Speaker

Mr Ian Govey AM
Independent Reviewer, *Integrity Commission Act 2018* and *Public Interest Disclosure Act 2012*
By email: icactreviewsecretariat@act.gov.au

Dear Mr Govey

***Public Interest Disclosure Act 2012* – Discussion Paper**

Thank you for your letter dated 16 June 2023, inviting me to make a written submission on matters raised in the *Public Interest Disclosure Act 2012* (the PID Act) discussion paper. Outlined below are several matters, raised in the paper, that I wish to comment on.

Discussion 1 asks the question where should responsibility for PIDs sit. As identified in the discussion paper, the Integrity Commission is one of multiple integrity agencies in the ACTPS integrity framework. The paper further highlights during the 2021 Justice and Community Safety Committee hearing into the Integrity Commission's 2019/20 annual report, the Integrity Commissioner noted that PIDs often relate to non-corruption matters and that the Commission would only investigate a PID itself if there was either patently a corruption allegation or potentially a real risk of likelihood of a corruption element. The Commissioner further emphasised the Commission's supervisory role, and its responsibility to refer matters to the appropriate entity for investigation.

In light of this evidence and the integrity frameworks which exist in the ACTPS and the ACT Legislative Assembly, it is my view that matters relating to potential PID's for ACT Public Service employees should be returned to the ACT Public Sector Standards Commissioner (PSSC) and where a determination is made that disclosures are matters which relate to serious or systemic corruption, they should be referred appropriately to the Integrity Commissioner for further investigation.

I am of the view that the PSSC may not be an appropriate avenue for the PID investigative function with respect to MLAs and their staff due to the function that the PSSC has in advising the Chief Minister under the *Public Sector Management Act 1994* (PSM Act). Accordingly, I can appreciate that for MLA's and their staff, the Integrity Commission may be the most appropriate place for referral, however, I would note that it is important that legislative timeframes which are applied to PIDs be upheld.

Discussion point 17 asks if section 44 of the PID Act should be amended to apply to journalists and MLAs. Further, in **point 18** the discussion paper asks should any provisions be put in place to protect individuals from the risk of reputational damage if a public disclosure is made to a journalist or an MLA before the matter is investigated?

I submit that s 44 of the PID Act should **not** apply to MLAs or journalists.

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As the discussion paper identifies, to apply this provision to MLAs may be contrary to the policy intent of allowing disclosure to them if a person who has made a disclosure has not received notification within three months. Further, the paper identifies that this brings accountability to the timeframe for responding to a PID and reporting back to the discloser.

Section 44(1) provides that it is an offence if a person uses protected information about someone else and is reckless about whether the information is protected information. Section 44(2) provides that it is an offence if a person does something to divulge protected information about someone else and the person is reckless about whether the information is protected information about someone else and doing the thing would result in the information being divulged to someone else.

The policy drivers for the offence provisions would seem to be the protection of disclosers from detrimental action; guarding against any undermining of procedural fairness; ensuring the integrity of the public interest disclosure process more generally. This is entirely appropriate.

However, the Act also recognises that there are circumstances in which a journalist or an MLA (described as 'third parties') may, legitimately, be given information about alleged disclosable conduct where certain conditions have been met (see Part 5). In such circumstances, the disclosure is taken to be a public interest disclosure and the person providing the information is taken to be a discloser, thereby attracting relevant protections under the Act (see s 27).

Essentially, the Part 5 provisions operate as a release valve enabling allegations of disclosable conduct to be publicly ventilated where a discloser has not received certain information pursuant to other provisions of the Act. In these circumstances, any actions that a journalist or an MLA might take are not taken pursuant to the Act but in connection with the more fundamental roles and functions that they perform in an open, representative democracy—that is, bringing matters of public concern into the public view with the hope of achieving transparency, accountability, and a responsive and responsible government. To be clear, information given to non-executive MLAs or journalists about matters that could be regarded as disclosable conduct can be so given without provisions of the PID Act having ever been enlivened (i.e. although they may be regarded as passive recipients of information pursuant to s 27(2) of the PID Act, non-executive MLAs and journalists are not heads of a public sector entity, investigative entities, disclosure officers—they do not participate in the formal statutory aspects of investigating or determining PID matters etc).

However, what appears to complicate matters is that a minister is an MLA for the purposes of the Part 5 provisions relating to third-party disclosures[1] but also performs a function (akin to a disclosure officer function), as part of executive government and with overall responsibility for public sector administration, under s 15(1)(b) of the PID Act.

While it is important that a minister is not permitted to use or divulge protected information gleaned pursuant to s 15(1)(b) in an improper manner, it is equally important that a non-executive MLA is not prevented from using or divulging protected information in such a way as to advance an accountability outcome by way of making public statements or attracting media interest.

Any amendments to the PID Act to address these matters need to carefully balance the public interest in the orderly, timely and procedurally fair investigation of PID matters by designated investigating entities with the public interest in non-executive MLAs—and journalists—being in a position to advance transparency and accountability where the circumstances demand and without the prospect of having committed an offence.

[1] See s 27(2) of the PID Act.

MLAs are entrusted with a unique position and with their position comes certain expectations around the use of privilege and privileged information. MLAs are not identified as disclosure officers under the PID Act, which arguably is intentional given the unique position they hold, and the associated privilege afforded in their role.

As identified in my earlier submission relating to discission papers for the *Integrity Commission Act 2018*, privilege is an issue which needs careful consideration and understanding. To include MLAs in S 44 of the PID Act could potentially enliven issues associated with privilege. It could also have the effect of discouraging disclosers from making disclosures to an MLA, or conversely lead to over-reporting of issues which people may perceive to be a matter of public interest.

Discussion 18, whilst raising important questions around reputational damage, also potentially presumes that an MLA may be flippant with the receipt of protected information, in which case, I would argue that the MLA Code of Conduct as identified in Continuing Resolution 5 of the Standing Orders, identifies a course of action in the event an MLA behaves in such a way that brings into question their conduct. Specifically, s 15 of Continuing Resolution 5 identifies MLAs must:

> *(15) Take care to consider the rights and reputations of others before making use of their unique protection of parliamentary privilege consistent with the resolution of the Assembly 'Exercise of freedom of speech' agreed to on 4 May 1995 (as amended or replaced from time to time).*

Discussion 19 and 20 poses the question, how should PIDs, particularly in relation to any disciplinary action, be handled for MLAs and their staff and should the head of a public sector entity be redefined to exclude the Clerk as the responsible entity with regard to MLAs and their staff?

In relation to disciplinary action for MLAs, as expressed in my earlier submission, I am confident that suitable processes exist for the investigation and referral of MLAs and their conduct. The appointment of the Commissioner for Standards expressly provides avenue for referral to the Integrity Commission should the conduct of an MLA be considered a matter of corruption.

The Commissioner for Standards is an independent appointment of the Assembly and MLAs would wholeheartedly expect that the person fulfilling that role would refer matters to the appropriate oversight body should they deem necessary.

The issue of MLA staff is, I believe, a more complex issue and one that I am unsettled on exactly how to address. I am certain that referrals to either the Commissioner for Standards or the Administration and Procedure Committee, are **not** the most suitable avenue for addressing concerns.

The Administration and Procedure Committee, chaired by the Speaker, could potentially be faced with the same conflict issues that individual MLAs would be in regard to their own staff members, and subsequent issues could arise where staff may feel that they have been unfairly subjected to committee deliberations of which they have absolutely no interface with.

Arguably the way an MLA manages their staffing and any issues associated with misconduct, is a condition which falls under the Members Code of Conduct. I would suggest s1 of Continuing Resolution 5, which states:

> *(1) Members should at all times act with integrity, honesty and diligence.*

Whilst I accept this hinges on MLAs identifying and proactively responding to staffing issues which may amount to corruption, I think the principles of natural justice and procedural fairness must be a consideration. The very nature of their place of employment subjects both staff and MLAs to risks of issues being unfairly politicised should they not be treated with care and diligence.

Presently the *ACT Legislative Assembly Members' Staff Agreement 2021-22* has misconduct and discipline procedures outlined at clause H1. I appreciate that these do not explicitly reference referral to the Integrity Commissioner, however perhaps a way forward would be for future enterprise agreements, or indeed staff codes of conduct, to clearly stipulate procedures for referral of MLA staff, should matters relating to suspected corrupt conduct or serious maladministration apply. Any inclusion would need to accommodate conflicts of interest and could consider the application or appointment of an independent arbiter to review matters pertaining to staff conduct.

Again, I am not entirely settled on the most appropriate way forward for these issues but appreciate the need for their consideration.

In respect of **point 20**, it is my view that the Clerk should be excluded from the definition of head of a public sector entity in relation to MLAs and their staff. The Clerk's role by its very nature is designed to be independent and impartial to MLAs and their staff. The Clerk has no responsibility for the hiring, disciplinary action, performance overview or any matters related to the employment of staff or MLAs and so to define the role of Clerk as a decision maker for the referral of MLAs or staff would compromise this impartiality and place an undue expectation on decision making relating to persons for whom no present oversight exists.

The final point I wish to comment on is **discussion 23** which relates to matters pertaining to oversight of the Inspector and poses the question who is best placed to undertake an investigation into disclosable conduct relating to the Ombudsman; and should the PID Act include a similar provision to the *Integrity Commission Act 2018* to allow a special investigator to be appointed for matters related to the Ombudsman in their role as Inspector.

In brief, yes I do hold the view that a similar provision should be adopted to enable a separate investigating body to oversight the Ombudsman should the need arise. Although I appreciate that it is entirely possible for the Integrity Commissioner to investigate their oversight agency with diligence and independence, I do recognise the potential conflict of interest, real or perceived, that this issue presents.

Presently section 213A of the Legislative Assembly Standing Orders sets out a process whereby the Clerk, at the express wish of the Assembly, can appoint an independent arbiter to examine and determine the release of papers which have been subject to a claim of privilege by the Chief Minister.

Acknowledging specific details would need to be resolved, including for example, required credentials of an arbiter, such a process could be similarly adopted by the Assembly in the event an independent investigator needs to be appointed to review allegations made against the Inspector. I accept in order to ensure procedural fairness, this process needs to be discreet, and it would ultimately not be desirable for this to play out on the floor of the Assembly. Rather, this appointment could be a process guided by the Administration and Procedure Committee and the appointment of an independent arbiter could be at the direction of the Clerk given the impartiality of the role.

I would like to make one final observation which relates more broadly to some of the questions raised in the discussion paper regarding oversight and review and are contemplated at **points 8** (page 19), **12, 13 and 23**.

There is no question that the intention of both the IC Act and the PID Act, are to strengthen community and public sector confidence in the integrity of, and mechanisms for, investigating, educating, oversighting and reporting on issues which relate to maladministration and corrupt conduct. With this in mind, I see any oversight as a necessary function to give confidence to the very things the legislation is designed to achieve.

As such, I support amendments or considerations which strengthen the oversight process, including through such things as regulated timeframes relating to communicating with disclosers and disclosure officers, referrals of matters to appropriate entities, and appropriate timeframes for decision making processes.

Presently reporting time frames for both IC and PID investigations, may cause some members of the community to question the processes in place and lead to a lack of confidence in these processes and in turn, the Assembly and government's very legitimate intentions around the creation and inception of these pieces of legislation.

I appreciate that matters pertaining to public interest disclosures are complex and require careful consideration. I appreciate the opportunity to contribute to this important discourse.

Sincerely,

Joy Burch, MLA
Speaker

13 July 2023