by legislation, provides a number of benefits. One of the most commonly cited of these is the ability for reports to act as an "early warning system". The benefit of an early warning system is that it enables organisations to address problems before they escalate. However, the benefits of an early warning system are limited if there is no systematic capture or analysis of data or trends that come from PID notifications.

While the 2016-17 Annual Report indicated that a whole of government PID database was being maintained, we understand that in reality this database was simply an index which was introduced in 2014. Initially it was designed solely to assist the office of the Public Sector Standards Commissioner to monitor the progress of PID investigations conducted by the various ACTPS entities. It then evolved in limited detail to assist in reporting data, in keeping with the provisions of section 45 of the PID Act as it existed at that time, for the Annual Report under the *Annual Reports (Government Agencies) Act 2004*, being:

(a) the total number of public interest disclosures made;
(b) the total number of investigations carried out;
(c) the total number of investigations completed;
(d) the average time take for completed investigations;
(e) anything else prescribed by regulation.

Section 45 was later excised from the PID Act, with the reporting requirements transferred to the Annual Report Directions. However, the reporting of data was still limited to the above parameters in order to protect the identity of the various disclosers.

[71] "Government whistleblowing policies" https://www.nao.org.uk/wp-content/uploads/2014/01/Government-whistleblowing-policies.pdf.

We requested data from the PSSC to be broken down under each element of the s 8 definition of disclosable conduct including:

1. Number of disclosures by a private citizen make a disclosure and outcome
2. Number of disclosures by a member of a public sector entity (s 9) and outcome?
3. Who has investigated disclosures? (head of entity or referred- if so to whom?)
4. How many times have the following sections of the Act been used:
    a. s 16 (1) b - an anonymous disclosure
    b. s 27 (30) - disclosure to a third party
    c. s 40 - offence of taking detrimental action
5. Who have disclosures been made to?
    a. 15 (1) (a) - disclosure officer
    b. 15 (1) (b) - Minister
    c. 15 (1) (c) (i) - supervisor of discloser
    d. 15 (1) (c) (ii) - a member of a governing board
    e. 15 (1) (c) (iii) - other public official

Very limited information was able to be provided in response to this request. The office of the PSSC indicated that the scale and detail of the information requested could only be accessed by visiting each entity, accessing each record and analysing the response/investigation processes. This would have imposed a significant burden on the PSSC and agencies. As a result, the information was not provided due to resource and time constraints.

As a result of the limited data sources, there are significant gaps in the data and in reaching an overall understanding of how effectively the PID Act has operated. Most concerningly, it is not clear what types of disclosable conduct have been alleged by reference to the constituent elements of the definition in s 8. Further, we cannot definitively determine how many matters would have been ruled out if a public interest test had been applied that excluded personal grievance matters. On the information available it appears as many as 50% of matters raised may not have met such a threshold.

There is also a question mark as to the integrity of the data that exists due to the inconsistent assessment as to which matters should be included in the data. It was reported that a number of matters may have initially been thought to be PID matters but were never registered or data captured if they were concluded to not be a PID. There

was an open question within PSSC as to whether or not those complaints should or should not be included on the PID Register.

It is evident from the immaturity of the data capture that there are limited “early warning system” benefits being realised. This was reinforced in our interviews with some stakeholders - particularly those who viewed their roles as holding government to account - who left us with an impression there is a lack of transparency about PID matters. This contributes to a lack of confidence in the system and a lack of insight as to how “deep” problems might be, which the lack of published data does nothing to allay.

Recommendation

23. The PID Act assign a function of capture and reporting of public interest disclosure matters. This be undertaken in a coordinated, whole of service function, and deliver agency specific insights and trends.

24. The Integrity Commissioner, if assigned the roles recommended above, take carriage of these reporting responsibilities.

25. The PID Act (or Regulations as appropriate) require the following to be reported with regard to information being presented as non-identifying and maintaining confidentiality:

    25.1. Under which part of the definition of disclosable conduct in s 8 is a report made.

    25.2. For each matter:

        25.2.1. was the matter dismissed, referred or investigated
        25.2.2. for investigations, which entity investigated
        25.2.3. what was the outcome or determination of investigations
        25.2.4. whether the report was made anonymously, by an ACTPS member or external person
        25.2.5. were the requirements to keep relevant parties informed met.

    25.3. How often the following sections of the Act are used:

        25.3.1. s 27 (3) - disclosure to a MLA or journalist (if known)

        25.3.2. s 40 - offence detrimental action

26. Reporting occur both in aggregate and at the ACTPS administrative unit or other public entity as defined in s 9 of the Act level.

Reduce Red Tape

S 11 (2) Process for appointing a disclosure officer

The requirement for a person or position to be declared by notifiable instrument to be a disclosure officer seems to be unnecessary and add 'red tape' to the process for little benefit. If a declaration is done by title, with public service changes it is prone to becoming out of date. If it is done by employee name, a similar problem can arise.

Further, if the scope of responsibility for assessment of disclosures is shifted to the Integrity Commissioner from disclosure officers, another reason for making these roles declared by notifiable instrument is diluted.

A more meaningful requirement would be that the disclosure officer for an agency is easily identifiable from an agency website and/or recorded in the annual report of the agency. It might also be useful for an agency to advise the Integrity Commission of who disclosure officers are for their agency in order for this to appear on the Integrity Commission website, and in order for the Integrity Commissioner to fulfill education and awareness obligations.

Recommendation

27. Remove s 11 (2) and (3) which requires a disclosure officer to be declared via a notifiable instrument. Replace this with a requirement for the information to be publicly available on an agency website, in annual reports, and provided to the Integrity Commissioner for central publication.

Procedures and Guidelines

Section 33 of the PID Act provides that the head of a public sector entity must make procedures for the entity for dealing with public interest disclosures. The head must obtain the approval of the Public Sector Standards Commissioner for those procedures

and any amendment of them. This appears to impose unnecessary bureaucracy for what should largely be a standardised process.

The Commissioner submitted that there may be scope to streamline the existing approval provisions in the Act or provide for public sector entities to adopt the Commissioner's guidelines, without a mandatory legislative requirement for public sector entities to develop procedures.

We agree with this observation and recommend that the approval of procedures is only required where an agency wishes to deviate from the guidelines issued by the Commissioner.

Given our other recommendations, we believe the role of issuing guidelines sits better with the Integrity Commissioner than the Public Sector Standards Commissioner.

Recommendation

28. The Integrity Commissioner be empowered to issue guidelines (s 32) and procedures under the PID Act instead of the Public Sector Standards Commissioner.

29. Amend s 33 to provide that the standard procedures issued by the Integrity Commissioner are the procedures of an agency unless the Commissioner approves alternative guidelines.

SECTION 4: OTHER MATTERS

Disapplying the PID Act from the conduct of MLAs

In the Clerk's 2017 Submission he suggested that consideration be given to removing the conduct of MLAs from the definition of disclosable conduct in the PID Act. In that submission, the Clerk suggested that the Parliamentary Standards Commissioner could be at the centre of all complaints or allegations made about the conduct of MLAs. The Chief Minister noted in his submission to this review that there does not appear to be a compelling case to remove the conduct of MLAs from the definition.[72]

The Moss Review also considered the issue of scope for politicians and their staff. Unlike the ACT PID Act and all other jurisdictions, the Moss Review found that this kind of wrongdoing should be scrutinised by the Parliament itself, not agencies within the Executive. This was a similar view to that presented by the Clerk in 2017. The Moss Review similarly noted:

> As neither the conduct of members of Parliament nor their staff can be subject to scrutiny and sanction by an independent body outside or within the Parliament, this approach is ill-adapted to extending the protections of the PID Act to Senators, Members and their staff, as it would not be clear upon whom the obligation to investigate disclosures would be bestowed, and it would impose a bureaucratic process upon political roles.[73]

However, the Moss Review did concede that:

> If an independent body is created with the power to scrutinise alleged wrongdoing by members of Parliament or their staff, such as a comprehensive federal integrity body, the

[72] See p 2 of Submission 10 to this Review.
[73] P 63 (161) Moss Review https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf.

Review recommends that consideration be given to extending the application of the PID Act to these groups.

Given the recommendations we make in relation to the role of the Integrity Commission for MLAs, we do not think that the conduct of MLAs or their staff should be removed from the definition of disclosable conduct. We think it preferable that these matters are considered by the Integrity Commissioner in the first instance with the ability to refer to the Parliamentary Standards Commissioner as appropriate.

Recommendation

30. The conduct of MLAs and their staff remain within the PID Act scope, with matters considered by the Integrity Commissioner in the first instance with the ability to refer to the Parliamentary Standards Commissioner as appropriate.

Derogation from parliamentary privilege

The issue of how the PID Act may impact on parliamentary privilege was raised in the Clerk's 2017 Submission as well as in his and other submissions to this review.

The Clerk's submission suggests that "if s 35(a)(iv) of the PID Act is regarded as 'a law with respect to [the Assembly's] power's pursuant to s 24(3) of the *Self Government Act*, there may well be implications for the operation of parliamentary privilege as it applies to the Assembly."

The PSSC suggests that the review consider the purpose behind s 35(a)(iv) of the PID Act and whether it is still necessary in its present form, suggesting that there should be consistency between the PID Act and the IC Act on this issue. The PSSC notes that a similar provision was included in the Exposure Draft of the Integrity Commission Bill (in what is now s 288 of the IC Act) and that this was amended to remove the derogation of the Assembly's contempt power.

We note that in the submission by the Office of the Legislative Assembly to the Select Committee on Independent Integrity Commission 2018 it states that "*whether or not such a provision interacts with s 24(2)(a) and 24(3) of the Self Government Act in such a way*

as to sever - either partially or completely - the Assembly's enjoyment of the powers, privileges and immunities of the House of Representatives is a legal question which deserves additional consideration."

It is beyond the scope of this review to answer this question. The ACT Government and/or the Legislative Assembly may have already - or may wish to - seek legal advice in relation to it.

Third party disclosure

As explained above, s 27 of the Act sets out when a disclosure to a journalist or Member of the Legislative Assembly will be protected under the Act.

The Explanatory Statement for the Bill reveals the purpose of this section (our emphasis added).[74]

> It is not unusual for matters to come to the attention of the media, nor is it revolutionary to suggest that a person could raise their concerns with their local member. However, the conditions under which a report to the Assembly or the media will be protected under the PID regime are necessarily strict.
>
> In most cases, before a disclosure to the media is protected, a person must first have made a genuine attempt to have their case heard internally. Then if the investigating entity refuses or fails to investigate, or has not complied with the information requirements for the discloser, or finds disclosable conduct has occurred but declines to take action, the discloser is able to go to the media or the Assembly without losing legislative protection.
>
> There is also one circumstance allowed under the Bill for a potential discloser to go direct to the media or a member of the Legislative Assembly without lodging their PID with one of the people listed under proposed section 15. **This is in the rare situation where it would be unreasonable to require the person to try to go to a public sector entity to have the matter resolved, and there is a risk of detrimental action or harm to a person if the PID was to be lodged.**
>
> The intent of this section is to establish a mechanism through which a report about grand corruption can be made and protections afforded without the discloser being left in fear of retaliation. A disclosure to the media or member should be seen as an avenue of last resort. **The intent of the provision is to cover instances of significant corruption or maladministration so seriously**

[74] https://www.legislation.act.gov.au/b/db_45218/.

> **embedded that there is no chance of the discloser receiving a fair hearing by either the entity responsible or the oversight agencies.**

With the advent of an Integrity Commission the Legislative Assembly may wish to consider whether the motivation for including a section like s 27 remains. It is also difficult to reconcile the ability to reveal information to a third party about a PID Act disclosure when the IC Act sets up a tight regime of confidentiality in relation to similar conduct.

If the PID Act is not amended to put the Integrity Commissioner at the apex of assessment as we recommend earlier, legal advice would need to confirm the reconciliation of the two regimes - in particular whether to the extent that the IC Act (or the IC Commissioner can) restrict certain information from being able to be made public, the restrictions are ever relieved through any provisions in the PID Act. If our recommendations are not implemented a person making a complaint under the IC Act may assert it is a disclosure under the PID Act. We doubt that this was the intent of the Legislative Assembly when the IC Act was passed. Of course, the PID Act also provides for other matters to be the subject of a disclosure (ie maladministration, public health or environmental matters) that are not within the ambit of the IC Act.

Third party disclosure: protections

Issues can also arise from the subjective nature of determining if something is a public interest disclosure under the current PID Act if a person wishes to make a third party disclosure under s 27 of the Act. These issues are explored in the submission of Mr Skehill, the Ethics and Integrity Adviser to the Members of the Legislative Assembly. As Mr Skehill points out:

> on key issues section 27 of the PID Act provides what are in practice problematic grounds on which to decide who is or is not a genuine whistleblower. That is:
>
> - It provides little assistance to an intending whistleblower seeking to ascertain whether their external intended disclosure will be protected; and
> - It provides little assistance to government in deciding whether prosecution or other action might be successfully taken once external disclosure occurs
>
> In some cases, section 27 set out purely factual grounds where parties can readily ascertain whether or not disclosure is permitted and thereby protected - for example, whether the discloser has been told certain things within prescribed time limits - paragraphs 27(1)(b) and (c). But other provisions in section 27 call for what is often

subjective and difficult judgment:

- whether there has been a failure or refusal to investigate - paragraph 27(1)(a);
- whether there is "clear evidence" of disclosable conduct - paragraph 27(1)(d)(ii); and
- whether there are "reasonable grounds" to believe that there would be a "significant risk" of detrimental action if disclosure were made under section 15 or that such disclosure would be "unreasonable in all the circumstances" - subsection 27(2)

Mr Skehill proposes that s 27 be amended to provide that the protections in that section are only available if a disclosure has been made to the Integrity Commission and a prescribed period had expired since that disclosure was made.

Under this regime, the role of the Integrity Commission within this period would be to:

- examine whether appropriate investigation and action had been taken by the original disclosure officer and, if not, to either direct the original disclosure officer to remedy their omission or to itself take over investigation and action. Section 27 protection would then not be available until those processes were concluded. In this way, the potential for external disclosure due to inadequate internal action within government would hopefully be minimised; and
- Where the Commission considered that the original disclosure officer had acted properly and reasonably, enter into dialogue with the intending external whistleblower with a view to allowing them to make a better informed decision about whether any external disclosure they might decide to make despite the view of the Commission would be found to be unprotected. For example, as an independent oversight body, the Commission might be able to satisfy the intending whistleblower that their cynicism about or disbelief in the processes of the agency about which they complain is unwarranted. While the Commission would have no power to veto external disclosure or to deny protection, hopefully it's standing as the Territory's pre-eminent and independent integrity agency would convince otherwise unprotected whistleblowers that external disclosure was not warranted.

We support the concept that reports must be made to the Integrity Commission before an external disclosure is made. If our recommendation that all PID matters are referred to the Integrity Commissioner for assessment, and determination as to whether it constitutes a public interest disclosure, this will address this element.

Mr Crispin notes that the section does not offer adequate protection for a potential discloser when he or she believes on reasonable grounds that there is a need for urgency in the disclosure of information to the Assembly or media. He recommends some further consideration be given to defining the nature of information that may be publicly disclosed and the circumstances in which such disclosures may be made.

It is difficult to conceive of ways of defining these circumstances that does not add further subjectivity to the PID Act.

We note that in certain circumstances a person will be afforded a degree of protection for a disclosure to a Member of the Legislative Assembly through the doctrine of parliamentary privilege.

It might also be that if the Integrity Commissioner takes on the additional roles we suggest this may assist with this issue (it might be that the Integrity Commissioner's assessment could replace some subjectivity). We do not dismiss the concern raised by Mr Skehill but have not identified an appropriate mechanism to deal with it. This matter might be further considered in a later review of the Act.

For completeness, we reference that Mr Crispin also noted in his submission.[75]

> It may be noted that the same conditions must be met for disclosures to the Assembly or to a journalist. This may reflect a judgment that, as a matter of political reality, a disclosure to the Assembly is likely to lead to disclosure to the press, but it is not self-evident that the supply of information to a duly elected Legislative Assembly should be limited in the manner required by this section. Whilst the Act is clearly directed towards disclosures made at the initiative of 'whistleblowers', its terms seem to cover disclosures [that] may be made in response to questions asked by others, including Members of the Assembly. Should they have no greater access to departmental officers than journalists? There is presumably and established protocol concerning contacts between Members and government agencies, but I recommend that this issue be referred to the Standing Committee on Administration and Procedure for further consideration.

The Private Sector

The application of the PID Act to bodies outside of the ACTPS would benefit from clarification. It is clear on the face of the PID Act that the concept of disciplinary action extends to non-employees of the ACTPS given the definition of disciplinary action includes "terminating the person's contract for services".[76] However, the PID guidelines

[75] P 6 of Submission 8 to this Review.
[76] Conduct of non-employees is also intended to be captured by the IC Act, although it is less clear on the face of the definition of serious disciplinary offence used in the IC Act. The definition of "public official" in s 12 of the IC Act

talk about the coverage of "complaints about suspected illegal or illegitimate practices of ACT Government employees and entities".

Further, the PID Act provides no mechanism for investigation and no remedies, presumably relying on any contractual arrangements or other powers that the head of an agency may have. It is recommended that the intended coverage of the private sector is considered when amendments are drafted for the PID Act.

As clarity is a key pillar of a healthy disclosure culture, the intended coverage of the private sector needs to be determined and made clear.

Recommendation

31. The intended coverage of the private sector in the PID Act is clarified.

Education and awareness

To compound the difficulties experienced with the current PID Act, we heard from a number of people that there is presently insufficient knowledge and awareness about the PID Act, including in the ACTPS.

The Leader of the Opposition Mr Coe suggests in his submission that periodic training and information sessions are provided to improve consciousness and confidence in the process. The CPSU in their submission highlighted that there are challenges for the ACTPS in complying with several layers of legislation and obligations pertaining to how public servants should report questionable conduct or potential misconduct. The CPSU's experience is that some staff are unaware of the avenues available, and/or the obligations in reporting questionable conduct or potential misconduct.

> It is clear that educational programs, and/or clear and concise information sessions need to be conducted with the ACTPS, as to both make staff aware of their obligations, and demonstrate how these decisions should be made. These programs should be reflected in all relevant guidelines and published material.[77]

extends to contractors, employees of a contractor or volunteers exercising a function of a public sector entity (the same definition of "public official" as in the PID Act).

[77] Page 4 of the CPSU Submission to this Review.

Recommendation

32. The requirement to provide integrity training and awareness be strengthened by requiring reporting under the Act to include information about integrity education, awareness and training opportunities offered and taken up.

Obligations flowing from a disclosure

The obligations that attach to a disclosure officer under s 17 should attach to anyone to whom a disclosure may be made - otherwise the provisions in the Act that call for an investigation to be undertaken by the head of the agency, and other processes, are not activated. At present, the Act doesn't explicitly require people to whom a disclosure may be made who are not disclosure officers to do anything with the disclosure.

The people who may receive internal disclosures and Ministers are not explicitly included within the definition of a disclosure officer under s 11 of the Act. This appears to be an oversight.

Recommendation

33. The obligations that attach to a disclosure officer under section 17 should attach to anyone to whom a disclosure may be made.

A principles based approach

The Moss Review considered and recommended the adoption of a principles based approach to PID procedures.[78] We gave similar consideration to the benefit of such an approach. While we are persuaded by the argument of the Moss Review of the benefits

[78] P 41 "The Review considers that the following procedural areas of the PID Act would particularly benefit from a principles-based approach: the procedures to allocate or reallocate a disclosure (sections 42-45); an agency's obligation to notify a discloser about the progress of a disclosure and its investigation (sections 44, 50, 50A); an agency's obligation to notify the Commonwealth Ombudsman or the IGIS about the progress of a disclosure and its investigation (sections 44, 50, 50A); and an agency's obligations to investigate; and, the timeframes for investigation." https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf.

of a principles based approach, we determined a similar recommendation would not be appropriate for this review.

This view is based on the following considerations. The first is that the interface between the IC Act and PID Act requires that it is desirable that approaches to procedures and processes are replicated as far as possible to reduce complexity and confusion in understanding how to navigate the integrity framework. The second is that with the new roles and functions for the IC recommended in this review, including the functions of setting guidelines under s 32 of the PID Act, setting PID procedures should be a matter for the Commissioner. Thirdly, the areas of focus Moss recommended for introducing principle based procedures are subject to significant change recommendations in this report. Finally, in absence of the experience of an operating IC Act, and the expanded role of the IC in the PID process, it is our view it would be premature to make such a recommendation.

Interaction between integrity bodies

We were fortunate to receive submissions for this review from the Ombudsman and the Auditor-General and also to have the opportunity to consult with the Integrity Commissioner and the Speaker of the Legislative Assembly.

Each of these officers have a role to play in the integrity framework for the ACTPS and the Legislative Assembly. Each of the statutory bodies have explicitly noted that they have been afforded independence in their governing legislation. This independence is rightly regarded as paramount to their roles. We do not intend any of the recommendations to undermine this independence, but we note that sometimes more than one integrity agency may have an interest in a matter.

We note also that each of the independent integrity bodies is committed to working with mutual respect and communication with other agencies. Administrative arrangements will likely need to be put in place to support the interactions and we note in particular the powers of the Integrity Commissioner to enter into arrangements under s 55 of the IC Act.

Regular Statutory Review

The amendments proposed in this review to reconcile the PID and IC Acts should be considered by the Legislative Assembly as soon as possible. Early implementation will enable resolution of the complex interface between the IC Act and the PID Act and the potential challenges the Integrity Commissioner may face in fulfilling his duties under both Acts.

The proposed changes to the PID Act are however being made ahead of the lessons that may be gleaned from an operating Integrity Commission. There is no doubt that further changes are likely to be required once the Integrity Commission commences operations. In addition, regular review of any legislation is good practice, particularly when it pertains to matters of importance and complexity such as those covered in the PID Act.

There will be significant amendments to the legislation and processes and approach to PID matters if our recommendations are adopted, and it will be important that these changes be evaluated in the future to ensure they are achieving their intended purpose.

It will also be desirable that the PID Act is reviewed again once the IC Act has been in operation for a sufficient time to understand how its operation impacts on the PID Act in a practical sense.

Section 303 of the IC Act requires:

> Review of Act -
>
> (1) The Minister must, in consultation with the Speaker, review the operation of this Act as soon as practicable after—
>
> (a) 1 July 2022; and
>
> (b) every 5 years after 1 July 2022.

Even with the extensive amendments we have suggested to the PID Act, we have not recommended that the PID Act be repealed and integrated into the IC Act given the IC Act is not yet operating and the importance of the Parliament in demonstrating a strong commitment to disclosing wrongdoing in the ACT. However, we would recommend that the ongoing need for a standalone PID Act be the focus of a future review, once the

operation of the IC Act has commenced and any recommendations of this report are adopted.

Recommendation

34. The PID Act be amended to include a clause for statutory review that aligns to the review of the IC Act, and that these Acts be reviewed concurrently, due to their significant interface.

35. A future review of the PID Act consider the ongoing need for the matters dealt with in the PID Act to sit in separate legislation to the IC Act.

SUBMISSIONS RECEIVED

1.	Mr Stephen Skehill, Ethics and Integrity Adviser, ACT Legislative Assembly
2.	Mr Tom Duncan, Clerk, Office of the Legislative Assembly
3.	Mr Ian McPhee, Public Sector Standards Commissioner
4.	Mr Michael Manthorpe, ACT Ombudsman
5.	Mr Leon Purdy
6.	Mr Michael Harris, ACT Auditor-General
7.	Mr Alistair Coe, MLA
8.	Dr Ken Crispin QC, Commissioner for Standards, ACT Legislative Assembly
9.	Mr Ben Ponton, Director-General, Environment, Planning and Sustainable Development Directorate
10.	Mr Andrew Barr, Chief Minister
11.	Mr Tony Harris
12.	Community and Public Sector Union
13.	Mr Michael De'Ath, Director-General, ACT Health
13A	Canberra Health Service