

Australian Capital Territory

Integrity Commission Reputational Repair Protocols 2020

Notifiable instrument NI2020–594

made under the

***Integrity Commission Act 2018*, section 204 (Reputational repair protocols)**

1 Name of instrument

This instrument is the *Integrity Commission Reputational Repair Protocols 2020*.

2 Commencement

This instrument commences on the day after notification.

3 Commission’s Guidelines

I make the Commission’s Reputational Repair Protocols as set out at Schedule 1 to this instrument.

The Hon D A Cowdroy AO QC

Integrity Commissioner, ACT

4 September 2020

Schedule 1

Reputational Repair Protocols

September 2020

Table of Contents

1. Introduction	4
2. Legislation	5
3. Procedure	7

1. Introduction

1.1 The ACT is a jurisdiction in which human rights are afforded paramount consideration. To this end, the *Human Rights Act 2004* (ACT) (“the Human Rights Act”) was passed in 2004. The Human Rights Act requires all ACT legislation to be interpreted so far as it is possible to do so consistently with its purpose, in a way that is compatible with human rights.¹

1.2 Section 12 of the Human Rights Act states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked.

1.3 Mindful of this requirement, the Select Committee on an Independent Integrity Commission in its report to the Legislative Assembly for the Australian Capital Territory published in October 2017 when the Select Committee recommended:

“The Committee recommends that an ACT Anti-Corruption and Integrity Commission Institute an Exoneration Protocol that can be accessed in circumstances where an individual is subsequently exonerated or cleared of any personal corruption – after a finding of corruption. The Protocol among things should include:

- a) a mechanism for public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person’s reputation has been attacked publicly; and*
- b) the development of guidelines to govern such a process.”*

1.4 To that end, one of the objects of the *Integrity Commission Act 2018* (ACT) (“the Act”) is, as outlined in section 6(c):

Achieving 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.

1.5 These protocols offer guidance to the ACT Integrity Commission (ACTIC) upon the issue of measures which may be required to address damage to a person’s reputation in specific circumstances.

¹ Ss 29, 30, *Human Rights Act 2004*

2. Legislation

- 2.1 These protocols are allied to the outcomes and findings of ACTIC investigations. The ACTIC must prepare an investigation report or special report at the completion of an investigation that may include the ACTIC's findings, opinions and recommendations and the reasons for those findings, opinions and recommendations.² The ACTIC must also publish an annual report which may contain the results of investigations.³
- 2.2 An investigation report or special report must be provided to the Legislative Assembly⁴ and an investigation report must be published on the ACTIC website.⁵ Consequently, the findings, opinions and recommendations of the ACTIC may be made publicly available at the conclusion of an investigation. Adverse findings about a person or entity may be included in the investigation report.
- 2.3 Section 204 of the Act enacts the intention of the legislature with regards to reputational repair. It provides:

204 Reputational repair protocols

- (1) The commission must make protocols (the ***reputational repair protocols***) about how the commission is to deal with damage to a person's reputation if—
- (a) the commission publishes in an investigation report, special report or commission annual report—
 - (i) a finding or opinion that a person has engaged in, is engaging in, or is about to engage in, corrupt conduct; or
 - (ii) a comment or opinion which is adverse to a person; and
 - (b) any of the following happens:
 - (i) the matter is referred to a prosecutorial body but the person is not prosecuted for an offence arising out of the investigation;
 - (ii) the matter is referred to a prosecutorial body, the person is prosecuted for an offence arising out of the investigation and—

² ss 182, 206

³ s 218(1)

⁴ ss 189, 206

⁵ s 190

- (A) the prosecution is discontinued or dismissed; or
- (B) the person is found not guilty of the offence; or
- (C) the person is convicted of the offence but the conviction is quashed, nullified or set aside; or
- (D) the person is otherwise cleared of wrongdoing;
- (iii) the person is the subject of termination action arising out of the investigation and the person is cleared of wrongdoing.

(2) The reputational repair protocols are a notifiable instrument.

2.4 Where any of the circumstances referred to in section 204(1)(a) occur, the ACTIC recognises that reputational damage may be occasioned to the person or entity alleged to have engaged in corrupt conduct.

2.5 The discontinuance or dismissal of a prosecution, the acquittal of a person or entity or the setting aside of a conviction on a particular criminal charge relating to the same or related subject matter as has been the subject of corrupt conduct findings by the ACTIC may, understandably, give rise to questions about the appropriateness of the ACTIC's earlier corrupt conduct findings. The ACTIC notes that such outcomes do not, of themselves, demonstrate the person or entity has been exonerated, in the sense that the outcomes may suggest that the adverse findings were not available, should not have been made and should be expunged. There are a number of reasons for this:

- (i) The ACTIC makes its findings based on the balance of probabilities, as opposed to the criminal standard of proof (beyond reasonable doubt). A conclusion by a court that criminal charges have not been proved beyond reasonable doubt, or the dismissal of a prosecution or overturning of a finding of guilt does not demonstrate the ACTIC, in considering related matters according to a different standard of proof, should have made different findings.
- (ii) The rules of evidence and criminal procedure do not apply to proceedings in the ACTIC. Evidence that may have formed the basis of ACTIC findings may be inadmissible in criminal proceedings, or new evidence may be available in the criminal proceeding that was unavailable to the ACTIC;
- (iii) There is no commensurate criminal offence of 'corrupt conduct' contained in the ACT statute books to the definition of 'corrupt conduct' in sections 9, 10 and 11 of the Act.

3. Procedure

- 3.1 Where the ACTIC becomes aware that the circumstances in section 204 may have occurred, the ACTIC may apply these protocols. The ACTIC may become aware of the s 204 circumstances arising of its own accord, or by way of complaint by the person or entity or a third party in relation to whom the finding, opinion or recommendation was made.
- 3.2 Upon becoming aware that the circumstances in s 204 may have arisen, the following procedure will be followed by the ACTIC:
- (1) The ACTIC will assess the circumstances, and determine whether the criteria set out in s 204 are met;
 - (2) If the ACTIC considers the s 204 criteria are met, the ACTIC in its absolute discretion will determine whether reputational repair measures are required;
 - (3) The ACTIC will determine the nature and extent of appropriate reputational repair measures required. Such measures may be by letter or by notification as set out in (4) below. The letter or publication may include the reputational repair information contained in (5) below.
 - (4) The notification redress measures may be by the following:
 - i. provision of a letter addressed to the person or entity; and/or
 - ii. publication of a notification on the website of the ACTIC.
 - (5) The reputational repair information to be contained in any letter or public notice may state the fact that:
 - i. the ACTIC published an investigation report, special or annual report which contained a finding that the person or entity had engaged in, was engaging in was about to engage in, corrupt conduct, or made a comment or which was adverse to the person or entity; and
 - ii. that one or more of the events to in section 204(b)(i) to (iii) have occurred; and
 - iii. that the Commission considers that it is possible that the person or entity has suffered reputational damage and of measures which the Commission considers are required to address such damage
- 3.3 The fact that the ACTIC institutes any reputational repair measures in consequence of section 204 of the Act does not establish any entitlement to recover compensation against the Australian Capital Territory, the ACTIC or any of the officers of the ACTIC.