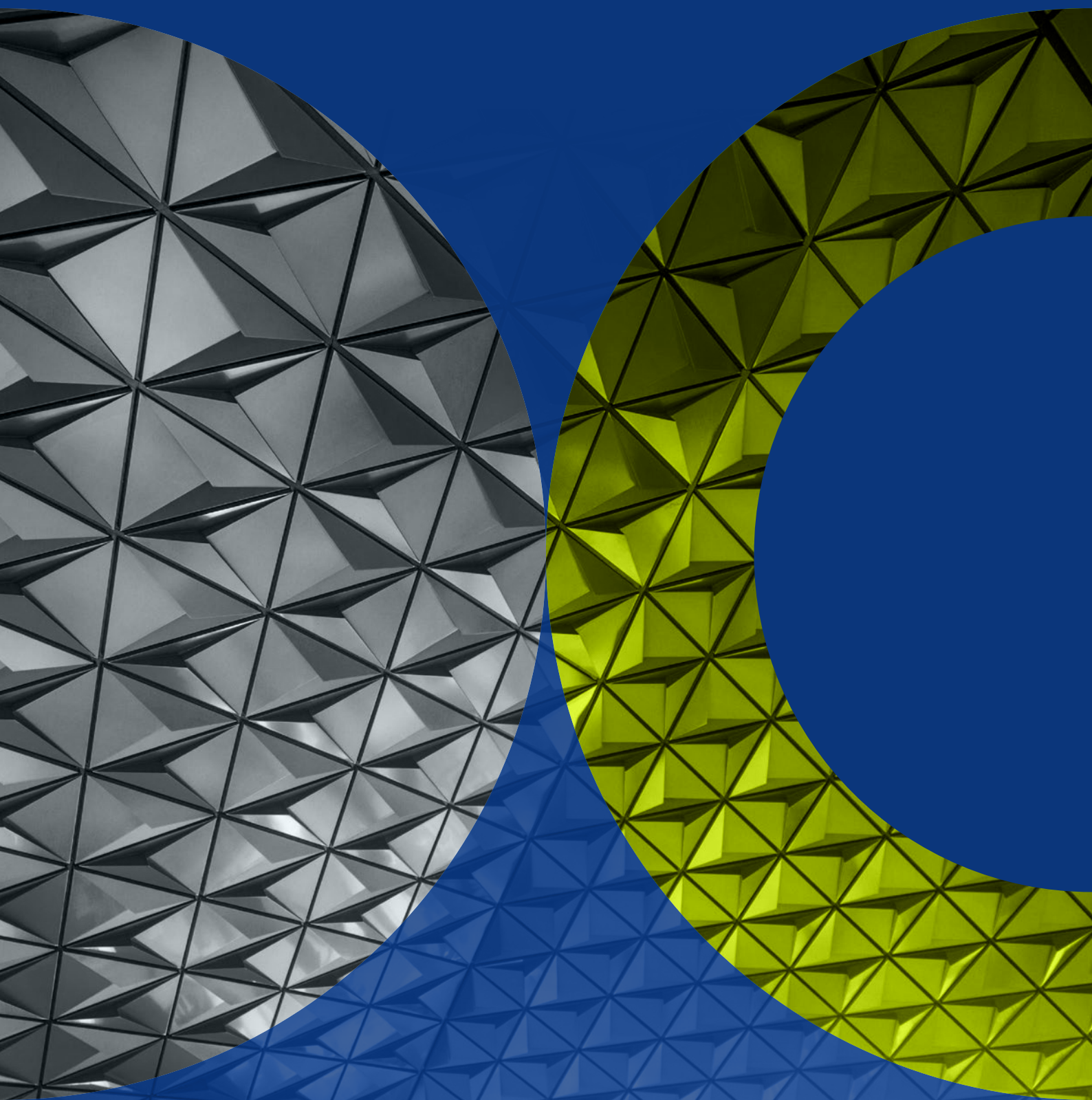


Report of the Review of the *Public Interest Disclosure Act 2012 (ACT)*

A report by Ian Govey AM





Acknowledgement of Country

The ACT Government acknowledges the Ngunnawal people as traditional custodians of the ACT and recognises any other people or families with connection to the lands of the ACT and region. I respect the Aboriginal and Torres Strait Islander people, and their continuing culture and contribution they make to the Canberra region and the life of our city.

Previous publications

Discussion Paper – (May 2023) available at <https://www.cmtedd.act.gov.au/office-of-industrial-relations-and-workforce-strategy/review-of-the-acts-integrity-commission-act-2018>

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Acronyms and abbreviations

Abbreviation	Meaning
2019 review	Review of the <i>Public Interest Disclosure Act 2012</i> conducted by PEG Consulting in 2019
ACAT	ACT Civil and Administrative Tribunal
ACTGS	ACT Government Solicitor Office
ACTPS	ACT Public Service
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1989</i> (ACT)
ATO	Australian Taxation Office
CC Act (Qld)	<i>Crime and Corruption Act 2001</i> (Qld)
CCM Act (WA)	<i>Corruption, Crime and Misconduct Act 2003</i> (WA)
CLEA	Criminal Law Enforcement Agency
CMTEDD	ACT Chief Minister, Treasury and Economic Development Directorate
Commission	ACT Integrity Commission
Commissioner	ACT Integrity Commissioner
DDG	Deputy Director-General
FOI Act	<i>Freedom of Information Act 2016</i> (ACT)
GNCA	Griffith/Narrabundah Community Association
HR Act	<i>Human Rights Act 2004</i>
IBAC	Independent Broad-based Anti-corruption Commission (Victoria)
ICAC (NT)	Independent Commissioner Against Corruption (Northern Territory)
ICAC (SA)	Independent Commission Against Corruption (South Australia)
IC Act	<i>Integrity Commission Act 2018</i>
ICAC Act (NT)	<i>Independent Commissioner Against Corruption Act 2017</i> (NT)
Inspector	Inspector of the ACT Integrity Commission
JACS	ACT Justice and Community Safety Directorate
MLA	Member of the ACT Legislative Assembly
NACC	Commonwealth National Anti-Corruption Commission
NACC Act	<i>National Anti-Corruption Commission Act 2022</i> (Cth)
Ombudsman Act	<i>Ombudsman Act 1989</i> (ACT)
PID	Public interest disclosure
PID Act	<i>Public Interest Disclosure Act 2012</i> (ACT)
PID Act (Cth)	<i>Public Interest Disclosure Act 2013</i> (Cth)
PSM Act	<i>Public Sector Management Act 1994</i> (ACT)
PSM Standards	<i>Public Sector Management Standards 2016</i> (ACT)
PSSC	Public Sector Standards Commissioner
SERBIR	Senior Executives Responsible for Business Integrity Risk
SLA	Suburban Land Agency
Speaker	Speaker of the ACT Legislative Assembly

Foreword

The Review of the *Public Interest Disclosure Act 2012* (ACT) (PID Act) was undertaken in accordance with the requirement in section 48 for the Act to be reviewed at the same time as the review of the *Integrity Commission Act 2018* (ACT) (IC Act). The contemporaneous nature of the two reviews by the same reviewer allowed a broad consideration of the ACT Public Sector (ACTPS) integrity framework.

The key considerations for the Review based on the terms of reference included the operation of the PID Act in relation to other reporting mechanisms for maladministration, and dangerous conduct threatening public health, or safety, or the environment, and whether the agreed recommendations of the 2019 PID Act review were met.

Stakeholders raised only a few significant issues arising from the current Public Interest Disclosure (PID) framework. The key issue raised was that the reporting process and requirements are complex and senior executives felt that staff understood them poorly. Reported PIDs average around 10 each year, which means public servant engagement with the PID process is rare. Feedback from ACTPS staff indicated a belief that most public servants would report matters using internal means other than through the formal PID framework, as they may not see the need for the formal protections, nor contemplate the public reporting options the framework provides.

The conclusions in the PID Act Review were heavily influenced by the findings of the IC Act Review in relation to the jurisdictional focus of the ACT Integrity Commission (the Commission). The Review of the IC Act recommended that the Commission should only investigate serious or systemic corrupt conduct (other than by Members of the ACT Legislative Assembly (MLAs) who are not covered by the same misconduct framework as other Public Officials under the *Public Sector Management Act 1994* (ACT)).

This Review considered that for the Commission to retain responsibility for PIDs would be inconsistent with the proposal to reduce the assessment, referral and oversight workload of the Commission, which directs resources away from investigating serious or systemic corrupt conduct and is misaligned with its extensive coercive powers. The Review has therefore concluded that the PID function should move from the Integrity Commissioner to the Public Sector Standards Commissioner (PSSC). It also concluded that the PID Act should require the PSSC to investigate a PID, rather than refer it back to an ACT Government agency. A PID that raises serious or systemic corruption issues would continue to be referred to the Commission.

The Review received feedback that the Commission assesses PIDs and generally refers them back to the ACTPS for investigation unless the matter involved corrupt conduct. This has led to disclosures being referred to the Integrity Commissioner for assessment, and then, after some considerable time, being referred back to the ACTPS for investigation. The intent of this arrangement was to give visibility of all integrity-related matters to the Commission. In practice, it has resulted in lengthy processing times before an investigation can commence.

This change would not be a return to the system of PIDs before the 2019 reform proposals were implemented. Under the new proposal, the PSSC would retain investigative responsibilities, with the right to engage external services as required. This would be an important difference from the previous operation of the legislation, and its current operation with the Commission, which is able to refer a matter back for investigation to the agency in which the report was made.

The Review concluded that the independence of the PSSC makes it more appropriate to foster trust in handling PID investigations than having agencies conduct their own investigations. Additionally, it would give the PSSC oversight of all workplace misconduct matters across the ACTPS, including those not reported as PIDs. The PSSC expertise in undertaking workplace misconduct investigations would make it the appropriate office to have this responsibility and would avoid any perception of a conflict of interest in having a directorate investigate possible misconduct by its officials. Given the recommended shift in PID responsibility and that the PSSC would undertake all investigations (where it has the requisite jurisdiction), the Review suggests that, should the Government adopt the recommendations, it should consider the need for additional resourcing for the PSSC to undertake the proposed functions.

The PSSC would not be the appropriate entity to investigate and address disclosable conduct of MLAs, their staff, officers of the Legislative Assembly, or the Clerk, the ACT Ombudsman, or the Integrity Commissioner. The Review has made specific recommendations for how PIDs relating to these people should be handled.

The Review has also made recommendations aimed at further enhancing accountability and encouraging whistleblowing. This includes minor amendments to the definition of disclosable conduct to recognise that some work-related grievances may be part of systemic maladministration. It also recommends placing mandatory timeframes on disclosure officers to assess disclosable conduct, and expanding protections in relation to whom a discloser may provide information in circumstances where disclosable conduct is not adequately addressed by government (the whistleblower protection).

In accordance with the terms of reference, the Review assessed whether the recommendations of the 2019 review of the PID Act were met. Most of the recommendations were implemented through the Public Interest Disclosure Amendment Bill 2020. In particular, the Bill implemented the recommendation to provide the Integrity Commissioner with responsibility and oversight of PIDs. Because of the Review's recommendation that PID responsibility revert to the PSSC, several of the 2019 review recommendations become redundant (should this Review's recommendation be agreed). However, the Review has provided a detailed analysis of the implementation of the 2019 review recommendations, and noted where recommendations remain relevant under the Review's proposed arrangements. This includes, for example, recommendations on the data that should be captured under PID annual reporting requirements.

The Review would like to acknowledge the assistance provided by the Review Secretariat within the Chief Minister, Treasury and Economic Development Directorate. The Secretariat, which included Chantel Potter, Christina Thompson, Julia Burns, Luke Janeczko, Rebecca Clark and Henry Gittleman, worked tirelessly to ensure the Review was informed by both research and stakeholder input.



Executive summary

Introduction (Chapter 1)

This report is a review of *Public Interest Disclosure Act 2012* (PID Act), made in accordance with section 48 of this Act. The review was conducted for the Chief Minister as the Minister responsible for the PID Act by Ian Govey AM with the assistance of an expert secretariat provided by the Chief Minister, Treasury and Economic Development Directorate. As required by section 48 of the PID Act it was undertaken at the same time as the review of the Integrity Commission Act made in accordance with section 303 of that Act.

Chapter 1 of the report provides background on the public interest disclosure (PID) regime, the frequency of reporting, and the background to and conduct of this Review.

The rest of the Executive summary provides a brief overview of the issues considered and the 39 recommendations made. (The numbering used in subheadings aligns with chapter numbering in the report.)

Responsibility under the PID Act (Chapter 2)

2.1 Who is responsible for public interest disclosures?

This Review considered whether the benefits of placing responsibility for PIDs with the Integrity Commissioner, as anticipated in the 2019 review, had been achieved. In practice under this arrangement, the Commission refers PIDs back to the ACT Public Service (ACTPS) for investigation unless the conduct involves corrupt conduct. The Review found that moving responsibility for investigating PIDs to the Public Sector Standards Commissioner (PSSC) would be more efficient and align with the recommended changes to the *Integrity Commission Act 2018* (ACT) (IC Act). The Review concluded that this would enable the Commission to focus on investigating serious and systemic corrupt conduct. It proposed that the related functions for oversight, conducting reviews, making guidelines and procedures, and reporting should also move to the PSSC. In addition, the Review proposed different arrangements for handling PIDs relating to officers of the Legislative Assembly.

RECOMMENDATION 1

The Review recommends the PID Act be amended to provide that the PSSC be given responsibility to determine whether disclosable conduct is a PID under Part 3 of the PID Act (maintaining the process whereby a disclosure officer may receive a disclosure and make an initial assessment).

RECOMMENDATION 2

The Review recommends the PID Act be amended to provide that the PSSC is the only entity that may investigate a PID (allowing for the use of independent external services) with exceptions for PIDs relating to:

- i. The Integrity Commissioner (and their staff) – which must be referred to the Inspector of the Integrity Commission for investigation.
- ii. The ACT Ombudsman (and staff), the Auditor-General (and staff) and the Electoral Commissioner (and staff) – which, as officers of the Legislative Assembly, must be referred to the Speaker, who must appoint a special investigator.
- iii. A Member of the ACT Legislative Assembly (MLA) (and staff)– which must be referred to the Legislative Assembly Commissioner for Standards for investigation.
- iv. The Clerk of the Assembly –which must be referred to the Speaker of the Assembly, who must appoint a special investigator.
- v. The PSSC (and staff) – which must be referred to the ACT Ombudsman for investigation.

RECOMMENDATION 3

The Review recommends that the PID Act be amended to provide the general oversight functions under section 28, currently allocated to the Integrity Commissioner, to the PSSC.

RECOMMENDATION 4

The Review recommends that the PID Act be amended to provide the PSSC with the function of reviewing PID decisions currently allocated to the Integrity Commissioner under section 29 of the PID Act.

RECOMMENDATION 5

The Review recommends that the PID Act be amended to transfer the requirement under sections 32 and 33 to publish guidelines and procedures from the Integrity Commissioner to the PSSC.

RECOMMENDATION 6

The Review recommends that the PID Act be amended to transfer annual reporting functions, currently allocated to the Integrity Commissioner under section 45 of the PID Act, to the PSSC.

Note: Several of the reporting functions would need to change if the PSSC carried out most investigations.

2.2 Consideration of a single legislative scheme

The Review considered the merits of combining the PID Act and the IC Act. The Review concluded that the PID Act and the IC Act have separate and distinct purposes, and should remain separate.

RECOMMENDATION 7

The Review recommends that the PID Act and IC Act remain separate.

2.3 Oversight of the PSSC and other PID investigations

The Review considered possible oversight arrangements for the Review's proposed PID framework. The Review found that the ACT Ombudsman's existing oversight role under the PID Act is fit for purpose and should be retained as an oversight mechanism of the PSSC.

RECOMMENDATION 8

The Review recommends retaining the ACT Ombudsman's role under the PID Act to oversee the PSSC in undertaking PID functions.

2.4 Head of public sector entity functions

The Review considered the requirement in the PID Act for a head of a public sector entity to address and prevent disclosable conduct that is occurring, is likely to occur, or has occurred. The Review found that the PID Act is ambiguous on how the head of a public sector entity may find out about the disclosable conduct given it may not be reported, or disclosed to them. The Review concluded that the PID Act should require the PSSC to inform the head of a public sector entity about a PID in their entity in order for the head of entity to meet their legislative obligations. The Review also made recommendations on whom the disclosure must be provided to if the disclosable conduct involves the head of a public sector entity, or certain other officials.

RECOMMENDATION 9

The Review recommends that the PID Act be amended to require the PSSC to inform the head of the public sector entity where disclosable conduct is determined to be a PID.

RECOMMENDATION 10

The Review recommends that the PID Act be amended to require the relevant head of public sector entity to take action in relation to a PID under section 24(1)(a) of the PID Act, and to inform the discloser and the PSSC about the action taken.

RECOMMENDATION 11

The Review recommends that the PID Act be amended to require that if the relevant head of public sector entity decides no action is needed, they must inform both the PSSC and the discloser. This amendment should include that the head of public sector entity may revisit this decision whilst the PSSC undertakes its investigation.

RECOMMENDATION 12

The Review recommends that the PID Act be amended to require, where the disclosable conduct involves the following people, that the PSSC inform the specified entities to perform the responsibilities that would otherwise be executed by the head of entity:

- i. A director-general – PSSC informs the Head of Service.
- ii. The Head of Service – PSSC informs the Chief Minister.
- iii. Person responsible for managing the affairs of a Territory authority – PSSC informs the responsible minister.
- iv. Person responsible for managing the affairs of a Territory-owned corporation – PSSC informs the responsible minister.
- v. Person responsible for managing the affairs of a Territory instrumentality – PSSC informs the responsible minister.
- vi. Statutory office holder – PSSC informs the person responsible for appointing the statutory office holder.
- vii. Clerk of the Assembly – PSSC informs the Speaker of the Assembly.
- viii. An MLA staff member – PSSC informs Legislative Assembly Commissioner for Standards who shall advise either:
 - a. the Employing MLA, or
 - b. if the PID raises a conflict of interest, or the Commissioner otherwise deems it more appropriate;
 - I. the leader of the employing MLA's party, or
 - II. the Chief Minister's office if the employing MLA is a member of the executive.
- ix. An MLA – PSSC informs the leader of their registered party.

RECOMMENDATION 13

The Review recommends that the PID Act be amended so that in the case of disclosable conduct of a leader of a registered party, or an independent MLA, no action may be taken until the Commissioner for Standards has completed an investigation and tabled a report in the Legislative Assembly.

PID assessment and investigations (Chapter 3)

3.1 What is ‘disclosable conduct’?

The Review considered the scope of disclosable conduct and the matters that should be dealt with as PIDs, taking into account the position in other jurisdictions. The Review found the definition was largely appropriate, but that it could be improved to recognise that work-related grievances may also be indicative of systemic maladministration. The Review also considered that the PSSC should promote education and training across the ACTPS to inform public servants about the appropriate avenues to pursue allegations of improper behaviour, including PIDs.

RECOMMENDATION 14

The Review recommends that the PID Act be amended to broaden the definition of ‘maladministration’ in section 8 to include systemic as well as substantial maladministration.

RECOMMENDATION 15

The Review recommends that the PID Act be amended to include personal work-related grievances as disclosable conduct, where it is reasonably suspected to identify a systemic practice of maladministration.

RECOMMENDATION 16

The Review recommends that the PSSC provide education to all public sector members about what constitutes disclosable conduct, and how disclosable conduct interacts with other integrity frameworks, such as misconduct and corrupt conduct.

3.2 Assessing disclosable conduct – disclosure officer

The Review considered the requirements placed on a disclosure officer to determine if there were any gaps in the PID Act that could lead to adverse consequences. The Review found that there is scope to streamline the PID process. This should be done by placing a timeframe for a disclosure officer to assess a disclosure, requiring a disclosure officer to notify a person when a disclosure is not considered disclosable conduct and enabling disclosure officers to receive PIDs from other ACTPS entities. The Review also assessed conflict of interest disclosure requirements across the ACTPS and concluded these are sufficient. Finally, the Review noted there would be benefit in clarifying that a person may provide a disclosure to a disclosure officer in another administrative unit outside of their area of employment.

RECOMMENDATION 17

The Review recommends that the PID Act be amended to provide a reasonable timeframe, such as 14 days, for the disclosure officer to assess and decide whether the matter falls within the definition of disclosable conduct. The Act should provide that if the timeframe is not met, the discloser may provide the disclosure directly to the PSSC and inform the PSSC the timeframe was not met. The PSSC must then inform the disclosure officer's immediate manager.

RECOMMENDATION 18

The Review recommends that the PID Act be amended to require a disclosure officer to notify the discloser where they have decided that the disclosure is not a PID and to provide reasons for that decision.

RECOMMENDATION 19

The Review recommends that the PID Act be amended to make clear that any disclosure officer nominated by the head of an ACTPS entity may receive a disclosure about any other ACTPS entity.

RECOMMENDATION 20

The Review recommends that no amendment to the PID Act is needed to require a disclosure officer to declare a conflict of interest under this Act.

3.3 Seeking review of decisions about disclosable conduct

The Review considered the merits of internal and external review of decisions about disclosable conduct. Currently, under the PID Act, the only means to review a decision about disclosable conduct is through the *Administrative Decisions (Judicial Review) Act 1989* (ACT). The Review concluded that an ability to seek review would enhance oversight and promote public confidence in decisions and outcomes under the PID Act.

RECOMMENDATION 21

The Review recommends that the PID Act be amended to allow a discloser to seek internal review of a decision by another disclosure officer that disclosable conduct is not a PID. In such a case, the discloser must alert the new disclosure officer to the first disclosure officer's decision.

3.4 Directing matters to a more appropriate entity

The Review considered the referral pathways in the PID Act to ensure that disclosable conduct that may also be 'misconduct' under the *Public Sector Management Act 1994* (ACT) (PSM Act) or 'corrupt conduct' under the IC Act may be referred and investigated under the most appropriate legislative framework. The Review concluded there is legislative authority for the PSSC to refer a PID to the Commission, or to treat it as misconduct if an alternative framework is more appropriate. The Review concluded that the Act should provide for the PSSC to refer matters meeting the corrupt conduct threshold under section 9 of the IC Act to the Commission if there is uncertainty as to their seriousness or systemic nature (noting the PSSC still has a mandatory obligation under section 62 of the IC Act to refer conduct that is reasonably believed to be serious or systemic corrupt conduct). The Review also concluded that protections for matters referred under different processes by the PSSC should still vest with the discloser, and they should be notified of a referral to other entities or processes, such as a misconduct process or to the Commission.

RECOMMENDATION 22

The Review recommends that the PID Act be amended so that, if the PSSC considers that disclosable conduct meets the requirements to be a PID, but also considers the matter is more appropriately dealt with by other means (such as referral to ACT Policing, the ACT Integrity Commission, or dealt with as misconduct), the PSSC may refer the matter to that more appropriate entity so that it may investigate the matter outside the PID Act.

RECOMMENDATION 23

The Review recommends that, if the PSSC refers disclosable conduct that is a PID to be dealt with in what is considered a more appropriate way:

- i. the PSSC must inform the discloser (if known) of the referral and provide the relevant contact details of the entity to which the disclosable conduct has been referred, and
- ii. the discloser retains protections available under the PID Act.

Outcomes of an investigation (Chapter 4)

4.1 Ending a PID investigation

The Review considered the PID Act's provisions that authorise the ceasing of an investigation to determine if there was scope for a public sector entity to end an investigation prematurely. The Review found that, given its recommendation that the PSSC undertake most PID investigations, and all those relating to the public service, any concern that this might occur would be largely avoided.

RECOMMENDATION 24

The Review recommends that the existing mechanisms for ending an investigation under section 20(2)(d) of the PID Act be retained with consequential amendments in relation to other recommendations.

4.2 Outcome of a PID investigation

The Review considered the adequacy of the PID Act provisions for dealing with closure of investigations and taking appropriate action as required. The Review found that only minor amendments are required to reflect the proposed role of the PSSC and relevant investigating entities as the only entities authorised to conduct an investigation under the PID Act.

RECOMMENDATION 25

The Review recommends that existing requirements to keep a discloser informed under section 23 of the PID Act be retained, but applied as appropriate to the investigating entity.

RECOMMENDATION 26

The Review recommends that the PID Act be amended to require the investigating entity to inform the relevant head of public sector entity about the outcome of a completed investigation.

RECOMMENDATION 27

The Review recommends that existing requirements for the head of a public sector entity to discipline any person responsible for the disclosable conduct under section 24(1)(b) of the PID Act be retained under the new clarified arrangements for heads of entity.

RECOMMENDATION 28

The Review recommends the PID Act be amended so that where the disclosable conduct involves the head of a public sector entity, the entities outlined in Recommendation 12 are responsible for undertaking the disciplinary action.

Protections and immunities (Chapter 5)

5.1 Point of application of privilege and immunity

The Review considered the most appropriate point in time for a discloser to receive the immunities and protections under the PID Act. Currently the protections are enlivened once the Integrity Commissioner considers the disclosable conduct is a PID. This may deter people from making a disclosure, particularly if release of confidential information is required to support the disclosure. If the disclosure is not considered a PID, then that discloser may be subject to a criminal offence for disclosing confidential information. The Review undertook an analysis to understand approaches in other jurisdictions. The Review concluded that privileges and immunities should commence at the point where a person makes a disclosure to a disclosure officer. This would align the Territory with all jurisdictions and may facilitate more disclosures.

RECOMMENDATION 29

The Review recommends that the PID Act be amended to apply immunities and protections from the time a person makes a disclosure to a disclosure officer.

5.2 Disclosure of PIDs and disclosable conduct

The Review considered the options available to a discloser where it is apparent that no action is being taken to address disclosable conduct. The Review concluded it is appropriate for a discloser to provide information to a journalist or MLA under the current circumstances set out in the PID Act. However, the Review found that the entities to which the discloser may provide information could be broadened to include certain community and non-government organisations that have a role related to the disclosable conduct (such as the RSPCA for disclosable conduct concerning animal cruelty).

The Review considered whether the offence against disclosing protected information should apply to MLAs or journalists who receive disclosable conduct. The disclosure offences do not apply to MLAs and journalists as they are not a prescribed category of people to whom the offence applies. In addition, the offence provision has an exception that the offence does not apply if the information is used or divulged under the PID Act or another Territory law.¹ An MLA or journalist would receive information authorised under Part 5 of the PID Act. The policy intent provides a safeguard and motivating purpose for the responsible entity to deal with disclosable conduct and PIDs. The Review considers that applying the disclosure offence to MLAs and journalists would be contrary to the policy intent of allowing such disclosure under the PID Act by restricting their ability to act on information when the required conditions are met. The Review also found that technical amendments should be made to provide additional clarity, such as defining 'journalists', and clarifying that a discloser loses protections if they knowingly provide false or misleading information to a journalist or MLA.

¹ *Public Interest Disclosure Act 2012 (ACT)* s 44(3)(a).

RECOMMENDATION 30

The Review recommends that no amendment be made to the PID Act to apply section 44 (offences – use or divulge protected information) to MLAs and journalists.

RECOMMENDATION 31

The Review recommends that the PID Act be amended to define a ‘journalist’ to be consistent with the definition of ‘journalist’ and ‘news medium’ in section 126J of the *Evidence Act 2011 (ACT)*.

RECOMMENDATION 32

The Review recommends that section 37(1)(a) of the PID Act be amended to remove protections for a discloser who has knowingly provided false or misleading information about their disclosure, or part of their disclosure, to any person (and not only to a person investigating the disclosure).

RECOMMENDATION 33

The Review recommends that the PID Act be amended to allow a discloser to disclose disclosable conduct to an entity that is authorised to receive the disclosable conduct under a regulation made by the Minister responsible for the PID Act (in addition to current authorised disclosures to a journalist or MLA).

Broader reforms and future review (Chapter 6)

6.1 Disclosing information obtained under the PID Act

It is not clear if the existing offence provisions for disclosing ‘protected information’ meet the Assembly’s intent as to what information must be protected under the PID Act. The Review has recommended the definition of protected information be expanded to include information about disclosable conduct. The Review also considered the PID Act’s information disclosure provisions and concluded that a more flexible approach to the sharing of information by PSSC would be desirable. It is reasonably foreseeable that a PID investigation could uncover information that may be useful to another public sector agency or require immediate attention and dissemination. This includes matters where there may be a real threat of harm or danger to an individual, and where information may assist other public sector agencies to undertake their role.

RECOMMENDATION 34

The Review recommends that the PID Act definition of ‘protected information’ be amended to include information about ‘disclosable conduct’.

RECOMMENDATION 35

The Review recommends that the PID Act be amended to enable the PSSC to disclose information to any person or entity if the information shows there is an immediate risk to the physical safety or wellbeing of a person that can be avoided by the disclosure.

RECOMMENDATION 36

The Review recommends that the PID Act be amended to allow the responsible Minister to make a regulation that would prescribe entities to which the PSSC may disclose information.

6.2 Technical amendment – section 27A(1)(b)

As currently written, section 27A(1)(b) lists three criteria that need to be met to allow a discloser to give the PID information to a journalist or MLA. It is intended and appropriate that all three criteria must be met. However, the wording lacks a conjunction between the criterion to make this clear. Due to the potentially ambiguous wording, it may be incorrectly interpreted that only one of the criteria under subsection (1)(b) needs to be satisfied. The Integrity Commissioner supports this clarification.

RECOMMENDATION 37

The Review recommends that section 27A(1)(b) of the PID Act be amended to make it clear that all three criteria in the section need to be met.

6.3 Outcomes of the 2019 review

The 2019 review made 35 recommendations, most of which the ACT Government addressed through the Public Interest Disclosure Amendment Bill 2020. The Review has prepared a table that outlines if whether recommendations were met, and how the recommendations may be affected by the recommendations of this Review. The Review has identified where a 2019 recommendation may still be considered by the ACT Government under arrangements where the PSSC has PID responsibility.

RECOMMENDATION 38

The Review recommends that, in line with the recommendations of the 2019 review (see row 25 and 26 of Table 8, section 45 of the PID Act be amended to give responsibility to the PSSC for the following data collation and reporting requirements:

- i. numbers of reports from each agency, to allow observation of trends and targeted education and engagement
- ii. which part of the definition of ‘disclosable conduct’ under section 8 of the PID Act each report falls under
- iii. how many reports were made anonymously, or by an ACTPS member, or an external third party, and
- iv. how often training was taken up and numbers of people who attended.

RECOMMENDATION 39

The Review recommends that, in line with the recommendation of the 2019 review (see row 29 of Table 8), section 33 of the PID Act be amended to require that public sector agencies apply the procedures issued by the PSSC under that section, but that the PSSC be authorised to approve alternative procedures for specific agencies where appropriate.



Chapter 1 – Introduction

1.1 About public interest disclosures

The PID Act is a key component of the ACT Government’s integrity framework. It is intended to encourage reporting of ‘disclosable conduct’ by providing protection and immunity to ‘whistleblowers’ and assurance that their claims will be assessed and appropriately acted on. Under the PID Act, any person may make a disclosure.

The current PID Act commenced in 2013 and replaced previous public interest disclosure legislation in the Territory. The PID Act was heavily influenced by *Whistling While They Work*² – a guide published about a four-year study into how public sector organisations can better fulfil their missions, maintain their integrity and value their employees by adopting a proactive approach to whistleblowing.³

Section 6 of the PID Act outlines its object is to promote trust in government by:

- providing a way for people to report disclosable conduct
- ensuring people who make public interest disclosures (PIDs) are protected and treated respectfully
- ensuring PIDs are properly investigated and dealt with, and
- ensuring appropriate consideration is given to the interests of people who make PIDs and the people who are the subject of the disclosures.⁴

All states and territories within Australia currently have some form of legislation to encourage whistleblowing by providing a framework to make disclosures and affording protections.

Under the PID Act, ‘disclosable conduct’ is defined as an action or policy, practice or procedure of a public sector entity, or public official for a public sector entity, that is maladministration, or results in a substantial and specific danger to public health or safety, or the environment.⁵

‘Maladministration’ means conduct or a policy, practice or procedure that:

- results in a substantial mismanagement of public resources or public funds, or
- involves substantial mismanagement in the performance of official functions.⁶

A public sector entity includes an ACT Legislative Assembly entity (such as Members of the Legislative Assembly (MLAs) and their staff, and members of the Office of the Legislative Assembly), ACT Public Sector entities (such as the ACT Public Service (ACTPS), statutory office holders, Territory authorities, and Territory-owned corporations), and entities prescribed by regulation.⁷

To be considered a PID, the report about disclosable conduct must meet the additional requirements that it is disclosed in the public interest and not frivolous or vexatious.⁸

² Peter Roberts, AJ Brown, Janne Olsen, *Whistling while they work*, Australian National University, 2011, <https://press-files.anu.edu.au/downloads/press/p144611/pdf/book.pdf>.

³ Legislative Assembly for the ACT, ‘Debates – Weekly Hansard, Seventh Assembly: 7 June 2012’, p 2799, <https://www.hansard.act.gov.au/hansard/7th-assembly/2012/PDF/20120607.pdf>.

⁴ *Public Interest Disclosure Act 2012* (ACT) s 6.

⁵ *Public Interest Disclosure Act 2012* (ACT) s 8.

⁶ *Public Interest Disclosure Act 2012* (ACT) s 8(3).

⁷ *Public Interest Disclosure Act 2012* (ACT) s 9.

⁸ *Public Interest Disclosure Act 2012* (ACT) s 17A.

When a matter is determined to be a PID, the person making the disclosure attracts the protections of the PID Act, which includes immunity from civil and criminal liability for the making of the disclosure and protecting them from any retribution, reprisal, or retaliatory actions to which they might be exposed by making the report. The PID Act makes it an offence to take detrimental action against a person because of a PID. The prohibited detrimental actions include:

- discriminating against a person by treating, or proposing to treat, the person unfavourably in relation to the person’s reputation, career, profession, employment or trade
- harassing or intimidating a person
- injuring a person, or
- damaging a person’s property.⁹

The scheme is designed to allow whistleblowers a pathway to publicly report PIDs to MLAs and journalists without facing criminal liability.

The PID Act sets out procedures for reporting disclosable conduct and how these should be dealt with in terms of investigations and outcomes. The Integrity Commissioner, who has the oversight function under the PID Act, has issued guidelines to assist public sector entities in dealing with reports of wrongdoing which may be PIDs, how disclosures must be investigated and how disclosers are to be protected.

1.2 Frequency of reporting

Table 1 provides the numbers of disclosures received and assessed since the Integrity Commissioner was given responsibility for PIDs.

Table 1: Numbers of disclosures received and assessed

Year	Disclosures received	Assessed as not a PID	Assessed as corruption	Assessed as a PID	Referred for investigation
2020–21	6	4	1	1	0
2021–22	17	3	6	2	2
2022–23	8	9*	0	4	4

*six of the matters assessed were from 2021–22.

Note: The Integrity Commission has reported that three matters from 2022–23 remained unassessed as at 1 July 2023.

⁹ *Public Interest Disclosure Act 2012 (ACT) Pt 7.*

1.3 Review of the PID Act by PEG Consulting

On 3 April 2019, the ACT Legislative Assembly passed a resolution in relation to an independent review of the PID Act, taking into consideration relevant provisions of the recently adopted *Integrity Commission Act 2018* (ACT) (IC Act). PEG Consulting was engaged on 6 May 2019 to conduct that review (the 2019 review). A key aspect of the 2019 review was to consider the interrelationships between existing integrity agencies in the Territory and the new Integrity Commission, including the sharing of information and the referral of complaints, oversight, accountability mechanisms, and identifying gaps in the framework.

The 2019 review made 35 recommendations, most of which the ACT Government accepted and implemented through the Public Interest Disclosure Amendment Bill 2020 (ACT) (the 2020 amendments). One of the more significant changes adopted was transferring the functions under the Act previously held by the PSSC to the Integrity Commissioner.

Under the amended PID Act, the Integrity Commissioner assumed responsibility to receive and assess disclosures, determine if disclosures are accepted as a PID under the Act, and if so, investigate the disclosure or refer the matter to another entity for investigation.

In their oversight role, the Integrity Commissioner can monitor and review how public sector entities deal with disclosures of disclosable conduct. The Integrity Commissioner has the authority to amend, set aside and substitute any decision or action taken by a public sector entity in relation to disclosable conduct that is the subject of a PID.

One of the 2019 review recommendations adopted by amendment to the PID Act was that provision be made for a statutory review of the PID Act to be aligned with the statutory review of the IC Act, due to their perceived interrelationship. Section 48 of the PID Act now provides that the Minister, in consultation with the Speaker of the Assembly, must review the PID Act at the same time as the review of the IC Act.

1.4 The Review

On 12 January 2023, Chief Minister Andrew Barr MLA announced that Mr Ian Govey AM was to conduct the first review of the IC Act. The review of the IC Act was in accordance with section 303 of the IC Act, requiring the responsible Minister, in consultation with the Speaker, to review the operation of the IC Act as soon as practicable three years after the commencement. The Chief Minister holds portfolio responsibility for integrity policy and is therefore the responsible Minister.

Given that Mr Govey was conducting a review of the IC Act, the Chief Minister, after consultation with the Speaker, also appointed Mr Govey to undertake the review of the PID Act.

The Chief Minister and the Speaker approved terms of reference for the statutory review of the PID Act:

- The reviewer is to review and inquire into:
 - the operation of the PID Act in relation to other reporting mechanisms for maladministration, and dangerous conduct threatening public health, or safety, or the environment in the Australian Capital Territory
 - whether the recommendations of the 2019 PID Act review as agreed by Government were met, and
 - any other matter the reviewer considers pertinent.

In undertaking the Review, Mr Govey was supported by the IC Act Review Secretariat (the Secretariat) from the Professional Standards Unit, Chief Minister, Treasury and Economic Development Directorate (CMTEDD). The Secretariat assisted Mr Govey in consulting with stakeholders both externally and within the ACTPS, and in preparing a draft of this report.

The Secretariat invited a broad range of internal and external stakeholders to provide a written submission. The terms of reference were also distributed.

The Review held meetings with key stakeholders, including:

- Commissioner, The Hon. Michael Adams KC
- CEO of the Commission, Judy Lind
- Commission Inspector, Iain Anderson
- Speaker of the ACT Legislative Assembly, Joy Burch MLA
- Legislative Assembly Commissioner for Standards, the Hon. Ken Crispin KC
- Legislative Assembly Ethics and Integrity Adviser, Stephen Skehill AO
- Clerk of the ACT Legislative Assembly, Tom Duncan
- ACT Public Sector Standards Commissioner, Ian McPhee AO PSM
- ACT Attorney-General and leader of the ACT Greens, Shane Rattenbury MLA
- Leader of the ACT Liberals, Elizabeth Lee MLA
- Chair of the JACS Standing Committee, Peter Cain MLA
- ACT Legislative Assembly Standing Committee on Justice and Community Safety
- Chief Police Officer (ACT Policing), Deputy Commissioner (Australian Federal Police), Neil Gaughan APM
- ACT Human Rights Commissioner (former), Helen Watchirs OAM
- CEO of Legal Aid Commission ACT, John Boersig
- ACT Government Senior Executives, including Director-General of the Justice and Community Safety Directorate, Richard Glenn; ACT Solicitor-General, Peter Garrison AM SC; Commissioner of ACT Corrective Services, Ray Johnson; and a group of Senior Executives Responsible for Business Integrity Risk (SERBIRs), and
- the Griffith and Narrabundah Community Association and Inner South Canberra Community Council; and the Australian Nursing and Midwifery Federation.

The Review developed a website to provide members of the community with key information about the status and progress of the Review.¹⁰ The website provides links to the terms of reference, the discussion paper prepared by the Review, and the submissions received by the Review.

As part of the Review's engagement with the community, a discussion paper was developed to seek stakeholder input on key issues arising in relation to the PID framework, and set out some options for how they might be resolved. The Review was especially interested in stakeholder feedback on the experience of placing PID responsibility with the Integrity Commissioner.

In total, including material received both before and in response to the discussion papers, the Review received nine submissions (including some supplementary submissions). Where requested, the confidentiality of a submission has been respected in the Review's report. The Review consulted with the authors of submissions prior to publication of any part of a submission. Submissions, with permission, are on the Review website and extracts on relevant issues are provided throughout the report.

The Review also received informal submissions from interested stakeholders, including several SERBIRs.

The Secretariat also conducted research into the legislative and process frameworks in other Australian jurisdictions.

¹⁰ See <https://www.cmtedd.act.gov.au/office-of-industrial-relations-and-workforce-strategy/review-of-the-acts-integrity-commission-act-2018>.



Chapter 2 – **Responsibility under the PID Act**

2.1 Who is responsible for public interest disclosures?

RECOMMENDATION 1

The Review recommends the PID Act be amended to provide that the PSSC be given responsibility to determine whether disclosable conduct is a PID under Part 3 of the PID Act (maintaining the process whereby a disclosure officer may receive a disclosure and make an initial assessment).

RECOMMENDATION 2

The Review recommends the PID Act be amended to provide that the PSSC is the only entity that may investigate a PID (allowing for the use of independent external services) with exceptions for PIDs relating to:

- i. The Integrity Commissioner (and their staff) – which must be referred to the Inspector of the Integrity Commission for investigation.
- ii. The ACT Ombudsman (and staff), the Auditor-General (and staff) and the Electoral Commissioner (and staff) – which, as officers of the Legislative Assembly, must be referred to the Speaker, who must appoint a special investigator.
- iii. A Member of the ACT Legislative Assembly (MLA) (and staff)– which must be referred to the Legislative Assembly Commissioner for Standards for investigation.
- iv. The Clerk of the Assembly –which must be referred to the Speaker of the Assembly, who must appoint a special investigator.
- v. The PSSC (and staff) – which must be referred to the ACT Ombudsman for investigation.

RECOMMENDATION 3

The Review recommends that the PID Act be amended to provide the general oversight functions under section 28, currently allocated to the Integrity Commissioner, to the PSSC.

RECOMMENDATION 4

The Review recommends that the PID Act be amended to provide the PSSC with the function of reviewing PID decisions currently allocated to the Integrity Commissioner under section 29 of the PID Act.

RECOMMENDATION 5

The Review recommends that the PID Act be amended to transfer the requirement under sections 32 and 33 to publish guidelines and procedures from the Integrity Commissioner to the PSSC.

RECOMMENDATION 6

The Review recommends that the PID Act be amended to transfer annual reporting functions, currently allocated to the Integrity Commissioner under section 45 of the PID Act, to the PSSC.

Note: Several of the reporting functions would need to change if the PSSC carried out most investigations.

Background

Following the 2020 amendments, the *Public Interest Disclosure Act 2012* (ACT) (PID Act) places central responsibility and oversight of PIDs with the Integrity Commissioner. Under this model, the Integrity Commissioner can investigate the matter, but also has discretion to refer PIDs to public sector entities for investigation, whilst retaining oversight of the outcome, and authority to substitute decisions if not satisfied with the outcome. This model is adopted by most jurisdictions, except for Victoria and the Northern Territory, which authorise their anticorruption commissions to investigate PIDs as if they were corruption reports using covert and coercive powers. In the ACT, if the Integrity Commissioner investigates a PID it must be under the PID Act, which does not have the same covert and coercive powers as in the *Integrity Commission Act 2018* (ACT) (IC Act).

The Integrity Commissioner must receive all disclosures under the PID Act where, after an initial assessment by a disclosure officer, the disclosure officer considers the disclosure is about disclosable conduct and disclosed in good faith. The Integrity Commissioner is then the ultimate decision-maker on whether the disclosable conduct is a PID.¹¹ If the Integrity Commissioner decides that the disclosable conduct is a PID, they must investigate the disclosure themselves if it relates to a legislative assembly entity, or, if the disclosure relates to an ACT Public Sector (ACTPS) entity, must:

- investigate the disclosure themselves, or
- refer the disclosure to either the head of a public sector entity, the Head of Service, the ACT Ombudsman, or the Public Sector Standards Commissioner (PSSC) for investigation.¹²

The Review understands that, to date, the Integrity Commissioner has retained investigation for PIDs that could involve corrupt conduct and referred other PIDs to the Head of Service or PSSC.

If the Commission has referred a PID for investigation, the person to whom the PID was referred must tell the Integrity Commissioner about:

- the progress and outcome of an investigation
- if the PID was referred to the Chief Police Officer under section 21 of the PID Act¹³
- any action taken, or proposed to be taken, in relation to the disclosable conduct that is the subject of the disclosure
- a decision to end the investigation of the disclosure, and
 - the grounds of that decision
 - the reasons for making the decision on those grounds, and
 - if it was ended because there was a more appropriate way to deal with the disclosure, how the disclosure was otherwise dealt with.¹⁴

The Integrity Commissioner may, at any time, review a decision by another investigating entity to end its investigation of a PID, and an action taken, or proposed to be taken, by a public sector entity in relation to disclosable conduct that is the subject of a PID. After reviewing a decision, the Integrity Commissioner may amend the decision, set aside the decision and substitute a new decision, or take no action.¹⁵

The Integrity Commissioner may also give a report to the Minister about a public sector entity's PID procedures, or how a disclosable conduct or a PID is dealt with by a public sector entity.¹⁶

¹¹ *Public Interest Disclosure Act 2012* (ACT) s 17A, 17B.

¹² *Public Interest Disclosure Act 2012* (ACT) s 19.

¹³ Section 21 of the *Public Interest Disclosure Act 2012* (ACT) requires an investigating entity for a PID to refer the disclosure to the Chief Police Officer if satisfied on reasonable grounds that the disclosable conduct that is the subject of the disclosure involves, or could involve, is an offence.

¹⁴ *Public Interest Disclosure Act 2012*(ACT) s 25.

¹⁵ *Public Interest Disclosure Act 2012* (ACT) s 29.

¹⁶ *Public Interest Disclosure Act 2012* (ACT) s 30.

The Integrity Commissioner must also prepare guidelines about:

- the way investigating entities investigate PIDs
- the way in which public sector entities deal with disclosures of disclosable conduct and PIDs, and
- the way MLAs are to deal with:
 - disclosures of disclosable conduct made under section 27 of the PID Act, and
 - PID made under section 27A of the PID Act.¹⁷

The Integrity Commissioner has published guidelines for managing disclosures and conducting investigations, including the *Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021*, and the *Public Interest Disclosure (Integrity Commission – Handling Public Interest Disclosures as a Member of the Legislative Assembly) Guidelines 2021*.¹⁸

The Integrity Commissioner also undertakes education and training programs for the ACTPS about disclosures of disclosable conduct and PIDs.¹⁹

The Integrity Commissioner position is established under the IC Act, and its functions include assessment, investigation and prevention of corrupt conduct, with a requirement to prioritise the investigation of serious and systemic corrupt conduct.²⁰ Under the IC Act, the Integrity Commission has extensive powers to investigate suspected corrupt conduct, including intrusive and coercive powers to acquire evidence.

Policy rationale for the current arrangements

The current arrangements were recommended by the 2019 review. The 2019 review emphasised the upcoming commencement of the Integrity Commission and the role of the Integrity Commissioner, and suggested that the Commission would be a pre-eminent body of the integrity framework. In light of this, the 2019 review concluded that any matters, including PIDs, that may come within the jurisdiction of the Integrity Commissioner should be reported to it.²¹

The 2019 review recognised that this proposed model (which was subsequently implemented) could see some matters initially being referred to the Integrity Commissioner that were not serious and systemic corrupt conduct. The 2019 review considered this would have a low impact, as the Integrity Commissioner would have the ability to dismiss matters or refer them to other agencies.²²

Other Territory options to oversight PIDs

The Review has considered two entities in the Territory that may be appropriate to undertake an oversight role for PIDs (besides the Integrity Commissioner).

Public Sector Standards Commissioner

The PSSC is an independent statutory officer appointed under the *Public Sector Management Act 1994* (ACT) (PSM Act) to investigate and report on misconduct in the ACTPS workplace. The definition of misconduct is broad, and it would be difficult to envisage a situation where disclosable conduct under the PID Act would not also be considered misconduct. Under the PSM Act, ‘misconduct’ is defined as a failure to comply with section 9, and includes specified matters in the ACTPS industrial agreements. In brief, misconduct encompasses behaviours such as:

- failure to manage a conflict of interest

¹⁷ *Public Interest Disclosure Act 2012* (ACT) s 32.

¹⁸ ACT Integrity Commission, ‘Guidelines and Directions’, ACT Integrity Commission website, n.d., <https://www.integrity.act.gov.au/publications/guidelines-and-resources>.

¹⁹ *Public Interest Disclosure Act 2012* (ACT) s 18.

²⁰ *Integrity Commission Act 2018* (ACT) s 23.

²¹ PEG Consulting, *Review of the Public Interest Disclosure Act 2012 (ACT)*, 30 September 2019, p 41, https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf.

²² PEG Consulting, *Review of the Public Interest Disclosure Act 2012 (ACT)*, p 42.

- failure to act with due care and diligence
- failure to obey Territory laws
- inappropriately taking a personal benefit through a person’s position as a public servant
- improperly using a Territory resource, and
- bringing the ACTPS into disrepute.

The PSSC functions are to:

- conduct investigations about matters declared by the Chief Minister and investigations under an industrial instrument
- provide advice to the Chief Minister about matters arising from an investigation conducted by the Commissioner
- promote and provide advice about the public sector values, the public sector principles and the conduct required under the PSM Act, and
- to exercise any function given to the PSSC under legislation.

Under the ACTPS enterprise agreements, the PSSC has the following functions under the misconduct process:

- receive and assess referrals requesting investigation of alleged employee misconduct
- initiate investigations of alleged misconduct in the absence of a referral if satisfied the matter warrants investigation
- make arrangements to investigate alleged misconduct, and
- consider the evidence and make a determination whether the allegations are proven and misconduct has occurred.

ACT Ombudsman

The *Ombudsman Act 1989* (ACT) (Ombudsman Act) established the Office of the ACT Ombudsman, and the ACT Ombudsman as an independent officer of the Legislative Assembly.²³

The Ombudsman Act gives the ACT Ombudsman the authority to investigate complaints made under that Act. Its investigative jurisdiction is generally limited to administrative action undertaken by an ACTPS entity. The Ombudsman Act explicitly excludes entities such as the judiciary, ministers and other independent entities, such as the ACT Human Rights Commission, from the ACT Ombudsman’s jurisdiction.

a. To exercise functions under the *Freedom of Information Act 2016* (ACT) (FOI Act)

The FOI Act makes the ACT Ombudsman the oversight entity of the FOI Act. This includes (but is not limited to) reviewing decisions made by ACTPS entities under the FOI Act, granting extensions to ACTPS entities that require more time to make a decision on an FOI application, and reporting annually on the compliance of ACTPS entities with the FOI Act.

b. To exercise functions under the PID Act

Under the PID Act, a person may complain to the ACT Ombudsman in relation to action taken by the head of a public sector entity, the Head of Service, or the PSSC in relation to the disclosure of disclosable conduct or a PID. The PID Act authorises the ACT Ombudsman to:

- give advice about disclosures of disclosable conduct and PIDs
- monitor the management of disclosures of disclosable conduct and PIDs by the entity
- review the way in which the entity dealt with or investigated the disclosure of disclosable conduct or PID that is the subject of the complaint, and
- ensure just outcomes for people who make PIDs, including preventing and remedying the effect of detrimental action taken against disclosers or witnesses because of a PID.

²³ *Ombudsman Act 1989* (ACT) s 4, 4A(1).

Stakeholder feedback

ACT Integrity Commission

This potential for common application of the notions of disclosable conduct and corrupt conduct suggests strongly that there should be a single arbiter of how the particular report should be treated. Aside from other considerations, it seems obvious that having the decision made following one assessment as distinct from several by different decision-makers is more efficient and more likely to produce consistency.

Responsibility for appropriate outcomes of PID investigation is primarily that of the relevant government entity. This will include appropriate education about the issues that come to light. The advantages of the Commission's present role are that it gives assurance to the community (and to whistleblowers) that there is independent oversight of the appropriateness of the response and it is useful to have a single body with overall information about problems – both corruption and maladministration – that may affect more than one directorate. This is not to suggest that the PSSC could not adequately perform the role in relation to the latter class but simply to point out that there does not appear to be any obvious advantage in changing this arrangement.

On conflict of interest of the investigating entity:

Where a PID is sought to be made by the employee of the directorate whose conduct or decision is impugned, that directorate must almost inevitably have a conflict of interest in dealing with it. One, rather awkward, solution is that the process should be managed by another directorate. Where the decision is that the disclosure is of disclosable conduct and, hence, it is referred to the Commission, it would follow that the conflict has not led to any adverse outcome and, hence has been appropriately managed. If, on the other hand, the decision is that the disclosure is not of disclosable conduct, it maybe that the conflict risk can be managed by referring the matter to the Head of Service. A disclosure about decisions or conduct of the Head of Service or a Minister needs to be assessed directly by the Commission.

Each directorate needs to have a PID conflict of interest protocol in place, prepared in consultation with the Commission.

The PID Act does not contemplate the possibility that an entity directed by the Commission to undertake an investigation can decline to do so. However, situations where the directorate directly involved in the impugned decision or conduct ought not to conduct an investigation may well arise. In such a case, either the Commission must itself conduct the investigation or, by agreement with the Head of Service, allocate the task to another directorate.

PSSC

It is important for continued public confidence that PIDs are properly and expediently dealt with, ensuring appropriate consideration and protection is given to those who make disclosures and those who are the subject of the disclosures. It is my view that with adequate and appropriate resourcing, both the PSSC and the Integrity Commission are viable alternatives to undertake this important work. The discussion paper raises the legitimate issue of whether there are more efficient ways of providing the services to support such disclosures in the public interest. The PSSC, supported by the PSU, is clearly an option available in this context to contribute to enhanced options for the administration of PIDs, should changes to the current arrangements be considered beneficial.

Speaker of the ACT Legislative Assembly

The (discussion) 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.

On responsible entity for MLAs

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 (ACT) (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.

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.

Clerk of the Assembly

The Clerk ought to be able to investigate PIDs relating to the Office and its staff and Officers of the Assembly ought to be able to investigate PIDs relating to their agencies and staff in line with s 19(2); however, the Integrity Commission should retain sole investigative jurisdiction in relation to matters involving MLAs, their staff, the Clerk, and the Officers of the Assembly themselves.

Suburban Land Agency (SLA)

In the circumstances where the Integrity Commission does not investigate PIDs which do not involve allegations of corruption, SLA would welcome restoring the responsibility for PIDs to the PSSC. Recognising the risks identified in the discussion paper, SLA considers the benefits of streamlining the processing of PIDS through the PSSC to be of greater benefit.

SLA considers the responsibility for education, oversight and decision substitution is best placed with the entity which has responsibility for the PIDS generally. In SLA's view, these functions should also sit with the PSSC, at least so far as non-corruption PIDs are concerned.

On conflict of interest of an investigating entity:

In relation to the question of whether the investigating entity should be required by the PID Act to declare an actual or perceived conflict of interest prior to investigating a PID, the SLA does not consider it necessary to prescribe this additional step in the PID Act.

Griffith/Narrabundah Community Association (GNCA) supported by the Inner South Canberra Community Council (ISCCC)

The Griffith/Narrabundah Community Association supports PID responsibility remaining with the Integrity Commissioner.

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

On conflict of interest of investigating agency

The GNCA (supported by the ISCCC) further agree that the investigating entity should be required by the PID Act to declare an actual or perceived conflict of interest prior to investigating a PID, and to prepare a conflict-of-interest management plan.

The GNCA (supported by the ISCCC) also agree that the PID Act should clarify that the Commissioner may reallocate a PID investigation to another investigating entity if the initial entity is unable or declines to investigate, noting that an entity should not have a choice of deciding where the investigation should occur.

Jurisdictional analysis

Table 2 outlines the responsible investigating and oversight entity in each jurisdiction.

Table 2: Investigating and oversight entity in each jurisdiction

Jurisdiction	Investigating Entity	Oversighting Entity	Function
Commonwealth	Agency where disclosure occurred	Commonwealth Ombudsman	A complaint may be made to the Ombudsman about the handling by an agency of a disclosure. ²⁴
New South Wales	Agency where disclosure occurred	NSW Ombudsman	Audit and monitor the exercise by agencies of their functions under the PID Act. ²⁵
Victoria	Independent Broad-based Anti-corruption Commission (IBAC)		The IBAC receives, assesses and investigates PIDs (unless those PIDs relate to certain agencies, such as the IBAC or the Victorian Inspectorate). ²⁶
Queensland	Agency where disclosure occurred	Queensland Ombudsman	Monitor and review the way in which public sector agencies manage and deal with PIDs. ²⁷
Western Australia	Agency where disclosure occurred	Public Sector Commissioner	Monitor compliance with the PID Act, and to assist public authorities comply with the PID Act. ²⁸
South Australia	Agency where disclosure occurred	Independent Commission Against Corruption (SA ICAC)	The oversight role appears limited. The SA ICAC may publish guidelines on the PID Act. ²⁹
Tasmania	Agency where disclosure occurred	Ombudsman Tasmania	As well as an oversight role, the Ombudsman can receive and investigate PIDs. ³⁰
Northern Territory	Independent Commissioner Against Corruption (NT ICAC)		The NT ICAC is responsible to receive and investigate allegations of ‘unsatisfactory conduct’ – which includes conduct that is considered in PID frameworks in other jurisdictions. ³¹

²⁴ *Public Interest Disclosure Act 2013* (Cth) s 7A.

²⁵ *Public Interest Disclosures Act 2022* (NSW) s 72(2).

²⁶ *Public Interest Disclosures Act 2012* (Vic) part 4.

²⁷ *Public Interest Disclosure Act 2010* (Qld) s 58, s 59.

²⁸ *Public Interest Disclosure Act 2003* (WA) s 8, 19.

²⁹ *Public Interest Disclosure Act 2018* (SA) s 14(1).

³⁰ *Public Interest Disclosures Act 2002* (Tas) s 38.

³¹ *Independent Commissioner Against Corruption Act 2017* (NT) s 12.

Review position

The Review recommends the PID Act be amended to give administrative responsibility of PIDs to the PSSC. This would include:

- responsibility to determine whether disclosable conduct is a PID under Part 3 of the PID Act (maintaining the process whereby a disclosure officer may receive a disclosure and make a first-pass assessment)
- investigating all PIDs – there would be no ability for the PSSC to refer a PID for investigation to the head of a public sector entity (with exceptions below)
- the general PID functions currently allocated to the Integrity Commissioner under section 28 of the PID Act
- the PID review functions currently allocated to the Integrity Commissioner under section 29 of the PID Act:
 - the PSSC would not have jurisdiction to overturn a decision relating to disclosable conduct in relation to entities in which the PSSC may not investigate
- publishing guidelines and procedures currently allocated to the Integrity Commissioner under sections 32 and 33 of the PID Act
- annual reporting functions currently allocated to the Integrity Commissioner under section 45 of the PID Act (several of the reporting functions would need to be amended as the PSSC would undertake most investigations).

The PID Act should set out exceptions where it would not be appropriate for the PSSC to investigate the PID. For more detail about these exceptions, see Table 3.

It would clearly not be appropriate for the PSSC to investigate a PID concerning itself. Where the disclosable conduct involves the PSSC, the disclosure officer would need to provide the disclosure to the ACT Ombudsman for assessment as to whether it is a PID. If the Ombudsman decided the disclosable conduct was a PID, the Ombudsman would be required to investigate.

The Review considers that, when compared with other entities (such as the Integrity Commissioner and the Ombudsman), the PSSC is best positioned to assess, investigate, oversee, and provide training on disclosable conduct. This is primarily due to the PSSC already being given investigative responsibility for workplace misconduct matters and promoting advice to the ACTPS about public sector values.

The Integrity Commissioner's function is to investigate corrupt conduct, and prioritise investigation of conduct that could be serious corrupt conduct or systemic corrupt conduct.³² The report into the IC Act prepared concurrently with this report made several recommendations aimed at improving the efficiency of Integrity Commission investigations. The Review considers that moving responsibility for PIDs to the PSSC would allow the Commission to dedicate more resources to investigate serious and systemic corrupt conduct. Chapter 3.4 of this Review provides recommendations that would ensure the Commission remains informed about matters that are reasonably believed to involve serious or systemic corrupt conduct.

The proposed recommendation would enable the PSSC to triage PIDs and refer those disclosures to the Commission which relate to serious or systemic corrupt conduct. This would mean that other less serious corrupt acts, such as timesheet fraud, would be dealt with by the PSSC as workplace misconduct matters without duplicative and time-consuming work by the Commission.

It would not be appropriate for the PSSC, nor would there likely be requisite jurisdiction, to investigate PIDs about certain independent statutory officers. These officers are listed in Table 3, along with the proposed investigating entity.

³² *Integrity Act 2018 (ACT)* s 21.

Table 3: Statutory officer investigative entity

Position	Investigative Entity	Justification
MLA MLA staff member	Commissioner for Standards	The Commissioner for Standards is established by resolution of the Assembly and is responsible for investigating alleged MLA breaches of the Code of Conduct. Like the PSSC, the Commissioner for Standards already has responsibility for conducting investigations into certain improper behaviour, and has a mandatory requirement to refer suspected serious or systemic corrupt conduct to the Integrity Commissioner. This would expand the role of the Commissioner for Standards to include investigating conduct of MLA staff members in a PID context. However, the Review considers the independence of the position provides greater confidence in investigation outcomes for MLA staff members.
Clerk	Speaker	The Clerk is appointed by the Speaker of the Assembly and holds office under the <i>Legislative Assembly (Office of the Legislative Assembly) Act 2012 (ACT)</i> . The Speaker is responsible for the Clerk – for example, the Speaker is authorised to suspend the Clerk on reasonable grounds of misbehaviour. ³³
Integrity Commissioner (and staff)	Inspector of the Integrity Commission	The Inspector of the Integrity Commission (the ACT Ombudsman) already undertakes oversight of the Commission under the IC Act. As part of its functions under that Act, the Inspector is required to investigate complaints against about the Commission and members of staff of the Commission.
ACT Ombudsman, ACT Auditor-General, and ACT Electoral Commissioner (and their staff)	Special investigator	<p>The ACT Ombudsman acts as general oversight and investigative agency across the ACTPS. Given its broad oversight function, it would be inappropriate for any existing statutory entity to undertake a PID investigation into the Ombudsman. The IC Act allows the Speaker to appoint an independent Special Investigator if the Speaker becomes aware of information that may tend to show corrupt conduct by the Ombudsman in its role as Inspector or a staff member. The Review considers this arrangement appropriate for PID investigations as well.</p> <p>As officers of the Legislative Assembly, the Review considers it appropriate that the Auditor-General and the Electoral Commissioner (and their staff) to be subject to the same investigative arrangements as the ACT Ombudsman (and staff).</p>

Outside of the position listed above, the Review considers that the PSSC is the appropriate investigating entity for PIDs. These arrangements already exist in misconduct. Section 154 of the PSM Act allows the PSSC to investigate allegations of misconduct by a statutory officer or Chief Executive Officer (CEO) of a territory instrumentality (at the request of the person with responsibility for appointing the officer). The Review considers that the Territory is in an advantageous position where it has already created a statutory entity that is independent of the ACTPS and is responsible to undertake workplace misconduct investigations. The premise of the PSSC position is to remove any perception of a conflict of interest when a directorate investigates workplace misconduct in its own agency. This benefit should be extended to PIDs.

³³ *Legislative Assembly (Office of the Legislative Assembly) Act 2012 (ACT)* s 13(1)(a).

The Review is also comfortable that the PSSC may undertake the review functions currently carried by the Integrity Commissioner, with certain limitations. Section 29 of the PID Act gives the Integrity Commissioner the authority to review:

- a decision by another investigating entity to end an investigation of a PID, and
- an action taken, or proposed to be taken, by a public sector entity in relation to disclosable conduct that is the subject of a PID.

The Review considers that both of these align with the PSSC functions in relation to dealing with misconduct. For example, under the PSM Act, the PSSC is authorised to exercise any function given to the Head of Service under an enterprise agreement in relation to an investigation, an appeal or review.

The Review acknowledges that the PSSC should not have jurisdiction to review decisions made by heads of entity in the Legislative Assembly. However, the Review is comfortable that the PSSC may review and provide recommendations (without overturning a decision) about action taken, or proposed to be taken, in relation to disclosable conduct.

Other Territory legislation provides the PSSC with a similar function in other contexts:

- section 9B of the *Auditor-General Act 1996* (ACT) authorises the Speaker to seek advice from the PSSC when considering suspending the Auditor-General
- section 18A of the *Electoral Act 1992* (ACT) authorises the Speaker to seek advice from the PSSC when considering suspending the Electoral Commissioner
- section 28A of the *Ombudsman Act 1989* (ACT) authorises the Speaker to seek advice from the PSSC when considering suspending the Ombudsman, and
- section 35 of the IC Act allows the Speaker to consult with the PSSC for advice about a proposed suspending of the Integrity Commissioner.

The Review considers that the PSSC is independent enough from government that it may effectively undertake the PID function. The PSM Act does not authorise the Chief Minister to direct how the PSSC undertakes its role. While the PSM Act allows the Chief Minister to request the PSSC to investigate a matter in a prescribed way,³⁴ it does not authorise the Chief Minister to direct the PSSC about the outcome of that investigation.

An additional safeguard, as discussed in detail in chapter 2, recommended by this Review is that PSSC decisions about whether disclosable conduct qualify as PIDs may be reviewable by the Ombudsman.

³⁴ *Public Sector Management Act 1994* (ACT) s 144(1)(a)(i).

2.2 Consideration of a single legislative scheme

RECOMMENDATION 7

The Review recommends that the PID Act and IC Act remain separate.

Background

The 2019 review recommended that consideration be given to consolidation of the PID Act and the IC Act.

The 2019 review stated:

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.³⁵

This recommendation was largely a consequence of the 2019 review's concern over the apparent overlaps, complexities and potential conflicts between operation of the IC Act and the PID Act. The report noted:

The 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.

In response to the 2019 review, amendments were made to the PID Act which transferred management, oversight and other functions formerly held by the PSSC to the Integrity Commissioner, and provided the Integrity Commissioner the authority to assess disclosures to determine if they qualified as PIDs, and if so, to investigate the disclosures.

Consequently, the Integrity Commissioner currently has jurisdiction over 'disclosable conduct' under the PID Act and 'corrupt conduct' matters reported under the IC Act. Importantly, these two different concepts may have some overlap – noting that it is possible that 'corrupt conduct' by a public official under the IC Act could also be considered 'maladministration' under the PID Act.

It is important to consider the role and purpose of the PID Act and the IC Act to determine if there are synergies that may warrant combining the two schemes, or if the manner in which the two are addressed are sufficiently different, that they are best addressed through separate Acts.

IC Act

The IC Act establishes the Commission as a fact-finding investigating entity to identify and expose corrupt conduct in the public sector, prioritising the exposure of serious corrupt and systemic corrupt conduct.³⁶ To achieve this, the IC Act provides the Commission with covert and coercive powers – such as the ability to apply for search warrants³⁷ and surveillance device warrants,³⁸ the ability to compel production of documents, items and other things,³⁹ the ability to require people to attend private and

³⁵ PEG Consulting, 'Review of the *Public Interest Disclosure Act 2012 (ACT)*' (30 September 2019) https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf p 6

³⁶ *Integrity Commission Act 2018 (ACT)* s 6.

³⁷ *Integrity Commission Act 2018 (ACT)* s 122.

³⁸ *Crimes (Surveillance Devices) Act 2010 (ACT)* s 11 (1).

³⁹ *Integrity Commission Act 2018 (ACT)* s 90, s 147.

public examinations,⁴⁰ abrogating privileges against self-incrimination,⁴¹ and compelling witnesses to answer questions.⁴²

There are strong confidentiality provisions under the IC Act. During an investigation, the Commission may issue a confidentiality notice to any person who may have information or knowledge about a matter that the Commission considers should remain confidential.⁴³ Breaching a confidentiality notice is a criminal offence.⁴⁴ Likewise, if the Commission provides an individual certain information under the IC Act, the Commission must provide that person a non-disclosure notice to restrict that individual from sharing that information.⁴⁵ Breaching a non-disclosure notice is also a criminal offence.⁴⁶

The IC Act encourages the voluntary reporting of corrupt conduct, referred to as ‘corruption complaints’, by providing certain immunities and protections for individuals who make a complaint under the IC Act. These include that the making of a complaint is not considered a breach of confidence, or a breach of professional ethics, or a breach of a rule of professional conduct.⁴⁷ Further, a complainant is not subject to civil or criminal liability only because of making a complaint, and for a complainant who is a public official or member of staff of an MLA, the complainant is not liable to administrative action (such as disciplinary action).⁴⁸ Further, the complainant is protected from defamation action,⁴⁹ and it is an offence for a person to take detrimental action against a complainant because of a complaint.⁵⁰

PID Act

The object of the PID Act is to encourage whistleblowing by providing protections to those who report disclosable conduct, and to ensure that PIDs are properly investigated and dealt with.⁵¹ As discussed above, disclosable conduct is broadly defined as maladministration (a practice or policy of a public sector entity or public official that involves a substantial mismanagement of public resources or funds, or a substantial mismanagement in the performance of official duties) or substantial and specific danger to public health or safety, or the environment.⁵²

Unlike the IC Act, the PID Act does not provide any covert or coercive powers to the responsible entity for investigating PIDs. The only additional investigative tool under the PID Act is the ability to provide protections to witnesses who voluntarily provide information or a document in relation to a PID.⁵³ Witness protections include immunity from civil or criminal liability, but not for a witness’s own conduct.⁵⁴

Further, the PID Act provides a means for public awareness of a PID, rather than creating an offence for the unauthorised disclosure of information. The PID Act enables a person to call attention to a significant concern through a public disclosure by affording protections to that person if they disclose the matter to a journalist or MLA under certain conditions.⁵⁵ The journalist or MLA may then alert the public to the matter.

The PID Act provides substantially similar protections to disclosers as those provided to complainants under the IC Act, with the additional provisions that protections are maintained under the PID Act if the discloser provides that information to an MLA or journalist in certain situations.

⁴⁰ *Integrity Commission Act 2018* (ACT) s 143.

⁴¹ *Integrity Commission Act 2018* (ACT) s 175.

⁴² *Integrity Commission Act 2018* (ACT) s 166(1)(b)(ii)(B).

⁴³ *Integrity Commission Act 2018* (ACT) s 79.

⁴⁴ *Integrity Commission Act 2018* (ACT) s 85.

⁴⁵ *Integrity Commission Act 2018* (ACT) s 198.

⁴⁶ *Integrity Commission Act 2018* (ACT) s 201.

⁴⁷ *Integrity Commission Act 2018* (ACT) s 288(a).

⁴⁸ *Integrity Commission Act 2018* (ACT) s 288(b), (c).

⁴⁹ *Integrity Commission Act 2018* (ACT) s 289.

⁵⁰ *Integrity Commission Act 2018* (ACT) s 293.

⁵¹ *Public Interest Disclosure Act 2012* (ACT) s 6.

⁵² *Public Interest Disclosure Act 2012* (ACT) s 8.

⁵³ *Public Interest Disclosure Act 2012* (ACT) s 42A.

⁵⁴ *Public Interest Disclosure Act 2012* (ACT) s 42A(2).

⁵⁵ *Public Interest Disclosure Act 2012* (ACT) s 27, s 27A.

Stakeholder feedback

Chief Minister, Treasury and Economic Development Directorate (CMTEDD) Senior Executives Responsible for Business Integrity Risk (SERBIR)

Simplifying the legislation and combining legislation to derive a single entity that is most appropriate to review and investigate PIDs, whether that be the ACT Integrity Commission or PSSC, or a single entity to review and if required refer on (e.g. everything goes to PSSC but PSSC refers to ACT Integrity Commission if required); the preference should be based on data analysis of the nature of the cases.

SLA

SLA would welcome the responsibility for PIDs being restored to the PSSC. If that occurs, SLA considers that the IC Act and the PID Act should remain separate pieces of legislation.

Jurisdictional analysis

Most Australian jurisdictions have separate legislation to address and deal with PIDs.

The exception is the Northern Territory, which deals with public interest matters in its legislation that establishes its Independent Commissioner Against Corruption (NT ICAC). Under that legislation, the term ‘unsatisfactory conduct’ largely reflects the matters generally considered a PID. ‘Unsatisfactory conduct’ is defined as conduct engaged in by a public officer or a public body that involves illegality, negligence, or incompetence that is connected to public affairs and results in substantial mismanagement of duties or resources, or substantial detriment to the public interest.⁵⁶ The NT ICAC is empowered to conduct preliminary inquiries and investigations using its covert and coercive powers into allegations of unsatisfactory conduct.^{57, 58}

While Victoria has separate legislation for its PID scheme⁵⁹ and an anti-corruption commission (IBAC),⁶⁰ the Victorian IBAC is empowered to investigate a PID as if it were a corruption complaint.⁶¹ However, there are instances in which PID matters and corruption complaints are treated differently. For example, before a person attending a witness examination is asked any questions or required to produce a document or thing, the IBAC must advise the person that additional obligations under the *Public Interest Disclosures Act 2012* (Vic) relating to confidentiality may apply to the person, and must inform the person of those obligations.⁶²

⁵⁶ *Independent Commissioner Against Corruption Act 2017* (NT) s 12(1).

⁵⁷ *Independent Commissioner Against Corruption Act 2017* (NT) s 24, s 31.

⁵⁸ The ICAC NT may investigate allegations of ‘improper conduct’, where ‘improper conduct’ is defined to include ‘unsatisfactory conduct’.

⁵⁹ *Public Interest Disclosures Act 2012* (Vic).

⁶⁰ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

⁶¹ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 7.

⁶² *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 131.

Review position

The Review recommends that the Territory continue to have separate legislation to deal with disclosable conduct and corruption matters.

Both the PID Act and the IC Act are intended to encourage the reporting of wrongdoing in the ACTPS by providing those reporting disclosable conduct and corrupt conduct with similar protections. However, the nature of the conduct addressed under each Act and the manner in which each type of conduct is addressed are significantly different.

The 2019 review noted that having multiple frameworks for reporting may create confusion for people trying to understand how to take action to report or address suspected wrongdoing. However, the Review considers that the delineated roles of the disclosure officer, the PSSC and the Integrity Commissioner under each Act provide a means to determine the most appropriate way to address complaints based on the nature of conduct reported. Providing the public with multiple avenues for reporting suspected wrongdoing may also be beneficial, as it will help ensure that reports and complaints are seen and assessed by multiple entities under both frameworks, with the most appropriate framework applied.

Noting the IC Act Review's recommendation that the Commission focus on the investigation of serious and systemic conduct utilising the significant investigative powers under the IC Act, a separate process defined though separate legislation should be maintained to address disclosable conduct, which does not rise to the level of serious or systemic corrupt conduct.

The Review considers that maintaining the existing definitions and protections in the IC Act and the PID Act is the best strategy for addressing these distinct forms of conduct. Consistent with this approach, the Review has suggested in Recommendation 1 that responsibility for the PID Act be transferred from the Integrity Commissioner to the PSSC, allowing the Integrity Commissioner to focus on the investigation of serious and systemic corrupt conduct, and for the PSSC to have responsibility for the investigation of other suspected wrongdoing in the public sector, including disclosable conduct and workplace misconduct.

Any practical difficulties arising in the interaction between the two Acts could be addressed through a memorandum of understanding between the Integrity Commissioner and the PSSC.

2.3 Oversight of the PSSC and other PID investigations

RECOMMENDATION 8

The Review recommends retaining the ACT Ombudsman’s role under the PID Act to oversee the PSSC in undertaking PID functions.

Background

In addition to the Integrity Commissioner, the ACT Ombudsman also has an oversight role under the PID Act. The PID Act allows a person to complain to the Ombudsman about an action taken by either the head of a public sector entity, the Head of Service, or the PSSC in relation to the disclosure of disclosable conduct or a PID.

The ACT Ombudsman may exercise the following functions in relation to the complaint:

- give advice about disclosures of disclosable conduct or PIDs
- monitor the management of disclosures of disclosable conduct or PIDs by the entity
- review the way in which the entity dealt with or investigated the disclosure of disclosable conduct or PID that is the subject of the complaint
- ensure just outcomes for people who make PIDs, including preventing and remedying the effect of detrimental action taken against disclosers or witnesses because of a PID.⁶³

The Review considered the appropriate oversight arrangements for the PSSC taking into account its proposed responsibilities under the Review’s recommendations.

Stakeholder feedback

The Review did not receive any stakeholder feedback on the role of the Ombudsman, or in relation to oversight of the entity which has responsibility for PIDs.

Jurisdictional analysis

As noted in the jurisdictional analysis in section 2.1, most jurisdictions authorise the agency where the disclosure occurred to undertake the investigation, with oversight by the local ombudsman. Victoria and the Northern Territory do not follow this model, and place responsibility to investigate PIDs largely with their anti-corruption commission, with each having its own oversight body.

Review position

The Review recommends the existing oversight role for the ACT Ombudsman as outlined in section 34 be retained. The Review considers that the existing section 34 provides appropriate scope for the Ombudsman to effectively oversee the PSSC role (and other entities) if a person is aggrieved with certain actions taken.

⁶³ *Public Interest Disclosure Act 2012 (ACT)* s 34.

2.4 Head of public sector entity functions

RECOMMENDATION 9

The Review recommends that the PID Act be amended to require the PSSC to inform the head of the public sector entity where disclosable conduct is determined to be a PID.

RECOMMENDATION 10

The Review recommends that the PID Act be amended to require the relevant head of public sector entity to take action in relation to a PID under section 24(1)(a) of the PID Act, and to inform the discloser and the PSSC about the action taken.

RECOMMENDATION 11

The Review recommends that the PID Act be amended to require that if the relevant head of public sector entity decides no action is needed, they must inform both the PSSC and the discloser. This amendment should include that the head of public sector entity may revisit this decision whilst the PSSC undertakes its investigation.

RECOMMENDATION 12

The Review recommends that the PID Act be amended to require, where the disclosable conduct involves the following people, that the PSSC inform the specified entities to perform the responsibilities that would otherwise be executed by the head of entity:

- i. A director-general – PSSC informs the Head of Service.
- ii. The Head of Service – PSSC informs the Chief Minister.
- iii. Person responsible for managing the affairs of a Territory authority – PSSC informs the responsible minister.
- iv. Person responsible for managing the affairs of a Territory-owned corporation – PSSC informs the responsible minister.
- v. Person responsible for managing the affairs of a Territory instrumentality – PSSC informs the responsible minister.
- vi. Statutory office holder – PSSC informs the person responsible for appointing the statutory office holder.
- vii. Clerk of the Assembly – PSSC informs the Speaker of the Assembly.
- viii. An MLA staff member – PSSC informs Legislative Assembly Commissioner for Standards who shall advise either:
 - a. the Employing MLA, or
 - b. if the PID raises a conflict of interest, or the Commissioner otherwise deems it more appropriate;
 - I. the leader of the employing MLA's party, or
 - II. the Chief Minister's office if the employing MLA is a member of the executive.
- ix. An MLA – PSSC informs the leader of their registered party.

RECOMMENDATION 13

The Review recommends that the PID Act be amended so that in the case of disclosable conduct of a leader of a registered party, or an independent MLA, no action may be taken until the Commissioner for Standards has completed an investigation and tabled a report in the Legislative Assembly.

Background

One object of the PID Act is to ensure that PIDs are properly investigated and dealt with.⁶⁴ To meet this object, section 24 of the PID Act requires the head of a public sector entity to take action if they believe on reasonable grounds that disclosable conduct has occurred, is likely to have occurred, or is likely to occur – including disciplining any person responsible for the disclosable conduct.

A head of a public sector entity is defined under the PID Act as any of the following:

- for an administrative unit – the director-general of the administrative unit
- for a Territory authority – the person who has responsibility for managing the affairs of the Territory authority
- for a Territory-owned corporation or a subsidiary of a Territory-owned corporation – the person who has responsibility for managing the affairs of the Territory-owned corporation
- for a Territory instrumentality – the person who has responsibility for managing the affairs of the Territory instrumentality
- for a statutory office holder – the statutory office holder
- for a Legislative Assembly entity other than an officer of the Assembly – the clerk of the Legislative Assembly
- for an officer of the Assembly – the officer, and
- for an entity prescribed by regulation under section 9(1)(c) – the person prescribed by regulation.⁶⁵

Currently, the PID Act facilitates this by allowing the Integrity Commissioner to refer PIDs to the head of a public sector entity to investigate.⁶⁶ If the Integrity Commissioner refers the PID to a head of public sector entity where the disclosable conduct is **not** occurring, it becomes less clear how the relevant head of public sector entity may be informed that disclosable conduct is occurring. There is no clear provision in the PID Act which would authorise disclosure of information necessary for this step to occur.

Where the head of a public sector entity is the subject of a disclosure

The PID Act is also unclear on how the section 24 requirement for a head of a public sector entity to prevent disclosable conduct occurring may be met if that conduct involves a head of public sector entity.

For example, if disclosable conduct was occurring in relation to a statutory office holder, it would be inappropriate for that statutory office holder to take action to prevent and address their own disclosable conduct. Further, a head of another public sector entity (such as a director-general) may not have the necessary management responsibility over the statutory office holder engaging in the disclosable conduct to take action.

The only action the director-general may take is to inform the responsible Minister so that the Minister may take appropriate action. However, in this event, there is no legislative obligation that requires the Minister to deal with the disclosable conduct, as Ministers are not a head of public sector entity under the PID Act.

⁶⁴ *Public Interest Disclosure Act 2012 (ACT)* s 6(c).

⁶⁵ *Public Interest Disclosure Act 2012 (ACT)* s 13.

⁶⁶ *Public Interest Disclosure Act 2012 (ACT)* s 19.

Addressing disclosable conduct in the Legislative Assembly

The PID Act may not adequately deal with how disclosable conduct occurring in the Legislative Assembly may be addressed. The PID Act places responsibility on the clerk of the Legislative Assembly to act as head of entity for a Legislative Assembly entity other than an officer of the Assembly. This would include head of entity functions over MLAs and their staff members. However, the Clerk has no responsibility or authority over MLAs or their staff members, and would not be in a position to direct or deal with MLAs and their staff members to adequately address disclosable conduct.

Stakeholder feedback

ACT Integrity Commission

The [Integrity] Commissioner may disclose to the head of a public sector entity an investigatory outcome that disclosable conduct has occurred or is likely to occur. If part of the process of correction reasonably requires – or the regime under which the statutory office holder stipulates – on-dissemination to the Minister to enable the correction to be undertaken, then both the Commissioner’s and the statutory office-holders dissemination is permitted.

Clerk of the Assembly

Section 13(b) makes the Clerk the head of a ‘Legislative Assembly entity’ other than an officer of the Assembly. That is, the Clerk is the ‘head of the entity’ in relation to the Office, an MLA or a staff member of an MLA.

Section 24(1) requires that where the head of public sector entity believes on reasonable grounds that disclosable conduct has occurred, is likely to have occurred or is likely to occur, ‘the entity’ must take action necessary and reasonable to:

- a. prevent the disclosable conduct continuing or occurring in the future; and*
- b. if an investigation of a public interest disclosure in relation to the disclosable conduct has been completed – discipline any person responsible for the disclosable conduct.*

Through the combined operation of the above provisions, it appears as though the Clerk has a role, as head of the relevant entities, to address the s 24 requirements – not only in relation to the Office and its staff but also in relation to MLAs and their staff.

While the section 24 requirements make sense where a director-general or statutory officer has a direct employment relationship with staff, the requirements lack coherence in respect of the Clerk who has no such relationship with the MLAs or their staff. Additionally, given the compound definition of Legislative Assembly entity in the Dictionary of the Act, it is not clear what/who ‘the entity’ is that must ‘take action’ under s 24 where an MLA or MLAs staff member is involved.

SLA

SLA considers that the current risk, that such a disclosure might be in breach of the confidentiality provisions of the PID Act (s.44), should be clarified to protect the heads of public sector entities. SLA has an independent Board and in our view, disclosure should be permitted to be made to the Board in these circumstances. In the case of Board members being involved in potentially disclosable conduct, it should appropriately be referred to the Minister.

Jurisdictional analysis

The legislative requirements of a head of agency (or referred to as the agency itself) to take action to address disclosable conduct vary across jurisdictions.

In New South Wales, PID legislation requires an agency to take action upon receiving a disclosure to minimise the risk of detrimental action against either the reporter or the person who is the subject of the disclosure.⁶⁷ An agency must also have a PID policy that specifies procedures for (amongst other matters):

- a. dealing with disclosures that are or may be PIDs, and
- b. taking appropriate corrective action in response to findings of serious wrongdoing or other misconduct that arises from PIDs to the agency.⁶⁸

In South Australia and Queensland, the legislation does not include a mandatory requirement for public agencies to address or deal with a disclosure in a certain way upon receiving a disclosure. Rather, the legislation imposes an obligation on the principal officer of an agency to publish procedures on how that agency will deal with a disclosure upon receipt. The procedures are informed by guidelines prepared by the respective oversight agency (the SA ICAC in South Australia,⁶⁹ and the Ombudsman in Queensland).⁷⁰

In Western Australia, if a proper authority forms the opinion that a person may be, may have been, or may in the future be, involved in a matter that may be the subject of a disclosure of public interest information, the proper authority must take such action as necessary, reasonable, and within its functions and powers to:

- prevent the matter to which the disclosure relates from continuing or occurring in the future
- refer the matter to the police or another body to investigate the matter, or
- take disciplinary action or commence or enable disciplinary proceedings.⁷¹

In the Commonwealth, an agency's principal officer must establish procedures for facilitating and dealing with public interest disclosures relating to the agency. The procedures must:

- a. deal with the assessment of risks that reprisals may be taken in relation to those disclosures
- b. provide for confidentiality of investigative processes, and
- c. comply with any standards in force under the PID Act.⁷²

The principal officer must also, as soon as reasonably practicable, ensure that appropriate action in relation to the agency is taken in response to any recommendation under a report from a PID investigation.⁷³

⁶⁷ *Public Interest Disclosures Act 2022* (NSW) s 61.

⁶⁸ *Public Interest Disclosures Act 2022* (NSW) s 42, 43.

⁶⁹ *Public Interest Disclosure Act 2018* (SA) s 12.

⁷⁰ *Public Interest Disclosure Act 2010* (Qld) s 28.

⁷¹ *Public Interest Disclosure Act 2003* (WA) s 9(1).

⁷² *Public Interest Disclosure Act 2013* (Cth) s 59(3)(4).

⁷³ *Public Interest Disclosure Act 2013* (Cth) s 59(6).

Review position

The Review recommends that, to maintain the existing requirement for the head of a public sector entity to address disclosable conduct they reasonably believe to be occurring in their entity, the PID Act be amended to require the PSSC to provide the relevant head of public sector entity with:

- a copy of the disclosure that is assessed as a PID, and
- the name and contact details of the discloser (if not disclosed anonymously).

The head of the public sector entity must then use the information in the disclosure to determine if they believe disclosable conduct has occurred, is likely to have occurred, or is likely to occur. If so, they must take action necessary and reasonable to prevent the disclosable conduct continuing or occurring in the future, and inform both the PSSC and the discloser of the action they have taken.

Alternatively, the head of the public sector entity may not form such a belief and wait for the outcome of the PID investigation. If so, it must inform the PSSC and the discloser of this. The PID Act should prescribe a time limit for the head of entity to notify the discloser of their decision. The Review considers that a four-week time period to be reasonable for this to be done. If the head of public sector entity does not provide this notification in four weeks, the PSSC must inform the relevant superior of the head of public sector entity (listed in Table 4).

This process acknowledges that, on face value with the information presented, there may be a strong case for the head of the public sector entity to take action to stop disclosable conduct occurring prior to an investigation. The investigation may then take place to provide a procedurally fair process to understand the complexities of how and why the disclosable conduct occurred and afford natural justice to anyone who may be subject to a disciplinary process from their involvement in the disclosable conduct.

The PID Act should also provide a process for when the head of a public sector entity is the subject of the disclosable conduct, and to adequately address disclosable conduct of an MLA or an MLA staff member. The current mechanisms under the PID Act are insufficient to adequately address and deal with disclosable conduct for these officers. This is contrary to the intention of the PID Act.

The Review considers it preferable that a requirement to take action when dealing with disclosable conduct by the head of entity, an MLA, or an MLA staff member be directed to the position with the appropriate authority to take management action required to prevent and address the disclosable conduct. The Review considers this recommendation would close an existing gap in the PID Act. Regarding MLA staff members, it is ideal that the Commissioner for Standards first receives the disclosure from the PSSC to determine the best course of action. The Commissioner for Standards should assess whether there may be any inherent conflict of interest by providing the disclosure to the employing MLA to address the disclosable conduct. If the Commissioner for Standards considers there is a risk, or otherwise deems it more appropriate, it should be provided to the leader of the employing MLA's party, or the Chief Minister's office if the employing MLA is a member of the executive.

Table 4 outlines who the PID Act should prescribe to take necessary action in relation to reasonably believed disclosable conduct by the head of a public sector entity:

Table 4: Proposed entity responsible for taking action in relation to disclosable conduct by head of a public sector entity

Head of public sector entity	Proposed entity responsible for taking action to address disclosable conduct
Director-General	Head of Service
Head of Service	Chief Minister
Person who has responsibility for managing the affairs of a Territory authority	Responsible minister for the Territory authority
Person who has responsibility for managing the affairs of the Territory-owned corporation	Responsible minister for the Territory-owned corporation
The person who has responsibility for managing the affairs of the Territory instrumentality	Responsible minister for the Territory-owned instrumentality
Statutory office holder	The entity responsible for appointing the statutory office holder
Clerk of the Assembly	The Speaker
An officer of the Assembly	<p>For an MLA – the leader of the registered party</p> <p>For an MLA staff member – PSSC informs Legislative Assembly Commissioner for Standards who shall advise either:</p> <ol style="list-style-type: none"> 1. the employing MLA, or 2. if the PID raises a conflict of interest, or the Commissioner otherwise deems it more appropriate; <ol style="list-style-type: none"> a. the leader of the employing MLA’s party, or b. the Chief Minister’s office if the employing MLA is a member of the executive. <p>In the case of disclosable conduct of the leader of a registered party, or an independent MLA, the PID Act should recognise that no action may reasonably be taken until the Commissioner for Standards has completed an investigation and tabled a report in the Legislative Assembly</p>



Chapter 3 – **PID assessments and investigations**

3.1 What is ‘disclosable conduct’?

RECOMMENDATION 14

The Review recommends that the PID Act be amended to broaden the definition of ‘maladministration’ in section 8 to include systemic as well as substantial maladministration.

RECOMMENDATION 15

The Review recommends that the PID Act be amended to include personal work-related grievances as disclosable conduct, where it is reasonably suspected to identify a systemic practice of maladministration.

RECOMMENDATION 16

The Review recommends that the PSSC provide education to all public sector members about what constitutes disclosable conduct, and how disclosable conduct interacts with other integrity frameworks, such as misconduct and corrupt conduct.

Background

Disclosable conduct goes to the heart of the *Public Interest Disclosure Act 2012 (ACT)* (PID Act), as it defines what conduct is so serious as to be authorised to be disclosed in the public’s interest, and attract whistleblower protections, in particular immunity from civil and criminal liability and reprisal action.

The Review has considered the scope of disclosable conduct to ensure it remains appropriate. The Review was guided by the following principles, all of which are considered in the ‘Review position’ section below:

- Avoiding inconsistencies in the definition of disclosable conduct that could lead to unintended outcomes.
- Simplicity in what is considered disclosable conduct so whistleblowers can understand what is capable of being disclosed under the PID Act.
- Avoiding unnecessary duplication in definitions across integrity frameworks, in particular, the *Public Sector Management Act 1994 (ACT)* (PSM Act) and the *Integrity Commission Act 2018 (ACT)* (IC Act), which can further confuse people as to which entity improper behaviour should be reported.
- Setting the threshold for disclosable conduct high enough that it warrants immunity from criminal and civil liability, including defamation.

Section 8 of the PID Act defines disclosable conduct as an action or policy, practice or procedure of a public sector entity, or public official for a public sector entity, that is maladministration, or results in a substantial and specific danger to public health or safety, or the environment. ‘Maladministration’ is defined in that section as conduct or a policy, practice or procedure that:

- results in a substantial mismanagement of public resources or public funds, or
- involves substantial mismanagement in the performance of official functions.

However, the PID Act excludes from the definition of disclosable conduct matters that relate to a personal work-related grievance of the person disclosing the conduct. The Act provides five examples of personal work-related grievances:

- An interpersonal conflict between the person and another employee.
- A decision not to approve the person’s leave application.

- A decision relating to the employment, transfer or promotion of the person.
- A decision relating to the terms and conditions of employment of the person.
- A decision to suspend or terminate the person, or to discipline the person.⁷⁴

As the exclusion applies to personal work-related grievances, this would only relate to grievances of the person disclosing the conduct, and not those of a third party. For example, even if an individual felt aggrieved over a decision relating to their employment, the PID Act would not exclude a disclosable conduct report about this matter if it were made by a third person who was also concerned about the matter.

The exclusion of personal work-related grievances was included as part of the reforms introduced to address recommendations from the 2019 review of the PID Act. The 2019 review noted this exclusion was recommended to provide increased clarity of scope and assist with timely decisions on the appropriate avenue for personal matters to be dealt with.⁷⁵

Stakeholder feedback

Griffith/Narrabundah Community Association (GNCA) supported by the Inner South Canberra Community Council (ISCCC)

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.

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.

Regarding personal work-related grievances:

The Griffiths/Narrabundah Community Counsel supported by the ISCCC considered the existing provisions adequate.

ACT Integrity Commission

Regarding personal work-related grievances:

The discussion rightly notes the difficulty that is raised by conduct that “relates to a personal work-related grievance of the person disclosing the conduct” where that conduct involves serious problems of a wider kind. Thus, where a work-related decision, for example, is made for sexist or racist reasons which (of their very nature) have wider implications than the decision itself, it is difficult to see why disclosure should not attract the protections of the Act. On the other hand, such a decision may well constitute corrupt conduct and therefore come within the Commission’s jurisdiction under the IC Act. Thus, despite the somewhat anomalous position created by the very wide reach of the phrase “relates to”, it is difficult to propose more precise terminology that effectively deals with the problem at which the exception is targeted whilst leaving undoubtedly bad conduct outside the definition of disclosable conduct. The fact that the report of a third party is disclosable, but that of the “victim” does [sic] not, highlights the anomalous result of the present provision. However, the availability of the protections offered by the IC Act in cases of wrongful decisions which are other than purely employment related affords a practical solution.

⁷⁴ Public Interest Disclosure Act 2012 (ACT) s 8(2).

⁷⁵ PEG Consulting, *Review of the Public Interest Disclosure Act 2012 (ACT)*, 30 September 2019, p 61, https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0005/1497047/PID-Act-Review-Final-Report-from-Peg-Consulting.pdf.

Suburban Land Agency (SLA)

Regarding personal work-related grievances:

SLA does not consider any change to this provision is required.

Jurisdictional analysis

The Review has compiled definitions (see Table 5) of what is considered ‘disclosable conduct’ in other Australian jurisdictions (noting that ‘disclosable conduct’ is not the term used in most other jurisdictions) to compare their scope and threshold.

Table 5: Definitions of ‘disclosable conduct’ in Australian jurisdictions

Jurisdiction	Term	Definition
Victoria	Improper conduct ⁷⁶	<ul style="list-style-type: none"> ▪ Corrupt conduct, or ▪ Conduct by a public officer or body that constitutes: <ul style="list-style-type: none"> – a criminal offence – serious professional misconduct – dishonest performance of functions – an intentional or reckless breach of public trust – an intentional or reckless use of information or material acquired in the course or performance of official duties – substantial mismanagement of public resources – a substantial risk to the health or safety of one or more persons, or – a substantial risk to the environment, or ▪ Conduct of any person that: <ul style="list-style-type: none"> – adversely affects the honest performance of a public function – is intended to adversely affect the effective performance by a public officer of the functions or powers of the public officer and results in the person, or an associate of the person, obtaining: <ul style="list-style-type: none"> » a licence, permit, approval or other entitlement » a statutory appointment » a financial benefit or a real or personal property, or » any other direct or indirect monetary or proprietary gain

⁷⁶ *Public Interest Disclosures Act 2012 (Vic)* s 4.

Jurisdiction	Term	Definition
South Australia	Appropriate disclosure ⁷⁷	<p>The public officer reasonably suspects that the information raises a potential issue of corruption, misconduct or maladministration in public administration (maladministration is defined under the <i>Ombudsman Act 1972 (SA)</i>).⁷⁸</p> <p>Environmental and health information means information that raises a potential issue of a substantial risk to the environment or to the health or safety of the public generally or a significant section of the public.</p>
New South Wales	Serious wrongdoing ⁷⁹	<ul style="list-style-type: none"> ▪ Corrupt conduct ▪ A government information contravention ▪ A local government pecuniary interest contravention ▪ Serious maladministration ▪ A privacy contravention, or ▪ A serious and substantial waste of public money
Tasmania	Improper conduct ⁸⁰	<p>Conduct that constitutes an illegal or unlawful activity, or corrupt conduct, or maladministration, or professional misconduct, or a waste of public resources, or a danger to public health or safety, or a danger to the environment.</p> <p>Improper conduct also includes misconduct, including breaches of applicable codes of conduct, or conduct that constitutes detrimental action against a person who makes a public interest disclosure.</p>

⁷⁷ *Public Interest Disclosure Act 2018 (SA)* s5.

⁷⁸ Maladministration 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.

⁷⁹ *Public Interest Disclosures Act 2022 (NSW)* s13.

⁸⁰ *Public Interest Disclosures Act 2002 (Tas)* s 3.

Jurisdiction	Term	Definition
Queensland	Public Interest Disclosure ⁸¹	<p>Information about:</p> <ul style="list-style-type: none"> ▪ the conduct of another person that could, if proved, be <ul style="list-style-type: none"> – corrupt conduct, or – maladministration that adversely affects a person’s interests in a substantial or specific way, or ▪ a substantial misuse of public resources (other than alleged misuse based on mere disagreement over policy that may properly be adopted about amounts, purposes or priorities of expenditure) ▪ a substantial and specific danger to public health or safety, or ▪ a substantial and specific danger to the environment. <p>‘Maladministration’ is defined as administrative action that:</p> <ul style="list-style-type: none"> ▪ was taken contrary to law ▪ was unreasonable, unjust, oppressive, or improperly discriminatory ▪ 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 ▪ was taken: <ul style="list-style-type: none"> – for an improper purpose – on irrelevant grounds, or – having regard to irrelevant considerations ▪ was an action for which reasons should have been given, but were not given ▪ was based wholly or partly on a mistake of law or fact, or ▪ was wrong.
Western Australia	Public Interest Information ⁸²	<ul style="list-style-type: none"> ▪ improper conduct⁸³ ▪ an act or omission that constitutes an offence under a written law ▪ a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources ▪ an act done or omission that involves a substantial and specific risk of: <ul style="list-style-type: none"> – injury to public health – prejudice to public safety – harm to the environment, or ▪ a matter of administration that can be investigated under section 14 of the <i>Parliamentary Commissioner Act 1971</i> (WA)

⁸¹ *Public Interest Disclosure Act 2010* (Qld) s 13.

⁸² *Public Interest Disclosure Act 2003* (WA) s3 (definitions).

⁸³ Note that improper conduct is not further defined in the PID Act (WA).

Jurisdiction	Term	Definition
Commonwealth	Disclosable conduct ⁸⁴	<ul style="list-style-type: none"> ▪ conduct that contravenes a law of the Commonwealth, a state or a territory ▪ conduct, in a foreign country, that contravenes a law that is in force in the foreign country, and is applicable to the agency or official, and corresponds to a law in force in the ACT ▪ conduct that perverts or attempts to pervert the course of justice ▪ conduct that constitutes maladministration, including conduct that is based in whole or part on improper motives, is unreasonable or unjust or oppressive, or is negligent ▪ conduct that is an abuse of public trust ▪ conduct that results in the waste of relevant money or relevant property ▪ conduct that unreasonably results in a danger to the health or safety of one or more persons, or unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons, or ▪ conduct that results in a danger to the environment, or results in, or increases, a risk of danger to the environment

⁸⁴ *Public Interest Disclosure Act 2013 (Cth)* s29.

Jurisdiction	Term	Definition
Northern Territory	Unsatisfactory conduct ⁸⁵	<p>Conduct is unsatisfactory conduct if it is conduct engaged in by a public officer (whether or not the identity of the public officer is known) or by a public body:</p> <ul style="list-style-type: none"> a. that involves: <ul style="list-style-type: none"> i. illegality or impropriety, or ii. negligence, or iii. incompetence, and b. that is connected to public affairs, and c. that results in: <ul style="list-style-type: none"> i. substantial mismanagement of public resources, or ii. the inappropriate or significantly inefficient use of public resources, or iii. substantial mismanagement in relation to the performance of official functions, or iv. substantial detriment to the public interest. <p>‘Incompetence’ is defined as:</p> <ul style="list-style-type: none"> a. conduct that would not be engaged in by a reasonable public officer or public body: <ul style="list-style-type: none"> i. having the skills and knowledge reasonably expected of a person or body with the role of the public officer or public body, and ii. having taken appropriate steps to obtain adequate resources, information and advice, but b. does not include conduct: <ul style="list-style-type: none"> i. that is less than best practice, or ii. that is a matter of policy about which reasonable public officers or public bodies may disagree. <p>Unsatisfactory conduct does not include any conduct engaged in by a judicial officer in the performance of judicial functions.</p>

⁸⁵ *Independent Commissioner Against Corruption Act 2017 (NT)* s 12.

Review position

The Review considers the definition of disclosable conduct is largely appropriate, but could be improved by:

- broadening the definition of maladministration to include systemic, as well as substantial, maladministration
- including personal work-related grievances as disclosable conduct where it is reasonably suspected to identify a systemic practice of maladministration.

The Review further recommends that the Public Sector Standards Commissioner (PSSC) provide ongoing education and training to the ACT Public Service (ACTPS) about what is considered ‘disclosable conduct’ to minimise risk that disclosers make reports as public interest disclosures (PIDs) that are better dealt with under other frameworks, such as the IC Act.

Work-related grievances

Work-related grievances which are indicative of systemic mismanagement, such as widespread use of discriminatory practices, nepotism, bullying and harassment may result in a dysfunctional work area, affecting the entity’s ability to perform effectively. In some cases, the systemic conduct may constitute ‘maladministration’ – that is, a substantial mismanagement in the performance of official functions, as it is a manager’s duty to ensure a functional, effective and safe workplace.

The current exclusion from the definition of ‘disclosable conduct’ of work-related grievances only applies to a personal work-related grievance of the person disclosing the conduct. It remains open for someone else to make a disclosure, for example, about a transfer or promotion where they consider systemic nepotism is involved, and that it constitutes a form of maladministration. While there may be other avenues where a person can contest a decision affecting their personal employment, the Act should not discourage reporting of matters indicating widespread or systemic employment-related malpractice where the person reporting the matter is affected.

In its submission, the Commission notes that ‘where a work-related decision, for example, is made for sexist or racist reasons which (of their very nature) have wider implications than the decision itself, it is difficult to see why disclosure should not attract the protections of the Act,’ and ‘the fact that the report of a third party is disclosable, but that of the “victim” does not, highlights the anomalous result of the present provision’. The Review agrees with this view.

Simplicity and ease of understanding

The Review considers the definition of disclosable conduct relatively easy to understand. In particular, the definition is largely self-contained and does not generally require the reader to move between parts of the Act, or different Acts, to refer to different concepts. The exception to this is the definitions of ‘environment’ and ‘public funds’, which refer to definitions in different legislation. However, the Review considers that these definitions should not cause difficulties.

Importantly, the Review considers that the key concept of maladministration is explained in a way that most people would understand the scope of what may be considered ‘disclosable conduct’. Further, it is broad enough to encourage whistleblowers to come forward with their disclosable conduct and provide the PSSC the opportunity to determine if the matter warrants being a PID (that is, that it is not frivolous or vexatious, and is disclosed in the public interest).

Avoiding duplication with other integrity definitions

There are several accountability and oversight mechanisms in the Territory. This includes (in addition to the PID Act) the Commission, established under the IC Act to investigate ‘corrupt conduct’, and the PSSC, established under the PSM Act to investigate ‘misconduct’ under workplace industrial agreements. When there are multiple entities that could each investigate a particular aspect of improper behaviour, it is important that there is a balance between enabling people to correctly identify where their complaint should be addressed, and ensuring that no improper behaviour falls through a gap.

The Review considers that the definition of disclosable conduct adequately provides guidance on the sorts of conduct intended to be captured, whilst also overlapping with other concepts such as misconduct and corrupt conduct to ensure no improper behaviour is overlooked. The words ‘substantial mismanagement’ and ‘substantial and specific danger’ alert people to the level of mismanagement and danger that is required to satisfy conduct being disclosable conduct. The word ‘substantial’ is not defined in the PID Act, so it has its ordinary meaning. It is reasonable to suggest that most people would associate ‘substantial’ with something that is of considerable importance.

The Review has considered the definitions of ‘misconduct’ and ‘corrupt conduct’ to assess any overlap with ‘disclosable conduct’. The Review is comfortable that each deals adequately with its respective concept and should not cause confusion.

Nonetheless, continued staff education and awareness of where to address complaints is important. The Review recommends that the PSSC (as the proposed responsible entity for PIDs) provide additional education, information and advice about disclosable conduct, and how it interacts with and differs from misconduct and corrupt conduct.

Threshold and scope

The Review considers that the definition of disclosable conduct appropriately sets a reasonably high threshold for what may be considered a PID for investigation, and to attract protections such as immunity from criminal and civil liability (including defamation).

The Review discussed the use of the word ‘substantial’ in the definition of disclosable conduct. It is an important element in identifying the threshold for matters that are disclosable conduct disclosed in the public interest, and thus to attract the protections provided.

The Review considers the scope of matters included in disclosable conduct to be appropriate as it provides a reasonable jurisdiction for the PSSC to investigate PIDs, while referring other improper conduct to entities that are better placed to investigate that conduct. Other jurisdictions include a broader range of matters that may be considered disclosable conduct under their PID framework. For example, the Commonwealth includes conduct that contravenes a law of the Commonwealth, state or territory, and Victoria includes conduct that constitutes a criminal offence. The Review does not consider this necessary or appropriate for the Territory. The PSSC expertise is in investigation of public sector standards and upholding the ACTPS values and behaviours. While some disclosable conduct may also be criminal conduct, by the nature of the definition of ‘maladministration’, that criminal conduct would still be tied to public sector governance. If serious enough, the PID Act would currently require the PSSC refer the matter to the Chief Police Officer. A proposal to include criminal conduct in the definition of disclosable conduct would broaden PIDs beyond the PSSC function and expertise. The Review considers that if a public official is committing, or has committed, a criminal offence outside of maladministration, it should be directly referred to ACT Policing.

3.2 Assessing disclosable conduct – disclosure officer

RECOMMENDATION 17

The Review recommends that the PID Act be amended to provide a reasonable timeframe, such as 14 days, for the disclosure officer to assess and decide whether the matter falls within the definition of disclosable conduct. The Act should provide that if the timeframe is not met, the discloser may provide the disclosure directly to the PSSC and inform the PSSC the timeframe was not met. The PSSC must then inform the disclosure officer's immediate manager.

RECOMMENDATION 18

The Review recommends that the PID Act be amended to require a disclosure officer to notify the discloser where they have decided that the disclosure is not a PID and to provide reasons for that decision.

RECOMMENDATION 19

The Review recommends that the PID Act be amended to make clear that any disclosure officer nominated by the head of an ACTPS entity may receive a disclosure about any other ACTPS entity.

RECOMMENDATION 20

The Review recommends that no amendment to the PID Act is needed to require a disclosure officer to declare a conflict of interest under this Act.

Background: Timeframe and notification for disclosure officer to assess a disclosure

Under the PID Act, once a disclosure has been made by a discloser, the disclosure officer is required to assess the disclosure and, if satisfied the report is about disclosable conduct and in good faith, provide the report to the Integrity Commissioner.⁸⁶ The Commissioner must then decide whether the matter is a PID and inform the discloser of its decision.⁸⁷

If, after three months, the discloser has not heard an outcome of a decision by the disclosure officer or the Integrity Commissioner, the discloser may share information about the disclosable conduct with a journalist or a Member of the ACT Legislative Assembly (MLA).⁸⁸ This avenue provides the means for a discloser to deal with inaction to address the disclosable conduct. The ability to share disclosable conduct with a journalist or an MLA is discussed separately in chapter 5 of this report, including an analysis of whether the PID Act should expand to whom information may be provided beyond an MLA or journalist.

⁸⁶ *Public Interest Disclosure Act 2012 (ACT)* s 17.

⁸⁷ *Public Interest Disclosure Act 2012 (ACT)* s 17, s 17B.

⁸⁸ *Public Interest Disclosure Act 2012 (ACT)* s 27.

The PID Act provides no specific timeframe for the assessor to undertake their assessment of the disclosure. However, the PID Act refers to section 151B of the *Legislation Act 2001* (ACT), which states that a provision that does not impose a time limit for doing a thing must be interpreted as requiring the thing to be done as soon as possible.

The PID Act requires the disclosure officer to inform the discloser in writing if a disclosure was accepted as disclosable conduct and given to the Integrity Commissioner. However, it has no such requirement if the disclosure is not accepted as disclosable conduct. Such a requirement is included in PID guidelines. However, the guidelines are not a legislative instrument and it would be preferable for this important element in the process to be specified in the primary legislation.

Stakeholder feedback

SLA

SLA considers that a statutory time limit would provide clarity around the assessment stage for a PID. Assuming the responsibility for PIDs will sit with the PSSC in the future, the PSSC could have power to grant extensions of time where warranted.

SLA considers that the discloser should be informed if a decision is made that the allegations do not involve disclosable conduct. The Suburban Land Agency supported a statutory time limit on assessment of a disclosure by the disclosure officer and that a discloser be informed if a decision is made that the allegations do not involve disclosable conduct.

Chief Minister, Treasury and Economic Development Directorate (CMTEDD) Senior Executives Responsible for Business Integrity Risk (SERBIR)

The PID Act imposing 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, would improve openness with the discloser and assist with the timely assessment and transfer of reports.

Griffith/Narrabundah Community Association

Yes. However, the risk is that a vague reason 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”. Griffith/Narrabundah Community Association supports a time limit to assess a disclosure and pass it on to the managing PID entity and a requirement that the disclosure officer inform a person who made a disclosure that the disclosure officer did not consider it to be disclosable conduct.

Jurisdictional analysis

The most common approach across jurisdictions is a ‘single pass’ model where one officer determines whether the disclosable conduct will be investigated as a PID. This is different in the Territory where, as noted above, a disclosure must go through a disclosure officer and the Integrity Commissioner (a two-pass process) prior to the Integrity Commissioner deciding that the disclosable conduct will be investigated as a PID (noting that a discloser may choose to provide their disclosure directly to the Integrity Commissioner).

The exception is Victoria, which also has a two-pass model. The Victorian legislation does not stipulate a timeframe, but requires a public entity to develop and publish guidelines that outline how it will deal with a PID.⁸⁹ Table 6 sets out various approaches.

Table 6: Single and two pass models across jurisdictions

Jurisdiction	Passes	Timeframe
Commonwealth	Single pass (internal disclosure officer assessment)	Authorised officer must use their best endeavours to assess the matter within 14 days. ⁹⁰ A person may provide a disclosure to certain external entities if no response is provided after 90 days. ⁹¹
New South Wales	Single pass (internal disclosure officer assessment)	Six months before disclosure may be provided to parliamentarian or journalist. ⁹² However, agencies may set internal deadlines under policies made under the PID Act. For example, the Department of Premier and Cabinet sets itself a 45-day timeframe to respond to a person about a disclosure. ⁹³
Queensland	Single pass (internal disclosure officer assessment)	Six months before disclosure may be provided to parliamentarian or journalist. ⁹⁴
Western Australia	Single pass (internal disclosure officer assessment)	Three months before disclosure provided to parliamentarian or journalist. ⁹⁵
South Australia	Single pass (internal disclosure officer assessment)	30 days before disclosure provided to parliamentarian or journalist. ⁹⁶

⁸⁹ *Public Interest Disclosures Act 2012* (Vic) s 57.

⁹⁰ *Public Interest Disclosure Act 2013* (Cth) s 43(11).

⁹¹ *Public Interest Disclosure Act 2013* (Cth) s 26, s 52.

⁹² *Public Interest Disclosures Act 2022* (NSW) s 28.

⁹³ The Cabinet Office and Premier’s Department NSW, *Public Interest Disclosure Policy*, October 2023, <https://www.nsw.gov.au/sites/default/files/2023-10/Premier%27s%20Department%20and%20The%20Cabinet%20Office%20Public%20Interest%20Disclosure%20Policy%20-%20October%202023%20.pdf>.

⁹⁴ *Public Interest Disclosure Act 2010* (Qld) s 20.

⁹⁵ *Public Interest Disclosure Act 2003* (WA) s 7A(2)(d).

⁹⁶ *Public Interest Disclosure Act 2018* (SA) s 6(b)(iii)(A).

Jurisdiction	Passes	Timeframe
Victoria	Two passes (internal disclosure officer, who then provides to Independent Broad-based Anti-corruption Commission (IBAC))	The Victorian legislation does not stipulate a timeframe. It requires a public body to prepare guidelines on how it will manage PIDs. The Department of Premier and Cabinet guidelines require a disclosure officer to notify a person on the outcome of an assessment by disclosure officer within 28 days of receiving the disclosure. ⁹⁷
Tasmania	Single pass (though may go through the Ombudsman or the public entity)	The public entity has 45 days to assess a disclosure. ⁹⁸ The Ombudsman must assess in a reasonable timeframe. ⁹⁹

Review position

The Review recommends that the PID Act require a disclosure officer (referred to as an ‘assessor’) to assess a disclosure within 14 days. If the assessor does not meet this timeframe, the discloser may then provide their disclosure to the PSSC and advise that the assessor did not meet the required timeframe. As an accountability mechanism, the PSSC would be authorised to inform the assessor’s immediate manager that they have failed to meet their requirements under the PID Act.

The Review considers the lack of a specified timeframe for an assessor to complete their obligations under section 17 to be inappropriate. The current provisions under the *Legislation Act 2001* (ACT) do not provide certainty about what length of time is reasonable for an assessment to take, which could cause confusion for both assessors and disclosers. Failure to conduct a timely assessment of a disclosure and forward it to the PSSC for further consideration would affect the overall timeliness of the PID process.

The submissions received by the Review in response to these issues support the need for the assessor to complete their assessment of a disclosure in a timely manner, and to inform the discloser of their decision. The Review considers that this notification should be provided when the allegations are found not to involve disclosable conduct, and the assessor should provide reasons for not accepting the disclosure as disclosable conduct. Placing this requirement in the principal legislation, rather than the PID guidelines, would make this requirement explicit and put it at the forefront of an assessor’s mind.

The Review recommends that the PID Act make it clear that any disclosure officer nominated by the head of an ACTPS entity may receive a disclosure about any other ACTPS entity (and likewise for a Legislative Assembly entity). This would remove any ambiguity in the PID Act, and encourage whistleblowers to come forward.

Background: Disclosure officer – conflict of interest

During debate of the Public Interest Disclosure Amendment Bill 2020 in the ACT Legislative Assembly, MLAs raised some matters that they wanted considered in the next PID Act review. They included whether there should be a requirement for a disclosure officer to declare a conflict of interest when assessing a disclosure. The PID Act does not expressly require a disclosure officer to declare a conflict of interest when assessing a disclosure.

⁹⁷ Victorian Department of Premier and Cabinet, *Guide to Making and Handling Public Interest Disclosures – Procedures for the Department of Premier and Cabinet*, part 3.3, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fcontent.vic.gov.au%2Fsites%2Fdefault%2Ffiles%2F2022-01%2FGuide-to-making-and-handling-p~of-Premier-and-Cabinet_clean%2520copy_0.DOCX&wdOrigin=BROWSELINK.

⁹⁸ *Public Interest Disclosures Act 2002* (Tas) s 33.

⁹⁹ *Public Interest Disclosures Act 2002* (Tas) s 30.

While the PID Act itself does not require a disclosure officer to declare a conflict of interest, the PSM Act includes conduct and expectations that are applicable to all employees in the ACTPS. These expectations include a requirement for public servants to take all reasonable steps to avoid a conflict of interest, and to declare or manage a conflict of interest that cannot reasonably be avoided.¹⁰⁰ Failing to act in a way that is consistent with this expectation may be misconduct, and subject the employee to a misconduct proceeding.¹⁰¹

To supplement this expectation, the Head of Service has issued conflict of interest instructions under the PSM Act, applicable to all employees engaged under the PSM Act.¹⁰² Relevantly, the policy includes guidance on conflicts of interest in a decision-making context. The policy states that, if an employee allows their private interests to have an influence on their official duties and decision making, it could be classified as misconduct and attract disciplinary action under the relevant clause of an ACTPS enterprise agreement, or the *Public Sector Management Standards 2016* (PSM Standards) for senior executives.¹⁰³

Stakeholder feedback

ACT Integrity Commission

It may be helpful to note that the most likely conflict of interest is that the disclosure officer is part of the management or administrative structure responsible for the issue about which a complaint is made. The advantage of this is that he or she is likely to have relevant and useful knowledge to bring to bear; the disadvantage is that his or her assessment of the disclosure may be or be reasonably thought to be affected by the possible outcome of the process. Another possibility is that the disclosure officer was involved in some way in the impugned decision or conduct. The first of these instances will almost certainly be patent and seems inescapable unless the rule is that disclosures are to be considered in every case by a disclosure officer in another directorate. This seems impractical. As to the other instances, the integrity of the process suggests that a conflict of interest needs to be acknowledged and managed, usually by referring the disclosure to another disclosure officer not involved in the issue. In principle, it seems reasonable that this should be managed by the directorate.

SLA

Given that the Public Sector Management Act already imposes obligations on public sector employees with regard to conflicts of interest, SLA does not consider there is any additional benefit in having a separate requirement for disclosure officers to make a conflict of interest declaration.

SLA would not support removing the disclosure officer from the scheme. SLA's view is that the agency is best placed to investigate the alleged conduct, having regard to the management of any conflict of interest.

GNCA

The GNCA (supported by the ISCCC) agree that the PID Act should include a requirement for a disclosure officer to declare a conflict of interest when assessing a disclosure, and that this conflict should be reported to the Commission.

¹⁰⁰ *Public Sector Management Act 1994* (ACT) s 9(1)(a), (b).

¹⁰¹ *Public Sector Management Act 1994* (ACT) s 9(3).

¹⁰² Under section 17(2)(a), the Head of Service has a leadership function to develop, oversee the implementation of, coordinate and provide advice and reports to the Chief Minister about whole-of-government strategies.

¹⁰³ ACT Government, *Conflict of Interest Policy*, June 2021, p 7, https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0003/1765443/Conflict-of-Interest-Policy-2021.pdf.

Jurisdictional analysis

The Review undertook an analysis of each Australian jurisdiction's PID legislation and could not find an express requirement for a disclosure officer to declare a conflict of interest.

Review position

Conflict of interest management is an important aspect of public sector governance. A real, perceived or potential conflict of interest in public administration can impact the public's confidence in the impartiality and integrity of its public institutions.

As outlined, a public servant already has an obligation to take all reasonable steps to avoid a conflict of interest and to declare or manage a conflict of interest which cannot reasonably be avoided. In addition, the ACTPS has an extensive policy on conflicts of interest that is made under the PSM Act. Threat of a disciplinary process for failing to declare a conflict of interest under existing obligations is sufficient to encourage a disclosure officer to act in accordance with their expectations.

The Review considers that these existing requirements are sufficient, and that the PID Act does not need to impose an obligation in the context of PIDs for a disclosure officer to declare a conflict of interest.

3.3 Seeking review of decisions about disclosable conduct

RECOMMENDATION 21

The Review recommends that the PID Act be amended to allow a discloser to seek internal review of a decision by another disclosure officer that disclosable conduct is not a PID. In such a case the discloser must alert the new disclosure officer to the first disclosure officer's decision.

Background

Under section 17A of the PID Act, the Integrity Commissioner must assess a disclosure of disclosable conduct and decide if it is satisfied on reasonable grounds that the disclosure:

- is about disclosable conduct
- was disclosed in the public interest, and
- is not frivolous or vexatious.

If satisfied of the above, the disclosure is taken to be a PID.

The Justice and Community Safety Committee (Legislative Scrutiny Role) (JACS Committee) for the Ninth Legislative Assembly noted a concern in its scrutiny report on the Public Interest Disclosure Bill 2020 that there was no avenue for merits review of a decision made by the Integrity Commissioner about a disclosure.¹⁰⁴ The government response stated that, given the nature of the Integrity Commissioner's role, combined with the fact that the Commissioner's decisions under the IC Act were not reviewable, it would not be appropriate provide for a review of the Integrity Commissioner's decision that a matter was or was not disclosed in the public interest.¹⁰⁵

Neither the PID Act nor the IC Act have a mechanism for internal merits review of a decision. However, there are mechanisms to lodge a complaint about the conduct of the Commission with the Inspector of the Commission.¹⁰⁶ Administrative decisions made under both Acts can also be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (ADJR Act) through the Supreme Court, which enables the review of administrative decisions in the Territory.

¹⁰⁴ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No 41*, 28 April 2020, p 17, https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1541079/Report-41.pdf.

¹⁰⁵ A Barr, Letter from Chief Minister Andrew Barr to Giulia Jones, MLA, Chair of the Standing Committee on Justice and Community Safety, 17 April 2020, p 3, https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/1539666/Response-Public-Interest-Disclosure-Amendment-Bill-2020.pdf.

¹⁰⁶ *Integrity Commission Act 2018* (ACT) s 257.

Stakeholder feedback

ACT Ombudsman

I support the capacity for a person to seek judicial review under the (Administrative Decisions (Judicial Review) Act 1989) (ACT), and suggest this be retained.

Internal review processes work most effectively where the reviewer's position is senior to (or at level but independent of) the person who made the original decision. Accordingly, an internal review mechanism might be worth considering, should the Integrity Commissioner be willing and able to delegate power to make initial decisions on disclosable conduct. In this regard, I note that internal review, supported by internal guidance material, operates effectively in the Commonwealth PID regime, which I oversee as Commonwealth Ombudsman. Disclosers may or may not agree with the outcome of an internal review, but the internal review process does provide an opportunity for a better explanation of a decision to be given to a discloser, for a decision that is defective to be corrected, and to identify whether first instance decision-makers need to be given additional guidance.

Speaker of the Legislative Assembly

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, overseeing 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.

GNCA (supported by the ISCCC)

The GNCA (supported by the ISCCC) do not agree that decisions by the Commission about whether a matter is a PID should be subject to review.

Jurisdictional analysis

There is no consistent approach amongst jurisdictions for PID review mechanisms. Some jurisdictions allow for internal review, others require review by the Ombudsman, and others only have judicial review.

In New South Wales, the maker of a disclosure may apply for internal review to the agency that made the decision either where a decision has been made to not accept a PID, or a decision has been made to cease dealing with a disclosure.¹⁰⁷ Similarly in Queensland, a person who receives written reasons for a decision of an entity not to investigate or deal with a PID may apply to the chief executive of the entity for a review of the decision within 28 days after receiving the written reasons.¹⁰⁸

Tasmania and the Commonwealth do not provide an avenue for internal review. However, in Tasmania, the Ombudsman must review any decision by a public body that a disclosure is not a PID.¹⁰⁹ Similarly, in the Commonwealth, the Ombudsman may (but is not required to) review a decision not to allocate a disclosure for investigation.¹¹⁰

In Victoria, review does not appear available if the relevant entity (being the IBAC, the Victorian Inspectorate, or the Integrity and Oversight Committee) decides that the matter is not a PID.

Review position

The ability to seek review is an important aspect of public administration as it provides a safety net to minimise the risk that a decision is made incorrectly. A decision may be made incorrectly for any number of reasons, and is unlikely to be an intentional decision to thwart an individual's right to make a PID. A review may also provide the discloser some comfort if, after seeking review, the reviewer agrees with the original decision, that the disclosable conduct is not a PID.

The Review recommends that ADJR Act be retained in addition to review by the Ombudsman. If a discloser remains dissatisfied with a decision by both the PSSC and the Ombudsman, the Review considers it should remain open to that discloser to seek judicial review.

The Review does not consider it appropriate that PSSC decisions not to accept disclosures as PIDs be reviewable by the ACT Civil and Administrative Tribunal (ACAT), which has the function of reviewing decisions prescribed as reviewable under an authorising law.¹¹¹ Reviewable decisions by ACAT typically relate to the granting of some benefit or right to an individual or entity. The decision that disclosable conduct is not a PID does not fit this category. Under a separate recommendation in this report, the discloser will receive immunities and protections when a disclosure is made, if made in good faith and about disclosable conduct, regardless of the PSSC decision to accept it as a PID.

¹⁰⁷ *Public Interest Disclosures Act 2022* (NSW) s 60(1)(a), (b).

¹⁰⁸ *Public Interest Disclosure Act 2010* (Qld) s 30(3).

¹⁰⁹ *Public Interest Disclosures Act 2002* (Tas) s 35(2).

¹¹⁰ *Public Interest Disclosure Act 2013* (Cth) s 55(3).

¹¹¹ *ACT Civil and Administrative Tribunal Act 2008* (ACT) Div 6.3.

3.4 Directing matters to the appropriate entity

RECOMMENDATION 22

The Review recommends that the PID Act be amended so that, if the PSSC considers that disclosable conduct meets the requirements to be a PID, but also considers the matter is more appropriately dealt with by other means (such as referral to ACT Policing, the ACT Integrity Commission, or dealt with as misconduct), the PSSC may refer the matter to that more appropriate entity so that it may investigate the matter outside the PID Act.

RECOMMENDATION 23

The Review recommends that, if the PSSC refers disclosable conduct that is a PID to be dealt with in what is considered a more appropriate way:

- i. the PSSC must inform the discloser (if known) of the referral and provide the relevant contact details of the entity to which the disclosable conduct has been referred.
- ii. the discloser retains protections available under the PID Act.

Background

It is not uncommon for a complainant to refer suspected improper behaviour to multiple entities to ensure the allegation is dealt with. When this occurs, there must be mechanisms to filter the allegation to the correct entity for appropriate action, and to minimise risk that several entities conduct separate investigations on the same matter.

Accountability and oversight of public sector conduct in the Territory are provided through the IC Act, the PSM Act (in conjunction with ACTPS enterprise agreements), and the PID Act. The interaction between them needs to minimise the risk that multiple investigations are undertaken into the same matter, resulting in an inefficient use of public resources. The Review is aware that this has previously occurred in the Territory.

Disclosable conduct under the PID Act covers public policy, practice or procedure that is maladministration (such as a substantial mismanagement of public resources or funds), or that results in a substantial and specific danger to public health or safety, or the environment.¹¹² This definition overlaps with the definition of corrupt conduct in the IC Act,¹¹³ and misconduct under the PSM Act¹¹⁴ and ACTPS enterprise agreements.¹¹⁵ Some overlap is to be expected to minimise the legislative gap, so that all concerning behaviour is captured under at least one of the Acts. However, the PID Act has no provision concerning concurrent investigations.

¹¹² *Public Interest Disclosure Act 2012* (ACT) s 8.

¹¹³ *Integrity Commission Act 2018* (ACT) s 9.

¹¹⁴ *Public Sector Management Act 1994* (ACT) s 9(3).

¹¹⁵ See for example, ACTPS Administrative and Related Classifications Enterprise Agreement 2023–26, G4.5.

In a situation where disclosable conduct is disclosed under the PID Act, and it could be considered both a PID under the PID Act, and corrupt conduct under the IC Act, the PID Act does not expressly require or authorise the Integrity Commissioner to investigate the matter under the IC Act if considered more appropriate. In fact, the IC Act only authorises the Integrity Commissioner to take a PID to be a corrupt conduct complaint if, upon assessment, it determines that the disclosable conduct is not a PID, but suspects on reasonable grounds that the conduct may be corrupt conduct.¹¹⁶

The Integrity Commissioner may immediately discontinue a PID investigation if satisfied that a more appropriate way is reasonably available to deal with the disclosable conduct,¹¹⁷ and then commence an own-motion investigation under the IC Act.¹¹⁸ However, this course of action removes the PID Act protections for the discloser.

The same issues exist for misconduct and the role of the PSSC. Nothing in the PID Act, the PSM Act or the ACTPS enterprise agreements would prevent a matter being investigated concurrently as both a PID and misconduct. Similarly, it is open to the investigating entity to end an investigation on the basis that the matter is more appropriately dealt with as misconduct, but this again would remove the PID Act protections for disclosers.¹¹⁹

Stakeholder feedback

SLA

SLA considers that a complaint should be treated as either a PID or corruption complaint, but not both. This is due to the interaction between the two Acts being cumbersome and inefficient.

SLA considers that a person should be able to claim protections under the PID Act where disclosure is made contrary to the IC Act. Consistent with the above comment, this will afford protection to persons who make a corruption complaint which ultimately becomes a PID.

GNCA

The GNCA supported amending the legislation to specify that a complaint can only be investigated under either the PID Act or the IC Act, but not both.

¹¹⁶ *Integrity Commission Act 2018 (ACT) s 59A.*

¹¹⁷ *Public Interest Disclosure Act 2012 (ACT) s 20(2)(d)(iii).*

¹¹⁸ *Integrity Commission Act 2018 (ACT) s 101.*

¹¹⁹ *Public Interest Disclosure Act 2012 (ACT) s 20(2)(d)(iii).*

Jurisdictional analysis

Several jurisdictions place mandatory referral requirements on public agencies to refer certain suspected corruption to its anti-corruption commission.

The *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) makes it mandatory for agency heads to refer ‘serious or systemic’ corrupt conduct by a current or former staff member to the National Anti-Corruption Commission (NACC).¹²⁰ The NACC Act and the *Public Interest Disclosure Act 2013* (Cth) set out a process whereby the NACC can issue a ‘stop action direction’, which prevents the agency taking any further action in relation to a corruption issue identified in a PID. This avoids a scenario where both the NACC and an agency are investigating the same issues under two frameworks.

In the Northern Territory, the NT Independent Commissioner Against Corruption (ICAC) is required to establish a system for mandatory reporting of improper conduct (which includes corrupt conduct).¹²¹ The NT ICAC Directions require that public and prescribed officers must report relevant conduct unless the officer knows that the conduct has already been reported to the NT ICAC.¹²²

In Victoria, the head of a public sector body must notify the IBAC of any matter which the person suspects on reasonable grounds involves corrupt conduct.¹²³

In New South Wales, a mandatory corruption reporting duty lies with the Ombudsman, the Commissioner of Police, the principal officer of a public authority, an officer who constitutes a public authority, and a Minister of the Crown. Each has a duty to report to the ICAC any matter that they suspect on reasonable grounds concerns or may concern corrupt conduct.¹²⁴

Review position

The Review recommends that the PID Act be amended to provide a clear pathway for matters to be referred to the appropriate entity at the point the PSSC is notified of disclosable conduct by a disclosure officer. The current process to accept a matter as a PID, and then immediately end an investigation, is inefficient and cumbersome. To ensure matters are appropriately dealt with, the PID Act should interact effectively with other Territory legislation provisions across the ACTPS prior to the PSSC accepting a matter as a PID.

If the PSSC is assessing a disclosure, and considers the disclosure is a PID, the PSSC should be provided the opportunity to deal with it under the PID Act, or refer the matter for investigation under other frameworks that may be more appropriate. This would be consistent with the broad nature of the definition of ‘disclosable conduct’ under the PID Act, ‘corrupt conduct’ under the IC Act, and ‘misconduct’ under the PSM Act, and the overlap between them. The PSSC would then cease any action under the PID Act and avoid a situation where two investigations could occur concurrently.

¹²⁰ *National Anti-Corruption Commission Act 2022* (Cth) s 33.

¹²¹ *Independent Commissioner Against Corruption Act 2017* (NT) s 22.

¹²² Office of the Independent Commissioner Against Corruption NT, *Mandatory Reporting Directions and Guidelines for Public Officers*, https://icac.nt.gov.au/_data/assets/pdf_file/0009/1174383/Mandatory_Reporting_Directions_Guidelines_amended-FA.pdf.

¹²³ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 57(1).

¹²⁴ *Independent Commission Against Corruption Act 1988* (NSW) s 11.

Examples of referral where a PID is better investigated by another entity may include:

- The ACT Integrity Commission as a corruption complaint under the IC Act. The PSSC has a mandatory requirement under section 62 of the IC Act to refer any reasonably suspected serious or systemic corrupt conduct.
- ACT Policing as a criminal offence. The PSSC would already have a mandatory obligation under section 21 of the PID Act to refer disclosable conduct that could involve criminal offence to the Chief Police Officer once the matter is accepted for investigation as a PID. The same obligation should exist when the PSSC is assessing disclosable conduct, if on the information provided, a reasonable belief is formed that the disclosable conduct could involve a criminal offence.
- The PSSC as a misconduct matter. It may be possible that a person makes a disclosure about maladministration by a manager, without knowledge that another employee impacted by the same maladministration has already commenced a PSSC misconduct process for the same matter.

If the PSSC refers the matter to another entity, they must be required to inform the discloser (where the disclosure was not anonymous) of the referral and provide the relevant contact details of the entity to which the disclosable conduct has been referred. A decision of the PSSC to refer the matter should not be reviewable by the Ombudsman (as recommended by this Review for decisions as to whether disclosable conduct is a PID). As the disclosable conduct is still progressing, albeit outside the PID framework, there is no need for review by the Ombudsman. Of course, as an administrative decision, the ADJR Act would still be available.

Importantly, the protections available to a discloser under Part 7 of the PID Act should continue to apply even if the PSSC refers the matter to another entity for investigation, except for section 42A which deals with protection for witnesses. This protection is not required as witnesses would be engaged under the terms of the respective investigative framework to which the disclosable conduct is referred.

The Review considers that the PID Act provides sufficient flexibility to refer a matter once it is accepted for investigation as a PID. This is currently allowed under section 20(2)(d)(iii) of the Act, which allows an investigating entity, if reasonably satisfied, to end an investigation if there is a more appropriate way reasonably available to deal with the disclosable conduct that is the subject of a PID. This acknowledges that it may only become apparent to the PSSC that the matter is more appropriately dealt with under another framework once the PID investigation has commenced and further information has been gathered. Should this occur, the discloser, and any witnesses who provided information, should continue to receive the protections available under Part 7 of the PID Act until the matter is concluded in the referred framework.



Chapter 4 – Outcomes of an investigation

4.1 Ending a PID investigation

RECOMMENDATION 24

The Review recommends that the existing mechanisms for ending an investigation under section 20(2)(d) of the PID Act be retained with consequential amendments in relation to other recommendations.

Background

Under section 20 of the *Public Interest Disclosure Act 2012* (ACT) (PID Act), the investigating entity for a public interest disclosure (PID) must investigate the disclosure whilst complying with the rules of natural justice and procedural fairness. The section also sets out circumstances under which an investigating entity may end an investigation.

Under section 20(2)(d), the investigating entity may end an investigation if it is reasonably satisfied that:

- the disclosed information is wrong in a material way and investigation is not warranted, or
- the age of the disclosed information makes it impracticable for the disclosure to be investigated, or
- there is a more appropriate way reasonably available to deal with the disclosure.

During debate of the Public Interest Disclosure Amendment Bill 2020, there was some concern that section 20(2)(d) could provide for ‘subjective’ decision making to quickly end an investigation, which could lead to the adverse outcome of matters not being investigated properly, allowing disclosable conduct to go unaddressed.

This concern, which stemmed from situations where agencies were conducting an internal investigation, is partly resolved by the Review’s recommendation that all investigations into PIDs be conducted by the Public Sector Standards Commissioner (PSSC) (except in circumstances noted in Recommendation 2). The current arrangement limits the relevant public sector entity’s authority to close an investigation under section 20. The Review has considered how the provisions relating to closing investigations would operate under a structure where the PSSC is responsible for investigating PIDs.

Stakeholder feedback

Suburban Land Agency (SLA)

SLA considers the current provisions to be adequate, noting that the PID Act safeguards that allow the Integrity Commissioner, at any time, to review a decision by another investigating entity to end its investigation of a PID under section 20(2). Also, a person may make a complaint to the Ombudsman.

Griffith Narrabundah Community Association (GNCA) (supported by the Inner South Canberra Community Council (ISCCC))

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.

Jurisdictional analysis

At the Commonwealth level, where a PID is allocated for handling under the *Public Interest Disclosure Act 2013* (Cth) (PID Act (Cth)), a decision-maker may exercise their discretion under s 48(1) not to investigate it, or to cease investigating it, if:

- the discloser is not a current or former public official (and a determination has not been made under s 70 of the PID Act (Cth))
- the information does not to any extent concern serious disclosable conduct
- the disclosure is frivolous or vexatious
- the disclosure is substantially the same as a disclosure that has already been investigated, or is currently being investigated, under another law of the Commonwealth, and
 - it would be inappropriate to conduct another investigation at the same time, or
 - the CEO is reasonably satisfied that there are no matters that warrant investigation
- the discloser has informed the CEO that they do not wish the disclosure to be pursued and the CEO is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation, or
- it is impracticable to investigate the disclosure because:
 - the discloser has not revealed their name and contact details
 - the discloser has refused or has failed or is unable to give the investigator the information they requested, or
 - of the age of the information.

If a decision not to proceed to investigation, or to end an investigation, is made under this section, the Commonwealth Ombudsman must be informed of that decision and the reasons for that decision as soon as reasonably practicable. In cases where the contact details of the discloser are available, they must also be informed of that decision, the reasons for the decision, and any other courses of action available to the discloser under other laws of the Commonwealth.

Similarly, in Western Australia, a proper authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the discloser if it considers that:¹²⁵

- the matter is trivial
- the disclosure is vexatious or frivolous
- there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter, or
- the matter is being or has been adequately or properly investigated by another person to whom an appropriate disclosure of public interest information has been made.

Should the proper authority refuse to investigate, or discontinues an investigation of, a matter it must provide the discloser with reasons for its refusal.¹²⁶

In Victoria, public interest complaints are administered by the Independent Broad-based Anti-corruption Commission (IBAC). If the IBAC determines that a disclosure is a PID, it may investigate the disclosure as if it was a corruption complaint under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), including conducting a preliminary inquiry or subsequent investigation.¹²⁷ The IBAC may discontinue an investigation at any time for any reason.¹²⁸

¹²⁵ *Public Interest Disclosure Act 2003* (WA) s 8(2).

¹²⁶ *Public Interest Disclosure Act 2003* (WA) s 8(3).

¹²⁷ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 7, s 59A, s 60.

¹²⁸ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 69.

In New South Wales, the new 2022 PID framework requires the NSW Ombudsman to prepare PID guidelines that public sector agencies must refer to when dealing with a PID.¹²⁹ The NSW Ombudsman guidelines note that while the *Public Interest Disclosures Act 2022* (NSW) requires agencies to decide how to deal with a PID, including whether to investigate, it does not confer any additional power on the agencies to conduct investigations. Accordingly, any investigation would need to be conducted in accordance with any relevant laws, policies and practices that apply to the agency in relation to suspected serious wrongdoing, however the agency becomes aware of it.¹³⁰ Consequently, the PID Act (NSW) delegates the means to end an investigation to alternative legislation and policies, which may be varying depending on a NSW public sector agency's internal policy.

In Queensland, the chief executive of a public sector entity must establish reasonable procedures to ensure that PIDs made to the entity are properly assessed and, when appropriate, properly investigated and dealt with.¹³¹ This provision delegates the investigation procedures to the head of a public sector entity, rather than dealing with such matters in the principal legislation. For example, the Queensland Department of Environment and Science PID guidelines provide that the department may decide to take no further action on a PID where:¹³²

- the allegations have already been dealt with by another appropriate process
- the allegations should be dealt with by another appropriate process
- the age of the information makes it impractical to investigate the matter
- the information is considered trivial or too demanding of resources to warrant investigation
- the entity that has jurisdiction to investigate the matter has notified the department that investigation is not warranted.

The Queensland Ombudsman Standards – but not the Act – require that written reasons be provided for a decision that a disclosure is not a PID.¹³³ If the person making the disclosure is not satisfied, they may apply to the director-general for a review of the decision within 28 days.¹³⁴

In the Northern Territory, the PID scheme was absorbed into the *Independent Commissioner Against Corruption Act 2017* (NT) (ICAC Act (NT)). Section 20 of the ICAC Act (NT) gives that commission a very broad discretion to determine how a matter should be dealt with, and whether any action is required. The NT ICAC must exercise that discretion in the public interest, a framework for which is set out in Schedule 1 of that Act.

¹²⁹ *Public Interest Disclosures Act 2022* (NSW) s 73.

¹³⁰ Ombudsman NSW, *Dealing with voluntary PIDs*, p 6, https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0010/138997/Dealing-with-voluntary-PIDs-.pdf

¹³¹ *Public Interest Disclosure Act 2010* (Qld) s 28(1)(a).

¹³² Queensland Government, *Public Interest Disclosure Policy & Procedure*, 10 May 2022, p 7, https://www.des.qld.gov.au/_data/assets/pdf_file/0020/260084/public-interest-disclosure-policy-procedure.pdf.

¹³³ 'Public Interest Disclosure Standard No. 2/2019 – Assessing, Investigating and Dealing with Public Interest Disclosures (Qld)' at 2.1.3.

¹³⁴ Queensland Government, *Public Interest Disclosure Policy & Procedure*, 10 May 2022, p 7, https://www.des.qld.gov.au/_data/assets/pdf_file/0020/260084/public-interest-disclosure-policy-procedure.pdf.

The Tasmanian *Public Interest Disclosures Act 2002* (Tas) provides for disclosures to several entities. Where the disclosure has been referred to the Ombudsman, the Ombudsman may decide not to investigate a disclosed matter if it is determined:

- the disclosure is trivial, vexatious, misconceived or lacking in substance
- the subject matter of the disclosure has already been adequately dealt with
- the person making the disclosure has commenced commission, court or tribunal proceedings in relation to the same matter
- the person making the disclosure had knowledge of the matter for more than 12 months and failed to give a satisfactory explanation for the delay in making the disclosure
- the disclosure relates solely to the personal interests of the discloser
- the disclosure is based on false or misleading information, or
- a decision has been made that the matter is not in the public interest.¹³⁵

The provision for matters that do not have to be investigated by a public body is similar to the provision for matters that do not have to be investigated where the referral has been made to the Ombudsman.¹³⁶

Review position

Given this Review's recommendation that investigations of PIDs be conducted by the PSSC (or the relevant investigating entity), the Review considers that provisions to end investigations under section 20(2)(d) are still relevant and required to allow the PSSC to refer matters to other agencies if considered appropriate. The concerns of Members of the ACT Legislative Assembly (MLAs) stemmed from concern that a public sector entity investigating its own conduct could end an investigation under section 20(2) to avoid dealing with disclosable conduct. This concern is alleviated by the Review's recommendation that the PSSC (or relevant other investigating entity) must conduct all PID investigations.

The approach in the PID Act to end an investigation is consistent with other Australian jurisdictions, which typically provide specific reasons for deferring or ending an investigation in the principal legislation, or provides for this in related instruments such as policies and guidelines.

The Review anticipates that section 20(2)(d) will be primarily relied upon by the PSSC where it becomes apparent during an investigation that referral to another entity to investigate under a different framework is warranted. For example, the PSSC may gather enough information to satisfy a reasonable belief that the disclosable conduct involves serious or systemic corrupt conduct. In this scenario, the PSSC must be able to end the investigation under the PID Act, so that the Commission may consider whether to commence an investigation under the *Integrity Commission Act 2018* (ACT) (IC Act). For the discloser's benefit, section 23 of the PID Act would require the investigating entity (the PSSC in most cases) to inform the discloser in writing about the outcome of an investigation, including, the grounds and reasons for ending the investigation.

¹³⁵ *Public Interest Disclosures Act 2002* (Tas) s 40.

¹³⁶ *Public Interest Disclosures Act 2002* (Tas) s 64.

4.2 Outcome of PID investigation

RECOMMENDATION 25

The Review recommends that existing requirements to keep a discloser informed under section 23 of the PID Act be retained, but applied as appropriate to the investigating entity.

RECOMMENDATION 26

The Review recommends that the PID Act be amended to require the investigating entity to inform the relevant head of public sector entity about the outcome of a completed investigation.

RECOMMENDATION 27

The Review recommends that existing requirements for the head of a public sector entity to discipline any person responsible for the disclosable conduct under section 24(1)(b) of the PID Act be retained under the new clarified arrangements for heads of entity.

RECOMMENDATION 28

The Review recommends the PID Act be amended so that where the disclosable conduct involves the head of a public sector entity, the entities outlined in Recommendation 12 are responsible for undertaking any disciplinary action.

Background

A core purpose of the PID Act is to provide a means for a whistleblower to raise concerns of disclosable conduct so that the relevant public sector entity may address and prevent the disclosable conduct occurring, or occurring in the future, and to discipline those public officials involved in the disclosable conduct.

To achieve this purpose, section 24 of the PID Act requires the head of a public sector entity to:

- take necessary and reasonable action to prevent disclosable conduct continuing or occurring in the future, and
- if an investigation of a PID is completed, discipline any person responsible for the disclosable conduct.

The Review considers the first point in Part 5.2 below. However, the PID Act does not explicitly allow an investigating entity, which is not the public sector entity itself, to inform the head of another public sector entity about the outcome of an investigation so that the head of that entity can take appropriate disciplinary action. Without explicit authority, providing this information to the head of a public sector entity may breach section 44 the PID Act, which prohibits the disclosure and use of protected information related to a PID.

Section 44 of the PID Act creates an offence if a person who has a function under the PID Act discloses 'protected information' – that is, information about a person that is disclosed to, or obtained by, a person because of the exercise of a function under the Act. This may prevent an investigating entity that undertakes an investigation into disclosable conduct from informing the head of a public sector entity where disclosable conduct was found to occur, or is reasonably suspected of occurring, about the matter so that they may take the action required of them under section 24 of the PID Act.

Disclosure of such information to another public sector entity may be authorised under section 44(3)(b) of the PID Act, which provides an exception to the offence provision if the disclosure is in relation to the exercise of a function of the Act by a person to whom the section applies. The relevant function in this case could be that the investigating entity has a responsibility to inform the Integrity Commissioner and the discloser of the disclosable conduct about action taken or proposed to be taken in response to the disclosable conduct.¹³⁷ This disclosure would require the investigating entity to consult with the relevant public sector entity in which the disclosable conduct occurred (or is occurring) to know the information to inform the discloser. However, this relies on there being an implied authority (to get information from the relevant public sector entity) as an exception to a clearly worded offence provision.

The Review has also considered how the above provisions may need to be amended if responsibility for PIDs is transferred to the PSSC.

Stakeholder feedback

ACT Integrity Commission

The Discussion Paper expresses the opinion (by way of example) that there is no clear provision in the PID Act that allows the Commissioner, without committing an offence under s 44, to share the outcome of the investigation with a relevant Director-General to enable the obligations to take action under s 24 of the PID Act. Section 44(3)(b), which excepts from the offence provisions in s 44(1) and (2) the divulging of information, “in relation to the exercise of a function, by a person to whom this section applies, under this Act or another territory law” does not appear to do so in the posited example as the Director-General in contemplation is the one who is required to exercise a function under the Act as distinct from someone who has exercised such a function (vide the definition of person to whom this section applies in s 44(6)). This may need clarification.

However, under ss 18 and 19, the Integrity Commissioner must either investigate the PID or refer it for investigation to the designated persons (head of a public service entity, the Head of Service, the Ombudsman and the PSSC). It is not necessary that the referee be the official with direct responsibility for the disclosed matter. Under s 24, the consequence of a belief (as distinct from a finding) of the head of a public sector entity that disclosable conduct has occurred is to take necessary corrective action. It is clear that such a belief can be – indeed, must be – based on information received from the investigating body, including the PSSC, the Ombudsman or the Commission, who may pass on that information without any offence under the exception in s 44(3), and that the corrective task may well need to include informing, for example, the Head of Service and, perhaps, a Minister. In short, where the information is used “under this Act” for the purpose of correction, its being divulged and its use do not constitute offences under s 44(1) or (2).

The above reasoning that allows what seems to be, at all events, the necessary outcome of an investigation which discloses something requiring correction, does appear to be unnecessarily complicated and tortuous. It seems that expressly specifying the sequence of responsibility following an investigation would be a clearer approach.

¹³⁷ Public Interest Disclosure Act 2012 (ACT) s23(1)(b), s25(1)(c).

SLA

Given the uncertain application of s.44 of the PID Act in this space, SLA would welcome an amendment which would allow the Integrity Commissioner (or other investigating entity) to share the outcome of an investigation with a public sector entity so that entity may meet its obligations to take action under section 24 of the PID Act (these obligations include taking action to prevent the disclosable conduct occurring in the future, and taking appropriate disciplinary action if it is found the disclosable conduct occurred).

Clerk of the Assembly

Given that the Clerk has neither an employment, nor supervisory relationship with MLAs or their staff, the Clerk ought not to be the head of a Legislative Assembly entity for the purposes of these two cohorts (The [2019] review recommended at page 8 that then s 13 (b) of the PID Act be amended ‘...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...’).

MLAs may not be apt to ‘discipline’ in the circumstances envisaged at s 24 (an alternative approach would be for a PID report of the Integrity Commissioner about an MLA to be presented to the relevant committee (the Standing Committee on Administration and Procedure) and then the committee could report to the Assembly recommending any further action in a manner consistent with the policy purpose at s 24).

Members’ staff would, in the normal course, be amenable to disciplinary action by their employing member and this should be reflected in the Act (i.e. the relevant provisions should require an MLA to take action against a staff member in the circumstances set out in s 24).

GNCA (supported by the ISCCC)

The GNCA (supported by the ISCCC) agree that the PID Act should expressly provide that an investigating entity be able to provide information and updates to a public sector entity that is required to take action under section 24, but that it should be limited to necessary information.

Jurisdictional analysis

New South Wales requires a public agency to develop a policy that outlines how that agency will deal with disclosures. It is a requirement that the policy must specify procedures to take appropriate corrective action in response to findings of serious wrongdoing or other misconduct that arise from PIDs relating to the agency.¹³⁸

Similarly, in Western Australia, a principal officer of a public agency must prepare procedures on how that agency will deal with a disclosure. The procedures must be in accordance with guidelines prepared by the Public Sector Commissioner.¹³⁹ By way of example, the WA Child and Adolescent Health Service (the Service) has prepared a PID guideline which requires the Service to take appropriate disciplinary action if improper conduct is substantiated through the investigation.¹⁴⁰

The Commonwealth requires the principal officer of an agency who undertakes an investigation to prepare a report of the investigation. The report must set out:

- the matters considered in the course of the investigation
- the duration of the investigation
- the principal officer's findings (if any)
- the action (if any) that has been, is being, or is recommended to be, taken
- claims of reprisal against the discloser
- the agency's response to any claims of reprisal.

The principal officer must provide a copy of the report to the discloser and the Ombudsman.¹⁴¹

In Tasmania, an investigation may be undertaken by either a public body or the Ombudsman. Upon completing an investigation, the public body must notify the Ombudsman in writing of the findings of the investigation, the steps taken to prevent the disclosable conduct occurring in the future, and any disciplinary proceedings against the person responsible for the conduct that was the subject of the investigation.¹⁴² If an investigation is undertaken by the Ombudsman, the Ombudsman must provide the relevant head of entity where the conduct occurred a report on the findings of the investigation, and may make recommendations as to the action to be taken as a result of an investigation.¹⁴³

¹³⁸ *Public Interest Disclosures Act 2022* (NSW) s 43(1)(f).

¹³⁹ *Public Interest Disclosure Act 2003* (WA) s 25.

¹⁴⁰ Government of Western Australia – Child and Adolescent Health Services, *Guideline – Public Interest Disclosure (PID)*, p 20, https://cahs.health.wa.gov.au/~/_media/HSPs/CAHS/Documents/About-us/Conduct/CAHSPMPublicInterestDisclosureGUIDELINE.pdf.

¹⁴¹ *Public Interest Disclosure Act 2013* (Cth) s 51.

¹⁴² *Public Interest Disclosures Act 2002* (Tas) s 76.

¹⁴³ *Public Interest Disclosures Act 2002* (Tas) s 56.

Review position

A stated object of the PID Act is to ensure that PIDs are properly investigated and dealt with.¹⁴⁴ In dealing with disclosable conduct, section 24 places the onus on the head of a public sector entity to discipline any person involved in the disclosable conduct.

The Review considers that section 44 of the PID Act should make clear the ability of an investigating entity to divulge information about an investigation of a PID to another public sector entity. Section 44 of the PID Act may be interpreted as prohibiting the sharing of such information, including the outcome and findings of an investigation, to the head of another public sector entity, and impede their ability to take action required under section 24.

The Review agrees with the view expressed in the public submission by the Commission that the provisions of the PID Act appear to be ‘unnecessarily complicated and tortuous’ and that ‘expressly specifying the sequence of responsibility following an investigation would be a clearer approach’.

The public submissions received from SLA and the GNCA similarly support clarification to the Act to expressly allow disclosure of information to another relevant public sector entity.

The Review considers that the ability for the PSSC or other investigating entity to communicate information about the outcome of a PID investigation to the head of another relevant entity is necessary to allow that entity to take the required actions under the PID Act.

To remove any uncertainty in the operation of the Act, the Review recommends the PID Act be amended to make it clear that the PSSC can disclose information to another relevant public sector entity about the outcome of an investigation to enable the entity to meet its requirement to take disciplinary action.

If the Review recommendation to transfer responsibility for the PIDs to the PSSC is adopted, several of the provisions discussed in this section will require modification. Section 23, which requires the discloser to be informed of any action taken by the head of a public sector entity in relation to the disclosure, would need to be amended so that the requirement applies to the investigating entity, which would either be the PSSC or a referral entity.

In addition, when action is required under section 24 for a head of an entity, the person responsible for taking this action cannot be the head of the entity themselves. In these circumstances, the Review recommends that the relevant entity as set out in Recommendation 12, take on this responsibility. In other circumstances, the requirement for the head of the entity to take action should be retained.

¹⁴⁴ *Public Interest Disclosure Act 2012 (ACT)* s 6.

Chapter 5 – **Protections and immunities**

5.1 Point of application of privileges and immunity

RECOMMENDATION 29

The Review recommends that the PID Act be amended to apply immunities and protections from the time a person makes a disclosure to a disclosure officer.

Background

The protections afforded to disclosers under Part 7 of the *Public Interest Disclosure Act 2012* (ACT) (PID Act), which include immunity from criminal and civil liability (including defamation) and detrimental actions, only apply when a disclosure is accepted as a public interest disclosure (PID) by the Integrity Commissioner. The protections then apply from the day the conduct was disclosed.¹⁴⁵

This provision leaves the discloser with uncertain protections between the time a disclosure is made to the point that the disclosure is accepted as a PID by the Integrity Commissioner, even though the provisions become retrospective to the date of disclosure once a PID is accepted. If a disclosure is not accepted by the Integrity Commissioner as a PID, despite the disclosure being made in good faith, the discloser has no protections under the PID Act.

Under the *Integrity Commission Act 2018* (ACT) (IC Act), which contains similar protections for persons who report corrupt conduct, they apply to the complainant from the time a complaint is made.

The Review has considered whether the current commencement point for protections under the PID Act are appropriate.

Stakeholder feedback

ACT Integrity Commission

Section 17(1) of the PID Act requires the disclosure officer to consider whether a disclosure is about disclosable conduct and made in good faith and, amongst other things, pass it on to the Integrity Commissioner. It may be that an appropriate compromise is to provide that the protections apply from that point, whatever the Commissioner determines, as to its being a PID.

Suburban Land Agency (SLA)

SLA does not consider any change to this provision is required.

Griffith/Narrabundah Community Association (GNCA) supported by the Inner South Canberra Community Council (ISCCC)

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

¹⁴⁵ *Public Interest Disclosure Act 2012* (ACT) s 17A(3).

Jurisdictional analysis

In general, PID legislation across the jurisdictions provide protections for disclosers at the time a disclosure is made, if the disclosure is made in good faith, relates to disclosable conduct, and is provided to an authorised entity (see Table 7).

Table 7: Protections for disclosers across jurisdictions

Jurisdiction	Application of immunity	Threshold for immunity
Commonwealth	Protections apply when an individual makes a PID. ¹⁴⁶	Protections do not apply to civil, criminal or administrative liability (including disciplinary action) for knowingly making a statement that is false or misleading.
New South Wales	Protections apply to a PID from the time the disclosure is first made. ¹⁴⁷	The maker of the disclosure honestly, and on reasonable grounds, believes the disclosure shows, or tends to show, serious wrongdoing, and is provided to a designated recipient. ¹⁴⁸
Northern Territory	Protections apply when a ‘protected person’ makes a ‘protected communication’. ¹⁴⁹	The individual believes the information on reasonable grounds would tend to show that improper conduct has occurred, is occurring or is at risk of occurring; or would assist the Independent Commissioner Against Corruption (ICAC NT) to perform the ICAC’s functions; or would otherwise assist in the administration, or achieving the objects, of the Act. ¹⁵⁰
Queensland	Protections apply when the disclosure is made. ¹⁵¹	The person provides the information to a proper authority, where the person honestly believes on reasonable grounds that the information tends to show the conduct reported. ¹⁵²
South Australia	Protections apply when a person has made an appropriate disclosure or if the person intends to make an appropriate disclosure. ¹⁵³	The person believes on reasonable grounds that the information is true; or believes on reasonable grounds that the information may be true and it is of sufficient significance to justify its disclosure so that its truth may be investigated. ¹⁵⁴
Tasmania	Protections apply when a ‘protected disclosure’ is made. ¹⁵⁵	A public officer must believe that another public officer or a public body has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or has taken, is taking or proposes to take detrimental action, and disclose that improper conduct or detrimental action. ¹⁵⁶

¹⁴⁶ *Public Interest Disclosure Act 2013* (Cth) s 25.

¹⁴⁷ *Public Interest Disclosures Act 2022* (NSW) s 30.

¹⁴⁸ *Public Interest Disclosures Act 2022* (NSW) s 26.

¹⁴⁹ *Independent Commissioner Against Corruption Act 2017* (NT) s 93.

¹⁵⁰ *Independent Commissioner Against Corruption Act 2017* (NT) s 93(2).

¹⁵¹ *Public Interest Disclosure Act 2010* (Qld) s 36.

¹⁵² *Public Interest Disclosure Act 2010* (Qld) s 11.

¹⁵³ *Public Interest Disclosure Act 2018* (SA) s 5.

¹⁵⁴ *Public Interest Disclosure Act 2018* (SA) s 5.

¹⁵⁵ *Public Interest Disclosures Act 2002* (Tas) s 14.

¹⁵⁶ *Public Interest Disclosures Act 2002* (Tas) s 6.

Jurisdiction	Application of immunity	Threshold for immunity
Victoria	Protections apply when the disclosure is made. ¹⁵⁷	Requirements include that information disclosed shows or tends to show a person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct and made in accordance with established procedures. ¹⁵⁸
Western Australia	Protections apply when a disclosure of public interest information is made to a proper authority. ¹⁵⁹	The person who makes the disclosure must believe on reasonable grounds that the information is true, or believe on reasonable grounds that the information may be true, and the disclosure of public interest information must be made to a proper authority. ¹⁶⁰

Review position

The Review recommends that the PID Act be amended to apply protections from the point at which a person provides a disclosure to a disclosure officer.

The intent of the PID Act is to encourage and facilitate the reporting of suspected wrongdoing within the ACT Public Service (ACTPS). A key component of the scheme is the assurance provided to would-be whistleblowers that they will not expose themselves to adverse consequences for doing so, when they report in good faith to an authorised recipient.

Limiting protections to the stage where a disclosure has been accepted by the Public Sector Standards Commissioner (PSSC) may make some people hesitant to make a disclosure because of the uncertainty whether their disclosure would qualify under the Act as a PID and therefore whether the protections would apply to them. This is particularly relevant where the discloser is providing confidential material in support of their disclosure and may be subject to offences for disclosing the information. The Review considers this as inconsistent with the PID Act's intent to protect whistleblowers.

PID legislation nationally generally affords protection to disclosers at the time a disclosure is made, if the disclosure is made in good faith, relates to disclosable conduct, and is provided to a designated entity which is authorised to receive such disclosures. Protections and immunities granted do not appear to be contingent on a subsequent review and acceptance of a disclosure as a PID.

Under section 37 of the PID Act, protections would cease to apply if the disclosure, or part of the disclosure, is determined to be knowingly false, misleading or vexatious.

¹⁵⁷ *Public Interest Disclosures Act 2012* (Vic) s 38.

¹⁵⁸ *Public Interest Disclosures Act 2012* (Vic) s 9.

¹⁵⁹ *Public Interest Disclosure Act 2003* (WA) s 5.

¹⁶⁰ *Public Interest Disclosure Act 2003* (WA) s 13.

5.2 Disclosure of PIDs and disclosable conduct

RECOMMENDATION 30

The Review recommends that no amendment be made to the PID Act to apply section 44 (offences – use or divulge protected information) to MLAs and journalists.

RECOMMENDATION 31

The Review recommends that the PID Act be amended to define a ‘journalist’ consistently with the definition of ‘journalist’ and ‘news medium’ in section 126J of the *Evidence Act 2011*.

RECOMMENDATION 32

The Review recommends that section 37(1)(a) of the PID Act be amended to remove protections for a discloser who has knowingly provided false or misleading information about their disclosure, or part of their disclosure, to any person (and not only to a person investigating the disclosure).

RECOMMENDATION 33

The Review recommends that the PID Act be amended to allow a discloser to disclose disclosable conduct to an entity that is authorised to receive the disclosable conduct under a regulation made by the Minister responsible for the PID Act (in addition to current authorised disclosures to a journalist or MLA).

Background

The Review has examined whether:

- the restrictions on providing protected information set out in section 44 be applied to Members of the ACT Legislative Assembly (MLAs) and journalists who receive such information about disclosable conduct from a discloser under Part 5 of the PID Act
- the meaning of ‘journalist’ needs to be clarified
- disclosers should lose the protections under Part 5 of the PID Act for providing false or misleading information generally, rather than only to the person investigating the disclosure, and
- disclosers should be authorised to provide their disclosure to additional entities in addition to those authorised under section 27 and 27a.

Providing information about disclosable conduct to a journalist or MLA

The PID Act authorises a discloser to disclose disclosable conduct to an MLA or journalist if the discloser made the disclosure to a designated person and did not receive the required notice on the outcome of that disclosure within three months after the disclosure was made.¹⁶¹

In addition, a discloser may give a PID to an MLA or a journalist if the discloser was told that the disclosure will be investigated as a PID, but:

¹⁶¹ *Public Interest Disclosure Act 2012 (ACT)* s 27.

- is not informed about the progress of the investigation for more than three months, or
- after an investigation that found clear evidence of disclosable conduct, the investigating entity has informed the discloser that no action will be taken to address the disclosable conduct.¹⁶²

In these circumstances, the discloser retains the protections and immunities available under the PID Act. The discloser may lose the protections under Part 5 of the PID Act if the information (or part of the information) they provided to the investigating entity is false or misleading, or vexatious.¹⁶³

Disclosing the information to an MLA or journalist provides an avenue for the discloser to make the public aware of the matter if the responsible entity fails to take appropriate action. If the matter is made public, this may prompt the responsible entity to take appropriate action to maintain public confidence in its institutions and officials.

The term ‘journalist’ is not defined under the PID Act. This may create ambiguity as to who may be considered a journalist for the purposes of the PID Act. Given the advance in communication technology, in particular social media, it is not uncommon for individuals to act as a journalist and publish social commentary or opinion articles, despite not performing the role of a journalist as their primary employment. Further, it is common for individuals (for example, retired politicians) to provide written pieces to recognised print publications. It is unclear whether such individuals would be considered journalists for the purposes of the PID Act.

The *Evidence Act 2011* (ACT) defines a journalist (for the purposes of the Evidence Act) as ‘a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium’.¹⁶⁴ ‘News medium’ is defined as ‘a medium for the dissemination to the public or a section of the public of news and observations on news’.¹⁶⁵

Application of the offence provision to MLAs and journalists

Section 44 of the PID Act sets out several offences which apply where protected information is used or divulged by a person to whom the section applies. The section applies to:

- a person who is or has been
 - the Integrity Commissioner
 - the Ombudsman
 - a disclosure officer, or
 - an investigating entity other than the Integrity Commissioner, or
- anyone else who has exercised a function under the PID Act.

The disclosure offences do not apply to MLAs and journalists as they are not a prescribed category of people to whom the offence applies – they are not listed as being a person to whom the section applies, and do not have a function under the PID Act.

Allowing disclosure to people or entities other than journalists and MLAs

More broadly, the Review has considered whether it is appropriate that, in the circumstances where a discloser may disclose information to a journalist or an MLA, the discloser may disclose the information to other entities. There is currently no provision in the PID Act which would enable information sharing to other agencies or entities, even where that distribution of information may be both appropriate and in the public interest.

¹⁶² *Public Interest Disclosure Act 2012* (ACT) s 27A.

¹⁶³ *Public Interest Disclosure Act 2012* (ACT) s 37.

¹⁶⁴ *Evidence Act 2011* (ACT) s 126J.

¹⁶⁵ *Evidence Act 2011* (ACT) s 126J.

Stakeholder feedback

ACT Integrity Commission

...the responsibility for ensuring timely dealing with a disclosure is not in the hands of the individual whose reputation may be at stake. Removing his or her rights of legal protection from public defamation because of bureaucratic delay (which may be without fault) seems difficult to justify.

Accordingly, there appear to be good grounds for making the amendment proposed by the Commission.

GNCA

The GNCA does not support amendment to apply to journalists and MLAs:

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.

ISCCC

The ISCCC in contemplating whether any provisions should 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, opine that:

...the public interest should be the uppermost consideration. Investigations may take years, during which time there could be significant damage to the public interest. The approach to this issue needs to take into account what will best protect the public interest.

Speaker of the Legislative Assembly

The Speaker of the Legislative Assembly submitted that section 44 of the PID Act should not apply to MLAs or journalists.

Jurisdictional analysis

There is a mix of approaches across jurisdictions, with some jurisdictions allowing disclosure to any external individual or entity (so long as certain conditions are met), and others taking a similar approach to the Territory and allowing disclosure only to journalists and MLAs.

At the Commonwealth level, the discloser may make a disclosure to any person, other than a foreign official, where:

- the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct
- on a previous occasion, the discloser made an internal disclosure of information that consisted of, or included, the information now disclosed

- any of the following apply:
 - a disclosure investigation relating to the internal disclosure was conducted, and the discloser believes on reasonable grounds that the investigation was inadequate
 - the *Public Interest Disclosure Act 2013* (Cth) (PID Act (Cth)) requires an investigation relating to the internal disclosure to be conducted, and that investigation has not been completed within 90 days
- the disclosure is not, on balance, contrary to the public interest
- no more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct
- the information does not consist of, or include, intelligence information, and
- none of the conduct with which the disclosure is concerned relates to an intelligence agency.¹⁶⁶

Victoria follows a similar approach to the Commonwealth, as an external disclosure may be made to any person or entity not considered a disclosure officer so long as conditions similar to that listed for the Commonwealth are met.¹⁶⁷

In New South Wales, a discloser may make a disclosure to a member of parliament or a journalist if, in addition to complying with the requirements to make a public interest disclosure:

- the disclosure is substantially true
- the maker of the disclosure has previously made substantially the same voluntary PID to a mandated person
- the previous disclosure was not anonymous
- the maker of the previous disclosure did not waive, in writing, the right to receive information in relation to the previous disclosure, and
- either:
 - the maker of the previous disclosure has not, at the end of the investigation period, received from an agency the required information in relation to the previous disclosure, or
 - the maker of the previous disclosure has been notified by an agency, at any time, that the agency has decided to not investigate, or to cease investigating, the disclosure.¹⁶⁸

The PID Act (NSW) also defines a journalist by reference to the *Evidence Act 1995* (NSW). Journalist is defined in that Act as ‘a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium’. ‘News medium’ is further defined as ‘a medium for the dissemination to the public or a section of the public of news and observations on news’.¹⁶⁹

In Queensland, members of the Legislative Assembly can receive disclosures in the first instance, so long as the disclosure does not relate to a judicial officer.¹⁷⁰ A discloser may provide information to a journalist if:

- the person has made a PID, and
- the entity to which the disclosure was made or, if the disclosure was referred, the entity to which the disclosure was referred:
 - decided not to investigate or deal with the disclosure, or
 - investigated the disclosure but did not recommend the taking of any action in relation to the disclosure, or
 - did not notify the person, within six months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.¹⁷¹

The PID Act (Qld) also expressly defines journalist as ‘a person engaged in the occupation of writing or editing material intended for public in the print or electronic news media’.¹⁷²

¹⁶⁶ *Public Interest Disclosure Act 2013* (Cth) s 26.

¹⁶⁷ *Public Interest Disclosures Act 2012* (Vic) s 38A.

¹⁶⁸ *Public Interest Disclosures Act 2022* (NSW) s 28.

¹⁶⁹ *Evidence Act 1995* (NSW) s 126J.

¹⁷⁰ *Public Interest Disclosure Act 2010* (Qld) s 14.

¹⁷¹ *Public Interest Disclosure Act 2010* (Qld) s 20.

¹⁷² *Public Interest Disclosure Act 2010* (Qld) s 20(4).

Review position

Application of offence provision to journalists and MLAs

The Integrity Commission submitted that MLAs and journalists should be subject to the offence provision in section 44 of the PID Act. The basis of the Commission's argument is that at the point an MLA or journalist receives information relating to disclosable conduct, the matter may still be under investigation, or even under assessment as to whether the disclosable conduct is in fact a PID. This could give rise to a situation where a delay, or administrative error in failing to meet the required three-monthly update, could trigger a situation where the discloser provides information to a journalist, who then publishes the material. In this event, the matter would be made public prior to any conclusive findings as to whether the individual or entity is involved in the allegations. Making this content publicly available prior to any conclusive findings may unjustly damage reputations, adversely affect an investigation, and impact procedural fairness for a person under investigation. Including journalists and MLAs in the offence provision would minimise the risk of reputational damage prior to a PID being finalised.

The Review considers that applying the disclosure offence to MLAs and journalists would be contrary to the policy intent of allowing such disclosure under the PID Act by restricting their ability to act on information when the required conditions are met. The very purpose of a PID is that the discloser should be able to disclose disclosable conduct where it is in the public interest and the requirements for action under the PID Act have not been met.

Allowing disclosure to a journalist or MLA provides a safeguard to motivate public officials and entities to take appropriate action when dealing with disclosable conduct or a PID. Further, it provides a means for the public to be made aware of the disclosable conduct if the responsible entity fails to take appropriate action to address the disclosable conduct.

The Review agrees that it is important to ensure that reputations are not damaged before a thorough investigation has occurred. However, the Review considers that both journalists and MLAs are in positions where they may effectively act on information provided by a discloser, and are subject to accountability mechanisms that would discourage publicly announcing information that may be defamatory or incorrect.

The Review considers that, taking into account the importance of a free press, there is insufficient risk that a journalist would publish material that is damaging to a reputation without conducting their own enquiries to confirm the accuracy of the information provided. If a journalist published false information received under the PID Act, the journalist would risk legal action from the person who was the subject of a disclosable conduct allegation. The threat of legal action, along with damage to their professional reputation for publishing inaccurate material, should be sufficient safeguard.

The question of reputational damage is arguably more difficult when disclosure is made to an MLA. An MLA may rely on parliamentary privilege to make statements in the Legislative Assembly. The most significant parliamentary privilege is that neither MLAs nor the Assembly itself can be the subject of legal action for anything said or done during Assembly proceedings.¹⁷³ Consequently, an MLA could provide information they receive from a discloser regarding disclosable conduct and remain immune from any legal action if the information is defamatory.

This risk that an MLA could raise unsubstantiated information in the Assembly under privilege is somewhat mitigated by the circumstances in which a discloser can provide information to an MLA. As noted above, one of the circumstances in which a discloser can provide information to an MLA is when:

- a matter is assessed as a PID
- the matter is investigated
- there is clear evidence that one or more instances of disclosable conduct occurred, and
- the discloser is told by the investigating entity that no action will be taken in relation to the disclosable conduct.

¹⁷³ See Article 9 of the *Bill of Rights 1688*, and *Parliamentary Privileges Act 1987* (Cth) s 16.

In these circumstances, the Review considers that disclosure to an MLA is appropriate as the required conditions include an acknowledgement from the investigating entity that one or more instances of disclosable conduct has occurred, and that the discloser is told no action will be taken in relation to the disclosable conduct.

The other situation where disclosure to an MLA may occur has an elevated risk of reputational damage to the subject of the allegation. Such disclosure may occur when disclosable conduct has been provided to a disclosure officer or the Integrity Commissioner and no notification about the disclosure has been provided within three months. At this point, there has been no independent assessment as to whether the disclosable conduct is indeed a PID, nor has there been any investigation into the matter.

The Review nevertheless considers that disclosure by an MLA in these circumstances should not be subject to a criminal offence. MLAs are subject to Assembly standing orders that include a code of conduct, which may facilitate a disciplinary process if an MLA were to use parliamentary privilege to publish unverified allegations of disclosable conduct. As with journalists, the potential for reputational damage, as well as the possibility of a code of conduct disciplinary process, should encourage an MLA to verify information before publishing it.

Broadening protection removals for false or misleading disclosures

The risk of a journalist or an MLA publishing information that may damage a person's reputation before a matter has properly been investigated as a PID would be mitigated by a separate amendment to the PID Act.

Presently, the PID Act removes protections for a discloser if a court is satisfied that the discloser has given information about the disclosure, or part of the disclosure, that the discloser knows is false or misleading to a person investigating the disclosure.¹⁷⁴

The Review considers this provision is too narrow, as it assumes that disclosable conduct may only become a PID if the Integrity Commissioner assesses it as such and then refers the matter for investigation. However, a matter can become a PID by virtue of subsection 27(4) of the PID Act, and consequently people other than an investigator may receive PID information from a discloser.

The Review recommends that this provision be amended to apply more broadly, not only to false or misleading information provided to a person investigating the disclosure. Expanding this provision to include false or misleading information provided to any person should discourage a discloser from providing false or misleading information to a journalist or MLA in situations where their disclosure is yet to be assessed or investigated.

Expressly defining who is considered a journalist

The Review recommends that the PID Act be amended to define who is considered a journalist. For consistency across Territory legislation, the PID Act should use the definition in the *Evidence Act 2011* (ACT).¹⁷⁵ This would provide useful guidance as to who is considered a journalist.

Given social media and other mediums that allow any person to publish opinions or news, the Review considers this an important amendment. This is confirmed by a recent Federal Court decision concerning whether a person who posted defamatory tweets from their Twitter account should be considered a journalist, and Twitter a news medium, for the purposes of Commonwealth journalist protection laws.¹⁷⁶ Ultimately, the court decided the person was not a journalist,¹⁷⁷ and Twitter was not a news medium,¹⁷⁸ but noted that different judicial approaches can be expected given the divergence of legislative codification.¹⁷⁹

¹⁷⁴ *Public Interest Disclosure Act 2012* (ACT) s 37(1)(a).

¹⁷⁵ *Evidence Act 2011* (ACT) s 126J.

¹⁷⁶ *Kumova v Davison* [2021] FCA 753.

¹⁷⁷ *Kumova v Davison* [2021] FCA 753 at 39.

¹⁷⁸ *Kumova v Davison* [2021] FCA 753 at 45.

¹⁷⁹ *Kumova v Davison* [2021] FCA 753 at 16.

Disclosure to external parties other than a journalist or an MLA

As noted above, the reason for allowing disclosure to a journalist or an MLA is to ensure that the public is aware of the disclosable conduct, that the public sector is not acting to address the disclosable conduct, or that the public sector has acknowledged the disclosable conduct is occurring and is not willing to address it. Both journalists and MLAs have avenues for making the public aware of disclosable conduct if it reaches the stage of disclosure.

There may be other entities and individuals to whom it could be appropriate for a discloser to provide information if no action is being taken to address the disclosable conduct. A non-government organisation with a particular focus may be well-placed to act on the information relating to the disclosable conduct. For example, if the disclosable conduct relates to animal cruelty, it may be appropriate for the discloser to provide the information to the RSPCA. Similarly, if the disclosable conduct relates to damage to the environment, it may be appropriate to allow the discloser to provide the information to the Environmental Defenders Office.

The Review does not recommend that the PID Act authorise disclosure to any particular external entity, but rather to community and non-government entities whose role may be relevant to information in a PID, as determined by the relevant Minister in consultation with the PSSC. The Review considers this would be best achieved by amending the PID Act to enable the responsible Minister to make regulations to prescribe entities which may receive disclosable conduct about a certain matter (assuming the conditions in section 27 and 27A are met).



Chapter 6 – **Broader reforms and future reviews**

6.1 Disclosing information obtained under the PID Act

RECOMMENDATION 34

The Review recommends that the PID Act definition of ‘protected information’ be amended to include information about ‘disclosable conduct’.

RECOMMENDATION 35

The Review recommends that the PID Act be amended to enable the PSSC to disclose information to any person or entity if the information shows there is an immediate risk to the physical safety or wellbeing of a person that can be avoided by the disclosure.

RECOMMENDATION 36

The Review recommends that the PID Act be amended to allow the responsible Minister to make a regulation that would prescribe entities to which the PSSC may disclose information.

Background

The *Public Interest Disclosure Act 2012 (ACT)* (PID Act) does not authorise the disclosure of information to third parties for either information or intelligence purposes, even where it is manifestly in the public interest to do so, or when there is an immediate risk to the physical safety or wellbeing of a person that could be avoided by the disclosure. The only circumstances in which information may be disclosed to a third party is when a discloser may provide information to a journalist or a Member of the ACT Legislative Assembly (MLA) when certain timeframes around assessment and investigation have not been met, or where no further action is to be taken on a substantiated matter.¹⁸⁰

Given the nature of disclosable conduct, there may be a need for broad dissemination of information related to the disclosure if an emergency arises. For example, disclosable conduct includes conduct that results in a substantial and specific danger to public health or safety, and dissemination of information may be required to protect the immediate public safety.

Public interest disclosure (PID) information is largely protected under the PID Act. Section 44 makes it an offence for a person who has exercised a function under the Act (including the Integrity Commissioner, a disclosure officer or an investigating entity) to recklessly use or divulge protected information, unless one of the listed exceptions applies. The offence does not apply if the information is used or divulged:

- under the PID Act or another territory law
- in relation to the exercise of a function, by a person to whom the offence applies, under the PID Act or another Territory law
- in a court proceeding, or
- with the consent of the person the information is about.

¹⁸⁰ *Public Interest Disclosure Act 2012 (ACT)* s 27, s 27A.

The definition of ‘protected information’ under section 44 of the PID Act covers ‘information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else’. The definition in the *Integrity Commission Act 2018* (ACT) (IC Act) is essentially the same.

Examples of what qualifies as protected information are provided in the PID Act:

- information given to a disclosure officer, whether or not it is a PID
- information given to an investigating entity about a PID by someone other than the discloser
- information that would identify the discloser or would allow the discloser’s identity to be worked out, and
- information that would identify a person, other than the discloser, who has given information to an investigating entity about a PID, or that would allow that person’s identity to be worked out.¹⁸¹

The concept of ‘protected information’ has been used in the PID Act since it was first passed in 2012. The Explanatory Statement for the Bill explains that the:

... relevant clause makes passing information obtained during a disclosure further than is warranted or necessary a crime. It mirrors clauses that appear in other investigation enabling laws such as the Auditor-General Act 1996.

However, the provision in the *Auditor-General Act 1996* (ACT) does not require that the information be ‘about a person’ as required in the PID Act:

*Protected information means information that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else.*¹⁸²

This provision makes it clear that any information obtained by a person (for example, the Auditor-General) exercising a function under that Act may not be disclosed without express authorisation.

The IC Act also defines a different category of information as ‘restricted information’. The definition of restricted information is broader than protected information, and includes:

- evidence given to, or obtained by, the Commission
- information that would identify, or allow a person to identify, a person examined, or proposed to be examined, by the Commission or who has produced, or may produce, any thing to the Commission, and
- the fact that a person has been, or is proposed to be examined by the Commission or who has produced, or may produce, any thing to the Commission.¹⁸³

A further offence under the *Crimes Act 1900* (ACT) (Crimes Act) applies where a Territory officer, or a former Territory officer, publishes information that has come into their possession by virtue of being an officer of the Territory and which it is their duty not to disclose (except where authorised).¹⁸⁴

The offences under the PID Act and the Crimes Act together create a framework for information disclosure. The offence under the PID Act places the duty on a Territory officer to not disclose ‘protected information’, while the Crimes Act provision is broader. The fault element for the PID Act offences is recklessness, while for the Crimes Act offence, the fault element is intention.¹⁸⁵ The differences between the offences allows the prosecution to select the most appropriate charge in the circumstances.

¹⁸¹ *Public Interest Disclosure Act 2012* (ACT) s 44(6).

¹⁸² *Auditor-General Act 1996* (ACT) s 34.

¹⁸³ *Integrity Commission Act 2018* (ACT) s 76.

¹⁸⁴ *Crimes Act 1900* (ACT) s 153.

¹⁸⁵ See *Criminal Code 2002* (ACT) s 22(1).

Stakeholder feedback

ACT Integrity Commission

The Commission proposes that it should be possible to disseminate information that is brought to attention by disclosers wherever it is in the public interest to do so and not only in emergency situations. Such information can cover a wide range of issues. Even where no wrongdoing (in the widest sense), is alleged, this information might well be useful for policy, administrative or governance purposes. In short, it should be regarded as a resource and not wasted.

The suggested objection in the PID context, namely, that it might endanger the discloser's privacy, is a reasonable but relatively minor consideration. At all events, the privacy issue can be overcome by requiring the discloser's permission or by confining the information to that which does not reveal the source. The proposed dissemination only applies to disclosable conduct, so a vetting process would already have taken place as to the significance of the information and the statutory protections therefore apply.

The proposed dissemination would apply only to government entities.

The Griffith Narrabundah Community Association (GNCA) (supported by the Inner South Canberra Community Council (ISCCC))

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

Jurisdictional analysis

Information disclosure arrangements across Australian jurisdictions vary, and take account of the different approaches taken to administer PIDs. At a minimum, the provisions generally authorise information sharing between public sector entities so that the appropriate entity can address the matters included in the disclosure. Other jurisdictions also authorise information disclosure to preserve the safety and wellbeing of a person (including disclosure to a registered medical practitioner), and where that disclosure is reasonably required to avoid harm to the safety or welfare of a person.

At the Commonwealth level, an investigative entity (including the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security) may share information and documents in relation to a disclosure with another investigative entity, the portfolio department of the agency to which the conduct relates, and with the agency to which the conduct disclosed to relates. The information may only be shared if the sharing agency considers the information or documents to be relevant to the destination agency's functions.¹⁸⁶

In New South Wales, an agency may provide information relating to a PID to another agency if doing so is reasonably necessary for the exercise of either agency's functions under the PID Act (NSW).¹⁸⁷ Further, an agency may provide that information to a person or body investigating misconduct or wrongdoing under a law of another state, the Commonwealth, or a territory of the Commonwealth if doing so is reasonably necessary for the exercise of functions under the law by the person or body.¹⁸⁸ 'Agency' is defined broadly under the PID Act (NSW), and generally includes all NSW public sector agencies, local governments within NSW, and Local Aboriginal Land Councils.¹⁸⁹

¹⁸⁶ *Public Interest Disclosure Act 2013* (Cth) s 65.

¹⁸⁷ *Public Interest Disclosures Act 2022* (NSW) s 83.

¹⁸⁸ *Public Interest Disclosures Act 2022* (NSW) s 83.

¹⁸⁹ *Public Interest Disclosures Act 2022* (NSW) s 16, s 19.

In Victoria, a person or body may in certain circumstances disclose the content, or information about the content, of an assessable disclosure, or information likely to lead to the identification of a person who has made an assessable disclosure. These circumstances include:¹⁹⁰

- where necessary for the purposes of the PID Act (Vic)
- to Victoria Police where an investigating entity has previously disclosed information to the Chief Commissioner of Police relating to actual or potential criminal conduct, and the information is relevant to an investigation of the criminal conduct by Victoria Police
- for the purposes of other integrity-related legislation
- for the purposes of obtaining legal advice or representation in relation to matters under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic)
- for the purposes of, or in the course of, a restorative engagement process, with the written consent of the person participating in the process who alleges that they are the victim of sex discrimination or sexual harassment
- to an interpreter
- to a parent or guardian (for a person under the age of 18)
- to an independent person for the purpose of enabling a person who is illiterate or has a mental or physical impairment that prevents the person from understanding the obligation imposed under the PID Act (Vic)
- to any of the following for the purpose of assisting the person who made the disclosure to seek advice or support in relation to the assessable disclosure:
 - a registered health practitioner
 - a trade union
 - an employee assistance program
- for the purposes of an application to the Fair Work Commission, including any related proceeding
- to the Victoria WorkCover Authority for the purpose of a workers' compensation claim.

In Queensland, a person may make a record or disclose confidential information (that is, information obtained under the PID Act) to someone else:

- for the purposes of the PID Act (Qld)
- to discharge a function under another Act including, for example, to investigate something disclosed by a PID
- for a proceeding in a court or tribunal
- if the person to whom the confidential information relates consents in writing to the making of the record or disclosure of the information
- if the person cannot reasonably obtain the consent of the person to whom the confidential information relates, and making the record or disclosing the information is unlikely to harm the interests of the person to whom the confidential information relates and is reasonable in all the circumstances
- if the person reasonably believes that making the record or disclosing the information is necessary to provide for the safety or welfare of a person, or
- is otherwise authorised under a regulation or another Act.¹⁹¹

The Review notes Queensland's Review of the *Public Interest Disclosure Act 2010* (Qld), published in August 2023, recommends that its Act should create an additional exception to the confidentiality obligations to enable external disclosures to an Australian legal practitioner or treating health professional or any person or body for support purposes.¹⁹²

¹⁹⁰ *Public Interest Disclosures Act 2012* (Vic) s 54.

¹⁹¹ *Public Interest Disclosure Act 2010* (Qld) s 65.

¹⁹² The State of Queensland Department of Justice and Attorney-General, Review of the *Public Interest Disclosure Act 2010*, 2023, pp 142, 144, 160.

Review position

The Review considers the existing definition of ‘protected information’ may lead to uncertainty as to what sort of information may be considered ‘about a person’. The inclusion of ‘about a person’ in the PID Act is an important qualifier as to what sorts of information may be disclosed under the PID Act without committing an offence, and the limitations it places on the offence could result in inappropriate disclosures of information not being covered by the offence.

The Review considers it is preferable to amend the section 44 offence to incorporate elements included in the definition of ‘restricted information’ contained in section 76 of the IC Act. This approach provides certainty for both disclosers, and also those who exercise a function under the PID Act. Broadening ‘protected information’ to all information obtained by exercising a function under the PID Act may be too encompassing and unnecessarily restrictive and have unintended consequences.

The Review considers that it is important to maintain the core aspect of protecting whistleblowers’ privacy, given the stringent provisions the PID Act provides to protect whistleblowers. Consequently, any proposed amendments to allow the disclosure of information needs to be carefully implemented. However, in urgent circumstances where the life or safety of a person may be at risk, the Review considers it important for the Public Sector Standards Commissioner (PSSC) to have the power to disclose relevant particulars to the appropriate individual entity as the need arises. The Review recommends that the PID Act be amended to enable the PSSC to disclose information to any person or entity if the information shows there is an immediate risk to the physical safety or wellbeing of a person that can be avoided by the disclosure. Such a disclosure is important given that disclosable conduct includes an action of a public sector entity or public official for a public sector entity that is a substantial and specific danger to public health or safety.

The Review also considers it important that there is scope under the PID Act to allow the PSSC to disclose information to certain entities for a particular purpose. Such a disclosure is authorised in other jurisdictions, such as the Commonwealth, New South Wales, Victoria, and Queensland, which all permit disclosure to third parties in certain circumstances. For example, this includes where the information or documents are relevant to the destination agency’s functions or the exercise of those functions (Commonwealth and New South Wales), or for the purposes of other integrity-related legislation (Victoria). The Review considers it is a matter for the government to determine the list of appropriate entities and circumstances where disclosure by the PSSC is authorised. This decision should largely be informed by experience of the PSSC (and the Commissioner) as to the sort of information typically received during the PID process that may be relevant to other entities.

To account for this unknown, and to provide a flexible process to authorise additional disclosures as the need arises, the Review recommends that the PID Act be amended to enable the responsible Minister to make a regulation that prescribes additional entities the PSSC may disclose information to, and the circumstances in which that information may be disclosed.

6.2 Technical amendment – section 27A(1)(b)

RECOMMENDATION 37

The Review recommends that section 27A(1)(b) of the PID Act be amended to make it clear that all three criteria in the section need to be met.

Background

Section 27A of the PID Act outlines circumstances where a PID may be disclosed to an MLA or a journalist by a discloser. The wording of section 27A(1) is:

A discloser for a public interest disclosure may give the public interest disclosure to a member of the Legislative Assembly or a journalist if—

- a. *the discloser is told under section 19A that the disclosure will be investigated, but is not told about the progress of the investigation under section 23 for more than 3 months; or*
- b. *the following applies:*
 - i. *the public interest disclosure is investigated under section 20;*
 - 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 is told by the investigating entity that no action will be taken in relation to the disclosable conduct under section 24 (Public sector entity must take action).*

The Review considered whether the wording of section 27A(1)(b) makes it clear that all three subparagraphs are cumulative for section 27A(1) to apply.

Stakeholder feedback

ACT Integrity Commission

This paragraph requires a small amendment, by way of the insertion of the word 'and' after subparagraphs (i) and (ii). This is to make it clear that s 27A(1)(b) is a tripartite requirement, and not a series of three alternatives.

GNCA

The GNCA supports amendment to make it clear that all three elements are required.

SLA

The SLA would welcome an amendment which provides clarity.

Review position

The purpose of section 27A is to promote a disclosure culture to encourage people to alert others to suspected wrongdoing when there is inaction from the public sector entity in addressing the disclosable conduct.

While it is clear that all three criterion must apply, there may be some uncertainty on the part of a discloser unfamiliar with legislation that this is the case. The Review recommends that, for clarity, section 27A(1)(b) be amended to make it clear that each criteria listed are required to be met. The Parliamentary Counsel Office has indicated that it could act on instructions to amend section 27A(1)(b) to further clarify or reinforce the existing legal effect of the provision.

6.3 Outcomes of the 2019 review

RECOMMENDATION 38

The Review recommends that, in line with the recommendations of the 2019 review (see row 25 and 26 of Table 8), section 45 of the PID Act be amended to give responsibility to the PSSC for the following data collation and reporting requirements:

- i. numbers of reports from each agency, to allow observation of trends and targeted education and engagement
- ii. which part of the definition of ‘disclosable conduct’ under section 8 of the PID Act each report falls under
- iii. how many reports were made anonymously, or by an ACTPS member, or an external third party, and
- iv. how often training was taken up and numbers of people who attended.

RECOMMENDATION 39

The Review recommends that, in line with the recommendation of the 2019 review (see row 29 of Table 8), section 33 of the PID Act be amended to require that public sector agencies apply the procedures issued by the PSSC under that section, but that the PSSC be authorised to approve alternative procedures for specific agencies where appropriate.

The terms of reference for the PID Act Review require an assessment of whether the recommendations of the 2019 PID Act review were met.

The 2019 review made 35 recommendations, most of which the ACT Government addressed through the Public Interest Disclosure Amendment Bill 2020.¹⁹³ Table 8 outlines if the recommendation was implemented, and how the recommendation is affected by the recommendations of this Review. In brief, the outstanding recommendations in the 2019 review relate to statistics and tracking PIDs,¹⁹⁴ and the Commissioner’s procedures under section 33 of the PID Act.¹⁹⁵

Statistics and data

Section 45 of the PID Act sets out what information about PIDs must be collected and reported each year. It includes several of the data categories recommended in the 2019 review (for example, reporting of number of times a person was charged with the offence of taking detrimental action under section 40).

The Review has not recommended including two significant sets of data proposed by the 2019 review. The first is the number of disclosures made to MLAs and journalists under sections 27 and 27A of the PID Act. The Review considers that this would be difficult, if not impossible, for the PSSC to ascertain as the knowledge may only be held by the discloser and the MLA or journalist. The second is the requirement to keep track of whether the obligation to keep parties informed was met. This would require tracking every communication with the discloser, and this would be very resource intensive for the investigating entity.

Given the relatively low number of PIDs that are made each year, it should not be overly onerous to keep the other recommended statistics. They could then be used to give government, and future reviews, a better understanding of how the legislation is being used and any trends that were emerging.

¹⁹³ Legislative Assembly for the ACT, *Public Interest Disclosure Amendment Bill 2020 (ACT)*, 2020, https://www.legislation.act.gov.au/View/b/db_61759/20200220-73330/html/db_61759.html.

¹⁹⁴ See PEG Consulting, *Review of the Public Interest Disclosure Act 2012 (ACT)*, recommendations 23–26 and 32.

¹⁹⁵ See PEG Consulting, *Review of the Public Interest Disclosure Act 2012 (ACT)*, recommendation 29.

Procedures for dealing with PIDs

Under section 33 of the PID Act, the Commissioner must make procedures for dealing with disclosures and PIDs. The procedures must include obligations on public sector entities to take action to protect disclosers, and to minimise the risk of detrimental action against people because of PIDs.

The 2019 review recommended that the Commissioner's procedures made under section 33 of the PID Act must be the adopted procedures of an agency, unless the Commissioner approves alternative arrangements. It seems clear that the 2020 amendments were intended to implement this recommendation. The 'Explanatory Statement for the Public Interest Disclosure Amendment Bill 2020' states:

Section 33 requires the Integrity Commission to make procedures for dealing with disclosures of disclosable conduct and public interest disclosures ... To streamline the process and provide consistency in process across the public sector entities, public sector entities will adopt the procedures issued by the Integrity Commissioner.¹⁹⁶

The current section 33 does not state that the Commissioner's procedures are that of an agency, or that an agency may not make its own procedures unless approved by the Commissioner. The Review considers that it should be explicitly stated in the Act that the procedures made by the PSSC under section 33 should be applied by public sector entities, unless otherwise authorised. This would achieve the goal of streamlining processes within the ACT Public Service (ACTPS) and improving consistency.

The Review recommends that the PSSC should have the ability to authorise alternative procedures as, given the diversity of public sector agencies, it may be appropriate to allow some agencies to deviate from the standard procedures.

Reviews of the PID Act

The 2019 review has been a valuable resource in conducting this Review, providing background and context. The recommendations of this Review have been made, as proposed by the 2019 review, in conjunction with the recommendations relating to the IC Act. As with the amendments proposed to the IC Act, the Review considers that these amendments will clarify roles and reduce the load placed on the Commissioner by directing matters, which are not serious or systemic corruption, to more appropriate entities.

This Review's recommendations provide insight into, and potential solutions for, technical and operational issues within the existing legislation. The recommendations would also enhance oversight of the broader ACTPS, including the administrative units and the Legislative Assembly, by navigating the separation between these arms of government, and providing practical structures to support the purposes of the PID Act.

This Review also notes the next review is required in five years (by virtue of the interaction of section 303 of the IC Act and section 48 of the PID act) and hopes this report will assist with considerations relevant at that point, but noting that earlier consideration of the integrity framework should take place should issues arise with either Act.

¹⁹⁶ Legislative Assembly of the ACT, *Explanatory Statement for the Public Interest Disclosure Amendment Bill 2020*, 2020, https://www.legislation.act.gov.au/View/es/db_61781/20200220-73332/html/db_61781.html.

Table 8: Implementation of 2019 review recommendations

Number	2019 Recommendation	2023 Review
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.	This matter is addressed in chapter 3.4 of the Review, which provides recommendations on how the PID Act should require matters to be referred, such as under the IC Act or the misconduct framework.
2	Remove section 8(1)(a) from the definition of disclosable conduct in the PID Act as this conduct is covered by the IC Act.	This was implemented through the 2020 amendments.
3	Amend the PID Act to provide that disclosure officers must only notify: <ul style="list-style-type: none"> a. the Commissioner of a disclosure under the PID Act, unless the disclosure relates to the Commissioner or Commission in which case the process in Part 5.2 of the IC Act applies b. the discloser (if the discloser’s identity is known) that the matter has been referred to the Commissioner. 	This matter was implemented through the 2020 amendments. The same process is proposed through this Review, albeit with the PSSC as the responsible entity rather than the Commissioner (see chapter 2.1).
4	A disclosure officer need not refer a matter to the Commissioner if they have reasonable grounds to believe the matter does not come within the jurisdiction of the IC Act or the PID Act.	This matter was implemented through the 2020 amendments as a disclosure officer must only provide a disclosure to the Commission if considered to be disclosable conduct. The Review has recommended this process be retained, though through providing the disclosure to the PSSC (see chapter 3.2).
5	Amend the PID Act to mirror section 70 of the IC Act to enable the Commissioner to dismiss, investigate, or refer to others with the ability to investigate an assessed PID matter.	This was implemented through the 2020 amendments. The same process is proposed through this Review, albeit with the PSSC as the responsible entity rather than the Commissioner.
6	The Commissioner be given the responsibility to: <ul style="list-style-type: none"> a. assess if something is a PID under the PID Act b. determine if the Commission wishes to investigate or otherwise take carriage of the response to the notification/complaint under the PID Act or the IC Act c. either transfer the obligations to keep a person informed to the referral body, or require the referral body to report to the Commission if the Commission is to be the point of contact for the person who made the notification d. advise the person who made the notification and the disclosure officer whether further communication is the responsibility of the Commission or the referral agency. 	These matters were largely addressed through the 2020 amendments. The Review has recommended an alternative process where the PSSC assesses if disclosable conduct is a PID, and then must investigate the matter itself, or, if it is about certain other officers, refer as appropriate (see chapter 2.1).

Number	2019 Recommendation	2023 Review
7	Amend section 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 Commissioner.	This was implemented through the 2020 amendments. The same process is proposed through this Review, albeit with the PSSC as the responsible entity rather than the Commissioner. The Review has recommended that the head of entity must make an assessment as to whether they must prevent the disclosable conduct occurring based on the information in the disclosure (see chapter 2.4).
8	There should be an obligation on those to whom the 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 Commissioner and referred for investigation.	This was implemented through the 2020 amendments. The Review has recommended that the PSSC take carriage of most investigations. However, the same obligations would apply to an investigating entity where the PID has been referred by the PSSC (see chapter 2.1).
9	If the proposed role of the Commissioner under the PID Act is not adopted, if the 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 section 17 of the PID Act.	The Review recommends that if a matter is being dealt with under the IC Act, it will not be treated as a PID and therefore, duplicative investigations or notification requirements under the PID Act to heads of agencies, or disclosure officers, will not occur (see chapter 3.4).
10	A more expansive definition of maladministration be adopted, with consideration given to models in use in other jurisdictions.	The 2020 amendments limited the definition of disclosable conduct, and the Review agrees with this approach. The Review has recommended minor amendments, but considers that the definition is accessible and easy to understand. Expanding the definition risks complicating what is considered disclosable conduct (see chapter 3.1).
11	Amend Part 6 of the PID Act so that the functions of the PSSC generally become functions of the Commissioner.	This was implemented through the 2020 amendments. The Review has recommended that the functions revert to the PSSC (see chapter 2.1).
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 Commissioner, who may refer matters to the Parliamentary Standards Commissioner as appropriate.	This was not addressed through the 2020 amendments. The Review has provided recommendations that would clarify that all PIDs are able to be addressed by the appropriate authority that may take action to address, and discipline, officials that engage in disclosable conduct (see chapters 2.4 (regarding addressing disclosable conduct), and 4.2 (disciplinary action against those involved in disclosable conduct)).

Number	2019 Recommendation	2023 Review
13	The PSSC not to be notified of a disclosure under section 17 that relates to a Member or staff of the Legislative Assembly.	This was implemented through the 2020 amendments. The Review has recommended that the PSSC be responsible for assessing whether disclosable conduct of an MLA is a PID, but that the PSSC must refer the matter to the Commissioner for Standards to be dealt with (see chapter 2.1).
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 Commissioner, who may refer these matters to the Parliamentary Standards Commissioner.	The Review has recommended that the Speaker, as the entity responsible for appointing the Clerk, should be responsible for dealing with disclosable conduct of the Clerk (see chapter 2.1).
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.	The Review has recommended no further amendments to the way in which the PSSC assesses if disclosable conduct is a PID. This includes a requirement to consider whether the disclosure was made in the public interest (section 17A(2)(b)) (see chapter 2.1).
16	Amend section 7(1) of the PID Act to make it clear that disclosures made in good faith that the Commissioner assesses to be a PID is afforded the protections of the PID Act.	The Review has recommended that the protections apply once a person makes a disclosure in good faith to a disclosure officer. This would align the Territory with other Australian jurisdictions that apply protections from the initial point of disclosure (see chapter 5.1).
17	Amend the Act so that protections are enlivened for both disclosers and witnesses if the Commissioner assesses a matter as a PID.	This was largely addressed through the 2020 amendments, and the Review considers no further amendments are necessary.
18	Amend section 7(2) of the PID Act to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing.	This was not fully addressed through the 2020 amendments. The Review has recommended that the PID Act be amended to include work-related grievances as disclosable conduct if they indicate systemic maladministration (see chapter 3.1).
19	Part 7 of the PID Act is expanded to encompass protection for disclosers and those assisting disclosure investigation in appropriate circumstances.	<p>The 2019 review suggested in its discussion of this recommendation that 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. This matter has not been addressed in legislation.</p> <p>The Review considers no further amendment to the PID Act is required, but that the PSSC should make disclosers and witnesses aware of the Employee Assistance Program and other services that are available if required.</p>

Number	2019 Recommendation	2023 Review
20	If the Commissioner has assessed something as a PID, 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.	This was not addressed through the 2020 amendments. However, the Review has recommended that section 37 (loss of protection) be amended to remove protections for a discloser if they provide false or misleading information to a journalist or MLA under section 27 or section 27A of the PID Act (see chapter 5.2).
21	Relevant provisions in the IC Act regarding natural justice are replicated in the PID Act.	This was addressed in the 2020 amendments. The Review considers no further amendments are required.
22	Section 37 of the PID Act should be amended to provide that the protection provided by section 36 is forfeited in respect of any part of the disclosure that is made dishonestly or vexatiously.	This was addressed in the 2020 amendments. The Review has separately recommended that section 37 of the PID Act be amended to remove protections for disclosers who provide false or misleading information to an MLA or journalist under section 27 or 27A (see chapter 5.2).
23	The PID Act assign a function of capturing and reporting of PID matters. This is to be undertaken in a coordinated, whole of service function, and deliver agency-specific insights and trends.	This was not fully addressed in the 2020 amendments. The Review has recommended that the PSSC undertake PID administration, and has recommended that current annual reporting requirements be transferred to the PSSC. The PSSC has existing whole of service reporting requirements under the misconduct framework, and is required to publish an annual statement to outline trends and occurrences of misconduct across the service (see chapter 6.3).
24	The Commissioner, if assigned the roles recommended above, takes carriage of these reporting responsibilities.	Recommendation 39 proposes that the reporting functions be given to the PSSC, in line with the recommendation in this Review that the PID function be moved from the Commissioner to the PSSC.

Number	2019 Recommendation	2023 Review
25	<p>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:</p> <ol style="list-style-type: none"> a. Under which part of the definition of disclosable conduct in section 8 a report is made. b. For each matter: <ol style="list-style-type: none"> i. was the matter dismissed, referred or investigated ii. for investigations, which entity investigated iii. what was the outcome or determination of investigations iv. whether the report was made anonymously, by an ACTPS member or external person v. were the requirements to keep relevant parties informed met. c. How often the following sections of the PID Act are used: <ol style="list-style-type: none"> i. section 27 (3) – disclosure to an MLA or a journalist (if known) ii. section 40 – offence detrimental action. 	<p>This was not fully addressed in the 2020 amendments. Recommendation 38 of this Review proposes that the reporting functions be given to the PSSC, in line with the recommendation in this Review that the PID function be moved from the Commissioner to the PSSC.</p>
26	<p>Reporting occurs both in aggregate and at the ACTPS administrative unit or other public entity as defined in section 9 of the PID Act.</p>	<p>This was not addressed through the 2020 amendments. The Review recommends that the PSSC retain all reporting requirements for the PID Act. Duplicative reporting from both administrative units and the PSSC may be confusing as to the actual instances of disclosable conduct. A single reporting entity responsible for all disclosable conduct is simpler. The Review recommends that the PSSC provide a breakdown of agencies in which disclosable conduct is occurring, to the extent this is possible without affecting confidentiality.</p>
27	<p>Remove sections 11(2) and 11(3) which require 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 Commissioner for central publication.</p>	<p>This was largely addressed through the 2020 amendments. There is no requirement for an agency to list disclosure officers in an annual report. The Review does not recommend this be implemented, as it considers it sufficient disclosure officer details are publicly available through a website, as is current practice.</p>
28	<p>The Commissioner be empowered to issue guidelines (section 32) and procedures under the PID Act instead of the PSSC.</p>	<p>This was addressed through the 2020 amendments. The Review has recommended that the function revert to the PSSC, and that the PSSC be required to publish guidelines on how it will conduct investigations (see chapter 2.1).</p>

Number	2019 Recommendation	2023 Review
29	Amend section 33 to provide that the standard procedures issued by the Commissioner are the procedures of an agency unless the Commissioner approves alternative guidelines.	This recommendation is not expressly covered in the legislation. The Explanatory Statement says that the intention is that ‘public sector entities will adopt the procedures issued by the Commissioner’. Recommendation 39 of this Review recommends that section 33 be amended to require that the PSSC’s guidelines are adopted as the procedures of an agency, unless an alternative procedure is approved by the PSSC.
30	The conduct of MLAs and their staff remain within the PID Act scope, with matters considered by the Commissioner in the first instance with the ability to refer to the Parliamentary Standards Commissioner as appropriate.	This was partially addressed through the 2020 amendments. The Review has recommended this process, albeit with the PSSC making the referral to the Commissioner for Standards (referred to as the Parliamentary Standards Commissioner in the recommendation) (see chapter 2.1).
31	The intended coverage of the private sector in the PID Act is clarified.	This was addressed through the 2020 amendments.
32	The requirement to provide integrity training and awareness be strengthened by requiring reporting under the PID Act to include information about integrity education, awareness and training opportunities offered and taken up.	Though technically the recommendation calls for the reporting of opportunities ‘offered and taken up’, the section only requires the reporting of programs undertaken or coordinated. This means that it is not possible to measure the impact of the outreach on a year-to-year basis by the number of people attending. Recommendation 38 proposes this be included in section 45 of the PID Act.
33	The obligations that attach to a disclosure officer under section 17 should attach to anyone to whom a disclosure may be made.	The Review considers this matter is no longer relevant under the recommended PID model.
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.	This was addressed through the 2020 amendments.
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.	The Review has considered this proposal and provided a recommendation that the PID Act and the IC Act remain separate frameworks (see chapter 2.2).

