



Mr Ian Govey AM
Independent Reviewer, *Integrity Commission Act 2018* and
Public Interest Disclosure Act 2012
Chief Minister, Treasury and Economic Development
GPO Box 158 Canberra ACT 2601

Your ref: CM23/59637

By email: ICActReviewSecretariat@act.gov.au

Dear Mr Govey

Review of the Public Interest Disclosure Act 2012

Thank you for the opportunity to comment on your review of the *Public Interest Disclosure Act 2012* (PID Act). We have previously provided comments and met with you in relation to your review of the *Integrity Commission Act 2018* and this review relates to that work.

As we have indicated to you, and in public fora, our main concern at this time is accountability under the proposed new ACT planning framework currently being introduced. The factors that help facilitate corruption and unethical and illegal conduct are:

- The introduction of discretionary decision making around “outcomes”
- The amounts of money involved in land dealings
- The limitation on merits review of planning decisions
- The inaccessibility of judicial review because of cost
- The dispersal of functions among directorates that makes it difficult for a citizen to determine where responsibility lies
- The lack of checks and balances that exist in other jurisdictions where there are local and state governments involved in planning and multicameral legislatures
- The temptation for a well-established government, that appears to be secure in power, to disregard the rule of law and accountability principles.
- The difficulty for citizens of proving illegal and unethical conduct

Sunlight (transparency) is the best disinfectant and many of these factors prevent sunlight. In these circumstances public interest disclosure is another useful tool to

facilitate accountability and it is important that public servants who are motivated to disclose, in the public interest, receive full protection.

The GNCA suggests that well-functioning public sector agencies should welcome disclosures from their staff that alert them to possible maladministration because it gives them the opportunity for internal continuous improvement.

The GNCA responds to the questions in the discussion paper in Attachment A. Its focus is again on the Integrity Commission (IC) having sufficient powers to hold public officials to account.

Yours sincerely



Dr David Denham AM
President
GNCA

3 July 2023

Attachment A

1. Where should responsibility for PIDs sit? In particular, should a distinction be drawn between those involving corruption allegations and those that do not?

The advantage of the IC seeing all PID allegations is that they form a pattern that shows the culture within an organisation. In the GNCA's experience, if the culture of an organisation includes disrespect for the rule of law, then maladministration will be evident in its internal and external actions. We have provided examples where we have perceived such disrespect.

The IC should be the triage agency for complaints. After preliminary assessment they may be allocated elsewhere.

The IC should maintain a register of all complaints, including those that have been referred, with regular updating of results. If the IC does not follow up on complaints, there is a risk that complaints could be shelved. The IC annual report should include a report (by number) of progress and location of handling of complaints.

2. Are matters of education, oversight and decision substitution appropriately allocated to the Integrity Commission in light of the operation of the legislation?

Yes.

3. Should the PID Act impose a time limit on a disclosure officer to assess a disclosure and if they determine it is disclosable conduct pass it on to the managing PID entity?

Yes

4. Should the PID Act include a requirement that a disclosure officer inform someone who has made a disclosure that the disclosure officer did not consider it to be disclosable conduct?

Yes. However, the risk is that a vague reason may be given. It would be a good discipline for the disclosure officer – and invaluable for the complainant, who may not be familiar with legal requirements – to also inform the complainant what further information would have been required to make the matter “disclosable conduct”.

5. Should the PID Act include a requirement for a disclosure officer to declare a conflict of interest when assessing a disclosure?

Yes

If yes, what would be the best method for managing such a scheme? Should conflicts be reported to the Commission or managed by the relevant agency?

Yes. Conflicts should be reported to the Commission.

6. Should the role of disclosure officer be removed from the scheme with reports made directly to the Integrity Commission?

Yes

7. Should the investigating entity be required by the PID Act to declare an actual or perceived conflict of interest prior to investigating a PID?

Yes

a. If so, should the investigating entity also be required to prepare a conflict-of-interest management plan?

Yes

8. Should the PID Act clarify that the Integrity Commissioner may reallocate a PID investigation to another investigating entity if the initial entity is unable or declines to investigate?

Yes

a. Alternatively, should the PID Act enable the investigating entity to refer the matter to another entity in consultation with the Commission?

An entity should not have the choice of deciding where the investigation should occur.

7.(sic) Should the PID Act include an avenue to allow disclosure to the responsible Minister if a statutory officer holder or the Head of Service is found to have been involved in disclosable conduct?

Yes

8. Are the oversight and review mechanisms sufficient to manage any risks arising from the current mechanism for deciding to end an investigation? If so, how should they be addressed?

The current mechanisms for ending an investigation appear to be unsatisfactory. There should be a requirement for reasons to be given for ending an investigation and those reasons should be given to the complainant. It should be a requirement that details of further avenues of investigation are provided to the complainant. If there is a concern about vexatious litigants that should be handled under separate mechanisms.

9. Is the current material on the definition of disclosable conduct under the PID Act clear and easy to understand?

The current material is clear but insufficient. The GNCA suggests waiting for consideration of the Robodebt Royal Commission Report before clarifying the range of disclosable conduct.

10. Are there any gaps in the current definition of disclosable conduct? a. If so, what should be captured?

The GNCA suggests, based on its experience, that lack of adherence to the rule of law is maladministration. Following agency policy that is inconsistent with tribunals and courts interpretation of the law can be maladministration. It is recommended that the Robodebt Royal Commission report be considered.

11. Should the PID Act and IC Act remain separate, or be combined into one piece of legislation?

Yes

12. Should decisions by the Integrity Commissioner about whether a matter is a PID be subject to review?

No

13. Is it sufficient to have the ability to apply for review under the Administrative Decisions (Judicial Review) Act or should an internal review process within the Integrity Commission be added?

AD(JR) review is sufficient.

14. Does the provision on work-related grievances (section 8) require further clarification?

No

15. Are the current thresholds for protections and immunities in Part 7 of the PID Act sufficient?

The Victorian, South Australian and Commonwealth provisions provide appropriate protection.

16. Do those who make a disclosure require additional protections, especially from retribution or employment related consequences?

Yes

a. If so, what sort of protections should be available?

There should be protection against retribution, particularly in employment, for a disclosure made in good faith.

17. Should section 44 be amended to apply to journalists and MLAs?

No

18. 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?

Yes. The legislation should make clear that the scheme operates to allow sufficient time for investigation and public disclosure should not occur until an investigation is complete. For this to operate effectively investigations must be timely and progress should be communicated.

19. How should PIDs, particularly in relation to any disciplinary action, be handled for MLAs and their staff?

The Commissioner for Standards appears to be a more appropriate investigating officer.

20. 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?

Yes

21. Should there be a power in the PID Act to allow for the disclosure of information to third parties?

a. If yes,

- i. in what circumstances should this power be enlivened?
- ii. should the PID Act define which third parties may receive the disclosure of information?

Disclosure to selected third parties where life or safety is deemed at risk - on reasonable grounds - seems appropriate.

22. Should the IC Act expressly provide that an investigating entity is able to provide information and updates to a public sector entity that is required to take action under section 24?

Yes, but it should be limited to necessary information.

23. Who is best placed to undertake an investigation into disclosable conduct relating to the Ombudsman?

- a. Should the PID Act include a similar provision to the IC Act to allow a special investigator to be appointed for matters related to the Ombudsman? Yes
- i. If so, who should make the appointment The Speaker seems appropriate.

24. Should section 27A(1)(b) be amended to make it clear that all three elements are required, and that is not a list of three separate alternatives?

Yes

25. Should the legislation be amended to specify that a complaint can only be investigated under either the PID Act or the IC Act, but not both?

Yes

- a. If no, should a person be able to claim the protections under the PID Act in relation to disclosure made contrary to a requirement under the IC Act?