

2018

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

INTEGRITY COMMISSION BILL 2018

EXPLANATORY STATEMENT

**Presented by
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Chief Minister**

INTEGRITY COMMISSION BILL 2018

INTRODUCTION

This explanatory statement (the statement) relates to the *Integrity Commission Bill 2018* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision - this being a task for the courts.

BACKGROUND

On 31 October 2017, the Select Committee on an Independent Integrity Commission (the Select Committee) released its report into their inquiry. The final report included 79 recommendations covering jurisdictional matters, relationships with other integrity stakeholders, the power to hold public hearings, accountability and independence, staffing and resourcing requirements, application of other legislation and other matters.

On 26 February 2018, the ACT Government tabled its response to the inquiry, committing to establishing an independent Integrity Commission which is broadly structured on those operating in similarly sized jurisdictions. The Select Committee report and recommendations will inform the establishment of a Commission.

The 2017 Select Committee recommended that the Government establish a standing ACT independent integrity body to investigate corruption in public administration and strengthen public confidence in government integrity. Consistent with this recommendation, the Bill establishes an Integrity Commission for the ACT.

The Bill ensures the functions of the body are delineated and clearly defined and cognisant of existing independent oversight bodies. The Integrity Commission will focus mainly on prospective and current matters, with some limited ability to review retrospective or previous matters, subject to certain requirements.

The 2017 Select Committee recommended that a standing ACT independent integrity body should be named as an Anti-Corruption and Integrity Commission (ACIC). As the proposed acronym is the same as that of the Australian Criminal Intelligence Commission (ACIC) and to avoid potential for confusion about the roles of the two bodies, the Government has decided that the Bill will establish the ACT Integrity Commission.

The Integrity Commission Bill 2018 (Exposure Draft) was tabled in the Legislative Assembly on 31 July 2018. The Exposure Draft was referred to the 2018 Select Committee Inquiry into the establishment of an Independent Integrity Commission.

The new Integrity Commission complements the ACT's existing strong structure of public sector oversight, ensuring a highly transparent and professional territory administration. These existing bodies include an ACT Public Sector Standards Commissioner, ACT Legislative Assembly Commissioner for Standards, ACT Legislative Assembly Ethics and Integrity Advisor, ACT Human Rights Commission, the ACT Auditor-General and ACT Ombudsman as well as staff Codes of Conduct and Ministerial Standards.

On 31 October 2018, the 2018 Select Committee released its report following consideration of the Government's Exposure Draft and the Opposition Anti-Corruption and Integrity Commission Bill 2018. The Committee's report contained 57 recommendations. Amendments have been made to the Exposure Draft to develop the Integrity Commission Bill 2018 which incorporates 42 of the 2018 Select Committee's recommendations.

OVERVIEW OF THE BILL

The Bill establishes an independent ACT Integrity Commission, constituted by a single Integrity Commissioner, who is an officer of the ACT Legislative Assembly. The Commissioner is to be appointed by the Speaker in the same manner as the existing officers of the Legislative Assembly, which include the ACT Ombudsman, Auditor-General and Electoral Commissioner.

Subject to the Bill and to other territory laws, the Integrity Commission has complete discretion in the exercise of the commission's functions.

The role of the Integrity Commission is to:

- investigate conduct that is alleged to be corrupt;
- refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action;
- prevent corruption, including by—
 - researching corrupt practices;
 - mitigating the risks of corruption;
- publish information about investigations conducted by the commission, including lessons learned;

- provide education programs about the operation of this Act and the commission, including providing advice, training and education services to:—
 - the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and
 - people who are required to report corrupt conduct under the Act; and
 - the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct; and
- foster public confidence in the Legislative Assembly and public sector.

The Bill provides for other oversight agencies, such as the Ombudsman, Human Rights Commission and integrity agencies in other jurisdictions to refer a complaint about conduct that may be corrupt conduct. In certain circumstances, the Integrity Commission may also refer complaints to other bodies. The Integrity Commission and other relevant bodies can also share information relevant to the exercise of their functions. This ensures a coordinated approach to the investigation of corrupt conduct in public administration in the ACT.

Corrupt Conduct

The 2018 Select Committee recommended that the Bill be examined to ensure that it incorporates the full extent of the NSW definition of corrupt conduct, but maintain the focus on ‘serious corrupt conduct’ and ‘systemic corrupt conduct’ as reflected in the Bill.

As recommended by the 2017 Select Committee, the definition of corrupt conduct in the Bill is based on Part 3 of the *NSW Independent Commission Against Corruption Act 1988*, drafted to reflect ACT legislation. The corrupt conduct definition continues to rely on the Criminal Code, Chapter 3, instead of listing matters that will be determined by common law.

The term serious disciplinary offence has been included in the definition of corrupt conduct. Serious disciplinary offence includes any serious misconduct or other matter that constitutes or may constitute grounds for termination action under any law. Serious disciplinary offence uses the term serious misconduct which is taken from the Fair Work Regulations 2009.

The Government is of the view that there are existing provisions and oversight mechanisms in place for dealing with misconduct of Members of the Legislative Assembly, Statutory Office Holders, ACT public sector employees and third party contractors (through contracts). Disciplinary issues will continue to be dealt with under applicable codes of conduct provisions.

NSW is not a human rights jurisdiction, unlike the ACT, so it is necessary to consider any amendments in order to meet compliance with the Human Rights Act 2004.

The Bill also reflects the Select Committee's recommendation that the Integrity Commission should prioritise investigating serious or systemic corruption, but the Bill does not restrict the commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct. This is also reflected in the objects of the Bill.

Public officials

The Select Committee recommended that the substantive jurisdiction of an integrity body should cover all public officials. The Bill defines public official to include a person having public official functions for the Territory, or acting in a public official capacity for the Territory, including a public servant, statutory office holder and an officer of the Legislative Assembly. The Bill reflects the 2017 Select Committee's recommendation that Members of the Legislative Assembly (MLAs) and their staff be included in the definition of public official.

Judicial officers and any ACT Civil and Administrative Tribunal members, registrars and staff exercising judicial or quasi-judicial powers are included in the definition of public official and therefore within the oversight of the Integrity Commission.

The Bill also provides for consequential amendments to reflect the new role of the Integrity Commission in other Territory Acts.

HUMAN RIGHTS IMPLICATIONS

The Bill is drafted to be compatible with human rights as set out in the *Human Rights Act 2004* (HRA). Rights under the HRA may be limited if such limitations are reasonable and proportionate. Section 28 of the HRA sets out the criteria for determining if a limitation is reasonable including considering the purpose of the limitation and if the limitation is the least restrictive to achieve that purpose.

The Bill achieves an important purpose overall, as it supports the Government's commitment to transparency and confidence in public administration within a framework where an individual's privacy and reputation are reasonably protected in accordance with community expectations.

The 2017 Select Committee noted the international basis for anti-corruption bodies including in the relevant UN Convention:

'Globally the placement on the policy agenda, of the concept of standing anti-corruption commissions, designated stand-alone integrity bodies, or specialised anti-corruption institutions can be sourced initially to the emergent need to address the

‘global and multi-faceted challenge of fighting corruption’. This was reinforced by a number of international conventions, amongst other things, mandating the establishment of anti-corruption bodies. For example, the UN Convention Against Corruption, considered to be the most universal in its approach requires parties, again amongst other things, to the Convention:

“...to implement specialised bodies responsible for preventing corruption and for combating corruption through law enforcement.”

This Bill engages a number of rights protected under the HRA, including the following:

- supports section 19 – protection from torture, inhuman or degrading treatment;
- supports section 11 – right to family life and of children;
- limits section 8 – recognition and equality before the law;
- limits section 12 – right to privacy and reputation;
- limits section 13 – freedom of movement;
- limits section 15 – right to association;
- limits section 16 – freedom of expression;
- limits section 17 - participation in public life;
- limits section 18 - right to liberty;
- limits section 21 - right to fair trial; and
- limits section 22 - rights in criminal proceedings.

The Integrity Commission will be considered a ‘public authority’ under section 40(b) of the HRA, resulting in an obligation under section 40B for the Commission to act consistently with human rights legislative requirements. While this obligation exists under the HRA, throughout the Bill, a number of safeguards have been used where it may seem a person’s human rights are limited. These safeguards are used to ensure where a right is limited, it is through the least restrictive means of doing so.

Complaints from Detained Persons

Section 19 – Humane treatment when deprived of liberty and Section 16 freedom of expression

This Bill supports section 19 of the HRA, the right to humane treatment when deprived of liberty and section 16, freedom of expression, in providing a specific process for a detained person to make a complaint to the Commission by virtue of provisions in existing legislation. This includes being able to make a complaint, other than in writing and for the person in charge of that detained person to take all steps to facilitate the making of the complaint, and to forward, immediately and unopened, any letter addressed to Integrity Commission by the detained person.

Confidentiality Notices

Section 11 – right to family life

The Bill supports section 11 of the HRA regarding the right to family life, in that a person subject to a confidentiality notice is able to disclose to a domestic partner that the person has been or is proposed to be examined by the commission, or has produced or may produce a document or thing to the commission if it is necessary to do so in order to comply with the relevant document.

Strict Liability Offences

Section 22 - Presumption of Innocence

The Bill includes a number of provisions that contain offences of strict liability. Offences of strict liability engage the right to be presumed innocent under section 22(1) of the HRA, as they may reverse the onus of proof from the prosecution onto the defendant.

The proposed strict liability offences are aimed to target and prevent the improper interference with the investigative work of the Commission including:

- Interfering with a thing seized and restricted by an investigator acting with the consent of the occupier of the premises; and
- A person who ceases to be an investigator does not return their card soon as practicable (but within 7 days).

An evidential onus, rather than a strict liability offence, would be less restrictive on the right to be presumed innocent found in section 22(1) of the HRA. This approach is taken elsewhere in the Bill, for example in providing a defendant with an exception to other offences where they have a ‘reasonable excuse’ for not complying.

It would not, however, prove to be as effective in prosecuting the proposed offences. Strict liability offences provide that the defendant’s act alone, rather than the reasons that the defendant acted in that way or his or her intention in so doing, should dictate the offence. The offences chosen for strict liability in the Bill reflect this.

The inclusion of strict liability within an offence limits the range of defences that may be available for a person accused of the offence to which it applies; however, a number of defences remain open to the accused, depending on the particular circumstances of each case. Section 23(1) (b) of the *Criminal Code 2002* (the Code) provides a specific defence to strict liability offences of mistake of fact. Section 23(3) of the Code provides that other defences may also be available for strict liability offences, including the defence of intervening conduct or event, as provided by section 39 of the Code.

Concern has been raised that by imposing a strict liability offence, third parties not directly connected to the item being seized (e.g. visitors, flatmates, tradespeople in the area where the item has been seized) may inadvertently interfere with the item without realising the offence attached to their action. However, it is envisaged that as part of the Commission's policies and procedures, investigators will make sure the item is physically secured or identified with tape or another measure to ensure that people other than the occupier or recipient of the notice of seizure are aware that the item is restricted.

The penalties are also limited to a fine rather than any form of imprisonment.

It is on this basis that the Government believes that the use of strict liability offences contained in this Bill is relevant to the policy objectives of ensuring the Integrity Commission is able to discharge its functions without interference and this is considered justifiable and reasonable.

The 2018 Select Committee recommended the Integrity Commission Bill be amended to include a general offence of obstructing the Commissioner, Inspector, their staff and witnesses. It was the Government's position that there are existing offences in ACT legislation that deal with obstruction that could be relied upon however, the Bill includes an offence for obstructing the Commissioner, Inspector, their staff and witnesses where gaps may exist within the offences.

Disclosure of Interests

Section 12 – Right to Privacy and Reputation

Under section 12 of the HRA, a person has the right not to have their privacy unlawfully or arbitrarily interfered with. Generally, an interference with privacy will not be unlawful where it is permitted by a law which is precise and appropriately circumscribed. Interferences with privacy will not be arbitrary, provided they are reasonable in the circumstances, just and proportionate to the end sought.

If the Commissioner has a conflict of interest, the Commissioner is required to disclose the conflict to the Speaker and the Inspector. A conflicts of interest register for the Commission must be established, and made available for inspection by the Inspector at any time.

Recommendation 10 of the 2018 Select Committee's stated that provisions surrounding the disclosure of conflicts of interest held by the Commissioner and Inspector be reviewed and a conflict of interest register be formed. Under the Bill, the Commissioner must not:

- (a) have paid employment that is inconsistent with the commissioner's functions; or
- (b) engage in any unpaid activity that is inconsistent with the commissioner's functions.

The Bill limits the right to privacy of the Integrity Commissioner and Inspector. Similar to the requirements for the disclosure of interests by others in similar positions, such as Officers of the Legislative Assembly, the Clerk and for executives of the public service, the Bill requires the Integrity Commissioner or Inspector to disclose their personal and financial interests. A disclosure must be made to the Speaker, within seven days of appointment, at the beginning of the financial year and of any change in an interest.

The purpose of the limitation on the right to privacy is to act as a check on the conduct of the Commissioner or Inspector, who holds a critical position with significant public responsibilities that must be beyond reproach. Public confidence in the Commissioner's role in investigating alleged corrupt conduct is critical to their role, including that they be free of any actual or perceived conflict of interest. Likewise, public confidence in the Inspector's role of assessing and reporting on the Commission's functions is also critical to their role.

The nature of the limitation is relatively minor as the disclosure is made only to the Speaker as the representative of the Legislative Assembly. This does not constitute an arbitrary or unlawful interference with the Commissioner's or Inspector's privacy. The disclosure ensures that the Integrity Commissioner or Inspector appropriately places on record any matters or interests to allow the Commissioner or Inspector and Speaker to determine whether there may be any potential or real conflicts of interest and there are also requirements to establish a conflict of interest register for the commission. The Speaker may use the information if the Speaker was contemplating suspending or terminating the appointment because the Integrity Commissioner or Inspector has allegedly acted improperly and failed to declare an actual or perceived conflict of interest. In these circumstances the Bill provides further protections in the process that the Speaker must follow, to provide the Commissioner or Inspector with procedural fairness.

Given the nature of the limitation and the important purpose that it serves it is reasonable to require the disclosure and create the limitation on the Integrity Commissioner or Inspector's right to privacy. The limitation is proportionate to its purpose and the least restrictive means of achieving a legitimate end.

A similar provision is provided under Clause 251 for the staff of the inspector. The inspector may ask a person being appointed as a member of staff of the inspector to declare any personal interests the inspector considers relevant. However, as this is a discretionary requirement, if section 12 of the HRA is engaged, it is justified due to the nature of the work the staff of the Inspector will be undertaking. Similar to the above, the limitation is proportionate to its purpose and the least restrictive means of achieving a legitimate end.

The 2018 Select Committee recommended that the ACT Government explore whether specific provision needs to be made in the legislation to permit the Commissioner to make

use of a Member of the Legislative Assembly's declarations of interest. The Government explored whether a specific provision was needed within the Bill and decided it was not necessary as continuing resolution 6 of the Legislative Assembly already deals with Members' conflicts of interest, and how the information may be available to any person on request. This does not interfere with the right to privacy, as the information is already public.

Mandated Reporting and Referring

Section 12 – Right to Privacy and Reputation

Clause 59, Clause 61 and Clause 107 may also limit the right to privacy of those mandated to notify the Integrity Commission or other relevant entities who may decide to refer matters to the Commission where there is suspected corrupt conduct. This includes:

- An entity that has received a complaint of corrupt conduct referring it to the Integrity Commission;
- the head of a public sector entity and an SES member, who must notify the commission about any matter the head of the entity suspects on reasonable grounds involves corrupt conduct;
- the Integrity Commission must refer a corruption report to another entity where the Commission considers it would be more appropriate for that entity to investigate rather than the Commission.

The 2018 Select Committee report recommended that the Integrity Commission Bill include an offence of failing to make a mandatory corruption notification. Thus, a person commits an offence if they are required to make a mandatory corruption notification and does not, as soon as practicable after forming the suspicion, make the notification. However, in determining the appropriate penalty applicable to this offence, various factors were considered. Factors such as the nature of the conduct being sought to be deterred was considered alongside whether the conduct seriously contravened fundamental values to be harmful to society. It was also considered whether the criminal law is appropriate for dealing with the conduct of those not reporting corrupt conduct.

The Government is of the view that imposing a fine, rather than a fine and imprisonment is a better deterrent than imposing a criminal conviction on a person that fails to make a mandatory corruption notification. By imposing an offence, it will assist the Commission in the identification and exposure of corrupt conduct. Part of the Commission's education functions will include developing guidelines to clarify obligations for those to which a mandatory corruption notification applies to.

In referring the complaint, the entity may give the Commissioner any information the entity has in relation to the complainant and if the complaint is referred, tell the complainant about the referral.

The purpose of this limitation is to ensure that potential corrupt conduct is brought to the attention of the Integrity Commission. It is also to ensure that complaints made to the Integrity Commission about subject matters other than corrupt conduct are referred to the appropriate body for investigation. It is the least restrictive approach because the head of a public sector entity is only mandated to notify if they suspect the conduct is corrupt on reasonable grounds.

Other relevant entities may refer corruption complaints to the Integrity Commission. Relevant entities are defined in Clause 59 which are confined to those doing work similar to that of the Integrity Commissioner including the Speaker, Auditor-General, Ombudsman, a statutory office holder such as the Human Rights Commission, and an entity having functions, under a State or Commonwealth law that corresponds to this Act, or that correspond to the functions of the commissioner. The Integrity Commission may make directions about how mandatory corruption notifications identifying the type of information that should be reported to the Integrity Commission under Clause 64. However, a safeguard is implemented to ensure that the Commission must consult each mandated reporter who is not an exempt mandated reporter, and anyone else the Commission considers appropriate before the Commission makes a mandatory corruption directions.

Under Clause 107, the Integrity Commission can only refer where it believes the referral entity has the power to investigate the subject matter of the corruption report and the Integrity Commission considers it would be more appropriate for the corruption report to be investigated by the referral entity than by the Integrity Commission. In deciding whether to make a referral, the Integrity Commission must consult with the referral entity. This does not mean that a referral entity is required to deal with the corruption report. The Integrity Commission may request the specified referral entity provide information on the results of the investigation and any action taken. This provision does not apply to the Auditor-General, the Ombudsman, the Human Rights Commissioner, the Legislative Assembly Commissioner for Standards, the Speaker and Deputy Speaker.

In addition, any entity referring a corruption complaint to the Commission must still comply with their legal obligations, which also includes the ACT *Information Privacy Act 2014* for many ACT Public Sector agencies.

Furthermore, Chapter 7 ensures that an individual's privacy is not impinged on as the provisions of this Chapter provides for protection for people involved in investigations. A

complainant under this chapter not only covers someone who makes a complaint, but also a person who has made a mandatory notification.

On this basis, the mandatory reporting and referral pathways do not constitute an arbitrary or unlawful interference with an individual's privacy.

Preliminary Inquiry Powers

Section 12 – Right to Privacy and Reputation and Section 13 – Freedom of movement

As part of its preliminary inquiry powers, the Bill limits the right to privacy in that the Integrity Commission may issue a witness notice to produce documents or other things where the Commission is satisfied that it is reasonable to do so. The Commission does this by having regard to factors including the necessity of the information in determining whether to dismiss, refer or investigate a complaint or notification, and whether it is reasonably practicable to obtain the information by any other means. Failure to comply with a witness summons without reasonable excuse is an offence under the *Criminal Code 2002* (ACT).

The 2018 Select Committee recommended that the legislation prohibit the use of summons in preliminary inquiries, the Government agreed to this recommendation in principle. This power is an important one to ensure the Commission is reasonably satisfied that a threshold has been met before conducting a full examination. Thus, the Commission can issue a preliminary issues notice.

In using the power, the Integrity Commission may require a person to disclose personal information engaging the right to privacy. The purpose of this limitation is to allow the Commission to discharge the significant public interest in determining whether an investigation to uncover corruption is warranted.

Along with its investigative coercion powers, this power is critical to the Commission fulfilling its functions particularly noting the difficulty in detecting corruption. It is important that there is a preliminary assessment of allegations to ensure they are substantiated, prior to any subsequent invasion of a persons' privacy during the coercive investigation stage being deemed necessary. Coercive investigations (which involve surveillance etc.) are also expensive. The 2018 Committee noted that where the Commission find their efforts to obtain information during a preliminary inquiry frustrated by non-cooperation, then launching a full investigation is desirable. However, the Government is of the view that public funds should not be spent on expensive coercive investigations into allegations that are unsubstantiated and do not meet the definition of serious corrupt conduct or systemic corrupt conduct.

This is the least restrictive manner of achieving this purpose. The Commission does not have any coercive powers during their preliminary inquiry stage. The 2018 Select Committee recommended that the Commission should not be able to summon someone during the preliminary inquiry stage. The Commission will be able to give a person a notice to produce a document or thing. Similarly, many of the Commission's extended investigative powers such as the use of surveillance devices are not available during preliminary inquiries. Further, unlike in examinations, a person who has been issued with a witness summons in relation to a preliminary inquiry can refuse to comply with the summons on the basis of claiming the privilege against self-incrimination or that a secrecy provision applies. Any dispute over the application of these exceptions, such as the privilege against self-incrimination, is adjudicated independently by the Supreme Court.

The Commission must also consider certain things prior to issuing a witness summons. This includes deciding whether the production of the document or thing is necessary in determining whether the Commission should dismiss, refer or investigate a corruption report, or investigate a matter of its own initiative.

It is an offence to fail to comply with a witness summons issued during a preliminary inquiry as a preliminary inquiry before the commission is a legal proceeding for the Criminal Code, chapter 7 (Administration of justice offences). However, the offence does not apply if the person has a reasonable excuse. Creating a 'reasonable excuse' exception can potentially engage the right to be presumed innocent in section 22 of the HRA, on the basis it may place a burden on the accused to prove (or disprove) an element of the offence. However, the reasonable excuse provision creates an evidential, not legal, burden on the accused and therefore does not transfer the legal burden of proof to the defendant. Rather, if the person is able to prove that a reasonable excuse exists on a lower evidentiary threshold, then the burden shifts back to the prosecution to prove the offence. On this basis, the provision does not limit the right to be presumed innocent, and if it does, it limits the right on a reasonable and proportionate basis.

The Commission will also be able to issue a confidentiality notice in respect of a witness issued a notice to produce during a preliminary inquiry. A person who complies with a preliminary inquiry notice has the same protection and immunity as a witness has in a proceeding in the Supreme Court.

Clause 89 may also limit an individual's right to privacy by carrying out a preliminary inquiry. The commission may ask the head of a public sector entity to provide information to the Integrity Commission that the Commission considers relevant to the preliminary inquiry.

The purpose of the limitation is to ensure the Integrity Commission is provided all the information it needs to conduct a preliminary inquiry. This is the least restrictive way of

achieving this purpose as the head of the public sector entity need not comply with the request if they advise the Commission of a reasonable excuse for not doing so. Further, the head of the public sector entity who complies with the request, and any person who assists the head in complying with this section, has the same protection and immunity as a witness has in a proceeding in the Supreme Court.

For these reasons, any interference with privacy arising from the Integrity Commission's preliminary inquiry powers are lawful and not arbitrary.

Clause 205 of the Bill also engages the right to privacy, in that the Commission must provide the Inspector with the name of person who a notice was directed, along with the reasons why. The purpose of the limitation is to ensure the Inspector is able to fulfil their important role in overseeing the work of the Commission and ensuring that the Commission is using its power appropriately. The limitation is also the least restrictive approach as only the name of the person must be provided to the Inspector and the reasons for issuing the notice.

Section 8 – Right to Equality and Section 11(2) – Rights of Children

The power to issue a preliminary inquiry notice may engage the right to equality, as it can be served upon anyone including those with a disability. Section 8 of the HRA provides that everyone is entitled to equal protection of the law without discrimination. The HRA provides examples of attributes that may lead to discrimination including race, disability and other status. This can include the law being expressed in neutral terms, but disproportionately impacting on a sector of the community whose members have one or more attributes.

The power may also result in a child being served with a notice. The rights of children are protected under section 11(2) of the HRA. The right under section 11(2) uses the international law definition of a 'child' being a person under 18 years of age. Section 11(2) of the HRA expressly guarantees that every child and young person has the right to the protection they need without any distinction or discrimination. In addition, children and young people are also entitled to all the other rights guaranteed under the HRA.

Any potential disproportionate impact is mitigated by protections in the Bill. Prior to issuing the notice, the Commission under Clause 90 is required to consider the age of the person and whether the person is suffering from a mental impairment. The Commission must also consider the impact that the preliminary inquiry notice may have on the person, in particular, impact due to disability, health or cultural or linguistic background. A child who is issued a preliminary inquiry notice to produce documents or other thing may receive necessary assistance from a parent, guardian or independent person in addition to a lawyer under Clause 90. A preliminary inquiry notice issued on a person under the age of 16 has no effect.

Section 13 – Freedom of Movement

A preliminary inquiry notice also engages the right to freedom of movement under the HRA, in that the person issued with the notice must attend a specified place at a specified time to produce a document or other thing. Section 13 of the HRA means that people have the right to move freely within the ACT. The purpose of the limitation is to provide the Commission with sufficient power to determine whether an investigation to uncover corruption is warranted. This is the same as the right to privacy. The limitation is the least restrictive as all that is required is attendance to provide documents or things for the preliminary inquiry process. The Commission can also excuse the person from attending if the person produces the document or thing to the Commission before the time for production stated in the preliminary inquiry notice.

Threshold to commence investigation and use investigative Powers

Section 12 – Right to Privacy and Reputation, Section 13 – Freedom of movement, Section 22 – Rights in Criminal Proceedings

The Commission is provided extraordinary investigative powers under the Bill which engage several rights including the right to privacy and reputation, freedom of movement and the right against self-incrimination. The 2017 Select Committee noted on page 217 of their report:

“Anti-corruption and integrity bodies mandated with the role of exposing and investigating corruption require a broad set of powers to be effective. It has been argued that the suite of powers required by such bodies is necessary because of the nature of corruption, in that it “is an extraordinary crime”, and that “it is almost impossible to detect or expose using ordinary investigative powers”.

In order to use these powers, the Commission must commence an investigation because it suspects on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct. This is a lower threshold than the original requirement introduced in Victoria that it be reasonably satisfied that conduct amounts to a relevant offence.

In recommending this threshold, the 2017 Select Committee stated on page 207:

“The Committee further agrees that the threshold for investigation is critical to the effectiveness of an ACIC—in that, if it is too high, the Commission is limited in its ability to act and if it is too low, it may permit the Commission to commence an investigation using investigative and coercive powers, on the basis of limited evidence.

The Committee supports an investigation threshold of ‘reasonable suspicion’ for an ACIC to commence an investigation. The Committee considers that it balances the requirements for procedural fairness whilst permitting an ACIC to investigate, where initially there may only be limited evidence.”

The compatibility statement that accompanied this change in Victoria also noted that ‘the IBAC’s expanded jurisdiction and lower investigation threshold as provided in the bill do not alter the way in which the IBAC’s existing investigative powers affect human rights protected by the charter or remove the legitimate objectives of those powers’.¹

As an additional safeguard, if an investigator exercises a power under the Bill that affects an individual, the investigator must first show the investigator’s identity card to the individual.

The Inspector also has the power to do anything reasonable and necessary to investigate a complaint under Clause 263. This may limit the right to privacy under section 12 of the HRA, and freedom of movement under section 13 of the HRA. This authorisation is important to ensure public confidence in the Inspector’s role which provides oversight of the Integrity Commission and its functions. Appropriate safeguards are placed throughout the Bill to ensure any findings that are reported by the Inspector are not contrary to public interest.

Search and Seizure

Section 12 – Right to Privacy and Reputation

The powers of investigators to apply for warrants to search properties and seize evidence primarily engages the right for an individual not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

These are based on existing search and seizure powers provided to other ACT entities including under the *Waste Management and Resource Recovery Act 2016*, *Nature Conservation Act 2014* and *Public Unleased Land Act 2013*. They are also consistent with the recommendations of the Select Committee.

The purpose of these powers are to allow investigators to fulfil the Integrity Commission’s function of investigating alleged corrupt conduct.

The Bill provides that an investigator may only enter premises:

- at any reasonable time those premises are open to the public;
- with the occupier’s consent;
- in accordance with a search warrant.

¹ Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 - Statement of compatibility - 10 December 2015.

Clause 117 (2) provides a further limitation on the exercise of this power, in that an investigator is not authorised to enter into premises on the first criteria that are used for residential purposes.

Further, an investigator may only seize an item if the thing is connected with corrupt conduct and the seizure is necessary to prevent the thing from being—

- concealed, lost or destroyed; or
- used to engage in, continue or repeat the corrupt conduct.

In the exercise of these powers, an investigator must take all reasonable steps to ensure that the investigator, and any person assisting the investigator, causes as little inconvenience, detriment and damage as is practicable. In certain circumstances, a person may also claim compensation arising from an investigator exercising these powers.

On this basis, the Government believes that any limitation on the right to privacy is reasonable and does not constitute an unlawful or arbitrary interference with an individual's rights.

Examination

The Bill provides that the Commission may hold public examinations with corresponding powers to compel the attendance of witnesses, and in doing so, may limit a number of rights under the HRA including to privacy, freedom of movement, fair trial and rights in criminal proceedings.

The purpose of this limitation is to provide transparency in relation to scrutiny of the activities of the Integrity Commission and to ensure public confidence in its investigations into alleged corruption. In considering the submissions made to it, and the experiences of other bodies tasked with investigating corruption, the 2017 Select Committee concluded that the Integrity Commission should have the ability to hold public examinations for it to discharge its legitimate objectives of transparency and accountability of the conduct of the body, public confidence in its operations, the discovery of further evidence, the education of the public, and the general deterrent effect. The 2018 Select Committee reiterated their view that the legislation should be neutral as to whether a public or private examination be conducted. The 2017 Select Committee recommended that the 'integrity Commission should have the power to hold public examinations. The decision on whether to hold public or private examinations should be informed by a public interest test.'

The Bill contains a public interest test, which must be satisfied prior to the Commission being able to hold a public hearing that seek to protect the privacy and fair trial rights of individuals. In deciding whether it is in the public interest to hold a public examination, the

commission may consider any of the following; whether the corrupt conduct was an isolated incident or systemic in nature, the benefit of exposing the examination to the public and making it aware of corrupt conduct, and the seriousness of the matter being investigated.

One of the objects of the Bill is to achieve a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation.

In Scrutiny Report 25, the Legislative Assembly Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) requested for consideration to be given to clarifying that it is not intended that the Commission can act incompatibly with human rights in the exercise of these of similar discretions. Amendments have been made to the final Bill to address these considerations to ensure compliance with the HRA.

Section 21 – Right to Fair Trial

Section 21 of the HRA requires that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. It also requires that all judgements or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless certain exceptions apply including if the interest of the private lives of the parties require the exclusion. The protections in section 21 incorporate principles of procedural fairness.

The Bill does not impose a presumption that examinations be heard in public, or in private.

The Integrity Commission will have discretion in this regard. This discretion serves the purpose of affording the Integrity Commission appropriate flexibility. The Commission's discretion to hold a public examination could engage the right to a fair trial under section 21 of the HRA. However this is arguable as the Integrity Commission is not a court or tribunal that conducts a trial for the purposes of the HRA. The Commission's ability to hold a public examination might *indirectly* engage section 21 of the HRA, as publically airing allegations of corruption could damage the fairness and impartiality of a jury trial should criminal charges be laid by the police following the Commission's investigation.

The Bill appropriately limits the Commission's ability to hold a public examination in recognition of a person's right to a fair trial. The Commission does not have absolute power to hold a public examination. The Bill restricts their direction by requiring the Commissioner to choose between a public or private examination based upon which option better serves the public interest on the facts of the relevant investigation. This public interest test explicitly requires the Commissioner to consider the negative impact that a public examination would have on a person's human rights when making this decision.

The Bill further protects the right to a fair trial during an examination. The commission:

- must comply with the rules of natural justice and procedural fairness; and
- must exercise its functions with as little formality and technicality as is possible; and, in particular—
 - must accept written submissions as far as possible; and
 - examinations must be conducted with as little emphasis on an adversarial approach as is possible.
- must allow persons to seek legal advice and be represented by a lawyer during an examination;
- must notify the Inspector of its decision to hold a public examination and reasons why;
- must allow a person to challenge the Commission’s decision to hold a public examination by hearing their arguments in favour of a private examination; and
- may issue confidentiality notices and suppression orders.

A default presumption in favour of private examinations could be less restrictive on the right to a fair trial. However, a presumption that favours private hearings is undesirable because it creates an expectation that allegations of corrupt conduct will not be publically aired. In addition, the Commission cannot fulfil its function of preventing corruption and improving public confidence in the integrity of public administration in the ACT without the power to hold public examinations. The denial of being able to conduct public hearings may invite suspicion that the Commission is withholding information from the public to protect the Government or the Legislative Assembly from public scrutiny.

It is important the public are aware that the Commission is not biased *against* public examinations, as public examinations assure the public that the Commission takes corrupt conduct seriously and is not complicit in the corruption it is investigating. A default presumption in favour of private hearings also has less of a deterrent effect on persons considering whether or not to engage in corrupt conduct. The Bill’s position, which includes no presumption for or against private or public examinations, achieves a fair balance between competing considerations in favour of public and private examinations.

Section 22 – Rights in Criminal Proceedings

Division 3.6.3 allows the Commission to certify and directly refer acts of contempt that occur in relation to a Commission examination to the ACT Supreme Court. This bypasses the normal criminal process in which criminal conduct is reported to the police, investigated, charged and prosecuted after a length of the time.

The inclusion of Division 3.6.3 may impede on section 22(b) of the HRA, which provides that anyone charged with a criminal offence is entitled to have adequate time to prepare his or her defence. The Bill's expedited process of certifying and referring acts of contempt may limit this right by decreasing the amount of time it takes to prosecute an act of contempt. This similarly decreases the amount of time a person has to prepare their defence against a charge of contempt.

The purpose behind this Division is to ensure the Integrity Commission is able to operate as effectively as possible. The Commission is only able to conduct an effective investigatory examination if witnesses comply with their legal obligation to answer questions and produce documents. The Commission's power to penalise non-compliance during a preliminary inquiry or examination is crucial. A process that deals with contempt quickly provides a greater deterrent effect. Further, examinations are an investigatory tool. Failure to answer questions and produce a document during an examination can prevent the Commission from properly investigating corrupt conduct in accordance with its statutory functions. This in turn, can stall investigations. Contempt proceedings are useful because they can compel uncooperative witnesses to change their mind and decide to comply with the relevant request for information. Referring acts to the Supreme Court facilitates this process quicker, which allows the Commission to return to investigation sooner. The majority of other State/Territory anti-corruption commissions also utilise the proposed pathway of directly referring acts of contempt to the Supreme Court.

This power is reasonable as it is subject to a variety of limitations, including:

- the Commission must inform the person they intend to make an application for contempt (which acts as a warning);
- the Commission's application must be supported by a certificate that includes an explanation of the grounds for their application, and the evidence in support of their application;
- a copy of the certificate must be given to the person before an application is made;
- the Commission must inform the Inspector;
- the Commission may withdraw the contempt application;
- a defence of reasonable excuse is available; and
- a person cannot be tried more than once for an act or omission that is both an act of contempt and an offence.

The alternative to referring acts of contempt to the Supreme Court is criminalising acts of contempt via the normal criminal process. This option does not achieve the desired purpose of avoiding delayed resolution of contempt proceedings. The procedure of referring acts of contempt to the Supreme Court is unusual in the ACT and is not used by other ACT inquisitorial bodies, such as the ACT Judicial Commission, Royal Commission or Boards of

Inquiry. The Australian Crime Commission has power to utilise the ACT Supreme Court's contempt procedures.

Examination Summons and Questioning

The Bill provides the Integrity Commission the power to compel an individual to attend an examination, if it believes it is reasonable to do so, in order to give evidence at an examination or produce a document or thing. A person cannot rely on the privilege against self-incrimination when appearing at an examination.

This engages an individual's right not to be compelled to testify against themselves or to confess to guilt in section 22 of the HRA. It may also engage, depending on the circumstances, the right to equality on the grounds of disability and age,² the rights of children³, freedom of movement,⁴ right to association,⁵ and the right to privacy and reputation.⁶

The 2017 Select Committee recommended client-legal privilege be unavailable. Whilst the Government, initially agreed to this recommendation, in considering the human rights implications of waiving this privilege as part of the policy development process and legislative drafting process, it was decided that legal privilege should be able to be claimed and that a balancing exercise should be undertaken every time legal professional privilege is claimed. However, due to the inquisitorial nature of the Integrity Commission it was noted that the Commission would not be able to independently assess the claim of privilege as it would have a vested interest in the subject matter to which the privilege applies. A person may be able to claim client-legal privilege, and the claim of privilege will be dealt with through the Supreme Court. The 2018 Select Committee noted the Bill's approach on this issue and was comfortable with how it has been drafted.

Allowing persons to claim client-legal privilege protects the rights of those being investigated and ensure that the Bill is human rights compliant.

Section 22 – Rights in Criminal Proceedings

In compelling a person to answer questions or produce documents or things, the Bill engages rights in criminal proceedings in section 22 of the HRA. The purpose of the provision is to assist the Commission in its function as a truth-seeking body that is able to undertake full and proper investigations.

² Section 8, HRA

³ Section 11(2), HRA

⁴ Section 13, HRA

⁵ Section 15, HRA

⁶ Section 14, HRA

The restriction on the right against self-incrimination is proportionate. Any self-incriminating material directly obtained as a result of a person being compelled to provide information cannot be used as evidence against that person in later court proceedings, other than an offence in relation to the falsity or the misleading nature of the answer, document or information or an offence against the Criminal Code, chapter 7 (Administration of justice offences). This provision supports the Integrity Commission being able to fully consider all available information when exercising its function, while protecting the people providing the information by conferring 'use immunity'.

Use immunity is a well-established practice in relation to investigative agencies in the ACT, including the Human Rights Commission and the recently established Inspector of Correctional Services. The limitation is further reduced as the Bill provides that a person has a right to legal representation at the examination. The Commission must also inform the Inspector if an examination summons is issued. The Commission cannot refer a transcript of an examination in which a person could not claim the privilege against self-incrimination to the Director of Public Prosecutions (DPP) as part of a brief of evidence.

In addition to use immunity, the Bill also implements derivative use immunity which protects evidence obtained *as a result of* evidence a person gives when being forced to incriminate themselves. No other State/Territory Integrity Commission has legislated to protect derivative use immunity. The problem with derivative use immunity is that it can greatly restrict the amount of evidence that can be used in a prosecution following a finding of corrupt conduct. Concerns have been raised that derivative use immunity generates little admissible evidence and makes persons under investigation by Integrity Commissions 'conviction-proof' in any subsequent criminal trial.

On the other hand, it may be unfair to not provide derivative use immunity to persons investigated by the Commission. No difference can be meaningfully drawn between the harm that may flow from evidence directly obtained under compulsion, and incriminating evidence that was indirectly derived from this information. Derivatively obtained information can be as damaging as the original self-incriminating information. The person has still been forced to assist the Crown to discharge the burden of proof in both cases.

Permitting derivative use immunity is therefore inappropriate in the ACT as it is a human rights jurisdiction. The Bill's approach implements partial derivative use immunity, in that indirectly obtained evidence is inadmissible in Court where the evidence could not have been obtained, or the significance for which could not have been appreciated, but for the compulsorily obtained evidence. Should prosecution later occur based on an investigation and brief of evidence referred by the Commission, the prosecution will have to prove that any derivatively evidence could have been obtained, or its significance could have been appreciated, without the compulsorily obtained evidence. This implements the measured

approach to derivative use immunity recommended by Warren CJ in *Major Crime (Investigative Powers) Act 2004* [2008]. This approach respects human rights whilst also permitting enough derivatively obtained evidence to effectively prosecute criminal charges laid following an investigation by a body with compulsory information gathering powers. As per her Honour's judgement, it is the least restrictive means available.

In an examination summons, a person must also be provided at least 7 days' notice prior to an examination, unless the Commission considers on reasonable grounds that a delay in the person's attendance is likely to result in:

- evidence being lost or destroyed;
- the commission of an offence;
- the escape of the person who is summoned; or
- serious prejudice to the conduct of the investigation.

The Bill also provides that if the Integrity Commission is aware of a criminal investigation or criminal proceedings, the Commission must not include in an investigation report any information which would prejudice the criminal investigation or criminal proceedings.

The Commission must appropriately inform a witness of their rights in the summons including the nature of the matters about which the person is to be questioned (except to the extent the Commission considers on reasonable grounds that this would be likely to prejudice the conduct of the investigation), that the witness is entitled to seek legal advice, and that privileges may apply.

Clause 296 (use or divulge protected information) further protects the unreasonable disclosure of material collected by the Commission as it makes it an offence for the Commissioner or their staff, or the Inspector of their staff, or anyone else with functions under the Bill, to disclose protected information other than in the exercise of a function under this Bill or another territory law, in a court proceeding or with consent. This is based on similar safeguards in other ACT legislation such as the *Information Privacy Act 2014*, *Official Visitor Act 2012*, and *Public Interest Disclosure Act 2012*. While this may engage the freedom of expression of the Commissioner and their staff, it is a proportionate limitation to protect the unreasonable disclosure of material collected by the Commission. The Commission is required to make guidelines about the handling of information under the Bill. The Commission must consult with the Information Privacy Commissioner before making guidelines.

Finally, a person can claim that information, documents or things sought by the Integrity Commission are subject to secrecy provisions or privilege. If the Commission continues to seek this material, it must seek a determination from the Supreme Court about the nature of that claim. The material must remain sealed until that determination is made.

In addition, both the Integrity Commissioner and Inspector may commence or continue an investigation despite any proceeding (whether civil or criminal) in any court or tribunal. Safeguards are placed through the Bill to ensure the right to fair trial under section 21 of the HRA is not limited. The Commissioner and Inspector must take all reasonable steps to ensure the conduct of an investigation does not prejudice any proceeding. There are also restrictions in place on the admissibility of particular evidence gathered by the Commission to ensure a person's fair right to trial is not impinged on.

Section 8 – Right to Equality and Section 11 – Rights of Children

The right to equality and rights of children may also be engaged by these provisions, depending on the circumstances of when an examination summons is issued. For example, if the Commission were to issue such a summons to someone with a disability or a child.

There are safeguards in the Bill to ensure any limitation is the least restrictive to achieve the purpose. In deciding whether it is reasonable to issue the examination summons, the Commission must have regard to:

- the evidentiary or intelligence value of the information, document or thing sought to be obtained from the person; and
- the age of the person and whether the person is suffering from a mental impairment.

The Commission must not issue an examination summons to a person who is under the age of 18 years unless the commission considers on reasonable grounds that:

- the information, document or thing that the person could provide may be compelling and probative evidence and
- it is not practicable to obtain the information, document or thing in any other way.

As is the case with a summons issued at the preliminary stage, a person who proves they are under the age of 16 is excused from attending an examination summons. If a witness is under the age of 18 years, the witness must be accompanied by a parent or guardian or an independent person. These protections combined ensure only those aged between 16-18 can be subject to an examination, and only then when accompanied by a parent, guardian or independent person. These protections exist for examinations undertaken by the Victorian IBAC.

In relation to the least restrictive limitation on the right to equality on the basis of race, if a witness does not have sufficient knowledge of the English language to enable the witness to understand or answer questions, the commission must provide for a competent interpreter to be present for the examination.

In relation to the least restrictive limitation on the right to equality on the basis of disability, the commission must direct that an independent support person be present during the examination of a witness if—

- the commission believes the witness has a mental impairment; or
- the witness provides the commission with reasonably satisfactory medical evidence that the witness has a mental impairment.

Section 12 – Right to Privacy

The power of the Integrity Commission to issue a witness summons for a public examination will engage the right to privacy if a person is compelled, as a result of that summons, to provide personal information or documents. The Bill provides that these powers are exercised in a lawful manner, and by providing clearly articulated circumstances, they are not arbitrary. It may also be argued that the ability to give sworn evidence in a public forum provides an individual to clear or uphold their reputation. There are currently no limits on what a witness may be asked in an examination summons however appropriate safeguards are in place to ensure that procedural fairness is granted. Examples of the safeguard include the Commission having regard to whether the production of the document or thing is necessary, whether it is reasonably practicable to obtain the information, the evidentiary or intelligence value of the information, the age of the person and whether they are suffering from mental impairment, and lastly, the impact the summons will have on the person.

Section 13 – Freedom of Movement

The Bill limits the freedom of movement as a person is required to attend a specified place at a specified time. This limitation also has the purpose of ensuring the Integrity Commission is able to fulfil its functions of truth-seeking and investigating alleged corrupt conduct. The limitation is relatively minor in nature, as a person's movement will only be restricted for a limited amount of time.

Section 16 – Freedom of Expression

Where the Supreme Court may determine that journalist privilege is to be waived, any resulting limitation on freedom of expression is minimised by provisions in the Bill that restrict the information that the Commission publically discloses. These include the Commission's power to conduct examinations in private, issue confidentiality notices and suppression orders. In addition, offences are contained in the Bill for those found to disclose information communicated in an examination without the Commission's permission and the Commissioner's discretion to withhold information from public reports that may endanger a person such as a journalist's informant.

Suppression orders

The Bill provides the Integrity Commission with the power to issue a suppression order prohibiting or restricting publication of information or evidence given during a public examination. This power limits the right to freedom of expression in section 15 of the HRA, which includes the freedom to seek, receive and impart information and ideas of all kinds.

In this context, the Bill may also limit the right to a fair and public hearing in section 21 of the HRA. This right provides that a person, whether as a defendant in a criminal case or a party to civil proceedings, has the right to a fair trial before a competent, independent and impartial court or tribunal established by law. Section 21 provides that judgments and hearings must be public unless other laws provide. As detailed above, it is arguable that as the Commission is not a court or tribunal, this right may not be engaged.

The purpose of this limitation is to protect the rights of others who may give information to the Integrity Commission, including their rights to privacy and reputation, protected in section 14, and the right to fair trial in section 21.

This is the least restrictive manner of achieving this purpose as a suppression order may only be issued for a specific purpose, being:

- to prevent prejudice or hardship to any person, including harm to their reputation or safety;
- to avoid the possibility of any prejudice to a legal proceeding; or
- for another reason having regard to all the circumstances (such as preventing prejudice to the Commission's investigation).

This limitation is an important protection in the Integrity Commission fulfilling its function to conduct public hearings in a way that protects the rights of individuals who appear.

Warrant to Arrest

The Bill provides that the Integrity Commission may apply for a warrant to arrest a witness who fails to appear at a public examination. This engages the right to liberty under section 18 of the HRA, which protects a person against unlawful or arbitrary arrest.

The purpose of this limitation is to ensure that the Commission is able to properly discharge its function of examining witnesses in public examinations that have information relevant to an investigation of corrupt conduct. The protections regarding this power ensure it is not unlawful or arbitrary, in that the Commission must apply to a magistrate for such a warrant. A magistrate may only grant such a warrant if certain criteria are met, including if the commission has taken reasonably practicable steps to contact the person. The magistrate

must also consider the importance of the evidence that the person is expected to give and whether the evidence could be obtained by other means.

Further, the significant safeguards in relation to the exercise of this function through this section of the Bill demonstrate that this is the least restrictive manner of achieving this purpose.

The Bill also implements recommendations made by the ACT Human Rights Commission in their submission to the 2018 Select Committee, these recommendations were in relation to the execution of an arrest warrant. In addition to a number of other matters, the Magistrate issuing a warrant must consider the reason (if any) given by the person for not attending in accordance with the examination summons, and, the impact of using the warrant for the arrest of the person, in particular, due to disability, health or cultural or linguistic background.

Furthermore, the Bill ensures that a person's home life is not arbitrarily interfered with by ensuring the police officer executing the warrant only executes it before 6am or after 9pm on any day unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person at another time, or it is necessary to enter the premises outside of the above times to prevent the concealment, loss or destruction of evidence, of or relating to, corrupt conduct.

The Bill also provides a less restrictive limitation on rights than under the equivalent Victorian legislation. In contrast to the Victorian provisions, which provide that if a person arrested under such a warrant cannot be brought before the IBAC within a reasonable time after he or she is arrested, the person must be brought before the Supreme Court or the Magistrates' Court for a consideration of bail. Under Clause 160(6) of the Bill, if, after arresting the person, a police officer believes on reasonable grounds that the person cannot be brought immediately before the commission, the police officer must immediately release the person.

The Commission's ability to issue warrants acts as a means of deterring non-compliance with summons to witnesses that are likely to provide information, documents or other things that are relevant to its investigations.

Non-disclosure notices and confidentiality Notice

Section 16 – Freedom of Expression

The Bill limits the freedom of expression by providing the Commission with the ability to issue a person or entity with a confidentiality notice or a non-disclosure notice, preventing that person or entity from disclosing information to others.

This is a reasonable limitation on the right as its purpose is to protect the safety of individuals, support the right to privacy and reputation of other persons subject to the work of the Integrity Commission and to avoid prejudicing the right to a fair trial of an accused person. The 2017 Select Committee's Report notes that 'there is also a legitimate expectation, as it concerns citizens generally, citizens making complaints and citizens subject to an alleged complaint, that confidentiality requirements apply to complaints and referrals until such time as an integrity body decides to conduct a public inquiry'⁷. These provisions are also modelled on similar provisions in the Victorian *Independent Broad-based Anti-corruption Commission Act 2011*.

The use of a non-disclosure notice and confidentiality notice is the least restrictive limitation to achieve this purpose, as the Commission is limited in the matters it may require a person to keep confidential. These matters are concerned with evidence or information given to, or obtained by, the Commission and other information relevant to the Commission's work, and the identity of those that are examined by it. The Commission may only give a non-disclosure notice confidentiality notice to a person or entity about a restricted matter if, during an investigation, the Commission considers on reasonable grounds that the disclosure of a restricted matter would be likely to prejudice the:

- investigation; or
- safety or reputation of a person; or
- fair trial of a person who has been, or may be, charged with an offence.

Clause 80 requires that the Commission must include certain information in a confidentiality notice including the details of the obligations on the person. Clause 198 requires that the Commission include certain information in a non-disclosure notice including a statement of permitted disclosures and any prohibited disclosures. The information must also include an explanation of the effect of a non-disclosure notice expiring.

The content of a confidentiality notice must also set out an explanation of the effect of any amendment, revocation, extension or expiry of a confidentiality notice. This acts as a safeguard in ensuring the person being given the confidentiality notice is aware of their rights and obligations. The purpose of this, is that it also protects any person that has made a permitted disclosure to someone else in that they also keep the person updated of any changes to the original confidentiality notice.

⁷ Citing Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at *the Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October 2013

Further, both confidentiality notices and non-disclosure notices expire after three years unless the Commission believes there are reasonable grounds to extend the operation of the confidentiality notice.

The Supreme Court may, on application by the Commission, only make an order extending the operation of the confidentiality notice if satisfied that it is necessary to avoid prejudice to:

- the investigation being conducted by the commission;
- the safety or reputation of a person;
- the fair trial of a person who has been, or may be, charged with an offence; or
- any proceedings that are proposed to be commenced or which have not been finally determined.

This requirement reflects circumstances where it would be reasonable to continue to limit a person's freedom of expression. The majority of cases with substantive allegations run on average for two years in other jurisdictions. Implementing a three-year time period for the Integrity Commission not only ensures that cases with substantive allegations have the opportunity to be investigated without undue prejudice, but also, will be in line with the median criminal trial time in the ACT.

In Victoria, confidentiality notices expire after 5 years, or earlier if the IBAC considers it no longer necessary to restrict the disclosure of the restricted matter or the matters will not be prejudiced. Likewise, if the Commission on reasonable grounds decides to revoke a confidentiality notice, the Commission must notify the person revoking the notice. This is an important safeguard in place to ensure that where the content of the confidentiality notice is no longer considered a restricted matter and it is before the end of the three-year expiry period, the notice must be revoked and the person must be notified.

Clause 85 creates an offence if a person discloses restricted information in a confidentiality notice.

It is the least restrictive means of achieving this purpose as there are several exceptions to this offence. The offence under Clause 85 does not apply if a person makes a permitted disclosure in accordance with a direction or authorisation given by the commission. Clause 85 also does not apply if a person makes a disclosure because it is necessary to comply with a relevant document, including:

- if the discloser does not have a sufficient knowledge of the English language to understand the nature of the relevant document—a disclosure made to an interpreter;

- if the discloser is under the age of 18 years—a disclosure made to the discloser’s parent or guardian or to an independent person;
- if the discloser is illiterate or has a mental, physical or other impairment which prevents the discloser from understanding the relevant document without assistance—a disclosure made to an independent person.

Clause 85 also does not apply to a person who makes a disclosure to obtain legal advice or representation in relation to a relevant document, or the discloser’s rights, liabilities, obligations and privileges under this Bill. This also applies where a lawyer who has received a disclosure in those circumstances and the disclosure is necessary to comply with a legal duty of disclosure or a professional obligation arising from the lawyer’s professional relationship with their client.

The person commits an offence if they make a disclosure in relation to one of these disclosures. However, this is also the least restrictive limitation, as the offence does not apply to a person if when making a permitted disclosure, the person tells the recipient it may be an offence to disclose the restricted information and gives the recipient a copy of the confidentiality notice.

A relevant document is defined as:

- a preliminary inquiry notice;
- an examination summons; or
- a confidentiality notice.

Finally, while during a preliminary inquiry the Commission can compel information from the head of a public sector entity, the head need not comply if they have a reasonable excuse.

Unlike a confidentiality notice, a disclosure notice expires on the earliest of when the commission revokes the non-disclosure notice, or 3 years after the non-disclosure notice was issued.

The person commits an offence under Clause 201 if they make a disclosure in relation to one of the disclosures listed in the section. However, this is also the least restrictive limitation, as the offence does not apply to a person if when making a permitted disclosure, the person tells the recipient it may be an offence to disclose the restricted information and gives the recipient a copy of the confidentiality notice.

Section 11(2) – Rights of Children

The Bill limits the rights of children, as the Integrity Commissioner may issue them a confidentiality notice preventing a person aged under 18 years of age disclosing certain information. A breach of this obligation is an offence.

The purpose of this limitation is reasonable in relation to confidentiality notices to ensure the Integrity Commission is able to protect the rights of individuals, including protecting an accused person's right to fair trial.

The limitation is least restrictive to achieve this aim, as children and young people subject to a confidentiality notice may disclose restricted material to a parent or guardian. Children and young people are also excluded from other powers of the Integrity Commission in relation to a preliminary inquiry notice unless additional criteria are satisfied, including that:

- the information, document or thing that the person could provide may be compelling and probative evidence; and
- it is not practicable to obtain the information, document or thing in another way.

Further, if the person under the age of 16 years is issued a preliminary notice and provides proof of age to the commission, the person need not comply with the preliminary inquiry notice. This is based on similar protections in the Victorian IBAC legislation.

Suspension and Ending Appointment of Integrity Commissioner, CEO or Inspector

Section 21 – Right to Fair Trial and Section 8 – Right to Equality

In providing a statutory mechanism for the suspension and the ending of the appointment of the Integrity Commissioner, CEO, or Inspector, the Bill engages the right to a fair hearing and right to equality in relation to the attribute of disability and potentially age. The purpose of the limitation is to ensure that the person in the role of Integrity Commission, CEO, or Inspector is willing and able to fulfil the functions of the role.

Clause 38 and Clause 242, respectively detail a comprehensive process for how the Speaker may end the Commissioner and Inspector's appointment, which is designed to provide the Commissioner procedural fairness. The grounds for ending an appointment are:

- for misbehaviour;
- for failure to take all reasonable steps to avoid being placed in a position where a conflict of interest arises during the exercise of the commissioner's functions;
- for physical or mental incapacity, if the incapacity substantially affects the exercise of the commissioner's functions; or
- the commissioner becomes bankrupt or personally insolvent.

The process requires that the Integrity Commissioner or Inspector is provided an opportunity to respond in the event that the motion is moved in the Legislative Assembly to end their appointment.

The Speaker may also end the commissioner's appointment if the Commissioner is absent from duty, except on leave granted by the Speaker, for 14 consecutive days or for 28 days in any 12 months. This is the least restrictive manner of achieving the purpose. At each stage of the process, explicit recognition of the requirement to give the office holder the chance to make a submission to the decision maker, or makers, where the question is before the Legislative Assembly, is afforded to the office holder.

Similar to Clause 38, Clause 43 provides that the Commissioner must end the CEO's appointment:

- for misbehaviour; or
- for physical or mental incapacity if the incapacity substantially affects the exercise of the CEO's functions; or
- if the CEO becomes bankrupt or personally insolvent; or
- if the CEO is convicted in the ACT, Australia or elsewhere of an offence punishable by imprisonment for at least 1 year.

As recommended by the 2017 Select Committee, the Bill adopts similar provisions that exist for the suspension and termination of appointment as set out for other Officers of the Legislative Assembly. These provisions were amended during debate on the *Legislative Assembly (Office of the Legislative Assembly) Bill 2012* to respond to the concerns of the Scrutiny Committee including how the process can provide greater procedural fairness.⁸

The Integrity Commissioner and Inspector are given three days to respond to a motion ending their appointment. This is a relatively short period of time however given the nature and importance of the role and the need to resolve any impropriety quickly and at the same time balance the harm to the reputation of the Integrity Commissioner from an unmeritorious motion sitting on the Legislative Assembly notice paper for an extended period of time.

Retirement

Clause 34 and Clause 238 also limits the right to equality on the grounds of disability, in that the Speaker may retire the Integrity Commissioner or Inspector on grounds of mental or physical incapacity of a kind that substantially affects the performance of the Integrity Commissioner's or Inspector's functions.

⁸ In report 49 of the seventh Legislative Assembly.

The purpose of this limitation also ensures the person in the role of Integrity Commissioner or Inspector is able to properly discharge their functions and ensure public confidence in the position.

This is the least restrictive way of limiting this right to achieve this purpose as the Commissioner or Inspector must consent to the retirement. Further, the retirement is subject to the superannuation circumstances of the Commissioner or Inspector. These provisions are also consistent with that for other Officers of the Legislative Assembly, as recommended by the 2017 Select Committee.

Appointment of Integrity Commissioner

Section 8 – Recognition and Equality before the law and Section 17 – appointment to the public service

The Bill engages the right to equality and rights in public life by preventing certain people from becoming Commissioner. Section 17 provides that individuals have the right to have access, on general terms of equality, appointment to the public service and public office.

The purpose of this limitation is to ensure that the person who fulfils the role is free from any perceived conflict of interest given the unique position they hold, and to ensure public confidence in this new independent body.

The Speaker must not appoint a person as the commissioner if the person—

- is or has been a member of the Legislative Assembly ; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—
 - the Parliament of the Commonwealth; or
 - the legislature of a State or another Territory; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a public servant; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—
 - a registered party;
 - a political party registered under a law of the Commonwealth, a State or another Territory; or
 - a political party or
- has been convicted —

- in the ACT, of an offence punishable by imprisonment for at least 1 year; or
- outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

In addition, the Speaker may appoint a person as the Integrity Commissioner only if the person has been a judge of the Supreme Court, a judge of the Federal Court, a justice of the High Court. The nature and importance of the role means the limitation on employment is justified. The public must have full confidence in the person appointed to the independent role of Integrity Commissioner. However, if the Speaker finds there are no eligible applicants that are rated suitable to meet the criteria of eligibility, the selection committee can then consider a lawyer of 10 years to be appointed as Integrity Commissioner.

The Speaker must, in relation to the appointment of the Commissioner, make a determination about selection criteria having regard to any selection criteria determined under the Supreme Court Act 1933, section 4AA (requirements of appointment – resident judges). Once again, this ensures that the person appointed as Integrity Commissioner has the relevant knowledge and skills required to carry out the role with public confidence.

Public servant is defined by the *Legislation Act 2001* to mean a public servant employed in the ACT public service. The constitution of the public service is dealt with by section 12 of the *Public Sector Management Act 1994* which provides that members of the ACT Public Service are—

- the head of service;
- the directors-general;
- the executives;
- other employees; and
- officers.

In effect this means that statutory office holders, such as the President, other Commissioners at the Human Rights Commission, or members of the ACT Civil and Administrative Tribunal, and includes Supreme Court Judges, who are not public servants within the definition can be appointed to the position of Integrity Commissioner. Former or current Commonwealth employees are also eligible for appointment as Integrity Commissioner on the proviso that they have not worked as an ACT public servant in the 5 years immediately before the day of the appointment.

The nature of the limitation is relatively specific in that it prevents a defined class of person from being appointed to a specific position that generally becomes available only every seven years.

The limitation also exists for the Auditor-General, which is analogous to the role of the Integrity Commissioner in that community expectations are that it is not appropriate to appoint a person from within an organisation to then be immediately being responsible for investigating that organisation. For example a public servant who had worked in a particular administrative unit or on a particular project could not, without at the very least the perception of a conflict of interest, investigate corrupt conduct in the administrative unit or project. More generally a senior public servant who may be considered for the Integrity Commissioner role is likely to have had a significant role across the service which will further give rise to a perception of a conflict of interest. It is reasonable to expect that a person appointed to a role as significant as the Integrity Commissioner will be able to exercise their statutory functions, on behalf of the legislature, without the risk of a perception of a conflict of interest.

This perception is not sufficiently overcome through the requirement to appoint a person to the position in accordance with the merit principles or because the appointment is made by the Speaker. Certainly these requirements improve the transparency and accountability of the decision making process but that does not overcome the need for the community to have confidence that the person in the role will be free of any actual or perceived conflict of interest.

There are similar limitations on who may be appointed as some other Officers of the Legislative Assembly.

These are adapted for the unique role of the Integrity Commissioner, including requiring a period of 5 years to lapse from being a public servant before a person is eligible. Similarly, as the Integrity Commissioner will have jurisdiction over MLAs and their staff, it is critical that there is no actual or perceived conflicts of interest through any political party affiliation within the last 5 years.

Similar arrangements apply to the appointment of the Inspector.

Employment of Staff

The Bill also limits the same rights – equality and access to employment in the public service – in relation to staff of the Integrity Commission. The Commissioner may appoint a person as a member of staff of the Commission only if the person is a suitable person to be a member of the staff of the commission. Also, the staff of commission cannot have been a public servant in the 5 years immediately before their engagement. This higher standards is

necessary for the Commission to avoid any actual or perceived conflicts of interest or bias. The limitation is necessary to ensure public confidence in the Commission's work.

The Commissioner must appoint a Chief Executive Officer (CEO) for the Commission for a maximum period of 7 years. A person who has been CEO for 7 years is not eligible for reappointment. However, the Commissioner cannot appoint a person CEO if the person is or has, in the 5 years immediately before the day of the proposed appointment, been a public servant, or has been convicted in the ACT of an offence punishable by imprisonment for at least 1 year. This includes outside of ACT, in Australia or elsewhere.

Other Work/Volunteer Activity

Section 15 - Freedom of association

The Bill also contains a limitation on the other work and volunteer activity that the Integrity Commissioner can engage in that potentially engages the right to freedom of association under section 15 of the HRA. The Bill prevents the Commissioner from doing any work or unpaid activity that is inconsistent with their functions. The Bill does not place a complete restriction on other work like other ACT statutory office holders.

The limitation placed on the Integrity Commissioner is different to that of other Officers of the Legislative Assembly. The 2018 Select Committee suggested a broader approach in the disclosure of conflicts of interest held by the Commissioner. The purpose of the limitation is to promote the independence and public confidence in this new position. It is necessary to guarantee the independence of the Commissioner and ensure that their impartiality cannot be called into question.

The restriction is the least restrictive means available to ensure that the conduct of the Integrity Commissioner is consistent with the legitimate expectation of the Assembly in the appointment as an independent Officer of the Legislative Assembly.

Reports and Recommendations

Section 12 – Right to Privacy and Reputation

The Bill provides that the Commission can make recommendations and report on its investigations. These provisions engage the right to privacy and reputation under section 12 of the HRA. This right may be engaged by the Commission reporting or recommending something that names, identifies or impacts on the reputation of a person. The purpose of this limitation is to ensure that the community benefits from its investigations and findings about corruption. Without this power, the Commission will be unable to fulfil its functions to investigate corruption, prevent corruption and publish information about lessons learned.

The 2018 Select Committee recommended that the Bill be amended so that the Commission has the discretion to withhold a proposed investigation report from a relevant entity if there are reasonable grounds to believe that the sharing of the proposed investigation report could prejudice a prosecutorial or serious disciplinary action. The Government is of the view that by removing this, concerns arise in relation to procedural fairness. The Bill already provides a safeguard in that the Commission must not include any information in an investigation report that would compromise another investigation, or prejudice a criminal investigation, criminal proceeding or other legal proceeding known to the commission.

This is the least restrictive limitation on the right to achieve this purpose. The Bill provides that the Commission can only make a recommendation in private first to:

- if the matter involves a Minister – the Chief Minister;
- if the matter involves a member of the Legislative Assembly – the Speaker and the leader of the registered party to which the member belongs;
- if the matter involves a member of staff of an MLA – the Speaker, the member of the Legislative Assembly employing the person and the leader of the registered party to which the member belongs;
- if the matter involves a public sector entity – the head of a public sector entity.

Only after this, and if the Integrity Commission considers there has been a failure to take appropriate action, can the Commission make a recommendation public.

The Commission must prepare reports at certain times, at the completion of an investigation and annually. These reports are tabled in the Legislative Assembly and may only include adverse findings about individuals if protections for the unlawful or arbitrary damage to the reputation of such individuals are satisfied. In addition, any special report must not include a finding of corrupt conduct unless it is serious corrupt conduct. However, the Commission may be able to report on the finding or opinion about conduct of a stated person if the finding or opinion does not describe the conduct as corrupt conduct. The finding or opinion may limit a person's right under section 12 of the HRA, however, this is mitigated by Clause 211 which states the Commission must consider whether the disclosure of the information is contrary to the public interest.

The commission must not include in an annual or investigation report a statement of a finding or opinion that a stated person:

- is guilty of or has committed, is committing or is about to commit, an offence against a law in force in the ACT; or

- has engaged, is engaging or is about to engage in conduct that would be reasonable grounds for termination action against the person.

Neither can it make a recommendation that a stated person be, or an opinion that a stated person should be prosecuted for an offence; or be the subject of serious disciplinary action.

This further limits any potential reputational damage to a person, and also protects their right to the presumption of innocence and a fair hearing by ensuring any prosecution will not be prejudiced.

The commission must also not include in an annual or investigation report a finding that a stated person has engaged, is engaging in or is about to engage in corrupt conduct unless the corrupt conduct is serious or systemic corrupt conduct. However, the Commission may include in an annual or investigation report a finding or opinion about conduct of a stated person that may be corrupt conduct if the statement of the finding or opinion does not describe the conduct as corrupt conduct. Even then, Clause 185, Clause 209 and Clause 221 prohibit the Commission from including in an investigation report, a special report or an annual report, any information that would compromise another investigation, or prejudice a criminal investigation, criminal proceeding or other legal proceeding known to the Commission.

The Commission must also not make an adverse comment about a person unless it has satisfied a number of measures to protect an arbitrary attack on that person's reputation and satisfied principles of natural justice. Firstly, the Commission must not identify a person in an investigation report, a special report or an annual report, who is not the subject of an adverse comment or opinion, unless the Commission:

- is satisfied that it is necessary or desirable to do so in the public interest;
- is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
- states in the investigation report that the person is not the subject of any adverse comment or opinion.

The Inspector must also protect an arbitrary attack on a person's reputation and the principles of natural justice when keeping complainants informed under Clause 258. Where an Inspector discloses the decisions and reasons for the decision not to investigate a complaint, and where personal information may be disclosed, section 12 of the HRA will be engaged. This limit will be protected by Clause 258(2). The limit is proportionate as the complainant's right to be kept informed is important to ensure public confidence in the functions of the Inspector.

Likewise, any personal information that may be disclosed under Clause 280 will be protected by Clause 281 and the Inspector's consideration of any human rights that may be engaged.

Under Clause 188 and Clause 212, even if the Commission intends to include in an investigation report or special report, a comment or opinion about a person which is not adverse to the person, the Commission must first provide the person with the material in relation to which the commission intends to name that person.

The Commission can provide some of this material in a confidential report, which can only be provided to the presiding member of the relevant Legislative Assembly Committee. This is consistent with the Commission's role as an Officer of the Legislative Assembly by providing it with the ability to confidentially report matters of concern to the Assembly.

In addition, an investigation report, a special report or an annual report must not include a finding or opinion that a specified person is guilty of or has committed, is committing or about to commit any criminal or disciplinary offence.

If the Commission omits information from a special report under Clause 209, Clause 210 or Clause 211, a confidential special report may be prepared and given to the presiding member of the relevant Assembly committee. The purpose of this limitation is to ensure that the community benefits from its investigations and findings about corruption. Without this power, the Commission will be unable to fulfil its functions to investigate corruption, prevent corruption and publish information about lessons learned, and for the relevant Legislative Assembly committee to have appropriate oversight of the Commission's work.

Under Clause 197, the Commission may give information about the commencement, conduct, or result of an investigation to any of the following:

- if the matter involves a Minister – the Chief Minister;
- if the matter involves a member of the Legislative Assembly – the Speaker and the leader of the registered party to which the member belongs;
- if the matter involves a person who is a member of staff of an MLA – the Speaker, the member of the Legislative Assembly employing the person and the leader of the registered party to which the member belongs;
- if the investigation involves a public sector entity - the head of a public sector entity.

This is also subject to protections for the privacy, reputation and safety of individuals. The Commission must not provide any information if the commission considers that giving the information would:

- not be in the public interest or in the interests of justice;
- put a person's safety at risk;
- cause unreasonable damage to a person's reputation;
- prejudice an investigation under this Bill or an investigation by the Australian Federal Police;
- be likely to lead to the disclosure of any secret investigative method used by the commission or a police officer;
- contravene a statutory secrecy obligation; or
- involve the unreasonable disclosure of information relating to the personal affairs of a person.

One of the objects of the Bill is to achieve a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation. Clause 211 provides a safeguard by setting out what the Integrity Commissioner must consider in determining whether the disclosure of the information, would, on balance, be contrary to the public interest.

Likewise, Clause 273 allows for the Inspector to disclose information it may have gathered through the use of its powers to an information sharing entity. While this may engage section 12 of the HRA, it only allows disclosure of information collected or obtained in exercise of the inspector's functions. The potential limit on section 12 of the HRA is reasonable and proportionate for the Inspector to carry out its functions.

These protections strike an appropriate balance between the public interest in the functions of the Commission and protections for the right of privacy and reputation for individuals subject to its work.

Section 15 – Freedom of Expression

It is an offence for a person to release information they have received from the Commission under Clause 201. This limits that person's freedom of expression. This is a necessary limitation to ensure the work of the Commission is not undermined by the disclosure of sensitive information about its work and findings of corruption, and that individual's privacy, reputation and right to fair trial are not unreasonably limited by a person releasing information provided to it by the Commission for the purposes of natural justice. It is the least restrictive way of achieving this purpose as the Bill provides that the person may release the information for certain permitted purposes, including to receive legal advice or making a complaint to the inspector.

Legal Advice Directions

Generally the Bill provides that a person is entitled to legal representation when dealing with the Integrity Commission including in responding to a confidentiality notice, a preliminary inquiry notice, an examination summons and when information is to be included in a report. However, under Clause 193, the Commission may direct the person not to seek legal advice or representation if the Commission considers on reasonable grounds that the investigation, or an examination for the investigation, would be prejudiced because the lawyer is:

- a witness in an examination for the investigation or another examination;
- the representative of another witness in an examination for the investigation or another examination; or
- a person involved, or suspected of being involved, in a matter being investigated by the commission or the inspector.

This may limit the right in section 22 of the HRA for an individual to have legal representation of their choosing in criminal proceedings. However, it is arguable the proceedings of the Integrity Commission do not constitute ‘criminal proceedings’. Even if the right is limited, this is a reasonable limitation to ensure that the investigations by the Commission, or other legal proceedings, are not prejudiced by a lawyer that has a conflict of interest. The Victorian Parliament’s Scrutiny of Acts and Regulations Committee found that a similar provision in the Victorian IBAC Act was reasonable in relation to a limitation of the equivalent provision of the Victorian *Charter of Rights and Responsibilities Act 2006*.⁹

Surveillance Devices

Section 12 – Right to privacy

The Bill includes an amendment to the *Crimes (Surveillance Devices) Act 2010* to provide the Integrity Commission with the power to operate surveillance devices. This may further limit the right to privacy in addition to the other powers provided under the Bill. The purpose of the limitation is to provide the Commission with all the necessary tools to fulfil its important function of investigating alleged corrupt conduct. In doing so, the Commission will be subject to the significant existing safeguards present in the *Crimes (Surveillance Devices) Act 2010*. The Commission will not be granted power to authorise surveillance devices without a warrant under the Act. This is consistent with the Select Committee’s recommendation that the Commission only have the power to apply for warrants to engage in covert tactics including listening devices and optical surveillance.

⁹ In Alert Digest 7 of 2012 - https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert_Digests/Alert_Digest_No_7_of_2012.pdf

Controlled Operations and Assumed Identities

Section 12 – Right to privacy and Section 8 – Equality before the law

The Bill also amends the *Crimes (Controlled Operations) Act 2008* to empower the Integrity Commission to conduct a controlled operation during an investigation into corrupt conduct. These powers engage the right to equality before the law under section 8 of the HRA, as the Commission will be able to authorise investigation officers to commit illegal acts for the purpose of an investigation. Investigation officers will not be held civilly or criminally liable for these acts. This may limit the principle that all persons, regardless of their occupation, should be held accountable before the law for any illegal acts that they commit.

The purpose of this limitation is to enable the Commission to covertly gather evidence on a person under investigation for corrupt conduct. It is sometimes necessary for investigatory agencies to break the law to covertly gather evidence on a suspect of investigation. This is particularly true regarding corrupt conduct, which is by nature highly secretive and less penetrable by ordinary investigatory techniques. Consequently six out of seven Integrity Commissions in Australia have powers to conduct controlled operations.

The *Crime (Controlled Operations) Act 2008* heavily restricts the circumstances in which investigation officers can commit unlawful acts during a controlled operation. Investigation officers must prospectively apply for approval to conduct a controlled operation. Before granting approval, the Commissioner must be satisfied on reasonable grounds that the proposed unlawful conduct is justified, and limited to the minimum extent necessary to effectively conduct the controlled operation. Investigation officers also retain liability for any civil or criminal acts they commit that exceed the scope of the operation approved by the Commissioner.

The Bill also amends the *Crimes (Assumed Identities) Act 2009*. This amendment empowers the Integrity Commission to authorise an investigation officer to assume a false identity when conducting a controlled operation. This engages the right to a fair trial under section 21 of the HRA, as the use of a false identity could potentially entrap or improperly induce a person under investigation into committing a criminal offence for which they may be later prosecuted.

The purpose of the limitation is to enable the Commission to effectively conduct a controlled operation. An investigation officer would be quickly discovered if they attempted to operate ‘undercover’ during a controlled operation without assuming a false identity. Being discovered would endanger the safety of an undercover officer and compromise the Integrity Commission’s covert investigation into corrupt conduct. The importance of assumed identities is consequently well recognised within existing Integrity Commission models in Australia, as six out of seven State and Territory Integrity Commissions have the power to authorise the use of assumed identities.

The Bill's authorisation of assumed identities does not fully limit the right to a fair trial, as the potential for an undercover operative to pressure or 'entrap' a person into committing an offence during a controlled operation is very limited. As with controlled operations, the use of an assumed identity must be approved in advance by the Commissioner. The Commissioner cannot approve an assumed identity unless satisfied on reasonable grounds that the assumed identity is necessary and the risk of abuse of the assumed identity is minimal. The Bill further retains the Court's discretion to exclude evidence that was illegally or improperly obtained, such as evidence of a criminal offence that a person was 'entrapped' into committing by an undercover operative working under a false identity. The Courts will also retain their ability to stay proceedings in such circumstances. As with controlled operations, the Ombudsman has oversight over the Commission's use of assumed identities.

It may be less restrictive for the Commission to apply to a Court for a judicial warrant to authorise controlled operations and assumed identities. However, a judicial warrant scheme is not considered necessary. ACT Policing are not required to request judicial approval prior to authorising controlled operations and assumed identities. It is also standard for controlled operations and assumed identities to be authorised without prospective judicial approval amongst police forces and Integrity Commissions in other jurisdictions. Notably the oversight bodies of Integrity Commissions in other jurisdictions have not recommended implementing a system of judicial approval for controlled operations and assumed identities. As above, there are measures within both assumed identities and controlled operations Acts which minimise the risk of these powers being abused, such as proportionality tests and oversight by the Ombudsman. Under the Ombudsman's powers, the Ombudsman is likely to conduct an investigation of the Commission's use of their powers under the *Crimes (Surveillance Devices) Act 2010*, *Crimes (Controlled Operations) Act 2008*, *Crimes (Assumed Identities) Act 2009* every 12 months post the Commission's establishment. These measures suitably contain the risks posed by controlled operations or assumed identities.

Protection from Liability

Section 12 - Right to Privacy and Section 21 – Right to Fair Trial

Chapter 6 protects complainants from liability, and in particular provide a complainant with the defence of absolute liability in a proceeding for defamation for publishing the information in the corruption complaint. This is based on similar provisions in the *Public Interest Disclosure Act 2012* (PID Act) and based on recommendations of the 2017 Select Committee. It limits the right to privacy and reputation and fair trial under the HRA, as the subject of the material published is limited in their ability to seek civil remedy for defamation.

This is a reasonable limitation on these rights. Like disclosures under the PID Act, complaints made to the Integrity Commission are by their very nature likely to bring the reputation of others into question. Where a disclosure is damaging to a person's reputation and that person sues the discloser for defamation, so long as the statements made by the discloser are a corruption complaint, then the complainant is permitted to use the defence of absolute privilege against the defamation action. Further, the protection is lost if a court finds the complaint was vexatious or the complainant has given information to a person investigating the complaint that the complainant knows is false or misleading.

Injunction to prevent detrimental action

Clause 291 provides the Supreme Court with the power, on application, to prevent a person from engaging in detrimental action, such as threatening a person who has made a complaint. A complainant under this part includes a person who makes a complaint. Depending on the circumstances, this may engage rights under the HRA including freedom of expression, right to association and freedom of movement. This clause is based on the recommendations of the Select Committee and similar provisions in the PID Act. The purpose of the limitation is to ensure those providing information to the Integrity Commission are not victimised and to provide public confidence that individuals are protected when they come forward to provide information. It is the least restrictive means of achieving the purpose as only the Commissioner, or a complainant or a person against whom detrimental action has been or is likely to be taken, may apply.

Amendments to Information Privacy and FOI Acts

The Bill exempts the Integrity Commission from the *Information Privacy Act* and the *Freedom of Information Act* (FOI Act). These exemptions may engage the right to freedom of expression, which includes the right to receive information. The exemption from the *Information Privacy Act* may also engage the right to privacy, as the Commission is not required to fully observe the Act's rules about storage, collection, use and citizen access to information gathered by the Commission.

The purpose of these limitations is to enable the Commission to function effectively as an investigatory body. It would not be practicable for the Integrity Commission to fully comply with privacy law. For example, requiring consent to share information or not being able to gather certain information on privacy grounds would limit the Integrity Commission's ability to investigate suspected corruption. Some form of exemption is also necessary to facilitate information flows into and out of the Integrity body. For example, agencies and entities disclosing personal information to the Integrity Commission, as well as the ability for the Integrity Commission to share and disclose information. It is similarly impractical for the Integrity Commission to fully comply with the FOI Act. In general, it would not be in the public interest for the Integrity Commission to disclose information relating to its investigations prior to making a deliberate decision to publish information or hold a public

examination, as it could jeopardise investigations, breach procedural fairness or cause undue harm to the reputation of the person under investigation.

The exemptions provided in the Bill do not fully limit the right to privacy or freedom of expression afforded by the *Information Privacy* and *FOI* Acts. Notably the Bill only exempts the Commission from complying with the requirements of these Acts when performing its investigatory functions. The Integrity Commission is therefore still obliged to comply with the standards and procedures around privacy and open access to information when performing its administrative and educative functions. This distinction recognises and maintains the legitimate public interest in protecting privacy and access to information where it is practicable to do so.

The Commission however, must in consultation with the Information Privacy Commissioner make guidelines about the handling of information once the Integrity Commission is operational. In addition, the limitations are narrow in scope and are the least restrictive means of supporting the Commission to effectively investigate corrupt conduct. The Bill's approach is also consistent with exemptions granted to other Officers of the Legislative Assembly such as the ACT Auditor-General.

Amendment to Victims of Crime Act

The addition of the Integrity Commission into section 12(6) of the Victims of Crime Act 1994, may engage section 12 of the HRA. This limitation is proportionate to ensure the Integrity Commissioner is given all relevant information in relation to a complaint to carry out its functions. It is the least restrictive purpose of doing so as the amendment adds the Integrity Commissioner to the list alongside the Human Rights Commissioner and the Ombudsman.

Delegation of Legislative/Administrative Power

The Bill provides significant responsibility to the Speaker for the appointment of the Integrity Commissioner, which is an Officer of the Legislative Assembly. The administrative and legislative power has a range of checks and balances in place to ensure that the Speaker's actions reflect the collective views of the Legislative Assembly.

The Bill also provides additional power to the Integrity Commissioner, providing that the Commissioner may appoint a person to act in their position while they are on approved leave. Ordinarily the *Legislation Act 2001* provides that the person making the appointment is also responsible for acting appointments. In the case of the Integrity Commissioner it is appropriate that they be able to appoint a person to act in their place while they are on approved leave given the particular position of trust they are placed in and the nature of the role. This is generally the case for other Officers of the Legislative Assembly. The ability to appoint a person to act in the position is only available where leave is approved by the Speaker and the office holder has consulted with the Speaker about their proposed acting

appointment. It is designed primarily to cover ordinary leave that any employed person would take from time to time, for example recreational leave. In circumstances where there is no long-term appointee, it is the Speaker who will make the acting appointment; for which they must consult the relevant Assembly committee.

CLAUSE NOTES

Chapter 1 Preliminary

Part 1.1 – Preliminary

Part 1.1 of the Bill comprises Clause 1 to Clause 8 dealing with formal matters including commencement, objects and key definitions for the purpose of the Bill.

Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Integrity Commission Act 2018* (the Act).

Clause 2 Commencement

This clause provides that the Act will commence on a day fixed by the Minister by written notice. This clause also displaces section 79 of the Legislation Act which requires automatic commencement of a postponed law.

Clause 3 Dictionary

This clause is a formal provision identifying the dictionary and explaining conventions used to define words and terms for the purposes of the Act.

Clause 4 Notes

This clause is a formal provision explaining the status of notes in the Act.

Clause 5 Offences against Act—application of Criminal Code etc

This clause clarifies that other legislation applies to this Act and in particular notes the operation of the *Criminal Code 2002*, which applies to all offences against the Act, and the *Legislation Act 2001*, which provides for interpretation, common definitions, and legislative machinery for the Bill and applicable offence penalty units.

Clause 6 Objects of Act

This clause outlines the main object of the Act is to provide for the identification, investigation and exposure of corrupt conduct; provide for the commission to prioritise the investigation and exposure of serious corrupt conduct and systemic corrupt conduct; achieve a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation; assist in the prevention of corrupt conduct; cooperate with other integrity bodies; educate public officials and the community about the detrimental effects of corrupt conduct on public administration; and assist in improving the capacity of the public sector to prevent corrupt conduct.

Clause 7 Application of Act—Parliamentary privilege

This clause is based on section 10 of the *Evidence Act 2011* and reflects the Select Committee’s recommendation that the Integrity Commission must ensure parliamentary privilege is maintained, as Members of the Legislative Assembly (MLAs) and their staff are within its jurisdiction. This clause is subject to clause 178 which provides for privilege to be waived in certain circumstances.

Clause 8 Application of Act—Conduct that happened before the commencement of this Act

This clause limits the jurisdiction of the Integrity Commission to matters that occur after self-government day and the commencement of the Act, unless the prior conduct concerns an entity that would have been a public official or public sector entity under this Act had this Act been in force at the time the conduct happened; and that conduct would have been corrupt conduct under this Act had this Act been in force at the time the conduct happened.

This reflects the 2017 Select Committee’s recommendation that the Integrity Commission’s jurisdiction should not be limited as to timeframes of alleged conduct, but should largely be prospective and focused on current matters. It is also a general principle in the ACT that legislative provisions do not commence retrospectively if they operate to the disadvantage of a person by adversely affecting the person’s rights or imposing liabilities on the person. As the Select Committee noted, it is reasonable to deviate from this principle on the basis that the Integrity Commission must be able to look into prior conduct to ensure public confidence in the new institution.

The clause provides that the commission must not conduct an investigation in relation to judicial officer if the matter directly relates to the merits of a decision made by the judicial officer, an order made by the judicial officer or a judgment given by the judicial officer. This approach respects the independence of the judiciary and maintains the separation of powers.

It also provide that the Commission need not conduct an investigation in relation to conduct which occurred entirely before the commencement of the Bill, if the Commission if satisfied on reasonable grounds that the matter does not justify investigation for any of the following reasons:

- (a) the conduct is trivial;
- (b) the conduct is unrelated to the functions of the Commission;
- (c) the corruption report is frivolous or vexatious;
- (d) the complaint report lacks substance or credibility;
- (e) the complaint report was not made genuinely or was made primarily for a mischievous purpose;

- (f) another investigatory body has already investigated or decided not to investigate the conduct;
- (g) the conduct occurred too long ago to justify investigation.

The Bill provides for the role of the Integrity Commission to be largely prospective and focused on current matters. When considering whether the Commission should investigate a historical matter, the Integrity Commissioner will be required to undertake a public interest test.

Clause 8(5) acts as a safeguard in ensuring the Commission is not going to expose people to additional penalties that have been punished or disciplined. It provides that the commission must be reasonable satisfied that it is in the public interest for the commission to investigate the conduct.

On the basis of Clause 8, matters to be investigated by the Integrity Commission would not go beyond self-government, given that the ACT was administered by the Commonwealth Government prior to 1989. The Integrity Commission does not have jurisdiction of matters prior to 1989 – these matters would fall to the Commonwealth.

The Bill applies to any conduct that happened at any time before the Bill commences, but does not apply to conduct that happened before self-government in 1989. Clause 8(1)(a) limits the conduct to conduct by an entity that would have been a public official or public sector entity when the conduct happened. Public official and public sector entity are defined in the Bill, and are limited to officials and entities within the ACT Government administration (see Clause 12 and Clause 14). Prior to self-government, there was not an ACT body politic, and no public officials or public sector entities (as defined).

Part 1.2 – Important concepts

Part 1.2 of the Bill deals with key definitions and concepts relevant to the operation of the Integrity Commission.

Clause 9 *Meaning of corrupt conduct*

This clause outlines the meaning of corrupt conduct for the purposes of this Act. Corrupt conduct is conduct that could constitute a criminal offence; a serious disciplinary offence or reasonable grounds for dismissing, dispensing or otherwise terminating the services of a public official, and is conduct that is set out in subclause (1)(b).

The terms criminal offence, serious disciplinary offence and serious misconduct are defined.

Under this Bill it does not matter if the corrupt conduct happened outside the Territory or if action in relation to the conduct can no longer be taken.

Examples have been included in this clause to outline some of the relevant matters from the Criminal Code.

Clause 10 Meaning of *serious corrupt conduct*

This clause defines serious corrupt conduct, as recommended by the 2017 Select Committee. The Bill provides that the Integrity Commission should prioritise investigating serious corrupt conduct, but does not restrict the commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct.

Clause 11 Meaning of *systemic corrupt conduct*

This clause defines systemic corrupt conduct, as recommended by the 2017 Select Committee. The Bill provides that the Integrity Commission should prioritise investigating systemic corrupt conduct, but does not restrict the commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct.

Clause 12 Meaning of *public official*

This clause defines public official for the purposes of the Act. A public official is a person having public official functions for the Territory, or acting in a public official capacity for the Territory. It includes:

- a public servant;
- a statutory office-holder;
- an officer of the Assembly;
- a member of the Legislative Assembly;
- a member of staff of an MLA;
- a judicial officer;
- a presidential member, non-presidential member, assessor or registrar of ACAT;
- any other person who is—
 - an employee of a public sector entity; or
 - a contractor, employee of a contractor, or volunteer exercising a function of, a public sector entity;

Clause 13 Meaning of *judicial officer*

This clause defines a judicial officer for the purpose of the Bill. It means the Chief Justice, a judge, associate judge, the Chief Magistrate, a magistrate or any office that must be occupied by a magistrate. It also includes a registrar of the Supreme Court and the Magistrates Court.

Clause 14 Meaning of *public sector entity*

This clause defines a public sector entity, which consists of a public service entity, a Legislative Assembly entity and an entity of a public nature. All of these terms are defined.

Clause 15 Meaning of *head of a public sector entity*

This clause defines the head of a public sector entity and is based on other ACT legislation including the *Public Interest Disclosure Act 2012*. The head of a public service entity means:

- for the public service – the head of service;
- for an administrative unit—the director-general of the administrative unit;
- for a statutory office-holder—the statutory office-holder;
- 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; and
- for a territory instrumentality—the person who has responsibility for managing the affairs of the territory instrumentality.

The head of a legislative assembly entity means:

- for a Member of the Legislative Assembly—the Speaker;
- for a member of staff of an MLA—the Speaker;
- for the office of the Legislative Assembly—the clerk of the Legislative Assembly;
- for an officer of the Assembly—the officer of the Assembly;
- for a member of staff of an officer of the Assembly—the officer of the Assembly.

If the Speaker is unavailable, the Deputy Speaker will perform the role of the head of the legislative assembly entity for Members of the Legislative Assembly or a member of staff of an MLA. There is also provision for this to occur where the Speaker has an actual or perceived conflict of interest that would prevent the Speaker from properly carrying out the functions under this clause.

The head of a public sector entity can also consist of:

- for an entity of a public nature—the person who has responsibility for managing the affairs of the entity.

Clause 16 Meaning of ACT public service entity

This clause defines an ACT public service entity, which is used in the definition of *public sector entity* and an *entity of a public nature*.

Clause 17 Meaning of Legislative Assembly entity

This clause defines legislative assembly entity to mean:

- a) a member of the Legislative Assembly;
- b) a member of staff of an MLA;
- c) for the office of the Legislative Assembly;
- d) for an officer of the Assembly;
- e) a member of staff of an officer of the Assembly.

Clause 18 Meaning of entity of a public nature

This clause defines entity of a public nature, a term used elsewhere in the Act. This definition is based on that used in the definition of a public authority under the *Human Rights Act 2004*. This includes an entity whose functions are or include functions of a public nature, when it is exercising those functions (whether under contract or otherwise). This means the Integrity Commission will generally have jurisdiction over those entities who also have obligations to act and make decisions consistently with human rights under the Human Rights Act.

Chapter 2 Integrity Commission

Part 2.1 – Commission—establishment, independence and functions

Part 2.1 establishes the independent Integrity Commission and Commissioner.

Clause 19 Establishment of commission

This clause establishes the ACT Integrity Commission.

Clause 20 Constitution of commission

This clause states that the Commission consists of the Commissioner.

Clause 21 Commissioner—officer of the Legislative Assembly

This clause establishes the Commissioner as an independent officer of the Legislative Assembly. This clause is based upon those in the legislation of other Officers of the Legislative Assembly including the Auditor-General, Ombudsman and Electoral Commissioner.

Clause 22 Independence of the commission

Based on similar provisions for other Officers of the Legislative Assembly, this clause establishes that, subject to this Act and to other territory laws, the Integrity Commission has complete discretion in the exercise of the commission's functions.

Clause 23 Functions of commission

This clause provides that the functions of the Commission are to:

- investigate conduct that is alleged to be corrupt conduct; and
- refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action; and
- prevent corruption, including by—
 - researching corrupt practices; and
 - mitigating the risks of corruption; and
- publish information about investigations conducted by the commission, including lessons learned; and
- provide education programs about the operation of this Act and the commission, including providing advice, training and education services to—
 - the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and
 - people who are required to report corrupt conduct under the Act;
- foster public confidence in the Legislative Assembly and public sector.

In performing its functions, the commission must prioritise the investigation and exposure of corrupt conduct which the commission considers may constitute serious corrupt conduct or systemic corrupt conduct. However, this does not restrict the commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct. The Commission must take into account the responsibility and role other public sector entities have in the prevention of corrupt conduct when exercising its functions.

Clause 24 Functions of commissioner

This clause provides that the Integrity Commissioner has the functions given to the commissioner under this Bill or another territory law.

Part 2.2 – Commissioner—appointment

Part 2.2 of the Act concerns the process for commencing, suspending and ending the appointment of the Integrity Commissioner and if necessary, acting Commissioner. These provisions are based on similar provisions for other Officers of the Legislative Assembly.

Clause 25 Commissioner—appointment

This clause requires the Speaker, acting on behalf of the Territory, to appoint an Integrity Commissioner, after a detailed consultative process. It is based on appointment provisions

for other Officers of the Legislative Assembly, which in turn were modelled on the requirements for the appointment of the Clerk under the *Legislative Assembly (Office of the Legislative Assembly) Act 2012*.

The Speaker must make the appointment in accordance with the selection process under Clause 27. The Speaker must also consult with the Chief Minister, the Leader of the Opposition and the leader of any other party that is represented in the Assembly by at least two Members. The relevant Assembly committee must be consulted.

The Speaker must not appoint a person as commissioner unless the Speaker is satisfied that the person has extensive knowledge of, and experience in—

- criminal investigation or criminal adjudication; or
- law enforcement or the conduct of investigations; or
- public administration, governance or government.

Reflecting the independence of the Integrity Commissioner's role, the Speaker must consult with the Legislative Assembly on the person's appointment. The Legislative Assembly must approve the appointment, by resolution passed by a majority of at least 2/3rd of the members.

An appointment is a disallowable instrument ensuring that the appointment reflects the view of and is approved by, the Assembly.

Eligibility for appointment is dealt with in Clause 26.

Clause 26 Commissioner—eligibility for appointment

This clause provides that the Speaker may appoint a person as Commissioner with specific background and experience reflecting the requirements of the role. The person must have been:

- (a) a judge of the Supreme Court;
- (b) a judge of the Supreme Court of a State or another Territory; or
- (c) a judge of the Federal Court; or
- (d) a justice of the High Court; or
- (e) a lawyer for at least 10 years.

In appointing a person as commissioner, the Speaker must consider applicants mentioned in (a)-(d) first then, only if there is no suitable applicant, consider the applicants in (e).

The clause includes a further limitation on who can be appointed by preventing those with certain backgrounds from being appointed. The Speaker must not appoint a person as the commissioner if the person—

- is or has been the Inspector of the Commission;
- is or has been a member of the Legislative Assembly; or the Parliament of the Commonwealth; or the legislature of a State or another Territory; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a public servant; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—
 - a registered party; or
 - a political party registered under a law of the Commonwealth, a State or another Territory; or
 - a political party.
- has been convicted –
 - in the ACT of an offence punishable by imprisonment for at least 1 year; or
 - outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

The purpose of this limitation is to ensure that the person who fulfils the role is free from any actual or perceived conflict of interest, given the unique position they hold, and to ensure public confidence in this new institution.

Public servant is defined by the *Legislation Act 2001* to mean a public servant employed in the ACT public service. The constitution of the public service is dealt with by section 12 of the *Public Sector Management Act 1994* which provides that members of the ACT Public Service are—

- the head of service;
- the directors-general;
- the executives;
- officers; and
- other employees.

In effect this means that statutory office holders, such as the President, other Commissioners at the Human Rights Commission, or members of the ACT Civil and

Administrative Tribunal are not public servants within the definition and would not be excluded from appointment as Integrity Commissioner.

Clause 27 Commissioner—selection criteria and process

The clause provides that the Speaker must make a determination about the criteria and selection process in relation to the appointment of the commissioner. It also states the Speaker must ensure the process is open and accountable and have regard to any selection criteria determined under the *Supreme Court Act 1933*, section 4AA (Requirements of appointments – resident judges). Appropriate consultation on the criteria and process is required with specified stakeholders. A determination is a disallowable instrument, and must be notified and presented to the Legislative Assembly.

Clause 28 Commissioner—term of appointment

This clause provides that an appointment must not be for more than 7 years and that a person previously appointed as Integrity Commissioner cannot be reappointed if they have served the 7 years. Further, the Commissioner’s appointment cannot end within 12 months either before or after the end of a CEO’s appointment.

Clause 29 Commissioner—oath or affirmation of office

This clause provides that a person must take an oath or make an affirmation of office before appointment as commissioner.

Clause 30 Commissioner—disclosure of interests

This clause requires disclosure of interests by the Commissioner to the Speaker. This clause is consistent with those applied to other Officers of the Legislative Assembly.

Clause 31 Commissioner—must avoid conflict of interest

This clause requires that the Integrity Commissioner not have paid employment or engage in unpaid activity that is inconsistent with their functions. The inclusion of this clause acknowledges the role of the Integrity Commissioner may be exercised in a part-time or per diem capacity depending on the workload requirements. It allows the person appointed to engage in employment or unpaid work, as long as there is no inconsistency with their functions as the Integrity Commissioner.

Clause 32 Commissioner—conflicts of interest register

This clause requires the Commission to keep register of conflicts of interest disclosed by the Commissioner. The register must be made available to the Inspector at all times. The clause also details what the register must include.

Clause 33 Commissioner—resignation

This clauses provides that the Commissioner may resign by written notice to the Speaker.

Clause 34 Commissioner—retirement

This clause provides that the Speaker may retire the Integrity Commissioner on grounds of mental or physical incapacity of a kind that substantially affects the performance of the Commissioner's functions. The Integrity Commissioner must consent and the retirement is subject to the superannuation circumstances of the Commissioner.

Clause 35 Commissioner—suspension generally

This clause provides that the Speaker may suspend the Commissioner and sets out the process the Speaker must follow. It also provides that the Commissioner's salary and allowances are not affected by the suspension.

This clause and the following clauses set out comprehensive procedures in relation to suspension of the Integrity Commissioner, which are based on those for other Officers of the Legislative Assembly and has been designed to ensure that the Integrity Commissioner is afforded procedural fairness for any potential suspension. The process also ensures the Legislative Assembly, through the relevant committee, is involved.

Clause 36 Commissioner—suspension—relevant Assembly committee notice and meetings

This clause provides that if the Speaker suspends the Commissioner, a written notice must be given to the relevant Assembly committee.

Clause 37 Commissioner—ending suspension

This clause sets out the situations when suspension ends.

Clause 38 Commissioner—ending appointment

The Commissioner's appointment can only cease if it expires, retirement under Clause 34 or under this clause. This clause details a comprehensive process for how the Speaker may end the Commissioner's appointment, which is designed to provide the Commissioner with procedural fairness and is based on that used for other Officers of the Legislative Assembly.

The grounds for ending an appointment are:

- for misbehaviour; or
- for failure to take all reasonable steps to avoid being placed in a position where conflict of interest arises during the exercise of the commissioner's function; or
- for physical or mental incapacity, if the incapacity substantially affects the exercise of the commissioner's functions; or
- the commissioner becomes bankrupt or personally insolvent.

The process requires that the Integrity Commissioner is provided an opportunity to respond in the event that the motion is moved in the Assembly to end their appointment.

The Speaker may also end the commissioner's appointment if the commissioner is absent from duty, except on leave granted by the Speaker, for 14 consecutive days or for 28 days in any 12 months.

Clause 39 Commissioner—leave of absence

This clause allows the Speaker to grant the Integrity Commissioner a leave of absence.

Clause 40 Commissioner—acting commissioner

This clause sets out how an Acting Commissioner can be appointed, including that the Integrity Commissioner is able to appoint an Acting Commissioner in certain circumstances. Ordinarily the *Legislation Act 2001* provides that the person making the appointment is also responsible for acting appointments. In the case of the Integrity Commissioner, it is appropriate that they be able to appoint a person to act in their place while they are on leave approved by the Speaker given the particular position of trust they are placed in and the nature of the role. This is generally the case for other officers of the Legislative Assembly. The ability to appoint a person to act in the position is only available where leave is approved by the Speaker and the Integrity Commissioner has consulted with the Speaker about their proposed acting appointment. It is designed primarily to cover ordinary leave that any employed person would take from time to time, for example recreational leave.

The clause provides that the acting appointment is not subject to the same requirements as those required for appointment as the commissioner. The acting appointment is not required to be made in accordance with the selection criteria and process determination under Clause 25(2)(b) or approval by the Legislative Assembly as required under Clause 25(3)(b).

When the Commissioner makes the appointment, when their leave has been approved by the Speaker, the consultation requirements and the need to obtain 2/3 majority resolution of the Assembly is not required. As part of the acting appointment, the Commissioner is required to consult the Speaker.

In circumstances where there is no permanent appointee, it is the Speaker who will make the acting appointment.

The provision also provides that a person cannot be appointed to act as Commissioner for longer than six months.

Part 2.3 – Commission—CEO

Clause 41 CEO—appointment

The Commissioner must appoint a Chief Executive Officer (CEO) for the Commission for a maximum period of seven years. The Commissioner cannot appoint a person CEO if the person is or has been the Commissioner or the Inspector; or a person who is or has been a public servant in the 5 years immediately before the day of the proposed appointment. In addition, the Commissioner cannot appoint a person as the CEO if the person has been convicted of an offence in the ACT, or outside the ACT in Australia or elsewhere of an offence that would be punishable by imprisonment for at least 1 year.

Public servant is defined by the *Legislation Act 2001* to mean a public servant employed in the ACT public service. The constitution of the public service is dealt with by section 12 of the *Public Sector Management Act 1994* which provides that members of the ACT Public Service are—

- the head of service;
- the directors-general;
- the executives;
- officers; and
- other employees.

In effect this means that statutory office holders, such as the President, other Commissioners at the Human Rights Commission, or members of the ACT Civil and Administrative Tribunal are not public servants within the definition and so can be appointed to the position of CEO of the Integrity Commission.

As a member of staff of the Commission, the CEO is also subject to the requirements of Clause 50.

Clause 42 CEO—term of appointment

This clause provides that the CEO must not be appointed for longer than 7 years and that a person who has been CEO for 7 years is not eligible for reappointment. This is a maximum term. The Commissioner may decide to make an appointment for a shorter period of time.

The CEO appointment term cannot end within 12 months either before or after the end of a Commissioner's appointment.

Clause 43 CEO—ending appointment

This clause states that the commissioner must end the CEO's appointment if any of the following occur:

- (a) for misbehaviour;
- (b) for physical or mental incapacity, if the incapacity substantially affects the exercise of the CEO's functions;
- (c) if the CEO becomes bankrupt or personally insolvent;
- (d) if the CEO is convicted, in the ACT, of an offence punishable by imprisonment for at least 1 year;
- (e) if the CEO is convicted outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

Clause 44 CEO—functions

This clause provides for the CEO's functions, which involves managing the administrative and financial operations of the Commission. The CEO is not subject to anyone other than the Commissioner.

Clause 45 CEO—delegation

This clause details how the CEO may delegate their functions. The CEO can delegate their functions to another member of the staff of the commission or another person. If the CEO decides to delegate their functions to another person who is not a member of staff of the commission without being satisfied that the function needs to be exercised by a person who is not a member of staff of the commission.

Clause 46 CEO—leave of absence

This clause outlines that the Commissioner may approve leave of absence for the CEO.

Part 2.4 – Commission—staff

Part 2.4 sets out how the Integrity Commission may engage staff.

Clause 47 Meaning of *staff of the commission*

This clause defines the meaning of *staff of the commission*, including the CEO, staff, consultants and contractors.

Clause 48 Commission employed staff

This clause allows the Integrity Commission to employ staff, and provides that staff of the Commission must be employed under the *Public Sector Management Act 1994*, which regulates the employment of ACT public sector employees.

Clause 49 Commission consultants and contractors

This clause allows the Commission to engage contractors or consultants.

Clause 50 Staff of the commission—eligibility for appointment

The Commission cannot appoint a person as a staff member if that person is not suitable to be a member of staff of the commission. This clause also prevents the Commissioner from appointing a person that is or has been a public servant in the 5 years immediately before the day of appointment.

This clause provides the commission with the ability to ask a prospective staff member to undertake the following to assist in determining whether a person is suitable to be a member of staff of commission:

- provide a police certificate;
- declare personal interests the inspector considers relevant;
- undergo a medical or psychological assessment;
- make a statutory declaration in relation to matters determined by the inspector to be relevant to the person’s suitability; or
- anything else the commissioner considers is necessary to decide whether a person is suitable.

The clause also provides that the Commission must make guidelines about the personal interests the commission considers should be declared. The personal interest guidelines are a notifiable instrument and must be published on the commission’s website. The guidelines must be made before commencement of the Bill (which is possible under the Legislation Act, section 81).

Clause 51 Staff of the commission—not subject to direction from others

This clause provides for the independence of Commission staff, who may only be directed by the Commissioner or another member of the commission staff authorised by the commissioner to give directions.

Clause 52 Delegation by commission

This clause details how the commission may delegate their functions and ensures that delegations can be given to staff to assist the commission in undertaking its functions.

Clause 53 Delegation by commissioner

This clause details how the Commissioner may delegate their functions. This ensures that delegations can be given to staff to assist the Commission in undertaking its functions. This clause prevents the Commissioner from delegating the Commissioner’s duty to preside at public examinations.

Clause 54 Commission—other arrangements for staff and facilities

This clause allows the Commissioner to arrange with the Head of Service to use the services of a public servant or Territory facilities. The inclusion of this provision supports the

Commission in the efficient and effective management of its functions, particularly regarding administrative, secretariat or specialised public service staff support or expertise.

The Commissioner can also arrange with the Speaker to use Territory facilities within the Assembly precincts, such as the Legislative Assembly hearing rooms.

Part 2.5 – Commission—cooperation with other entities

Clause 55 Commission—cooperation with other entities

This clause requires the Commission to work cooperatively with public sector entities in order to avoid duplication of effort and to also co-ordinate the activities of other organisations with similar functions.

Clause 56 Commission—arrangements with other entities

This clause allows the Commission to enter into an arrangement with another entity that will assist the Commission in relation to investigations or the exercise of other functions of the commission. This may include assisting the entity by providing services within the commission's field of expertise.

Chapter 3 Commission—investigating corrupt conduct

Part 3.1 – Commission—reporting corrupt conduct

Part 3.1 deals with the reporting of corrupt conduct to the Commission.

Division 3.1.1 – Corruption complaints

Clause 57 Anyone may make corruption complaint

This clause outlines how anyone can make a complaint to the Commission about conduct that may be corrupt conduct.

Clause 58 How to make a corruption complaint

This clause provides that corruption complaints may be made orally or in writing, using any form of electronic communication, and can also be made anonymously.

Clause 59 Other entities may refer corruption complaints

This clause applies if a person makes a complaint to a relevant entity about conduct that may be corrupt conduct. The relevant entity may refer the complaint to the commission. The clause also defines relevant entity.

Clause 60 Withdrawal of corruption complaints

This clause provides how a complainant may withdraw a complaint, including that the Commission may continue to investigate the subject matter of the complaint.

Division 3.1.2 – Mandatory corruption notifications by public sector entities

Clause 61 Meaning of *mandatory corruption notification*

This clause defines the term *mandatory corruption notification* for the purpose of the Act.

Clause 62 Mandatory corruption notifications—heads of public sector entities and senior executives

This clause mandates that the head of a public sector entity and a senior executive member must notify the commission about any matter the head of the entity or SES member suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct. This is consistent with the recommendations of the 2018 Select Committee.

Clause 63 Mandatory corruption notification—MLAs and chiefs of staff

This clause mandates that a member of the Legislative Assembly must notify the Commission about any matter the member suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct by another member of the Legislative Assembly or a member of staff of a MLA.

It also states that a chief of staff of a Minister or a Chief of Staff of the Leader of the Opposition must notify the commission about any matter the chief of staff suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct by a member of the Legislative Assembly, or another member of staff of an MLA.

It also mandates that these chiefs of staff must notify the commission about any matter they suspect on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct by a member of the Legislative Assembly, or another member of staff of a MLA.

Clause 64 Directions about mandatory corruption notifications

This clause provides that the Commission may make mandatory corruption notification directions which a head of a public sector entity, an SES member, a member of the Legislative Assembly and the Chief of Staff for an MLA or the Chief of Staff of the Leader of the Opposition must follow. The notification directions will be a notifiable instrument and published on the Commission website. The Auditor-General, ACT Ombudsman, ACT Electoral Commissioner, members of the Human Rights Commission and the Speaker are excluded. There are consultation requests for developing the directions.

Clause 65 Offence—mandatory corruption notifications – heads of public sector entities

This clause creates an offence of 50 penalty units if a head of a public sector entity required to make a mandatory notification of corruption knows that a public official has engaged in conduct that constitutes serious corrupt conduct or systemic corrupt conduct and does not, as soon as practicable, notify the commission about the conduct.

The clause also lists the heads of public sector entities that the offence applies to if the public official is a public official in the public sector entity for which they are the head.

Clause 66 Offence mandatory corruption notifications – senior executives

This clause creates an offence of 50 penalty units if a senior executive member required to make a mandatory notification of corruption knows that a public official has engaged in conduct that constitutes serious corrupt conduct or systemic corrupt conduct and does not, as soon as practicable, notify the commission about the conduct.

Clause 67 Offence mandatory corruption notifications – MLAs

This clause creates an offence of 50 penalty units if a member of the Legislative Assembly required to make a mandatory notification of corruption knows that another member of the Legislative Assembly or a member of staff of an MLA has engaged in conduct that constitutes serious corrupt conduct or systemic corrupt conduct and does not, as soon as practicable, notify the commission about the conduct.

Clause 68 Offence mandatory corruption notifications – chiefs of staff

This clause creates an offence of 50 penalty units if chief of staff of a Minister or the Leader of the Opposition required to make a mandatory notification of corruption knows that another member of the Legislative Assembly or a member of staff of an MLA has engaged in conduct that constitutes serious corrupt conduct or systemic corrupt conduct and does not, as soon as practicable, notify the commission about the conduct.

Division 3.1.3 – Reports must be dismissed, referred or investigated

Clause 69 Meaning of *corruption report*

This clause defines a corruption report as a corruption complaint or a corruption notification.

Clause 70 Commission must dismiss, refer or investigate corruption reports

As recommended by the 2017 Select Committee, Clause 70 provides that the Commission must dismiss, refer or investigate corruption reports. The requirements to triage reports are based on relevant provisions of the Victorian *Independent Broad-based Anti-corruption Commission Act 2011*.

These provisions ensure that the Commission can refer complaints to other entities more suitable to handle them, while retaining the ability to investigate the matters that are serious corrupt conduct or systemic corrupt conduct.

Clause 71 When corruption reports must be dismissed

This clause provides that the commission must dismiss a corruption report made against a judicial officer if the report relates to an order, decision or judgement made by the judicial officer.

The commission must also dismiss a corruption report, if satisfied on reasonable grounds, the complaint does not justify an investigation. This clause specifies the reasons why a corruption report would not warrant an investigation.

If the commission dismisses a corruption report, the commission may refer the matter to another entity with the power to investigate the subject matter.

Division 3.1.4 – Commission must keep people informed

Clause 72 Commission must keep complainant informed

Clause 73 Commission must keep referring entity informed

Clause 74 Commission must keep notifier informed

Clause 75 Limitations on keeping people informed

These clauses provide for how the Commission is to keep certain people informed about the progress of complaints and notifications. These processes are based on provisions in the *ACT Public Interest Disclosure Act 2012* and the Victorian *Independent Broad-based Anti-corruption Commission Act 2011*.

The Commission must keep complainants and referring entities informed about certain aspects of its handling of a corruption complaint or notification, including where the Commission has dismissed, referred or investigated a complaint. However, information to a complainant must be accompanied by a written statement telling the complainant that it is an offence to disclose the information.

The Commission must also not tell a person about a matter in Clause 72, Clause 73 or Clause 74 if:

- telling the person would be likely to adversely affect—
 - a person’s safety; or
 - an investigation under this Act; or
- telling the person—
 - would identify another person who has given information in relation to a corruption report; or
 - could allow the identity of the person to be worked out; or
- telling the person would be contrary to a law in force in the ACT.

Part 3.2 – Commission - confidentiality notices

Part 3.2 provides for how the Integrity Commission is to conduct preliminary inquiries and investigations in a confidential manner including directing certain persons to keep restricted information confidential. These protections are to protect individual's right to privacy and reputation and to avoid prejudicing a person's right to fair trial. These provisions are based on the recommendations of the Select Committee that the Commission have the power to conduct preliminary investigations that do not include the use of coercive authority and that an accused's right to fair trial is not prejudiced.

Clause 76 *Meaning of restricted information*

This clause defines restricted information, which are matters that the Commission can direct a person not to disclose under the Bill, and includes any of the following:

- evidence or information given to, or obtained by, the commission;
- the contents of a document, or a description of a thing, produced to, or obtained by, the commission;
- the contents of a document, or a description of a thing, that the commission has made a copy of or seized under Part 3.5 (Powers of entry, search and seizure);
- the existence of, or any information about, a confidentiality notice, preliminary inquiry notice or examination summons;
- the subject matter of a preliminary inquiry or investigation;
- information that would identify a person, or could allow the identity of a person to be worked out, who—
 - has been or is proposed to be examined by the commission; or
 - has produced or may produce a document or thing to the commission; or
- the fact that a person—
 - has been or is proposed to be examined by the commission; or
 - has produced or may produce a document or thing to the commission.

Clause 77 *Meaning of confidentiality notice*

This clause defines a confidentiality notice, which is given by the Commission under the Bill, directing the person to not disclose a restricted matter.

Clause 78 Confidentiality notices for preliminary inquiries

This clause provides that the Commission may give a confidentiality notice to a person about restricted information if, during a preliminary inquiry, the commission—

- gives a preliminary inquiry notice to a person; and
- considers on reasonable grounds that the disclosure of a restricted matter would be likely to prejudice the preliminary inquiry.

The provision also protects the Commission’s investigations by preventing witnesses from disclosing information about restricted matters that could undermine an ongoing covert investigation. These powers of preliminary inquiry provided to the Integrity Commission mirror the Victorian IBAC model.

Clause 79 Confidentiality notices for investigations

This clause provides that the Commission may give a confidentiality notice to a person about restricted information if, during an investigation, the Commission considers on reasonable grounds that the disclosure of restricted information would be likely to prejudice the —

- investigation; or
- safety or reputation of a person; or
- fair trial of a person who has been, or may be, charged with an offence.

Clause 80 Confidentiality notices—content

This clause requires that the Commission must include certain information in a confidentiality notice including the details of the obligations on the person.

Clause 81 Meaning of *permitted disclosure* of restricted information—Part 3.2

This clause states when a person may make a permitted disclosure of restricted information and to whom they can make the disclosure to.

Clause 82 Confidentiality notices—amendment and revocation

This clause provides for how the Commission may amend and revoke a confidentiality notice. The Commission must make the application to the Supreme Court.

Clause 83 Confidentiality notices—extension

This clause provides for how the Commission may apply to the Supreme Court for an extension of the confidentiality notice.

The Supreme Court is an appropriate arbitrator because they are a neutral third-party that have no vested interest in the Commission’s investigation.

Clause 84 Confidentiality notices—expiry

Under this clause, confidentiality notices expire:

- if the confidentiality notice is revoked under Clause 82—the day the commission issues the notice revoking the confidentiality notice;
- if the confidentiality notice is not revoked under Clause 82—
 - 3 years after the day on which the confidentiality notice was issued; or
 - if an extension is granted under Clause 83 the day on which the extension expires.

This is because a blanket prohibition on disclosing information would be an unreasonable limitation on freedom of expression under the Human Rights Act.

Clause 85 Offence—disclose restricted information in confidentiality notice

This clause creates an offence for a person given a confidentiality notice about a restricted matter that has not expired to disclose the restricted matter.

The offence under Clause 85(1) does not apply if a person makes a permitted disclosure in accordance with a direction or authorisation given by the commission.

Clause 85 also does not apply if a person makes a permitted disclosure, and the permitted disclosure is not identified as a prohibited disclosure in the confidentiality notice. When making the permitted disclosure, the person tells the recipient that disclosure of the information may be an offence and the recipient is given a copy of the confidentiality notice.

A person commits an offence if the person is the recipient of a copy of a confidentiality notice about restricted information as a result of someone making a permitted disclosure to the person, the confidentiality notice has not expired and the person discloses the restricted information.

Part 3.3 – Commission - preliminary inquiries

Part 3.3 deals with preliminary inquiries made by the Integrity Commission. This is consistent with the Select Committee’s recommendation that the Commission have the power to conduct preliminary investigations that do not include the use of coercive authority as witnesses retain their rights to claim privilege.

The purpose of a preliminary inquiry is to conduct an investigation into a complaint to determine if a full investigation using coercive powers is warranted.

Clause 86 Preliminary inquiries about corruption reports

This clause provides that the commission may carry out a preliminary inquiry to decide whether to dismiss, refer or investigate a corruption report.

Clause 87 Preliminary inquiries about own initiative matters

This clause provides that the Commission may carry out preliminary inquiries to decide whether to investigate a matter of its own initiative.

Clause 88 Certain powers not to be used for preliminary inquiries

This provision prevents the Integrity Commission using its powers to do the following in carrying out a preliminary inquiry:

- use the powers in Part 3.5 (Entry, search and seizure); or
- use the powers in Part 3.6 (Examinations); or
- authorise or conduct a controlled operation under the *Crimes (Controlled Operations) Act 2008*; or
- apply for a surveillance device warrant under the *Crimes (Surveillance Devices) Act 2010*; or
- use an assumed identity under the *Crimes (Assumed Identities) Act 2009*.

The Commission is therefore unable to use these coercive powers during the preliminary inquiry stage.

This ensures any limitation on human rights inherent in those powers is the least restrictive limitation possible to achieve the important aim of the Commission being able fulfil its role in investigating allegations of corrupt conduct.

Clause 89 Power to request information from head of public sector entity

This clause provides that in carrying out a preliminary inquiry, the Integrity Commission may ask the head of a public sector entity to provide information held by the public sector entity to the commission that the commission considers relevant to the preliminary inquiry. The head of the public sector entity must comply with the request within a reasonable time, being not less than 7 days after receiving the request.

The head of the public sector entity need not comply with the request if the head of the public sector entity advises the commission of a reasonable excuse for not doing so.

As a further protection, the head of the public sector entity who complies with the request, and any person who assists the head in complying with this section, has the same protection and immunity as a witness has in a proceeding in the Supreme Court.

Clause 90 Power to issue preliminary inquiry notice

This clause specifies the power to issue a preliminary inquiry notice requiring the person to produce a document or other thing to assist the Commission in undertaking its preliminary inquiry. Sub-clause 2 outlines a number of considerations that the Commission must have regard to when determining whether it is reasonable to issue the notice. These considerations are provided in clauses (a) to (e).

The Commission may issue a preliminary inquiry notice to a person under the age of 18 years, however the Commission will need to consider whether there are reasonable grounds to do so. This may include that the information, document or thing that the person could provide may be compelling and probative evidence, and it may not be practicable to obtain the information, document or thing in another way.

The person is not required to appear before the Commission if the requested document or other thing is provided to the Commission before the required time. Where a person complies with the conditions of a preliminary inquiry notice, they have the same protection and immunity as a witness has in a proceeding within the Supreme Court.

The purpose of a preliminary inquiry notice is not to require a person to appear before the Commission to give oral evidence.

Clause 91 Preliminary inquiry notice—content

This clause specifies that the preliminary inquiry notice must require the person to appear before the Commission at a stated time and place, and to produce or provide to the Commission any document or other thing in the notice that is within the person's possession or control. Sub-clause 2 outlines the required content of the preliminary inquiry notice.

This provision ensures that persons issued with confidentiality notices are aware of their legal rights and obligations during a preliminary inquiry. This will assist them when seeking legal advice.

Clause 92 Preliminary inquiry notice—person under 16 years

This clause outlines that a preliminary inquiry notice directed at a person under the age of 16 years has no effect. The Commission can require a person under the age of 16 years to provide evidence of proof of age.

This clause protects the rights of children.

Clause 93 Preliminary inquiry notice—service

This clause outlines that the Commission may apply to the Supreme Court for an order to serve the preliminary inquiry notice in another way if it is not reasonably practical to serve a preliminary inquiry notice to a person under 0. For example, where the person has no known physical address, but they can be located on social media.

Where the Supreme Court is satisfied that it is not reasonably practicable to serve a preliminary inquiry notice, an order may be made for the notice to be served in another way considered appropriate by the court. Alternatively the Supreme Court may make an order for substituted service.

Clause 94 Preliminary inquiry notice—first actions to be taken

This clause specifies a number of requirements that must be met prior to a person presenting at the Commission to produce document or thing. These are provided in clauses (a) to (e).

Clause 95 Preliminary inquiry notice—claiming privilege or secrecy

This clause specifies that the claimant must appear before the Commission according to the preliminary inquiry notice. A person may claim that a document or other thing is subject to privilege or cannot be disclosed due to a secrecy requirements under a Territory law. The Commission is required to consider the claim for privilege or secrecy. The Commission may withdraw the requirement to produce the document or other thing. Alternatively, the Commission may refuse to withdraw the requirement and require the claimant to secure the document or other thing in a sealed envelope and give it to the Commission. The Commission will not inspect the document or other thing.

Persons can claim privilege or secrecy during a preliminary inquiry because waiving the right to claim these protections is akin to a coercive power. As per the Select Committee's recommendations, it is inappropriate to subject persons to coercive powers during the preliminary inquiry stage.

In this section, privilege does not including parliamentary privilege. Parliamentary privilege is covered in Clause 177.

Clause 96 Preliminary inquiry notice—application to Supreme Court to decide privilege or secrecy

This clause outlines that where a claim for privilege or secrecy is made, and a document or thing is secured, the Commission must give the secured document or other thing to the Supreme Court. Within 7 days, the Commission must apply to the Supreme Court for a determination of the claim. The Commission is required to give notice of the application to the claimant. The claimant is entitled to appear before the hearing of the application in the

Supreme Court. If within 7 days, the Commission does not make an application to the Supreme Court, the secured document or other thing must be returned to the claimant.

It is appropriate for the Supreme Court to determine a contested privilege claim because they are a neutral third party that has no interest in the outcome of the Commission's preliminary inquiry.

This approach is known as a bare claim of privilege.

Clause 97 Preliminary inquiry notice—Supreme Court to decide privilege or secrecy

This clause specifies that the Supreme Court must determine whether the document or other thing is the subject of privilege or a secrecy requirement under a Territory law. The Supreme Court may be required to open and inspect the secured document or other thing to consider the matter.

If the Supreme Court decides that the document or other thing is subject to privilege or a secrecy requirement, an order must be made returning the document or other thing to the claimant. However if the Supreme Court decides that the document or other thing is not subject to privilege or a secrecy requirement, an order must be made requiring document or other thing to be provided to the Commission.

Clause 98 Preliminary inquiry notice—offence to open secured document or other thing

This clause specifies that it is an offence to open a secured document or other thing if the conditions outlined in Clause 95 are met.

Clause 99 Preliminary inquiries—application of Criminal Code, ch 7

This clause confirms that a preliminary inquiry of the Commission is considered a legal proceeding for the purposes of the Criminal Code, Chapter 7 (Administration of justice offences). This clause engages the offence procedures in Chapter 7 such as falsifying evidence, destroying or concealing evidence and failing to produce a document or other thing.

Part 3.4 – Commission - conducting an investigation

This part outlines requirements for starting an investigation including when the Commission may investigate certain matters and when the Commission must investigate certain matters on its own initiative. This part also sets out the Commission's responsibilities when investigating while court proceedings are underway, and entering into agreements to conduct of joint investigations. The Commission may decide to carry out a preliminary inquiry in order to determine whether to dismiss, refer or investigate a corruption report.

Division 3.4.1 – Starting an investigation

Clause 100 Commission may investigate corruption report

This clause outlines that the Commission may conduct investigations if it receives a corruption report and it is suspected that there are reasonable grounds for the conduct to be considered corrupt conduct.

Clause 101 Commission may investigate on own initiative

This clause outlines that the Commission may conduct an own initiative investigation if it suspects there to be reasonable grounds for the conduct to be considered corrupt conduct. It is the Commission's prerogative to determine whether a preliminary inquiry may assist in determining whether to investigate the matter any further.

Clause 102 Investigation of judicial officers

This clause outlines how the Commission is to investigate into the conduct of judicial officers, which was a recommendation by the 2017 and 2018 Select Committees.

The clause provides that when investigating a judicial officer, the Commission must have proper regard for the preservation of the independence of judicial officers. In addition, the commission for a judicial officer other than the Chief Justice or Chief Magistrate – must notify the head of jurisdiction unless doing so would prejudice an investigation. The clause also defines the head of jurisdiction for the purpose of the clause.

Clause 103 Investigation may be conducted during court proceeding

This clause acknowledges that the Commission may still carry out its statutory functions even though a civil or criminal proceeding by a court or tribunal may be underway. The Commission can decide whether to:

- (a) commence or continue an investigation;
- (b) discontinue or complete an investigation; or
- (c) provide a report about an investigation.
- (d) Do anything necessary or convenient to carry out action in (a)-(c) above

However, the Commission is required to take reasonable action to avoid prejudicing any court or tribunal proceeding through the Commission's own actions. This may include the Commission not issuing a confidentiality notice during the other proceeding or defer giving a report about the Commission's investigation until the proceeding has been completed.

The section applies to a proceeding regardless of whether the proceeding commences before or after the investigation commences, or the commission or a member of staff of the commission is a party to the proceeding

Clause 104 Investigation may be conducted as joint investigation

This clause provides for the Commission to undertake investigations in coordination with any integrity body or law enforcement agency for the purposes of, or in connection with, its investigative functions under this Bill.

A joint investigation may be conducted as the Commission sees fit.

In conducting such a coordinated investigation, the Commission may do 1 or more of the following—

- consult, coordinate and cooperate with any integrity body or law enforcement agency which is, in accordance with that body's or agency's own duties, function and powers, conducting an investigation in respect of the same matter or similar or related matters;
- in accordance with Clause 196, provide or disclose information to an integrity body or law enforcement agency with which the Integrity Commission is conducting a joint investigation;
- receive information from an integrity body or law enforcement agency with which the Integrity Commission is conducting a joint investigation;
- enter into a memorandum of understanding or an agreement with any integrity body or law enforcement agency in relation to the conduct of coordinated investigations with that integrity body or law enforcement agency.

Division 3.4.2 – Referring matters to another entity

This Division provides for the Integrity Commission to make referrals to other persons or bodies in certain circumstances.

Clause 105 Commission must refer corruption reports about staff to inspector

This clause provides that the Commission must refer corruption reports about the Commissioner, Chief Executive Officer or commission staff to the Inspector.

Clause 106 Meaning of *referral entity*

This clause defines a referral entity.

Clause 107 Commissioner may refer corruption reports to referral entity

This clause allows the Integrity Commission to refer a corruption report to specified persons or bodies who have power to investigate the subject matter of the complaint or notification, and where the Integrity Commission considers that it would be more appropriate that it be investigated by that other person or body.

This clause provides that the Integrity Commission must consult with the referral entity before deciding to make a referral. However, nothing in this clause requires the referral entity to deal with the corruption report.

Clause 108 Referral to referral entity—results and actions

This clause provides that certain referral entities may be required by the Integrity Commission to report on the results of their investigation and the action taken, or proposed to be taken, in relation to the corruption report. This will allow the Integrity Commission to ensure that the corruption report is properly dealt with.

While the Commission cannot compel a referral entity to take any particular action in relation to a referral, the Commission retains the ability to investigate the matter itself and to make public comment in relation to whether a referral was dealt with. If an independent entity does not investigate a matter it has been referred, the Integrity Commission may decide this gives it good reason to investigate the matter itself, depending upon the seriousness of the matter and the Integrity Commission’s priorities and resources.

Clause 109 Referral to referral entity—withdrawal of referral

This clause allows the Integrity Commission to withdraw referrals from certain referral entities. If the Integrity Commission has made a referral under this section, it may determine to investigate the corruption report under Division 3.4.1 of this Bill (Starting an investigation), and withdraw the referral by providing written notice to the person or body to whom the referral was made.

Where a person or body receives notice of such a withdrawal, it must cease its investigation of the referred complaint or notification, and provide the Integrity Commission with any evidence it has in its possession or control, and cooperate with the Integrity Commission and ensure its officers provide all reasonable assistance requested by the Integrity Commission, in relation to the complaint or notification that was referred.

Clause 110 Commission may refer matters to judicial council or judicial commission

This clause enables the commission to refer a matter to the judicial council or the judicial commission if the matter is relevant to their functions and the Integrity Commission considers it appropriate to do so.

The Commission must consult with the judicial council or judicial commission in deciding whether to make a referral.

The commission may enter into a memorandum of understanding or agreement with the judicial council or judicial commission about practices and procedures to be used for referrals.

Clause 111 Commission may refer matters to prosecutorial body

This clause provides for the Integrity Commission to refer a matter to a prosecutorial body. The Integrity Commission may do this at any time, if it considers it appropriate and that it is relevant to the exercise of prosecutorial body's functions. The clause also provides that the Integrity Commission may enter into a memorandum of understanding or an agreement with a prosecutorial body in relation to the practices and procedures for referrals.

Division 3.4.3 – Discontinuing an investigation

Clause 112 Discontinuing an investigation

This clause provides that the commission is required to discontinue an investigation if it is satisfied that there are reasonable grounds to do so having considering the matters in Clause 71 (When corruption reports must be dismissed).

Part 3.5 – Commission-powers of entry, search and seizure

This part covers the role and powers of investigators, the issuing of search warrants and requirements for returning and forfeiting of things that have been seized.

Division 3.5.1 – Investigators

Clause 113 Investigators—appointment

This clause allows the Commission to appoint a member of staff of the Commission as an investigator. This clause also provides the Commissioner is an investigator.

Clause 114 Investigators—identity cards

This is a standard clause for persons who represent and exercise coercive functions on behalf of a statutory body. It provides that an investigator appointed under Clause 113 must be issued an 'identity card' which persons can view in order to satisfy themselves that a person claiming to be an investigator is in fact an investigator. The clause also requires a person to return an identity card if they are no longer an investigator.

Clause 115 Investigator must show identity card on exercising power

This clause provides that an investigator must show their identity card on exercising a power under this Act.

Division 3.5.2 – Powers of investigators

This Division outlines the powers provided to investigators of the Commission. In addition to the powers provided in this division, the Commissioner also has powers under other legislation including:

- *Crimes (Assumed Identities) Act 2009*;
- *Crimes (Controlled Operations) Act 2008*; and
- *Crimes (Surveillance Devices) Act 2010*.

Clause 116 Definitions—Part 3.5

This clause outlines the definitions of connected, corrupt conduct, occupier, premises and warrant, which are covered in this part.

Clause 117 Power to enter premises

This clause specifies the investigator's power to enter public premises at any reasonable time, or a premises with the occupier's consent at any time, or according to the requirements of a search warrant. The investigator may enter the premises using any necessary and reasonable assistance or force according to the search warrant. Under this power, the investigator may enter land around the premises, without the occupier's consent, in the interests of asking the occupier for consent to enter the premises. The investigator is not required to pay an entry fee or other charge to enter the premises. The terms 'at any reasonable time' and 'necessary assistance' are defined in this clause.

Clause 118 Production of identity card

This clause specifies that an investigator must provide their identity card when asked by the occupier, otherwise it is not possible for the investigator or any other persons assisting the investigator (other than a police officer) to remain at the premises.

Clause 119 Consent to entry

This clause specifies that when seeking the occupier's consent to enter the premises, an investigator must produce their identity card and provide the occupier with the following information:

- the purpose of the entry;
- the reason for and identity of any other people assisting the investigator at the time;
- that anything found and seized which may be used in evidence in court (or as party of the Commission's investigation); and
- that consent may be refused.

Where the occupier consents to the entry, the investigator is required to ask the occupier to sign a written acknowledgement form to confirm that consent was provided. A copy of the acknowledgement of consent must be provided to the occupier at the time it is signed.

Clause 120 General powers on entry to premises

This clause outlines the general powers provided to investigators when entering premises. Investigators may undertake the following activities:

- inspect or examine;
- take measurements or conduct tests;
- take samples;
- make sketches, drawings or any other kind of record; and

- require the occupier, or anyone at the premises, to give the investigator reasonable help to exercise any of these powers.

A penalty of 50 units applies where a person does not take all reasonable steps to comply with investigator's direction to give the investigator reasonable help to exercise a power under this section.

Clause 121 Power to seize things

This clause provides the power to seize anything from the premises which is consistent with the purpose of the entry and authorised under the search warrant to assist with the commission's investigation. Where a thing has been seized by the investigator, the thing may be removed from the premises to another place, or the investigator may leave the thing at the place of seizure, however the investigator may restrict access to it.

It is considered an offence if a person interferes with a seized thing which has been restricted by the commission, or where the investigator's approval to interfere with the thing has not been provided. The offence is a strict liability offence.

Division 3.5.3 – Search warrants

Clause 122 Warrants—generally

This clause outlines that an investigator may apply to a magistrate for a warrant to enter premises. The magistrate may require certain information to be provided before the magistrate agrees to the application. Sub-clause 4 outlines the conditions that must be met for the magistrate to be satisfied that there are reasonable grounds for the search warrant. Sub-clause 5 provides the content of the search warrant.

Clause 123 Warrants—application other than in person

This clause outlines how an investigator can request a search warrant from a magistrate if there are urgent or some other special circumstances. The investigator must prepare an application for the warrant outlining the grounds that the warrant is needed. The magistrate will provide a written copy of the warrant to the investigator. However if this is not practicable to do so, the investigator must complete a warrant form and include the necessary information approved by the magistrate as well as the warrant's terms. A copy of the written warrant or the warrant form provides sufficient authorisation for the commission to enter and exercise investigative powers. The investigator is required to send the sworn application or the completed warrant form to the magistrate.

Clause 124 Search warrants—announcement before entry

This clause provides the conditions that need to be met before the investigator enters the premises. Prior to entering a premises using a search warrant, an investigator must do the following:

- announce that the investigator is authorised to enter the premises;

- provide anyone at the premises an opportunity to allow entry; and
- identify themselves to the occupier or someone who represents the occupier.

If there are reasonable grounds that necessitates the immediate entry to the premises, the investigator is not required to make the above announcement.

Clause 125 Details of search warrant to be given to occupier etc

This clause specifies that the investigator or person assisting the investigator must make available to the occupier, or a person representing the occupier, a copy of the warrant and a document outlining the occupier's rights and obligations.

Clause 126 Occupier entitled to be present during search etc

This clause specifies that the occupier or someone representing the occupier is entitled to observe the search being conducted if they are present at the time that the search warrant is being executed. This person or persons are not entitled to observe the search if they are likely to impede the search, or, if they are under arrest and they may interfere with the search. Two or more areas of the premises may be searched at the same time.

Clause 127 Search warrants—claiming privilege

This clause outlines that the investigator must consider any claim for privilege and must not inspect the document or other thing. A document or other thing is considered secured if it is in a sealed envelope. When the claim for privilege is known by the investigator, they must stop exercising the power provided under the search warrant, or require the claimant to secure the document or thing immediately and give it to the investigator. The investigator is unable to inspect the document or thing in the envelope.

In this section, privilege does not include parliamentary privilege. Parliamentary privilege is covered in Clause 177.

Clause 128 Search warrants—application to Supreme Court to decide privilege

This clause outlines that where a claim for privilege is made under Clause 127, and a document or thing is secured, the investigator must notify the Commissioner about the claim as soon as possible. The investigator is required to give the secured document or other thing to the Supreme Court.

Within 7 days of the Commissioner being notified, the Commission must apply to the Supreme Court for a determination of the claim. The Commissioner is required to give notice of the application to the claimant. The claimant is entitled to appear before the hearing of the application in the Supreme Court.

It is appropriate for the Supreme Court to determine a contested privilege claim because they are a neutral third party that has no interest in the outcome of the Commission's examination.

This approach is known as a bare claim of privilege.

Clause 129 Search warrants—Supreme Court to decide privilege

This clause specifies that the Supreme Court must determine whether the document or other thing is the subject of privilege. The Supreme Court may open and inspect the secured document or other thing to make a determination on this matter. If the Supreme Court decides that the document or other thing is subject to privilege, the document or other thing must be returned to the claimant. However if the Supreme Court decides that the document or other thing is not subject to privilege, the document or other thing must be returned to the Commission.

Privilege under this section does not include parliamentary privilege.

Clause 130 Search warrants—offence to open secured document or other thing

This clause specifies that it is an offence to open a secured document or other thing if the conditions outlined in sub-clauses (2)(a) and (b) are met. A person commits an offence if they open or otherwise inspect the secured document or other thing and are not authorised to do so.

Division 3.5.4 – Return and forfeiture of things seized

Clause 131 Receipt for things seized

This clause specifies that after a thing is seized, the investigator must provide a receipt to the person to whom it was seized. Where this is not possible, the investigator must leave the receipt at the place of seizure. The contents of the receipt must include the requirements outlined in sub-clauses (3)(a) to (d).

Clause 132 Moving things to another place for examination or processing under search warrant

This clause outlines that a thing seized may be moved to another place for examination or processing in order to determine whether it can be seized under the search warrant, if the following conditions are met:

- (i) there are reasonable grounds for believing that the thing is or contains something to which the warrant relates;

- (ii) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance.

Alternatively the occupier of the premises may agree in writing to the seized thing to be moved to another place for examination or processing.

The seized thing can only be moved to another place for no longer than 72 hours, unless an investigator applies to a magistrate for an extension of time. The occupier or occupier's representative can be present during the examination or processing of the seized thing.

Clause 133 Access to things seized

This clause outlines that a person entitled to undertake the examination or processing of the seized thing can inspect it, photograph it or take extracts from it or make any necessary copies to assist in carrying out this function.

Clause 134 Return of things seized

This clause outlines that a thing seized must be returned to its owner otherwise the Territory must pay a reasonable compensation to the owner, unless the following occurs:

- a prosecution for an offence against a Territory law has begun within 1 year and the thing is required to be used as evidence in the prosecution;
- an application for the forfeiture of the seized thing is made to a court under the *Confiscation of Criminal Assets Act 2003* or another Territory law within 1 year; or

The Commissioner may have a view that the practical use of the thing at the premises it was seized or the possession of the thing is an offence against a Territory law. If this is the case, the requirement to return the thing seized does not apply.

Clause 135 Forfeiture of seized things

Clause 135 outlines that the seized thing is forfeited to the Territory and may be sold, destroyed or disposed of as directed by the Commissioner. This occurs if the seized thing has not been returned or an application for disallowance of the seizure has not been made, or application has been refused or withdrawn.

Clause 136 Application for order disallowing seizure

This clause outlines that an application may be made to the Magistrates Court for an order disallowing the seizure. A person claiming to be entitled to the seized thing must make the application within 10 days after the date the thing was seized. The Magistrates Court may consider the application if the applicant has served a copy of it to the Commissioner. As part of the hearing for the application by the Magistrates Court, the Commissioner is entitled to appear as the respondent.

Clause 137 Order for return of seized thing

This clause specifies that the Magistrates Court is to make an order to disallow a seizure if it is satisfied that the following conditions have been met:

- (a) the applicant would, apart from the seizure, be entitled to the return of the seized thing; and
- (b) the thing is not connected with corrupt conduct; and
- (c) possession of the thing by the person would not be an offence.

In certain circumstances, the Magistrates Court may make an order to disallow a seizure along with ancillary orders outlined in paragraphs (4)(a) to (c).

Division 3.5.5 – Miscellaneous

Clause 138 Damage etc to be minimised

This clause requires the investigator to take reasonable and practicable steps to reduce the level of inconvenience, detriment and damage caused as part of exercising the functions under this part. Where there has been a damage to a particular item by the investigator during a search, a written notice must be provided to the owner of the item providing details specified in paragraphs (3)(a) to (c).

Clause 139 Compensation for exercise of enforcement powers

This clause outlines that a claim for compensation from the Territory may be made where a person suffers loss or expense due to the enforcement powers that were exercised. A court may consider that payment of reasonable compensation for the loss or expense if it is justified, if the court is satisfied that it is just to make the order having assessed the circumstances presented. A regulation may prescribe matters for consideration by the court.

Part 3.6 – Commission-examinations

This part covers examinations, privilege matters, contempt of the commission and other provisions associated with examinations.

Division 3.6.1 – Examinations

Clause 140 Power to hold examination

This clause provides the power for the commission to hold examinations for an investigation.

Clause 141 Commissioner to preside

This clause requires that the Commissioner to preside over examinations.

Clause 142 Conduct of examination

This clause outlines the requirements that apply for examinations. The commission is required to comply with the rules of natural justice and procedural fairness. However the commission is not bound by the rules of evidence. The commission can inform itself in any way that it considers is appropriate and may determine its own examination procedures in order to undertake its statutory functions in an effective and efficient manner. There is a legislative obligation for the commission to undertake examinations with little formality and technicality. Written submission must be accepted and examinations must not have an adversarial approach where possible.

This clause provides that the commission may make examination conduct guidelines which are a notifiable instrument.

Clause 143 Examinations may be public or private

This clause provides for the ability for an examination to be held in public or in private. In deciding whether to hold an examination in public or in private, the Commission must consider whether it is in the public interest to hold a public examination, and such an examination can be held without unreasonably infringing on a person's human rights. The public interest test considerations are outlined in paragraphs (3)(a) to (c).

The clause provides that an examination relating to investigation of a judicial officer is to be held in private.

It is not necessary to require the Commissioner to provide reasons for every decision to hold a public examination. If a witness feels a decision to hold a public examination was not appropriate, they can request a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* or request the Commissioner to reconsider their decision to hold a public examination.

The Commission may make examination guidelines about whether examinations should be held in public or private. The examination guidelines are a notifiable instrument.

Clause 144 Commission must notify inspector of public examination

This clause provides that if the commission intends to hold a public examination, the commission must, by written report, notify the inspector stating that the commission intends to hold a public examination and the reasons why. This must occur not less than 7 days before the day of the public examination.

Clause 145 Offence to be present at examination not open to public

This clause provides for it to be an offence for certain people to be present at a private examination. Present includes being remotely present. The following people can be present at a private examination:

- the Commissioner, CEO, or a member of staff of the commission;
- a lawyer, or other person, engaged by the commission to assist the commission in the examination;
- the Inspector, or a member of the staff of the inspector;
- people attending in accordance with an examination summons;
- a lawyer representing a person who is attending in accordance with an examination summons;
- people entitled to be present under a direction given by the commission or another Territory law.

It is considered an offence, with a maximum penalty of 100 penalty units, 1 year imprisonment or both, for all other persons not meeting the above criteria to be present or remotely present at the private examination.

Clause 146 Commission may give directions

This clause provides the commission with the ability to give directions about the people who may be present and must not be present during an examination or part thereof. A direction can provide that a person can be remotely present. A direction cannot prevent the presence of certain people when evidence is being taken – these are outlined in Clause 146(3)(a) to (d).

A person appearing before a public examination may request the commission to consider making a direction for the examination, or part thereof, to be held in private. The commission is required to hear the arguments about this request, in private, unless the commission is of the view that there are valid reasons to believe the request is vexatious or without merit.

If a witness feels a decision to hold a public examination was not appropriate, they can request a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977*.

Clause 147 Power to issue examination summons

This clause provides for the power to issue an examination summons requiring a person to appear before the commission to give evidence or produce a document or other thing. Sub-clause 2 outlines a number of considerations that the Commission must have regard to when determining whether it is reasonable to issue the summons. These considerations are provided in clauses (a) to (e).

The Commission may issue an examination summons to a person under the age of 18 years, however the Commission will need to consider whether there are reasonable grounds to do so. This may include that the information, document or thing that the person could provide may be compelling and probative evidence, and it may not be practicable to obtain the information, document or thing in another way.

The person is not required to appear before the Commission if the requested document or other thing is provided to the Commission before the required time.

Clause 148 Examination summons—content

This clause specifies that the examination summons must require the person to appear before the Commission at a stated time and place, to give evidence, or produce or provide to the Commission any document or other thing in the summons that is within the person's possession or control.

The examination summons is required to outline what the person will be questioned on unless the commission believes that it would prejudice the conduct of the investigation or be contrary to the public interest. An examination summons is to be accompanied by a confidentiality notice and statement containing a number of matters outlined in subparagraphs (3)(b)(i) to (xiii). This includes a provision providing that if the person is a member of the Legislative Assembly, the person is not required to attend on a sitting day of the Legislative Assembly.

Clause 149 Examination summons—person under 16 years

This clause outlines that an examination summons directed at a person under the age of 16 years has no effect. The Commission can require a person under the age of 16 years to provide evidence of proof of age.

Clause 150 Examination summons—notice and immediate attendance

This clause outlines that an examination summons must be served on a person at least 7 days prior to the person being required to appear before the Commission. The Commission can issue an examination summons requiring a person's immediate appearance before the Commission. Under these circumstances, the Commission must consider whether there are reasonable grounds for requesting an immediate appearance of a person.

The Commission must have a view that any delay in the person's appearance is likely to result in the following:

- (a) evidence being lost or destroyed; or

- (b) the commission of an offence; or
- (c) the escape of the person who is summoned; or
- (d) serious prejudice to the conduct of the investigation.

Clause 151 Examination summons—service

This clause outlines that the Commission may apply to the Supreme Court for an order that an examination summons be served, where it is not reasonably practicable to serve an examination summons on a person under Clause 150. For example, where the person has no known physical address, but they can be located on social media.

Where the Supreme Court is satisfied that it is not reasonably practicable to serve an examination summons, an order may be made for the summons to be served in another way considered appropriate. Alternatively the Supreme Court may make an order for substituted service.

Clause 152 Examination—legal representation

This clause provides for a witness to be represented at an examination by a lawyer. Where the Commission makes a legal advice direction about a witness, at least 3 days must be given from the date the witness receives the direction. This is to allow the witness to seek legal advice or representation prior to the witness being required to appear before the Commission according to the examination summons.

In special circumstances, a person who is not a witness may be authorised by the commission to be represented by a lawyer as part of an examination of a witness.

Clause 153 Examination—provisions for vulnerable witnesses

This clause deals with provisions for vulnerable witnesses. Where the commission becomes aware that a witness is under 16 years of age, the person must be immediately released and not required to comply with the examination summons applying to them.

Witnesses under the age of 18 years are required to be accompanied by parent or guardian, or an independent person.

The Commission must provide an interpreter at the examination in circumstances where a witness does not have sufficient competency in the English language to be able to answer questions.

An independent person is required to be present during examinations of a witness where there is a belief that the witness has a mental impairment or medical evidence is provided in support of this.

Clause 154 Examination—commission may issue suppression order

This clause provides the Commission with the ability to issue a suppression order which prohibits or restricts the publication of information or evidence provided as part of a public examination. The Commission may issue a suppression order in the following reasons:

- (a) to prevent prejudice or hardship being caused to a person, including harm to their safety or reputation;
- (b) to avoid the possibility of any prejudice to a legal proceeding or an investigation by the Commission under this Bill.

A copy of the suppression order is required to be placed on the door of the public examination hearing room. A suppression order notice will also be published on the Commission’s website and provided to the person who is the subject of the suppression order.

Clause 155 Offence—contravene suppression order

This clause outlines that it is an offence if the requirements of the suppression order are not met.

Clause 156 Examination—first actions to be taken

This clause specifies a number of requirements that must be met prior to a witness appearing before the Commission and being asked questions or producing a document or thing. These are provided in paragraphs sub-clause (1)(a) to (e). The Commission is required to notify the witness of the nature of the questions, unless the Commission considers that this would prejudice the investigation or would not be in the public interest.

Clause 157 Examination—power to examine on oath

This clause provides for the Commissioner to administer an oath to a person, including staff or contractors/consultants of the Commission, or people summoned to appear before an examination hearing of the Commission.

The Commissioner can require people summoned before an examination hearing to take an oath and it is an offence for a person to fail to take an oath.

Clause 158 Examination—video recording and transcript

This clause outlines that the Commission is required to record the person’s appearance at the examination hearing on video. A copy of the video recording of the person’s evidence is to be provided to the person and any transcript created of the evidence, unless the commission believes that it may prejudice an investigation. Where the Commission determines not to provide a copy of the video recording and transcript to the person, the Commission is required to provide the person the opportunity to view the recording.

Clause 159 Examination—warrant to arrest witness who fails to appear

This clause provides that the Commission may issue a warrant to arrest a witness who fails to appear at an examination. The Commission may apply to a magistrate to issue an arrest for this purpose. The magistrate is required to be satisfied that the conditions outlined in sub-clause 2 are met. Where the magistrate is considering whether the issue of the arrest warrant is in the interests of justice, the magistrate must consider the criteria provided in paragraphs (3)(a) to (f). It is an offence for a person who does not attend an examination hearing as required in the examination summons.

Clause 160 Examination—executing warrant to arrest witness who fails to appear

This clause defines the procedures to be followed in exercising the power to issue a warrant under Clause 159. The warrant authorises a police officer to arrest a person and bring the person to appear before the Commission for an examination hearing. It also provides that the police officer is authorised to use necessary assistance and force to enter premises, and provides that the police officer must not enter a residential premises before 6am and after 9pm on any day unless the officer believes that it is necessary to enter to prevent the destruction of evidence or that it is not practicable to arrest the person at another time.

A police officer executing the warrant:

- must use not more than the minimum amount of force necessary to arrest the person and remove the person to the place stated in the warrant;
- must, before removing the person, explain to the person the purpose of the warrant;
- must bring the person immediately before the Commission; and
- if a person is under a legal disability—must inform a parent or guardian of the person of the arrest.

To avoid doubt, if, after arresting the person, the police officer believes on reasonable grounds that the person cannot be brought before the commission immediately, the police officer must immediately release the person.

Together, these provisions confirm that the power to arrest under Clause 159 is not a power of detention, and is only for the purpose of taking a person on an examination summons directly to the commission to give evidence.

Division 3.6.2 – Examinations—privilege

Clause 161 Examination—claiming privilege

This clause specifies that the claimant must appear before the Commission according to the examination summons. A person may claim that information in response to a specific question, a document or other thing is subject to privilege. The Commission is required to consider the claim for privilege. The Commission may withdraw the requirement to answer the question, produce the document or other thing. Alternatively, the Commission may refuse to withdraw the requirement and require the claimant to secure the document or other thing in a sealed envelope or otherwise and give it to the Commission. The Commission will not inspect the document or other thing.

Clause 162 Examination—application to Supreme Court to decide privilege

This clause outlines that where a claim for privilege is made, and a document or thing is secured, the Commission must give the secured document or other thing to the Supreme Court. This occurs if the Commission refuses to withdraw the requirement to give evidence at an examination hearing or to produce a document or other thing. Within 7 days, the Commission must apply to the Supreme Court for a determination of the claim. The Commission is required to give notice of the application to the claimant. The claimant is entitled to appear before the hearing of the application in the Supreme Court.

If within 7 days, the Commission does not make an application to the Supreme Court, the secured document or other thing must be returned to the claimant. If the claim is about a requirement to answer a question or provide information at an examination hearing, and the 7 days passes without the Commission applying to the Supreme Court, the requirement is taken to be withdrawn.

The Supreme Court is an appropriate arbitrator because they are a neutral third-party that have no vested interest in the Commission's investigation.

This approach is known as a bare claim of privilege.

Clause 163 Examination—Supreme Court to decide privilege

This clause specifies that the Supreme Court must determine whether information required to answer a question at an examination hearing is the subject of privilege. If the Supreme Court decides that the information is subject to privilege, an order must be made that the claimant is not required to provide the information to the commission. However if the Supreme Court decides that the information is not subject to privilege, an order must be made requiring the claimant to provide the information to the Commission.

Clause 164 Examination—offence to open secured document or other thing

This clause specifies that it is an offence to open a secured document or other thing if the conditions outlined in sub-clauses (2)(a) and (b) are met.

Clause 165 Examination—protection of witnesses and lawyers

This clause specifies that where a person is appearing before an examination hearing as a witness, they have the same protection and immunity as a witness has in a proceeding within the Supreme Court. Likewise, a lawyer representing a person at an examination hearing or assisting the commission, has the same protection and immunity as a lawyer has in representing a party in a proceeding within the Supreme Court.

Division 3.6.3 – Examinations—contempt

The division empowers the Commission to refer acts of contempt to the ACT Supreme Court (i.e. a person or witness refusing to provide information to the Commission, produce a document or other thing, or answer a question during an examination). The contempt will then be resolved via the Court's inherent power to punish acts of contempt, as if the act of contempt committed against the Commission were an act of contempt against the ACT Supreme Court. This classification allows the ACT Supreme Court to resolve a contempt charge under the *Court Procedure Rules 2006 (ACT)*, which bypasses a number of stages in the normal criminal process, such as investigation by the police, formal charging and criminal committal hearings.

This referral procedure to the ACT Supreme Court was chosen to secure the assistance of uncooperative witnesses within a proximate timeframe. If a contempt charge was resolved via normal criminal processes, the Commission would be required to wait long periods of time for trial in the ACT Supreme Court. This is undesirable as long delays risk stalling the Commission's investigations.

Most State and Territory Integrity Commissions use this expedited referral procedure to punish acts of contempt. This contrasts to the position in other States such as the Northern Territory, where conduct that could otherwise constitute an act of contempt is criminalised as a series of discrete criminal offences. This requires such Commissions to report the act of contempt to the police as a crime, after which the offender is charged, investigated and prosecuted via the normal criminal process.

The proposed procedure is unusual in the ACT. It is not used by other ACT inquisitorial bodies, such as the ACT Judicial Commission, Royal Commission or Boards of Inquiry. However, the Australian Crime Commission has power to utilise the ACT Supreme Court's contempt procedures.

A contempt power is necessary to pressure uncooperative witnesses to change their mind and provide information required to further the Commission's investigation.

The purpose of referring acts of contempt to the Supreme Court is to resolve contempt proceedings in a timely manner. This allows the Commission to return to its investigation far sooner than if the conduct was criminalised via the normal criminal process.

Clause 166 Contempt of commission

This clause deals with contempt of the Commission which occurs in the following circumstances:

- (a) if a person has been served with a preliminary inquiry notice and refuses or fails to produce a document or other thing as required by the notice;
- (b) where an examination summons has been served:
 - (i) the person fails to attend the examination as required by the examination summons;
 - (ii) when appearing as a witness at the examination—
 - A. the person refuses or fails to take an oath when required;
 - B. the person refuses or fails to answer a question relevant to the subject matter of the examination;
 - C. the person refuses or fails to produce a document or other thing as required by the examination summons;
- (c) the person gives evidence at an examination that the person knows is false or misleading in a material particular;
- (d) the person obstructs or hinders the Commissioner in the performance of the Commissioner's functions at an examination;
- (e) the person disrupts an examination; or
- (f) the person threatens a person present at an examination.

However, having said this, a person is not in contempt of the Commission, if they have a reasonable excuse.

Clause 167 Commission may apply to Supreme Court to deal with contempt

This clause provides for the Commission to apply to the Supreme Court for a matter of contempt of the Commission in relation to an examination. Prior to making the application, the Commission is required to advise the person about the proposed application and will be accompanied with reasons and supporting evidence. This will be provided to the person prior to the application being made.

Clause 168 Supreme Court to deal with contempt

This clause specifies that a contempt of the commission is to be dealt with by the Supreme Court in the same way that the Supreme Court deals with contempt.

Clause 169 Commission may withdraw contempt application

This clause provides for the Commission to withdraw an application of contempt at any time. This acts as a further incentive for uncooperative witnesses to change their mind and decide to comply with the Commission’s coercive powers.

Clause 170 Act or omission both offence and contempt

This clause outlines that a person is not liable to be punished more than once for the same act or omission. To avoid doubt, this means that if a person is liable to be proceeded against for an offence against this Bill or for contempt of the Commission or both, they will only be punished once.

Division 3.6.4 – Examinations—other provisions

Clause 171 Witnesses at examinations—provision of legal assistance

This clause provides that that a witness prescribed by regulation who is appearing before an examination hearing of the Commission, may be entitled to be paid an amount by the Territory for legal assistance in connection with their appearance in accordance with Supreme Court scale of costs or as prescribed by regulation.

Clause 172 Witnesses at examinations—reimbursement of expenses

This clause provides for a witness prescribed by regulation who is appearing before an examination hearing of the Commission, is entitled to be paid for the expenses of the appearance in accordance with Supreme Court scale of courts or as prescribed by regulation.

Clause 173 Examination—application of Criminal Code, ch 7

This clause confirms that an examination of the Commission is considered a legal proceeding for the purposes of the Criminal Code, Chapter 7 (Administration of justice offences). This clause engages the offence procedures in Chapter 7 such as perjury, falsifying evidence, failing to attend an examination and refusing to take an oath.

Part 3.7 – Commission - privilege

This part covers the application of privilege, including client legal privilege, journalist privilege and parliamentary privilege.

Clause 174 Meaning of *privilege*

This clause outlines the definition of privilege in the Bill, excluding parliamentary privilege. Under the Bill, privilege:

- (a) means any privilege a person is entitled to claim in a proceeding before a court or tribunal; and
- (b) includes public interest immunity under the *Evidence Act 2011*, section 130 (Exclusion of evidence of matters of state); but

- (c) does not include privileges against self-incrimination and exposure to civil penalty do not apply.

Clause 175 Privileges against self-incrimination and exposure to civil penalty do not apply

This clause removes the common law privilege against self-incrimination and civil liability that would otherwise allow a person to refuse to answer questions or produce documents or other things, or provide information as requested by the Commission during the examination stage.

This provision supports the Commissioner being able to fully consider all available information when exercising its function, while protecting the people providing the information.

Clause 176 Privileges against self-incrimination and exposure to civil penalty—use and derivative use immunity

This clause provides use and derivative use immunity in relation to evidence obtained because of Clause 175, which prevents persons from claiming the privilege against self-incrimination or exposure to civil penalty to refuse to comply with various coercive powers of the Commission.

Use immunity is conferred by sub-clause 1. This clause applies to evidence that was directly obtained under Clause 175. This is intended to apply to evidence such as:

- Answers to questions asked during an examination;
- Documents or other things produced to the Commission under summons.

Sub-clause 1 of this clause provides use immunity by rendering this evidence inadmissible in court proceedings, other than specified legal proceedings such as a proceeding for contempt of the Commission under Division 3.6.3 of the Bill, or an offence against Chapter 7 of the *Criminal Code 2002 (ACT)*. Sub-clause 1 further prohibits this evidence from being used in a disciplinary process or action unless the Commission has made a finding of serious corrupt conduct or systemic corrupt conduct in relation to the person.

Derivative use immunity is conferred by sub-clause 2. This applies to evidence that was indirectly obtained *as a result of* evidence obtained under Clause 175. Sub-clause 2 provides that such indirectly obtained evidence is inadmissible in civil or criminal proceedings against a person unless:

- (a) It could have been obtained without the evidence obtained under Clause 175; or
- (b) Its significance could have been appreciated without the evidence obtained under Clause 175.

This clause implements a human rights compliant approach to derivative use immunity as per the decision handed down in *Major Crime (Investigative Powers) Act 2004 [2008] VSC 381*.

Clause 177 Parliamentary privilege

This clause provides that if a claim for parliamentary privilege is made by a person entitled to make a claim, the Legislative Assembly will determine the matter.

An MOU may be established between the Speaker and Commissioner under Clause 56 to outline the roles and responsibilities where parliamentary privilege is identified during the course of the Commission's investigations.

Clause 178 Parliamentary privilege—taken to be waived for MLAs' declaration of interests etc

Members of the Legislative Assembly are required to make declarations of interests in accordance with Legislative Assembly Continuing Resolution 6. This clause provides that parliamentary privilege is taken to be waived in situations when the commission uses a declaration of interests for investigations and/or to make findings, opinions or recommendations on whether a Member of the Legislative Assembly has disclosed or not disclosed a matter.

This clause is modelled on section 122 of the NSW *Independent Commission Against Corruption Act 1988*.

Part 3.8 – Commission—recommendations

These clauses provide for the Integrity Commission to make recommendations about a particular matter which may arise out of an investigation.

Clause 179 Commission may make private recommendation at any time

This clause outlines who the Integrity Commission can make a private recommendation about a particular matter which may arise out of an investigation. This includes

- a) if the matter involves a Minister—the Chief Minister;
- b) if the matter involves a member of the Legislative Assembly—
 - (i) the Speaker;
 - (ii) the leader of the registered party to which the member belongs;
- c) if the matter involves a person who is a member of staff of an MLA—
 - (i) the Speaker;
 - (ii) the member of the Legislative Assembly employing the person;

- (iii) the leader of the registered party to which the member employing the person belongs;
- d) if the matter involves a public sector entity - the head of the public sector entity.

This recommendation must state the action the commission considers should be taken.

Clause 180 Commission may require response to private recommendation

This clause provides the Commission with the discretion to determine whether a response is required to a private recommendation. It is a legislative requirement for the person to respond to the Commission's request under this clause. The Commission may request that the person advise whether they intend on implementing the Commission's recommendation. If the person does not intend on implementing the Commission's recommendation, the Commission can request reasons.

Clause 181 Commission may make private recommendation public

This clause provides that the commissioner may make a recommendation public, in an investigation report or annual report, if a report under Clause 180 has not been received within the stated time or has received the report and considers the person has failed to take appropriate action in relation to a private recommendation. After considering any reasons stated in the report for not taking the recommended action, the commission may make a private recommendation public in an investigation report or annual report.

Part 3.9 – Commission—completing an investigation and investigation reports

This part outlines how investigations will be completed with the development of an investigation report through to releasing and the tabling the report.

Clause 182 Investigation reports

This clause provides that the Commission will prepare an investigation report after completing an investigation. The report may include a range of things including findings, opinions and recommendations and associated reasons.

Clause 183 Investigation report—not to include findings of guilt etc or recommendations about prosecution

This clause specifies what must not be included in an investigation report. This includes a finding or opinion that a person is guilty or has committed, or is about to commit, an offence against a law in force in the ACT. The investigation report also cannot include that a person has engaged, or is about to engage in conduct that would be reasonable grounds for termination action against the person. In addition, the report cannot indicate that the person should be prosecuted for an offence or by subjected to a termination action following the completion of the investigation. Clause 183(2) outlines that a finding or

opinion that a person has engaged, or about to engage in corrupt conduct is not considered a finding or opinion.

Clause 184 Investigation report—not to include finding of corrupt conduct unless serious or systemic

This clause specifies that an investigation report must not include any finding of corrupt conduct unless it is considered serious or systemic corrupt conduct by the Commission. This includes a finding that a stated person has engaged, or is about to engage in corrupt conduct unless the corrupt conduct is either serious or systemic conduct.

The Commission may include a finding or opinion about conduct of a person that may be corrupt conduct even if the statement of the finding (or opinion) does not describe the conduct as corrupt conduct.

This provision is based on the NSW ICAC section 74BA which implements the High Court's decision in *Cunneen and Ors v Independent Commission Against Corruption*.

Clause 185 Investigation report—not to include information that may prejudice proceeding etc

This clause specifies that an investigation report must not include any information that would either compromise another existing investigation or prejudice a criminal investigation, criminal proceeding or other legal proceeding known to the Commission.

Clause 186 Investigation report—not to include information identifying certain people

This clause places some privacy restrictions on the investigation report which must not include any information that would identify a person who is not the subject of an adverse comment or opinion. This is subject to some conditions that the Commission must consider. The Commission may consider that it is in the public interest to identify a person in an investigation report who is not the subject of a particular matter. As part of making this assessment, the Commission will consider whether identifying the particular individual would cause unreasonable damage to the person's reputation, safety or wellbeing.

Clause 187 Investigation report-not to include information contrary to the public interest

This clause specifies that the Commission must not include information in an investigation report if the commission considers that the disclosure of such information would be contrary to the public interest. The disclosure of information may be contrary to the public interest only if the disclosure would be likely to:

- unreasonably infringe an individual's right to privacy and reputation, or any other right under the *Human Rights Act 2004*; or
- disclose a trade secret, or the business affairs or research of an entity; or

- prejudice relations between the ACT government and another government.

An exception to this is if the commission is satisfied that the substance of information mentioned in sub-clause 1 is public knowledge.

Clause 188 Investigation report—comments on proposed reports

This clause specifies that if the commission is preparing an investigation report, the commission must provide the proposed investigation report, or parts of it, to the relevant person or public sector entity, seeking comments. The Commissioner must consider the comments and whether or not to include the comments into the report or to amend the report.

Clause 189 Investigation report—presentation to the Legislative Assembly

This clause outlines the requirements to present investigation reports to the Legislative Assembly. If the Legislative Assembly is sitting when the investigation report is released, the report must be presented on the next sitting day. Alternatively, if the Legislative Assembly is not sitting when the investigation report is released, arrangements will be made for the report to be distributed to all Members of the Legislative Assembly out of session and then formally presented on the next sitting day. This process does not apply to a confidential report as there are separate presentation requirements for this type of report.

Clause 190 Investigation report—publication on website

This clause states that the commission must publish the investigation report on the commission’s website after providing the report to the Speaker.

Clause 191 Investigation report—Ministerial response about ACT public service entity

This clause applies in the event that an investigation report is presented to the Legislative Assembly under section 187 and the report made a finding of serious or systemic corrupt conduct in relation to an ACT public service entity. This clause specifies the process that must be followed, which includes the Minister responsible providing a ministerial response within 4 months.

Clause 192 Confidential investigation report

This clause specifies that the Commission may exclude some information from an investigation report, as this is considered confidential and sensitive information. When this occurs, the Commission must prepare a separate confidential report which is provided to the relevant Assembly Committee which has oversight of the Integrity Commission.

Part 3.10 – Commission—secrecy and information sharing

This part outlines the secrecy and information sharing requirements in relation to the work of the Commission.

Clause 193 Legal advice directions

This clause specifies that the Commission can direct a person not to seek legal advice or representation about a relevant document from a lawyer, if there are reasonable grounds that investigation would be prejudiced. This may occur when the lawyer is:

- (a) a witness in an examination;
- (b) the representative of another witness in an examination;
- (c) involved, or suspected of being involved, in a matter being investigated by the commission or the inspector;
- (d) representing a person involved, or suspected of being involved, in a matter being investigated by the commission or the inspector.

Sub-clause 1 lists the documents that are ‘relevant document’ for the purpose of the clause. The *Legislation Act 2001* outlines how the legal advice direction document may be served.

The purpose of this section is to prevent a witness from seeking legal advice from a lawyer who has a conflict of interest due to involvement with a Commission investigation.

Clause 194 Offence—fail to comply with legal advice direction

This clause specifies that an offence is committed if a person does not comply with the legal advice direction. The offence does not apply if the person has a reasonable excuse why they did not comply with the direction.

Clause 195 Public sector entity may disclose information to commission

This clause provides the head of a public sector entity may disclose any information held by the public sector entity to the commission if the head considers the disclosure appropriate and that the information is relevant to the exercise of the functions of the commission.

Clause 196 Disclosure of information by commission

This clause facilitates the cooperation and referral between the commission and other oversight agencies and investigative entities by authorising the sharing of relevant information necessary to appropriately accept, respond or deal with the matter.

This clause aims to ensure a coordinated approach to the oversight of integrity in the ACT.

This clause further specifies that the Commission must not divulge a transcript of an examination or a video recording of an examination to certain entities, such as a law enforcement agency. The purpose of this prohibition is to protect a person’s right to a fair trial. During an examination a witness will likely be compelled to answer questions about their involvement in suspected corrupt conduct, and what their ‘excuse’ is. These answers

will likely form the basis of the person's defence to any criminal charges later laid by the police.

Providing a transcript or video recording of these answers to entities such as law enforcement agencies may therefore disclose the accused's defence case to the Director of Public Prosecutions (DPP). This may provide the DPP with a forensic advantage at trial, because the DPP has advance notice of a person's legal defence and can prepare accordingly. This is inappropriate as the defence has no general duty to disclose their case in such fine detail to the prosecution.

Clause 197 Information about investigation may be given to certain people

This clause outlines who the Integrity Commission can give information about a particular matter which may arise as part of an investigation. This includes the following:

- a) if the investigation involves a Minister—the Chief Minister;
- b) a member of the Legislative Assembly—
 - (i) the Speaker; and
 - (ii) the leader of the registered party to which the member belongs;
- c) if the matter involves a person who is a member of staff of an MLA—
 - (i) the Speaker; and
 - (ii) the member of the Legislative Assembly employing the person; and
 - (iii) the leader of the registered party to which the member employing the person belongs;
- d) if the investigation involves a public sector entity—the head of the public sector entity.

The Commission may share any information to these individuals outlining any action that the Commission has undertaken and any recommendation that the Commission considers appropriate to be taken. In providing this information, the Commission is required to consider the factors specified in paragraphs (3)(a) to (g) to determine whether it is appropriate to provide this information in relation to a particular matter.

The Commission is required to comply with the *Territory Records Act 2002* similar to other Officers of the Legislative Assembly.

Clause 198 Commission must give non-disclosure notice when giving information

This clause applies if the commission gives a person information under Clause 72, Clause 73, Clause 74, Clause 188, Clause 197 and Clause 212. The Commission must also give the person a non-disclosure notice about the information setting out that disclosure of the information may be an offence and penalties may apply. The notice will also set out the kinds of disclosures that are permitted and prohibited.

Clause 199 **Meaning of *permitted disclosure* of restricted information—Pt 3.10**

This clause states when a person may make a permitted disclosure of restricted information and to whom they can make the disclosure to.

Clause 200 **Non-disclosure notices—expiry**

This clause provides that a non-disclosure notice will expire on the earliest of the following:

- If the commission revokes the non-disclosure notice, the day the commission gives the person notice;
- 3 years after the day the non-disclosure notice was issued.

Clause 201 **Offence—disclose information received from the commission**

This clause creates an offence of 100 penalty units, 1 year imprisonment or both. A person commits an offence if they are given information under Clause 72, Clause 73, Clause 74, Clause 188, Clause 197 and Clause 212 or given a non-disclosure notice about the information and subsequently discloses the information.

A person will not commit an offence under this clause if the disclosure is a permitted disclosure and when making the disclosure the person tells the recipient of the disclosure and that this section applies to any subsequent disclosure. The recipient must be given a copy of the non-disclosure notice.

The clause is an important safeguard that deters complainants from inappropriately disclosing information that may prejudice the conduct of an investigation. This offence is modelled off a similar offence imposed by the Victorian IBAC.

Clause 202 **Evidence in court proceedings**

This clause gives a court discretion to compel the Commission to produce evidence gathered during an investigation. A court can compel the Commission to produce evidence for the purpose of a proceeding for an offence, where the court is satisfied that the interests of justice require production. The court must give the Commission a reasonable opportunity to appear and make submissions in relation to why the evidence should not be produced before making an order.

This clause confirms that the Commission can be compelled to disclose information to a court under Clause 196(3) and (4). The provision is intended to apply in situations where a defendant in a legal proceeding subpoenas the Commission to produce a transcript of an examination that contains exculpatory evidence relevant to their defence.

The clause is modelled from section 156 of the Northern Territory *Independent Commissioner Against Corruption Act 2017 (NT)*.

Part 3.11 – Commission—outcomes

Clause 203 Outcome of prosecutions and termination action to be published

This clause provides that the Commission must publish the outcome of the prosecution or the termination action on the Commission’s website.

Clause 204 Exoneration guidelines

This clause provides for the Commission to make guidelines in relation to how the Commission handles the damage to a person’s reputation as a result of the Commission’s work. The exoneration guidelines are a notifiable instrument.

Chapter 4 Commission—reporting

Part 4.1 – Commission—monthly reports to inspector

Clause 205 Commissioner—monthly reports to inspector

This clause lists the matters that the commissioner must report to the Inspector at the end of each month.

Part 4.2 – Commission—special reports

This part covers the publication of special reports.

Clause 206 Special Reports

This clause specifies that the commission may give a special report to the Legislative Assembly on any matter relating to the performance of its statutory responsibilities including administrative and general policy matters.

Clause 207 Special report—not to include findings of guilt etc or recommendations about prosecution

This clause specifies what must not be included in a special report. This includes a finding or opinion that a person is guilty or has committed, or is about to commit, an offence against a law in the ACT. The special report also cannot include that a person has engaged, or is about to engage in conduct that would be reasonable grounds for disciplinary action against the person. In addition, the report cannot indicate that the person should be prosecuted for an offence or by subjected to a termination action following the completion of the investigation. Sub-clause 2 outlines that a finding or opinion that a person has engaged, or about to engage in corrupt conduct is not considered a finding or opinion.

Clause 208 Special report—not to include finding of corrupt conduct unless serious or systemic

This clause specifies that a special report must not include any finding of corrupt conduct unless it is considered serious or systemic corrupt conduct by the Commission. This includes a finding that a stated person has engaged, or is about to engage in corrupt conduct unless the corrupt conduct is either serious or systemic conduct. The Commission may include a

finding or opinion about conduct of a person that may be corrupt even if the statement of the finding (or opinion) does not describe the conduct as corrupt conduct.

Clause 209 Special report—not to include information that may prejudice proceeding etc

This clause specifies that a special report must not include any information that would either compromise another existing investigation or prejudice a criminal investigation, criminal proceeding or other legal proceeding known to the commission.

Clause 210 Special report—not to include information identifying certain people

This clause places some privacy restrictions on the special report which must not include any information that would identify a person who is not the subject of an adverse comment or opinion. This is subject to some conditions that the Commission must consider. The Commission may consider that it is in the public interest to identify a person in a special report who is not the subject of a particular matter. As part of making this assessment, the Commission will consider whether identifying the particular individual would cause unreasonable damage to the person's reputation, safety or wellbeing.

Clause 211 Special report—not to include information contrary to the public interest

This clause specifies that the Commission must not include information in a special report if the commission considers that the disclosure of such information would be contrary to the public interest. The disclosure of information may be contrary to the public interest only if the disclosure would be likely to:

- unreasonably infringe an individual's right to privacy and reputation, or any other right under the *Human Rights Act 2004*; or
- disclose a trade secret, or the business affairs or research of an entity; or
- prejudice relations between the ACT government and another government.

An exception to this is if the commission is satisfied that the substance of information mentioned in sub-clause 1 is public knowledge.

Clause 212 Special report—comments on proposed reports

This clause specifies that if the commission is preparing a special report, the commission must provide the proposed special report, or parts of it, to the relevant person or public sector entity, seeking comments. The Commissioner must consider the comments and decide whether or not to include the comments into the report or to amend the report.

Clause 213 Special report—presentation to Legislative Assembly

This clause outlines the requirements to present special reports to the Legislative Assembly. If the Legislative Assembly is sitting when the special report is completed, the report must be presented on the next sitting day. Alternatively, if the Legislative Assembly is not sitting

when the special report is completed, arrangements will be made for the report to be distributed to all Members of the Legislative Assembly out of session and then formally presented on the next sitting day. This process does not apply to a confidential report as there are separate presentation requirements for this type of report.

Clause 214 Special Report—publication on website

This clause states that the commission must publish the special report on the commission's website as soon as practicable after providing the report to the Speaker. This does not apply to a confidential special report. If the Speaker is unavailable, Clause 303 specifies who the special report must be given to.

Clause 215 Special report—Ministerial response about ACT public service entity

This clause applies in the event that a special report is presented to the Legislative Assembly under Clause 213 and the report made a finding of serious or systemic corrupt conduct in relation to an ACT public service entity. This clause specifies the process that must be followed, which includes the Minister responsible providing a ministerial response within 4 months.

Clause 216 Confidential special report

This clause specifies that the Commission may exclude some information from a special report, as this is considered confidential and sensitive information. When this occurs, the Commission must prepare a separate confidential report which is provided to the presiding member of the relevant Assembly Committee which has oversight of the Integrity Commission.

Part 4.3 – Commission—annual reports

Clause 217 Meaning of *commission annual report*

This clause provides that commission annual report means a report under section 7A of the *Annual Reports (Government Agencies) Act 2004*.

Clause 218 Commission annual report—content

This clause specifies what the commission annual report must include.

Clause 219 Commission annual report—not to include findings of guilt etc or recommendations about prosecution

This clause specifies what should not be included in an annual report. This includes a finding that a stated person is guilty of an offence against a Territory law, or that a stated person has engaged in conduct that would be reasonable grounds for serious disciplinary action. It also include a recommendation that a stated person be, or an opinion that a stated person should be prosecuted for an offence or be the subject of serious disciplinary action.

Clause 220 Commission annual report—not to include finding of corrupt conduct unless serious or systemic

This clause specifies what should not be included in an annual report. This includes a finding that a stated person has engaged, is engaging or is about to engage in corrupt conduct unless the corrupt conduct is serious or systemic. It does provide that the commission may include a finding or opinion about conduct of a person that may be corrupt conduct even if the statement of the finding (or opinion) does not describe the conduct as corrupt.

Clause 221 Commission annual report—not to include information that may prejudice proceeding etc

This clause specifies that an annual report must not include any information that would either compromise another investigation or prejudice a criminal investigation, criminal proceeding or other legal proceeding known to the commission. This protects the right to a fair trial.

Clause 222 Commission annual report—not to include information identifying certain people

This clause places some privacy restrictions on the annual report which must not include any information that would identify a person who is not the subject of an adverse comment or opinion. This is subject to some conditions that the Commission must consider. The Commission may consider that it is in the public interest to identify a person in an annual report who is not the subject of a particular matter. As part of making this assessment, the Commission will consider whether identifying the particular individual would cause unreasonable damage to the person's reputation, safety or wellbeing.

Clause 223 Commission annual report—not to include information contrary to the public interest

This clause states that the commission must not include information in an annual report if the commission considers that the disclosure of the information would, on balance, be contrary to the public interest. The clause also states what kinds of disclosure may be contrary to the public interest. However, the commission may include the information in the annual report if it is satisfied the substance of the information is public knowledge.

Clause 224 Commission annual report—comments on proposed reports

This clause addresses comments raised in the Legislative Assembly Scrutiny Report 25 and protects an individual's human rights. This clause provides that when the Commission is preparing its annual report, the Commission must provide a copy, or part thereof, of the report if it relates to a person (then the proposed report must be provided to that person) or a public sector entity (then the proposed report must be provided to the head of that public sector entity) and gives the individual an opportunity to comment on the proposed

report. This clause also provides the requirements to which the Commission must meet when providing a copy of the proposed annual report to an individual.

Chapter 5 Inspector of the commission

Chapter 5 creates a statutory role whose function is to oversee the Integrity Commission, particularly to assess and report the commission's legislative compliance. The inspector will be able to access the Integrity Commission's records to ensure that they are acting within their legislative power. This role will also provide crucial oversight to ensure very intrusive powers such as telecommunications intercept activities are not being abused. The Inspector is appointed for a period of up to 7 years and must themselves be someone who would be qualified to be appointed as the Integrity Commissioner.

Part 5.1 – Inspector of the commission

Division 5.1.1 – Inspector—independence and functions

Clause 225 Inspector—officer of the Legislative Assembly

This clause establishes the Inspector as an Officer of the Legislative Assembly. This clause is based upon those in the legislation of other Officers of the Legislative Assembly including the Auditor-General, Ombudsman and Electoral Commissioner.

Clause 226 Inspector—independence

Based on similar provisions for the Commissioner (Clause 22) and the other Officers of the Legislative Assembly, this clause establishes that, subject to this Act and to other Territory laws, the Inspector has complete discretion in the exercise of the inspector's functions.

Clause 227 Inspector—functions

The Inspector's key functions are to:

- assess and report on the commission's compliance with this Act and any memorandums of understanding or agreements entered into under this Act;
- receive, investigate and assess complaints about the commission and members of staff of the commission; and
- make recommendations to the commission and other public bodies about practices and procedures in relation to the performance of functions under this Bill.

The function of making recommendations offers a valuable opportunity for the Integrity Commission to receive independent suggestions for improvement.

Clause 228 Inspector—powers

This clause addresses recommendation 44 of the 2018 Select Committee and sets out the powers available to the inspector. The inspector:

- (a) may investigate the operations of the commission or conduct of the commissioner or commission staff;
- (b) is entitled to full access to records of the commission;

- (c) may require the commissioner or commission staff to provide information or produce documents relating to inspector investigations;
- (d) may refer matters to another public sector entity or public official; and
- (e) may recommend disciplinary action or criminal prosecution.

Division 5.1.2 – Inspector—appointment

This Part of the Bill concerns the process for commencing, suspending and ending the appointment of the Inspector and if necessary, acting inspector. These provisions are based on similar provisions for the Integrity Commissioner and the other Officers of the Legislative Assembly.

Clause 229 Inspector—ombudsman to be inspector until other appointment made

This clause states that the ombudsman is the inspector until an appointment is made under Clause 230. The ACT Ombudsman is well placed to be the Inspector as these functions are complementary and consistent with the ACT Ombudsman’s existing role. There are challenges in establishing and appointing a further statutory officer in a small jurisdiction like the ACT to provide oversight over the Commission, particularly in the early stages of the Commission commencing operations.

The Inspector’s functions substantially correspond to the functions of the ACT and Commonwealth Ombudsman, which includes legislative compliance, complaints about the Commission and making recommendations about practices and procedures in relation to the performance of the Commission under the enabling legislation. As a result there is significant merit in the ACT Ombudsman undertaking the role of the Inspector. This is considered an effective arrangement which means that oversight of the Commission’s intrusive powers and legislative compliance would be contained within the same body. If the ACT Ombudsman is not the Inspector, the Commission would be oversights by two separate and distinct bodies.

The proposal of the ACT Ombudsman undertaking the role of the Inspector was raised with the 2018 Select Committee by the ACT Ombudsman as part of the Select Committee’s hearings.

Given the small size of the ACT and the limited resources, the Territory benefits from the Commonwealth Ombudsman being the ACT Ombudsman. A similar arrangement also applies to the Commonwealth Information Privacy Commissioner who is also the ACT Information Privacy Commissioner.

The proposal for the ACT Ombudsman to be the Inspector has been carefully considered and it has decided that, on balance, the proposal has sufficient merit. The proposal would be the most cost effective and efficient arrangement for the Territory at this time.

Under the Bill, the ACT Ombudsman will be the Inspector until such time as the Speaker decides to make another appointment. This course of action would be Speaker's decision.

While the 2018 Select Committee did not make a specific recommendation about this proposal, there is still appears merit in the Territory pursuing such a model, particularly during the initial setup phase of the commission.

The model of the ACT Ombudsman undertaking the role of the Inspector is considered the most cost effective approach particularly in the short-term as any recruitment costs would be avoided, as would unexpected salary costs beyond the scope of the existing budget. This model ensures that the Inspector would be ready to commence work as soon as the Integrity Commissioner is appointed.

In the future, if there is a view by the Legislative Assembly that model is not ideal or that it is not working as effectively according to the legislative provisions, it would be the Speaker's prerogative to proceed with appointing an Inspector which would mean that the ACT Ombudsman would no longer be required to undertake the Inspector's functions.

Clause 230 Inspector—appointment

Should the Speaker decide that the ACT Ombudsman is no longer required to be the Inspector, an appointment can be made under this Clause 230. This approach is modelled on the approach under the *Ombudsman Act 1989*.

This clause provides that the Speaker may, on behalf of the Territory, to appoint an inspector, after a detailed consultative process. It is based on appointment provisions for the Integrity Commissioner (Clause 25) and the other Officers of the Legislative Assembly.

The Speaker may make the appointment in accordance with an open and accountable selection process. The Speaker must also consult with the Chief Minister, the Leader of the Opposition and the leader of any other party that is represented in the Assembly by at least two Members. The relevant Assembly committee must be consulted.

The Speaker must not appoint a person as the inspector unless the Speaker is satisfied that the person has extensive knowledge of, and experience in—

- criminal investigation or criminal adjudication; or
- law enforcement or the conduct of investigations; or
- public administration, governance or government

The Legislative Assembly must approve the appointment, by resolution passed by a majority of at least 2/3rd of the members.

Reflecting the independence of the inspector's role, the Speaker must consult with the relevant Assembly committee on the person's appointment. The relevant Assembly committee is defined in the Dictionary as the committee of the Legislative Assembly whose functions include the examination of matters related to corruption and integrity in public administration.

An appointment is a disallowable instrument ensuring that the appointment reflects the view of and is approved by, the Assembly. Eligibility for appointment is dealt with in Clause 231.

Clause 231 Inspector—eligibility for appointment

This clause provides that the Speaker may appoint a person as Inspector with specific background and experience reflecting the requirements of the role. The person must have been:

- a judge of the Supreme Court; or
- a judge of the Supreme Court of a State or another Territory; or
- a judge of the Federal Court; or
- a justice of the High Court; or
- a lawyer for at least 10 years.

The clause includes a further limitation on who can be appointed by preventing those with certain backgrounds from being appointed. The Speaker must not appoint a person as the inspector if the person—

- is or has been the commissioner; or the CEO of the commission;
- is or has been a member of the Legislative Assembly; or the Parliament of the Commonwealth; or the legislature of a State or another Territory; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a public servant; or
- is or has, in the 5 years immediately before the day of the proposed appointment, been a member of—
 - a registered party; or
 - a political party registered under a law of the Commonwealth, a State or another Territory; or

- a political party; or
- has been convicted –
 - in the ACT, of an offence punishable by imprisonment for at least 1 year; or
 - outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

The purpose of this limitation is to ensure that the person who fulfils the role is free from any actual or perceived conflict of interest, given the unique position they hold, and to ensure public confidence in this new institution.

Public servant is defined by the *Legislation Act 2001* to mean a public servant employed in the ACT public service. The constitution of the public service is dealt with by section 12 of the *Public Sector Management Act 1994* which provides that members of the ACT Public Service are—

- the head of service;
- the directors-general;
- the executives;
- officers; and
- other employees.

In effect this means that statutory office holders, such as the President, other Commissioners at the Human Rights Commission, or members of the ACT Civil and Administrative Tribunal are not public servants within the definition and so can be appointed to the position of Inspector.

Clause 232 Inspector—selection criteria and process

Before the Speaker appoints a person under Clause 230, the Speaker must make a determination regarding the selection criteria and process for selection for the inspector appointment.

In making the determination, the Speaker must consult with the Chief Minister, the Leader of the Opposition; the leader of any other party that is represented in the Assembly by at least two Members and the relevant Assembly committee. The Speaker must also have regard to any requirements for appointment as a resident judge under the *Supreme Court Act 1933*, section 4AA (requirements of appointment – resident judges) and ensure the selection process is open and accountable.

This determination is a disallowable instrument.

This clause defines ‘an inspector selection criteria and process determination’.

Clause 233 Inspector—length of appointment

This clause states that the length of appointment cannot exceed 7 years.

Clause 234 Inspector—terms of appointment

This clause states the terms of appointment for the inspector.

Clause 235 Inspector—oath or affirmation of office

This clause states that a person appointed as the inspector must take an oath or make an affirmation of office. This must be taken before the Speaker.

Clause 236 Inspector—disclosure of interests

This clause requires the Inspector to disclosure personal and financial interests to the Speaker. These provisions are consistent with those applied to the Integrity Commissioner (Clause 28, Clause 29 and Clause 30) and to other Officers of the Legislative Assembly. The Inspector must take all reasonable steps to avoid a conflict of interest, this is in addition to the obligation for all public servant’s under the *Public Sector Management Act 1994* (PSM Act) and the *Public Sector Management Standards 2016*. As the Inspector is a public sector member under the PSM Act, the duty to avoid conflict of interests is also covered here. This is similar to other statutory office holders.

Clause 237 Inspector—must not do inconsistent work etc

This clause requires the Inspector not have paid employment or engage in unpaid activity that is inconsistent with their functions. The inclusion of this clause acknowledges the role of the Inspector may be exercised in a part-time or per diem capacity depending on the workload requirements to ensure the efficient and effective function of the Act. It allows the person appointed to engage in employment or unpaid work, as long as there is no inconsistency with their functions as the Inspector. This clause is consistent with provisions applied to other Officers of the Legislative Assembly.

Clause 238 Inspector—resignation

This clauses provides that the inspector may resign by written notice to the Speaker.

Clause 239 Inspector—retirement

This clause deals with how the appointment of the Inspector may end including through retirement. This clause allows the Speaker to retire the Inspector on grounds of mental or physical incapacity of a kind that substantially affects the performance of the Inspector’s

functions. The Inspector must consent and the retirement is subject to the superannuation circumstances of the Inspector.

Clause 240 Inspector—suspension generally

This clause provides that the Speaker may suspend the Inspector. The clause sets out the process the Speaker must follow. It also provides that the Inspector's salary and allowances are not affected by the suspension.

Clause 241 Inspector—suspension—relevant Assembly committee notice and meetings

This clause provides that if the Speaker suspends the Inspector, a written notice must be given to the relevant Assembly committee.

Clause 242 Inspector—ending suspension

This clause sets out the situations when suspension ends.

Clause 243 Inspector—ending appointment

The Inspector's appointment can only cease if it expires, retirement under Clause 239 or under this clause. This clause details a comprehensive process for how the Speaker may end the Inspector's appointment, which is designed to provide the Inspector procedural fairness and is based on that used for the Integrity Commissioner (Clause 38) and for other Officers of the Assembly.

The grounds for ending an appointment are

- for misbehaviour; or
- for failure to take all reasonable steps to avoid being placed in a position where conflict of interest arises during the exercise of the commissioner's function; or
- for physical or mental incapacity, if the incapacity substantially affects the exercise of the inspector's functions; or
- the inspector becomes bankrupt or personally insolvent.

The process requires that the Inspector is provided an opportunity respond in the event that the motion is moved in the Assembly to end their appointment.

The Speaker may also end the inspector's appointment if the inspector is absent from duty, except on leave granted by the Speaker, for 14 consecutive days or for 28 days in any 12 months.

Clause 244 Inspector—leave of absence

Clause 244 allows the Speaker to grant the Inspector a leave of absence. If the Ombudsman holds the office of the inspector under Clause 229 and is granted a period of leave of absence under the *Ombudsman Act 1989*, the inspector is taken to have been granted leave of absence for the same period.

Clause 245 Inspector – acting inspector – acting ombudsman

This clause applies if the ombudsman holds the office of the inspector under Clause 229. A person acting as ombudsman under the *Ombudsman Act 1989* during an absence of unavailability of the ombudsman may act in the office of inspector under this Act during the absence or unavailability.

Clause 246 Inspector—acting inspector-generally

This clause states how an Acting Inspector can be appointed, including that the Inspector is able to appoint an Acting Inspector. Ordinarily the *Legislation Act 2001* provides that the person making the appointment is also responsible for acting appointments. In the case of the Inspector it is appropriate that they be able to appoint a person to act in their place while they are on approved leave given the particular position of trust they are placed in and the nature of the role. This is generally the case for other Officers of the Legislative Assembly. The ability to appoint a person to act in the position is only available where leave is approved by the Speaker and the Inspector has consulted with the Speaker about their proposed acting appointment. It is designed primarily to cover ordinary leave that any employed person would take from time to time, for example recreational leave. In circumstances where there is no permanent appointee, it is the Speaker who will make the acting appointment; for which they must consult the relevant Assembly committee.

This provision is similar to that of the Commissioner.

Clause 247 Inspector—arrangement for another person to exercise functions

This clause provides that the Speaker may make arrangements for a person (however described) responsible for exercising functions under a Commonwealth or State law that substantially corresponds to the functions of the inspector, to exercise 1 or more of the functions of the inspector.. The clause also provides with whom the Speaker must consult with in making the arrangements.

Division 5.1.3 – Inspector—staff**Clause 248 Meaning of staff of the inspector**

This clause defines the meaning of *staff of the inspector*, including staff under Clause 249, and consultants and contractors under Clause 250.

Clause 249 Inspector's employed staff

This clause allows the Inspector to employ staff, and provides for staff of the Inspector to be employed under the *Public Sector Management Act 1994*, which regulates the employment of ACT public sector employees. The clause also provides that if the Ombudsman holds the office of the inspector, and the Commonwealth ombudsman is the ombudsman, then staff must be appointed or employed under the *Public Service Act 1999* (Cwlth).

Likewise, if a Commonwealth authority is employing staff under this clause because of an arrangement under Clause 247, then staff must be employed under the *Public Service Act 1999* (Cwlth). If a State authority is employing under this clause because of an arrangement under Clause 247, then the staff must be employed under an Act that substantially corresponds to the *Public Sector Management Act 1994*.

Clause 250 Inspector's consultants and contractors

This clause allows the Inspector to engage contractors or consultants.

Clause 251 Staff of the inspector—eligibility for appointment

The Inspector cannot appoint a person as a staff member of the inspector if that person is not suitable. This clause provides the Inspector with the ability to ask a prospective staff member to undertake the following to assist in determining whether a person is suitable to be a member of staff of commission:

- provide a police certificate;
- declare personal interests the inspector considers relevant;
- undergo a medical or psychological assessment;
- make a statutory declaration in relation to matters determined by the inspector to be relevant to the person's suitability;
- anything else the Inspector considers is necessary to decide whether a person is suitable.

The inspector must make guidelines (personal interest guidelines) about subclause (2) (b). The personal interest guidelines are a notifiable instrument and must be published on the inspector's website.

Clause 252 Staff of the inspector—not subject to direction from others

This clause provides for the independence of Inspector's staff, who may only be directed by the Inspector in the exercise of the inspector's functions.

Clause 253 Delegation by inspector

This clause details how the Inspector may delegate their functions. The Inspector can delegate their functions to a member of the staff of the inspector or another person. If the Inspector decides to delegate their functions to another person who is not a member of

staff of the inspector without being satisfied that the function needs to be exercised by a person who is not a member of staff of the inspector.

Clause 254 Inspector—other arrangements for staff and facilities

This clause allows the Inspector to arrange with the Head of Service to use the services of a public servant or Territory facilities. The inclusion of this provision supports the Inspector in the efficient and effective management of its functions, particularly regarding administrative, secretariat or specialised public service staff support or expertise.

The Inspector can also arrange with the Speaker to use Territory facilities within the Assembly precincts, such as the Legislative Assembly hearing rooms.

Clause 255 Inspector—arrangements with other entities

This clause allows the Inspector to enter into an arrangement with another entity that will assist the Inspector in relation to the exercise of their functions.

Part 5.2 – Inspector—investigating complaints about the commission

Clause 256 Meaning of *commission personnel*—Part 5.2

This clause defines the term ‘commission personnel’ as the Commissioner or a member of the commission staff, and includes a person who was formerly appointed to these positions.

Clause 257 Inspector—making a complaint to the inspector

This clause enables a person to make a complaint to the Inspector about the conduct of the Integrity Commission or the Commission personnel in respect of the performance or exercise, or failure to perform or exercise, or purported performance or exercise, of the duties, functions or powers of the Integrity Commission or the commission personnel. It specifies that a complaint may be made on the basis that the conduct was contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; based on improper motives; an abuse of power; or otherwise improper.

Clause 258 Inspector—must keep complainant informed

This clause states what an inspector must tell a complainant about if they receive a complaint under Clause 257. It also states that the inspector must not tell the complainant about a matter if it would be likely to adversely affect a person’s safety, an investigation under this Act, or would identify another person who has given information in relation to the matter under investigation; or could allow the identity of another person who has given information in relation to the matter under investigation to be worked out; or would be contrary to a law in force in the Territory.

Clause 259 Inspector—must give non-disclosure notice when giving information

This clause places a similar obligation on the Inspector as on the Commissioner to give a non-disclosure notice setting out particular information.

Clause 260 Meaning of *permitted disclosure* of information—Part 5.2

This clause sets out what is considered a permitted disclosure under this Part.

Clause 261 Non-disclosure notices—expiry

This clause states the expiry conditions of a non-disclosure notice.

Clause 262 Offence—disclose information received from the inspector

This clause provides that it is an offence for someone to disclose information received under Clause 258, if they have been given a non-disclosure notice about the information, the non-disclosure notice has not expired and they subsequently discloses the information. The offence is of 100 penalty units, imprisonment for 1 year or both.

Clause 263 Inspector—investigating a complaint

This clause enables the Inspector to conduct an investigation, at its discretion, following the receipt of a complaint to assess the conduct as specified in the complaint or any other relevant conduct. If the Inspector decides to investigate a complaint, the Inspector must notify the Integrity Commission in writing unless this would prejudice the investigation of the complaint.

The inspector may make guidelines on how the inspector handles complaints. The complaint investigation guidelines are a notifiable instrument.

Clause 264 Inspector—own initiative investigation

This clause enables the Inspector to conduct an own initiative investigation, at its discretion, in the course of performing its functions. This investigation can be undertaken into the conduct of the Integrity Commission or the Commission personnel in respect of the exercise, or failure to exercise, the functions or powers of the Integrity Commission or commission personnel.

Clause 265 Inspector—conduct of investigation

This clause provides powers to the Inspector in the conduct of an investigation to investigate any aspect of Integrity Commission's operations or any conduct of commission personnel; have full and free access to the records of Integrity Commission; require information from commission personnel; and require attendance of commission personnel to produce documents or other things.

The Inspector can commence or continue an investigation even though an investigation by the Integrity Commission or proceedings in a court or tribunal may be underway, relating to the same matter. The Inspector must take all reasonable steps to ensure that the conduct of its investigation does not prejudice court or tribunal proceedings of which it is aware.

Clause 266 Inspector—commission must give assistance

This clause establishes that the Integrity Commissioner must provide any assistance, and ensure that commission personnel give any assistance, to enable the Inspector to carry out an investigation under Chapter 5 of this Bill.

Clause 267 Inspector—withdrawal of complaint

This clause deals with the withdrawal of a complaint. A person who makes a complaint may withdraw the complaint at any time, and if a complaint is withdrawn the inspector may continue to investigate the subject matter of the complaint.

Clause 268 Inspector—power to ask for information, documents and other things

This clause provides the Inspector with the ability to require a person to produce a document or other thing by written notice. The written notice must state how and the timeframe within which the person must comply with the notice. The person commits an offence if the person fails to comply with the written notice requesting the person to produce a document or other thing. However the person may have a reasonable excuse.

The Inspector does not have the power to hold examination hearings.

Clause 269 Inspector—privileges against self-incrimination and exposure to civil penalty

This clause provides that a person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing.

Clause 270 Inspector—referral to other entities

This clause provides that the inspector may at any time refer a matter to the commission, the public sector standards commissioner, or a law enforcement agency or prosecutorial body.

Clause 271 Inspector—recommendations about practices or procedures

This clause provides that the inspector may, at any time, make a recommendation about practices or procedures in relation to the exercise of functions under this Act to the head of a public sector entity, the commission, the relevant Assembly committee.

Clause 272 Inspector—recommendation to Speaker that commissioner or staff be investigated

This clause provides that the inspector may make a recommendation to the Speaker that an acting commissioner be appointed to investigate the commissioner or a member of the commission staff if the complaint received by the inspector relates to the commissioner or a member of the commission staff.

Part 5.3 – Inspector—secrecy and information sharing

Clause 273 Inspector—disclosure of information

This clause facilitates the cooperation and referral between the inspector and other oversight agencies and investigative entities by authorising the sharing of relevant information necessary to appropriately accept, respond or deal with the matter.

Part 5.4 – Inspector—reviews and reports

Division 5.4.1 Inspector’s special report

Clause 274 Inspector’s special report

This clause provides that the inspector can make a special report to the Legislative Assembly.

Clause 275 Inspector’s special report—not to include information contrary to the public interest

This clause specifies that the inspector must not include information in a special report if the inspector considers that the disclosure of such information would be contrary to the public interest. The disclosure of information may be contrary to the public interest only if the disclosure would be likely to:

- unreasonably infringe an individual’s right to privacy and reputation, or any other right under the *Human Rights Act 2004*; or
- disclose a trade secret, or the business affairs or research of an entity; or
- prejudice relations between the ACT government and another government.

An exception to this is if the inspector is satisfied that the substance of information mentioned in sub-clause (1) is public knowledge.

Clause 276 Inspector's special report—comments on proposed reports

This clause addresses comments raised in the Legislative Assembly Scrutiny Report 25 and protects an individual's human rights. This clause provides that when the Inspector is preparing a special report, the Inspector must provide a copy, or part thereof, of the report if it relates to a person (then the proposed report must be provided to that person) or a public sector entity (then the proposed report must be provided to the head of that public sector entity) and gives the individual an opportunity to comment on the proposed report. This clause also provides the requirements to which the Inspector must meet when providing a copy of the proposed special report to an individual.

Clause 277 Inspector's special report—presentation to Legislative Assembly

This clause outlines the requirements to present special reports to the Legislative Assembly. If the Legislative Assembly is sitting when the special report is completed, the report must be presented on the next sitting day. Alternatively, if the Legislative Assembly is not sitting when the special report is completed, arrangements will be made for the report to be distributed to all Members of the Legislative Assembly out of session and then formally presented on the next sitting day. This process does not apply to a confidential report as there are separate presentation requirements for this type of report.

Clause 278 Inspector's special report—publication on website

This clause states that the inspector must publish the inspector's special report on the inspector's website as soon as practicable after giving the report to the Speaker.

Division 5.4.2 – Inspector—annual operation review of commission**Clause 279 Inspector—annual operation review of commission**

This clause provides that the Inspector must assess the commission's compliance with the Act each financial year, focussing on whether the Commission has acted within power and in compliance with legislation. The Inspector must consider the commission's management

While it is possible for the Inspector to consider the Integrity Commission's conduct more generally, it is anticipated that the Inspector would not engage in a subjective and more broad-reaching assessment of whether the Integrity Commission's approach to matters is preferable. However, the Inspector may wish to deal with issues of particular concern, and follow up on whether recommendations made to the Integrity Commission have been implemented.

Clause 280 Inspector—annual operational review report

This clause provides that a report on the annual operational review must be provided to the Commission for comment. A reasonable opportunity must be provided for the Commission to comment on the proposed report. The Inspector must include a fair representation of the

commission's comments in the report. The Inspector must give the report to the Speaker and the Commission within 15 weeks after the end of the financial year.

Division 5.4.3 – Inspector—annual reports

Clause 281 Meaning of *inspector's annual report*

This clause defines inspector's annual report for the purposes of the Act.

Clause 282 Inspector's annual report-content

This clause specifies what the inspector's annual report must include.

Clause 283 Inspector's annual report—not to include information contrary to the public interest

This clause specifies that the inspector must not include information in an annual report if the inspector considers that the disclosure of the information would, on balance, be contrary to the public interest.

Clause 284 Inspector's annual report—comments on proposed reports

This clause addresses comments raised in the Legislative Assembly Scrutiny Report 25 and protects an individual's human rights. This clause provides that when the Inspector is preparing their annual report, the Inspector must provide a copy, or part thereof, of the report if it relates to a person (then the proposed report must be provided to that person) or a public sector entity (then the proposed report must be provided to the head of that public sector entity) and gives the individual an opportunity to comment on the proposed report. This clause also provides the requirements to which the Inspector must meet when providing a copy of the proposed annual report to an individual.

Chapter 6 Special investigation of commission or inspector

Clause 285 Speaker may appoint special investigator to investigate commission or inspector

This clause provides that the Speaker may appoint a special investigator to carry out an investigation, if the inspector makes a recommendation to the Speaker; or the Speaker otherwise becomes aware of information that, if true, would tend to show corrupt conduct by commissioner (or a member of the commission's staff) or the Inspector (or member of the inspector's staff). The Speaker may only appoint a person as a special investigator if the person could be appointed as acting commissioner. When carrying out a special investigation, the special investigator can exercise any of the functions of the commission or the inspector.

This provision is important as the inspector is unable to undertake a full investigation as the inspector has limited powers.

Chapter 7 Protection for people involved in investigations

This Chapter outlines provisions on the legal protections afforded to complainants without the complainant being left in fear of retaliation. This part is based on Part 7 of the *Public Interest Disclosure Act 2012*.

Part 7.1 – Definitions—Chapter 7

Clause 286 Meaning of *complaint and complainant*—Chapter 7

This clause defines a complaint and complainant for the purposes of this chapter.

Part 7.2 – Protection for people who report corruption

This part provides various protections and immunities to those who have made a complaint or are a witness to an investigation.

Clause 287 Immunity from liability

This clause outlines the safeguards in place for those bringing a legitimate corruption complaint matter to light under the Bill. This clause makes clear that the usual secrecy, confidentiality or other ethical, professional and legal requirements do not apply once an assessment is made that a person has brought forward a genuine corruption complaint. This includes a waiver from all civil and criminal liability that the person would otherwise incur because of making the corruption complaint. For a complainant who is a public official or the chief of staff of an MLA – the complainant is not liable to administrative action because of making the complaint.

Clause 288 Protection from defamation action

This clause specifies the protection from defamation action which is available to complainants. However, the defence is not available if the complainant publishes the information before the information is published under this Act by the commission or the inspector.

Under the HRA, a person has the right to privacy and reputation but also the right to impart information. In the case of corruption complaints, these competing rights must be balanced in a way that best preserves the public interest.

Some corruption complaints are by their very nature likely to bring the reputation of others into question. This clause clarifies that where a disclosure is damaging to a person's reputation and that person sues the complainant for defamation, so long as the statements made by the complainant qualify as a corruption complaint, then the complainant is permitted to use the defence of absolute privilege against the defamation action.

Providing an absolute privilege is considered appropriate for corruption complaints because if they are a legitimate truth finding exercise that seeks to right wrongs then they should be

treated the same as other areas of public life pursuing similar ends such as official inquiries and court proceedings.

Clause 289 Loss of protection

This clause limits protection to those who have made a complaint. If a person has knowingly provided false information or is vexatious, a court can find that the complainant is not permitted to rely on the protections available under the Bill.

Clause 290 Liability for own conduct

This clause specifies the liability for the complainant's own conduct. To avoid cases where a corruption complaint is made with the sole purpose of seeking the immunity provided under section 291, this clause clarifies that a person does not discharge their responsibility for their actions simply by making a corruption complaint. The complainant does not become protected from the ramifications of their own conduct simply by couching it as a corruption complaint.

Part 7.3 Detrimental action against a person

Clause 291 Meaning of *detrimental action*—Part 7.3

This clause outlines the meaning of detrimental action in this part. This clause defines the kinds of responses to a corruption complaint that are unacceptable. Retaliation in the form of unfavourable treatment in relation to a person's career or reputation is not permitted, nor is harassment or intimidation. Similarly, making real threats and causing damage or injury to a person or their property will be considered detrimental action under the Bill.

Clause 292 Offence—taking detrimental action

This clause creates an offence of 100 penalty units, imprisonment for 1 year or both, if a person takes discriminating, harassing or intimidating action, or injures a person or damages a person's property because they intend to disclose, have disclosed, or are thought to have disclosed information to the commission. This clause is modelled on section 40 of the *Public Interest Disclosure Act 2012*.

This clause is important to ensure the appropriate safeguards are in place for public officials and other people who may provide, or wish to provide information to the Commissioner. This may be particularly important, if the information a person wishes to provide is seen as compromising the reputation of a person or agency.

It is intended that this will allow the Commissioner to fully consider all available information when exercising their function.

This power is one that is commonly given to investigative bodies and is consistent with the powers currently available to equivalent statutory authorities in the ACT.

It is intended that the criminal penalties serve as a deterrent to obstruction of the commission carrying out its functions and that they need only apply as a last resort protection against non-compliance.

Clause 293 Damages for detrimental action

This clause outlines that a person is able seek compensation from another person who retaliates against the person for making a corruption complaint. It has been left for the court to decide the appropriate remedies available to a complainant who suffers a reprisal.

Clause 294 Injunction to prevent detrimental action etc

This clause allows the Supreme Court to issue an order to stop or prevent detrimental action occurring. The clause also states who an application can be made by.

To give greater weight to the likelihood that a case will be prosecuted, not only can a person who suffers for making a corruption complaint seek an injunction under the Bill, but the Commissioner can also apply to the court on behalf of someone suffering reprisal action.

Chapter 8 Miscellaneous

Clause 295 Offence—obstruct commission, inspector and others

This clause states that a person commits an offence if the person obstructs, hinders, resists or threatens the commissioner, or a member of staff of the commission, the inspector or a member of their staff, a lawyer or other person authorised to appear before the commission. The person also commits an offence if they fail to comply with a lawful requirement of the commissioner, a member of staff of the commission, the inspector or a member of staff of the inspector.

The person also commits an offence if they make a false statement to mislead the commissioner, commission staff, the inspector or the inspector's staff.

The offence is of 50 penalty units, imprisonment for 12 months or both.

Clause 296 Offences—use or divulge protected information

This clause protects the confidentiality of any information that the Commissioner or a member of the staff of the Commission has access to because of the Act.

Clause 296(1) and (2) create offences for such persons to use, share or divulge information. The information may only be exchanged or shared under the Act or another Territory law, in relation to the exercise of a function under this Act or another Territory law or in a court proceeding.

This is an important provision intended to protect the privacy of persons about whom the Commission has collected information. It is also intended to prevent inappropriate disclosure of information about secretive investigative techniques and methods used by the Commission.

Clause 297 Protection of officials from liability

This clause protects the commissioner and a member of staff of the commission from being civilly liable for things done for the purpose of putting the Act into effect, provided that it acts honestly and not recklessly. The liability that would otherwise have attached to the commission instead attaches to the Territory.

Clause 298 Information guidelines

This clause provides that the Commission must make guidelines about the handling of information. The commission must consult the information privacy commissioner before making an information guideline. The clause provides that the information guidelines are a notifiable instrument.

Clause 299 Unavailability of Speaker

This clause applies to Clause 189, Clause 190, Clause 191, Clause 213, Clause 214, Clause 215, Clause 276 and 0. It provides that where the Speaker is unavailable, the Speaker includes the Deputy Speaker. If both the Speaker and the Deputy Speaker are unavailable then the Speaker includes the Clerk of the Legislative Assembly. The clause discusses what is meant by the Speaker being unavailable.

Clause 300 Assistance for Speaker

This clause enables the Speaker to seek administrative support or advice in discharging the Speaker's statutory functions that arise under this Bill. The Speaker is able to seek support from the Office of the Legislative Assembly or another entity that is able to provide impartial administrative support or advice. This clause addresses recommendation 15 of the 2018 Select Committee report.

Clause 301 Regulation-making power

This clause is a formal provision giving the Executive power to make regulations under the Act. The existence of a regulation making power does not oblige the Executive to make regulations. Any regulations made must be consistent with any provisions of the Act. Regulations are intended to provide for more detailed rules and operation of an Act where necessary.

This clause provides a requirement for the Executive to consult with the Integrity Commissioner and the relevant Assembly committee before any regulation can be made for the Act. This is an important mechanism to regulate the regulation making power given to

the Executive to ensure that the Integrity Commissioner and the relevant Assembly committee participate in the development of any proposed regulations.

In addition, the clause provides that any regulation that is made cannot commence until after the period for disallowance has concluded or a motion to disallow has been rejected by the Assembly. This ensures that any regulations made by the executive are consistent with the views of the Assembly and cannot operate without having effectively secured Assembly support.

Clause 302 Review of Act

This clause requires the Minister, in consultation with the Speaker, to arrange for the review of the operation of the Act as soon as practicable after the end of every fifth year of operation. It also requires the Minister to present a report of the review to the Legislative Assembly within a timeframe decided in consultation with the Speaker.

Chapter 9 Consequential amendments

This Chapter of the Bill comprises Clause 303, which amends the legislation mentioned in Schedule 1 of the Act.

Clause 303 Legislation amended—sch 1

This clause is a formal provision that outlines consequential amendments to other Territory Acts mentioned in schedule 1.

Schedule 1 makes consequential amendments to the:

- *Annual Reports (Government Agencies) Act 2004*
- *Children and Young People Act 2008*
- *Co-operatives National Law (ACT) Act 2017*
- *Corrections Management Act 2007*
- *Criminal (Assumed Identities) Act 2009*
- *Crimes (Controlled Operations) Act 2008*
- *Crimes (Protection of Witness Identity) Act 2011*
- *Crimes (Surveillance Devices) Act 2010*
- *Criminal Code 2002*
- *Freedom of Information Act 2016*
- *Gambling and Racing Control Act 1999*
- *Government Procurement Act 2001*
- *Information Privacy Act 2014*
- *Inspector of Correctional Services Act 2017*
- *Legislation Act 2001*

- *Mental Health Act 2015*
- *Mental Health (Secure Facilities) Act 2016*
- *Official Visitor Act 2012*
- *Public Interest Disclosure Act 2012*
- *Remuneration Tribunal Act 1995*
- *Taxation Administration Act 1999*
- *Terrorism (Extraordinary Temporary Powers) Act 2006*
- *Victims of Crime Act 1994.*

These consequential amendments ensure a co-ordinated approach to the oversight of integrity in the ACT and provide that the new role of the Commissioner is reflected in other relevant Territory laws.

Schedule 1 Consequential amendments

Part 1.1 Annual Report (Government Agencies) Act 2004

This amendment adds a note in stating the integrity commissioner and inspector for the integrity commission are not required to comply with this Act in certain circumstances.

Part 1.2 Children and Young People Act 2008

These amendments protect communications between young persons detained in the Bimberi Youth Justice Centre and the Integrity Commission. The amendments are intended to prevent Bimberi staff from inappropriately reading or listening to such communications.

Part 1.3 Co-operatives National Law (ACT) Act 2017

This amendment adds the commission to a list of entities that information may be divulged to.

Part 1.4 Corrections Management Act 2007

These amendments similarly protect the communications of detainees in the Alexander Maconochie Centre and the Integrity Commission. The amendments also allow the integrity commissioner to access a corrections policy or operating procedure.

Part 1.5 Crimes (Assumed Identities) Act 2008

These amendments empower the Commissioner to authorise investigation officers to adopt false identities for the purpose of a controlled operation.

Part 1.6 Crimes (Controlled Operations) Act 2008

These amendments grant the Commissioner power to authorise and conduct controlled operations to gather evidence for a corrupt conduct investigation.

Part 1.7 Crimes (Protection of Witness Identity) Act 2011

These amendments protect the identity of persons involved in controlled operations conducted by the Commission.

Part 1.8 Crimes (Surveillance Devices) Act 2010

These amendments empower the Commissioner to authorise the use of surveillance devices as part of an investigation into corrupt conduct.

The Commissioner is not granted power to authorise the use of a surveillance device without a judicial warrant.

Part 1.9 Criminal Code 2002

This amends the definition of ‘public official’ in the *Criminal Code 2002* to specifically include staff and advisers of MLAs. This allows these persons to be prosecuted for offences that relate to ‘public officials’ under the Code, such as abuse of public office.

Part 1.10 Freedom of Information Act 2016

This amendment exempts the Integrity Commission from the requirements of the *Freedom of Information Act 2016* when the Commission is exercising its investigative functions.

The Commission must comply with the FOI Act’s requirements when exercising administrative functions. This position aligns with exemptions granted to other Officers of the Legislative Assembly.

Part 1.11 Gambling and Racing Control Act 1999

This amendment adds the Commission to a list of entities that the gaming officer is permitted to disclose information in relation to the administration of a gaming law.

Part 1.12 Government Procurement Act 2001

The amendment inserts the integrity commissioner into a list to whom confidential information may be disclosed to.

Part 1.13 Information Privacy Act 2014

This amendment provides the Commissioner as an enforcement body and an enforcement-related activity under section 14.

Part 1.14 Inspector of Correctional Services Act 2017

This amendment adds the Integrity Commission to a list of entities that the Inspector of Correctional Services must cooperate with. The amendment also adds the integrity commission into the definition of investigative entity.

Part 1.15 Legislation Act 2001

This amendment adds the Integrity Commission and the Integrity Commissioner to the definitions within the *Legislation Act 2001*.

Part 1.16 Mental Health Act 2015

This amendment includes the Integrity Commission into the definition of a court.

Part 1.17 Mental Health (Secure Facilities) Act 2016

This amendment protects communications between persons detained in the Adult Mental Health Unit (AMHU) and the Integrity Commission. The amendments are intended to prevent AHMU staff from inappropriately reading or listening to such communications.

Part 1.18 Official Visitor Act 2012

This amendment includes the integrity commissioner into the definition of investigative entity.

Part 1.19 Public Interest Disclosure Act 2012

This amendment includes the Integrity Commissioner as a disclosable officer.

Part 1.20 Remuneration Tribunal Act 1995

This amendment includes the Integrity Commissioner and CEO into Schedule 1, Part 1.2, so that the Remuneration Tribunal can determine their remuneration, allowances and other entitlements.

Part 1.21 Taxation Administration Act 1999

This amendment adds the Integrity Commissioner into a list of persons to whom a tax office may disclose information obtained under or in relation to the administration of a tax law.

Part 1.22 Terrorism (Extraordinary Temporary Powers) Act 2006

This amendment provides that a person detained under a preventative detention order is entitled to contact, and be contacted by, the Integrity Commissioner.

Part 1.23 Victims of Crime Act 1994

This amendment adds the Commission into a list of entities defined as a *relevant complaints entity*.

Dictionary

The dictionary contains definitions for terms used in the Act.