

Australian Capital Territory

Integrity Commission (Mandatory Corruption Notification) Directions 2019

Notifiable instrument NI2019–722

made under the

Integrity Commission Act 2018, section 64 (Directions about mandatory corruption notifications)

1 Name of instrument

This instrument is the *Integrity Commission (Mandatory Corruption Notification) Directions 2019*.

2 Commencement

This instrument commences on 1 December 2019.

3 Commission's Directions

The Commission makes the Integrity Commission (Mandatory Corruption Notification) Directions 2019 as set out in Appendix 1.

Dennis Cowdroy AO QC
ACT Integrity Commissioner

Date: 27 /11/2019



ACT INTEGRITY COMMISSION

Attachment 1

Integrity Commission (Mandatory corruption notification) Directions 2019

Table of contents

1. About these Directions	4
2. Obligations of mandated reporters under the Act	4
3. What is corrupt conduct?	5
4. What is serious corrupt conduct and systemic corrupt conduct?	6
Serious corrupt conduct	6
Systemic corrupt conduct	6
What types of conduct may constitute suspected serious or systemic corrupt conduct?	6
‘Suspects on reasonable grounds’	7
More information	8
5. Making a notification	8
Public interest disclosures, referrals to the Australian Federal Police (AFP)	9
Multiple mandated reporters reasonably suspect serious or systemic corrupt conduct	9
What information is required as part of a notification?	9
6. Failure to report is an offence	10
7. Confidentiality in notifications	10
8. Integrity Commission’s response after receiving a notification	10
The Commission is required to keep mandated reporters informed	11
9. Protections for mandated reporters	12
Loss of protection (false or vexatious complaints)	12
10. Education and prevention	13
11. Review	13

1. About these Directions

- 1.1. These directions are a notifiable instrument made pursuant to section 64 of the *Integrity Commission Act 2018* (the Act). They set out:
 - the obligations of mandated reporters to make a mandatory corruption notification to the Integrity Commission (the Commission) where they suspect, on reasonable grounds, that a matter involves serious or systemic corrupt conduct;
 - the types of matters that must be notified; and
 - the form, content and method of notification.
- 1.2. They also set out the steps that the Commission will take once a mandatory notification has been received.
- 1.3. Pursuant to section 64(7) of the Act, these directions do not apply to:
 - a) the Auditor-General;
 - b) the Ombudsman;
 - c) the Electoral Commissioner;
 - d) a member of the Human Rights Commission;
 - e) the head of a public sector entity prescribed by regulation (no such regulation has, to date, been made).
- 1.4. **Importantly, however, the officers at 1.3(a)-(e) above are still required to observe the relevant statutory notification requirements provided for in division 3.1.2 of the Act.**

2. Obligations of mandated reporters under the Act

- 2.1. Under division 3.1.2 of the Act, the following persons (**mandated reporters**) must notify the Commission about certain matters as follows:
 - a) **the head of a public sector entity**¹ must, subject to the exceptions at subparagraph 2.1(b) below, notify the Commission about any matter that they suspect on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct.
 - b) **the following heads of public sector entities** need only notify the Commission if the matter involves the conduct of a public official² for the public sector entity for which

¹ Public sector entities include: a Legislative Assembly entity (includes: MLAs and their staff, the Office of the Legislative Assembly, and officers of the Legislative Assembly (such as the Auditor-General, members of the Electoral Commission and their staff)); Government directorates; statutory bodies and office holders; Territory authorities; Territory instrumentalities; Territory-owned corporations (and their subsidiaries); providers of public health services; including public hospitals; ACT detention places and correctional centres; providers of ACT public transport; providers of ACT emergency services; providers of public education; providers of public housing; and providers of gas, electricity and water supply where excising the functions of a public nature (see section 18 of the Act).

² Public officials include: Members of the Legislative Assembly (MLAs); members of staff of an MLA; judicial officers (including the justices of the ACT Supreme Court, magistrates of the ACT Magistrates Court, and the registrars of the Supreme Court and the Magistrates Court); presidential members, non-presidential members,

they are the head, and the conduct relates to the public official's duties for the public sector entity:

- the Auditor-General;
 - the Ombudsman;
 - the Electoral Commissioner;
 - the Clerk of the Legislative Assembly.
- c) **an SES member**³ must notify the Commission about any matter that the member suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct.
- d) **a Member of the Legislative Assembly (MLA)** must notify the Commission about any matter that the MLA suspects on reasonable grounds involves serious or systemic corrupt conduct by either: i) another MLA; or ii) a member of staff of an MLA.
- e) **a chief of staff of a minister (including the Chief Minister) or of the Leader of the Opposition** must notify the Commission about any matter that the relevant chief of staff suspects on reasonable grounds involves serious corrupt conduct or systemic corrupt conduct by either: i) an MLA; or (ii) another member of staff of an MLA.
- 2.2. The provision of such information to the Commission is known as a **mandatory corruption notification** (see section 61 of the Act).

3. What is corrupt conduct?

- 3.1. Corrupt conduct, under the Act, is conduct that could constitute a criminal or serious disciplinary offence⁴ or reasonable grounds for terminating the services of a public official and is conduct:
- a) by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not honest or is not impartial;
 - b) by a public official or former public official that constitutes a breach of public trust or the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person;

assessors or registrars of the ACT Civil and Administrative Tribunal; officers of the Assembly (such as the Auditor-General, members of the Electoral Commission); statutory office holders; public servants; employees of a public sector entity; contractors, employees of contractors, or volunteers exercising a function of a public sector entity.

³ Means a person employed as a member of the senior executive service under section 12(3)(a) of the *Public Sector Management Act 1994*, namely: i) the Head of Service; ii) directors-general; and iii) executives, or section 72 of the *Public Sector Management Act 1994* (Republication No. 39).

⁴ Serious disciplinary offence includes—(a) any serious misconduct; or (b) any other matter that constitutes or may constitute grounds for—(i) termination action under any law; or (ii) a significant employment penalty. 'Serious misconduct' has a meaning under section 1.07 of the Fair Work Regulations 2009 (Cwlth).

- c) that adversely affects, either directly or indirectly, the honest or impartial exercise of functions by a public official or a public sector entity;
 - d) that adversely affects, either directly or indirectly, the exercise of official functions by a public official or public sector entity; or
 - e) that would constitute, if proved, an offence against a provision of the [Criminal Code](#), chapter 3 (Theft, fraud, bribery and related offences).
- 3.2. Conduct of the types described at 3.1(a)-(e) that involves any of the following is also defined as corrupt conduct:
- a) collusive tendering;
 - b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety, protect the environment or facilitate the management and commercial exploitation of resources;
 - c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;
 - d) defrauding the public revenue;
 - e) fraudulently obtaining or retaining employment or appointment as a public official.
- 3.3. Corrupt conduct also includes conduct engaged in by a person in relation to conduct mentioned in subparagraphs 3.2(a)-(e) above (the primary conduct), that would constitute an offence against part 2.4 of the [Criminal Code](#), (Extensions of criminal responsibility) on the basis that the primary conduct is an offence, whether or not the primary conduct is in fact an offence.
- 3.4. **Mandated reporters are not required to report all suspected corrupt conduct to the Commission, only corrupt conduct that they reasonably suspect is serious corrupt conduct or systemic corrupt conduct. However, mandated reporters are able to report conduct that may be corrupt conduct (that is, corrupt conduct that does not rise to the level of serious or systemic corrupt conduct) pursuant to section 57 of the Act. For more information see paragraph 5.6 below.**

4. What is serious corrupt conduct and systemic corrupt conduct?

Serious corrupt conduct

- 4.1. Section 10 of the Act provides that serious corrupt conduct is corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration in the ACT.

Systemic corrupt conduct

- 4.2. Section 11 of the Act provides that systemic corrupt conduct refers to instances of corrupt conduct that reveal a pattern of corrupt conduct in 1 or more ACT public sector entities.

What types of conduct may constitute suspected serious or systemic corrupt conduct?

- 4.3. It can be difficult to discern with precision what constitutes serious or systemic corrupt conduct or at what point certain material that is available to a mandated reporter ought to give rise to a reasonable suspicion that serious or systemic corrupt conduct has or is occurring.

- 4.4. Mandated reporters are required to exercise their judgement and may elect to seek legal advice.
- 4.5. As a broad guide, where a mandated reporter suspects on reasonable grounds that a person, or persons, are engaged in corrupt conduct that is particularly grave—either in terms of the potential impact of the conduct itself, or in terms of the potential impact that the conduct is likely to have on the community’s confidence in the integrity of government and public administration in the ACT—an obligation to report will arise. Matters that may be regarded as serious corrupt conduct could include, but are not limited to, corrupt conduct which is:
- a) collusive tendering;
 - b) theft of, or dishonestly obtaining, Territory property or funds resulting in a significant loss to the Territory;
 - c) bribery;
 - d) blackmail;
 - e) providing or receiving corrupting benefits;
 - f) providing or receiving payola;⁵ or
 - g) abuse of public office.
- 4.6. An obligation to report will also arise where a mandated reporter suspects on reasonable grounds that one or more people are engaged in corrupt conduct to the extent that a pattern of corrupt conduct is indicated. Matters that may be regarded as systemic corrupt conduct could include, but are not limited to, corrupt conduct which is:
- a) not isolated or singular in nature; that is, the corrupt conduct is being engaged in by more than one person from one or more public sector entities;
 - b) a conspiracy to engage in corrupt conduct; or
 - c) collusive tendering.

‘Suspects on reasonable grounds’

- 4.7. The words ‘**suspects on reasonable grounds**’ mean there is a real possibility of serious or systemic corrupt conduct. ‘Suspicion’ is something less than belief but requires more than idle speculation. It must be based on facts and circumstances that would be sufficient to make a reasonable person suspect that serious or systemic corrupt conduct had occurred or was occurring. However, proof is not necessary, nor is it required that an individual or individuals be identified.

⁵ ‘Payola’ is an offence under section 358 of the *Criminal Code 2002* and occurs when: a) a person holds themselves out to the public as being engaged in a business or activity of making disinterested selections or examinations or expressing disinterested opinions in relation to property or services; and b) the person dishonestly asks for or obtains, or agrees to obtain, a benefit for the person or someone else in order to influence the selection, examination or opinion.

More information

4.8. Mandated reporters are able to contact the Commission for more information on the sorts of conduct that may be considered serious or systemic corrupt conduct.

- Email: info@integrity.act.gov.au
- Telephone: (02) 6205 9899

5. Making a notification

5.1. A mandated reporter must make a corruption notification as soon as the mandated reporter forms a suspicion, on reasonable grounds, that serious or systemic corrupt conduct has occurred or is occurring.⁶ Delays in notifying suspected corrupt conduct can result in lost investigative and preventive opportunities and may negatively impact on due process and natural justice.

5.2. **Mandated reporters must make mandatory corruption notifications to the Commission in writing.**

5.3. There is a secure form available on the Commission's website (www.integrity.act.gov.au) for making mandatory corruption notifications. This is also a form attached to these directions, which can be emailed to complaints@integrity.act.gov.au or mailed to:

ACT Integrity Commission
GPO Box 1949
CANBERRA ACT 2601

5.4. An assessment as to whether a matter must be notified to the Commission should be made by a mandated reporter based on the material that is available to them. Sometimes it may be that the available material is not sufficient to form a suspicion on reasonable grounds. However, where additional material becomes available to the mandated reporter—whether as a result of further inquiries or some other means—and that material leads to the 'reasonable suspicion' threshold being met, the mandated reporter is obligated to make a corruption notification.

5.5. **There is a duty on mandated reporters to carefully consider all information or material that comes to their attention about serious or systemic corrupt conduct. A mandated reporter must not be wilfully blind—intentionally shutting their eyes to the obvious or failing to make further inquiries that an honest, reasonable person would make when confronted with information or material about serious or systemic corrupt conduct.**

5.6. It is important to note that a mandated reporter is not prevented from making a complaint to the Commission pursuant to section 57 of the Act. Where a complaint is made pursuant to this provision, it is not necessary for the complainant to form a suspicion on reasonable grounds and nor is it a requirement that the conduct reported must be serious or systemic corrupt in nature. Instead, the complaint may be made about 'conduct that *may* be corrupt conduct'. The

⁶ The Act does not provide for any delays in notifying suspected serious or systemic corrupt conduct to the Commission.

Commission's website (www.integrity.act.gov.au) provides more detailed information about making a general complaint under this provision of the Act.

Public interest disclosures, referrals to the Australian Federal Police (AFP)

- 5.7. Where a mandated reporter receives a **public interest disclosure** under the *Public Interest Disclosure Act 2012* that gives rise to a reasonable suspicion that serious or systemic corrupt conduct has occurred, or is occurring, there is an obligation to make a corruption notification to the Commission. Similarly, merely because a mandated reporter makes a public interest disclosure about a matter does not relieve the mandated reporter from their obligations under the mandatory notification provisions in the Integrity Commission Act.
- 5.8. There may be occasions where a public official reports a particular matter (for example, in relation to fraud or theft against the Territory) to the Australian Federal Police or another investigative or law enforcement body. In such cases, a mandated reporter nonetheless has an obligation to provide a corruption notification to the Commission where the mandated reporter reasonably suspects serious or systemic corrupt conduct is at issue.

Multiple mandated reporters reasonably suspect serious or systemic corrupt conduct

- 5.9. Where a number of different mandated reporters suspect on reasonable grounds that serious or systemic corrupt conduct has or is occurring in relation to a particular matter, the obligation to make a notification to the Commission is imposed on each of them.

What information is required as part of a notification?

- 5.10. The following information must, where known, be included in a mandatory corruption notification.
 1. The name (first name and last name), position and contact details (phone, email address and postal address) of the mandated reporter.
 2. Whether or not the matter has been reported to the Commission previously and information about when the report was made.
 3. The name of any agency to which the suspected serious or systemic corrupt conduct was previously reported and information about when the report was made.
 4. As much detail as is known about when the suspected serious or systemic corrupt conduct occurred.
 5. As much detail as is known about where the suspected serious or systemic corrupt conduct occurred.
 6. A description, in as much detail as is known, about the nature of the suspected serious or systemic corrupt conduct.
 7. The name, if known, of the public sector entity or entities about which the suspected serious or systemic corrupt relates.
 8. The name, role, and position of any public official that the mandated reporter reasonably suspects are involved in the serious or systemic corrupt conduct or as much identifying information about such persons as is known.

9. The name and position of any person who the mandated reporter reasonably suspects has witnessed, or has knowledge of, the suspected serious or systemic corrupt conduct or as much identifying information about such persons as is known.
10. Any other information that the mandated reporter believes will assist the Commission in assessing the suspected serious or systemic corrupt conduct. **Where a mandated reporter becomes aware of additional information or material relating to suspected serious or systemic corrupt that has been previously reported, the mandated reporter must provide this information or material to the Commission, in writing, at the earliest opportunity.**

6. Failure to report is an offence

- 6.1. A mandated reporter commits an offence where they **know** that a public official has engaged in serious corrupt conduct or systemic corrupt conduct but fails to notify the Commission as soon as practicable.⁷ An offence is punishable by a fine of 50 penalty units (at the time these directions were made, the fine for the offence was \$8,000 (see Legislation Act, section 133)). **For more information, see sections 65-68 of the Act.**
- 6.2. Whether or not a mandated reporter can be said to ‘know’ that a public official has engaged in serious or systemic corrupt conduct will depend on the circumstances, including the material that is available to the mandated reporter.
- 6.3. The word ‘know’ means a person is aware of some fact or circumstance leading to the conclusion that the serious or systemic corrupt conduct exists. The word ‘know’ is used in the ordinary sense without any intention that it should be graduated or refined. Put simply, a person ‘knows’ if he or she becomes aware of some circumstance about which an honest and reasonable person would conclude that notifiable corrupt conduct has occurred or is occurring.

7. Confidentiality in notifications

- 7.1. Information that is received by the Commission will only be used in accordance with the Integrity Commission Act and other relevant laws.
- 7.2. A mandatory corruption notification must be made without the mandated reporter advising the person(s) about whom the notification relates, and without publicity.
- 7.3. It is an offence to use or divulge ‘protected information’. **For more information about protected information see section 297 of the Act.**
- 7.4. Under Schedule 1.1B of the *Freedom of Information Act 2016*, the disclosure of information in the possession of the Integrity Commission is taken to be contrary to the public interest, unless the information is administrative in nature.

8. Integrity Commission’s response after receiving a notification

- 8.1. After a mandated reporter has made a notification, the Commission will assess it. The Commission is required to:

⁷ As soon as practicable means at the earliest possible opportunity in the circumstances.

- a) **Dismiss the complaint or notification**—there are a number of grounds on which the Commission is able to dismiss complaint or notification (for example, where a matter is trivial, vexatious or frivolous, or it is unrelated to the functions of the Commission (See section 71 of the Act); or
- b) **Refer the complaint or notification to another entity**—where it may be more appropriate for the matter to be investigated by a referral entity (See section 107 of the Act) and the Commission may ask the referral entity for a written report about the investigation or action taken in relation to the corruption report (see section 108 of the Act); or
- c) **Investigate the complaint or notification**—if the Commission suspects on reasonable grounds that the conduct in the complaint or notification may constitute corrupt conduct (See section 100 of the Act).

The Commission is required to keep mandated reporters informed

- a) If a complaint is dismissed, the Commission must tell the mandated reporter the grounds for dismissing the complaint and the reasons for making the decision on those grounds.
- b) If the Commission dismisses the matter contained within a mandatory corruption notification but gives it to another entity to investigate, the name and contact details of the other entity must be provided to the mandated reporter.
- c) If the Commission refers the material contained within the complaint to another entity or prosecutorial body, information indicating the referral (and any withdrawal of a referral) must be provided to the mandated reporter.
- d) If a complaint is investigated by the Commission, the Commission must tell the mandated reporter about the progress of the investigation at least once every 3 months.
- e) If the Commission discontinues an investigation, the Commission must tell the mandated reporter about the grounds for discontinuing the investigation and the reasons for making the decision on those grounds. If after the discontinuance, the Commission gives the corruption report to another entity, the Commission must tell the mandated reporter the name and contact details of the other entity.
- f) If an investigation of a complaint is complete, the Commission must tell the mandated reporter the outcome of the investigation and provide the mandated reporter with a copy of the investigation report that has been presented to the Legislative Assembly.

For more information, see sections 72-74 of the Act.

- 8.2. The Commission must not tell a mandated reporter about matters listed above if telling the person would be likely to adversely affect a person’s safety or an investigation under the Act.
- 8.3. Similarly, the Commission must not tell a mandated reporter about certain matters if telling the person would identify another person who has given information in relation to a corruption report, could allow the identity of the other person to be worked out, or would be contrary to a law in force in the Territory. ***For more information see Division 3.1.4 of the Act.***

9. Protections for mandated reporters

- 9.1. Mandated reporters are given a number of important protections under the Integrity Commission Act.
- 9.2. A mandated reporter does not incur civil or criminal liability only because the person has made a mandatory corruption notification. In the case of a public official or a member of staff of an MLA, a reporter is not subject to disciplinary action or dismissal only because they have made a notification.
- 9.3. However, a person's liability for their own conduct is not affected by their disclosure of that conduct under the Act. ***For more information see sections 288 and 291 of the Act.***
- 9.4. A person making a complaint also has the defence of absolute privilege against defamation action. However, this defence is not available if the person making the complaint publishes information contained in the complaint before the information is published by the Commission or the Inspector in accordance with the Act. ***For more information see section 289 of the Act.***

Loss of protection (false or vexatious complaints)

- 9.5. If a person makes a complaint and a court finds that the person making the complaint knew that it was false or misleading or vexatious, the protections under the Act are forfeited. ***For more information see section 290 of the Act.***

Detrimental Action

- 9.6. It is an offence for a person (the retaliator) to take detrimental action against someone else because:
 - a) a person has made, or intends to make, a complaint;
 - b) the retaliator believes that a person has made, or intends to make, a complaint;
 - c) the Commission or the Inspector has conducted, is conducting or intends to conduct, an own initiative investigation; or
 - d) the retaliator believes that the Commission or the Inspector has conducted, is conducting or intends to conduct, an own initiative investigation.
- 9.7. Detrimental action means action that involves:
 - a) Discriminating against a person by treating, or proposing to treat, the person unfavourably in relation to the person's reputation, career, profession, employment or trade;
 - b) Harassing or intimidating a person;
 - c) Injuring a person;
 - d) Damaging a person's property.
- 9.8. The Supreme Court is able to grant an interim injunction, on application, restraining a person from taking detrimental action.

- 9.9. **The maximum penalty for a person convicted of the offence of taking detrimental action is 100 penalty units,⁸ imprisonment for one year, or both. A person who takes detrimental action against someone else is also liable for civil damages to anyone who suffers detriment as a result. For more information, see part 7.3 of the Act.**

10. Education and prevention

- 10.1. The Integrity Commission will provide education and training across the ACT public sector on the operation of mandatory corruption notification requirements and general information about corruption prevention and reporting.

11. Review

- 11.1. These directions will be periodically reviewed and revised following additional consultation with mandated reporters.

⁸ At the time these directions were made, the fine component of the penalty was \$16,000 (see Legislation Act, section 133).



ACT INTEGRITY COMMISSION

Mandatory corruption notification form

This form may be used by mandated reporters to make a mandatory corruption notification. Before completing the form:

1. Read the *Integrity Commission (Mandatory corruption notification) Directions 2019* issued by the Commission and understand: a) your legal obligations to make a report; and b) offences that apply where there is a failure to report. The Directions are available on the ACT Legislation Register at www.legislation.act.gov.au or the Commission's website at www.integrity.act.gov.au
2. Be clear on what you are reporting and provide as much information as possible to enable further consideration by the Commission.

Field marked with an asterisk* are required fields.

Contact details*

Mandated reporters are required to provide the following contact details to enable the Commission to follow-up on details of the notification.

1. First name and last name:*	
2. Agency and position held:*	
3. Phone:*	
4. Email:*	
5. Postal address:*	
6. Other ways to contact you:	

7. Have you previously reported this matter to the Commission? If so, when was it reported?*

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8. Have you previously reported this matter to another agency? If so, to which agency was it reported and when?*

9. What public official/s and/or public sector body or bodies are you making a notification about?*

You may select more than one category.

Public official / public sector body	Mark an 'X' next to those that apply. Where 'other' is indicated, please provide details.
a) Member of the Legislative Assembly	
b) Staff member of a Member of the Legislative Assembly	
c) A judge, magistrate or registrar of the court	
d) A presidential member, non-presidential member, assessor or registrar of the ACAT	
e) An Officer of the Assembly (the Auditor-General, a member of the ACT Electoral Commission, the Ombudsman)	
f) A statutory officer-holder	
g) A public servant	
h) An employee of public sector entity	
i) A contractor, employee of a contractor, or volunteer exercising a function of a public sector entity	
j) Other	

10. When did the suspected serious or systemic corrupt conduct occur?*

If you don't know an exact time or date, please provide an approximate (for example, January 2013). If the conduct happened more than once, then please list the approximate timeframes.

11. Where did the suspected serious or systemic corrupt conduct occur? *

Include as much detail as possible. Where known, include the address and any other location-specific information that will assist the Commission in understanding where the conduct occurred.

12. What is the name of the person/s and/or organisation/s you are making a notification about? *

Include as much detail as possible, including (where known) a person's first name and surname, the name of the organisation that they work for, and the position or role that they hold within an organisation.

13. Describe the serious or systemic corrupt conduct you suspect has occurred or is occurring? *

Include as many details as possible, including any actual or potential impacts that you believe are associated with the suspected corrupt conduct and, where known, the names of any persons that you believe may have witnessed or have knowledge of the suspected corrupt conduct.

14. Do you have any other information that you wish to provide?*

*Include any other information that you think will assist the Commission in assessing the suspected corrupt conduct. **If you become aware of additional information or material relating to the suspected serious or systemic corrupt conduct after you have made a mandatory corruption notification, you must provide this information or material to the Commission in writing at the earliest opportunity.***