

Our ref: A2320277

24 March 2023

Mr Ian Govey AM
Independent Reviewer, *Integrity Commission Act 2018*

By email: icactreviewsecretariat@act.gov.au

Dear Mr Govey

Review of the *Integrity Commission Act 2018* and the *Public Interest Disclosure Act 2012*

Thank you for the opportunity to provide a written submission to your review of the *Integrity Commission Act 2018* (ACT) (the IC Act) and the *Public Interest Disclosure Act 2012* (ACT).

As the Inspector of the ACT Integrity Commission (the Inspector), I make the following suggestions.

1. The role of the Inspector and appropriateness of legislative provisions (TORs 2(d))

Noting paragraph 2(d) of the terms of reference, I consider there are several opportunities to clarify provisions of the IC Act to ensure they remain fit for purpose.

Access to information subject to a claim of legal professional privilege (LPP)

I suggest you recommend that section 270 of the IC Act be amended to put beyond doubt that a claim of LPP (or client legal privilege) cannot be used as a ground for refusing to provide material lawfully requested by the Inspector.

Under section 269 of the IC Act, I have a broad power as Inspector to require the production of any document or other thing I believe is relevant to an investigation, and a person commits an offence if they fail to comply. Section 270 of the IC Act expressly provides that certain specified common law privileges cannot be relied upon to refuse to comply with a notice under section 269, and notes section 171 of the *Legislation Act 2001* deals with client legal privilege. Section 171 simply notes that Acts need to be interpreted to preserve client legal privilege but that section 171 does not affect the operation of the *Evidence Act 2011*. Section 122(5)(a)(iii) of the Evidence Act has the effect that providing a document under compulsion of law (as is the case with a notice under section 269 of the IC Act) does not waive privilege.

This is an issue where the Commissioner and the Inspector initially had different views, although the Commissioner is now providing legally privileged documents if requested by the Inspector. Nonetheless, I believe that it is highly desirable to remove any doubt about whether a claim of LPP can be used as a ground to refuse to comply with a lawful request by the Inspector. Otherwise, there remains the possibility that a person might at some time decline to provide documents due to privilege, which has the capacity to delay an investigation by the Inspector. The Investigator requires full and free access to all relevant information in order to properly conduct investigations.

Public examinations

Under section 144 of the IC Act, if the Commission intends to hold a public examination, the Commission must notify the Inspector in writing 'not less than 7 days before the day of the public examination'.

I suggest you recommend that this timeframe be extended to 10 business days, to give the Inspector a more reasonable timeframe within which to consider a notice from the Commission.

The *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) (IBAC Act) of Victoria, on which numerous provisions in the IC Act are based, was amended in 2019 to extend the notification period for public examinations in relation to the Victorian Inspectorate to 'not less than 10 business days before a public examination is held' (amendment No 2/2019 of 117(5) of the IBAC Act).

Amendment No 2/2019 also inserted section 117(5A) in the IBAC Act:

The IBAC must not make a public announcement of its intention to hold a public examination for the purposes of an investigation unless the IBAC has notified the Victorian Inspectorate in accordance with subsection (5) of its intention to do so.

I consider there would be value in including an equivalent provision in the IC Act.

You may also wish to consider other amendments made to section 117 of the IBAC Act in relation to public examinations. For example, section 117(1)(c) was amended to include the need to consider whether on reasonable grounds a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.

Commission's monthly reports to the Inspector

Under section 205 of the IC Act, the Commissioner must give a written report to the Inspector at the end of each month including certain specified material. Staff of the Inspector review this material to assess the Commission's compliance with the IC Act.

If the Commission is granted any additional powers, or if you recommend that it gain additional powers, I suggest section 205 of the IC Act should be amended to expressly require the Commission to include material related to the use of any such additional powers in its monthly reports to the Inspector.

Importance of retaining ss 226-228 of the IC Act

I would like to draw your attention to the importance of the provisions in sections 226, 227 and 228 of the IC Act, which relate to independence, functions and powers. These provisions are integral to the Inspector's independence and role and should be retained in their current form.

2. Designating the Commission under the TIA Act (TORs 2(b)(i))

In relation to paragraph 2(b)(i) of the terms of reference, I wish to reiterate the matters raised in my recent submission to the ACT Legislative Assembly.

In November 2022, I made a written submission to the Standing Committee on Justice and Community Safety's inquiry into the Integrity Commission Amendment Bill 2022 (No 2). I would like to draw your attention to the following points in my submission:

- I did not express a view on whether the Commission should be permitted to intercept telecommunications, as in my view this is a policy matter for the Legislative Assembly.
- I noted most state integrity commissions have access to these powers under the TIA Act and complementary state legislation.

- I noted that if the ACT Ombudsman and Inspector were to become responsible for overseeing the Commission's use of telecommunications interception powers under the TIA Act, the ACT Ombudsman and Inspector would require additional funding, as the new activities contemplated by such oversight could not be absorbed within existing resources.

3. Witness welfare (TORs 2(f))

Finally, in relation to paragraph 2(f) of the terms of reference, I support a focus on the welfare of witnesses involved in integrity agency investigations.

In this regard, I draw to your attention that in February 2023 the Inspector of the Independent Commission Against Corruption (ICAC) (NSW) published *Special Report 2023/01: Audit of the welfare of witnesses and other people involved in ICAC investigations*. The Special Report examined the effectiveness and appropriateness of the procedures of ICAC in relation to the welfare of witnesses. Similarly, in October 2022, the Victorian Parliamentary Integrity and Oversight Committee released a report titled the *Performance of the Victorian integrity agencies 2020/21: Focus on witness welfare*.

I would be happy to provide you with further information on my role as Inspector or answer any questions about the points raised in this submission.

Yours sincerely



Iain Anderson

Inspector of the ACT Integrity Commission