

# Guideline: Inquiries into the Administration and Management of Government sector agencies

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# 1 Introduction

## 1.1 Purpose

This Guideline sets out a principles-based approach to guide the Public Service Commissioner (**Commissioner**) in considering whether to exercise the power of inquiry under section 83 of the *Government Sector Employment Act 2013 (GSE Act)*. It also provides guidance on the exercise of the Commissioner's statutory power. This Guideline considers the inquiry process in four broad phases:

- Assessing whether a matter merits an inquiry
- Determining the scope and purpose of an inquiry
- Carrying out an inquiry
- The outcome of the inquiry including reporting and other action.

## 1.2 Scope

This Guideline applies to the Commissioner and the staff of the Commissioner working in the Office of the Public Service Commissioner (**OPSC**).

This Guideline is not binding on the Commissioner but provides guidance on the exercise of the Commissioner's functions under section 83. References to 'the Commissioner' should be understood to include any authorised persons exercising delegated functions of the Commissioner under section 83 (within the limits of their delegation), as well as any person appointed by the Commissioner to conduct an inquiry under section 83 (within the limits of their appointment).

## 1.3 Legislative context

Section 83 of the GSE Act provides that the Commissioner or the Secretary of the Premier's Department (**PD**) may conduct an inquiry into any matter relating to the administration or management of a government sector agency. This Guideline pertains to and discusses the Commissioner's functions under section 83.

The Commissioner may appoint a person to act on behalf of the Commissioner for the purposes of conducting an inquiry under section 83. Any person so appointed by the Commissioner is to act under the direction of the Commissioner and has the functions conferred on the Commissioner under section 83.

Section 83 provides coercive information gathering powers for the purposes of conducting an inquiry. A person conducting an inquiry under section 83 may wish to exercise the information gathering powers set out in section 83(4) during the inquiry. The powers in section 83(4)(b)-(e) can be used in relation to an employee of a government sector agency as well as any person who is engaged by the government sector agency (whether directly or indirectly) under a contract for services. However, where the person conducting the inquiry intends to use these powers in relation to any external contractor, the power should be exercised only in relation to those employees or representatives of the external contractor who worked on the matter which is the subject of the inquiry, or who are likely to have knowledge or documents in their possession which may be relevant to the conduct of the inquiry.

Information relating to the inquiry functions of the Commissioner under section 83 is 'excluded information' under Schedule 2 of the *Government Information (Public Access) Act 2009 (GIPA Act)*.

However, the Commissioner may prepare and publish a report on the conduct and findings, and any recommendations, of a section 83 inquiry if the Commissioner considers it to be in the public

interest to do so. No civil or criminal action or proceedings may be brought in relation to the publication of the report or a copy of the report.

Other legislative requirements may be relevant to the conduct of an inquiry by the Commissioner under section 83, depending on the circumstances.

## 1.4 Related resources

Information on the management of complaints received by the Commissioner is available to the public on the Commissioner's website.

# 2 Key responsibilities

The Commissioner is solely responsible for:

- determining whether to conduct an inquiry under section 83, conducting an inquiry, and determining any further action to be taken;
- appointing any other person to conduct an inquiry under section 83; and
- delegating or authorising the Commissioner's functions under section 83 to staff of the Commissioner.

The Commissioner has authorised certain OPSC staff to respond to a complaint or similar correspondence received by the Commissioner or the OPSC where it has been determined that no further action is warranted under section 83 in accordance with applicable legislation and policy.

The Commissioner's Office is responsible for overseeing the handling of complaints requesting an inquiry under section 83 and ensuring that they are recorded and dealt with generally in accordance with this Guideline. The Commissioner's Office may direct complaints to an authorised officer for review and response in accordance with the relevant authorisation.

Any OPSC staff receiving a complaint raising broader systemic issues or becoming aware of a matter which is properly within the Commissioner's functions under section 83 must refer the complaint or matter to the Commissioner's Executive Officer for consideration by the Commissioner.

The OPSC's Director Legal Services is responsible for managing the provision of legal advice to the Commissioner on legal issues raised by or in connection with a section 83 inquiry, any complaint or matter warranting a section 83 inquiry, or any resulting action.

There are additional responsibilities where an inquiry under section 83 arises as a result of a public interest disclosure (PID), or where a PID is made in an inquiry:

- The Commissioner and OPSC disclosure officers are responsible for ensuring any PID they receive is dealt with appropriately in accordance with the *Public Interest Disclosures Act 2022* (PID Act) and applicable Public Interest Disclosures Policy (PID Policy).
- OPSC managers are required to pass on reports they receive to an appropriate PID Disclosure Officer, and all OPSC staff are required to comply with their responsibilities under the PID Act and applicable PID Policy.

# 3 Assessing whether a matter merits inquiry

## 3.1 Preliminary assessment

After receiving information about a matter that may merit inquiry, the Commissioner will:

- make a preliminary assessment of the information

- consider whether the matter falls within the scope of the inquiry power
- assess whether the matter merits inquiry.

The Commissioner may then decide whether or not to proceed to an inquiry into the matter or authorise someone else to do so, or whether some other action should be taken.

Special considerations apply if the matter has been referred to the Commissioner for investigation or other action under section 53 of the *Independent Commission Against Corruption Act 1988 (ICAC Act)* or where the matter is subject to the PID Act (see 3.3.4-3.3.5).

## 3.2 Receiving information about matters that may merit inquiry

### 3.2.1 Sources of information

The Commissioner may become aware through a range of channels about matters that may merit inquiry under section 83 of the GSE Act. These channels include:

- allegations, reports or information provided by a government sector agency or directly by an employee, contractor, volunteer or other individual, such as a member of the public, to the Commissioner
- formal referrals by government sector agencies under other legislation such as the ICAC Act and matters arising under the PID Act
- allegations or information received by staff of the OPSC and referred to the Commissioner
- workforce reviews and surveys, such as the *NSW Public Sector Report* and *People Matter Employee Survey Report*
- publicly available information, such as academic reviews or media reporting
- the day-to-day work of the OPSC.

### 3.2.2 Types of information that may be received

Information received that could merit inquiry may be about culture, policy, procedures and practices the conduct of individual government sector employees or groups of employees (including persons engaged by a government sector agency, whether directly or indirectly, under a contract for services).

Such information may concern the administration or management of a specific agency or agencies or part of an agency (including persons engaged by a government sector agency, whether directly or indirectly, under a contract for services) or the government sector as a whole.

## 3.3 Undertaking a preliminary assessment

As soon as practicable after becoming aware of information that may merit inquiry under section 83 of the GSE Act, the Commissioner should undertake a preliminary assessment of the information at hand. The purpose of the assessment is to do the following:

- exclude any matters that on their face will clearly not merit inquiry (e.g. because they are frivolous, vexatious, not in good faith, the subject-matter of the complaint is trivial, is the responsibility of another oversight agency, or where the employer is better placed to resolve the matter)
- if there is no obvious and immediate exclusion, the Commissioner will then proceed to consider in further detail whether the matter falls within the scope of the inquiry power and whether the facts of the matter merit inquiry

- if the matter involves a referral from another oversight body (including Independent Commission Against Corruption (ICAC)) or a PID under the PID Act, the Commissioner will consider the implications for the inquiry.

### 3.3.1 Where the Commissioner has a conflict of interest

Circumstances may arise in which the initial information received about a matter indicates that a reasonable person might perceive that the Commissioner may have a conflict of interest in conducting an inquiry into the matter. Where there is reasonably perceived conflict of interest, the conflict should be disclosed and appropriately managed. Appropriate management may include the Commissioner declining to conduct an inquiry and referring the matter to the PD Secretary for possible inquiry by the Secretary under section 83, or alternatively delegating to a suitably qualified person with no conflict of interest the Commissioner's power of inquiry in relation to that matter in accordance with section 17(2) of the GSE Act.

Where the potential impact of the conflict is minimal or unclear, the Commissioner may choose to seek legal or professional advice on how the conflict might be appropriately addressed or discuss this with the Ombudsman's Office.

Where the matter has been delegated, the person to whom the power has been delegated should then proceed to assess whether the matter merits inquiry under section 83, and should an inquiry proceed, manage the conduct of that inquiry. The Commissioner should be informed of the outcome, but should not be involved in any decision-making in relation to the conduct of the inquiry.

If later in the preliminary assessment process or during an inquiry by the Commissioner, information comes to light that indicates the Commissioner could reasonably be perceived as having a conflict of interest, the Commissioner should disclose and appropriately manage the conflict or withdraw from the process as outlined above.

### 3.3.2 Seeking further information

The Commissioner may seek further information informally about a matter to assist in this preliminary assessment. This may involve discussing the matter further with the person or agency that made the allegation or provided the information concerned.

If necessary, the Commissioner may use the information gathering powers under section 16 of the GSE Act to require the head of a government sector agency to provide the Commissioner with a report on such matters relating to the employees of the agency, or the employment policies and practices of the agency. Any law relating to the protection of personal information within the meaning of the *Privacy and Personal Information Protection Act 1998 (PPIP Act)* does not operate to prevent the furnishing of this information, or affect a duty to furnish information under the section 16 power. Information received by the Commissioner under section 16 of the GSE Act may provide guidance to the Commissioner as to whether a section 83 inquiry is warranted.

### 3.3.3 Frivolous or vexatious claims

Where the information received is an allegation or complaint, the Commissioner will only consider the option of an inquiry if the allegation or complaint appears to be credible, made in good faith and is neither frivolous nor vexatious.

Where the Commissioner determines an allegation or complaint to be frivolous or vexatious, the OPSC will notify the complainant in writing of the Commissioner's decision not to undertake inquiry. Where a complainant persists in communicating the same issues to the OPSC, the OPSC may reiterate the decision not to undertake an inquiry and, if necessary, advise the complainant that the OPSC will no longer engage in any further correspondence.



### 3.3.4 Consideration of whether the information constitutes a public interest disclosure

Where a public official makes an allegation or complaint directly to the Commissioner or OPSC staff member, consideration should be given in the first instance to whether the allegation or complaint constitutes a PID. If it does, care needs to be taken to deal with it in accordance with the PID Act and the applicable PID Policy (see 5.4.3 below for further information on confidentiality implications for PIDs).

### 3.3.5 Matters referred to the Commissioner under other legislation

Where agencies refer matters to the Commissioner under the ICAC Act or PID Act, there may be requirements for pre-referral consultation under that legislation that have implications for the preliminary assessment stage.

Part 5 of the ICAC Act provides that ICAC may refer matters for investigation or other action to any person or body considered by ICAC to be appropriate in the circumstances. This may include the Commissioner. However, ICAC is required to conduct appropriate consultation with the person or body, and to take into account their views, before referring the matter. That consultation should be used to clarify ICAC's expectations in terms of any particular matters to be investigated (see also 6.1 below).

Sections 55 and 56 of the PID Act provide for the referral of PIDs to a person or body that is authorised by another Act or law to investigate the relevant serious wrongdoing. Unless the referral is mandatory under another Act or law, an agency is not to refer a voluntary PID without considering whether the disclosure would more appropriately be dealt with by the person to whom, or body to which, the disclosure is to be referred, as well as the risk of detrimental action (s.57(2)).

Where consultation occurs prior to referral of a disclosure to the Commissioner under the PID Act, this should consider whether the matter intended to be referred is within the scope of the inquiry power in section 83 of the GSE Act.

### 3.3.6 Referring matters to other agencies

If it is clear at any stage that the matter should be referred to another oversight body, the Commissioner will do so. Relevant oversight bodies in NSW for various allegations or complaints include:

- Anti-Discrimination NSW: for investigation of discrimination
- Auditor-General: for serious and substantial waste of public money
- Independent Commission Against Corruption: for corrupt conduct
- Information Commissioner: for government information-related matters
- Law Enforcement Conduct Commission (LECC): for serious misconduct or serious maladministration by police or the NSW Crime Commission
- Inspector of the Law Enforcement Conduct Commission: for agency maladministration or officer misconduct or maladministration against the LECC
- Office of Local Government: for matters involving serious and substantial waste in local government, general council management, misconduct by a councillor and breaches of the *Local Government Act 1993* and related Acts
- NSW Ombudsman: for investigation of conduct of a public authority within the Ombudsman's statutory functions, including serious maladministration, serious misconduct by police, child abuse concerning the staff of designated government and non-government agencies
- NSW Police: for criminal conduct and for police misconduct
- Privacy Commissioner: for inquiries and investigation of complaints about privacy related matters



- SafeWork NSW: for work health and safety matters.

Relevant federal oversight bodies may include, for example, the Australian Federal Police or Australian Taxation Office.

Referral of a specific allegation or complaint to another oversight body does not necessarily preclude the Commissioner from conducting a concurrent inquiry on broader questions of culture, policy, procedure and practices related to the administration or management of an agency or agencies.

### 3.4 Is the matter within the scope of the Commissioner's power of inquiry?

Section 83 provides that the Commissioner may inquire into 'any matter relating to the administration or management of a government sector agency'.

Such matters might include, but are not limited to, where there are reasonable grounds for the belief or suspicion that:

- there are serious shortcomings in the administration or management of a government sector agency, which cannot be resolved internally
- an agency head or other very senior executive is personally involved in a matter of concern
- a matter of concern may be systemic across the government sector
- the matter concerns administration or management culture, policy, procedures or practices across the government sector as a whole
- the matter could affect the administration or management of other government sector agencies or have consequences for strategic management and workforce planning for the government sector
- public trust in the integrity and accountability of the government sector could be undermined.

### 3.5 Do the facts of the matter merit inquiry?

Where a matter falls within the inquiry power, the Commissioner will consider whether the facts of the matter merit inquiry on that occasion. In doing so, the Commissioner will have regard to the Commissioner's objectives and functions as set out in sections 10 and 11 of the GSE Act. Additional specific considerations are discussed below.

#### 3.5.1 Matters concerning a specific agency or agencies to be resolved internally, where possible and appropriate

Under the GSE Act, agency heads are responsible for the general conduct and management of the functions and activities of their agency in accordance with the government sector core values as set out in the Act. This includes promoting and maintaining ethical conduct by their agencies and employees and managing unsatisfactory performance and misconduct by employees of their agency.

Where the Commissioner becomes aware of a matter of administration or management in a particular agency that may merit inquiry, the Commissioner will (where possible and appropriate) consult the agency head with a view to the matter being resolved internally within the agency. This includes matters relating to the conduct of individuals or groups of employees, and matters relating to culture, policy, procedures and practices. Agency heads should respond to the Commissioner in writing when a matter is resolved internally, setting out how the matter was resolved and what actions were taken.

There may be instances where the matter cannot be resolved internally, or where it would be inappropriate to rely solely on internal agency oversight mechanisms to resolve a matter (for

example, where the agency head is the subject of an allegation or there are other reasonable grounds for the belief or suspicion that the agency head would have a conflict of interest in dealing with the matter).

### 3.5.2 Where internal resolution is not possible or appropriate – factors to consider in assessing whether a matter merits inquiry

In making an assessment as to whether or not a matter merits inquiry, the Commissioner may consider factors which include, but are not limited to, the following:

- primarily, whether an inquiry would be in the public interest
- whether the matter is, or has already been, the subject of review, inquiry, investigation or prosecution by another NSW oversight or enforcement body
- whether there are better alternative means that could be used effectively to obtain the information sought or to resolve the matter
- the gravity of the matter and its potential to adversely affect the management, administration, operation or reputation of individual agencies or the NSW government sector if not investigated
- the seniority and number of government sector employees involved
- any likely operational impact of an inquiry on the agency or agencies concerned
- the length of time since any activities of concern took place
- competing work priorities of the OPSC, including the operational demands of any other inquiries under way at the time, available resourcing and funding
- the utility of the Commissioner conducting an inquiry, and whether there are good prospects that the inquiry will make a significant contribution to resolving the matter and/or the administration and management of the sector
- the risk that the public reputation of the government sector may be undermined if not investigated.

If the Commissioner considers that the matter merits inquiry, the Commissioner will proceed to identify the scope and purpose of the inquiry in accordance with Chapter 4 of this Guideline.

## 3.6 Deciding not to proceed to an inquiry

On consideration of the available information, the Commissioner may decide that a matter is outside the scope of section 83 or does not merit an inquiry.

If the Commissioner nonetheless considers that some form of action or oversight is appropriate the following options may be available:

- referral of the matter at any stage to another oversight body which may have jurisdiction (see 3.3.6 *Referring matters to other agencies*)
- review of particular issues in reliance on publicly available information or the voluntary provision of information by agencies (particularly in the case of sector-wide reviews of culture, policy, procedures or practices)
- issuing a direction under section 13 of the GSE Act
- requiring the head of a government sector agency to provide the Commissioner with a report in accordance with section 16 of the GSE Act
- monitoring the matter for any developments that may result in the matter coming within the scope of the inquiry power or meriting an inquiry
- recommending that particular action be considered under the GSE Act, Regulation or Rules or relevant legislation

- considering whether the matter warrants amendment to the GSE Rules.

Where the Commissioner decides not to inquire into a matter, the reasons for deciding not to inquire should be documented and recorded, and the agency or individual providing the information or making the allegations should be informed in writing of the decision not to proceed to an inquiry and the reasons for this.

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## 4 Identifying the scope and purpose of the inquiry

### 4.1 Drafting terms of reference for consultation

If the Commissioner decides that a particular matter merits an inquiry, the Commissioner will prepare draft terms of reference setting out the proposed scope and purpose of the inquiry.

The terms of reference should provide clear direction and limitations for the inquiry, but not limit the flexibility needed to inquire into all relevant aspects of a matter.

### 4.2 Consultation with PD Secretary and any other relevant parties

The Commissioner may inform the PD Secretary of the Commissioner's decision to inquire into a particular matter or to appoint another person to conduct the inquiry. If appropriate, the Commissioner may consult the PD Secretary on the draft terms of reference and, depending on the nature of the inquiry, consult on whether it would be appropriate for the Secretary to conduct the inquiry instead of the Commissioner, or for PD and the OPSC to share resources and expertise on a particular inquiry.

The Commissioner may also choose to consult other relevant parties to refine and finalise the draft terms of reference.

In consulting on the draft terms of reference, personal information about individuals who are the subject of the inquiry is subject to privacy laws (unless any lawful exclusions apply) and should only be disclosed where reasonably necessary to properly consult on the draft terms of reference. If a PID is involved there are particular confidentiality obligations (see 5.4.3 below).

Following any appropriate consultations, the Commissioner will finalise the terms of reference.

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## 5 Carrying out the inquiry

The following section deals with the appointment of a person to conduct an inquiry and provides broad guidance about the conduct of the inquiry.

### 5.1 Appointing a person to conduct an inquiry on the Public Service Commissioner's behalf

Section 83 of the GSE Act permits the Commissioner to conduct an inquiry personally or to appoint another person to conduct the inquiry on the Commissioner's behalf.

### 5.1.1 Nature of the appointment

A person appointed by the Commissioner to conduct an inquiry under section 83 conducts the inquiry in their own right. However, the person acts on behalf of, and under the direction of, the Commissioner (section 83(2A)).

### 5.1.2 Who should be appointed to conduct the inquiry

The Commissioner will only appoint a person who the Commissioner is satisfied:

- is sufficiently senior and has relevant skills and experience in conducting investigations or inquiries and knowledge of relevant matters such as the rules of procedural fairness, and
- has had no prior direct involvement in the matter and no actual or perceived conflicts of interest in the matter (the Commissioner may seek a conflict of interest declaration from the person).

The person may be a NSW government sector employee or an individual (such as a solicitor or barrister or retired judicial officer) or an incorporated organisation (such as a consultancy firm) outside the sector. The choice will depend to a large extent on the nature of the matter under inquiry. Where an incorporated organisation is appointed to conduct the inquiry, the associated contract of engagement should specifically name the individuals within the organisation who are to conduct the inquiry.

The OPSC may also engage individuals or firms to provide the Commissioner or whoever is appointed to conduct the inquiry with specialist services (such as legal, human resources or accounting advice) needed for the inquiry (see 5.1.5 below).

### 5.1.3 Instrument of appointment

The Commissioner's appointment of a person to conduct the inquiry will be in writing, signed and dated by the Commissioner and will:

- specify or attach the terms of reference of the inquiry
- set out the coercive investigatory powers under section 83 that the person is appointed to exercise on the Commissioner's behalf.

A copy of the instrument will be provided to the appointed person.

### 5.1.4 Contract to engage services of person appointed to conduct the inquiry

Where the Commissioner appoints someone from outside the NSW government sector to conduct the inquiry there should be a contract between the Commissioner and the service provider.

In addition to the standard terms (term of appointment, fee, termination, dispute resolution etc) the contract should set out terms governing the service provider's relationship with the Commissioner, including:

- an undertaking to keep the Commissioner informed of key developments and seek the Commissioner's input into critical decisions in the inquiry
- a timeline for the inquiry
- a reporting schedule that provides for when and how reports will be provided to the Commissioner
- the instrument of appointment to conduct the inquiry.

Where a government sector employee is appointed to conduct an inquiry, it is unlikely that a contract will be necessary. However, the terms of the relationship between the Commissioner and that person, including reporting expectations, should be set out in writing prior to the commencement of the inquiry.

### 5.1.5 Contract to engage specialists to assist person conducting the inquiry

The Commissioner may arrange for the person appointed to conduct the inquiry to have access to specialist assistance from an external provider (for example, forensic accountants, lawyers or human resources experts). The individual or organisation concerned should be engaged under the relevant NSW Government procurement contract where applicable or a standard consultancy contract. The terms of the contract will need to be consistent with the terms of reference for the inquiry and relevant legislation.

## 5.2 Best practice literature

The carrying out of an inquiry is a complex task, and providing detailed advice on all aspects of the carrying out of inquiries is beyond the scope of this Guideline. However, a wide range of literature exists on best practice in conducting inquiries and investigations. A person appointed by the Commissioner to conduct an inquiry should familiarise themselves with this material, which includes in the NSW government sector context:

- NSW Independent Commission Against Corruption's Factfinder: A guide to conducting internal investigations.
- NSW Ombudsman's Complaint Handling Resources, Effective Complaint Handling Guidelines, and Good conduct and administrative practice: Guidelines for state and local government.

## 5.3 Procedural fairness obligations

There is a presumption that the principles of procedural fairness (also known as natural justice) must be observed in exercising statutory powers that could affect the rights, interests or legitimate expectations of individuals.

In conducting an inquiry, the Commissioner must ensure as an overriding priority that the inquiry observes procedural fairness. This requires the person conducting the inquiry to:

- avoid actual and perceived conflicts of interest, and act in an impartial and objective manner
- inform any individuals who are the subject of an inquiry of the allegations against them and provide an opportunity for them to respond to the allegations
- make reasonable inquiries, including providing a hearing to, or receiving submissions from, affected parties before making a decision
- take into account all relevant factors, and no irrelevant factors
- base findings on facts and the best available information
- complete the inquiry without undue delay, and inform affected parties of any unexpected delay.

## 5.4 Confidentiality and privacy obligations

To ensure procedural fairness, the person conducting the inquiry will need to consider carefully how the public interest is best served in balancing confidentiality with transparency throughout the course of the inquiry. The balance is likely to change depending on the nature of the inquiry, and may change during the course of the inquiry.

The person conducting the inquiry should also seek advice and guidance from the Commissioner or a senior OPSC staff member nominated by the Commissioner where difficult judgments need to be made about balancing confidentiality with transparency.

Legislative or legal requirements may restrict the disclosure of information in an inquiry. Where appropriate, legal advice should be obtained as to what information, including any confidential or

personal information, about the inquiry can lawfully be disclosed, and what information is required to be disclosed.

### **5.4.1 Principles guiding whether information in an inquiry should remain confidential**

Where permitted by law, it may be appropriate to disclose certain information in an inquiry, for example:

- to facilitate an investigation
- to keep interested parties aware of the progress and results of an investigation
- to comply with procedural fairness requirements
- to give reasons for decisions or conclusions
- to comply with legal obligations, e.g. under subpoena, or for the purposes of criminal or disciplinary proceedings, etc
- where it is otherwise in the public interest to do so.

Circumstances where it may be appropriate not to disclose information include:

- to minimise detrimental impact on individuals (e.g. harassment, reputational damage, privacy or defamation actions)
- where it would be premature (e.g. involving working documents prior to a final decision being made)
- to minimise detrimental impact on any current or future investigations
- to minimise prejudice to the future supply of information to the agency or government
- to minimise or prevent substantial adverse impact on the management or assessment of an agency's personnel or to minimise prejudice to work health and safety
- to minimise prejudice to law enforcement, cyber security or the security of premises or individuals
- in various specific circumstances, e.g. in relation to complaints by third parties, disciplinary proceedings, child protection
- to maintain confidentiality, including complying with obligations under the PID Act
- to comply with privacy requirements
- to comply with secrecy requirements.

### **5.4.2 Providing information on the progress of an inquiry to affected parties**

The Commissioner will write to the head of the government sector agency that is the subject of the inquiry to advise of the commencement of the inquiry and the expectation of cooperation by the agency's employees. The agency head should also be advised of the terms of reference of the inquiry, the estimated timeframe, details of the person appointed to conduct the inquiry, and the person's powers under section 83.

Affected parties (complainants, PID reporters, subjects, witnesses) should be provided with appropriate information about the commencement and progress of an inquiry, in accordance with best practice investigation standards.

However, there are limitations on the disclosure of personal information about identifiable individuals under privacy laws (see 5.4.5 below) when informing affected parties about the progress of an inquiry.



Particular requirements and limitations apply to disclosing information to affected parties where the inquiry involves a PID or referral from ICAC (see 5.4.3 and 5.4.4 below).

### 5.4.3 Additional confidentiality requirements for PIDs

Where an inquiry is being conducted as a result of a PID, or where a PID is made or received during the course of an inquiry, confidentiality or non-disclosure requirements may apply under the PID Act.

Information about an individual that is contained in a PID, or that has been collected while dealing with a voluntary PID in accordance with that Act, is not “personal information” for the purposes of the PPIP Act.

However, the PID Act requires that information tending to identify the person who has made a voluntary PID is not to be disclosed by a public official or agency except in certain circumstances. These include, for example, where:

- the person consents in writing to the disclosure of that information, or
- it is generally known that the person is the maker of the PID as a result of the person having voluntarily identified themselves as the person who made the PID, or
- after consulting the person, the Commissioner or agency reasonably considers it necessary to disclose the identifying information to protect a person from detriment, or
- the Commissioner or agency is of the opinion that disclosure of the identifying information is necessary to deal with the disclosure effectively, or
- it is otherwise in the public interest to do so.

The NSW Ombudsman has produced [\*Maintaining confidentiality when dealing with voluntary PIDs\*](#) guidelines.

Confidentiality requirements should also be considered in relation to any mandatory or witness PIDs in an inquiry.

### 5.4.4 Additional secrecy and reporting requirements for matters referred by ICAC

Section 54 of the ICAC Act provides that ICAC may, when referring a matter under Part 5 for investigation or other action, require the relevant authority to submit to the ICAC a report or reports in relation to the matter and the action taken by the authority. ICAC may give directions about the nature of and timeframe for these reports. Where a matter has been referred by ICAC, the Commissioner will communicate progress and updates in accordance with any reporting directions or requirements made by ICAC.

In addition, in accordance with secrecy requirements under section 111 of the ICAC Act, the Commissioner will not make a record of any information or divulge or communicate any information about the commencement or progress of the inquiry except in accordance with section 111 of the ICAC Act.

### 5.4.5 Privacy law obligations

The Commissioner will ensure compliance with the Information Protection Principles under the PPIP Act, and where applicable, the Health Privacy Principles under the *Health Records and Information Privacy Act 2002* (HRIP Act). This includes ensuring that personal information is:

- only collected, used and disclosed in accordance with the PPIP and HRIP Act, and
- stored and disposed securely.

The PPIP Act provides certain exemptions from the IPPs with respect to investigations when public sector officials handle complaints or other matters that could be referred or made to an investigative agency, or have been referred from or made by an investigative agency. Where those



exemptions apply, the Commissioner may disclose personal information in certain circumstances where reasonably necessary for the proper exercise of complaint handling or investigative functions.

The PPIP Act also provides that public sector agencies are exempted from the Information Privacy Principles in relation to exchanges of personal information which are reasonably necessary for the purpose of referring inquiries between agencies.

Where permitted by law, the Commissioner may disclose personal information that is reasonably necessary to provide the complainant with advice as to the progress of the investigation into their complaint. However, the Commissioner will not disclose to a complainant personal information relating to any other person's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities, unless necessary to prevent a serious and imminent threat to life or health of that individual or another person.

The Mandatory Notification of Data Breach Scheme set out in Part 6A of the PPIP Act contains various requirements in the event of a suspected eligible data breach involving personal information. Where applicable, any person conducting an inquiry should ensure they are aware of and comply with the requirements of the Scheme and applicable Data Breach Policy.

#### **5.4.6 Government Information (Public Access) exclusion**

Information about inquiries held by the office of the Commissioner is expressly excluded from the application of the *Government Information (Public Access) Act 2009* (see Schedule 2, Item 2). The Commissioner is not obliged to release information about such inquiries under that Act (including any information obtained in the course of such an inquiry).

## **5.5 Record-keeping obligations**

### **5.5.1 General principles**

Any person conducting an inquiry should ensure they are aware of and comply with record-keeping requirements under the *State Records Act 1998* and applicable Records Management Policy.

Public offices are obliged to make and keep full and accurate records of their activities of the office (section 12 (1), *State Records Act*). Schedule 2 of the *State Records Regulation 2024* sets out guidelines on what constitutes normal administrative practice and deals with matters including retention of drafts and working documents containing significant information. Individuals responsible for or in possession of these records must ensure that they are kept secure against unauthorised access, alteration, loss or destruction.

### **5.5.2 Record-keeping responsibilities during the carrying out of an inquiry**

In the context of an inquiry it is essential that contemporaneous notes of all discussions, phone calls and interviews are made. File notes should be legible, include relevant dates/times, clearly identify the author of the note, and contain a file reference. Every person who has been told about the complaint during an investigation should be able to be identified from these records.

Care should be taken to ensure that inquiry documents are kept secure, and not lost, misplaced, modified or disclosed at any stage throughout the inquiry process.

Unless secrecy requirements apply, electronic documents about inquiries should be securely saved in OPSC's electronic record system, with a dedicated folder for each inquiry which is only accessible by those with a need to know the information.

## **5.6 Preparing an inquiry plan**

Before the inquiry commences, the person conducting the inquiry should formulate an inquiry plan, considering the following:

- what the core factual issues are
- what the key risks are and how to manage them
- what information gathering powers will be used and how
- how information obtained will be recorded and stored
- what resources will be required to successfully complete the inquiry (staff, financial, assets, any external advice or assistance)
- the timeframe for completing the various steps of the inquiry.

Note that if the inquiry is into a matter referred by ICAC for investigation or other action, ICAC may have requested that it be provided with the investigation plan for the inquiry.

## 5.7 Gathering information

Under section 83 of the GSE Act, the person conducting the inquiry may exercise any of the following coercive information gathering powers in conducting an inquiry:

- enter and inspect the premises of a government sector agency
- require the production of, and take copies of, any documents in the custody of an employee of the government sector agency (or a person/company engaged by the agency under a contract for services)
- for the purposes of further examination, take possession of, and remove, any of those documents
- require an employee of the government sector agency (or a person/company engaged by the agency under a contract for services) to answer questions
- require an employee of the government sector agency (or a person/company engaged by the agency under a contract for services) to provide such assistance and facilities as is or are necessary to enable the person conducting the inquiry to exercise their inquiry functions.

Existing best practice literature provides significant guidance on techniques for gathering these types of information in a way that is effective and accountable. Legal or other technical advice may be required.

The person conducting the inquiry should consider the use to which information that is to be gathered is likely to be put at the conclusion of the inquiry and, as far as practicable, ensure that the information would be appropriate for that use. For example, if it is likely that the information will be needed as evidence in legal proceedings, the information should, where practicable, meet the requirements for admissibility as evidence in those proceedings (see 6.2). If this is the case the person appointed to conduct an inquiry should seek expert guidance on the admissibility of evidence before starting to gather information.

## 5.8 Nature of the inquiry to guide information gathering methods used

Given the wide range of matters relating to the 'administration or management' of government sector agencies that could potentially fall within the Commissioner's power of inquiry, the conduct of inquiries may differ significantly from case to case.

Not every inquiry will necessitate the use of all or any of the information gathering powers available to the person conducting the inquiry. Coercive information gathering powers may be used to the extent necessary to conduct the inquiry fairly, effectively and efficiently. Where appropriate, an inquiry may be conducted on the papers, that is, based on documentary evidence only.

Before exercising coercive information gathering powers, the Commissioner or person undertaking the inquiry should, to the extent practicable, outline to all affected persons the inquiry process and

how the information gathering powers are intended to be used. This information should generally include, at a minimum:

- the terms of reference of the inquiry (the Commissioner may also elect to publish the terms of reference on the Commissioner's website where this is warranted by the significance or nature of the inquiry)
- the methods by which evidence is intended to be gathered
- the timeframe within which the inquiry is intended to be conducted
- any opportunity that will be afforded to comment on proposed findings or recommendations or respond to a report of the inquiry.

The nature and extent of the information that can be provided will be affected by, among other things, legal requirements to maintain confidentiality and protect personal information.

Consideration should be given to adopting a trauma-informed approach, where appropriate, to support information gathering and reduce harm to affected individuals during the inquiry. This may include, for example, the use of culturally-responsive and trauma-informed interview techniques.

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## 6 The outcome of the inquiry – reporting and other action

### 6.1 Report on the factual findings and recommendations

After all relevant information has been gathered, the Commissioner, or person conducting the inquiry, will prepare a written report. If another person was appointed to carry out the inquiry, that person's written report will be provided to the Commissioner for consideration. The Commissioner should record that they have received and read the report, and should record any comments or responses to the findings and recommendations.

The report should include:

- an executive summary
- the terms of reference of the inquiry
- an outline of relevant legislation and policies
- information on the management of conflicts of interest (if any)
- an overview of how relevant information was obtained
- a statement of all relevant facts and evidence (copies of evidence may be attached to the report in appendices)
- the findings reached and the basis for them
- recommendations for action (if any)
- any other relevant information.

The report does not necessarily need to include any finding that wrongdoing or inappropriate conduct occurred (or did not occur). Section 83 is not directed at the taking of disciplinary action against any person, but rather at the administration or management of government sector agencies.

Where a report is prepared under section 83(4A) on the conduct and findings, and any recommendations, of the inquiry, this should be stated in that report. Where the Commissioner publishes such report in the public interest under section 83(4A), this should also be stated in that report.

The decision to publish a report is at the absolute discretion of the Commissioner, however a range of factors may be considered when deciding whether to publish a report, for example:

- the nature and context of the report, including the purpose of the inquiry itself
- whether publication of the report would support the exercise of the Commissioner's functions or objectives under the GSE Act
- whether publication of the report may benefit the proper administration of government, for example by enhancing government accountability or transparency
- Whether publication of the report would be in the public interest for example by increasing transparency in relation to the administration and management of a government agency
- whether there is an overriding public interest against disclosure under the *Government Information (Public Access) Act 2009* in relation to any of the information within the report
- if there are any requirements or obligations under other legislation including, but not limited to, the *Public Interest Disclosures Act 2022* and *Privacy and Personal Information Protection Act 1998* that would prevent publication of the report
- considerations of procedural fairness that may impact whether publication is in the public interest or not.

If the inquiry was into a matter that ICAC had referred for investigation or other action, the referral may have required a report to ICAC from the Commissioner under section 54 of the ICAC Act. If so, the report should be prepared in accordance with ICAC's [Section 54 Report Guidelines](#).

Where the person who conducted the inquiry wishes to make findings or recommendations about a specific allegation, and about broader system issues, it may be appropriate to produce two (or more) separate reports.

## 6.2 Standard of proof

When conducting an inquiry under section 83, the Commissioner is not legally subject to a standard of proof in the way that a court is. However, it is considered best practice for the Commissioner to arrive at findings as if a standard of proof were applicable. This approach helps to ensure that a sound evidentiary basis is used when reaching conclusions, especially where adverse findings are to be made against any person.

Applying an appropriate standard of proof in making inquiry findings is also important to ensure that administrative decisions and actions taken as the result of the findings will not be overturned should the matter proceed to litigation.

In making findings of fact on the basis of information obtained through an inquiry, the civil standard of proof should be applied. This means allegations must be proved 'on the balance of probabilities'.

For a finding to be made on the balance of probabilities, the information gathered must establish that it is more probable than not that the facts occurred (*Miller v Minister of Pensions* [1947] 2 All ER 372 at 374). However, the strength of evidence necessary to establish a fact in issue on the balance of probabilities may vary according to the seriousness of the issues involved. The more serious the allegation, the more satisfied the decision-maker must be that the evidence demonstrates a fact on the balance of probabilities (known as the 'Briginshaw test' from *Briginshaw v Briginshaw* (1938) 60 CLR 336). The Briginshaw test has been widely applied in courts, in particular with regard to proving workplace misconduct and discrimination allegations, and is an important guide when (for example) making any finding of misconduct or other inappropriate conduct by any person.

## 6.3 Deciding on action to be taken as a result of the inquiry findings

Following the inquiry, there is a range of actions that the Commissioner could consider taking. These include:

- making, amending or repealing a government sector employment rule in accordance with the GSE Act
- issuing a direction to the head of a government sector agency in accordance with section 13 of the GSE Act
- requiring the head of a government sector agency to provide a report in accordance with section 16 of the GSE Act
- recommending to a government sector agency head that they:
  - ensure training or professional development is provided for a particular individual or group within the agency
  - make changes to administration and management culture, systems, policies, practices or procedures
- where a matter concerns the conduct or performance of a particular individual, recommending that consideration be given to the taking of particular action in relation to that person under the GSE Act or relevant legislation
- making a recommendation to the government that policy or legislative changes be made
- publishing a report of the inquiry if the Commissioner considers it in the public interest to do so (section 83(4)(b))
- monitoring the matter for further developments
- referring the matter to a different oversight body (see 3.3.6 *Referring matters to other agencies*)
- taking no action.

## 6.4 Communicating the outcome of the inquiry

The Commissioner will determine the manner in which the findings of the inquiry and any action taken are to be communicated.

This section includes some standard practices for consideration when determining communication in relation to an inquiry. However, the approach taken to communication may vary depending on the nature of the inquiry.

As a general rule, personal information and other confidential information should not be disclosed unless the Commissioner considers it reasonably necessary to the proper conduct of the inquiry, and disclosure is authorised by law.

Note that where the inquiry arose from a PID, it will be important to ensure that information concerning a PID or the maker of a PID is not disclosed unless there is good reason to do so and it is permitted by law (see 5.4.3).

### 6.4.1 Advising complainants of the outcome (where the inquiry arose from a complaint or allegation)

As a general rule but subject to the above considerations, complainants should be informed of:

- the general outcome of the inquiry
- any recommendations that could impact on the interests of or otherwise be of concern to the complainant

- what is likely to happen next and whether the complainant is likely to be further involved in the matter
- the need to keep this information confidential (where appropriate).

### 6.4.2 Advising PID reporters (where the inquiry arose from a PID)

Where an inquiry has arisen from a PID, there may be legislative requirements to communicate certain information about the outcome of the inquiry.

Section 59 of the PID Act requires that an agency dealing with a voluntary PID must inform the maker of the PID of various matters, including, but not limited to, how the agency is dealing with, or proposes to deal with, the disclosure and any corrective action taken or proposed or recommended in response to their PID.

### 6.4.3 Subjects of an inquiry (agencies and individuals)

The Department Secretary or agency head should be advised of the following information at the conclusion of an inquiry into the administration or management of their Department or agency. Where an allegation or complaint was made against a particular individual and they are the subject of the inquiry, that individual should also be advised of the following information:

- the outcome of the inquiry
- details of any referral made as a result of the inquiry
- any recommendations that relate particularly to the subject of the investigation
- what is likely to happen next
- where appropriate, a request that this information be kept confidential.

### 6.4.4 Witnesses who were involved in the inquiry (where applicable)

Witnesses should be advised of:

- the general outcome of the inquiry
- what is likely to happen next and whether the witness will be further involved in the matter
- a request or direction that this confirmation be kept confidential (where appropriate).

### 6.4.5 Special requirements for matters referred by ICAC

Section 54 of the ICAC Act provides that ICAC may require the person or body to whom it referred a matter for investigation or other action to provide a report or reports to the ICAC in relation to the matter and the action taken. ICAC may give directions about the nature of and timeframe for these reports.

Where a matter has been referred by ICAC, the Commissioner will communicate any report on the findings of the inquiry to ICAC in accordance with any requirement or direction made.

Any communication of the outcome of the inquiry will be managed in consultation with ICAC, and subject to any applicable secrecy requirements under section 111 of the ICAC Act.

## 6.5 Ongoing evaluation

Following an inquiry, the OPSC will assess the inquiry process to determine whether and, if so, how the process could be improved. This may be done via a post-inquiry review where the person who conducted the inquiry, and any other OPSC staff who were involved, document any 'lessons learned'. This should include what went well, what risks were uncovered and mitigated (or not) and whether there were any gaps in the process. This review should be recorded and may be drawn on in future inquiries to refine inquiry processes where required.





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