

Australian Capital Territory

Integrity Commission (Examination) Guidelines 2021

Notifiable instrument NI2021–133

made under the

***Integrity Commission Act 2018*, section 143(4) (Examinations may be public or private)**

1 Name of instrument

This instrument is the *Integrity Commission (Examination) Guidelines 2021*.

2 Commencement

This instrument commences on the day after notification.

3 Commission's Guidelines

I make the *Integrity Commission (Examination) Guidelines 2021* as set out at Schedule 1 to this instrument.

The Hon M Adams QC

Acting Commissioner
ACT Integrity Commission

3 March 2021

Schedule 1

Examination Guidelines

March 2021

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1. Introduction

1.1 The ACT Integrity Commission (**‘Commission’**) may conduct an investigation pursuant to s 100 of the *Integrity Commission Act 2018* (ACT) (**‘Act’**). A decision to conduct an investigation may occur after the receipt of a corruption report¹ or on the Commission’s own initiative.² Once a decision is made to conduct an investigation there are a number of powers available to the Commission to further the investigation. These include the power to conduct an examination.³

1.2 Part 3.6 of the Act relates to Commission examinations. An examination summons issued pursuant to s 147 of the Act may require a person to, at a stated time and place, appear at the Commission to give evidence, produce a document or other thing to the Commission, or both.⁴

1.3 An examination that involves a person giving evidence at the Commission may be conducted in public or in private.⁵ Each investigation concerns different issues, presents its own challenges, and is undertaken in its particular environment. Thus, although it is possible to identify general principles which apply to the question whether an examination should be public or private, it is necessary to bear in mind that in every case these principles will vary in their applicability and a judgment will need to be made by the Commissioner on a case by case basis as to what, in the end, the public interest requires. It is important to note at the outset that the public interest encompasses not only the purposes of the Commission’s investigations but also the protection of the human and civil rights of those who are subjected to its compulsory powers.

1.4 These Guidelines are made to inform the public about the matters that will be considered in deciding whether an examination will be private or public.

¹ Section 100, *Integrity Commission Act 2018*. All references to sections in these Guidelines refer to the *Integrity Commission Act 2018*, unless otherwise specified.

² Section 101

³ Section 140

⁴ Section 147

⁵ Section 143(1)

2. Legislation

2.1 Section 143 of the Act states the matters the Commission must consider when deciding whether to hold an examination in public or private:

143 Examinations may be public or private

- (1) *An examination may be held in public or in private.*
- (2) *In deciding whether to hold an examination in public or in private, the Commission must consider whether:*
 - (a) *it is in the public interest to hold a public examination; and*
 - (b) *a public examination can be held without unreasonably infringing a person's human rights.*
- (3) *In deciding whether it is in the public interest to hold a public examination, the Commission may consider the following:*
 - (a) *whether the corrupt conduct is related to an individual and was an isolated incident or systemic in nature;*
 - (b) *the benefit of exposing to the public, and making it aware of, corrupt conduct;*
 - (c) *the seriousness of the matter being investigated.*
- (4) *The Commission may make guidelines about whether an examination should be held in public or in private (the **examination guidelines**).*
- (5) *The examination guidelines are a notifiable instrument.*

2.2 With regards to the issue of whether a public examination can be held without unreasonably infringing a person's human rights, the Explanatory Statement to the Integrity Commission Bill 2018 stated:

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 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.⁶

2.3 The power in the Act to compel the attendance of witnesses and to conduct an examination, whether private or public examination may affect a number of human rights under the HRA. These include the following provisions of the HRA:

- s 12 – a person’s right to not to have their privacy unlawfully or arbitrarily interfered with and the right not to have their reputation unlawfully attacked; and
- s 13 – a person’s right to freedom of movement within the ACT.

2.4 The HRA provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.⁷ The Explanatory Statement to the Integrity Commission Bill 2018 notes that certain limits on human rights may occur during a public examination and offers this explanation for those constraints:

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

⁶ Explanatory Statement, Integrity Commission Bill 2018, pp 6-7

⁷ Section 28, *Human Rights Act 2004*

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.⁸

⁸ Explanatory Statement, Integrity Commission Bill 2018, pp 18-19

3. Considerations and procedure

General considerations

- 3.1 The purpose of an examination, whether public or private, is to obtain evidence on oath or affirmation. Penalties apply where evidence is not truthful or complete. An examination also enables live questioning, which is a useful technique both for obtaining and testing evidence. In appropriate cases, interested persons may also, reasonable grounds being demonstrated, be afforded this opportunity through cross-examination. Whether an examination will be held will principally depend on the nature of the investigation and whether a less intrusive mode of obtaining information, such as an interview or obtaining a statement will be effective. Different modes of information gathering are not mutually exclusive. Cases vary so widely that more precise guidelines as to when an examination will be held cannot usefully be provided.
- 3.2 The human rights the Commission is required to not unreasonably infringe will most often be those of the witness, but this will not always be the case. The human rights of a person who might be affected by the publicity given to the evidence must also be considered.
- 3.3 A public examination is open to the public but the Commission may determine to hold part of the examination in private if it considers that to do so is in the public interest.⁹In some public examinations, a witness' identity may nevertheless be anonymised and other steps taken to safeguard their privacy. This might happen where, for example, it is in the public interest to hold the examination in public because of the nature of the issues being investigated or to demonstrate to the public that, in the particular case, the powers of the Commission are appropriately exercised, whilst ensuring the witness' or some other person's human rights are not unreasonably infringed.
- 3.4 At the conclusion of an investigation the Commission is likely to require Counsel Assisting to make submissions to assist the Commission in the preparation of its Report. The interested parties, particularly, those who may be subjected adverse comment, will be invited to respond. These submissions will be in writing in the first instance, but the Commissioner may also require oral submissions where the facts or proposed outcomes are controversial. Even where public examinations have been held, submissions will usually be made in private to safeguard privacy.

⁹ Sections 143 and 146

3.5 Considerations relevant to the Commission's decision about whether it is in the public interest to hold a public examination include:

- whether the conduct under investigation is an isolated incident or systemic in nature;
- whether public exposure would be apt to:
 - educate the public about serious corruption or systemic failures and issues;
 - encourage others to come forward with information relevant to the investigation;
 - encourage public agencies to engage in reform and/or establish public understanding of why change is necessary; or
 - give transparency to and accountability for the Commission's use of its power to conduct examinations;
- the seriousness and nature of the conduct alleged, for example:
 - whether the conduct involves a criminal offence/s;
 - the seniority or standing of the public official/s involved;
 - the level of sophistication, organisation and planning involved; and
 - the number of persons involved and whether the alleged conduct is systemic;
- whether the allegations are already in the public domain and the public examination would:
 - provide a transparent mechanism for public officials and others to be made publicly accountable for their actions; and
 - enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account;
- the public interest in protecting the privacy of persons who may be witnesses or mentioned in a public examination and whether a suppression order issued under s 154 would alleviate these concerns;

3.6 Where the Commissioner has formed a preliminary view that a public examination should be conducted, the proposed witness and interested persons will, unless there is a risk that the integrity of an investigation might be compromised, be notified of the prospect and invited to make written submissions on whether a public examination should be conducted. The Commissioner will take the submissions into account in determining whether the examination will be held in public. In the normal course, the Commissioner's reasons for the decision will be reduced to writing and provided to the interested persons.

Public Examinations – notification to Inspector

3.7 Section 144 requires the Commission to provide the Inspector with a written report not less than 7 days before the day of a public hearing, that states the following:

- (a) that the Commission intends to hold a public examination; and
- (b) the reasons why the Commission decided to hold a public examination.