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Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mrs Jones

I am writing in response to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) Scrutiny Report 40 (the Report), which included comments relating to the Public Interest Disclosure Amendment Bill 2020 (the PID Amendment Bill).

The Committee has requested further information on the role and justification of the public interest test to be introduced by the PID Amendment Bill. The response below provides this information and also addresses a number of other matters raised by the Committee in the Report.

Scope of the *Public Interest Disclosure Act 2012*

As the Report notes, the PID Amendment Bill changes the scope of the *Public Interest Disclosure Act 2012* (the PID Act). Allegations of criminal activity have been removed from the scope of the PID Act to address the current overlap with the *Integrity Commission Act 2018* (the IC Act); criminal activity now falls within the scope of the IC Act. Personal work-related grievances have also been specifically excluded from the legislation as these matters are more appropriately dealt with through other existing mechanisms (such as appeal and review processes set out in ACTPS Enterprise Agreements). This change was a recommendation of the independent review into the PID Act.

However, it should be noted that the exclusion of matters giving effect to government policies about amounts, purposes or priorities of public expenditure from the scope of the PID Act is not new. This exclusion is currently set out in section 7(2)(b) of the PID Act. The exclusion of these matters reflects the underlying purpose of the public interest disclosure framework. The misuse of public funds is still captured under the PID Act and has not shifted to the IC Act.

Under the proposed amendments, the focus of disclosable conduct under the PID Act is on maladministration and substantial and specific dangers to public health or safety, or the

ACT Legislative Assembly

London Circuit, Canberra ACT 2601, Australia GPO Box 1020, Canberra ACT 2601, Australia
Phone +61 2 6205 0011 Fax +61 2 6205 0157 Email barr@act.gov.au



@ABarrMLA



AndrewBarrMLA



actchiefminister



environment. Additional guidance has been provided to clarify the meaning of maladministration under the PID Act, to emphasise that it involves a substantial mismanagement of public resources or public funds or a substantial mismanagement in the performance of official functions.

Investigation of Disclosures

The Report discusses the investigation of disclosures under the current PID Act. It identifies the provision that the Act requires either that the person making the disclosure honestly believes it shows disclosable conduct, or, regardless of what the discloser believes, the information does tend to show disclosable conduct. The Report states that such public interest disclosures generally have to be investigated, unless the disclosure has been withdrawn, it is impractical to investigate for several specified reasons, it is wrong in a material way, or there is a more appropriate way to deal with the disclosable conduct.

The Public Interest Disclosure Guidelines 2019, issued by the Public Sector Standards Commissioner under section 32 of the current PID Act, provide that a disclosure becomes a public interest disclosure once a disclosure officer determines that it meets the various elements of the definition of a public interest disclosure. This means that a disclosure is not automatically a public interest disclosure and is not investigated if it does not meet the elements of the public interest disclosure definition.

Protections under the PID Act

Under the PID Amendment Bill, disclosers are protected against reprisals once the Integrity Commissioner has determined that the disclosure relates to disclosable conduct. If the Integrity Commissioner determines the disclosure does not relate to disclosable conduct, the Integrity Commissioner is required to notify the discloser, and any person they initially disclosed the information to, that the information will not be protected by the PID Act.

This is similar to the current provisions in the PID Act, where disclosers are protected against reprisals once a disclosure officer has determined that it meets the various elements of the definition of a public interest disclosure. However, under the current provisions there is no obligation to advise the discloser that the protections do not apply.

Disclosure to the Assembly or Journalists

The Report identifies that under the PID Act, disclosure to the Assembly or to journalists is permitted in certain circumstances, including where an investigation under the PID Act is not initiated or progressed or despite clear evidence has not resulted in any action being taken, or the standard route of disclosure is unreasonable given the significant risk of detrimental action. It is noted that the Report puts forward the position that, under the PID Amendment Bill, disclosures that are not assessed by the Integrity Commissioner to be public interest disclosures can only be disclosed to journalists or members of the Assembly and receive protection under the Act where that notice has not been provided within three months of the initial disclosure. This is set out in section 27(2) of the PID Amendment Bill.

Currently, under section 27 of the PID Act, matters can be disclosed to the Assembly or a journalist when an investigating entity has refused or failed to investigate a matter. Under section 20(1)(a) of the PID Amendment Bill an investigating entity is not able to refuse to investigate a matter. In addition, under the Bill, if there is failure by an investigating entity to investigate a matter, or if no

notice of progress of an investigation is provided to the discloser within three months, section 27A(1)(a) would apply, which would enable the matter to then be disclosed to the Assembly or a journalist. If the situation arises where no action is taken when an investigation shows disclosable conduct has occurred, section 27A(1)(b) of the PID Amendment Bill would enable the matter to be disclosed to the Assembly or a journalist.

Review of Integrity Commissioner's Decisions

The Committee's comment that there is no provision in the PID Amendment Bill for appeal or review of the Integrity Commissioner's decision that a disclosure was not disclosed in the public interest is noted.

Given the nature of the role of the Integrity Commissioner, combined with the fact that the Integrity Commissioner's decisions under the Integrity Commission Act 2018 are not reviewable, it would not have been appropriate to include provisions in the PID Amendment Bill for appeal/review of the decision of the Integrity Commissioner that a matter was not disclosed in the public interest.

Public Interest Test

As stated in the Report, the Explanatory Statement accompanying the Bill outlines the purpose of the public interest test as:

to ensure that the discloser is not solely or personally affected by the disclosure matter and strengthens the exclusion of personal employment-related grievances from the scope of this legislation. The conduct relating to the disclosure must affect others and must also be genuinely in the public interest.

As discussed above, under the proposed amendments to the PID Act, the focus of disclosable conduct is on maladministration and substantial and specific dangers to public health or safety, or the environment. Personal work-related grievances have been specifically excluded from the legislation. The PID Amendment Bill provides the following examples of personal work-related grievances:

1. an interpersonal conflict between the person and another employee;
2. a decision not to approve the person's leave application;
3. a decision relating to the employment, transfer or promotion of the person;
4. a decision relating to the terms and conditions of employment of the person; or
5. a decision to suspend or terminate the employment of the person, or to discipline the person.

The introduction of the public interest test strengthens the exclusion of these matters. It should also be noted that personal work-related grievances only apply to disclosures made by ACT public servants. The PID Act enables anyone, not just ACT public servants, to make a disclosure. Any matters disclosed by members of the public, for example, would not be personal work-related grievances.

As noted above, the focus of disclosable conduct under the PID Act is on maladministration and substantial and specific dangers to public health or safety, or the environment.

The public interest test for matters that are disclosable conduct would assess whether the conduct being disclosed affects others, for example, the general public, or whether it only affects the person making the disclosure. The public interest test will also consider whether the disclosure is genuinely being made in the public interest.

As I outlined in my presentation speech, the PID Amendment Bill reduces the complexity of current whistleblowing arrangements; increases protections for those making disclosures and extends these protections to witnesses; and clarifies the role of the ACT Integrity Commission and Integrity Commissioner. The Bill seeks to promote a pro-disclosure culture by encouraging people to disclose matters of disclosable conduct.

I trust these responses address the matters raised in the Scrutiny Report.

Yours sincerely

SIGNED

Andrew Barr MLA
Chief Minister
17 April 2020