

ACT AUDITOR–GENERAL’S REPORT

**ACT HEALTH’S MANAGEMENT OF
ALLEGATIONS OF MISCONDUCT AND
COMPLAINTS ABOUT INAPPROPRIATE
WORKPLACE BEHAVIOUR**

REPORT NO. 9 / 2018

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PA 17/10

The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Madam Speaker

I am pleased to forward to you a Performance Audit Report titled 'ACT Health's management of allegations of misconduct and complaints about inappropriate workplace behaviour' for tabling in the Legislative Assembly pursuant to Subsection 17(4) of the *Auditor-General Act 1996*.

Yours sincerely



Dr Maxine Cooper
Auditor-General
1 August 2018

The ACT Audit Office acknowledges the Ngunnawal people as traditional custodians of the ACT and pays respect to the elders; past, present and future. The Office acknowledges and respects their continuing culture and the contribution they make to the life of this city and this region.

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SUMMARY

In mid to late 2016 concerns associated with the accuracy of ACT Health's performance information and reporting were identified. The former ACT Health Director-General has outlined their concerns, which are presented in paragraph 2.50.

On 29 July 2016, ACT Health wrote to two officers of the former Performance Information Branch, ACT Health to notify them of misconduct allegations against them. These allegations related to errors in the *March 2016 ACT Health Services Quarterly Performance Report* (i.e. the Third Quarter 2015-16 report). The two former officers had key responsibilities for the production and accuracy of this report and other ACT Health performance information.

The two former officers made claims of inappropriate workplace behaviour on the part of the former ACT Health Director-General and former Deputy Director-General Corporate, ACT Health.

Comments provided by entities who were provided with the *draft proposed report* and *final proposed report* (or relevant extracts) were considered and the substance of their comments included in this report. In including comments provided the Audit Office did not seek evidence to assess whether such statements are correct or not.

Overall conclusion

ACT Health did not effectively manage allegations of misconduct initiated by the former Director - General and former Deputy Director-General, Corporate against two former Performance Information Branch officers who were involved in preparing performance information and reporting, the accuracy of which was of concern to these executives. Furthermore, complaints of inappropriate workplace behaviours made by one of the former Performance Information Branch officers against the former Director-General and former Deputy Director-General, Corporate were also ineffectively managed.

Despite significant concerns held about the accuracy of performance information and reporting, to provide transparency and demonstrate accountability, it was important that appropriate processes be undertaken and documented for the management of the allegations of misconduct against the former officers; this did not occur.

In going forward, ACT Health needs to confirm and articulate the desired culture and values to be fostered across the organisation. As part of disseminating this information, there should be an emphasis on how allegations of misconduct are to be managed, including the processes to be used for making and responding to complaints of inappropriate workplace behaviour. Additionally, it would be timely for the Public Sector Standards Commissioner and the Professional Standards Unit to raise awareness of their roles and the merits of early contact with them, especially for allegations of serious misconduct.

Chapter conclusions

THE MANAGEMENT OF ALLEGATIONS AGAINST FORMER EMPLOYEES

ACT Health did not effectively manage allegations of misconduct against two former officers in the Performance Information Branch. While it is apparent that the former Director-General and former Deputy Director-General, Corporate had significant concerns regarding the preparation of performance information and reporting, for which the Performance Information Branch was responsible, the decision to initiate a misconduct investigation into the two officers based on these concerns was precipitous.¹ There is no contemporaneous documentation to justify potential misconduct or the initiation of the misconduct investigation.

Documentation (an ACT Health Preliminary Assessment *proforma*) that purported to support undertaking a misconduct investigation was produced approximately three weeks after the decision was made to undertake the misconduct investigation and suspend the officers. Given the decision and actions already undertaken this means the documentation was redundant.

ACT Health referred the allegations, including the ACT Health Preliminary Assessment *proforma*, to the Professional Standards Unit for investigation. The Professional Standards Unit's processes complied with the requirements of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*. This included the two officers being given the opportunity to respond to the allegations and review key documentation. The result of the investigation was a determination that one former officer had not engaged in misconduct; there was no formal resolution for the other officer as, although the investigation was completed and findings were made, the independent Delegate did not make a determination as to misconduct because the officer's employment contract with ACT Health had expired.

The investigation took around five months to complete which, although lengthy, is reasonable considering its technical nature and complexity, delays in receiving relevant documentation from ACT Health, requests for additional time to respond by the two former officers and the Christmas and New Year shut-down period.

¹ In a response to the final proposed report on 27 July 2018, legal representatives on behalf of the former Director-General advised 'The use of the word 'precipitous' is a totally inappropriate categorisation of [the former Director-General's] decision to refer the two [officers] for misconduct investigation. ... there was nothing precipitous about [their] decision making. It was a deliberate decision, taken upon advice, based on ever increasing evidence of a complete governance and management failure in the performance area despite assurances to [themselves] and then Minister to the contrary, and designed to ensure that substantial payouts utilising tax payer funds were not inappropriately paid to staff'.

THE MANAGEMENT OF COMPLAINTS ABOUT THE FORMER DIRECTOR-GENERAL AND FORMER DEPUTY DIRECTOR-GENERAL, CORPORATE

ACT Health's management of complaints regarding inappropriate workplace behaviours (including allegations of bullying) made by the former Senior Manager, Business Intelligence was not effective.

Procedures in ACT Health's *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* were not followed by the former Director-General or former Deputy Director-General, Corporate in responding to a written complaint by the former Senior Manager, Business Intelligence in July 2016 about the conduct of the former Deputy Director-General, Corporate. Given that the SOP is ACT Health's policy it was incumbent on the executives to follow the intent of its procedures, even though the SOP specifically refers to a complainant as 'the staff reporting an act of bullying behaviour to their manager [Audit emphasis]' and not the executive.

Key discussions (in May 2016 and July 2016) between ACT Health Human Resource officers and the former Senior Manager, Business Intelligence, regarding complaints (including allegations of bullying) were not adequately documented. While retaining adequate documentation of such allegations is always important it is particularly so if the allegations are related to executives.

The former Public Sector Standards Commissioner implemented appropriate processes in responding to complaints about the former Director-General and former Deputy Director-General, Corporate's behaviours, noting that the complaints 'were very low level' and 'they weren't able to develop a case that this was bullying'. However, the former Commissioner's communication advising the two former officers that a determination had been made that the matters they had raised did not constitute a public interest disclosure was confusing. Clarity was therefore not provided to the two officers.

Key findings

THE MANAGEMENT OF ALLEGATIONS AGAINST FORMER EMPLOYEES

Paragraph

In mid to late July 2016 the former Senior Manager, Business Intelligence was in discussions with ACT Health Executives for the purpose of facilitating their departure from the organisation. In an interview under oath or affirmation on 16 April 2018, the former Director-General recalled that the former Senior Manager, Business Intelligence's demeanour had changed: 'I just noticed that [they] went from someone who was positive and contributing, to somebody who just didn't seem happy. Which is why I was happy to give [them] the package ...' The ACT Government Solicitor provided advice and drafted a Deed of Release to effect the former Senior Manager's departure. The acting Executive Director, People and Culture had a telephone discussion with the former Senior Manager on 22 July 2016 where agreement was reached and a payment of approximately \$126,000 was to be made. The acting Executive Director, People and Culture emailed the former Director-

2.33

General and former Deputy Director-General, Corporate, to advise of this outcome on the afternoon of 22 July 2016. The payment of approximately \$126,000 was not made as the departure of the former Senior Manager, Business Intelligence did not proceed as then planned.

On 25 July 2016 the former Executive Director, Performance Information emailed the former Director-General and Deputy Director-General, Corporate advising that 'I would like to be considered for a redundancy'. At a meeting with the former Deputy Director-General Corporate and the acting Executive Director, People and Culture on 25 July 2016 the former Executive Director, Performance Information was advised by the former Deputy Director-General, Corporate that 'opportunities exist for [them]' and '[they are] well respected and liked' and advised '[they have] options, no pressure or hurry to make decision'. Notwithstanding these assurances the former Executive Director reiterated in an email to the Director-General on 28 July 2016 that they 'would still like to be considered for a redundancy rather than other options due to the abolition of my position'. 2.42

On 13 July 2016, an ACT Health officer commenced acting in the role of the Executive Director, Performance Information and Decision Support, due to the absence on personal leave of the former Executive Director, Performance Information. A key task of the acting Executive Director, Performance Information and Decision Support Branch was to review the draft *March 2016 ACT Health Services Quarterly Performance Report* (the 3rd Quarter Performance Report). In undertaking this task the acting Executive Director identified several errors throughout the draft report including; internal inconsistencies and incorrect figures; unsubstantiated statements; and errors in labelling graphs. These errors caused the acting Executive Director, Performance Information and Decision Support to have doubts as to the veracity of the report. 2.49

In a response to the draft proposed report on 5 June 2018 legal representatives on behalf of the former Director-General advised of the former Director-General's growing concerns with respect to the accuracy of performance information and reporting in ACT Health from May 2016. The former Director-General identified performance information and reporting errors that became public in May 2016 with respect to the *December 2015 ACT Health Services Quarterly Performance Report* (i.e. the Second Quarter 2015-16 report) as well as assurances that they felt were provided by the former Executive Director, Performance Information (and former Senior Manager, Business Intelligence) in relation to these errors. The former Director-General advised that 'it was because of this ongoing pattern of data integrity flaws being raised with [the former Director-General] that [they] decided to commence misconduct proceedings'. 2.52

The legal representatives on behalf of the former Director-General, and the former Deputy Director-General, Corporate, in responding to the draft proposed report advised of their growing concerns with respect to performance information and reporting and the actions of the former Executive Director, Performance Information and Senior Manager, Business Intelligence. 2.77

- In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised ‘there were a number of matters around potential failures of governance that were being brought to [their] attention in late June and July of 2016. But the main issue was [their] belief that the then Minister of Health and [they] had been misled by personal advice from [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] that the errors were only one-offs — not systematic failures of governance’.
- In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised ‘Between 16 May 2016 and 29 July 2016, a series of emails regarding the integrity of the quarterly reporting eroded my confidence in its accuracy and reliability, and over time I began to form the view that [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] may have failed to meet their obligations under section 9 of the PSM Act in the preparation of quarterly reporting, and in their assurances to the former Health Minister’.
- In response to the draft proposed report the former Executive Director, Performance Information and former Senior Manager, Business Intelligence disagreed that they provided the above claimed assurance to the former Director-General and Deputy Director-General, Corporate with respect to the performance information and reporting.
- On 30 July 2016 (five days after the Executive Director, Performance Information was advised ‘opportunities exist for [them]’ and ‘[they are] well respected and liked’) the two former members of the former Performance Information Branch received written notification of a misconduct investigation against them. Accounts as to the rationale behind undertaking a misconduct investigation differ between the former Director-General, former Deputy Director-General, Corporate and ACT Health Human Resource officers. While it is apparent that concerns had been raised as to ACT Health performance information and reporting processes, for which the two staff members had responsibility, it is not clear how their actions were identified as potential misconduct and warranted investigation. No contemporaneous documentation was produced at the time of the written notification of misconduct against the two former staff members justifying undertaking a misconduct investigation. Nor was early advice of the Professional Standards Unit sought in order to ensure that the allegations were clearly linked to a potential breach of the ACT Public Sector Code of Conduct, suffice to warrant an investigation into their conduct and the suspension of both former officers.
- In an interview under oath or affirmation, the former Director-General has advised that they thought it would be ‘unethical’ to allow the two staff members to depart the organisation with ‘voluntary redundancy’ payments when the former Director-General had concerns that the actions of the staff members may have amounted to misconduct. (While an exit from the organisation had been agreed with the former Senior Manager, Business Intelligence, no such exit had, at that time, been agreed with the former Executive Director, Performance Information). Accordingly, the former Director-General advised that they were seeking a ‘short, sharp’ investigation

into their activities to ‘reassure me that ... I’m not sitting on an absolute time bomb here of, you know, deliberate incompetence’. The former Deputy Director-General, Corporate advised that no other options such as performance management or reassignment to other duties were considered because ‘[the former Senior Manager, Business Intelligence] for all intents and purposes, I think in their own mind was somewhere between negotiating a VR and wanting to go’ and the former Executive Director, Performance Information had ‘made a decision that they wanted to just leave, you know’.

In responses to the draft proposed report both the former Executive Director, Performance Information (29 May 2018) and Senior Manager, Business Intelligence (28 May 2018) disagreed with assertions that they were unwilling to return to work or otherwise assist in resolving issues with performance information and reporting before their departures from the organisation. 2.111

The *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*, which applied to the former Senior Manager, Business Intelligence (as a non- Executive employee of the ACT Public Service) requires the conduct of a preliminary assessment ‘in cases where an allegation of inappropriate behaviour is made’ in order to ‘determine whether further action is required’. Following the conduct of the preliminary assessment a range of possible future actions may be taken, one of which is an investigation. A Minute into the matter, which included a completed ACT Health Preliminary Assessment *pro forma*, was completed by the acting Executive Director, Performance Information and Decision Support Branch on 22 August 2016. The Brief identified the problems associated with performance information and reporting but did not specifically refer to, or discuss, allegations of potential misconduct on the part of the two officers with respect to the *Public Sector Management Act 1994*, *Public Sector Standards 2006* or the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*. 2.129

On 24 August 2016 the former Deputy Director-General, Corporate ticked the ‘requires investigation’ box on the ACT Health Preliminary Assessment *pro forma* and noted that ‘Noting serious concerns raised by Minute (22.8.2016) and the very serious implications for ACT health operationally and for government generally, I am satisfied that this now warrants independent investigation’. This Minute, and the attached Preliminary Assessment *pro forma*, were produced more than three weeks after the former Senior Manager, Business Intelligence (and the former Executive Director, Performance Information) were suspended and informed that they would be subject to a misconduct investigation. 2.130

On 24 August 2016 a *Workplace Investigation or Review Request* document, signed by the former Deputy Director-General, Corporate as Delegate, was submitted to the Professional Standards Unit to formally request an investigation into the actions of the two former Performance Information Branch employees. The attachment to this *Workplace Investigation or Review Request* was the ACT Health Preliminary Assessment *pro forma* signed by the former Deputy Director-General, Corporate on the same date. Following its receipt of the *Workplace Investigation or Review Request* document, the Professional Standards Unit undertook a series of actions to determine an appropriate strategy for the investigation and to engage a suitably 2.152

qualified investigator to conduct the investigation. This included liaising with ACT Health to further develop and articulate the nature of the allegations against the two former staff members. These were further clarified and articulated and based, in part, on the findings of PwC's *Process and Controls Review: Status of the ACT Health Quarterly Performance Report* (22 August 2016). On 16 September 2016, the former Deputy Director-General, Corporate wrote to the former officers further clarifying the allegations against them.

On 26 September 2016 the independent investigator contacted the former Senior Manager, Business Intelligence and former Executive Director, Performance Information informing them that they had been engaged by ACT Health to undertake the misconduct investigation. The letter was accompanied by the Terms of Reference for the investigation. Between 29 September 2016 and 6 February 2017 the independent investigator undertook the investigation into the officers. The two former officers were given the opportunity to respond in writing to the allegations and were provided with access to relevant documents.

2.167

The requirements of section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* were met in relation to the conduct of the investigation (although it is noted that these requirements only applied to the former Senior Manager, Business Intelligence, as a former non-Executive ACT Public Service employee). While there are no specific timeframe requirements for the conduct of a misconduct investigation, this investigation was conducted in a relatively timely manner, once the referral was received from ACT Health by the Professional Standards Unit on 24 August 2016. The investigation took around five months to complete which, although lengthy, is reasonable considering its technical nature and complexity, delays in receiving relevant documentation from ACT Health, requests for additional time to respond by the two former officers and the Christmas and New Year shut-down period.

2.168

Dr James Popple (Principal Reviewer, CPM Reviews), who was engaged by the Audit Office as a subject matter expert to review the processes undertaken in relation to the misconduct investigation, advised that both former employees were afforded procedural fairness in the management of the allegations against them, noting that both officers were given details of the allegations against them and given the opportunity (which they took) to respond and an independent investigator was engaged to conduct the investigation. Dr Popple advised 'the process was an extended one and, no doubt, caused the employees considerable stress. But the process did not cause the employees any practical injustice'. Dr Popple further advised 'even though the investigation process was procedurally fair, the decision to conduct the investigation was problematic'.

2.176

THE MANAGEMENT OF COMPLAINTS ABOUT THE FORMER DIRECTOR-GENERAL AND FORMER DEPUTY DIRECTOR-GENERAL, CORPORATE

Paragraph

In late May 2016 the former Senior Manager, Business Intelligence had a conversation with an ACT Health Human Resources officer in relation to the behaviour of the Deputy Director-General, Corporate. The ACT Health Human Resources officer in an interview under oath or affirmation recalled that the former Senior Manager, Business Intelligence was seeking advice as to how they could make

3.24

a complaint about the former Deputy Director-General, Corporate (and, in doing so, expressed concern that they could not make a complaint to the former Director-General). The former Senior Manager, Business Intelligence has since advised that they were making a complaint at the time. The ACT Health Human Resources officer recalls that they provided advice to the effect that the issues could be raised with the Head of Service or Public Sector Standards Commissioner and that this advice was satisfactory to the former Senior Manager, Business Intelligence. No contemporaneous records were kept in relation to the conversation and the ACT Health Human Resources officer did not raise the matter with their supervisor or other managers within ACT Health, including the former Deputy Director-General, Corporate.

On 1 July 2016 the former Senior Manager, Business Intelligence sent an email to the former Deputy Director-General, Corporate complaining about their behaviour. The former Deputy Director-General, Corporate did not respond to the former Senior Manager, Business Intelligence but forwarded the email to their direct supervisor, the former Director-General, along with a suggestion as to how the complaint could be handled. In an interview under oath or affirmation, the former Director-General advised that they sought advice from ACT Health Human Resources and then spoke directly to the former Executive Director, Performance Information about the incident. There is no evidence that a response was provided to the former Senior Manager, Business Intelligence in relation to the complaint. 3.38

The handling of the complaint by the former Deputy Director-General, Corporate and former Director-General did not align with existing ACT Health policy and was not effective. While the former Deputy Director-General, Corporate and former Director-General met some of the 'Information Gathering requirements' of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011), there is no evidence of how other requirements of the policy were addressed, including: 3.39

- 'the expectations both parties had/have for resolving the issue';
- 'any actions each of the parties agreed to for gaining resolution'; and
- 'management follow up and any further recommendations'.

While the former Director-General states that they considered the allegation in the email dated 1 July 2016, consulted with ACT Health Human Resources staff and spoke to the former Executive Director, Performance Information directly on the matter, they did not meet the requirements and recommendations of the *ACT Health Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (February 2011) to: 3.40

- inform the staff/s concerned that no disciplinary action will be taken, and that an investigation will not take place;
- discuss with all parties the behaviours expected from them to repair and maintain a professional working relationship; and
- arrange a follow up discussion to ensure expectations have been met.

There is no evidence that ACT Health considered informal resolution processes in response to the allegation of 1 July 2016 and it is apparent that principles of the ACT 3.41

Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* were not met, specifically that:

- ‘wherever possible, complaints should be resolved by a process or discussion, cooperation and conciliation. The aim is to reach an acceptable outcome that minimises any potential detriment to ongoing relationships’; and
- ‘both the staff member raising the complaint (the complainant) and the person/persons against whom the complaint is made (the respondent) will receive appropriate information, support and assistance in resolving the grievance’.

The legal representatives on behalf of the former Director-General noted that the definition of ‘bullying’ for the purpose of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) is ‘repeated, unwelcome behaviour of a person/s’ and because the former Senior Manager, Business Intelligence only raised one instance of witnessed behaviour the procedure did not apply. The legal representatives on behalf of the former Director-General also noted that the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) ‘contemplates that a complainant under the SOP is a person who raises a complaint with their manager’ and that because neither the former Director-General nor former Deputy Director-General, Corporate was the manager of the former Senior Manager, Business Intelligence they had no responsibility for actioning or responding to the information. 3.44

Such an interpretation of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) misses the intent and spirit of the procedure and its emphasis on implementing appropriate processes to recognise and manage complaints of inappropriate behaviours. The language of the email makes it clear that a complaint was being made about the behaviours of the former Deputy Director-General, Corporate and this was not effectively managed for the reasons outlined in paragraphs 3.38 to 3.41. 3.45

On 18 July 2016, during a conversation with the acting Executive Director, People and Culture, the former Senior Manager, Business Intelligence raised concerns about their treatment by senior ACT Health executives (the former Director-General and former Deputy Director-General, Corporate). The conversation occurred in the context of the former Senior Manager, Business Intelligence seeking a ‘voluntary redundancy’ from the organisation and an associated payment. In an interview under oath or affirmation the acting Executive Director, People and Culture advised that they considered the information that was provided and asked for specific examples of the incidents. The acting Executive Director, People and Culture considered that the allegations were general and lacked specificity. The acting Executive Director, People and Culture made brief, handwritten contemporaneous notes associated with the conversation. They advised that they had a conversation in which they ‘would have pretty much read out the theme of [the complaints] to the former Director-General and former Deputy Director-General, Corporate’. There is no documentation of this conversation or of the consideration of the allegations i.e. why they did not amount to potential bullying. 3.54

On 4 August 2016, the former Executive Director, Performance Information and former Senior Manager, Business Intelligence met with the Public Sector Standards Commissioner to discuss their concerns about the behaviours of the former Director-General and former Deputy Director-General, Corporate. In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner advised that they had separate discussions with the former Director-General and former Deputy Director-General, Corporate in relation to the issues that were raised. The former Public Sector Standards Commissioner advised that ‘given that there were I think three or four specific complaints [that] didn’t show a pattern over a long period of time of – of intimidation or, you know, anything that could – could be perceived as bullying, I really took them as a different perception of manner’. In doing this, however, it is noted that faced with conflicting stories of the events, the Commissioner decided that they would take no further action in relation to the allegations made by the former employees. In a response to the draft proposed report on 29 May 2018 the former Public Sector Standards Commissioner advised ‘I was not made aware of any witnesses to the incidents by the complainants and having interviewed them and the subjects of the complaints I understood the matters to have been exhausted as much as they could have been’.

3.61

On 7 September 2016, a letter was sent to the former Public Sector Standards Commissioner from the legal representative of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence. The letter purported to make a public interest disclosure under the *Public Interest Disclosure Act 2012*. The former Public Sector Standards Commissioner made a decision that the purported public interest disclosure from the two officers in September 2016 was not a public interest disclosure under the *Public Interest Disclosure Act 2012*. In doing so, the former Public Sector Standards Commissioner advised the Audit Office under oath or affirmation that ‘They were very low level. They weren’t able to – in my mind they weren’t able to develop a case that this was bullying’. This was a decision that was open and available to the Commissioner. Notwithstanding that the former Public Sector Standards Commissioner did not consider the matters raised to be a public interest disclosure, the former Commissioner referred to aspects of the *Public Interest Disclosure Act 2012* (paragraphs 20(f) and 20(g)) as the rationale for not investigating the matter further. Paragraph 20(f) refers to ‘the investigating entity [in this case the former Commissioner] is reasonably satisfied that the substance of the disclosure has already been investigated under this Act or another law in force in the ACT’ and Paragraph 20(g) refers to ‘there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure’. The use of two different sections of the Act is considered to create ambiguity.

3.72

Recommendations

RECOMMENDATION 1 ACT HEALTH TRAINING FOR EXECUTIVES AND MANAGERS

ACT Health should implement training for executives and managers for the handling of allegations of potential breaches of the ACT Public Sector Code of Conduct. This training should include:

- a) managing and documenting the conduct of preliminary assessments;
- b) the need to fully consider options available prior to proceeding with a misconduct investigation (e.g. underperformance management); and
- c) processes for managing and documenting allegations of breaches of the ACT Public Sector Code of Conduct.

RECOMMENDATION 2 PROFESSIONAL STANDARDS UNIT GUIDANCE MATERIAL

The Public Sector Standards Commissioner should review guidance material for ACT Government agencies with respect to the documentation of allegations of potential breaches of the ACT Public Sector Code of Conduct. The guidance material should address:

- a) the need to document the relevant and clear connection between an employee's behaviours and any alleged breach of the ACT Public Sector Code of Conduct;
- b) the role of Directors-General to consider and investigate the actions and conduct of staff in the first instance and refer allegations that are particularly serious or complex to the Public Sector Standards Commissioner in a timely manner; and
- c) the need to communicate with the Professional Standards Unit as early as possible when allegations of potential breaches of the ACT Public Sector Code of Conduct may be referred to the Public Sector Standards Commissioner for actioning.

RECOMMENDATION 3 RECEIVING AND MANAGING ALLEGATIONS OF INAPPROPRIATE WORKPLACE BEHAVIOURS

ACT Health should implement awareness training for Executives and managers to reinforce requirements for receiving, documenting and managing reports of inappropriate workplace behaviours.

Response from entities

In accordance with section 18 of the *Auditor-General Act 1996*, the Auditor-General provided a copy of the draft proposed report and final proposed report to the Interim Director-General, ACT Health, Director-General, Chief Minister, Treasury and Economic Development Directorate, the Public Sector Standards Commissioner, the former Public Sector Standards Commissioner and the former Director-General, ACT Health. They were offered the opportunity to provide a statement for consideration for inclusion in the Summary Chapter. No succinct comments for inclusion in the Summary Chapter were received. Where additional substantive comments were provided, these have been included in this audit report.

1 INTRODUCTION

- 1.1 This chapter presents background information on concerns associated with the accuracy of ACT Health performance information and reporting, the investigation of misconduct allegations, management of complaints of inappropriate workplace behaviour by the former Director-General and former Deputy Director-General, Corporate and a public interest disclosure made to the Audit Office. It also presents the audit objective, scope, criteria, approach and method.
- 1.2 Background information on the concerns associated with the accuracy of ACT Health performance information is included as it is the context of the allegations which are the subject of this audit.

Accuracy of ACT Health performance information

- 1.3 In mid to late 2016 concerns associated with the accuracy of ACT Health's performance information and reporting were identified:
- in May 2016 errors were identified in the publically reported *December 2015 ACT Health Services Quarterly Performance Report* (i.e. the Second Quarter 2015-16 report); and
 - in September 2016 the former ACT Health Director-General communicated concerns to the ACT Auditor-General associated with the accuracy of ACT Health performance information and reporting, specifically with respect to the *March 2016 ACT Health Services Quarterly Performance Report* (i.e. the Third Quarter 2015-16 report).
- 1.4 These concerns followed the publication of two ACT Auditor-General reports in relation to ACT Health performance information and reporting since 2012 (refer to Appendix A):
- *Emergency Department performance Information* (July 2012); and
 - *Integrity of data in the Health Directorate* (June 2015).
- 1.5 The former ACT Health Performance Information Branch was responsible for the preparation of quarterly performance reports (and other ACT Health reports) for external reporting.

December 2015 ACT Health Services Quarterly Performance Report (2nd Quarter Report)

1.6 In May 2016 errors were identified in the *December 2015 ACT Health Services Quarterly Performance Report*.² These errors were brought to the attention of the ACT Audit Office by the former Shadow Minister for Health in a letter dated 17 May 2016. The ACT Audit Office sought information and advice from ACT Health in relation to these errors. On 31 May 2016 the Executive Officer to the former ACT Health Director-General provided a document to the Audit Office titled *ACT Health response to question raised by Auditor-General in relation to errors in the December 2015-16 Quarterly Report*. Through this document, ACT Health advised:

No data was changed in source systems, extracts from source systems or in prior reports. The issues relate to

- i. inconsistent and inaccurate reporting of figures in the 2nd Quarter Health Performance Report for 2015-16, due to:
 - a. inaccurate calculations from the available data extracts;
 - b. inaccurate transcribing of data into tables within the report; and
- ii. A typographical error in the 2nd Quarter Report for the same quarter in 2014-15.

1.7 ACT Health further advised:

There was an existing quality assurance process in place to [sic] the compilation of the ACT Health Quarterly Performance Report.

The process included having 2 staff members responsible for generating the figures for different aspects of the Report. The 2 staff would then swap function and generate the same figures to ensure consistency and accuracy.

The report would then go through a final validation and check by the Manager of this area, before going up the line for Senior Executive and Minister endorsement.

...

The process for the compilation and checking of the Report is sound, however in the case of the December 2015-16 Quarterly Performance Report, a review indicates this process was not followed.

Firstly, the team leader of the Reporting Team was away on leave. This person has previously taken the lead on coordinating the Report. Instead, the Manager of the Team undertook to coordinate the completion of the Report.

The Manager tasked a range of people to undertake aspects of the Report. Many of these people had not previously had involvement in the compilation of the Report, and were unaware of correct sources of data used to complete the tasks.

Additionally, a review of the Report was not done thoroughly, which led to a number of errors in the Report. Most of the errors were [sic] due to transcription issues, not updating figures from previous reporting periods, and incorrectly calculating figures.

² According to ACT Health 'The information contained within the ACT Health Quarterly Performance Report is used to inform the public of current activity and performance across the health system, and provide insights into improvements and challenges faced by Health'.

1.8 In relation to new and revised assurance processes that were planned, ACT Health advised:

ACT Health has undertaken a review and amendment of processes related to the development of the quarterly report and the manual for its development has also been reviewed and updated.

In addition, ACT Health has identified the need for, and are currently implementing, a robust quality and compliance system in our reporting area to ensure consistency and accuracy in the data we produce and publish. This includes a new sign-off process that ensures all established processes have been followed in the development of the report.

ACT Health is reviewing all processes related to reports as part of its continual quality improvement cycle. This includes consolidation of data extracts and improved documentation of processes, particularly related to information used for external and national purposes.

March 2016 ACT Health Services Quarterly Performance Report (3rd Quarter Report)

1.9 On 8 September 2016 the former ACT Health Director-General wrote to the Auditor-General advising of the identification of 'data anomalies when preparing the Quarter 3 ACT Public Health Services Quarterly Performance Report (Q3 report)'. The former Director-General advised '[w]e are currently working through a process to understand the issues and causes. To assist us with this work we have engaged the services of PricewaterhouseCoopers (PwC) to undertake data assurance and integrity work'. The former Director-General further advised:

The Performance Information Branch (now known as Business Performance Information and Decision Support) initially delayed the release of the Quarter 3 ACT Public Health Services Quarterly Performance Report (Q3 report) as a result of their stated additional assurance checks put in place after the errors in the second quarter report.

Once the Q3 report was prepared, senior executives and I reviewed the report and identified an error that was probably due to an incorrect calculation or transcription. As a result, further assurance checks were carried out.

Through the additional checking processes, data variances were found that indicated probable issues in the extraction code used to generate the data. This led to the discovery that standards were not used to guide consistent data extraction processes. Data variances were identified in both the current year data and in data for prior years.

Engagement of PwC

1.10 In the 8 September 2016 letter to the ACT Auditor-General, the former ACT Health Director-General identified that ACT Health had engaged PwC for assistance with respect to performance information and reporting processes. The former Director-General advised:

On 3 August 2016, ACT Health engaged PwC to undertake a body of work on data assurance services for ACT Health quarterly performance reports. PwC were again engaged to undertake data integrity services and this work commenced on Wednesday 17 August 2016. PwC were again engaged on 1 September 2016 to prepare a data governance framework for the Business Performance Information and Decision Support (BPI&DS) Branch.

1.11 In the letter of 8 September 2016 the former Director-General advised that PwC had prepared three draft reports to date:

- *Process and Controls Review: Status of the ACT Health Quarterly Performance Report (22 August 2016);*

- *Process and Controls Review: Generation of metrics for the Annual Report (26 August 2016); and*
- *Source System to Data Warehouse Validation: Scoping phase report (31 August 2016).*

1.12 In a letter to the ACT Auditor-General on 20 December 2016 the former ACT Health Director-General provided an update on ACT Health’s performance information and reporting. The former Director-General advised that following the identification of errors in the March Third Quarter 2015-16 report, PwC was engaged ‘to provide data integrity and assurance services for critical data and reporting that were immediately due at the time. This included the 2015-16 Annual Report and quarterly performance reports’. Following this work PwC provided to ACT Health the following reports:

- *Data Integrity and mapping: Status of the ACT Health Quarterly Performance Report and high risk metrics for the 2015-16 Annual Report (Final Report) (23 October 2016);*
 - *Addendum 1a: ACT Public Health Services Quarterly Report – KPI/SQL Standards (9 October 2016);*
 - *Addendum 1b: Documented Standards – ACT Health Annual Report (9 October 2016);*
 - *Addendum 2: Quarterly Performance Report / Annual Report Procedural Documents (25 October 2016);*
 - *Addendum 3: Governance Assurance Framework for ACT Health Business Performance Information and Decision Support (9 October 2016);*
 - *Addendum 4 – Implementation Roadmap for Governance Assurance Framework (9 October 2016);*
 - *Addendum 5: Quarterly Performance Report (Quarter 4) – Quality Assurance Review (23 October 2016).*

1.13 In the letter to the ACT Auditor-General on 20 December 2016 the former Director-General provided further information on the services that had been sought from PwC in relation to performance information and reporting in ACT Health:

Following consideration of the PwC findings I again engaged PwC to provide the following services in line with their earlier recommendations:

- Quality assure metrics for the Review of Government Services Report;
- Provide an evidence based risk assessment related to the integrity of the reporting program of work;
- Undertake an end to end process controls review of the process related to the provision of data used in the automated generated routine reports;
- Provide ongoing support for quality assurance controls for business as usual report and data submissions deliverables by the Business Performance Information and Decision Support branch; and
- Provide options for resolution of known data warehouse issues.

- 1.14 The former Director-General also advised of improvements to performance information and reporting that ACT Health had already commenced:

Key structural and procedural changes made through this work to date include:

- Development of 108 standards for reporting metrics in the quarterly performance reports and annual report;
- Development of a reporting procedure for the quarterly performance and annual reports;
- Development of a governance assurance framework and implementation plan for data and reporting functions under the Business Performance Information and Decision Support branch;
- Implementation of a robust quality assurance approach (including four weeks of assisted support /mentoring) for work undertaken by the Business Performance Information and Decision Support branch; and
- Implementation of a governance group to support and monitor implementation of the PwC recommendations.

- 1.15 In relation to longer term reform of performance information and reporting across ACT Health the former Director-General advised:

To facilitate this ongoing improvement work, I am currently considering proposals for the longer term reform of the data and reporting functions across ACT Health including:

- a review of data and reporting functions across ACT Health and related governance and structural reform;
- continued implementation and embedding of strengthened data management and governance across the organisation;
- review of our approach to data holdings and architecture to improve quality and efficiency of reporting; and
- an independent review of implementation of information services capability covering all agreed recommendations and public commitments in relation to data integrity and governance.

- 1.16 In a letter to the Auditor-General on 9 March 2017 the ACT Health Acting Director-General advised that the PwC engagement had ‘recently concluded’ and that ‘the full range of recommendations from later reports is still being formally assessed by ACT Health’. The ACT Health Acting Director-General also advised:

KPMG has recently been engaged to initially provide independent advice on the development of a consolidated Data Integrity Improvement Program. This Program will consolidate all past recommendations from both PwC and previous Reports and recommendations from your office.

- 1.17 In a response to the final proposed report on 26 July 2018, in relation to paragraphs 1.10 to 1.16, the former Executive Director, Performance Information advised:

Statements note work completed by consultants at considerable cost to ACT Health to address supposed issues with information management.

ACT Health staff will attest to the fact that revised quarterly and annual reports produced by consultants contained errors (not picked up by ACT Health staff and signed off by Executives

after my suspension) and that the majority of the outputs provided by consultants in relation to systems and processes have not implemented [sic] within ACT Health.

February 2017 Report on Government Services

1.18 On 1 February 2017 the Productivity Commission's *Report on Government Services* was released. The February 2017 *Report on Government Services* did not include some data relating to ACT Health services, specifically part of Chapter 12, Volume E, including:

- Table 12A.13 'Emergency waiting times, by triage category, public hospitals';
- Table 12 A.30 'ACT Elective surgery waiting times, by clinical urgency category, public hospitals'; and
- Table 12A.32 'Proportions of presentations to emergency departments with a length of stay of four hours or less in admission, public hospitals'.

1.19 On 6 February 2017 the Shadow Minister for Health wrote to the Auditor-General in relation to this matter.

1.20 The ACT Audit Office sought information from ACT Health in relation to the *Report on Government Services* and the omission of ACT Health services data. On 9 March 2017 the ACT Health Acting Director-General advised:

... as a result of finding errors in the ACT Health Services Quarterly Performance Report Quarter 3, I engaged PricewaterhouseCoopers (PwC) to provide data integrity and assurance services to meet critical data and reporting requirements.

While this work was being undertaken I directed that supply of data to external organisations cease until such time that ACT Health could be assured that data supplied for these purposes was sufficiently accurate. The work program to review these data meant that the Emergency Department (ED), Elective Surgery Waiting Times (ESWT) and the Mental Health Establishments data could not be supplied to the AIHW for forwarding to the Productivity Commission between the required timeframes of 29 September to 28 November 2016. You should also be aware that the RoGS Mental Health Chapter 13 also has missing data.

...

Following submission of the Elective Surgical Waiting Times Emergency Department and Mental Health Establishment datasets to the Australian Institute of Health and Welfare (AIHW), ACT Health engaged the AIHW to process the datasets and provide the same data to ACT Health as would be published in the 2017 RoGS Report. This was completed however ACT Health verification of the results identified anomalies that are still being resolved with the AIHW.

System Wide Review

1.21 On 14 February 2017 the Minister for Health announced the conduct of a System Wide Review into ACT Health performance information and reporting.

1.22 According to the Terms of Reference for the System Wide Review, the purpose of the review was as follows:

The system-wide review (the Review) will be completed by 31 March 2018 and undertaken in a timely, transparent and effective manner and shall:

1. investigate the extent, and where possible, the root cause of the current data issues
2. establish revised governance processes and protocols for data management, reporting and analysis
3. develop a framework for the provision of essential data reports derived directly from source systems as an interim process and re-building of the ACT data warehouse
4. implement the framework outcomes
5. provide a detailed road-map to address existing recommendations from the Auditor-General and ACT Health external advisers
6. provide advice on the publication of data for consumers that facilitates improved understanding of ACT Health information, performance, quality and safety, including options for real-time provision of information.

1.23 The Terms of Reference for the System Wide Review identified that '[o]verview sight of the Review shall be undertaken by a Panel' and that '[t]he Panel will meet regularly and shall provide quarterly reports to the Health Minister through the ACT Health Director-General and shall provide a final report in early 2018'.

1.24 The Terms of Reference for the System Wide Review outlined six different pillars/activities that were to be addressed by the System Wide Review. These pillars/activities had various dates for completion, ranging from 30 June 2017 through to 31 March 2018, as follows:

- Activity/Pillar 1 (root cause analysis) – 30 September 2017
- Activity/Pillar 2 (revised governance processes and protocols for data management, reporting and analysis)
 - Phase 1 – 30 June 2017
 - Phase 2 – 31 March 2018
- Activity/Pillar 3 (framework for the provision of reports and replacement of data warehouse)
 - Framework for provision of reports - 30 June 2017
 - Framework for replacement of data warehouse – 30 September 2017
- Activity/Pillar 4 (implementation of framework outcomes) – 31 March 2018
- Activity/Pillar 5 (roadmap for addressing recommendations from Auditor-General and ACT Health external advisors) – 30 June 2017
- Activity/Pillar 6 (advice on publication of data for consumers) – 30 September 2017.

1.25 On 10 May 2018, the ACT Minister for Health made a statement in the Legislative Assembly that the System Wide Review 'report is now with ACT Health staff for their final consultation' and 'Final consultation with staff will also inform the next steps and implementation activities as we prepare to embed quality data within the organisation through the

outcomes of the system-wide review'. The Minister also identified that the System Wide Review final report is to be made publically available once staff consultation is complete and a government response received.³

Investigation by ACT Health of misconduct allegations

Notification of the investigation

1.26 On 29 July 2016 letters were prepared for the former Executive Director, Performance Information and former Senior Manager, Business Intelligence of the former Performance Information Branch, which provided written notification of a misconduct investigation into their alleged activities. These letters were provided to the officers on 30 July 2016.

1.27 In the letters provided to both officers on 30 July 2016 (dated 29 July 2016) the former ACT Health Deputy Director-General, Corporate advised:

I am writing to inform you that I have received allegations of possible misconduct against you. The preliminary allegations relate to your failure to exercise reasonable care and skill, and or failing to act with probity in performing your duties, namely:

- Advice that was provided to the Minister for Health and the ACT Health Director General in relation to the approach being taken within the Performance Information Branch to ensure consistency and accuracy in the data ACT Health produces and publishes was false.

1.28 The former Senior Manager, Business Intelligence was suspended with pay on 29 July 2016 and the former Executive Director, Performance Information was suspended with pay on 5 August 2016.

1.29 The former ACT Health Deputy Director-General, Corporate wrote to both officers again on 16 September 2016, with further detail of the allegations made against them. The letters stated '[f]ollowing the review of the information relating to this matter, I am writing to you to clarify the allegations of possible misconduct that will be investigated'. The letters provided further information on the allegations of possible misconduct as follows:

1. That you provided assurances to the Minister for Health and the Director-General of ACT Health ... that issues that resulted in the publication of incorrect figures in the *ACT Health Quarterly Performance Report December 2015* (Q2 report) had been resolved for the production of the March 2016 Quarterly Report (Q3 report). You advised a number of new processes had been established for the completion of the reports with greater transparency and auditing which ensures processes are adhered to. You advised that a robust quality compliance system was being implemented to ensure consistency and accuracy in the data produced and published when these issues had not in fact been resolved.

...

³ Legislative Assembly for the ACT, ACT Health- System-wide data review quarterly update Ministerial statement, PROOF, P1748. Accessed online at: <http://www.hansard.act.gov.au/hansard/qtime/pq180510.pdf> on 17/05/18

2. That ... you provided a progress report dated 8 July 2016 (COR 16/8675) to Deputy Director-General Corporate ... on ACT Health's implementation of recommendations from the Auditor General's Report 5/2015 stating that many of the actions to address the Auditor General's recommendations had been completed while others require ongoing review, when these actions had not in fact been completed.
- 1.30 The letter to the former Executive Director, Performance Information included an additional allegation:
3. That ... you provided assurances to the Select Committee on Estimates that the quarterly report undergoes data validation and checking before being provided to the Director-General, despite these processes being ineffective.
- 1.31 The letter to the former Executive Director, Performance Information (a former ACT Public Service Executive employee) identified the relevant section of the *Public Sector Management Standards* (2006) definition of misconduct by an Executive as:
- a) conduct that harms, or is likely to harm, the reputation of the service or the Territory; and
 - b) a breach of the Act, section 9.
- 1.32 The letter to the former Senior Manager, Business Intelligence (a former ACT Public Service non-Executive employee) identified the relevant section of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* definition of misconduct as:
- a) the employee fails to meet the obligations set out in section 9 of the PSM Act 1994 (this includes bullying and harassment or discrimination);
 - b) the employee engages in conduct that has brought, or is likely to bring, the Directorate or ACTPS into disrepute.

Conduct of the investigation

- 1.33 ACT Health referred the matter to the Professional Standards Unit (and therefore by association to the Public Sector Standards Commissioner) of the Chief Minister, Treasury and Economic Development Directorate on 24 August 2016. The Professional Standards Unit engaged an independent investigator to investigate the allegations.

Outcome of the investigation

- 1.34 In early February 2017 the investigation into the actions of the former officers was concluded.

Investigation findings – former Executive Director, Performance Information

- 1.35 The investigation report in relation to the conduct of the former Executive Director, Performance Information was completed in February 2017. The investigation report made the following findings:
- a. Following receipt of Auditor-General Report 5/2015 which contained specific recommendations, [former Executive Director, Performance Information] did fail in [their] role as Executive Director, Performance Information Branch to have in

place effective processes to ensure the consistent and accurate collection and reporting of ACT Health data noting:

- i. A number of actions were being implemented to improve data and reporting;
 - ii. The critical period relating to the allegations was one involving organisational and leadership changes which may have blurred reporting and accountability expectations; and
- b. [Former Executive Director, Performance Information] did not provide inaccurate or false assurances to the Minister for Health and the Director-General, ACT Health that such processes were in place and, to the extent that some information may have been misleading because of a narrow approach to the errors in the Q2 report or by overstating the robustness of actions implemented or the state of ongoing implementation, this was not intentional.

Investigation findings – former Senior Manager, Business Intelligence

1.36 The investigation report in relation to the conduct of the former Senior Manager, Business Intelligence was completed in February 2017. The investigation report made the following findings:

- a. Following receipt of Auditor-General Report 5/2015 which contained specific recommendations, [the former Senior Manager, Business Intelligence] did fail in [their] role as Senior Manager, Business Intelligence to have in place effective processes to ensure the consistent and accurate collection and reporting of ACT Health data, although the extent of this failure is limited by the following:
 - i. [They] shared responsibilities for reporting of ACT Health data with [their] supervisor, from whom [they] obtained agreement to initiatives;
 - ii. [They] did not have direct responsibilities for data collection and so could not be held responsible for ensuring its consistency or accuracy;
 - iii. While there were performance deficiencies, including on [former Senior Manager, Business Intelligence's] part, organisational and individual performance requirements do not appear to have been clearly stated, particularly in the context of changes to [former Senior Manager, Business Intelligence's] role in late 2015 and wider organisational changes in 2015 and 2016;
- b. [the former Senior Manager, Business Intelligence] did not provide inaccurate or false assurances to the Executive Director, Performance Information Branch, ACT Health, that such processes were in place and, to the extent that some information may have been misleading because of a narrow approach to Q2 report errors or by overstating the robustness of actions implemented or the state of ongoing implementation, this was not intentional.

Findings in relation to misconduct – Delegate's determination – former Senior Manager, Business Intelligence

1.37 The investigation report into the allegations relating to the former Senior Manager, Business Intelligence was provided to the Acting Director-General of the Transport Canberra and City Services Directorate (as an independent Delegate) in order to make a determination as to whether misconduct had occurred. On 24 February 2017 the Acting Director-General of the Transport Canberra and City Services Directorate accepted the

investigation report. In relation to the first allegation the Acting Director-General of the Transport Canberra and City Services Directorate determined there was no misconduct, noting:

The detailed report ... demonstrates that [the former Senior Manager, Business Intelligence] did provide assurances, through the Executive Director Performance Information Branch, to the Minister for Health and the Director General ACT Health ... that issues that had resulted in publication of incorrect figures in the *ACT Health Quarterly Performance Report December 2015* (Q2 report) had been resolved for the production of the March 2016 Q3 report.

By virtue of the presence of errors in the 2015-16, Q2 and Q3 performance reports, it is apparent that effective processes to ensure consistent and accurate collection and reporting of ACT Health data were not in place notwithstanding the assurances of [the former Senior Manager, Business Intelligence], through [their] supervisor. Therefore, I am comfortable to conclude that the allegation is proven. However, the extent of any failing is limited by:

1. [The former Senior Manager, Business Intelligence] shared responsibilities for reporting ACT Health data with [their] supervisor, from whom [they] obtained agreement to initiatives;
2. [The former Senior Manager, Business Intelligence] did not have direct responsibilities for data collection and so cannot be held responsible for ensuring its consistency and accuracy;
3. Organisational and individual performance requirements do not appear to have been clearly stated, particularly in the context of changes to [the former Senior Manager, Business Intelligence's] role in late 2015 and wider organisational changes in 2015 and 2016.

However, on the question of whether that action, as noted above, constitutes misconduct I have concluded that the evidence before me does not support a finding of misconduct against this allegation.

In addition to all the evidence provided to me, I have considered Section 9 of the *Public Sector Management Act 1994* (PSMA) in force at the time of the allegation, together with the ACT Public Service Guidelines on Misconduct and Investigations.

It is my opinion that there is insufficient evidence to support a claim that [the former Senior Manager, Business Intelligence] made such assurances (referred to above) with a view to wilfully or deliberately deceive. To the contrary, it is evident to me [the former Senior Manager, Business Intelligence] made the assurances believing that the statements were true and correct.

The extent to which [the former Senior Manager, Business Intelligence] may have failed to exercise reasonable care and skill (Section 9 (a) of the PSMA), that appears to me to fall within the realm of performance management rather than misconduct. I say this noting that the ACT Public Service Guidelines on Misconduct and Investigations includes the following paragraph:

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties.

As noted above I conclude that although [the former Senior Manager, Business Intelligence] may have overstated the robustness of [their] actions implemented or the state of ongoing implementation, there is insufficient evidence to conclude that [the former Senior Manager, Business Intelligence] behaviour was intended to be wilfully or deliberately unsatisfactory or that [the former Senior Manager, Business Intelligence] intentionally failed to meet the requirements of [their] duties. Indeed the evidence suggests, that until this event, [the former Senior Manager, Business Intelligence] was a well-regarded officer of the ACT Health. Therefore I could not find the evidence based on what was provided to me that [the former Senior Manager, Business Intelligence] had failed to act with probity in performing [their]

duties (Section 9(c) of the PSMA). It is my view that organisational change and adjustments to the duties of individual officers in the lead up to the events, the subject of this investigation, may have contributed to this situation.

- 1.38 In relation to the second allegation the Acting Director-General of the Transport Canberra and City Services Directorate determined there was no misconduct, noting:

[The former Senior Manager, Business Intelligence] was on leave and not responsible for the preparation of the progress report dated 8 July 2016 (COR 16/8675) to [former ACT Health Deputy Director-General, Corporate] on ACT Health's implementation of the recommendations from Auditor-General's Report No 5/2015. I accept the conclusion of the Investigation Report that [the former Senior Manager, Business Intelligence] did not provide inaccurate or false assurances with respect to this allegation.

Findings in relation to misconduct – former Executive Director, Performance Information

- 1.39 The investigation into the allegations about the former Executive Director, Performance Information ceased on 9 February 2017. This was the date on which the former Executive Director's ACT Public Service Executive contract expired. Although the investigation report was completed, the Delegate did not make a determination as the individual was no longer employed by the ACT Public Service. On 17 March 2017, the former Deputy Director-General, Corporate wrote to the former Executive Director, Performance Information advising:

The Investigator's report was finalised in February 2017 and provided to [the Acting Director-General of the Transport Canberra and City Services Directorate] to make a determination on the balance of probabilities as to whether misconduct had occurred.

I am writing to advise you that [the Acting Director-General of the Transport Canberra and City Services Directorate] has considered the investigator's report as well as their findings therein. However, given that your employment with ACT Health ceased on 9 February 2017, the misconduct process was wholly discontinued on that date and accordingly no findings with respect to whether you had engaged in misconduct were made by [the Acting Director-General of the Transport Canberra and City Services Directorate].

Return to work discussions – former Senior Manager, Business Intelligence

- 1.40 On 17 March 2017, the former Deputy Director-General, Corporate wrote to the former Senior Manager, Business Intelligence advising:

The Investigator's report was finalised in February 2017 and provided to [the Acting Director-General of the Transport Canberra and City Services Directorate] to make a determination on the balance of probabilities as to whether misconduct had occurred.

...

I am writing to advise you that [the Acting Director-General of the Transport Canberra and City Services Directorate] has considered the Investigator's report as well as their findings therein, and determined that you have not engaged in misconduct with respect to either allegation 1 or allegation 2. Accordingly, I confirm that the investigation into the allegations against you is now concluded, and no sanctions against you will be imposed.

- 1.41 The letter further advised:

- their suspension from duty would cease as at the date of the letter; and

- they should contact a representative of the ACT Health People and Culture Branch to discuss their return to work.

1.42 On 30 March 2017, the former Senior Manager, Business Intelligence met with the former Executive Director, People and Culture and the former Deputy Director-General, Workforce Capability and Governance regarding their options for a return to work. At that meeting the former Senior Manager, Business Intelligence indicated that they did not wish to return to any role in ACT Health or the broader ACT Public Service. In a letter dated 28 April 2017 to the to the former Senior Manager, Business Intelligence from the former Executive Director, People and Culture, it was recorded that:

... [the former Senior Manager, Business Intelligence's] preference was to negotiate [an] exit from the ACT Public Service by way of either a voluntary redundancy, or some form of financial settlement, where [they] would be paid a sum of money upon the end of [their] employment.

1.43 In a response to the draft proposed report on 28 May 2018 the former Senior Manager, Business Intelligence advised that:

In that meeting, I expressed my great disappointment in ACT Health, but also in the ACT Government Public Service. I said I had been let down by those people in the organisation who should have stopped the process into [former Executive Director, Performance Information] and I, and that I had subsequently lost the trust and respect for the organisation. I explained that my once excellent reputation had been tarnished across not only ACT Health, but across many other Directorates so it was not a reasonable option for me to return to the ACTPS.

Additionally, it should be noted, that following this meeting, I received a letter stating that I should either return to work, or resign. This was despite me providing a psychology report stating I had suffered from PTSD, depression and an adjustment disorder as a result of my treatment, and that in their professional opinion, returning to work in the ACT was not an option.

Legal settlement

1.44 The former Senior Manager, Business Intelligence subsequently engaged legal representation to progress a claim against the ACT Public Service. On 29 June 2017, the former Senior Manager, Business Intelligence's legal representative sent a letter to the Head of Service seeking to commence legal proceedings against the ACT Government. On 8 August 2017 the former Executive Director, Performance Information also communicated their intention to pursue legal recourse.

1.45 The legal claims against the Australian Capital Territory by the former Senior Manager, Business Intelligence and the former Executive Director, Performance Information were resolved in October 2017 and the Territory made payments of just over \$400,000 to each of the former officers. These included payments for:

- salary in lieu of required notices;
- a 'severance benefit' for the former Senior Manager and a 'special benefit' for the former Executive Director;
- leave and other entitlements accrued by the officers;

- damages for pain and suffering for both officers and economic loss for the former Executive Director; and
- reimbursed legal costs.

Management of complaints of inappropriate workplace behaviour by the former Director-General and former Deputy Director-General, Corporate

Complaints about the former Director-General and former Deputy Director-General, Corporate

Complaints to Health Directorate executives and officers

1.46 It was asserted to the Audit Office that complaints of inappropriate workplace behaviour were made:

- in late May 2016 a complaint was made in relation to the actions of the former Deputy Director-General, Corporate. It was asserted that the complaint was made to an officer in Human Resources at ACT Health;
- in early July 2016 a complaint was made in relation to the actions of the former Deputy Director-General, Corporate. It was asserted that the complaint was made directly to the former Deputy Director-General, Corporate; and
- in mid-July 2016 a complaint was made in relation to the actions of the former Director-General and former Deputy Director-General, Corporate. It was asserted that the complaint was made to the former Executive-Director of Human Resources at ACT Health.

1.47 The above complaints are further discussed in paragraphs 3.2 to 3.50.

Complaint(s) to the former Public Sector Standards Commissioner

1.48 On 4 August 2016, the former Executive Director, Performance Information and former Senior Manager, Business Intelligence met with the former Public Sector Standards Commissioner to discuss their concerns about the behaviours of the former Director-General and Deputy Director-General, Corporate.

1.49 On 24 August 2016 the former Senior Manager, Business Intelligence also wrote to the former Public Sector Standards Commissioner outlining their concerns associated with the procedural fairness of the misconduct investigation.

Purported public interest disclosure to the former Public Sector Standards Commissioner

1.50 On 7 September 2016, a letter was sent to the former Public Sector Standards Commissioner from the legal representative of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence. The letter purported to make a public interest disclosure under the *Public Interest Disclosure Act 2012*. The letter stated, in part:

The disclosure concerns behaviour towards or in relation to [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] of ACT Health, by [the former Director-General] and [the former Deputy Director-General, Corporate].

...

That is, the behaviour of [the former Director-General] and [the former Deputy Director-General, Corporate] towards [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] amounts to maladministration that has adversely affected [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence]'s interest in a substantial and specific way.

Public Interest Disclosure made to the Audit Office

1.51 On 8 February 2017 the ACT Audit Office received communication associated with ACT Health's performance information and reporting processes. The Audit Office sought further information, which was provided. On 18 September 2017 the Auditor-General determined that the information provided was a public interest disclosure in accordance with the *Public Interest Disclosure Act 2012*.

1.52 Paragraph 20(g) of the *Public Interest Disclosure Act 2012* states that 'an investigating entity may decide not to investigate a public interest disclosure, or may end the investigation of the disclosure, if ... there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure'.

1.53 On 19 September 2017 the Auditor-General wrote advising:

The matters raised some complexities under the *Public Interest Disclosure Act 2012* (PID Act) because of your express wish that the representation be treated in confidence by my office, and this has caused some delay in formally advising you of the outcome of the matter.

As a disclosure officer under the PID Act, I formed the view that certain information provided ... constituted a public interest disclosure. Under section 17 of the PID Act I am required, once I have formed the view that a public interest disclosure has been made, to refer it to the head of the responsible entity for investigation. ... This legislative requirement presented clear difficulties in this case because of your wish for confidentiality and the high likelihood you could be inadvertently identified ...

1.54 The Auditor-General further advised:

... I can decide to undertake a performance audit of a public sector entity under the *Auditor-General Act 1996* and ... I considered that would be an appropriate course of action in this matter.

- 1.55 It is to be noted that undertaking a public interest disclosure investigation does not preclude undertaking a performance audit or vice versa. It is not an either/or situation. However, there were impediments to pursuing a public interest disclosure investigation given confidentiality requirements under the *Public Interest Disclosure Act 2012*.

Commencement of the audit

- 1.56 On 23 March 2018 the Auditor-General announced the conduct of the audit in relation to the management of specific allegations of breaches of the *Public Sector Management Act 1994* relating to ACT Health's former Performance Information Branch. The media release for the announcement of the conduct of the audit stated:

An audit on ACT Health's response to misreporting of data was included in the *Performance Audit Program 2017-18 and Potential Audits to Commence over 2018-19 to 2019-20*. Within this context an audit that is focused on the management of specific allegations of breaches of the *Public Sector Management Act 1994* relating to the preparation and reporting of performance information is being progressed as a first step.

Comments on audit processes

- 1.57 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

We question whether you complied with your obligation at section 17 of the [*Public Interest Disclosure Act 2012*]: for instance, whether you provided [the former Director-General] with a copy of the Disclosure as you are required to do under the PID Act.

We also question your reasons for commencing your performance audit. ... from the terms of your proposed report, you appear to base your decision to commence a performance audit on the legislative discretion contained at paragraph 20(g) of the PID Act, which allows that 'an investigating entity may decide not to investigate a public interest disclosure or may end the investigation of the disclosure if ... there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure.'

We note the requirements set out in section 18 of the PID Act regarding who has responsibility to undertake an investigation under the PID Act, i.e. the 'investigating entity'. It is far from clear in this case that you, or your office, was the relevant investigating entity for the purposes of the PID.

If you were not the relevant investigating entity, the PID should have been referred to the appropriate investigating entity. It would then be a matter for that investigating entity to assess whether the PID should not be investigated for a reason in section 20, including on the basis that there was a more appropriate way to deal with the disclosable conduct.

- 1.58 The Audit Office disagrees with the assertions with respect to non-compliance with the requirements of the *Public Interest Disclosure Act 2012* and the validity of the performance audit. Paragraphs 1.51 to 1.55 discuss the Audit Office's actions with respect to its handling of the public interest disclosure and its considerations in undertaking a performance audit, including the discloser's 'wish for confidentiality and the high likelihood [they] could be inadvertently identified'.

- 1.59 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

[The former Director-General] was extremely distressed that the announcement made by the your office on 23 March 2018 was made on the same afternoon that the Government announced [the former Director-General's] resignation from [their] position as Director-General of ACT Health. Publicly, the inference to be drawn from the timing of these announcements was that the cessation of [the former Director-General's] employment with Health was inextricably linked to the performance audit. Indeed a Canberra Times article on the two matters the next day reinforced this inference. [The former Director-General] had advised the Government two weeks earlier of [their] intention to depart ACT Health. The timing of the original announcement was therefore detrimental to [the former Director-General's] reputation.

The timing of these two announcements is even more concerning for [the former Director-General] now, in light of the findings in the proposed report. Given the manner in which [the former Director-General] is portrayed, the perception that [the former Director-General's] resignation was linked to the performance audit is reinforced, with a significant personal and professional impact on [the former Director-General]. We request that you make clear that there was no connection between the decision to commence the performance audit and the cessation of [the former Director-General's] employment with ACT Health.

- 1.60 The Audit Office's actions with respect to the initiation of the audit are discussed in paragraph 1.56. There was no connection between the decision to commence the performance audit, or its announcement, and the cessation of the former Director-General's employment with ACT Health.

Audit objective and scope

Audit objective

- 1.61 The objective of the audit is to provide an independent opinion to the Legislative Assembly on the effectiveness of the management of specific allegations of breaches of the *Public Sector Management Act 1994* involving employees of the ACT Health Directorate.

Audit scope

- 1.62 The scope of the audit includes management and administrative actions taken in relation to:
- allegations of breaches of the *Public Sector Management Act 1994* by two former staff of the Performance Information Branch; and
 - allegations made by these former staff of breaches of the *Public Sector Management Act 1994* by senior Executives.

1.63 The allegations of breaches of the *Public Sector Management Act 1994* by former members of the Performance Information Branch within the audit scope are:

- that they provided false assurances to the Minister and the Director-General of the Health Directorate concerning the accuracy of data in the ACT Health Quarterly Performance Report March 2016 (Quarter 3 report) specifically;
 - that new processes had been established for the completion of reports with greater transparency and auditing which ensures processes are adhered to;
 - a robust quality assurance system was being implemented to ensure accuracy and consistency in the data produced; and
- that they provided a progress report, dated 8 July 2016, to the Deputy Director-General, Corporate on ACT Health’s implementation of recommendations for the Auditor General’s Report No 5/2015 stating that many of the actions to address the Auditor General’s recommendations had been completed, when these actions had not in fact been completed.

1.64 The allegations made by these former members of the Performance Information Branch of breaches of the *Public Sector Management Act 1994* within the audit scope are that, on several occasions, senior ACT Health Executives engaged in inappropriate workplace behaviours including bullying.

1.65 The period of time covered by the audit is May 2015 to October 2017.

Out of scope

1.66 The audit did not:

- repeat the investigation of the former members of Performance Information Branch managed by the Professional Standards Unit;
- consider or otherwise assess the independent Delegate’s decision making in response to the misconduct investigation;
- consider or otherwise assess the veracity of the complaints of inappropriate workplace behaviour on the part of the former Director-General and Deputy Director-General, Corporate;
- consider or otherwise assess the decision of the former Commissioner for Public Sector Standards that representations from two former Health Directorate employees were not public interest disclosures under the *Public Interest Disclosure Act 2012*;
- consider or otherwise assess the accuracy of Health Directorate performance information; or
- consider or otherwise assess the conduct of the System Wide Review.

1.67 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:⁴

... it is not possible for you to accurately assess the impact of the misrepresentations made by [the former Executive Director Performance Information] and [former Senior Manager Business Intelligence], nor the actions of [the former Director-General] when the conduct that was the subject of the investigation first came to light, without reference to the full context of those misrepresentations and actions. That context includes that there was a major breach in the integrity of ACT Health data during [the former Executive Director Performance Information's] time as Executive Director of the Performance and Information at ACT Health. [Paragraph 1.67 a]

The importance of health data and the implications of inaccurate, inflated or manipulated data cannot be understated — for ACT Health, the then Minister for Health, and for the ACT Government more broadly — data integrity must be seen through the prism of the 2012 data integrity breach, and the subsequent audits undertaken by your own office in 2012 and 2015. In addition, the seriousness of the circumstances was demonstrated by the numerous representations as to the ongoing integrity of ACT Health data made by various Ministers to the ACT Legislative Assembly. [Paragraph 1.67 b]

Data is relied on across the board in ACT Health, in the context of everything from managing staffing numbers for the purpose of meeting patient ratios, to securing access to federal government funding. Multiple internal and external stakeholders rely on the information. The accuracy of the data produced by ACT Health, and data outputs are a key indication of the performance of the health system in the ACT in both an administrative and political context. Given the importance of data at a Territory and Federal level — including that data underpinned operations and relationships to such a significant extent — any indication that further issues with the integrity of ACT Health data post 2012 had the potential to have a significant impact upon the reputation of ACT Health. It would also have serious flow-on effects across the organisation from an operational perspective. The potential fallout included the risk of motions of no-confidence in the Legislative Assembly, as evidenced by such motions having already been tabled in the Legislative Assembly on this issue. [Paragraph 1.67 c]

It was in this context that when further issues of integrity were discovered in data under the management of the [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence], not once or twice, but on numerous instances in July 2016, that [the former Director-General] made the decision that it was appropriate for an investigation to be carried out into the actions of the [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence]. [Paragraph 1.67 d]

...

We question why you have seen it necessary to refrain from an analysis of the fallout of the [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] failures to put in place effective processes to ensure the consistent and accurate collection and reporting of ACT Health data, and the implication of the representatives that were made to [the former Director-General] and the Minister by [the former Executive Director, Performance Information] regarding the consistent and accurate collection and reporting of ACT Health data. [Paragraph 1.67 e]

Instead of this analysis, the focus of your overall conclusions is on the ineffective handling of the misconduct investigation and allegations of bullying which, it is implied, necessitated the payment of \$400,000 to each of these individuals. You have omitted any analysis about the significant cost to ACT Health from the systemic failures regarding the accuracy of data, in particular the significant capital investment of millions of dollars in payments made to external consultants to rectify the data issues that fell squarely within the realm of the [former

⁴ These paragraphs have been numbered for the purpose of assisting consideration of further comments received.

Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] responsibilities. These issues were identified by the current Minister in the Legislative Assembly only last week given that there remain over 165 recommendations for issues to be rectified. While you criticise [the former Director-General] for not preparing paper work (notwithstanding that there is no legal or administrative requirement for [former Director-General] to do so) you do not address the fact that limited data from ACT Health has been available for public use for nearly two years as a direct consequence of the management failures of [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence], nor the millions of dollars that were spent by ACT Health on consultants engaged to rectify the issues. [Paragraph 1.67 f]

1.68 The Audit Office notes these comments and also that, on announcing the conduct of the audit on 23 March 2018 (refer to paragraph 1.56), the Auditor-General advised:

- an audit on ACT Health’s response to misreporting of data was included in the *Performance Audit Program 2017-18 and Potential Audits to Commence over 2018-19 to 2019-20*; and
- an audit that is focused on the management of specific allegations of breaches of the *Public Sector Management Act 1994* relating to the preparation and reporting of performance information was being progressed as a first step.

1.69 The *Performance Audit Program 2018-19 and Potential Audits to Commence over 2019-20 to 2020-21* (published on 21 June 2018) has also identified a potential audit topic to commence in 2018-19 in relation to ACT Health performance information and reporting. The Auditor-General considered it was appropriate to undertake an audit focused on the management of specific allegations of breaches of the *Public Sector Management Act 1994* as a first step before consideration of health performance information and reporting.

1.70 In a response to the final proposed report on 26 July 2018, specifically paragraph 1.67, the former Executive Director, Performance Information advised that:

[Refer to Paragraph 1.67 a]

The ED(PI) and Snr Mgr(BI) provided evidence as part of the investigation that demonstrated that the representations provided to the Minister and former DG included qualifications that recognised additional work was required (and underway) to provide for greater information integrity, and that this was part of the development of the ACT Data Warehouse project

[Refer to paragraph 1.67 b]

This could be considered defamatory. The ED data issue was a result of changes to data within the source system at the Canberra Hospital. PI Branch was not responsible for the ED system. PI Branch validations cleared data as values in the data set met standards (eg time treatment starts is noted as a valid time – is the same or after arrival time – is before departure time, etc). It was not within the role of PI to manage the integrity of the source ED system.

[Refer to paragraph 1.67 c]

Data and information was provided from a range of areas across ACT Health. Part of the work of PI was to establish a “single source of truth” for all data. This was signed off by DG on advice from ED(PI) in October 2015 and new processes for all major data sets would have been completed by the end of 2016, with the remainder during 2017. However, the comments in the final draft would lead a reasonable person to suggest that PI Branch was responsible for all data and information in 2016 and this was demonstrably NOT the case.

As an example, planning data was the responsibility of another Branch in ACT Health. Epidemiology data was produced by the Chief Health Officer. It is of note that the former DG was not aware of this after three years in the position.

[Refer to Paragraph 1.67 d]

The provision of details of supposed concerns was only provided about four weeks after the suspension of the ED(PI) and Snr Mgr(BI). There is no evidence of concerns being raised directly to the ED(PI). Subsequently, there was no reference back to the ED(PI) in relation to issues or plans. This failure resulted in the expenditure of considerable public funds for outputs that resulted in the publication of inaccurate quarterly reports

[Refer to paragraph 1.67 f]

The plan in place in 2016 provided for a “single source of truth” for all data sets, commencing with emergency department data (providing full compliance with standards from collection, validation, storage and usage) could have been continued with no additional costs to ACT Health (as the ED part was completed in June 2016).

The decision to bring in external consultants (for work other than initial audits of plans and processes) was undertaken by the former DG and other senior executives. There was never any consideration of determining whether the work in progress would be sufficient to provide for a robust information management service for ACT Health. In fact, it could be considered that relevant executives deliberately ignored plans and processes in place. In fact, there is evidence of external experts noting that work being undertaken in PI Branch was nation leading (including support from Microsoft and in relation to the new health costing standards)

ACT Health staff will attest to the fact that reports produced as part of external consultancies included erroneous data and that the standards and procedures developed (at great cost) are, in general, not being used within ACT Health.

The incorrect results in reports prepared by consultants in late 2016 (after our suspension) was not picked up by the executive team who replaced the former ED(PI) and Snr Mgr (BI).

In addition, the failure of the system-wide review to deliver on its timeline suggests a lack of governance by the former DG and DDG – which is a claim levelled at the former ED(PI) and Snr Mgr(BI) – despite the System-wide review being provided with considerable resources which were never available to PI Branch to undertake the breadth of its work

Audit criteria, approach and method

Audit criteria

1.71 The audit was conducted with reference to the following criteria:

- Criteria 1: The management of allegations that the former employees breached the *Public Sector Management Act 1994* was effective.
 - Were procedural and administrative requirements in the relevant Enterprise Agreement and legislation in relation to performance management and misconduct met?
 - Were the procedures and activities procedurally fair and conducted without bias?
- Criteria 2: The management of allegations made by the former employees of breaches of the *Public Sector Management Act 1994* was effective.

- Were procedural and administrative requirements in the relevant Enterprise Agreement and legislation in relation to allegations of inappropriate workplace behaviour met?
- Were the procedures and activities procedurally fair and conducted without bias?

Audit approach and method

1.72 This audit adopted the ACT Audit Office's Performance Audit Methods and Practices (PAMPr) and related Policies, Practice Statements and Guidance Papers. These policies and practices have been designed to comply with the requirements of the *Auditor-General Act 1996* and relevant professional standards (including *ASAE 3500 – Performance Engagements*).

1.73 The audit approach and method consisted of:

- identifying and documenting relevant policies, controls and procedures associated with misconduct investigations (refer to Appendix B - Legislative requirements, Appendix C - Enterprise Agreement requirements and Appendix D - ACT Government policies and procedures);
- interviews and discussion with key staff (current and former) of ACT Health and other directorates. Some of these interviews were conducted under oath or affirmation in accordance with section 14A of the *Auditor-General Act 1996*;
- examination of relevant ACT Health documentation and records, including email communications. The Audit Office sought the assistance of Shared Services in order to obtain email communications of former staff members;
- the engagement of subject matter expertise and advice from CPM Reviews (a professional services firm with expertise in reviewing and providing advice on performance management and potential misconduct as well as conducting investigations into potential misconduct);
- the conduct of an engagement quality control review (EQCR) in relation to the audit; and
- the engagement of Mr Mike Blake, former Auditor-General of Tasmania, to undertake an independent assessment of the Audit Office's acquittal of comments provided by some parties in response to the *draft proposed report*.

1.74 Auditing Standard ASAE 3500 requires that an audit consider events up to the date of the report. To achieve this, the audit team sought comments on the draft proposed report, and asked the agency to inform the team of any significant events affecting audit findings since fieldwork ceased.

Provision of proposed reports (or extracts)

1.75 As part of the audit process the Auditor-General provided *the draft proposed report* and *final proposed report* to the Interim Director-General of ACT Health and the Head of Service and Director-General of the Chief Minister, Treasury and Economic Development

Directorate. Other people who the Auditor-General considered had a direct interest in the report were also provided with the *draft proposed report* (or relevant extracts) and *final proposed report* (or relevant extracts).

Reports for the Interim Director-General of ACT Health, Head of Service and Director-General of the Chief Minister, Treasury and Economic Development Directorate and former Director-General of ACT Health

- 1.76 In accordance with paragraph 18(2)(a) of the *Auditor-General Act 1996*, the Auditor-General provided the Interim Director-General of ACT Health and the Head of Service and Director-General of the Chief Minister, Treasury and Economic Development Directorate with:
- a *draft proposed report* for comment (issued on 11 May 2018 with comments requested by close of business 29 May 2018); and
 - additional material comprising an overall conclusion; proposed revised conclusions for Chapter 2 and Chapter 3; and advice that paragraph 1.41 of the *draft proposed report* was to be incorporated as a key finding (issued on 21 May 2018 with comments requested). There were no changes to the remainder of the report, i.e. the factual content remained unchanged.
- 1.77 The Interim Director-General provided a response on 29 May 2018. The Head of Service and Director-General of the Chief Minister, Treasury and Economic Development Directorate provided a response on 29 May 2018.
- 1.78 In accordance with subsection 18(3) of the *Auditor-General Act 1996*, audit material was provided to the former Director-General of ACT Health either directly or via their legal representatives as follows:
- on 11 May 2018 the former Director-General of ACT Health was provided with a *draft proposed report*. The *draft proposed report* was hand delivered. Comments were requested by close of business on 29 May 2018 (18 days from 11 May 2018); and
 - on 21 May 2018 legal representatives of the former Director-General of ACT Health were provided with the following: an overall conclusion; proposed revised conclusions for Chapter 2 and Chapter 3; and advice that paragraph 1.41 of the *draft proposed report* was to be incorporated as a key finding. These documents were hand delivered. There were no changes to the remainder of the report, i.e. the factual content remained unchanged.
- 1.79 On 22 May 2018 legal representatives on behalf of the former Director-General sought access to ‘other information included, or referred to, in the report. This may include, for example, relevant contemporaneous material that informed any findings made by you in the report’ and on 23 May 2018 legal representatives on behalf of the former Director-General of ACT Health requested (via email) an extension of time for responding to close of business 13 June 2018. On 24 May 2018 (via an emailed letter) the Audit Office advised of an extension of time to 31 May 2018 (20 days from 11 May 2018; 10 days from 21 May 2018). The Auditor-General also advised:

You raised the possibility of obtaining access to audit material that was used to support the audit's conclusions and findings. The basis of the audit's conclusions and findings are in the material in the *draft proposed report*. On this basis the request you have made is not agreed. However, I will give consideration to a request for access to specific material referenced in the *draft proposed report* if the reason for requesting it is explained.

- 1.80 On 30 May 2018, legal representatives on behalf of the former Director-General of ACT Health requested (via an emailed letter) an extension of time for responding, to close of business 13 June 2018. As part of this request the legal representatives identified an extensive and wide-ranging 'indicative list of the documents that [the former Director-General] can recall that [they] considers will be relevant to the preparation of [their] response'. On 31 May 2018 (via an emailed letter) the Audit Office advised of an extension of time to 5 June 2018 (25 days from 11 May 2018 and 15 days from 21 May 2018). The Auditor-General also advised:

... your letter also requests access to an 'indicative list of ... documents' for the purpose of responding to the *draft proposed report*. I note that the 'indicative list of ... documents' is broad and is made without reference to any specific conclusions or findings in the report.

As per my letter of 24 May 2018, the basis of the audit's conclusions and findings are in the material presented in the *draft proposed report*. I consider that the content of the *draft proposed report* provides [the former Director-General] with sufficient information to meaningfully engage with the audit's conclusions and findings and make any representation [they] wishes to make about whether those conclusions and findings should be made. Accordingly, your request for access to additional documentation, including the 'indicative list of ... documents' is not agreed. In the letter of 24 May 2018, I advised that I would give consideration to a request for access to specific material referenced in the *draft proposed report* if the reason for requesting it is explained. That offer remains open, noting what I say below about your request for an extension of time.

- 1.81 The legal representatives on behalf of the former Director-General of ACT Health provided what they described as *interim comments* on the *draft proposed report* on 5 June 2018.

- 1.82 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

We note that you have denied our repeated requests for access to categories of particular documents. [The former Director-General] has not been provided access to a number of documents which would enable [them] to properly respond to the proposed report. [They are] at an inherent disadvantage compared to others with a direct interest in the proposed report who continue to have access to relevant documentation as Government employees.

In our email to you of 22 May 2018 we first sought access to all relevant contemporaneous material that informed the findings in the proposed report. In our email to you of 24 May 2018, we noted that we had not yet been provided with the documentation requested. In our letter dated 30 May 2018 we provided an indicative list of a significant number of documents, without which [the former Director-General] is unable to provide an accurate and comprehensive response. In our letter of 4 June 2018 we reiterated our requests for access to documents and made further requests for the provision of documents.

- 1.83 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

In light of the failure to provide the additional documentation that we have requested, we contend that the two short extensions of time for [the former Director-General] to provide

comments on the proposed report are inadequate to allow [the former Director-General] to properly prepare [their] response to the report.

- 1.84 The legal representatives of the former Director-General were provided with additional time to respond to the *draft proposed report*. By virtue of subsection 18(6) of the *Auditor-General Act 1996*, the Auditor-General need only provide a *proposed report* notice, including a minimum fourteen day period, once in relation to a report or extracts thereof. Paragraphs 1.78 to 1.79 identify the length of time the former Director-General had to respond to the proposed reports.
- 1.85 On 6 and 7 July 2018 the Audit Office contacted the legal representatives of the former Director-General to invite the former Director-General and their legal representatives to meet to discuss their issues with the report. On 7 July 2018 (via an emailed letter) a written invitation was sent to legal representatives of the former Director-General, to meet to discuss the content of the audit report, specifically ‘to identify and comment on specific sections of the draft proposed report with which you disagree, and to refine your document request so this can be given consideration’. The meeting took place on 12 July 2018, at which the Audit Office advised of modifications it had made to the *draft proposed report* and general issues related to the ‘context’ of health performance information and reporting in 2016 (relevant to Chapter 2) and the complaints of inappropriate workplace behaviour (relevant to Chapter 3) were discussed. Further changes were made to the report following this discussion. While the Audit Office sought the identification of specific parts of the report that were problematic from the perspective of the former Director-General or their legal representative; this did not occur. The former Director-General and their legal representative reiterated former comments regarding access to information and audit processes.
- 1.86 On 19 July 2018 a *final proposed report* was provided to the Interim Director-General of ACT Health, the Head of Service and Director-General of the Chief Minister, Treasury and Economic Development Directorate and the former Director-General. They were asked to confirm that there were no factual errors to bring to the attention of the Auditor-General and to provide any comments they wished to be considered for inclusion in the final report.

Reports for other entities

- 1.87 In accordance with subsection 18(3) of the *Auditor-General Act 1996* the Auditor-General provided others who the Auditor-General considered had a direct interest in the report with:
- a *draft proposed report* for comment (issued on 11 May 2018 with comments requested by close of business 29 May 2018); and
 - additional material comprising an overall conclusion; proposed revised conclusions for Chapter 2 and Chapter 3; and advice that paragraph 1.41 of the *draft proposed report* was to be incorporated as a key finding (issued on 21 May 2018 with comments requested). There were no changes to the remainder of the report, i.e. the factual content remained unchanged.

- 1.88 In accordance with subsection 18(3) of the *Auditor-General Act 1996* the Auditor-General provided others who the Auditor-General considered had a direct interest in the report with:
- extracts of the *draft proposed report* for comment (issued on 11 May 2018 with comments requested by close of business 29 May 2018); and
 - (where relevant) additional material comprising extracts of an overall conclusion and extracts of proposed revised conclusions for Chapter 2 and Chapter 3 (issued on 21 May 2018 with comments requested). There were no changes to the remainder of the report, i.e. the factual content remained unchanged.
- 1.89 All comments provided by entities who were provided with *draft proposed reports* (or relevant extracts) were considered, and the substance of their comments included in the *final proposed report*.
- 1.90 On 19 July 2018 the *final proposed report* (or relevant extracts) was provided to others who the Auditor-General considered had a direct interest in the report. Others were asked to confirm that there were no factual errors to bring to the attention of the Auditor-General.
- 1.91 All comments provided by entities who were provided with the *final proposed report* (or relevant extracts) were considered, and the substance of their comments included in this report.
- 1.92 In a response to the final proposed report on 26 July 2018, the former Executive Director, Performance Information advised:
- I note that the final draft Audit Report incorporates a large amount of content provided by the former Director-General's legal representative. I appreciate the need for valid input by those who are the subject of the Audit Report. However, I am concerned that the information incorporated within the Audit Report is provided without any commentary as to whether evidence exists to support all of the suggested input. It is my contention that many of the statements are incorrect and that evidence exists contrary to the claims made.
- 1.93 In including comments provided the Audit Office did not seek evidence to assess whether such statements are correct or not.

Directions under section 35 of the Auditor-General Act 1996

- 1.94 Where the Auditor-General issued a *proposed report* (or extracts thereof) or related audit material for comment the Auditor-General issued a direction under section 35 of the *Auditor-General Act 1996*. Directions issued under section 35 of the *Auditor-General 1996* prohibited a person from disclosing the provided material. Where a person requested that they be allowed to consult with other persons for the purpose of responding to the report this was granted by the Auditor-General and appropriate additional directions under section 35 of the *Auditor-General Act 1996* were issued.

- 1.95 The Auditor-General considered that issuing directions under section 35 of the *Auditor-General Act 1996* was a means by which to protect the integrity of the audit, including the confidentiality of information obtained and disclosed, and in so doing was a means by which to promote the purpose of the *Auditor-General Act 1996*.

Inclusion of comments in response to the draft proposed report

- 1.96 On 5 June 2018, the legal representatives on behalf of the former Director-General, provided a 16 page response to the *draft proposed report*. These comments provided additional information regarded by the former Director-General as important context for the conduct of the audit; commentary on the interpretation of the material; and comments about the audit process.

- 1.97 Along with other persons who provided comments on the *proposed reports* (or extracts thereof), the response from the legal representatives on behalf of the former Director-General was considered and the substance of these comments has been included in the relevant parts of this report.

- 1.98 Furthermore, the Audit Office engaged Mr Mike Blake , former Auditor-General of Tasmania, to:

... undertake an independent assessment of how the Audit Office has acquitted comments provided [by] parties [the former Director-General and former Deputy Director Director-General, Corporate] in relation to the draft performance audit report titled 'ACT Health's management of allegations of misconduct and bullying'.

.... provide an opinion on whether the Audit Office has adequately included the substance of the comments provided by the parties.

- 1.99 Mr Blake was asked to provide an opinion on whether the Audit Office has adequately included the substance of the comments provided by the former Director-General and Deputy Director-General, Corporate. Mr Blake advised:

It is my assessment that, in the draft audit report handed to me on 11 July 2018, the auditor-general appropriately considered all of the comments received from the two parties on the dates outlined in my engagement and included them, where relevant, in the body of the report.

I assessed comments made but not included and I am satisfied with the reasons provided by the auditor-general for not including them.

2 THE MANAGEMENT OF ALLEGATIONS AGAINST FORMER EMPLOYEES

- 2.1 This chapter considers ACT Health's handling of allegations made against two former members of the Performance Information Branch that they engaged in inappropriate workplace behaviour. Also considered are the actions of ACT Health executives and staff as well as those of the Professional Standards Unit in the Chief Minister, Treasury and Economic Development Directorate.

Summary

Conclusions

ACT Health did not effectively manage allegations of misconduct against two former officers in the Performance Information Branch. While it is apparent that the former Director-General and former Deputy Director-General, Corporate had significant concerns regarding the preparation of performance information and reporting, for which the Performance Information Branch was responsible, the decision to initiate a misconduct investigation into the two officers based on these concerns was precipitous.⁵ There is no contemporaneous documentation to justify potential misconduct or the initiation of the misconduct investigation.

Documentation (an ACT Health Preliminary Assessment *proforma*) that purported to support undertaking a misconduct investigation was produced approximately three weeks after the decision was made to undertake the misconduct investigation and suspend the officers. Given the decision and actions already undertaken this means the documentation was redundant.

ACT Health referred the allegations, including the ACT Health Preliminary Assessment *proforma*, to the Professional Standards Unit for investigation. The Professional Standards Unit's processes complied with the requirements of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*. This included the two officers being given the opportunity to respond to the allegations and review key documentation. The result of the investigation was a determination that one former officer had not engaged in misconduct; there was no formal resolution for the other officer as, although the investigation was completed and

⁵ In a response to the final proposed report on 27 July 2018, legal representatives on behalf of the former Director-General advised 'The use of the word 'precipitous' is a totally inappropriate categorisation of [the former Director-General's] decision to refer the two [officers] for misconduct investigation. ... there was nothing precipitous about [their] decision making. It was a deliberate decision, taken upon advice, based on ever increasing evidence of a complete governance and management failure in the performance area despite assurances to [themselves] and then Minister to the contrary, and designed to ensure that substantial payouts utilising tax payer funds were not inappropriately paid to staff'.

findings were made, the independent Delegate did not make a determination as to misconduct because the officer's employment contract with ACT Health had expired.

The investigation took around five months to complete which, although lengthy, is reasonable considering its technical nature and complexity, delays in receiving relevant documentation from ACT Health, requests for additional time to respond by the two former officers and the Christmas and New Year shut-down period.

Key findings

Paragraph

In mid to late July 2016 the former Senior Manager, Business Intelligence was in discussions with ACT Health Executives for the purpose of facilitating their departure from the organisation. In an interview under oath or affirmation on 16 April 2018, the former Director-General recalled that the former Senior Manager, Business Intelligence's demeanour had changed: 'I just noticed that [they] went from someone who was positive and contributing, to somebody who just didn't seem happy. Which is why I was happy to give [them] the package ...' The ACT Government Solicitor provided advice and drafted a Deed of Release to effect the former Senior Manager's departure. The acting Executive Director, People and Culture had a telephone discussion with the former Senior Manager on 22 July 2016 where agreement was reached and a payment of approximately \$126,000 was to be made. The acting Executive Director, People and Culture emailed the former Director-General and former Deputy Director-General, Corporate, to advise of this outcome on the afternoon of 22 July 2016. The payment of approximately \$126,000 was not made as the departure of the former Senior Manager, Business Intelligence did not proceed as then planned. 2.33

On 25 July 2016 the former Executive Director, Performance Information emailed the former Director-General and Deputy Director-General, Corporate advising that 'I would like to be considered for a redundancy'. At a meeting with the former Deputy Director-General Corporate and the acting Executive Director, People and Culture on 25 July 2016 the former Executive Director, Performance Information was advised by the former Deputy Director-General, Corporate that 'opportunities exist for [them]' and '[they are] well respected and liked' and advised '[they have] options, no pressure or hurry to make decision'. Notwithstanding these assurances the former Executive Director reiterated in an email to the Director-General on 28 July 2016 that they 'would still like to be considered for a redundancy rather than other options due to the abolition of my position'. 2.42

On 13 July 2016, an ACT Health officer commenced acting in the role of the Executive Director, Performance Information and Decision Support, due to the absence on 2.49

personal leave of the former Executive Director, Performance Information. A key task of the acting Executive Director, Performance Information and Decision Support Branch was to review the draft *March 2016 ACT Health Services Quarterly Performance Report* (the 3rd Quarter Performance Report). In undertaking this task the acting Executive Director identified several errors throughout the draft report including; internal inconsistencies and incorrect figures; unsubstantiated statements; and errors in labelling graphs. These errors caused the acting Executive Director, Performance Information and Decision Support to have doubts as to the veracity of the report.

In a response to the draft proposed report on 5 June 2018 legal representatives on behalf of the former Director-General advised of the former Director-General's growing concerns with respect to the accuracy of performance information and reporting in ACT Health from May 2016. The former Director-General identified performance information and reporting errors that became public in May 2016 with respect to the *December 2015 ACT Health Services Quarterly Performance Report* (i.e. the Second Quarter 2015-16 report) as well as assurances that they felt were provided by the former Executive Director, Performance Information (and former Senior Manager, Business Intelligence) in relation to these errors. The former Director-General advised that 'it was because of this ongoing pattern of data integrity flaws being raised with [the former Director-General] that [they] decided to commence misconduct proceedings'.

2.52

The legal representatives on behalf of the former Director-General, and the former Deputy Director-General, Corporate, in responding to the draft proposed report advised of their growing concerns with respect to performance information and reporting and the actions of the former Executive Director, Performance Information and Senior Manager, Business Intelligence.

2.77

In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised 'there were a number of matters around potential failures of governance that were being brought to [their] attention in late June and July of 2016. But the main issue was [their] belief that the then Minister of Health and [they] had been misled by personal advice from [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] that the errors were only one-offs — not systematic failures of governance'.

2.78

In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised 'Between 16 May 2016 and 29 July 2016, a series of emails regarding the integrity of the quarterly reporting eroded my confidence in its accuracy and reliability, and over time I began to form the view that [former Executive Director, Performance Information] and [former Senior Manager,

2.79

Business Intelligence] may have failed to meet their obligations under section 9 of the PSM Act in the preparation of quarterly reporting, and in their assurances to the former Health Minister’.

In response to the draft proposed report the former Executive Director, Performance Information and former Senior Manager, Business Intelligence disagreed that they provided the above claimed assurance to the former Director-General and Deputy Director-General, Corporate with respect to the performance information and reporting. 2.80

On 30 July 2016 (five days after the Executive Director, Performance Information was advised ‘opportunities exist for [them]’ and ‘[they are] well respected and liked’) the two former members of the former Performance Information Branch received written notification of a misconduct investigation against them. Accounts as to the rationale behind undertaking a misconduct investigation differ between the former Director-General, former Deputy Director-General, Corporate and ACT Health Human Resource officers. While it is apparent that concerns had been raised as to ACT Health performance information and reporting processes, for which the two staff members had responsibility, it is not clear how their actions were identified as potential misconduct and warranted investigation. No contemporaneous documentation was produced at the time of the written notification of misconduct against the two former staff members justifying undertaking a misconduct investigation. Nor was early advice of the Professional Standards Unit sought in order to ensure that the allegations were clearly linked to a potential breach of the ACT Public Sector Code of Conduct, suffice to warrant an investigation into their conduct and the suspension of both former officers. 2.109

In an interview under oath or affirmation, the former Director-General has advised that they thought it would be ‘unethical’ to allow the two staff members to depart the organisation with ‘voluntary redundancy’ payments when the former Director-General had concerns that the actions of the staff members may have amounted to misconduct. (While an exit from the organisation had been agreed with the former Senior Manager, Business Intelligence, no such exit had, at that time, been agreed with the former Executive Director, Performance Information). Accordingly, the former Director-General advised that they were seeking a ‘short, sharp’ investigation into their activities to ‘reassure me that ... I’m not sitting on an absolute time bomb here of, you know, deliberate incompetence’. The former Deputy Director-General, Corporate advised that no other options such as performance management or reassignment to other duties were considered because ‘[the former Senior Manager, Business Intelligence] for all intents and purposes, I think in their own mind was somewhere between negotiating a VR and wanting to go’ and the former Executive Director, Performance Information had ‘made a decision that they wanted to just leave, you know’. 2.110

In responses to the draft proposed report both the former Executive Director, Performance Information (29 May 2018) and Senior Manager, Business Intelligence (28 May 2018) disagreed with assertions that they were unwilling to return to work or otherwise assist in resolving issues with performance information and reporting before their departures from the organisation. 2.111

The *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*, which applied to the former Senior Manager, Business Intelligence (as a non- Executive employee of the ACT Public Service) requires the conduct of a preliminary assessment ‘in cases where an allegation of inappropriate behaviour is made’ in order to ‘determine whether further action is required’. Following the conduct of the preliminary assessment a range of possible future actions may be taken, one of which is an investigation. A Minute into the matter, which included a completed ACT Health Preliminary Assessment *pro forma*, was completed by the acting Executive Director, Performance Information and Decision Support Branch on 22 August 2016. The Brief identified the problems associated with performance information and reporting but did not specifically refer to, or discuss, allegations of potential misconduct on the part of the two officers with respect to the *Public Sector Management Act 1994*, *Public Sector Standards 2006* or the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*. 2.129

On 24 August 2016 the former Deputy Director-General, Corporate ticked the ‘requires investigation’ box on the ACT Health Preliminary Assessment *pro forma* and noted that ‘Noting serious concerns raised by Minute (22.8.2016) and the very serious implications for ACT health operationally and for government generally, I am satisfied that this now warrants independent investigation’. This Minute, and the attached Preliminary Assessment *pro forma*, were produced more than three weeks after the former Senior Manager, Business Intelligence (and the former Executive Director, Performance Information) were suspended and informed that they would be subject to a misconduct investigation. 2.130

On 24 August 2016 a *Workplace Investigation or Review Request* document, signed by the former Deputy Director-General, Corporate as Delegate, was submitted to the Professional Standards Unit to formally request an investigation into the actions of the two former Performance Information Branch employees. The attachment to this *Workplace Investigation or Review Request* was the ACT Health Preliminary Assessment *pro forma* signed by the former Deputy Director-General, Corporate on the same date. Following its receipt of the *Workplace Investigation or Review Request* document, the Professional Standards Unit undertook a series of actions to determine an appropriate strategy for the investigation and to engage a suitably qualified investigator to conduct the investigation. This included liaising with ACT Health to further develop and articulate the nature of the allegations against the two former staff members. These were further clarified and articulated and based, in part, on the findings of PwC’s *Process and Controls Review: Status of the ACT Health Quarterly Performance Report* (22 August 2016). On 16 September 2016, the former Deputy Director-General, Corporate wrote to the former officers further clarifying the allegations against them. 2.152

On 26 September 2016 the independent investigator contacted the former Senior Manager, Business Intelligence and former Executive Director, Performance Information informing them that they had been engaged by ACT Health to undertake the misconduct investigation. The letter was accompanied by the Terms of Reference for the investigation. Between 29 September 2016 and 6 February 2017 the independent investigator undertook the investigation into the officers. The two former officers were given the opportunity to respond in writing to the allegations and were provided with access to relevant documents. 2.167

The requirements of section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* were met in relation to the conduct of the investigation (although it is noted that these requirements only applied to the former Senior Manager, Business Intelligence, as a former non-Executive ACT Public Service employee). While there are no specific timeframe requirements for the conduct of a misconduct investigation, this investigation was conducted in a relatively timely manner, once the referral was received from ACT Health by the Professional Standards Unit on 24 August 2016. The investigation took around five months to complete which, although lengthy, is reasonable considering its technical nature and complexity, delays in receiving relevant documentation from ACT Health, requests for additional time to respond by the two former officers and the Christmas and New Year shut-down period. 2.168

Dr James Popple (Principal Reviewer, CPM Reviews), who was engaged by the Audit Office as a subject matter expert to review the processes undertaken in relation to the misconduct investigation, advised that both former employees were afforded procedural fairness in the management of the allegations against them, noting that both officers were given details of the allegations against them and given the opportunity (which they took) to respond and an independent investigator was engaged to conduct the investigation. Dr Popple advised 'the process was an extended one and, no doubt, caused the employees considerable stress. But the process did not cause the employees any practical injustice'. Dr Popple further advised 'even though the investigation process was procedurally fair, the decision to conduct the investigation was problematic'. 2.176

Allegations of misconduct

Notification of the investigation

- 2.2 On 30 July 2016 the former Executive Director, Performance Information and former Senior Manager, Business Intelligence of the former Performance Information Branch received notification of a misconduct investigation into their activities. In letters dated 29 July 2016 the former Deputy Director-General, Corporate advised each officer of the alleged misconduct:

I am writing to inform you that I have received allegations of possible misconduct against you. The preliminary allegations relate to your failure to exercise reasonable care and skill, and or failing to act with probity in performing your duties, namely:

- Advice that was provided to the Minister for Health and the ACT Health Director General in relation to the approach being taken within the Performance Information Branch to ensure consistency and accuracy in the data ACT Health produces and publishes was false.

2.3 The same allegations were put to both officers. They were advised the allegations, if proven, could constitute a breach of the general obligations of public sector employees, as set out in section 9 of the *Public Sector Management Act 1994*. At the time, section 9 of the *Public Sector Management Act 1994* outlined the general obligations of ACT Public Service employees. Section 9 required that a 'public employee shall, in performing his or her duties' comply with a range of requirements, some of which were:

- (a) exercise reasonable care and skill;
- (b) act impartially;
- (c) act with probity;
- ...

2.4 At the time the term 'misconduct' was defined in section 636C of the *Public Sector Standards 2006*, which deals with potential misconduct on the part of an ACT Public Service executive employee, as:

- conduct that harms, or is likely to harm, the reputation of the service or the Territory; and
- a breach of section 9 of the *Public Sector Management Act 1994*.

Meaning of misconduct

2.5 Guidance on the nature of inappropriate workplace behaviour and misconduct can be found in the Chief Minister, Treasury and Economic Development Directorate *Resolving Workplace Issues: Overview* document, which states:

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties. In the ACTPS, an intentional or reckless breach of employee obligations/standards amounts to misconduct. Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employee's employment and usually warrants termination of employment or the suspension of the employee without pay. Employees found to have engaged in misconduct or serious misconduct may have disciplinary action imposed against them.

2.6 Further guidance on the nature of inappropriate workplace behaviour and misconduct can be found in the Chief Minister, Treasury and Economic Development Directorate *Resolving Workplace Issues: Misconduct and Investigations* document, which states:

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties. In the ACTPS, an intentional or reckless breach of employee obligations/standards will amount to misconduct, and includes the following:

- the employee fails to meet the obligations set out in Section 9 of the Public Sector Management Act 1994 (the PSM Act) (this includes bullying and harassment or discrimination);
- the employee engages in conduct that has, or is likely to, bring the Directorate or ACTPS into disrepute;

...

2.7 The *Resolving Workplace Issues: Misconduct and Investigations* document further states:

Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employee's employment and usually warrants termination of employment or the suspension of the employee without pay. The ACT Government Solicitor (ACTGS) should be advised of all cases where summary dismissal or suspension without pay is being considered.

Some examples of serious misconduct, as outlined within the *Fair Work Regulations 2009*, include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- engaging in theft, fraud or assault, or being intoxicated at work;
- employees refusing to carry out a lawful and reasonable instruction that is consistent with their contract of employment; and
- conduct that causes imminent and serious risk to: the health or safety of a person; or
- the reputation, viability or profitability of the organisation's business.

Serious misconduct can result from instances not outlined above which are made serious due to the type or nature of employment. Each case needs to be looked at individually because what may constitute an act of misconduct or serious misconduct in one work environment may not constitute an act of misconduct or serious misconduct in another work environment.

Events preceding the allegations of misconduct

2.8 At the time that the allegations were made, in July 2016, the two officers were in discussion with ACT Health for the purpose of exiting the organisation. This followed a series of events throughout early 2016, through which the officers' ongoing employment with ACT Health was discussed and negotiated.

Former Senior Manager, Business Intelligence

Negotiation of ARIn

2.9 In early 2016 the former Senior Manager, Business Intelligence was in receipt of an Attraction and Retention Incentive payment (ARIn) of \$10,000 in addition to their classification salary.

2.10 ARIn payments are made to employees for the purpose of attracting and retaining employees with critical skills in a competitive labour market. Criteria to be taken into account when determining an ARIn include the criticality of the position to the operation of

the Directorate, the specialist qualifications or high level skills required of an employee who occupies the position, the market demand for the skills required of the employee who occupies the position and any costs incurred in replacing the position.

- 2.11 On 29 February 2016 the former Executive Director, Performance Information recommended an ARIn of \$40,000 per annum for the former Senior Manager, Business Intelligence. In recommending the ARIn, the former Executive Director, Performance Information noted:

...

In my view [the former Senior Manager, Business Intelligence] is the single biggest risk to the success of not only information management within Performance Information Branch, but to the success of a range of transformational reform projects and organisational change.

...

[The former Senior Manager, Business Intelligence]'s leadership ability is highly recognised and respected. [They have] built a team that has a high work ethic, is suitably skilled and most importantly understand what [the former Senior Manager, Business Intelligence] requires of them as individuals and as part of a team.

[The former Senior Manager, Business Intelligence] is a visionary, not just in terms of information management, but in terms of how we could improve the health system and [they] always [go] the extra mile to try and improve people awareness of issues and offer solutions to better improve the services in ACT Health.

- 2.12 A brief was provided to the former Director-General on 7 March 2016 which recommended 'That you: Agree to seek the endorsement of the Head of Service to the proposed [ARIn] for [the former Senior Manager, Business Intelligence]'. On 14 March 2016 the former Director-General agreed to the recommendation and added a handwritten note 'Has my full support'.

- 2.13 On 18 March 2016 a series of emails were exchanged between members of the ACT Health Human Resources business unit, the former Executive Director, Performance Information and representatives of the Chief Minister, Treasury and Economic Development Directorate Workplace Relations Team. As part of the email exchange the then Executive Director, Human Resources requested that the representatives of the Chief Minister, Treasury and Economic Development Directorate Workplace Relations Team 'pause the processing' of the ARIn.

- 2.14 On 15 June 2016 the former Senior Manager, Business Intelligence emailed the then Executive Director, Human Resources requesting an update on the ARIn:

I understand [the former Executive Director, Performance Information Branch] has talked to you about providing me a letter regarding what has eventuated in terms of the proposed ARIn which has been signed off by the DG in early March 2016.

Just wondering when I might receive the letter?

Also, is it possible to provide within the letter detailed reasons for why this was reconsidered or abandoned?

I would greatly appreciate it if I could receive some advice this week so I can consider my options.

- 2.15 Shortly afterwards, the then Executive Director, Human Resources emailed the former Director-General advising:

On paper, the last action is that you have signed off on a brief approving an ARIn for the [former Senior Manager, Business Intelligence] that pays [them] at roughly the equivalent of a level 1.3 executive. You'll recall that I checked in with you by phone prior to lodging the request with CMTEEDD for approval, you hadn't realised the ARIn was so large (you read \$4000 when the ARIn was actually for \$40,000) and asked for extra information. I provided further advice by email, and I understand you also had had further discussion with the [former Executive Director, Performance Information]. I now need to formalise that outcome.

The [former Senior Manager, Business Intelligence] would like a letter explaining what has happened. If the decision is not to proceed with the ARIn, I am happy to have a conversation with [them] if you would prefer. There is no reason to formally write to [them], it would be good practice to annotate the final brief with the changed position or write a file note to that effect. Otherwise if the ARIn is to proceed-at the initial amount or some other amount-I will arrange for the appropriate action.

- 2.16 The former Director-General subsequently asked if the ARIn had been approved by the Head of Service and in response the then Executive Director Human Resources advised:

No because I stopped it and had the conversation with you first. I never lodged ... it for approval.

- 2.17 In an interview under oath or affirmation on 16 April 2018, the former Director-General of ACT Health recalled their understanding of these events:

The ARIn came through asking for a \$40,000 ARIn for [the former Senior Manager, Business Intelligence]. And I signed it saying, "Yep. Well done. Fully support it. I think [they are] doing a good job".

... Which is what I did think.

... so ... [the former Executive Director, Human Resources] stopped it. ...

So ... [the former Executive Director, Human Resources], said to me ... words to the effect of, "It'll never get approved. It's too much ... You can't – can't have it. So I rang [the former Executive Director, Performance information Branch], and I said, "... look I've signed it, but I've got to withdraw it." I said, "My advice from HR is it's not appropriate. It won't get approved by [the Head of Service]. And it's going to pay [them] more than you're being paid." And which [the former Executive Director, Performance Information Branch], in [their] normal supportive style of [the former Senior Manager, Business Intelligence], ... said "Oh that's alright. [They work] very hard." And I said, "No ... I can't let that happen." I said, "I've made mistake". I said, "I've stuffed up, sorry but I can't".

- 2.18 In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

The telephone call by the Director-General to me in relation to the proposed ARIN for [the former Senior Manager, Business Intelligence] ... did not occur. I did seek clarification from the then Executive Director of People and Strategy and I advised them that the level of the ARIN was consistent with ARINs approved for other officers at the same level (with four SOGA officers receiving ARINs of \$30,000 without any staff supervision or major objectives) discernible by the former Executive Director, Performance Information Branch.

- 2.19 In response to a question from the Audit Office as to whether the former Senior Manager, Business Intelligence had known about the apparent approval and withdrawal of the ARIn

the former Director-General said 'Well, [they] did [know about it] ... Because somebody told [them]. But I didn't realise that [they] did know about it'. The former Director-General said '[the former Senior Manager, Business Intelligence] found out, and then took that very personally ... as a slight. And it wasn't a slight. It was just a – I should never – I should never have signed it'. The former Director-General advised that they did not meet with the former Senior Manager, Business Intelligence to discuss it at that stage 'because I didn't realise [they] knew about it'.

- 2.20 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

... it is not in dispute that the referral of the ARiN onto the Head of Service for approval was halted by ACT Health HR not [the former Director-General]. There is no suggestion of impropriety on [the former Director-General's part, just a genuine error made in the context of ARiNs for significantly higher sums of money being regularly approved for Doctors. [The former Senior Manager, Business Intelligence] had no legal entitlement to an ARiN of this magnitude and [the former Director-General] was acting on the advice and recommendations of [the former Executive Director, Performance Information] who, [they] assumed, would not have made the recommendation without a valid basis for doing so. [The former Director-General] did not have the authority to approve the ARiN — [they were] only one approval step in the process.

- 2.21 The handling of the ARiN is included in this report as it provides contextual information on the interactions of key participants and their relationship prior to the allegations of misconduct in July 2016.

Email to former Director-General about organisational restructure

- 2.22 On 11 April 2016 the former Senior Manager, Business Intelligence sent an email to the former Director-General reflecting [their] opinions about the proposed restructure of ACT Health. Their email was in response to an 'All Staff Email' from the former Director-General to ACT Health, requesting feedback directly on the proposed restructure.

- 2.23 In their email, the former Senior Manager, Business Intelligence criticised the proposed restructure and the former Deputy Director-General, Corporate. Their email stated in part:

...

Since the implementation of SIG/SIP/TRD now Health Services Innovation, I have seen nothing but confusion and chaos. It feels like the whole organisation is now reporting to the DDG Health Service Innovation. Whilst I again endorse the notion of reform and change, my concern is that the DDG is not prepared to listen to people who might actually know a few things.

I have witnessed and been heavily involved in the last minute panic where this area has not met their requirements, and then expect others not responsible for this functions to do that work, without any clarity of the requirements.

...

My major concern is that whilst we have this wonderful opportunity to do things better, I don't believe the proposed structure and the way things have been done to date support really positive change.

I would be happy to discuss my concerns in more detail should you wish.

- 2.24 On 13 April 2016 the former Senior Manager, Business Intelligence sent a further email to the former Director-General apologising for their previous comments. Their email stated in part:

I want to apologise for my recent submission for feedback on the proposed restructure.

On reflection, my feedback was subjective and disrespectful, and completely out of character for me.

...

I am very proud of what I have managed to achieve in ACT Health, and love this organisation. I still believe I have a lot to offer the organisation and the reform work. That said, I realise I have let you down with my previous feedback and would understand if you believe my fit for the role and for the future no longer align with your expectations.

Once again, I apologise for the way I approached things recently.

- 2.25 In an interview under oath or affirmation on 16 April 2018, the former Director-General of ACT Health was asked 'So after that, how did that – what did that do for you in terms of future communication with [them]?' The former Director-General recalled that the former Senior Manager, Business Intelligence's demeanour changed around this period:

... okay, [the former Senior Manager, Business Intelligence] is not happy. Now, I can't recall if that was all around the time of the 40,000 ARIn, but ... the demeanour changed. ... I just noticed that [they] went from someone who was positive and contributing, to somebody who just didn't seem happy. Which is why I was happy to give [them] the package ... [they want] to go.

...

Negotiation about departure

- 2.26 The former Senior Manager, Business Intelligence was on planned leave for the period 3 July to 22 July 2016. On 18 July 2016 the former Senior Manager, Business Intelligence had a telephone conversation with the acting Executive Director, People and Culture during which they indicated their desire to leave ACT Health and questioned the possibility of a voluntary redundancy.
- 2.27 The acting Executive Director, People and Culture's contemporaneous notes in relation to the conversation record that the officer advised that during their absence on leave they had been 'thinking about what [they want] to do' and had thought of the possibility of a voluntary redundancy from ACT Health. The notes from the conversation further record that the officer 'doesn't think [they fit] in [with the organisation]' and that [they] 'no longer [have] the influence [they] once had, this has been stripped away'. The notes from the conversation further record that the officer 'wants to leave 'cleanly' without making it 'noisy' or 'messy' and that [their] supervisor [the former Executive Director, Performance Information] was not aware that the Senior Manager Business Intelligence was seeking a voluntary redundancy.

2.28 The former Senior Manager, Business Intelligence was due to return to work on Monday 25 July 2016. At 8:07 am on Friday 22 July the former Deputy Director-General, Corporate wrote an email to the acting Executive Director, People and Culture which stated:

Per our discussions in relation to the one key individual in p&l, I have spoken with the DG and we agree the individual cannot return to the department.

I need your advise (sic) on options to ensure we do not loose (sic) the position by making a severance payment, hence in order to facilitate and keep the individual away from the area what are the options to immediately affect (sic).

Can you give urgent consideration to this matter in order to close off with the DG by midday and in turn discuss with me in advising the individual consequently.

Please give me a call should you have any questions.

2.29 On 22 July 2016 the acting Executive Director, People and Culture called the former Senior Manager, Business Intelligence to discuss their exit from the organisation. At 4.14 pm on 22 July 2016 the acting Executive Director, People and Culture subsequently emailed the former Director-General and former Deputy Director-General, Corporate with information on the outcomes of the discussion, including:

I spoke with [the former Senior Manager, Business Intelligence] by phone and advised [them] that I was authorised to offer [them] a VR. I told [them] the net amount [they] would receive was around \$126K which took into account [their] full service history and entitlement and was dated to 31 August 2016. [They] said OK.

I informed [them] that [they were] not to return to work following [their] leave (which ends today).

...

I told [them] that the paperwork will be ready ASAP next week. I flagged that part of the requirements was that [they] will need to seek financial advice and that there would be paperwork for [them] to complete and return to HR.

2.30 Advice was sought from the ACT Government Solicitor's Office as to how to arrange for the former Senior Manager, Business Intelligence's exit from the organisation. The ACT Government Solicitor's Office subsequently provided advice and drafted a Deed of Release to be agreed between the employee and the Australian Capital Territory to effect the Senior Manager's departure.

2.31 In an interview under oath or affirmation on 16 April 2018, the former Director-General recalled their understanding of these events:

... I don't recall independently how the VR came up. ... But I know at the time [the former Senior Manager, Business Intelligence], I've been told, wanted to [relocate from Canberra] and that my view, with staff like that is, once they start starting to show they're unhappy, [they have] already made a decision to leave ACT Health. And I could have done one of two things. I could have gone, "Well [they] can just resign". But at that stage, again, I thought ... "Okay [they] wants a VR. Just fine, move [them]-let [them] have a VR." It wasn't a – also out of recognition of the work [they were] supposedly, might have, you know, probably been doing.

...

And – and I didn't want the angst at that stage with [former Senior Manager, Business Intelligence].

...

So I can't remember how it came up. But yes, there was a VR, and I had authorised the VR for [them].

- 2.32 In a response to the draft proposed report on 28 May 2018 the former Senior Manager, Business Intelligence advised that they:

... had sought agreement to attend work on the Monday 25 [July] 2016. However ... [their] access card to the building no longer worked and ... [their] network access had been removed. [Former Executive Director, Performance Information] received a call shortly after and was instructed to remove [them] from the building immediately.

I am unaware of any person being treated this way following an agreed VR ...

- 2.33 In mid to late July 2016 the former Senior Manager, Business Intelligence was in discussions with ACT Health Executives for the purpose of facilitating their departure from the organisation. In an interview under oath or affirmation on 16 April 2018, the former Director-General recalled that the former Senior Manager, Business Intelligence's demeanour had changed: 'I just noticed that [they] went from someone who was positive and contributing, to somebody who just didn't seem happy. Which is why I was happy to give [them] the package ...' The ACT Government Solicitor provided advice and drafted a Deed of Release to effect the former Senior Manager's departure. The acting Executive Director, People and Culture had a telephone discussion with the former Senior Manager on 22 July 2016 where agreement was reached and a payment of approximately \$126,000 was to be made. The acting Executive Director, People and Culture emailed the former Director-General and former Deputy Director-General, Corporate, to advise of this outcome on the afternoon of 22 July 2016. The payment of approximately \$126,000 was not made as the departure of the former Senior Manager, Business Intelligence did not proceed as then planned.

Former Executive Director, Performance Information

- 2.34 On 2 March 2016, the Head of Service agreed a proposed new executive structure for ACT Health. That restructure involved the recruitment and filling of new Executive positions as well as three positions upgraded from Executive Level 1.3 to Executive Level 2.4. The upgraded positions included the Executive Director, Performance Information.

- 2.35 The former Executive Director, Performance Information was absent on personal leave for the period 11 July 2016 to 5 August 2016. At 7:20 am on 25 July 2016 the former Executive Director wrote an email to the former Director-General and former Deputy Director-General, Corporate advising:

I would like to be considered for a redundancy.

The nature and role of information management within ACT Health will change considerably with the new structure and direction for ACT Health.

This provides the opportunity for ACT Health to establish a fresh approach to IM services for the Directorate.

I understand that my current role will be abolished as part of the restructure, which would provide the basis for a redundancy.

I would welcome the opportunity to discuss this in more detail.

2.36 Later that day, the acting Executive Director, People and Culture and the former Deputy Director-General, Corporate met with the former Executive Director, Performance Information. During the conversation the former Executive Director advised that they would take further sick leave. Contemporary notes taken at the meeting by the acting Executive Director, People and Culture record that the former Deputy Director-General, Corporate advised the former Executive Director that ‘opportunities exist for [them]’ and ‘[they are] well respected and liked’. The notes record that the former Deputy Director-General, Corporate ‘asked [them] to consider another role within ACT Health’ and noted ‘[they have] options, no pressure or hurry to make decision’.

2.37 At the meeting on 25 July 2016, the former Executive Director, Performance Information advised that they wished to withdraw their application for the new higher level executive position as Executive Director of Business Performance Information and Decision Support. They provided a hand-written letter to the former Deputy Director-General, Corporate to that effect, which stated ‘I wish to withdraw my application for the new role of ED BPDS Branch’. The former Director-General followed up this discussion with an email later that afternoon saying ‘I understand you met with [the former Deputy Director-General, Corporate and the acting Executive Director, People and Culture] this morning. I know you are on sick leave but if you want to talk to me please give me a call if you are up to it’.

2.38 In relation to the former Executive Director, Performance Information’s request for a redundancy from ACT Health, in an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate recalled that:

On 25 July though, after [the former Executive Director Performance Information] had been on leave and was sick, [they] then sent a note to the Director-General and to myself, so dated 25 July. “Dear [former Director-General] and [former Deputy Director-General, Corporate], I would like to be considered for a redundancy. ...”

...

So I just want to note at the same time I’ve now got not one, but I’ve got two individuals, very senior in the department, not wanting to – or particularly [the former Executive Director, Performance Information], ... not wanting to come back and assist us to work through the issues around the perceptions of...gaps in governance and also data. So I just want to draw your attention to that.

2.39 In relation to the former Deputy Director-General, Corporate’s views on the former Executive Director, Performance Information and their performance and value to the organisation and the meeting on 25 July 2016, in an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate advised that:

So for the record, [the former Executive Director, Performance Information], from my perspective, was highly valued.

...

Highly valued. And I also was aware [their] contract I think from memory was coming to an end in February the following year.

And [the former Executive Director, Performance Information] was highly valued, and therefore had an enormous amount of skill and experience and I was very keen where possible to harness.

...

From memory ... the conversation was ... [the former Executive Director, Performance Information] had been very unwell ... and I was very conscious of that I didn't want [the former Executive Director, Performance Information] to be under any pressure whatsoever in relation to wanting to make any quick or irrational decisions, because at the end of the day, ... I had a personal view when I first met [them] that ... [they] wanted to remain in ACT Health and [they] wanted to [do] a lot of things into the future.

2.40 At 8:46 am on Thursday 28 July 2016 the former Executive Director, Performance Information wrote an email to the former Director-General stating:

I would still like to be considered for a redundancy rather than other options due to the abolition of my position.

While I understand that there may be other options I would prefer a redundancy and would like your support noting, in addition to the points noted below, that:

- there is a precedence over a number of years in ACT Health and ACT Govt to provide redundancies for executives in a range of similar and other situations
- I have spent 26 of the lat (sic) 27 years (with the last 13 straight) with ACT Govt. In that time I have demonstrated commitment to Govt service beyond my established duties. I would also ask that this be considered in determining a position on a possible redundancy.

Happy to discuss further.

2.41 In response to the draft proposed audit report on 29 May 2018 the former Executive Director, Performance Information advised:

The Director-General is noted as stating "so I've got not one, but I've got two individuals, very senior in the department not wanting ... to come back and assist us to work through the perceptions of ... of gaps in governance and also data. So I just want to draw your attention to that." There is no evidence that we didn't want to return to work, and there are statements on record that the Deputy Director-General wanted to summarily dismiss us.

The Deputy Director-General (on 25 July 2016) advised that I was "highly valued" and that I had an "enormous amount of skill and experience and I was very keen where possible to harness". Yet, within three days, the Deputy Director-General was seeking to have me summarily dismissed. There was no discussion at the 25 July 2016 meeting as to any issues with data ...

The Deputy Director-General notes that "[they were] not in a position to have the two senior people advise me [in relation to supposed data issues]". However, [former Senior Manager, Business Intelligence] had returned to work on 25 July and could have been asked to address perceived issues. Instead, the DDG directed that [former Senior Manager, Business Intelligence] not be allowed in the building from that date until his redundancy was to be actioned. Also, I met with the DDG on 25 July and [they] failed to raise any information management issues with me.

- 2.42 On 25 July 2016 the former Executive Director, Performance Information emailed the former Director-General and Deputy Director-General, Corporate advising that 'I would like to be considered for a redundancy'. At a meeting with the former Deputy Director-General Corporate and the acting Executive Director, People and Culture on 25 July 2016 the former Executive Director, Performance Information was advised by the former Deputy Director-General, Corporate that 'opportunities exist for [them]' and '[they are] well respected and liked' and advised '[they have] options, no pressure or hurry to make decision'. Notwithstanding these assurances the former Executive Director reiterated in an email to the Director-General on 28 July 2016 that they 'would still like to be considered for a redundancy rather than other options due to the abolition of my position'.

Problems with performance information and reporting

Review of the accuracy of the draft March 2016 ACT Health Services Quarterly Performance Report (3rd Quarter Performance Report)

- 2.43 On 13 July 2016 an ACT Health officer commenced acting in the role of the Executive Director, Performance Information and Decision Support, due to the absence on personal leave of the former Executive Director, Performance Information. In relation to the acting role, in an interview under oath or affirmation on 4 April 2018 the acting Executive Director, Performance Information and Decision Support advised:

I got a phone call from [the former Deputy Director-General, Corporate] early in the morning ... to say that [the former Executive Director, Performance Information] had taken sick leave. And [they had] been away for days. I'm not sure if it was many days, but I knew [the former Deputy Director-General, Corporate] said somebody needed to go and help out the staff.

... I was told it was about a week. So I just told staff I was filling in for about a week. That week went and I understand that [the former Executive Director, Performance Information]'s sick leave extended.

- 2.44 The former acting Executive Director, Performance Information and Decision Support was asked by the former Deputy Director-General, Corporate to review the draft March 2016 3rd Quarter Performance Report, that had been prepared by the Executive Director, Performance Information and provided on 29 June 2016.

2.45 The review of the draft 3rd Quarter Performance Report was initially undertaken by the acting Executive Director, Performance Information and Decision Support with the support of two staff members. The initial review identified several errors throughout the draft report including; internal inconsistencies and incorrect figures; unsubstantiated statements; and errors in labelling graphs. In summary these errors caused the former acting Executive Director, Performance Information and Decision Support to have doubts as to the veracity of the report. In an interview under oath or affirmation with the Audit Office on 4 April 2018, the former acting Executive Director, Performance Information and Decision Support advised:

My first task was around that quarterly report, ... I was asked if it was ok to put out. ... So my very first check was to get someone to do an internal consistency check ... which means, do all the numbers all match up throughout the report. I found ... [a SOG level staff member] ... found ... there was a number that said, ... an increase or decrease of performance by 11 per cent. When you looked at the figures you could see straight away it was nowhere near the 11 per cent. It was 2 or 4 per cent or something. So there was an error. And there was also where the number that had been reported in one of the ED figures was – it wasn't purely correct. It ... had combined the two figures together. And so [for example] instead of being 5,000 it was 10,000 or whatever.

... so there were these three errors. And I can't remember the third one. That then made me ask, what's the business rules for this? ... And so they didn't have business rules. So that's a big issue.

...

There were very, very few. And when I asked to see them, they didn't ever come to show. So "Yes, yes, we're working on that." But there was no evidence that they were ever completed or applied, and they were very small in number for the amount of report, which was quite broad. And so to me my confidence in the information was low. And I had to go back to the [former Deputy Director-General, Corporate] and say "This is what I've found". I can't remember if I met with just [former Deputy Director-General, Corporate] or with [former Deputy Director-General, Corporate] and [former Director-General], at that time, and briefed them on what had been initially found in that. And we agreed ... There needed to be some more investigation done, because their confidence had to be high.

So they gave me a briefing as background to understand that there had been errors the previous year in the quarterly report. And there was a commitment made to the minister that this had been fixed, so there would be no further errors. I had to go and check, had those things they had promised, which was like, that there was a process correction and process documentation, from memory, had actually occurred as part of this checking.

So we made an agreement that I would go and look and try and identify the process information that was in the brief, and that we would run another analysis process. So pretty industry standard stuff is to have two quite senior people run the numbers in parallel and see if they come up with the same answer.

That again generated the fact that there were no business rules behind. So they had what they called stored code, but the stored code was actually analytical code, like ... Computer language ... to run the queries across the data, but there was no process to assure that that code was actually correct. And there was no process to manage the code from interference.

So anybody could pick up the code and it could have been changed by accident or on purpose.

And so ... they ran them. We got mostly agreement. There was one number that just wouldn't come to agreement, from memory, and that was about outpatients. And again I uncovered another layer of problem in that when I asked, "How did you come up ... What did you do?"

They had both said ..., “It depends on who calculates it as to what the answer will be” which was not an appropriate response.

...

So then we dug into that and understood that there was data sitting on a number of different servers in a number of different environments, and different people were using their own code, potentially, and/or the stored code, and they were potentially applying it to different data sources.

So where was the source of truth was not necessarily very clear. So then we tried to map – where does the data come in and out, et cetera.

- 2.46 In an interview under oath or affirmation with the Audit Office on 4 April 2018, the former acting Executive Director, Performance Information and Decision Support further advised:

And so it was just multiple things like this of multiple, multiple [errors]. So poor quality in a quarterly report. And not just the figures. There was the approach to labelling. You know, in reporting there is consistency, people being clear about what they’re reading in front of them, knowing whether its nine months, 12 months, what you’re comparing to what. So there were lots of issues like that in the quarterly report. And there were issues like that in so many things.

...

So there was a low level of confidence in the outputs. And at that time we were moving to needing to do the annual report data. And the director-general needs to sign off on that annual report data as being adequate and correct. We had no business rules for running that. We had, you know, problems with assurance processes that were either non-existent or poor – that were inadequate.

- 2.47 In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

There are a number of issues with the [former acting Executive Director, Performance Information and Decision Support]’s testimony as it exaggerates issues and is silent on others that would conflict with [their] version of events.

The supposedly major issues identified by [former acting Executive Director, Performance Information and Decision Support] include one reference to an incorrect number (out of well over 100 performance measures in the report) and some textual issues which do not result in falsification of information and which could have easily been addressed prior to publication as it was still in draft. It had been common practice for many years for a number of minor issues to be questioned by the DG and DDG in their consideration of the draft report.

... comments at [paragraph 2.77] are also not correct. While I accept that systems were not yet at the level they should be (and considerable work was underway to address these issues as part of the development of the new data warehouse for ACT Health), it is not correct to state that there were no processes in place. ACT Health reports always matched results reported by national agencies such as the AIHW (who calculated their results based on raw data, not on consolidated figures provided by ACT Health). As such, it is not accurate to suggest that relevant national standards were not followed in establishing ACT Health reports (such as the Quarterly Report).

It is also worth noting that the work underway in Performance Information Branch to provide for a consolidated “single source of truth”, as part of the work being undertaken for the further development of the agency’s data warehouse, was stopped by [former acting Executive Director, Performance Information and Decision Support]. That work was providing for consolidated standards for the collection, validation, data definitions, processing and

reporting of ACT Health performance information, with the first tranche of this work completed in May 2016, with the remaining key data sets to be completed by the end of 2016.

...

It is of note that no-one sought to put any of the perceived issues to either [former Senior Manager, Business Intelligence] or me for comment or corroboration which would have provided the opportunity to demonstrate the systems in place and being built during 2016. This would have enabled senior executives to ask relevant questions in relation to data and information management reforms and processes and provide for any changes should concerns have been raised.

This would not only have eliminated the need of a costly misconduct process, but would have also avoided the considerable costs of the PwC work by providing clarity of the work underway to achieve a consolidated and accurate reporting service for ACT Health.

Instead, progress has stalled and there is no clear indication as to when a consolidated information service will be implemented within ACT Health.

2.48 The comments from the former Executive Director, Performance Information are noted, as is their disagreement with the comments of the former acting Executive Director, Performance Information and Decision Support with respect to the extent of the errors and inaccuracies in the draft 3rd Quarter Performance Report and performance information and reporting processes generally. These matters were not within the scope of this audit (refer to paragraph 1.66).

2.49 On 13 July 2016, an ACT Health officer commenced acting in the role of the Executive Director, Performance Information and Decision Support, due to the absence on personal leave of the former Executive Director, Performance Information. A key task of the acting Executive Director, Performance Information and Decision Support Branch was to review the draft *March 2016 ACT Health Services Quarterly Performance Report* (the 3rd Quarter Performance Report). In undertaking this task the acting Executive Director identified several errors throughout the draft report including; internal inconsistencies and incorrect figures; unsubstantiated statements; and errors in labelling graphs. These errors caused the acting Executive Director, Performance Information and Decision Support to have doubts as to the veracity of the report.

2.50 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

[Part1]

In early 2015 [the former Director-General] applied for the position of Director-General at ACT Health and won the role through a competitive merit based recruitment process. [Paragraph 2.50 Part 1a]

[The former Director-General] commenced in [their] role as Director-General of Health in June 2015. [Paragraph 2.50 Part 1b]

In [their] first meeting with the then Minister of Health, ... in mid June 2015, the Minister set out [their] priorities for [the former Director-General] during [their] five year tenure. These priorities included:

- (a) improving access to health services in the ACT;
- (b) driving reform across health to ensure it was a sustainable service; and

(c) increasing the accountability of staff across the organisation. [Paragraph 2.50 Part 1 c]

Between June and November of 2015, [the former Director-General] invested significant time in assessing the prominent issues in health and setting the strategic direction of the organisation. This was reflected in cabinet approval for the forward direction of ACT Health in November 2015. [Paragraph 2.50 Part 1 d]

Implementing the forward direction of ACT Health was projected to be a large, complex and multifaceted change process that impacted on all aspects of ACT Health, including the operations, infrastructure, finance, systems and culture of ACT Health. [Paragraph 2.50 Part 1 e]

During the first six months in [their] position as Director-General, it was evident to [the former Director-General] that [they] had inherited a significant number of serious systemic issues across the portfolio. These issues included, though were not limited to:

- (a) poor understanding of accountability in operational delivery across the organisation; and
- (b) a culture where there was little to no performance management of under-performing staff health service. [Paragraph 2.50 Part 1 f]

[Part 2]

Scope of responsibility of the Director-General

Given the vast array of issues identified, the significant reform agenda, and the need to maintain business as usual, including in the delivery of \$1.6 billion, 24 hour a day health service, and management of a workforce of a FTE work force of 7,000 employees, [the former Director-General] was heavily reliant on [their] team of senior managers to assist [them] in discharging [their] day to day responsibilities. [Paragraph 2.50 Part 2 a]

During [their] time as Director-General, [the former Director-General] usually had between 15 and 16 direct reports. These direct reports were very senior public servants that were engaged and remunerated at a level that reflected their background, experience and roles as senior advisors to [the former Director-General]. [The former Director-General] relied heavily on these senior managers to inform [them] about day to day operational issues, staffing issues, budget issues and issues associated with information management and technology. Under these Deputy Director-Generals sat approximately 100 executive members of staff. Given the diversity in operations, and the scope of [the former Director-General]'s overall responsibility, [the former Director-General] relied heavily on these staff members as subject matter experts in their particular areas of expertise. [Paragraph 2.50 Part 2 b]

There were dedicated processes for dealing with issues raised by members of the public, and employees, and any correspondence escalated to [the former Director-General] was typically acknowledged and where possible unless otherwise advised, dealt with by [the former Director-General] within a five day period. While [the former Director-General] did have a level of understanding about misconduct processes, [they] relied heavily on human resources staff (HR) for information and advice with respect to the management of these types of issues. Given that 7000 employees sat below [them], it was not practicable for [them] to be personally involved in the management of all performance and misconduct issues, nor the detail associated with particular provisions in the Enterprise Agreement, the Public Sector Management Act, Public Sector Management Standards and the associated policy or guidance material. [The former Director-General] had a dedicated team of HR advisors, supervisors, and managers that specialised in these issues, and individuals within that team were overseen by executive members of staff, and ultimately a Deputy Director-General. [Paragraph 2.50 Part 2 c]

With respect to the management of data, [the former Director-General] had a good understanding of data outputs, however, [they] relied heavily on very senior managers to provide information and guidance around the systems, process and governance that produced these outputs. [The former Director-General] was not qualified in data systems, and could not

read or produce code. It was not practicable for [the former Director-General] to be actively involved in the management of information and data, or the detail associated with how data was processed and produced through systems. [The former Director-General] had a dedicated team that specialised in information and data, that was overseen by executive members of staff, and ultimately a Deputy Director-General. [Paragraph 2.50 Part 2 d]

[Part 3]

Data integrity issues in ACT Health

In carrying out [their] duties, and gaining an appreciation for the operational context of ACT Health, [the former Director-General] became aware during [their] first six months in [their] role of issues associated with data integrity that dated back as far as 2012. In a particularly well known incident, data integrity issues were widely publicised ... manipulating emergency department data at Canberra Hospital. This incident provided the impetus for the current Auditor General to conduct a performance audit into the Health Directorate's data and data integrity at Canberra Hospital, and the data issues in 2012 resulted in significant adverse publicity for both ACT Health, the Minister and the Government. [Paragraph 2.50 Part 3 a]

...

As discussed above, the importance of data integrity to ACT Health's operations cannot be overstated. Data is relied on across the board, in the context of everything from managing staffing numbers for the purpose of meeting ratios, to securing access to federal government funding. Multiple internal and external stakeholders rely on the information and accuracy of the data, and data outputs are a key indication of performance of the health system in the ACT in both an administrative and political context. [Paragraph 2.50 Part 3 b]

Given the importance of data at a Territory and Federal level, any indication that there were data integrity issues had the potential of significant reputational damage to ACT Health and flow on effects across the organisation and the ACT. [Paragraph 2.50 Part 3 c]

As indicated above, [the former Director-General] was not proficient in the creation or monitoring of business information systems - it was simply beyond [their] remit. [The former Director-General] relied heavily on the expertise of those within the relevant areas of ACT Health to produce accurate and timely data, and acted on representations made by those individuals within information and data intelligence team, to carry out [their] duties and advise government. [Paragraph 2.50 Part 3 d]

[Part 4]

Relationship with [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence]

[The former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] had been long standing employees in the data and information management teams, with widely recognised experience and corporate knowledge. When [the former Director-General] commenced [their] employment in 2015, [the former Executive Director, Performance Information] was employed at an executive level. Following a restructure that was undertaken at [the former Director-General]'s initiative in 2016, [the former Executive Director, Performance Information] headed up the Performance and Business Intelligence Unit (**PBIU**). [Paragraph 2.50 Part 4 a]

[The former Director-General] set up the PBIU to streamline the creation and dissemination of data to a single source within Health, rather than having data creation interspersed in discrete pockets from multiple sources across the organisation. [Paragraph 2.50 Part 4 b]

[The former Director-General] met with [the former Executive Director, Performance Information] on a relatively frequent basis, as required to deal with data related questions or issues that [they] had, and at times [the former Senior Manager, Business Intelligence] would accompany [the former Executive Director, Performance Information] to these meetings. [The

former Director-General's interactions with [the former Senior Manager, Business Intelligence] virtually ceased at the beginning of 2016 when [the former Executive Director, Performance Information]'s and [the former Senior Manager, Business Intelligence]'s team was relocated to Woden, while [the former Director-General] remained in the Civic office. [Paragraph 2.50 Part 4 c]

[The former Director-General] relied heavily on [the former Executive Director, Performance Information] and those under [the former Executive Director, Performance Information]'s management such as [the former Senior Manager, Business Intelligence], for their technical expertise, corporate knowledge and business intelligence to guide [their] decision making and advice to government. [The former Executive Director, Performance Information], as a senior member of staff had the requisite understanding and assumed knowledge to ensure that representations that [they] made about the work being carried out by [their] area was accurate and correct. Prior to May 2016, it would never have occurred to [the former Director-General] that [the former Executive Director, Performance Information] or [the former Senior Manager, Business Intelligence] were providing anything other than accurate and correct information to [the former Director-General] regarding the state of information and data management within ACT Health. Advice that [the former Director-General] provided to internal and external stakeholders, including the Minister for Health, the Government and the Legislative Assembly, relied on the accuracy and correctness of this information. [Paragraph 2.50 Part 4 d]

[Part 5]

Misrepresentations about the state of data

Each quarter ACT Health releases a report noting the performance for that quarter and comparing the performance of that quarter against the proceeding comparative quarter. [Paragraph 2.50 Part 5 a]

During [the former Director-General]'s first six months as Director-General, the data was produced, seemingly without incident. [Paragraph 2.50 Part 5 b]

In or about Easter 2016, the Standing Committee on Health and Ageing requested an update on the recommendations from the 2012 Audit back in 2012. In response to this request, [the former Director-General] asked [the former Deputy Director-General, Corporate] work with [the former Executive Director, Performance Information] to reassure [the former Director-General] that the appropriate data related governance was in place within the Directorate and that all was as it should be in [their] team. [Paragraph 2.50 Part 5 c]

In early May 2016, the then Leader of the opposition ... made a public comment on anomalies that [they] believed that [they] had uncovered in ACT Health data. In response to this, [the former Senior Manager, Business Intelligence] and [the former Executive Director, Performance Information] provided advice that, in effect, there was nothing to be concerned about, to both [the former Director-General] and [the former Deputy Director-General, Corporate]. [Paragraph 2.50 Part 5 d]

Notwithstanding the above advice, in mid-May [the former Director-General] verified that there were errors in the Q2 report for the 2015/2016 financial year. In light of ACT Health's reliance on data, and previous adverse publicity relating to data integrity, this represented a significant issue for ACT Health. [Paragraph 2.50 Part 5 e]

[The Minister for Health] requested information regarding how these data anomalies had occurred and [the former Executive Director, Performance Information] briefed [them] in person, in [the former Director-General]'s and others presence, citing 'human error' as the cause of the anomaly. [Paragraph 2.50 Part 5 f]

[The former Executive Director, Performance Information] suggested that members of [their] team had ignored standard protocol and rewritten code because they were stressed, and this

was the basis for the errors identified. [The former Executive Director, Performance Information] stressed to both [the former Director-General] and the Minister that it could not, and would not be possible, for the errors to occur again. [Paragraph 2.50 Part 5 g]

[The former Director-General] recalls that [the former Executive Director, Performance Information] made subsequent representations to [the former Director-General] that there were more errors including data errors in the ED data and these errors necessitated changes to the December Quarter report from both 2014 and 2015. [Paragraph 2.50 Part 5 h]

The Minister was asked about ACT Health data in early June in the Legislative Assembly and [they] provided responses to questions put to [them], relying on the assurances of [the former Executive Director, Performance Information]. [Paragraph 2.50 Part 5 i]

The Q3 report was due for release by the end of June 2016. The report was late leaving [the former Executive Director, Performance Information]'s office and was not released to [the former Director-General] prior to Estimates. [The Leader of the Opposition] challenged [the former Director-General] about whether [they] felt confident it would be error free, and [the former Director-General]'s answers to the questions posed to [them] were based on the information and advice that had been provided to [them] by [the former Executive Director, Performance Information]. [Paragraph 2.50 Part 5 j]

[The former Director-General] was also advised in or around June of 2016 that representatives from NSW Health were complaining about [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] not being responsive and missing meetings. Concerns were also being raised by Calvary Hospital about the lack of information and data they were receiving from [the former Executive Director, Performance Information]. [Paragraph 2.50 Part 5 k]

The issues regarding Calvary Hospital and the failure by the Division to have data ready was of particular concern due to an unrelated audit by you into the management of the Calvary Hospital contract by ACT Health and the findings of financial irregularities on the Calvary Hospital side of the ledger. [Paragraph 2.50 Part 5 l]

Despite the assurances given by [the former Executive Director, Performance Information] that the anomalies would not happen again, the Q3 report also contained data anomalies and could not be released. [The former Senior Manager, Business Intelligence] commenced a period of leave in July 2016, as did [the former Executive Director, Performance Information]. Both then sought redundancy payments. [Paragraph 2.50 Part 5 m]

[The acting Executive Director, Performance Information and Decision Support], who was acting in [the former Executive Director, Performance Information]'s position while [they were] on leave, identified serious and systemic issues relating to the collation and production of ACT Health data. The issues identified suggested that despite the assurances received from [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence], the errors and anomalies were not attributable to human error and were not, in fact, one off occurrences. [Paragraph 2.50 Part 5 n]

Instead it became apparent to [the former Director-General] during the last week in July 2016 that there were serious systemic governance failures which meant the data being produced by ACT Health was inherently flawed. It was clear at that point that the 'never again' assurance given by [the former Executive Director, Performance Information] was incorrect. It was because of this ongoing pattern of data integrity flaws being raised with [the former Director-General] that [they] decided to commence misconduct proceedings. [Paragraph 2.50 Part 5 o]

2.51 In a response to the final proposed report on 26 July 2018, in particular paragraph 2.50, the former Executive Director, Performance Information advised:

[Paragraph 2.50 Part 1 d]

In providing this information as context, evidence should be provided as to outcomes of the strategy and key deliverables. I suggest that there is considerable evidence that the Strategy has failed to deliver on its key performance measures. If the former DG is seeking to rely on this as context, the lack of effectiveness in meeting the key deliverables of the strategy should also be noted.

[Paragraph 2.50 Part 1 f]

This statement is not justified and I believe could be considered defamatory. There is significant evidence of clear strategic directions and business plans implemented by the DGs that preceded the former DG. There is also evidence from prior to the reign of the former DG of the implementation of performance plans and the addressing of performance issues.

Of note, despite the statements by the former DG of the need for major reform: there was no ACT Health corporate or business plan developed to guide the implementation of supposed reforms; the promised Clinical Services Plan has still not been completed (despite a promise of its completion in 2016); and there was no performance management processes implemented by any of the executives to whom the former ED(PI) reported from the time of the arrival of the former DG.

Established governance processes, including Executive Council, the Finance and Performance Committee, and Executive Directors' Council were either suspended or had their membership culled to the level that there were no established processes for the dissemination of information and direction across the executive team— which was demonstrated in the failure of ACT Health to meet a large number of governance standards as part of its accreditation process in 2018.

[Paragraph 2.50 Part 2 b]

The former DG also notes that there were some 100 executive members of staff. While the former DG increased the number of executives, there have never been 100 executives in ACT Health, with the total well below half that amount. It is also of note that the Executive Structure for ACT Health established by the former DG has been considerably down-sized by the current acting DG.

[Paragraph 2.50 Part 5 k]

No evidence of complaints by NSW Health were provided to the former ED(PI). A concern from NSW Health noted to the former ED(PI) was in relation to a responsibility of another Branch. The former ED(PI) advised the relevant DDG who raised the issue of this at the time.

[Paragraph 2.50 Part 5 l]

No evidence provided of this being an issue discussed with the ED(PI). Calvary regularly discussed issues with the ED(PI). IT issues needed addressing in relation to compatibility and access between ACT Health and Calvary systems in relation to full access to relevant info. This was not a responsibility of PI Branch.

- 2.52 In a response to the draft proposed report on 5 June 2018 legal representatives on behalf of the former Director-General advised of the former Director-General's growing concerns with respect to the accuracy of performance information and reporting in ACT Health from May 2016. The former Director-General identified performance information and reporting errors that became public in May 2016 with respect to the *December 2015 ACT Health Services Quarterly Performance Report* (i.e. the Second Quarter 2015-16 report) as well as assurances that they felt were provided by the former Executive Director, Performance Information (and former Senior Manager, Business Intelligence) in relation to these errors. The former Director-General advised that 'it was because of this ongoing pattern of data

integrity flaws being raised with [the former Director-General] that [they] decided to commence misconduct proceedings’.

Decision to undertake a misconduct investigation

2.53 As discussed in paragraphs 1.26 to 1.27, on 29 July 2016 letters were prepared for the former Executive Director, Performance Information and former Senior Manager, Business Intelligence of the former Performance Information Branch, which provided written notification of a misconduct investigation into their activities. These letters were provided to the officers on 30 July 2016.

2.54 In the letters provided to both officers on 30 July 2016 (dated 29 July 2016) the former Deputy Director-General, Corporate advised:

I am writing to inform you that I have received allegations of possible misconduct against you. The preliminary allegations relate to your failure to exercise reasonable care and skill, and or failing to act with probity in performing your duties, namely:

- Advice that was provided to the Minister for Health and the ACT Health Director General in relation to the approach being taken within the Performance Information Branch to ensure consistency and accuracy in the data ACT Health produces and publishes was false.

2.55 These letters were sent to the two staff members in a relatively short period of time after:

- an agreement had been reached with the former Senior Manager, Business Intelligence for an exit from the organisation with an associated payment (on 22 July 2016) (refer to paragraphs 2.28 to 2.29); and
- the former Executive Director, Performance Information had been provided with assurances by the former Deputy Director-General, Corporate that ‘opportunities exist for [them]’ and ‘[they are] well respected and liked’ and that the former Deputy Director-General, Corporate ‘asked [them] to consider another role within ACT Health’ and noted ‘[they have] options, no pressure or hurry to make decision’ (on 25 July 2016) (refer to paragraph 2.36).

Initiation of the misconduct investigation

2.56 The Audit Office sought information as to how the decision was made to undertake the misconduct investigation into the two former staff members so soon after the agreement was reached and assurances provided. In an interview under oath or affirmation on 6 April 2018, the Senior Manager Employment Services explained their involvement in preparing the letters advising the two former officers of allegations of misconduct. The Senior Manager Employment Services advised that when they arrived at work on Friday 29 July 2016, there was a message for them to contact the former Deputy Director-General, Corporate urgently due to the absence of the acting Executive Director, People Strategy and Corporate.

2.57 In an interview under oath or affirmation on 6 April 2018 the Senior Manager Employment Services said that on the morning of 29 July 2016, the former Deputy Director-General, Corporate was seeking the summary termination of the two former staff members:

... And when I contacted [the former Deputy Director-General, Corporate], [they] informed me that [they] wanted [the former Executive Director, Performance Information] and [Senior Manager, Business Intelligence] summarily terminated from their employment. I provided advice that I didn't think that was prudent and that if we took steps to summarily terminate someone without some, you know, sort of gross misconduct being undertaken of which we had certain proof, that if we were taken to at the Fair Work Commission for unfair termination, we would in all probability lose a case like that.

...

[The former Deputy Director-General, Corporate] wanted them gone that day. [They] didn't want them at work on Monday. That was made quite plain to me, yes.

2.58 In an interview under oath or affirmation on 6 April 2018 the Senior Manager Employment Services further advised:

The conversation then moved on to – and this is my recollection from 18 months ago – that the conversation moved onto removing them from the workplace as of Monday. And I informed [the former Deputy Director-General, Corporate] that my interpretation of the current enterprise agreement was that a person could be suspended if there was a misconduct investigation being undertaken, or an investigation being undertaken. So at the preliminary assessment phase we wouldn't be looking at suspending someone, because at that stage we were still gathering information.

My advice was that we should gather information, and then when we had the information, refer it for investigation, once we could frame some allegations. And [the former Deputy Director-General, Corporate] didn't agree with that advice and didn't want to take that advice. [They] wanted to be able to suspend them. So [they] wanted to move immediately onto misconduct investigations. So at the end of the day, as that conversation moved along, I agreed to commence the paper work for referring it for investigations.

2.59 In relation to whether the former Deputy Director-General, Corporate recalled receiving such advice, in an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate advised:

I honestly cannot recall that ... but I will make the point that [the former Director-General] was very keen to see those letters move and go.

2.60 In an interview under oath or affirmation on 6 April 2018 the Senior Manager Employment Services also advised:

... I said, "Well, what are the allegations that we're going to put in a misconduct investigation letter?" because, I said we had to provide some sort of allegation to an individual. We can't rely on, you know, sort of not having some allegation ... that there had been some potential breach of the Code of Conduct or the provisions of the Fair Work Act. [The former Deputy Director-General, Corporate] instructed me to seek those allegations from [the acting Executive Director, Performance Information and Decision Support], who was an executive director at this stage.

2.61 In a non-contemporaneous chronology of events made after this discussion and provided to the Audit Office the Senior Manager Employment Services recorded:

Arrived at work in the morning and was instructed that [the former Deputy Director-General, Corporate] wanted me to call [them] as [the acting Executive Director, People and Culture] was away. I went to [the acting Executive Director, People and Culture]' office and called [former Deputy Director-General, Corporate]. [They] informed me that [they] wanted [the former Executive Director, Performance Information and the former Senior Manager, Business Intelligence] terminated today. I asked [them] what the circumstances were and [they] said that [the former Executive Director, Performance Information and the former Senior Manager, Business Intelligence] had provided data in a report to Government that was not correct. I said that this would not be enough to justify summary termination in my view but we could undertake a preliminary assessment and then [they] could refer the matter for misconduct investigation. [They] said that that was fine but [they] did not want [the former Executive Director, Performance Information and the former Senior Manager, Business Intelligence] at work on Monday.

I informed [former Deputy Director-General, Corporate] that if that was [their] objective then [they] would need to suspend. If [they] suspended then [they] would need to have a misconduct investigation being undertaken. [They] said that was fine and that would be the course of action without the preliminary assessment. I advised that this wasn't prudent as [they were] not able to form the allegations and there was no information to support the circumstances as there was a PwC review being undertaken that would inform us of the issues.

[The former Deputy Director-General, Corporate] said that [they] wanted them suspended and an investigation notified and that I was to liaise with [the acting Executive Director, Business Performance Information and Decision Support] in drafting up the allegations. The phone call terminated and I commenced work in accordance with my instructions.

2.62 In a response to the final proposed report on 26 July 2018 the former Executive Director, Performance Information and Business Support advised:

I was requested by the former DDG Corporate to provide HR with wording regarding issues identified with reporting.

2.63 In a non-contemporaneous chronology of events made after this discussion and provided to the Audit Office the Senior Manager Employment Services also recorded:

- at 12:55 pm the acting Executive Director Business Performance Information and Decision Support supplied the wording for the allegations; and
- at 3:39 pm the [Senior Manager Employment Services] sent draft letters for comment to the former Deputy Director-General, Corporate and the acting Executive Director.

2.64 The email from the Senior Manager Employment Services to the former Deputy Director-General, Corporate and the acting Executive Director, Business Performance Information and Decision Support at 3:39 pm, which included the draft letters, stated:

I have attached draft letters for [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] in relation to the misconduct issues. In addition [the former Senior Manager, Business Intelligence]'s letter incorporates a suspension action and provides [them] with seven days to make comment or raise any issue [they wish] to in relation to the matter. Once the letters are approved and signed by you ... I will then have a phone conversation with each of the staff and inform them that the letters are in the mail and that I will email them a copy at home as well.

- 2.65 In a response to the draft proposed report on 24 May 2018 the acting Executive Director, Business Performance Information and Decision Support advised:

I was asked to provide or check (not sure which one) wording about my findings for letters to the two staff. I checked the wording to ensure it factually reflected what I had found. I did not provide any other input as far as I recall. I also don't believe I saw the final letters sent as it was not an issue for my role.

Reasons for undertaking a misconduct investigation

Genesis of the allegations of potential misconduct

- 2.66 In an interview under oath or affirmation on 11 April 2018 the Audit Office sought information from the former Deputy Director-General, Corporate as to the reasons behind undertaking a misconduct investigation into the actions of the two staff members. The following exchange took place with the former Deputy Director-General, Corporate:

Audit Office

... So the letter says, "I have received allegations of possible misconduct," So who made those allegations to you?

Former Deputy Director-General, Corporate

... so [the acting Executive Director, Performance Information and Decision Support] was the person, at the end of the day, who I asked to go in and provide comfort to me that we had sound governance ...

...

Audit Office

And was it [the acting Executive Director, Performance Information and Decision Support] that made the allegations of possible misconduct?

Former Deputy Director-General, Corporate

[They] certainly raised it with me, yes ...

- 2.67 In an interview under oath or affirmation on 4 April 2018 the acting Executive Director, Performance Information and Decision Support was asked about their role in providing advice on the actions of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence:

Audit Office

Was your opinion sought in relation to potential inappropriate behaviour on the part of these two people in July 2016?

...

Former acting Executive Director, Performance Information and Decision Support

... I believe in fact. And so my fair assessment of the situation was that these were the things that occurred. I don't believe I was asked for my opinion. It's not – would not be normal for me to give it. Okay. These are the facts.

...

... And you should assess these facts against standards, et cetera. So if you assess these facts against... what the performance requirements of a role were, that's not an opinion.

- 2.68 In an interview under oath or affirmation on 5 April 2018 the former Acting Executive Director, People and Culture was asked how the allegations of possible misconduct first eventuated:

So I believe it was [the former Deputy Director-General, Corporate] ... who made the link between ... the problems with the data and then saying, "But we've got advice from that branch saying we have addressed all these issues and ... we have due processes in place." So I believe it was [the former Deputy Director-General, Corporate] who made that link to say, "Well, hang on, there's problems, but you've told us it's all fine". And that's where the link was drawn by [the former Deputy Director-General, Corporate].

- 2.69 In an interview under oath or affirmation on 5 April 2018, the former acting Executive Director, People and Culture also recalled their understanding of the events leading to the decision to undertake a misconduct investigation against the two officers:

So [the former Deputy Director-General, Corporate] sort of put to me that ... this was allegations. It was looking like potential misconduct, because there'd been briefings going to the minister through the DG saying that ... double-checking, triple-checking had happened, that... from previous audit reports, those recommendations were being actioned, ... processes were put in place for checking. [The former Deputy Director-General, Corporate] said, "Look, I don't know that they have been put in." [The former Deputy Director-General, Corporate] said – their view was that it was looking like failure to exercise due care or reasonable care.

As well as a briefing to the minister, [the former Deputy Director-General, Corporate] also pointed to a transcript of a – I think it was an estimates hearing ... that asked about ... what was the process in producing these reports, and where former [the Executive Director, Performance Information] had said, "Look, they are double and triple checked".

So [the former Deputy Director-General, Corporate] pointed to those two as evidence that ... "We've been misled because we were told that all this was being resolved and that recommendations were being actioned, but it doesn't look like they have been."

- 2.70 In a response to the draft proposed report on 24 May 2018 the acting Executive Director, Performance Information and Decision Support advised:

The former DG Corporate states I raised possible misconduct. I did not. I reported and briefed on factual findings of issues related to the Q3 report and other work of the branch.

Allegations of misconduct

- 2.71 In an interview under oath or affirmation on 16 April 2018 the former Director-General was asked about the decision to undertake the misconduct investigation into the actions of the two former staff members (specifically the former Senior Manager, Business Intelligence):

Audit Office

What happened between 22 July and the 29th, such ... a move ... from agreement to the redundancy to ...

Former Director-General

I'm assuming that's when I became aware of the findings, whether it be from [the acting Executive Director, Performance Information and Decision Support] or ... something would have happened in that week that made me go, "Whoa, whoa, whoa. Okay. Stop."

...

That's all I can say ... because I know the VR was definitely – that was the reason I said stop, because ... I'd been told something that made me go, "Whoa, whoa, whoa, whoa. Is that misconduct here?"

- 2.72 As discussed in paragraph 2.38 the former Deputy Director-General, Corporate advised that they had a high opinion of the former Executive Director, Performance Information. In an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate was asked why allegations of misconduct were put to the former Executive Director, Performance Information if they were held in such high esteem:

Audit Office

So if you had that view of [the former Executive Director, Performance Information], and if you had a conversation to this effect on 25 July what happened and why was a letter sent to [them] on 29 July which said [the former Executive Director, Performance Information] was under investigation?

Former Deputy Director-General, Corporate

... all I can say at the end of the day with ... trying to get to the bottom of – did we have a systemic problem with sound governance, and not being in a position to have the two senior people advise me, and to advise our ... third party. This is about governance. It's not about their performance. This is about governance. Then as best I can recollect is those letters – the letters that were produced and sanctioned through the HR process, I was advised to send them.

Audit Office

So the catalyst may have been governance, but when those letters were sent on the 29th, it was certainly about their performance. And that's what was said in those letters. They mention misconduct.

Former Deputy Director-General, Corporate

So I had asked [the former Executive Director, Performance Information] to return as quickly as possible. And I can't remember whether it was late June or early July, that suffered... [their] health – to come back and help us resolve these matters. The difficulty we had is we had no one who could stand independent of both [the former Senior Manager, Business Intelligence] and [the former Executive Director, Performance Information] and say that we had sound governance processes in play. At the same time we had provided assurances in previous briefings to the ministers and other key people that in fact we had ... addressed all the problems that we had in the past. So somewhere between ... wanting to get to the bottom of that and then not having access to the individuals but at the same time seeing them want to leave the organisation fairly quickly and not assist us to basically resolve ... those matters, and again, ... perhaps [the former Director-General] needs to explain any other conversations [they] might have had with [the former Senior Manager, Business Intelligence] or [the former Executive Director, Performance Information] individually. But, ... I distinctly remember asking [the former Executive Director, Performance Information] to come back and assist me in early July to resolve this.

Audit Office

...

... who gave you the advice between ... the 25th and the 29th, because one minute we're talking around overall governance, and then the next minute these two people have I think by anybody's standard, quite a severe letter in terms of a shift there. So can you help us? Did you have a chat with [the former Director-General]?

...

... I'm going to be very blunt, and you're under oath. Were you directed to write the letter you wrote on the 29th and signed?

Former Deputy Director-General, Corporate

Yes.

Audit Office

Who directed you? ...

Former Deputy Director-General, Corporate

DG.

- 2.73 In a response to the draft proposed report on 28 May 2018 the former Senior Manager, Business Intelligence advised:

The former DDG states that we had provided advice to Government that we had 'fixed everything'. This is not true. Details are in a Ministerial Brief which clearly states we had put a number of things in place, and were working on others – that was fact and would have been verified by the staff involved had they had the opportunity to prove this. In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

... the DDG is noted as stating that [they] asked [me] "to come back and help us resolve these matters". [They] also notes "I distinctly remember asking [me] to come back and assist me in early July to resolve [the perceived reporting issues]" This did not occur. I was never advised of any issues, and the DDG did not mention any issues at our 25 July meeting.

... the DDG advises that "we had addressed all the problems that we had in the past" In briefs to the Minister and in a statement to the Select Committee I stated clearly that some initiatives had been put in place but further processes were being put in place (as part of the development of the data warehouse).

- 2.74 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised:

The draft Report correctly acknowledges that I had developed "significant concerns" regarding the preparation of performance information and reports by the two former officers but the draft Report has given insufficient weight to those concerns and to the existence of material supporting those concerns. It also does not recognise my concerns as to the accuracy and veracity of the assurances provided by the two former officers.

Based on the materials available to me at the time, I had developed real concerns that the two former officers may have breached section 9 of the *Public Service Management Act 1994* (PSM Act). I formed the view that they may have, amongst other things, failed to do their job with "reasonable care and diligence, impartiality and honesty" in providing assurances to the ACT Health Minister and the former Director-General regarding the quality and reliability of the information and the governance arrangements in place to assure quality and reliability in arranging the relevant data sets for ACT Health. My concerns were shared by the former Director-General.

Between 16 May 2016 and 29 July 2016, a series of emails regarding the integrity of the quarterly reporting eroded my confidence in its accuracy and reliability, and over time I began to form the view that [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] may have failed to meet their obligations under section 9 of the PSM Act in the preparation of quarterly reporting, and in their assurances to the former Health Minister.

2.75 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

By omitting relevant information about the accuracy of the data, by failing to put in place proper checks and balances to ensure the integrity of the data, and by failing to highlight the data integrity issues as systemic problems when the errors first came to light in May 2016, [former Senior Manager, Business Intelligence] and [former Executive Director, Performance Information] put ACT Health in a position that necessitated the expenditure of millions of dollars on external consultants to rectify data integrity issues.

It was [former Director-General] who discovered the errors in the data; it was [former Director-General] who moved to protect the interest of the Government and ACT Health by proactively seeking to have the data integrity issues first internally reviewed and then reviewed by external independent experts.

[Former Director-General] proactively raised the issues of potential data flaws with the then Minister, and was open with you, as the Auditor General, about [their] concerns and [their] approach to investigating and rectifying the issues. The data integrity issues were not of [their] making; they did not occur through any failure of management or leadership on [their] behalf. [Former Director-General] did not try to hide or limit the likely risk of the issues [former Director-General] was uncovering — [former Director-General] was open, proactive and took on the role of finding a solution to the problems.

Given the extent of independent oversight that occurred around the issue of the integrity of ACT Health data between 2012 and [former Director-General] commencement in the role of Director-General in June 2015, it was fair on any objective test for the public, the Government, ACT Health and indeed [former Director-General] as a new Director-General, to assume that the possibility of further failings of data integrity in the Health Directorate could not occur again.

It seems to be your contention that [former Director-General] was precipitous in making a decision to advise [they] intended to undertake a misconduct investigation. As [the former Director-General] states in [their] sworn testimony there were a number of matters around potential failures of governance that were being brought to [their] attention in late June and July of 2016. But the main issue was [their] belief that the then Minister of Health and [they] had been misled by personal advice from [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] that the errors were only one-offs — not systematic failures of governance. However, those statements have now been unequivocally demonstrated as false.

[Former Director-General] has been clear at all times that [they] considered it was inappropriate for any payouts to be made to [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] if there was a possibility of them being guilty of misconduct. [Former Director-General] contend[s] that it was an entirely ethical and appropriate position for [former Director-General] to take in relation to the expenditure of public money - had [former Director-General] paid out the voluntary redundancies, given the massive failures in governance on the management of data which have been uncovered by [Former Director-General], [they] would have been open to serious criticism for making such payments to managers who would have been shown to have failed to exercise reasonable care and skill in carrying out their duties.

2.76 In a response to the final proposed report on 27 July 2018, legal representatives on behalf of the former Director-General advised:

[The former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] were personally involved in one context or another with the extensive negative history of data management in ACT Health, the undertakings given to the Auditor General, Parliament and the then Minister, the discovery of further errors in the management

reports and the alarming issues of governance and management failure that were being raised with [the former Director-General] in the lead up to the issuing of the letters at the end of July 2016. In [the former Director-General]'s view, alternative performance management processes were not appropriate given both [persons] had advised of their desire to leave ACT Health.

- 2.77 The legal representatives on behalf of the former Director-General, and the former Deputy Director-General, Corporate, in responding to the draft proposed report advised of their growing concerns with respect to performance information and reporting and the actions of the former Executive Director, Performance Information and Senior Manager, Business Intelligence.
- 2.78 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised 'there were a number of matters around potential failures of governance that were being brought to [their] attention in late June and July of 2016. But the main issue was [their] belief that the then Minister of Health and [they] had been misled by personal advice from [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] that the errors were only one-offs — not systematic failures of governance'.
- 2.79 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised 'Between 16 May 2016 and 29 July 2016, a series of emails regarding the integrity of the quarterly reporting eroded my confidence in its accuracy and reliability, and over time I began to form the view that [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] may have failed to meet their obligations under section 9 of the PSM Act in the preparation of quarterly reporting, and in their assurances to the former Health Minister'.
- 2.80 In response to the draft proposed report the former Executive Director, Performance Information and former Senior Manager, Business Intelligence disagreed that they provided the above claimed assurance to the former Director-General and Deputy Director-General, Corporate with respect to the performance information and reporting.

Preparation of material for the allegations of potential misconduct

- 2.81 In an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate was asked about the decision to undertake the misconduct investigation. The following exchange took place with the former Deputy Director-General, Corporate:

Audit Office

So can you take us through the actions of that day? You've previously said that you were advised – instructed by the Director-General of Health to commence a misconduct process. Is that correct? Or what were you instructed by the Director-General of Health?

Former Deputy Director-General, Corporate

... my clear recollection, as best as I can remember, was that ... given the concerns in relation to the broader environment that was going – being experienced between the feedback from the minister's office, the dialogue with the DG, the concerns raised around governance, [the

former Director-General] wanted reassurance that ... we got to the bottom of what was occurring. My understanding is, [the former Director-General] was dealing primarily with [the acting Executive Director, People and Culture], and at the same time I was dealing with HR and trying to co-join the process together to get to the bottom of it.

Audit Office

And the intention on whose part was to get to the bottom of it through a misconduct investigation?

Former Deputy Director-General, Corporate

Well, ultimately it's the Director-General.

Audit Office

So the Director-General, it was [their] explicit or implicit instruction to conduct - ?

Former Deputy Director-General, Corporate

It will always be explicit.

- 2.82 In an interview under oath or affirmation on 16 April 2018 the former Director-General was asked about the former Deputy Director-General, Corporate's assertions that they had instructed them to prepare the letters alleging the potential misconduct:

Audit Office

... [The former Deputy Director-General, Corporate] has said that you directed [them] to proceed in this manner, to have the letters done that day and to move to misconduct. Is that correct?

Former Director-General

I wouldn't have directed [them] without advice.

...

Audit Office

So did you consult with HR? Who – where did the HR advice go to send that letter?

Former Director-General

Well, if [Senior Manager Employment Services] signed, it would have come from [acting Executive Director, People and Culture] and [Senior Manager Employment Services] were the ones that were the senior people. [The acting Executive Director, People and Culture] I think at that stage was acting.

...

So the advice came from them. It would have come to [the former Deputy Director-General, Corporate], and [the former Deputy Director-General, Corporate] would have briefed me either with [the acting Executive Director, People and Culture] or by [themselves]. I can't remember.

...

I wouldn't have just woken up and gone – I wouldn't go after them for misconduct. I mean, it must have been on the basis ... I'm very clear, it was all on the basis of HR advice...

- 2.83 In an interview under oath or affirmation on 16 April 2018 the former Director-General advised that the impending exit from ACT Health of the Senior Manager, Business Intelligence (including the agreed sum of money to be paid on their exit) was a factor in

decision-making associated with the investigation of potential misconduct. In an interview under oath or affirmation on 16 April 2018, the former Director-General advised:

... So what I was very firm on was I was not going to hand over hundreds of thousands of dollars of taxpayers' money if there was a ... basis for termination through misconduct. ... I was very firm on that. I just thought it was unethical. So...I'd approved [the Senior Manager, Business Intelligence]'s payout, but I asked for it to be stopped. And that's why they were on full pay.

2.84 With respect to decision-making associated with the former Executive Director, Performance Information in an interview under oath or affirmation on 16 April 2018 the former Director-General advised:

And [the former Executive Director, Performance Information] is slightly more complicated because [they had] said that [they] didn't want to apply for the level 2 job. So [they were] almost just seeing [their] contract out anyway. So there was another bit of ...an ethical issue about paying someone a package when their contract was going to be terminated in a year's time.

2.85 It is noted that a voluntary redundancy (or other form of exit package) had been requested by the former Executive Director, Performance Information, but had not been agreed to at that time. Although it had been requested, it was open to the Director-General not to agree to the request for the voluntary redundancy.

2.86 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

Given the imperative on the organisation to produce accurate data, and in light of the vast number of stakeholders that relied on that data, including the federal government, the territory government and individuals within ACT Health, the misrepresentation regarding the veracity of the state of data production in ACT Health had significant implications for ACT Health, the Minister and the ACT government. [Paragraph 2.86 a]

Both [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] both sought to exit the organisation within a three day period of one another, requesting the payment of a redundancy. [Paragraph 2.86 b]

[Former Director-General] was understandably concerned that these individuals were potentially going to receive a significant payment through this process, in circumstances where information had come to light through the individual acting in [former Executive Director, Performance Information]'s position, that there may have been a deliberate misrepresentation of the governance systems that were in place. This issue was particularly acute given the assurances from [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] that the errors in the Q2 reports were one off incidents that would not be repeated. [Paragraph 2.86 c]

The Resolving Workplace Issues: Misconduct and Investigations [policy] states:

Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employees employment ...

Examples of serious misconduct, as outlined in the Fair Work Regulations 2009 include

...

[conduct that causes a serious and imminent risk to] the reputation, viability or profitability of the employer's business

Each case needs to be looked at individually because what may constitute an act of misconduct or serious misconduct in one work environment may not constitute an act of misconduct or serious misconduct in another work environment.

It was apparent to [former Director-General] that the misrepresentations made to [them] and the [then] Minister for Health had the potential to cause serious and imminent damage to the reputation of ACT Health, to the Minister and to the ACT government. The perception they held satisfies the requirements of "serious misconduct" under the *Fair Work Regulations 2009* and justifies [former Director-General]'s assertion that it was not appropriate for [former Executive Director, Performance Information] or [former Senior Manager, Business Intelligence] to return to ACT Health until an investigation had been conducted into their actions. [Paragraph 2.86 d]

Given [former Director-General]'s reliance on [former Senior Manager, Business Intelligence] and [former Executive Director, Performance Information] for their expertise in relation to the collation, production and dissemination of data, the data imperative for ACT Health, and the assurances that had been made by [former Senior Manager, Business Intelligence] and [former Executive Director, Performance Information] regarding the systems of checks and balances in place to both the Minister and [former Director-General], the revelation of what [former Director-General] construed as being misrepresentations about the state of data, suggested to them that there was a prima facie case of misconduct that warranted investigation. Apart from the risk of damage to ACT Health's reputation, there also appeared to be a prima facie case that [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] had failed to exercise reasonable care and skill performing their duties. [Paragraph 2.86 e]

It was completely reasonable for [former Director-General] to seek to have [their] significant concerns about potential misconduct investigated prior to any redundancy payments being made to [former Senior Manager, Business Intelligence] and [former Executive Director, Performance Information]. [Their] concern at the time was that [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] were fully aware of the extent of the issues associated with the data despite their assurances, and that their disinclination to deal with the magnitude of the issues, including the fallout of the lack of integrity in the data entering the public sphere, represented their true motivation for seeking to exit the organisation within three days of each other. This was the impetus behind [them] referring the matter for what should have been a short, sharp investigation. [Paragraph 2.86 e]

- 2.87 In a response to the final proposed report on 26 July 2018, in particular paragraph 2.86, the former Executive Director, Performance Information advised:

[Paragraph 2.86 e]

This is simply untrue and defamatory. Our record shows that we never ran from issues. While we worked to minimise errors, issues did arise from time to time and we have a record of working to address those issues. Further, there is no evidence that issues were raised with us as a means of us explaining or addressing those issues – nor is there any evidence of either of us refusing to return to work to address issues. The inclusion of such testimony which has no basis in fact is extremely distressing, even within a report in which officers are not directly named.

- 2.88 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General provided additional comments on 'why [the former Director-General] did not seek to performance manage [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence]':

Both [officers] had already advised of their intention to exit the organisation, and one had in fact already agreed to the terms of [their] departure. Performance management was simply

not an option in those circumstances. The evidence, as it stood, suggested to [former Director-General] that deliberate misrepresentations had been made by [both officers] about the systems of governance that existed in relation to the collation and dissemination of data that had the potential to significantly impact the reputation of ACT Health. This was not an issue that fell within the scope of simply managing performance issues.

For completeness at this point, given the concerns that [former Director-General] had in relation to what [they] reasonably perceived to be misconduct, [they] relied on [their] specialist HR Team, and the then Executive Director of Human Resources to undertake the necessary steps associated with discharging ACT Health's legal and administrative obligations under the relevant legislative and industrial instruments. It was simply not practicable for [former Director-General] to undertake the drafting of the letters, a review of the provisions relevant to suspension or an analysis of the relevant provisions of the enterprise agreement. There is currently no suggestion that [former Director-General] was even sent the letters to review. Given [the former Director-General]'s significant span of control and [their] numerous competing priorities, it is entirely reasonable that [they] relied on [their] dedicated HR team to ensure that appropriate processes were followed. At no stage is there any evidence that [former Director-General] was advised by [their] HR Executive, the Head of Service, the Public Service Commissioner, the ACT Government Solicitor Office or indeed anyone that the process [they] had agreed to follow was flawed or inappropriate.

- 2.89 As discussed in paragraph 2.26, the former Senior Manager, Business Intelligence first raised the possibility of a voluntary redundancy with the Executive Director of People and Culture on 18 July 2016, which was agreed to by the former Director-General on 22 July 2016. The former Executive Director, Performance Information requested that they be considered for a voluntary redundancy on 25 July 2016, seven days after the former Senior Manager, Business Intelligence first raised the possibility.
- 2.90 In an interview under oath or affirmation on 11 April 2018 the Audit Office sought information from the former Deputy Director-General, Corporate on their experience in the management of misconduct matters and training they received upon induction to ACT Government.

Audit Office

So on your engagement by the ACT government, or ACT Health, what sort of induction were you provided or training or support were you provided in relation to workplace behaviours, the ... framework and the like.

Section 9 of the Public Sector Management Act, all of those soft skilled areas.

Former Deputy Director-General, Corporate

Zero.

...

That didn't mean I didn't do anything about it though. So just to clarify. I did my absolute best to review the ... Public Sector Management Act, and familiarise myself with the normal processes and policies that ACT Health is obliged to both administer and follow.

Audit Office

... So no formal induction process for you?

Former Deputy Director-General, Corporate

No. Zero.

Audit Office

Okay. In relation to human resources, or HR matters, misconduct investigations and the like, what sort of experience have you had in relation to those prior to coming on board with ACT government?

Former Deputy Director-General, Corporate

... I've worked in multi jurisdictions both within the private and the public sector, so I have a fairly diverse and somewhat experienced – level of experience associated with administering matters associated with anything from workplace bullying, harassment, sexual harassment, equal opportunity and so on.

...

So I am incredibly conscious of my obligations and role in that process.

Audit Office

... Did you have an opportunity to – I think you said that you did but I just want to confirm it – look through Health's policies and practices and become familiar with those?

Former Deputy Director-General, Corporate

Look as best I could.

Audit Office

... Did you have any view on those policies and practices as you tried to apply those?

Former Deputy Director-General, Corporate

No. Look, what I'll always say, [Audit Office], is that... I was expected to have an exemplary approach, and I always took advice

...

-- on individual matters, always.

- 2.91 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate further advised:

When I started in my role as Deputy Director-General, Corporate with the ACT Health Directorate in 2016, I received no training with respect to managing workplace behaviours and the ACT Government's framework for dealing with misconduct issues. I made this clear during my interview with the Audit Office on 11 April 2018.

The Business Intelligence unit within ACT Health did not directly report to me, and instead reported to the former Director-General. Accordingly, I did not action issues raised with me regarding this unit and instead referred any issues to the former Director-General for [them] to manage.

My focus at all times has been to improve the governance structure and data reporting systems within the Directorate and to do so in the interests of the Territory and in line with the advice I received internally. Others in ACT Health, including the former Director-General and [former acting Executive Director, Performance Information and Decision Support], took primary responsibility for initiating and managing the human resources matters arising out of the issues with the data reporting system and the advice being given in relation to those systems. They had more direct contact with ACT Health's HR branch in relation to these processes than me.

- 2.92 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised:

At no time was I told that an investigation was inconsistent with ACT Health's policies or procedures, nor did anyone advise against pursuing that course of action. In [their] email to me on 29 July 2016 attaching the letters [the Senior Manager, Employment Services] indicated that after the letters had been signed, HR would arrange for telephone calls to be made to [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] informing them that the letters were in the mail ... I reiterate ... that I relied on advice from ACT Health's HR area when issuing the 29 July 2016 letters.

In all these circumstances, if there has been a failure to follow ACT Health internal policies and procedures with respect to commencing an investigation, that failure should not be attributed to me.

- 2.93 In a response to the final proposed report on 27 July 2018 the former Deputy Director-General, Corporate advised:

[The former acting Executive Director, Performance Information and Decision Support] discussed my concerns with ACT Health's HR area, and enquired as to whether an investigation into potential breaches should occur. I reiterate that following this consultation with ACT Health's HR area, at no time was I told that an investigation was inconsistent with ACT Health's policies or procedures, nor did anyone advise against pursuing that course of action. In [their] email to me on 29 July 2016 attaching the letters regarding the investigation and suspension of the two former officers, [the Senior Manager, Employment Services] indicated that after the letters had been signed, HR would arrange for telephone calls to be made to the two former officers informing them that the letters were in the mail.

To confirm, at no point was I advised by ACT Health's HR area, or by the Professional Standards Unit, about concerns in initiating an investigation into potential breaches of the PSM Act.

- 2.94 These comments are noted, as is the former acting Executive Director, Performance Information and Decision Support's comments with respect to their role in the process (refer to paragraph 2.67) and the former Senior Manager, Employment Services' comments with respect to their role in the process (refer to paragraphs 2.57 to 2.64).

- 2.95 The legal representatives on behalf of the former Director-General, and the former Deputy Director-General, Corporate, in commenting on the draft proposed report regarding the initiation of the investigation into allegations of misconduct asserted that they relied on advice from ACT Health Human Resource officers. While this is noted it is incumbent on senior executives to understand and take accountability for their decisions and actions, especially if the allegations of misconduct are serious and involve suspension of employees.

Preparation of advice in preceding days

2.96 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate provided a copy of a draft Ministerial briefing dated 28 July 2016 titled 'publication of the report is overdue' as a contemporaneous document that identified the problems with performance information and reporting. The draft Ministerial briefing lists the following under the headings 'Issues' and 'Actions being taken':

Issues:

Release of the third quarter report was initially delayed as a result of additional assurance checks put in place after the errors in the second quarter report.

Following Senior Executive Review of 2015-16 third quarter report, the Director-General requested the Acting Executive Director Performance Information to undertake further assurance checks.

As a result of the additional checking processes, a number of errors were identified in both the current year data and data for prior years...

...

The issues identified are likely to have flow on effects for the fourth quarter reports where similar errors in prior years are likely to be identified.

Actions being taken:

Key staff responsible for the accuracy and quality of the report are currently being terminated i.e. the Executive Director Performance Information and the Senior Manager Business Intelligence.

...

2.97 The Audit Office sought further advice and evidence from ACT Health as to the status of the draft Ministerial briefing provided by the former Deputy Director-General, Corporate. ACT Health advised that the briefing did not proceed and identified that up to eight versions of the draft Ministerial briefing had been produced. Those drafts, with a critical date of 28 July 2016, were prepared for the former Director-General, by the then acting Executive Director, Performance Information and Decision Support, who was listed on the draft briefs as the Action Officer, with the former Deputy Director-General, Corporate as the Signatory.

2.98 The different versions of the draft Ministerial briefing contain a range of 'Actions being taken' with reference to the key staff responsible for data accuracy and quality including:

Key staff responsible for the accuracy and quality of the report are currently being terminated i.e. the Executive Director Performance Information and the Senior Manager Business Intelligence.

Key staff responsible for the accuracy and quality of the report are currently being separated i.e. the Executive Director Performance Information and Senior Manager Business Intelligence.

We are currently ensuring that key staff responsible for the accuracy and quality of the report will no longer be working for ACT Health (the Executive Director Performance Information and Senior Manager Business Intelligence).

Key staff responsible for the accuracy and quality of the report are currently on paid leave pending outcomes of the data integrity review and PwC engagement (the Executive Director Performance Information and Senior Manager Business Intelligence).

2.99 A review of contemporaneous exchanges of emails over the period 25 – 29 July 2016 was conducted to confirm the circulation and any approval of the draft Ministerial briefing. The version of the draft Ministerial briefing provided by the former Deputy Director-General, Corporate, was sent by the acting Executive Director Performance Information and Decision Support by email on 27 July 2016 at 6.17pm. The acting Executive Director Performance Information and Decision Support sent a further two versions of the draft briefing to the former Deputy Director-General, Corporate on 28 July 2016. Versions of the draft briefing were also sent to the Ministerial and Government Services team of ACT Health for review and feedback on 28 July 2016. On 29 July at 4.52pm, the Ministerial and Government Services team emailed a copy of the ministerial briefing to the former Director-General and former Deputy Director-General, Corporate stating:

...

This is the updated brief from [acting Executive Director Performance Information and Decision Support]. Can you please review and let me know when cleared.

I intend to forward this and the attachments first thing Monday to [name withheld] (before health meeting) in preference to emailing the office now and I do require clearance before doing so.

...

2.100 The former Director-General replied to this email at 5.09pm on 29 July 2016 stating:

Ok will do thanks

But please do not send it until you have spoken to me on Monday morning ...

2.101 Between 27 and 29 July 2016, a Ministerial briefing on the 'ACT Health Quarterly Performance Report – March 2016' was drafted by the acting Executive Director, Performance Information and Decision Support. The briefing was written for the former Director-General, with the former Deputy Director-General, Corporate as the Signatory. The draft briefing described data errors in the quarterly report and included a range of actions that were to be taken in relation to the former Executive Director, Performance Improvement and former Senior Manager, Business Intelligence in response to the data errors. These actions included that they were being 'terminated', 'separated', that they 'will no longer be working for ACT Health' and that they 'are currently on paid leave pending outcomes of the data integrity review and PwC engagement'. While it is noted that the Ministerial briefing did not proceed, the draft versions of the briefing make reference to outcomes (e.g. termination, separation, not working at ACT Health any longer) for the two officers prior to them being advised of misconduct allegations on 29 July 2016.

Expectations for the investigation

2.102 In an interview under oath or affirmation on 16 April 2018 the former Director-General advised:

It was meant to have been a short, sharp – bring someone in, just reassure me that they haven't misled the auditor-general, that they haven't misled the, ... parliament, that I'm not sitting on an absolute time bomb here of ... deliberate incompetence. And that was ... my

thinking, because of the nature of things blowing up in exactly the same areas that should have never have blown up before. In an ideal world, it was going to be a quick, short, sharp review, no misconduct found. As it was ... heaps of incompetence and probably lots of things that should have been done that haven't been done. And then I would've not had so much of an ethical issue about paying them out ... paying their packages. But to have found subsequently that they were guilty of misconduct, and then having paid them hundreds of thousands of dollars, I just – I think that's just a misuse of – from my perspective, as the director-general.

...

... so we had a problem in relation to ...the issues ... coming up, and ... from my recollection, it was: ... these are the issues we're finding. These issues are inconsistent with ... what's been said to the minister, what's been said to the auditor-general. Is there a misconduct issue here? Don't know. Thought HR was speaking with ... the public service commissioner. You know, the way to handle that is put them on full pay and do a quick misconduct hearing, or ... investigation, and then kill that issue once and for all, and then we move forward.

2.103 In an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate advised:

... the whole idea was in the ... referring through to the PSU, ... was to do a quick, short, sharp assessment. That's really what it was. And that took, you know, one, two, three, four, five, six, seven, eight months to do. You know, one, it's just unheard of. ... but that was the government's position ... once you move into this process and once you actually start something formally within the directorate and you hand it over, that's the process. ... in a perfect world, the whole idea of this was to make it [a] fairly condensed ... defined process. Depending on ... where you sit, have an outcome at a certain point in time, and then make a decision. And unfortunately I would say that this was a bit clumsy, this process.

2.104 In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

... the Director-General states that [they] wanted a quick assessment of allegations due to possible "deliberate incompetence" as well as repeating the falsehood that I had confirmed that all issues related to information management had been fully addressed, despite briefings that stated initiatives were in place but others were being developed. It is also of note that despite [their] supposed concerns, the DG never sought any information from me in relation to those concerns.

Reasons for suspending the officers

2.105 In an interview under oath or affirmation on 11 April 2018 the former Deputy Director-General, Corporate was asked about the reasons for suspending the officers. The following exchange took place with the former Deputy Director-General, Corporate:

Audit Office

So the suspension. So whether it be the 29th for [the former Senior Manager, Business Intelligence] or whether it be 5 August for [the former Executive Director, Performance Information], advice was put to them that they were to be suspended. You can conduct an investigation without suspending. Can you talk us through the thinking or the rationale as to why they were suspended and not moved to another section, retained, kept in their roles?

Former Deputy Director-General, Corporate

... they didn't return to work.

...

They were not prepared to return to work, would be ... my understanding.

...

... If [the former Executive Director, Performance Information] had wanted to come back to work ...and I'm only thinking about it from my perspective, ... I would have been incredibly amenable ... to assist in whatever capacity that [they] might have wanted to do. But once [the former Executive Director, Performance Information] expressed an interest on 22 July to approach the director-general, and again noting the Performance Information Branch was always to the director-general's office, it just became apparent that there was really no real signalling of any intention to want to return to work. So the conversation ... perhaps the best way I can convey it, the conversation was never really an option, because it was never really an option.

Audit Office

I find that challenging ... because ... regardless of what the employee wants, an employer can say ... "We would like you back at work." And they say, "Well, no." But that doesn't mean you suspend them. It doesn't mean you take an action that ratifies their behaviour. ...

Former Deputy Director-General, Corporate

...

And I accept that ... at the end of the day could there have been another course of action? But I guess, ... just in the way I remember it, at the end of the day where you've got, we felt, we had substantive issues around a lack of governance in terms of the conviction process.

...

And not having the two people available to return to work and commit to assisting us to resolve it, but in fact – and again just on reflection –... wanting to approach a VR, not participate any further in the workplace.

...

And other than I think what you are signalling is the issue around the employer providing a reasonable direction to return to work, did we really want to agitate the situation any more than what it was.

Now, again I go back to what I said before. In hindsight, if I'd received any other advice, ... had...there been a different ... way to do this, then, ... clearly, on reflection, I would have been very happy to have considered it.

2.106 In an interview under oath or affirmation on 11 April 2018 the Audit Office sought information from the former Deputy Director-General, Corporate as to whether other options were considered instead of the suspension of the officers and a misconduct investigation. The following exchange took place with the former Deputy Director-General, Corporate:

Audit Office

Did you consider any other options like ... under-performance management?

Former Deputy Director-General, Corporate

The problem I had I think ... was that no one was wanting to return to work. That was the issue. I mean [the former Senior Manager, Business intelligence] for all intents and purposes, I think in [their] own mind was somewhere between negotiating a VR and wanting to go. And in the case of [the former Executive Director, Performance Information], as I said, my clear recollection at the end of the day was that ... – [they were] genuinely unwell. And we – I did

not want to pressure [them] to return to work in a hurry. And then in the intervening period leading up to July, [they had] made a decision that [they] wanted to just leave... on the 22nd. And there was really never any opportunity to want to sit down with them ...

- 2.107 In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

... the DDG states the misconduct investigation was required as “[the former Senior Manager, Business Intelligence and I] were not prepared to return to work would be my – my understanding”. This is a baseless statement as this was never broached with me and I would have returned to work at the end of my sick leave.

... the DDG states that “there was really no real signalling of any intention [by me] to want to return to work.” However, notwithstanding my work ethic (which I demonstrated over 27 years), I do not understand on what basis I could have refused to return to work at the completion of my sick leave.

- 2.108 In a response to the draft proposed report on 28 May 2018 the former Senior Manager, Business Intelligence advised:

The former DDG stated that “we were not prepared to return to work” while the investigation went on, and that’s why we were suspended. This is untrue. When I was approved for my VR, I was thankful that it would take approximately 5 weeks to come to affect, as it would give me time to hand over many aspects of my work, and sort out a number of things. I was also unaware of any concerns they had in relation to reporting at that point.

- 2.109 On 30 July 2016 (five days after the Executive Director, Performance Information was advised ‘opportunities exist for [them]’ and ‘[they are] well respected and liked’) the two former members of the former Performance Information Branch received written notification of a misconduct investigation against them. Accounts as to the rationale behind undertaking a misconduct investigation differ between the former Director-General, former Deputy Director-General, Corporate and ACT Health Human Resource officers. While it is apparent that concerns had been raised as to ACT Health performance information and reporting processes, for which the two staff members had responsibility, it is not clear how their actions were identified as potential misconduct and warranted investigation. No contemporaneous documentation was produced at the time of the written notification of misconduct against the two former staff members justifying undertaking a misconduct investigation. Nor was early advice of the Professional Standards Unit sought in order to ensure that the allegations were clearly linked to a potential breach of the ACT Public Sector Code of Conduct, suffice to warrant an investigation into their conduct and the suspension of both former officers.

- 2.110 In an interview under oath or affirmation, the former Director-General has advised that they thought it would be ‘unethical’ to allow the two staff members to depart the organisation with ‘voluntary redundancy’ payments when the former Director-General had concerns that the actions of the staff members may have amounted to misconduct. (While an exit from the organisation had been agreed with the former Senior Manager, Business Intelligence, no such exit had, at that time, been agreed with the former Executive Director, Performance Information). Accordingly, the former Director-General advised that they were seeking a ‘short, sharp’ investigation into their activities to ‘reassure me that ... I’m not

sitting on an absolute time bomb here of, you know, deliberate incompetence'. The former Deputy Director-General, Corporate advised that no other options such as performance management or reassignment to other duties were considered because '[the former Senior Manager, Business Intelligence] for all intents and purposes, I think in their own mind was somewhere between negotiating a VR and wanting to go' and the former Executive Director, Performance Information had 'made a decision that they wanted to just leave, you know'.

- 2.111 In responses to the draft proposed report both the former Executive Director, Performance Information (29 May 2018) and Senior Manager, Business Intelligence (28 May 2018) disagreed with assertions that they were unwilling to return to work or otherwise assist in resolving issues with performance information and reporting before their departures from the organisation.

The conduct of the preliminary assessment

Enterprise Agreement requirements

- 2.112 Section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

In cases where an allegation of inappropriate behaviour is made, the manager/supervisor will initiate a preliminary assessment process to determine whether further action is required. The manager/supervisor may inform and/or seek the assistance of an appropriate Human Resources Manager.⁶

- 2.113 Section H2.2 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

Following this process if the manager/supervisor determines that the allegations:

- a) require no further action, then no further action needs to be taken;
- b) can be resolved through counselling, other remedial action, or assistance to the employee then the manager/supervisor will implement such action;
- c) are better resolved through Internal Review procedures set out in this Agreement or appropriate external mechanisms the manager/supervisor will refer the matter accordingly;
- d) relate to underperformance processes the manager/supervisor will commence an underperformance process where this is warranted;
- e) require investigation the manager/supervisor will recommend to the head of service that the matter be investigated;
- f) may be vexatious or knowingly false, the manager/supervisor will consider whether further action needs to be taken in relation to the person who made the allegations.⁷

⁶ ACT Public Service, Administrative and Related Classifications, Enterprise Agreement 2013-2017, p. 110.

⁷ ACT Public Service, Administrative and Related Classifications, Enterprise Agreement 2013-2017, p. 110.

ACT Public Sector Guide

2.114 The *ACT Public Sector Guide to Managing Workplace Behaviours* states that:

When a manager or supervisor becomes aware of inappropriate workplace behaviour or an allegation/complaint of misconduct, the first step is to conduct a preliminary assessment to determine what further action, if any, is required.

The purpose of the preliminary assessment is to determine what the allegation is really about, whether it has substance and to consider whether it justifies the commencement of action such as an underperformance process or misconduct investigation, or whether it can be dealt with in a different or less formal manner.⁸

2.115 Although it is desirable to inform an employee that a preliminary assessment is undertaken, this is not mandatory. The *ACT Public Sector Guide to Managing Workplace Behaviours* states:

Under Section H (Workplace Values and Behaviours) of ACTPS Enterprise Agreements, an employee should be told that a preliminary assessment is being conducted if it is appropriate to do so. In most circumstances, it will be appropriate to advise the employee of the allegations so that they can provide a response for consideration or comment on any proposed course of action before a decision is made.

Situations where it may not be appropriate to advise the employee include where:

- the preliminary assessment is undertaken quickly and it is impractical to advise the employee;
- there is a reasonable prospect that no further action will be required;
- relationships may be damaged, affecting the opportunity for harmonious operation in the workplace between employees into the future;
- an employee may destroy or remove evidence; or
- the manager believes the allegation/complaint is frivolous, trivial or vexatious.⁹

2.116 The *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* applies to non-executive employees of the ACT Public Service. The requirements of the Enterprise Agreement for the conduct of a preliminary assessment applied in relation to the former Senior Manager, Business Intelligence (as a non-Executive employee). There was no such similar requirement for Executive employees of the ACT Public Service. At the time, however, section 636D of the *Public Sector Standards 2006* required that 'procedures [for allegations of potential misconduct on the part of Executive employees] are consistent with principles of natural justice and procedural fairness'.

⁸ *ACT Public Sector Guide to Managing Workplace Behaviours* (2015) p 4.

⁹ *ACT Public Sector Guide to Managing Workplace Behaviours* (2015) p 7.

Preliminary assessment

2.117 On 22 August 2016 the acting Executive Director, Performance Information and Decision Support provided a Minute to the Deputy Director-General, Corporate the purpose of which was to:

... provide a preliminary assessment, consistent with verbal reports already provided, on issues identified with the third quarter ACT Public Health Services Performance Report (Q3 Report).

2.118 The 22 August 2016 Minute to the Deputy Director-General, Corporate from the acting Executive Director, Performance Information and Decision Support stated:

My initial review of the Q3 Report identified the following:

- An error that was likely due to a calculation not being updated in the report. This error was that a variance was reported at 11% and the actual result was 2% (Q3 Report – p18). Staff advised that the cause was ‘an oversight’; and
- Other issues noted included:
 - The report text included statements that staff could not substantiate such as noting performance was ‘directly related’ to a change in activity;
 - The text noted ACT Health was working to reduce occupancy to optimum level when actual performance was at this level;
 - The text discussed prior full year data (12 months) and nine months of the current year, which can lead to the drawing of comparison between different periods; and
 - There are inconsistencies in presentation of tables and periods throughout the report e.g. some tables do not identify in labels if the data is full year or nine months e.g. Q3 Report p6), there is inconsistency in tables and graphs in the description of the period – some are described as ‘years to March’ and others as ‘July to March’.

...

2.119 The 22 August 2016 Minute to the Deputy Director-General, Corporate from the acting Executive Director, Performance Information and Decision Support also advised:

- There is also no standard process for checking the analysis or transcription of data into the report by at least two people prior to being provided for progression through sign off processes ...;
- There are no identifiable change controls – i.e. documentation of change requests or version controls ...; and
- A ‘snapshot’ of the data used to generate the report is not captured and recorded as the source nor are data extraction dates noted on the report.

2.120 The 22 August 2016 Minute to the Deputy Director-General, Corporate from the acting Executive Director, Performance Information and Decision Support also advised:

The findings noted above do not align with the advice provided by [former Senior Manager, Business Intelligence] and [former Executive Director, Performance Improvement] to the DG and the Minister ...

2.121 However the Minute did not specifically refer to, or discuss, allegations of potential misconduct on the part of the two officers with respect to the *Public Sector Management Act 1994*, *Public Sector Standards 2006* or the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*.

2.122 The 22 August 2016 Minute to the Deputy Director-General, Corporate from the acting Executive Director, Performance Information and Decision Support listed two recommendations:

That you:

- note the information provided in this brief.
- record your decision on the attached preliminary assessment form.

2.123 The Minute included an attachment, an ACT Health Preliminary Assessment *pro forma* for the Deputy Director-General, Corporate's signature. The *pro forma* lists the former Executive Director, Performance Information and the former Senior Manager, Business Intelligence as the 'Respondents' and the 'Nature of the Allegation' as 'failure to exercise reasonable care and skill and failure to act with probity in performing your duties'. The 'Date allegation made' is recorded as 14 July 2016.

2.124 The ACT Health Preliminary Assessment *pro forma* identified that a number of possible courses of action could be taken, including:

- 'requires no further action';
- 'can be resolved through counselling, other remedial action, or assistance to the employee';
- 'is better resolved through Internal Review procedures set out in this Agreement or appropriate external mechanisms';
- 'relates to underperformance processes';
- 'requires investigation'; or
- 'may be vexatious or knowingly false'.

2.125 On 24 August 2016 the former Deputy Director-General, Corporate ticked the 'requires investigation' box on the form and noted on the Preliminary Assessment *pro forma*:

Noting serious concerns raised by minute (22.8.2016) and the very serious implications for ACT health operationally and for government generally, I am satisfied that this now warrants independent investigation.

- 2.126 In an interview under oath or affirmation on 4 April 2018 the acting Executive Director, Performance Information and Decision Support was asked about the preliminary assessment that was prepared and provided to the former Deputy Director-General, Corporate on 22 August 2016:

Audit Office

We're just trying to get a handle around that timeframe and that process and that particular document I suppose.

It's dated 22 August. So did it take that long to produce ...

Former acting Executive Director, Performance Information and Decision Support

To produce this? I was giving verbal briefings. And there were some briefings – I believe there would be some briefings, ministerial briefings potentially – that would have been flagging some of these issues along the way. This I was asked to do to pull the issues together. So I'm sure that, ... both [former Director-General] and [former Deputy Director-General, Corporate] said, ... "You've flagged for us a number of issues along the way. This needs to be all put into one document."

- 2.127 In an interview under oath or affirmation on 4 April 2018 the following exchange took place with the former acting Executive Director, Performance Information and Decision Support:

Audit Office

... Were you consulted for the purpose of kicking off or commencing the investigation?

Former acting Executive Director, Performance Information and Decision Support

I believe that what I found and what I briefed would have ... been considered to do that, but I don't think that that would have been the only ... information that made that investigation occur.

Audit Office

And were you asked to do that task or any other task for the purpose of commencing the investigation on these people?

Former acting Executive Director, Performance Information and Decision Support

I'm not definitely sure.

...

... my recall is that I was asked to do this. It was very close around the investigation time, but my recall is I was asked to do this to pull the information – I'd given a whole pile of briefs, verbal briefs. Met with them numerous times. And I was asked to pull it all together. It could have been for the investigation.

Audit Office

But was there an explicit instruction or advice to you that it was for the investigation or the commencement of the investigation?

Former acting Executive Director, Performance Information and Decision Support

I honestly can't tell you that with all fact. ...I don't think so, but I'm not certain.

- 2.128 In a response to the draft proposed report on 1 June 2018, the former Deputy Director-General, Corporate advised:

While a formally-documented preliminary assessment was not recorded within a single document, the evidence I have provided established that I had a significant amount of material, including from sources such as ... which, could properly give rise to a legitimate concern that section 9 of the PSM Act may have been breached. As I have noted, HR was involved in the process leading to the decision to issue the 29 July 2016 letters. In substance, the material considered in context of the advice from HR amounts to a preliminary assessment of the circumstances before taking action.

- 2.129 The *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*, which applied to the former Senior Manager, Business Intelligence (as a non-Executive employee of the ACT Public Service) requires the conduct of a preliminary assessment 'in cases where an allegation of inappropriate behaviour is made' in order to 'determine whether further action is required'. Following the conduct of the preliminary assessment a range of possible future actions may be taken, one of which is an investigation. A Minute into the matter, which included a completed ACT Health Preliminary Assessment *pro forma*, was completed by the acting Executive Director, Performance Information and Decision Support Branch on 22 August 2016. The Brief identified the problems associated with performance information and reporting but did not specifically refer to, or discuss, allegations of potential misconduct on the part of the two officers with respect to the *Public Sector Management Act 1994*, *Public Sector Standards 2006* or the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017*.

- 2.130 On 24 August 2016 the former Deputy Director-General, Corporate ticked the 'requires investigation' box on the ACT Health Preliminary Assessment *pro forma* and noted that 'Noting serious concerns raised by Minute (22.8.2016) and the very serious implications for ACT health operationally and for government generally, I am satisfied that this now warrants independent investigation'. This Minute, and the attached Preliminary Assessment *pro forma*, were produced more than three weeks after the former Senior Manager, Business Intelligence (and the former Executive Director, Performance Information) were suspended and informed that they would be subject to a misconduct investigation.

Documentation of decision-making

- 2.131 Dr James Popple, Principal Reviewer, CPM Reviews was engaged by the Audit Office as a subject matter expert to review the processes undertaken in relation to the initiation of the misconduct investigation in relation to the former Senior Manager, Business Intelligence and former Executive Director, Performance Information. In relation to decision-making associated with the initiation of the misconduct investigation Dr Popple advised:

... the decision to conduct the investigation was problematic. When the then ACT Health Deputy Director-General Corporate wrote to the officers on 29 July 2016, advising them of the misconduct investigation, [the former Deputy Director-General, Corporate] wrote that there had been "preliminary allegations" that "relate to your failure to exercise reasonable care and skill, and of failing to act with probity in performing your duties". Notwithstanding the

reference to “preliminary” allegations, it is difficult to characterise this as the commencement of a preliminary assessment (rather than the commencement of an investigation), given that the then Senior Manager, Business Intelligence was suspended on the same day, and the then Executive Director was suspended a week later.

In an interview under oath or affirmation, the former Deputy Director-General, Corporate was asked to identify the source of the allegations that [they] referred to in [their] 29 July letters. [They] said that the acting Executive Director Business Performance Information and Decision Support had raised with [them] the possibility that there had been misconduct. [They] said they did this verbally in the course of [the acting Executive Director Business Performance Information and Decision Support] review of the draft *March 2016 ACT Health Services Quarterly Performance Report*. [The former Deputy Director-General, Corporate] pointed to the written brief that [the acting Executive Director Business Performance Information and Decision Support] had provided to [the former Deputy Director-General, Corporate] on 22 August ... The stated purpose of that brief was “[t]o provide a preliminary assessment, consistent with verbal reports already provided, on issues identified with the third quarter ACT Public Health Services Performance Report”. The brief recommended that the then Deputy Director-General, Corporate note the information in the brief, and “record [the former Deputy Director-General, Corporate] decision on the attached preliminary assessment form”. That form listed six possible decisions, including that the matter “requires no further action” or that it “requires investigation”. On 24 August, the then Deputy Director-General, Corporate indicated on the attached form that, given the contents of the brief and the seriousness of the implications for ACT Health and the government, [the former Deputy Director-General, Corporate] had decided that the matter warranted investigation.

The brief set out concerns about processes and governance. It made no allegations of misconduct. It did not recommend a particular course of action. Presumably the then Deputy Director-General, Corporate came to the view that the information in the brief raised the possibility that the two officers had failed to exercise reasonable care and skill, or to act with probity, in performing their duties—and that that failure possibly amounted to misconduct. Given the seriousness of the allegations, it is regrettable that the 24 August form (even when read with the 22 August brief) does not make that reasoning clear.

In any event, the brief from the acting Executive Director Business Performance Information and Decision Support was provided to the then Deputy Director-General, Corporate 24 days after [the former Deputy Director-General, Corporate] advised the two officers of the misconduct investigation. It is highly regrettable that the earliest known written record of the reasons for commencing the investigation were prepared so long after the investigation commenced. The absence of any such record raises the possibility that ACT Health instigated the investigation of the two officers without having any reasonable cause to do so. ...

2.132 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

In your report there are criticisms made regarding the lack of documentation prepared to support decision making in relation to the investigation process and the creation of pro forma preliminary assessment form a number of weeks after the initial allegations and decision to suspend was made.

There is no requirement in the Enterprise Agreement, the Public Sector Management Act, or the Public Sector Management Standards that dictates when or how documentation should be produced for an investigation for an investigation. The failure to create a paper based trail of decision making does not support a finding for the purposes of your audit that any procedural and administrative requirements in the Enterprise Agreement and legislation were not followed.

- 2.133 The response is noted, as is that the relevant Enterprise Agreement and legislation does not impose requirements in relation to documentation of decision-making for decisions associated with the suspension of staff and the commencement of misconduct investigations. Nevertheless, decisions to suspend and conduct investigations in relation to staff behaviours are significant administrative actions for the affected staff members and should be supported by appropriate documentation.

The conduct of the investigation

Enterprise Agreement requirements

- 2.134 Section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The role of the investigating officer is to establish the facts of the allegations and to provide a report of those facts to the head of service.

- 2.135 Section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The investigating officer will:

- a) inform the employee in writing of the particulars of the alleged misconduct, and details concerning the investigative process; and
- b) give the employee a reasonable opportunity to respond to allegations, in writing and/or at a scheduled interview, before making a finding of fact; and
- c) provide the employee with at least twenty four hours written notice prior to conducting an interview, and advise the employee if the interview is to be recorded electronically; and
- d) advise the employee that the employee may have a second person present during the interview, who may be the employee's union representative or other individual acting as support person and will allow reasonable opportunity for this to be arranged; and
- e) as soon as practicable take any further steps considered necessary to establish the facts of the allegations; and
- f) provide a record of the interview to the employee to correct any inaccuracies in the record and to provide any further response in relation to the allegations before signing the record. If the employee elects not to sign the record, then details of the offer will be noted; and
- g) provide a written report to the head of service setting out the investigating officer's findings of fact.

- 2.136 The *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* applies to non-executive employees of the ACT Public Service. The requirements of the Enterprise Agreement for the conduct of a preliminary assessment applied in relation to the former Senior Manager, Business Intelligence (as a non-Executive employee). There was no such similar requirement for Executive employees of the ACT Public Service. At the time, however, section 636D of the *Public Sector Standards 2006* required that 'procedures

[for allegations of potential misconduct on the part of Executive employees] are consistent with principles of natural justice and procedural fairness’.

Referral to the Professional Standards Unit

- 2.137 Since 2016 investigations into potential misconduct by ACT public sector employees have been managed by the Professional Standards Unit of the Chief Minister, Treasury and Economic Development Directorate. According to the *Managing Workplace Behaviour and Performance – Fast Facts*¹⁰ document the purpose of an investigation is to undertake a factual investigation to determine, on the balance of probabilities, whether or not allegations are substantiated. Investigations are conducted in accordance with the provisions of the relevant ACT Public Sector Enterprise Agreement, the *Public Sector Management Act 1994* and the *Public Sector Management Standards 2006*.¹¹
- 2.138 On 24 August 2016 a *Workplace Investigation or Review Request* document was submitted as a request for a formal investigation to the Professional Standards Unit. The document was submitted and signed by the former Deputy Director-General, Corporate as the Delegate.
- 2.139 Attachment A to the document provided supporting information for the request, including references to the errors in previous quarterly reports, the statements made by the former Executive Director, Performance Information at the Select Committee on Estimates of 29 June 2016, the results of the review of the draft third quarter report by the acting Executive Director, Performance Information and Decision Support and the preliminary findings of PwC’s review of governance and administrative processes associated with the performance information and reporting (refer to paragraph 1.9). Attachment A to the document stated *inter alia*:

... On the basis of [the acting Executive Director, Performance Information and Decision Support] findings, [the former Deputy Director-General, Corporate] was unable to have confidence in the assurances that had been provided by the [former Executive Director Performance Information] and [former Senior Manager, Business Intelligence] to themselves, the Director-General and the Minister that remedies had been put in place in response to previously identified data issues.

As a result [the former Deputy Director-General, Corporate] suspended [former Executive Director, Performance Information] and [former Senior Manager, Business Intelligence] with pay, on the basis of the high operational risk nature of that work area, while the assurance check by independent experts was underway.

¹⁰ Accessed online at: <https://www.cmtedd.act.gov.au/employment-framework/managers-And-supervisors/managers-toolkit/fast-facts>, on 9 May 2018

¹¹ Accessed online at: <http://www.cmd.act.gov.au/functions/publications/2015-16annualreport/organisational-overview-non-financial-reporting/b.2-performance-analysis/output-1.2-public-sector-management> <https://www.cmtedd.act.gov.au/employment-framework/managers-And-supervisors/managers-toolkit/fast-facts>, on 27 April 2018

2.140 In a response to the draft proposed report on 29 May 2018 the former Executive Director, Performance Information advised:

I did not provide 'rolled-gold' assurances and no one sought my advice as to what was put in place. There was no consideration of the work program of the Branch as the means for addressing the assurances I provided to the Minister and the Assembly. This could have been addressed with direct discussions with me to determine whether a misconduct investigation or other actions were warranted.

2.141 On 29 August 2016, a meeting was held in the Professional Standards Unit to discuss the request and the strategy to progress the investigation. At that meeting the engagement of a suitable external investigator and potential delegates for decision-making were considered and discussed.

2.142 On 2 September 2016, the Professional Standards Unit again considered the investigation strategy and approach. That meeting was attended by the former Public Sector Standards Commissioner, the Director of the Professional Standards Unit, the Professional Standards Unit case manager and a representative from the ACT Government Solicitor's Office. According to the Professional Standards Unit worksheet for the matter, at that meeting it was decided that:

- the allegation sent to each respondent should be clarified, now that information available from the PwC review was available;
- the suspension should be reviewed to confirm either the continuation of suspension/transfer to other duties/bring back to work;
- an external investigator should be engaged; and
- an independent Delegate should be appointed to determine the misconduct.

2.143 Draft letters to the former Executive Director, Performance Information and former Senior Manager, Business Intelligence confirming the Professional Standards Unit investigation were prepared and provided to ACT Health as well as options for the Delegate who would determine whether there was misconduct on the basis of the investigators' factual findings.

2.144 On 12 September 2016, a further meeting involving Professional Standards Unit, ACT Health and the representative from the ACT Government Solicitor's Office was held to finalise the letters to the former Executive Director, Performance Information and the former Senior Manager, Business Intelligence. According to the Professional Standards Unit worksheet for the matter, at the meeting it was confirmed that these letters should:

... review the delegate's decision to suspend, that an external investigator is being engaged to conduct the investigation and that an independent delegate will be appointed to determine the matter.

2.145 On 15 September 2016, the acting Executive Director, People and Culture met with Professional Standards Unit and the independent investigator and signed a letter of engagement and Terms of Reference for the investigation. At that meeting, the contents of

the letters to be sent to the former Executive Director, Performance Information and former Senior Manager, Business Intelligence were still under discussion.

Articulation of the allegations

2.146 On 16 September 2016 the former Deputy Director-General, Corporate wrote to the former officers for the purpose of refining the allegations. The lengthy and detailed letters of 16 September 2016 clarified the allegations made against these officers. The letters provided further information on the allegations of possible misconduct, including the following allegations:

4. That you provided assurances to the Minister for Health and the Director-General of ACT Health ... that issues that resulted in the publication of incorrect figures in the *ACT Health Quarterly Performance Report December 2015* (Q2 report) had been resolved for the production of the March 2016 Quarterly Report (Q3 report). You advised a number of new processes had been established for the completion of the reports with greater transparency and auditing which ensures processes are adhered to. You advised that a robust quality compliance system was being implemented to ensure consistency and accuracy in the data produced and published when these issues had not in fact been resolved.

...

5. That ... you provided a progress report dated 8 July 2016 ... to Deputy Director-General Corporate ... on ACT Health's implementation of recommendations from the Auditor General's Report 5/2015 stating that many of the actions to address the Auditor General's recommendations had been completed while others require ongoing review, when these actions had not in fact been completed.

2.147 The letter to the former Executive Director included an additional allegation:

6. That ... you provided assurances to the Select Committee on Estimates that the quarterly report undergoes data validation and checking before being provided to the Director-General, despite these processes being ineffective.

2.148 The allegations in the letters were, in part, based on the findings of PwC's *Process and Controls Review: Status of the ACT Health Quarterly Performance Report* (draft dated 22 August 2016).

2.149 The letters also advised that 'The Professional Standards Unit, or an external investigator engaged through the Professional Standards Unit, will be in contact'. The former officers were also informed they would be 'provided with further particulars of the allegations and given the opportunity to respond to the allegations'. Their current suspension was also confirmed with further advice that their suspension would continue until such time as the misconduct process was finalised. These letters were signed by the former Deputy Director-General, Corporate.

2.150 The letter to the former Executive Director (as an ACT Public Service Executive) identified the relevant section of the *Public Sector Management Standards* (2006) definition of misconduct as:

- c) conduct that harms, or is likely to harm, the reputation of the service or the Territory; and

d) a breach of the Act, section 9.

2.151 The letter to the former Senior Manager, Business Intelligence (a former ACT Public Service non-Executive employee) identified the relevant section of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* definition of misconduct as:

- c) the employee fails to meet the obligations set out in section 9 of the PSM Act 1994 (this includes bullying and harassment or discrimination);
- d) the employee engages in conduct that has brought, or is likely to bring, the Directorate or ACTPS into disrepute.

2.152 On 24 August 2016 a *Workplace Investigation or Review Request* document, signed by the former Deputy Director-General, Corporate as Delegate, was submitted to the Professional Standards Unit to formally request an investigation into the actions of the two former Performance Information Branch employees. The attachment to this *Workplace Investigation or Review Request* was the ACT Health Preliminary Assessment *pro forma* signed by the former Deputy Director-General, Corporate on the same date. Following its receipt of the *Workplace Investigation or Review Request* document, the Professional Standards Unit undertook a series of actions to determine an appropriate strategy for the investigation and to engage a suitably qualified investigator to conduct the investigation. This included liaising with ACT Health to further develop and articulate the nature of the allegations against the two former staff members. These were further clarified and articulated and based, in part, on the findings of PwC's *Process and Controls Review: Status of the ACT Health Quarterly Performance Report* (22 August 2016). On 16 September 2016, the former Deputy Director-General, Corporate wrote to the former officers further clarifying the allegations against them.

Commencement of the investigation

2.153 The Professional Standards Unit engaged a firm, which included a qualified independent investigator, to investigate the allegations. On 22 September 2016, the independent investigator contacted both former officers to inform them of the engagement. On 26 September 2016 these former officers received letters signed by the investigator, informing them that they had been engaged to conduct a workplace investigation of two allegations of misconduct made against each of them by ACT Health. The letter was accompanied by the Terms of Reference for the investigation.

Request to cease investigation into Senior Manager, Business Intelligence

2.154 On 22 September 2016 the former Executive Director, Performance Information emailed the investigator informing them that they had received the letter intended for the former Senior Manager, Business Intelligence. The investigator confirmed that the former Executive Director, Performance Information had received the letter intended for the Senior Manager, Business Intelligence in error.

2.155 On 4 October 2016 the former Executive Director, Performance Information sent an email to the former Public Sector Standards Commissioner and to the investigator requesting that the investigation into the Senior Manager, Business Intelligence cease. As part of the email the former Executive Director, Performance Information stated:

...

Notwithstanding that I refute the allegations in relation to me (as well as the grave concerns I have with the entire process ...), the allegations in relation to [the former Senior Manager, Business Intelligence] have no basis at all given that:

- [the former Senior Manager, Business Intelligence] is the Senior Manager of the Business Intelligence Unit
- [the former Senior Manager, Business Intelligence] reports to me as the Director of Performance Information Branch
- Information supplied by me in relation to those Audit Report recommendations that relate to Business Intelligence responsibilities were assessed by me as being sufficient to demonstrate progress against recommendations in my opinion
- I viewed the evidence provided by staff of the Business Intelligence Unit in relation to those recommendations which impact on the role of that unit
- [the former Senior Manager, Business Intelligence] was not present at the time that an update was provided to [the former Deputy Director-General, Corporate] on 8 July 2016, and had been on leave for two weeks prior to that date
- Notwithstanding that [the former Senior Manager, Business Intelligence] put in place a range of systems and processes that give effect to the recommendations that impact on BIU activities, [they were] not responsible for ensuring that all audit recommendations were implemented

...

2.156 The request to cease the investigation into the former Senior Manager, Business Intelligence was forwarded to the acting Executive Director, People and Culture, by the investigator. An email from the Senior Manager, Operations in the Professional Standards Unit to the investigator confirmed '[the acting Executive Director, People and Culture] has consulted with the delegate who referred the matter for investigation ... and the advice is that the ... investigation should continue'. It is noted that the second of the two allegations put to the former Senior Manager, Business Intelligence directly related to events of 8 July 2016, on which they were on leave (and had been on leave in the days' preceding). The subsequent finding of the Delegate was that '[The former Senior Manager, Business Intelligence] was on leave and not responsible for the preparation of the progress report dated 8 July 2016 ... I accept the conclusion of the Investigation Report that [the former Senior Manager, Business Intelligence] did not provide inaccurate or false assurances with respect to this allegation'.

Conduct of the investigation

- 2.157 Between 4 October and 23 November 2016, the investigator completed interviews with several members of the former Performance Information Branch as well as ACT Health executives including the former Deputy Director-General, Corporate as referring Delegate and the acting Executive Director Business Performance Information and Decision Support.
- 2.158 On 18 November 2016 the investigator sought further and specific information from ACT Health, including; a copy of the final PwC report and agreement from ACT Health to provide that report to the former Senior Manager, Business Intelligence and the former Executive Director, Performance Information.
- 2.159 The investigator wrote again to these officers on 30 November 2016 to provide further information and seek their response to the allegations in an interview or in writing.
- 2.160 On 12 December 2016, ACT Health gave approval for a copy of the PwC report to be sent to the two officers. The investigator provided a copy of the PwC report to each of the officers by email on 13 December 2016.
- 2.161 The former Senior Manager, Business Intelligence and the former Executive Director, Performance Information initially agreed to respond in writing to the investigator by 28 December 2016. A short extension to 9 January 2017 was agreed, given the response time overlapped with the Christmas period, and that they also wished to respond to the PwC material that had been provided on 13 December 2016.
- 2.162 Between 4 and 31 January 2017, the investigator again sought documents that had been previously requested but not received from ACT Health. According to the Professional Standards Unit worksheet for the matter, at a meeting between representatives of the Professional Standards Unit and the investigator on 4 January 2017, it was recorded that:
- Some delays in requested information being provided by ACT Health – offered to follow up on any matters not resolved.
- 2.163 According to the Professional Standards Unit worksheet for the matter, at a meeting between representatives of the Professional Standards Unit and the investigator on 31 January 2017, the investigator provided the Executive Director Human Resources with a consolidated list of documents previously requested from ACT Health that had not been provided.
- ...
- [Representative ...] gave an overview of the incidents being investigated and the requests for information;
 - ... will provide [the Executive Director Human Resources] with a list of the information requested but not provided. [The Executive Director Human Resources] will attempt to locate required documents, which will then be provided to either the investigator or the delegate, depending on timing.
- ...

- 2.164 According to the Professional Standards Unit worksheet for the matter, the investigator provided the Executive Director Human Resources with the consolidated list of documents previously requested from ACT Health that had not been provided on 1 February 2017. These documents were considered necessary to finalise the investigation report or to inform the Delegate (decision-maker).
- 2.165 On 6 February 2017, the investigator submitted the final reports to the Professional Standards Unit. Both the report on the former Senior Manager, Business Intelligence and the report on the former Executive Director, Performance Information were emailed to the Delegate by the Professional Standards Unit on 10 February 2017. These reports, including all attachments and the PwC reports, were later delivered in hard copy to the Delegate on 13 February 2017.
- 2.166 The former Public Sector Standards Commissioner was asked by the Audit Office in an interview under oath on 18 April 2018 whether the length of time to conduct the investigation was usual. They advised that 'It was slightly longer than usual... they don't usually take the length of time that it took, except in very difficult circumstances. This was technically a very difficult investigation.'
- 2.167 On 26 September 2016 the independent investigator contacted the former Senior Manager, Business Intelligence and former Executive Director, Performance Information informing them that they had been engaged by ACT Health to undertake the misconduct investigation. The letter was accompanied by the Terms of Reference for the investigation. Between 29 September 2016 and 6 February 2017 the independent investigator undertook the investigation into the officers. The two former officers were given the opportunity to respond in writing to the allegations and were provided with access to relevant documents.
- 2.168 The requirements of section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* were met in relation to the conduct of the investigation (although it is noted that these requirements only applied to the former Senior Manager, Business Intelligence, as a former non-Executive ACT Public Service employee). While there are no specific timeframe requirements for the conduct of a misconduct investigation, this investigation was conducted in a relatively timely manner, once the referral was received from ACT Health by the Professional Standards Unit on 24 August 2016. The investigation took around five months to complete which, although lengthy, is reasonable considering its technical nature and complexity, delays in receiving relevant documentation from ACT Health, requests for additional time to respond by the two former officers and the Christmas and New Year shut-down period.

The resolution of the investigation

- 2.169 The investigation reports of the independent investigator was completed in February 2017 in relation to the conduct of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence.

Findings in relation to misconduct – Independent Delegate’s determination

2.170 The investigation report into the allegations relating to the former Senior Manager, Business Intelligence was provided to the Acting Director-General of the Transport Canberra and City Services Directorate (as an independent Delegate) on 10 February 2017, in order to make a determination as to whether misconduct had occurred. On 24 February 2017 the Acting Director-General of the Transport Canberra and City Services Directorate accepted the investigation report and determined that, in relation to the two allegations that were made, there was no misconduct (refer to paragraphs 1.34 to 1.39).

2.171 The investigation into the allegations about the former Executive Director, Performance Information ceased on 9 February 2017. This was the date on which the former Executive Director’s ACT Public Service Executive contract expired. Although the investigation report was completed, the Delegate did not make a determination as the individual was no longer employed by the ACT Public Service (refer to paragraph 1.39).

2.172 On 17 March 2017, the former ACT Health Deputy Director-General, Corporate wrote to the former Executive Director advising:

The Investigator’s report was finalised in February 2017 and provided to [the Acting Director-General of the Transport Canberra and City Services Directorate] to make a determination on the balance of probabilities as to whether misconduct had occurred.

I am writing to advise you that [the Acting Director-General of the Transport Canberra and City Services Directorate] has considered the investigator’s report as well as their findings therein. However, given that your employment with ACT Health ceased on 9 February 2017, the misconduct process was wholly discontinued on that date and accordingly no findings with respect to whether you had engaged in misconduct were made by [the Acting Director-General of the Transport Canberra and City Services Directorate].

2.173 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

While we note the delegate did not find that [the former Senior Manager, Business Intelligence] had engaged in misconduct, we make the following observations.

- (a) The interaction between the Public Sector Management Act 1994 the Public Sector Standards 2006 and the Resolving Workplace Issues policy document and the Enterprise Agreement is unclear.
- (b) Your proposed report has cherry picked particular parts of these documents, and you have not provided us with access to the content of the entire documents.
- (c) Notwithstanding this denial of procedural fairness, even on the basis of the information contained within the report there would appear to have been some deficiencies in the application of the relevant statutory tests in the context of the investigation.
- (d) For example, the delegate states in [their] report:

The detailed report ... demonstrates that [former Senior Manager, Business Intelligence] did provide assurances, through the [former Executive Director, Performance Information] to the Minister for Health and the Director-General ACT Health ... that issues that had resulted in publication of incorrect figures in the ACT Health Quarterly Performance Report December 2015 (Q2 report) had been resolved for the production of the March 2016 Q3 report.

By virtue of the errors in the 2015-16 Q2 and Q3 performance reports, it is apparent that effective processes to ensure consistent and accurate collection and reporting of ACT Health data were not put in place notwithstanding the assurances of [former Senior Manager, Business Intelligence] through [their] supervisor. Therefore I am comfortable that the allegation is proven ...

The extent to which [former Senior Manager, Business Intelligence] may have failed to exercise reasonable care and skill (Section 9(a) of the PSMA) that appears to me to fall within the realm of performance management rather than misconduct. I say this noting that the ACT Public Service Guidelines on Misconduct and Investigations includes the following paragraph Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment or intentionally fails to meet the requirements of their duties.

*As noted above, I conclude that although [former Senior Manager, Business Intelligence] may have overstated the robustness of [their] actions implemented or the state of ongoing implementation, there is insufficient evidence to conclude that [former Senior Manager, Business Intelligence's] behaviour was **intended** to be wilfully or deliberately unsatisfactory or that [former Senior Manager, Business Intelligence] **intentionally** failed to meet the requirements of [their] duties.*

We note that the delegate has referenced [their] decision in relation whether or not the allegation, as substantiated, constituted misconduct under the *Public Sector Management Act 1994*, to the relevant section of the Resolving Workplace Issues: Misconduct and Investigations document. In particular, the delegate finds that a lack of intention or wilfulness on the part of former Senior Manager, Business Intelligence precluded a finding of misconduct. However, it appears that the delegate has only considered part of the relevant inquiry set out in the Resolving Workplace Issues: Misconduct and Investigations document, as the rest of the paragraph reads:

*Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment or intentionally fails to meet the requirements of their duties. **In the ACTPS, an intentional or reckless breach of employee obligations/standards amounts to misconduct.***

[our emphasis]

It would appear that the delegate failed to turn [their] mind to whether the former Senior Manager, Business Intelligence's failure to exercise reasonable care and skill in the performance of [their] duties was either reckless or careless, irrespective of [their] intent.

We note that at paragraph 1.58 of the proposed report, you identify that the audit was conducted with reference to whether or not procedural and administrative requirements in the relevant Enterprise Agreement and legislation were met.

It is our view that the administrative and legislative requirements were not met as it appears that the delegate misconstrued the relevant test for whether or not the former Senior Manager, Business Intelligence failed to exercise reasonable care and skill in the performance of [their] duties.

2.174 The Audit Office provided this extract to the independent Delegate for comment. In a response to the Audit Office on 4 July 2018 the independent Delegate advised:

I do recall that I spent a considerable amount of time on the matter (many days), so that all relevant considerations were taken into account.

I am comfortable with the decision that I made as Delegate in relation to this matter.

I note that I made reference to 'care and skill' earlier in my Determination ... which I consider is relevant to 'reckless' and determined that in the particular circumstances this was a performance management issue.

In relation to the particular sentence emphasised by the writer in the attached, I consider that for someone to be reckless, there needs to be a degree of intent (wilful or deliberate). I haven't included a reference to the definition of 'reckless' as I am not revisiting my decision, but you may wish to look at the ordinary meaning of the word. The decision was not questioned at the time, as far as I am aware.

So, my comment in summary, would be no more than to say that I am comfortable with the decision that I made in relation to the issue and that I am confident that all relevant matters were considered.

- 2.175 Dr James Popple, Principal Reviewer, CPM Reviews was engaged by the Audit Office as a subject matter expert to review the processes undertaken in relation to the misconduct investigation in relation to the former Senior Manager, Business Intelligence and former Executive Director, Performance Information. In relation to the conduct of the investigation Dr Popple advised:

In the management of the allegations against them, the then Senior Manager, Business Intelligence and the then Executive Director, Performance Information, ACT were afforded procedural fairness. ... Both officers were given details of the allegations against them, and given the opportunity (which they took) to respond to those allegations. An independent investigator conducted the investigation. There was no finding of misconduct. The process was an extended one and, no doubt, caused the employees considerable stress. But the process did not cause the employees any practical injustice.

However, even though the investigation process was procedurally fair, the decision to conduct the investigation was problematic. When the then ACT Health Deputy Director-General Corporate wrote to the officers on 29 July 2016, advising them of the misconduct investigation, [they] wrote that there had been "preliminary allegations" that "relate to your failure to exercise reasonable care and skill, and of failing to act with probity in performing your duties". Notwithstanding the reference to "preliminary" allegations, it is difficult to characterise this as the commencement of a preliminary assessment (rather than the commencement of an investigation), given that the then Senior Manager Business Intelligence was suspended on the same day, and the then Executive Director was suspended a week later.

- 2.176 Dr James Popple (Principal Reviewer, CPM Reviews), who was engaged by the Audit Office as a subject matter expert to review the processes undertaken in relation to the misconduct investigation, advised that both former employees were afforded procedural fairness in the management of the allegations against them, noting that both officers were given details of the allegations against them and given the opportunity (which they took) to respond and an independent investigator was engaged to conduct the investigation. Dr Popple advised 'the process was an extended one and, no doubt, caused the employees considerable stress. But the process did not cause the employees any practical injustice'. Dr Popple further advised 'even though the investigation process was procedurally fair, the decision to conduct the investigation was problematic'.

RECOMMENDATION 1 ACT HEALTH TRAINING FOR EXECUTIVES AND MANAGERS

ACT Health should implement training for executives and managers for the handling of allegations of potential breaches of the ACT Public Sector Code of Conduct. This training should include:

- a) managing and documenting the conduct of preliminary assessments;
- b) the need to fully consider options available prior to proceeding with a misconduct investigation (e.g. underperformance management); and
- c) processes for managing and documenting allegations of breaches of the ACT Public Sector Code of Conduct.

RECOMMENDATION 2 PROFESSIONAL STANDARDS UNIT GUIDANCE MATERIAL

The Public Sector Standards Commissioner should review guidance material for ACT Government agencies with respect to the documentation of allegations of potential breaches of the ACT Public Sector Code of Conduct. The guidance material should address:

- a) the need to document the relevant and clear connection between an employee's behaviours and any alleged breach of the ACT Public Sector Code of Conduct;
- b) the role of Directors-General to consider and investigate the actions and conduct of staff in the first instance and refer allegations that are particularly serious or complex to the Public Sector Standards Commissioner in a timely manner; and
- c) the need to communicate with the Professional Standards Unit as early as possible when allegations of potential breaches of the ACT Public Sector Code of Conduct may be referred to the Public Sector Standards Commissioner for actioning.

3 THE MANAGEMENT OF COMPLAINTS ABOUT THE FORMER DIRECTOR-GENERAL AND FORMER DEPUTY DIRECTOR-GENERAL, CORPORATE

- 3.1 This chapter considers the handling of complaints of inappropriate workplace behaviour on the part of the former Director-General and former Deputy Director-General, Corporate. Also considered are the actions of ACT Health staff and the former Public Sector Standards Commissioner and Professional Standards Unit in responding to these complaints.

Summary

Conclusions

ACT Health's management of complaints regarding inappropriate workplace behaviours (including allegations of bullying) made by the former Senior Manager, Business Intelligence was not effective.

Procedures in ACT Health's *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* were not followed by the former Director-General or former Deputy Director-General, Corporate in responding to a written complaint by the former Senior Manager, Business Intelligence in July 2016 about the conduct of the former Deputy Director-General, Corporate. Given that the SOP is ACT Health's policy it was incumbent on the executives to follow the intent of its procedures, even though the SOP specifically refers to a complainant as 'the staff reporting an act of bullying behaviour to their manager [Audit emphasis]' and not the executive.

Key discussions (in May 2016 and July 2016) between ACT Health Human Resource officers and the former Senior Manager, Business Intelligence, regarding complaints (including allegations of bullying) were not adequately documented. While retaining adequate documentation of such allegations is always important it is particularly so if the allegations are related to executives.

The former Public Sector Standards Commissioner implemented appropriate processes in responding to complaints about the former Director-General and former Deputy Director-General, Corporate's behaviours, noting that the complaints 'were very low level' and 'they weren't able to develop a case that this was bullying'. However, the former Commissioner's communication advising the two former officers that a determination had been made that the matters they had raised did not constitute a public interest disclosure was confusing. Clarity was therefore not provided to the two officers.

Key findings

	Paragraph
<p>In late May 2016 the former Senior Manager, Business Intelligence had a conversation with an ACT Health Human Resources officer in relation to the behaviour of the Deputy Director-General, Corporate. The ACT Health Human Resources officer in an interview under oath or affirmation recalled that the former Senior Manager, Business Intelligence was seeking advice as to how they could make a complaint about the former Deputy Director-General, Corporate (and, in doing so, expressed concern that they could not make a complaint to the former Director-General). The former Senior Manager, Business Intelligence has since advised that they were making a complaint at the time. The ACT Health Human Resources officer recalls that they provided advice to the effect that the issues could be raised with the Head of Service or Public Sector Standards Commissioner and that this advice was satisfactory to the former Senior Manager, Business Intelligence. No contemporaneous records were kept in relation to the conversation and the ACT Health Human Resources officer did not raise the matter with their supervisor or other managers within ACT Health, including the former Deputy Director Director-General, Corporate.</p>	3.24
<p>On 1 July 2016 the former Senior Manager, Business Intelligence sent an email to the former Deputy Director-General, Corporate complaining about their behaviour. The former Deputy Director-General, Corporate did not respond to the former Senior Manager, Business Intelligence but forwarded the email to their direct supervisor, the former Director-General, along with a suggestion as to how the complaint could be handled. In an interview under oath or affirmation, the former Director-General advised that they sought advice from ACT Health Human Resources and then spoke directly to the former Executive Director, Performance Information about the incident. There is no evidence that a response was provided to the former Senior Manager, Business Intelligence in relation to the complaint.</p>	3.38
<p>The handling of the complaint by the former Deputy Director-General, Corporate and former Director-General did not align with existing ACT Health policy and was not effective. While the former Deputy Director-General, Corporate and former Director-General met some of the 'Information Gathering requirements' of the <i>Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)</i> (February 2011), there is no evidence of how other requirements of the policy were addressed, including:</p> <ul style="list-style-type: none">• 'the expectations both parties had/have for resolving the issue';• 'any actions each of the parties agreed to for gaining resolution'; and• 'management follow up and any further recommendations'.	3.39
<p>While the former Director-General states that they considered the allegation in the email dated 1 July 2016, consulted with ACT Health Human Resources staff and spoke to the former Executive Director, Performance Information directly on the matter,</p>	3.40

they did not meet the requirements and recommendations of the ACT Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (February 2011) to:

- inform the staff/s concerned that no disciplinary action will be taken, and that an investigation will not take place;
- discuss with all parties the behaviours expected from them to repair and maintain a professional working relationship; and
- arrange a follow up discussion to ensure expectations have been met.

There is no evidence that ACT Health considered informal resolution processes in response to the allegation of 1 July 2016 and it is apparent that principles of the ACT Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* were not met, specifically that: 3.41

- ‘wherever possible, complaints should be resolved by a process or discussion, cooperation and conciliation. The aim is to reach an acceptable outcome that minimises any potential detriment to ongoing relationships’; and
- ‘both the staff member raising the complaint (the complainant) and the person/persons against whom the complaint is made (the respondent) will receive appropriate information, support and assistance in resolving the grievance’.

The legal representatives on behalf of the former Director-General noted that the definition of ‘bullying’ for the purpose of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) is ‘repeated, unwelcome behaviour of a person/s’ and because the former Senior Manager, Business Intelligence only raised one instance of witnessed behaviour the procedure did not apply. The legal representatives on behalf of the former Director-General also noted that the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) ‘contemplates that a complainant under the SOP is a person who raises a complaint with their manager’ and that because neither the former Director-General nor former Deputy Director-General, Corporate was the manager of the former Senior Manager, Business Intelligence they had no responsibility for actioning or responding to the information. 3.44

Such an interpretation of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) misses the intent and spirit of the procedure and its emphasis on implementing appropriate processes to recognise and manage complaints of inappropriate behaviours. The language of the email makes it clear that a complaint was being made about the behaviours of the former Deputy Director-General, Corporate and this was not effectively managed for the reasons outlined in paragraphs 3.38 to 3.41. 3.45

On 18 July 2016, during a conversation with the acting Executive Director, People and Culture, the former Senior Manager, Business Intelligence raised concerns about their treatment by senior ACT Health executives (the former Director-General and former Deputy Director-General, Corporate). The conversation occurred in the 3.54

context of the former Senior Manager, Business Intelligence seeking a 'voluntary redundancy' from the organisation and an associated payment. In an interview under oath or affirmation the acting Executive Director, People and Culture advised that they considered the information that was provided and asked for specific examples of the incidents. The acting Executive Director, People and Culture considered that the allegations were general and lacked specificity. The acting Executive Director, People and Culture made brief, handwritten contemporaneous notes associated with the conversation. They advised that they had a conversation in which they 'would have pretty much read out the theme of [the complaints] to the former Director-General and former Deputy Director-General, Corporate'. There is no documentation of this conversation or of the consideration of the allegations i.e. why they did not amount to potential bullying.

On 4 August 2016, the former Executive Director, Performance Information and former Senior Manager, Business Intelligence met with the Public Sector Standards Commissioner to discuss their concerns about the behaviours of the former Director-General and former Deputy Director-General, Corporate. In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner advised that they had separate discussions with the former Director-General and former Deputy Director-General, Corporate in relation to the issues that were raised. The former Public Sector Standards Commissioner advised that 'given that there were I think three or four specific complaints [that] didn't show a pattern over a long period of time of – of intimidation or, you know, anything that could – could be perceived as bullying, I really took them as a different perception of manner'. In doing this, however, it is noted that faced with conflicting stories of the events, the Commissioner decided that they would take no further action in relation to the allegations made by the former employees. In a response to the draft proposed report on 29 May 2018 the former Public Sector Standards Commissioner advised 'I was not made aware of any witnesses to the incidents by the complainants and having interviewed them and the subjects of the complaints I understood the matters to have been exhausted as much as they could have been'.

3.61

On 7 September 2016, a letter was sent to the former Public Sector Standards Commissioner from the legal representative of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence. The letter purported to make a public interest disclosure under the *Public Interest Disclosure Act 2012*. The former Public Sector Standards Commissioner made a decision that the purported public interest disclosure from the two officers in September 2016 was not a public interest disclosure under the *Public Interest Disclosure Act 2012*. In doing so, the former Public Sector Standards Commissioner advised the Audit Office under oath or affirmation that 'They were very low level. They weren't able to – in my mind they weren't able to develop a case that this was bullying'. This was a decision that was open and available to the Commissioner. Notwithstanding that the former Public Sector Standards Commissioner did not consider the matters raised to be a public interest disclosure, the former Commissioner referred to aspects of the *Public Interest Disclosure Act 2012* (paragraphs 20(f) and 20(g)) as the rationale for not investigating the matter further. Paragraph 20(f) refers to 'the investigating entity [in this case the former Commissioner] is reasonably satisfied that the substance of the disclosure has already been investigated under this Act or another law in force in the ACT' and

3.72

Paragraph 20(g) refers to 'there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure'. The use of two different sections of the Act is considered to create ambiguity.

Complaints of inappropriate workplace behaviour

- 3.2 The Audit Office received information that the former Director-General and former Deputy Director-General, Corporate had engaged in inappropriate workplace behaviour (including bullying).
- 3.3 The Audit Office sought clarification on this information. In doing this three instances were identified where it was asserted that specific complaints had been made about the behaviours of the former Director-General and former Deputy Director-General, Corporate.
- 3.4 These instances have been identified as follows:
- in late May 2016 it was asserted that a complaint was made in relation to the actions of the former Deputy Director-General, Corporate. It was asserted that the complaint was made to an officer in Human Resources at ACT Health;
 - in early July 2016 it was asserted that a complaint was made in relation to the actions of the former Deputy Director-General, Corporate. It was asserted that the complaint was made directly to the former Deputy Director-General, Corporate;
 - in mid July 2016 it was asserted that a complaint was made in relation to the actions of the former Director-General and former Deputy Director-General, Corporate. It was asserted that the complaint was made to the former Executive-Director of Human Resources at ACT Health.

ACT Health policies and procedures

- 3.5 At the time of the alleged incidents ACT Health had in place the following policies for reporting and managing such incidents:
- *Respect at Work – Preventing and Managing Work Bullying, Discrimination and Harassment* (August 2015); and
 - *ACT Health Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (February 2011).

Respect at Work – Preventing and Managing Work Bullying, Discrimination and Harassment (August 2015)

3.6 The *Respect at Work – Preventing and Managing Work Bullying, Discrimination and Harassment* (August 2015) policy states:

ACT Health is committed to providing a safe and harmonious work environment that enhances the achievements of both the individual's and the organisation's goals. In this environment, everyone has the right to be treated fairly and with respect.

ACT Health adopts the provisions of the ACT Whole of Government, Respect, Equity and Diversity Framework.

When allegations of work bullying, discrimination or harassment occur, provisions within the ACT Public Service, Workplace Bullying, Discrimination and Harassment Framework and its associated procedures will be followed.

All reports and complaints of work bullying, discrimination or harassment will be treated seriously, promptly and fairly with due regard to the principles of procedural fairness, natural justice and confidentiality.

The ACT Government's Preventing Work Bullying Guidelines, Section 8, Resolving Work Bullying, outlines the appropriate procedure to uphold these principles and is attached to this policy.

3.7 The *Respect at Work – Preventing and Managing Work Bullying, Discrimination and Harassment* (August 2015) policy set outs the responsibilities that apply to the Director-General/Delegate, Executive Directors and Managers and Staff and volunteers for responding to allegations. The responsibilities that apply to the Director-General/Delegate are:

Director-General / Delegate:

- must promote to staff the ACTPS values and code of conduct;
- must actively prevent work bullying, discrimination and harassment by adopting the Whole of Government policy, providing supervision, awareness raising and training for staff, and undertaking ongoing risk management;
- must ensure that executives, managers and staff are educated and made aware that conduct of a work bullying, discriminatory or harassing nature will not be tolerated;
- must ensure guidelines and procedures are in accordance with ACT Public Service Enterprise Agreements and consistent with ACT Government guidelines to enable staff to raise issues about and make formal complaints of work bullying, discrimination or harassment;
- must ensure that executives, managers and staff are aware of what to do if work bullying, discrimination or harassment is reported or observed;
- must identify, assess, and eliminate or control the risk factors that contribute to a work culture where work bullying is likely to occur;
- must keep accurate records of complaints of work bullying, discrimination and harassment; and
- must provide data on work bullying, discrimination and harassment to the Commissioner for Public Administration as part of the Agency Survey process.

3.8 The responsibilities that apply to Executive Directors and Managers are:

Executive Directors and Managers:

- must uphold the values and code of conduct of the ACTPAS and treat all staff with respect;
- must ensure that their own conduct is beyond reproach and examine their own preconceptions, biases and stereotypes concerning work bullying, discrimination or harassment;
- must communicate this policy and related procedures to staff to ensure that they are aware of their rights and responsibilities;
- must actively prevent work bullying, discrimination and harassment by addressing conduct that is inappropriate and taking necessary corrective and preventative action;
- must treat reports or complaints of work bullying, discrimination or harassment seriously and respond promptly and confidentially in accordance with ACT Public Service Enterprise Agreements and consistent with the ACT Government guidelines; and
- must take all reasonably practicable steps to prevent complaints and witnesses being victimised.

3.9 The responsibilities that apply to staff and volunteers are:

Staff and volunteers:

- ...
- must actively prevent work bullying, discrimination and harassment by requesting, if observed, that the offending behaviour cease, either by directly discussing this with the individuals involved or by talking with a supervisor about the situation;
- ...
- should raise concerns as early as possible about potential work bullying, discrimination or harassment issues;
- may raise their concerns with their supervisor or any other senior manager or executive or raise their concern with their Contact officer, Work Safety Representative or agency human resources area;

3.10 The *Respect at Work – Preventing and Managing Work Bullying, Discrimination and Harassment* (August 2015) policy refers to, and includes as an attachment, Section 8 of the *ACT Public Service Preventing Work Bullying Guidelines* (2010). Section 8 refers to actions that may be taken in relation to inappropriate workplace behaviour, including:

- ‘individual action’;
- ‘informal report’; and
- ‘formal complaint’.

3.11 With respect to ‘individual action’ and ‘informal report’ the Section 8 extract states:

There is a greater chance of successfully resolving a work bullying incident when action is taken quickly to deal with the situation. In any instance of work bullying, the parties concerned should not ignore the situation thinking it will go away.

An individual experiencing work bullying has options available to assist them to resolve the matter quickly and effectively including:

- Telling someone they trust to ensure perspective;
- Speaking to the perpetrator directly, being mindful of personal safety and the likelihood of reprisals;
- Reporting the matter to their supervisor and working with them to resolve the incident by discussing options available (note: the supervisor is responsible for identifying and minimising any risk without implicating the complainant); and/or
- Speaking to a contact officer, union representative, supervisor and/or human resources for advice and support.

...

In the first instance, both the person alleging work bullying, and management are encouraged to resolve the matter in the immediate work area through discussion, which may include mediation utilising the Employee Assistance Program (EAP) service. This step is particularly important if the behaviour was unintentional and can often allow resolution of the situation without the labelling of individuals involved as troublemakers or harassers, and without attributing blame to the parties involved.

ACT Health Standard Operating Procedure – Anti Discrimination, Bullying and Harassment

3.12 The ACT Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011) seeks to '[provide] clear information to staff on ACT Health processes for managing bullying, harassment and discrimination issues'.

3.13 The *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011) states that 'ACT Health has a Zero Tolerance to discrimination, harassment and bullying' and sets out principles that include in part:

Any form of discrimination, harassment or bullying in the workplace will be addressed, and disciplinary action may be taken against any individual proven to be engaging in such conduct.

...

Every individual has the right to bring complaints forward and expect they will be taken seriously.

Complaints will be treated seriously and sensitively, with due regard for; natural justice, procedural fairness, confidentiality and privacy. ...

...

Wherever possible, complaints should be resolved by a process of discussion, cooperation and conciliation. The aim is to reach an acceptable outcome that minimises any potential detriment to ongoing relationships.

Both the staff member raising the complaint (the complainant) and the person/persons against whom the complaint is made (the respondent/s) will receive appropriate information, support and assistance in resolving the grievance.

...

3.14 In relation to information gathering, the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011) requires that:

Where allegations of discrimination, bullying and harassment have been made, the manager is to gather and provide the following information to the Delegate who will determine whether the matter warrants informal or formal resolution:

- The nature of the incident being reported (behaviour/what was said and done);
- The time it occurred;
- The parties involved;
- How the incident was addressed;
- The expectations both parties agreed to for gaining resolution; and
- Management follow up and any further recommendations.

3.15 The *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011) goes on to state that in instances where a determination has been made that bullying (or harassment) has not occurred that:

If after considering the gathered information, the Delegate is of the opinion that the alleged discrimination, bullying or harassment has not occurred, or is not sufficiently serious to warrant disciplinary action or an investigation:

- The Delegate will inform the staff/s concerned that no disciplinary action will be taken, and that an investigation will not take place;
- The Delegate is to discuss with all parties the behaviours expected from them to repair and maintain a professional working relationship;
- It is recommended that all parties be advised of additional support that may assist them in accepting the decision (e.g. EAP, training, fact sheets); and
- The Delegate/Manager is to arrange a follow up discussion to ensure expectations have been met.

3.16 Options for formal and informal procedures to resolve matters are also included in the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011). Informal options being:

Designed to prove an avenue for the early resolution of issues to enable work relationships to continue. Access to informal resolution encourages those involved to act early, rather than waiting until problems are so serious that a formal complaint may be necessary, which is stressful on all parties both directly and indirectly. Information resolution may include:

- Informal Counselling
- Mediation;
- Facilitated discussion;
- Training; and
- Coaching.

- 3.17 Formal options are to be used if the delegate determines that the alleged matters require investigation and are to be dealt with as discipline or misconduct under the relevant Enterprise Agreement. In this case ‘the Delegate will as soon as practicable take any further steps considered necessary to establish the facts of the allegations’.

Complaint about former Deputy Director-General, Corporate (May 2016)

- 3.18 It was asserted that in late May 2016 the former Senior Manager, Business Intelligence made a verbal complaint in relation to the actions of the former Deputy Director-General, Corporate to an ACT Health Human Resources officer.
- 3.19 The May 2016 complaint is described in a letter from the former Senior Manager, Business Intelligence’s legal representative to the ACT Head of Service dated 29 June 2017:

In late May 2016, [the former Executive Director, Performance Information] met with our client and informed [them] of the details of a meeting ... with [the former Deputy Director-General, Corporate]. [The former Executive Director, Performance Information] was visibly distressed following this meeting with [the former Deputy Director-General, Corporate]. [The former Executive Director, Performance Information] explained to our client that [the former Deputy Director-General, Corporate] threatened [them] in the meeting stating “[the former Deputy Director-General, Corporate] was going to break [their] team apart” and also that [their] “neck was in a noose.” Our client understood this to be a reference to [them], given [their] treatment by [the former the former Director-General] and [the former Deputy Director-General, Corporate] ...’

Following this meeting with [the former Executive Director, Performance Information] our client met with [the ACT Health Human Resources officer], to complain that [they] felt [they were] being bullied and harassed by [the former Deputy Director-General]. ...

Our client sought advice from [the ACT Health Human Resources officer] about how to resolve [their] complaints and to stop [the former Deputy Director-General, Corporate]’s bullying behaviour. [The former Senior Manager, Business Intelligence] expressed particular concern that [they] would be victimised by [the former Director-General] and [the former Deputy Director-General, Corporate] since they were the subject of [their] complaints and also the most senior officers at ACT Health. ... [The ACT Health Human Resources officer] suggested that our client and other aggrieved staff should raise their concerns externally and organise meetings to see the Minister for Health or Commissioner for Public Administration.

- 3.20 In response to a question under oath or affirmation on 9 April 2018, relating to whether they had received any allegations of inappropriate behaviour from the Senior Manager, Business Intelligence, the ACT Health Human Resources officer advised:

... I had one interaction with [the former Senior Manager, Business Intelligence]. [They came] down to the area, and both [Senior Manager Employment Services] and ... who was ... second-in-charge of the Employee Relations area, weren’t available. So [the former Senior Manager, Business Intelligence] came and spoke to me about a meeting [they had] just left. And [they] alleged in that conversation that [the former Deputy Director-General, Corporate] had bullied [the former Executive Director, Performance Information] in front of ... the general group. And [the former Senior Manager, Business Intelligence] had then responded, saying ... “Your behaviour is inappropriate.” That was the end of that conversation in regards to the detail [they] provided.

And then [the former Senior Manager, Business Intelligence] said to me, “What do I do from here?” And I said, “Look, the normal circumstances, because of the position that [the former

Deputy Director-General, Corporate] holds, you would have to go to [their] boss, which would be the Director-General.”

And [the former Senior Manager, Business Intelligence] said, “Well, obviously I can’t go there because ... [the former Director-General] brought [the former Deputy Director-General, Corporate] into the organisation.” I said – well, my reply to that was – my next step was, “Then you’d have to go to Chief Minister’s. You’d have to contact ... someone in Chief Minister’s, whether that’s the head of service or someone at that level and actually raise the allegations to that level.”

... [the former Senior Manager, Business Intelligence] said, “Yep. Okay. Do you know who that is?” And I said, “Well, ... the [the Head of Service].” And I mentioned the [the former Public Sector Standards Commissioner] as well, as the two senior people in Chief Minister’s. And that was the last thing that [they] had a conversation with me about.

- 3.21 In an interview under oath or affirmation on 9 April 2018 the ACT Health Human Resources officer was asked what action was taken following the exchange:

Audit Office

... And did you take any action after that conversation?

ACT Health Human Resources officer

No, I didn’t.

Audit Office

No?

ACT Health Human Resources officer

I just left it with [the former Senior Manager, Business Intelligence].

Audit Office

... Was that [their] expectation?

ACT Health Human Resources officer

I think so. [They] really just wanted to have a chat. I think [they] wanted to tell someone what had happened, and then [they] just wanted to know where [they] could go further. So obviously I started with the DG. And then [their] comment was, “Well, no, I can’t go there.” And then that’s when we discussed either [the Head of Service] or [Public Sector Standards Commissioner] would be [their] next steps.

- 3.22 The ACT Health Human Resources officer advised that they made a record of the conversation, but did not retain it.

- 3.23 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

In relation to the May 2016 “complaint” it is clear that the ACT Health Human Resources Officer did not perceive the conversation to be the making of a complaint about [former Deputy, Director-General, Corporate]. Rather, the Officer perceived the substance of the conversation with [former Senior Manager, Business Intelligence] as being related to a request for advice about how to make a complaint, and to whom the complaint should be made. Given the manner in which the conversation took place, and the reality that HR Officers often receive enquiries of this nature without an actual complaint being made, there is no evidence to substantiate a finding that [former Senior Manager, Business Intelligence] made “allegations of bullying” to ACT Health in May 2016.

- 3.24 In late May 2016 the former Senior Manager, Business Intelligence had a conversation with an ACT Health Human Resources officer in relation to the behaviour of the Deputy Director-General, Corporate. The ACT Health Human Resources officer in an interview under oath or affirmation recalled that the former Senior Manager, Business Intelligence was seeking advice as to how they could make a complaint about the former Deputy Director-General, Corporate (and, in doing so, expressed concern that they could not make a complaint to the former Director-General). The former Senior Manager, Business Intelligence has since advised that they were making a complaint at the time. The ACT Health Human Resources officer recalls that they provided advice to the effect that the issues could be raised with the Head of Service or Public Sector Standards Commissioner and that this advice was satisfactory to the former Senior Manager, Business Intelligence. No contemporaneous records were kept in relation to the conversation and the ACT Health Human Resources officer did not raise the matter with their supervisor or other managers within ACT Health, including the former Deputy Director Director-General, Corporate.
- 3.25 In a response to the final proposed report on 27 July 2018 the former Deputy Director-General, Corporate advised, specifically with respect to paragraph 3.24:

I also seek to clarify the comments made in paragraph 3.24 of the ... Report, where statements have been included that address retrospective complaints being made by the former Senior Manager, Business intelligence about my behaviour. At no point was any allegation of inappropriate behaviour put to me for comment (or subject to any investigation), nor am I aware of any similar complaints being made about me in the time I held the role of Deputy Director-General, Corporate.

Complaint about former Deputy Director-General, Corporate (July 2016)

- 3.26 On 1 July 2016 the former Senior Manager, Business Intelligence made a complaint via email to the former Deputy Director-General, Corporate about their behaviour.
- 3.27 The complaint is described in a letter from the Senior Manager, Business Intelligence's legal representative to the ACT Head of Service dated 29 June 2017:

In late June 2016, our client and [the former Executive Director, Performance Improvement] were holding a teleconference with the Australian Institute of Health and Welfare (AIHW) in [the former Executive Director, Performance Improvement]'s office when [the former Deputy Director-General, Corporate] entered the office unannounced and angrily shouted "get off the phone ... get off the phone now!". Our client told [the former Deputy Director-General, Corporate] that they were in the middle of a teleconference with AIHW. [The former Deputy Director-General, Corporate] nonetheless repeated [their] demand for them to "get off the phone". Our client observed that [the former Deputy Director-General, Corporate] appeared red in the face and upset and that [the former Executive Director, Performance Improvement] appeared visibly shaken by [the former Deputy Director-General, Corporate]'s behaviour. The telephone call was ended and our client left the room after which [the former Deputy Director-General, Corporate] and [the former Executive Director, Performance Information] had a private meeting.

...

Our client immediately emailed [the former Deputy Director-General, Corporate] and expressed [their] concerns about [the former Deputy Director-General]'s behaviour. [They]

stated that [the former Deputy Director-General]'s behaviour towards [themselves] and [the former Executive Director, Performance Information] was inappropriate and not what [they] would expect from any employee, let alone a Senior Executive. [They] stated that [the former Deputy Director-General]'s behaviour did not display the values of the organisation, including integrity, respect and care. Our client also requested that [the former Deputy Director-General] meet with [them] to discuss [their] concerns in more detail.

[The former Deputy Director-General, Corporate] has not responded to [this complaint].

- 3.28 The Audit Office obtained a copy of the email that the former Senior Manager, Business Intelligence sent to the former Deputy Director-General, Corporate on 1 July 2016 which stated:

I witnessed today the way you talked to [the former Executive Director, Performance Information] in [their] office.

I must say that I am disturbed by the way you conduct yourself, and the way you approach conversations with key staff in the organisation.

I have heard many people raise concerns about different discussions they have with you, and the types of comments you make to people – these people feel bullied and harassed, however I wasn't there to witness it first-hand. But standing here today while you talked to [the former Executive Director, Performance Information] in that manner made me concerned.

... you are a senior manager in this organisation. An organisation that suggests its core values include care, respect, and integrity. However, this is not being demonstrated by you and is causing a great deal of unrest and fear across the board.

I don't see that this type of behaviour is acceptable at any level, or in any organisation and I request that you consider your approach before any further damage is done to really good people.

I would be very happy to meet with you at any time that suits to discuss my concerns further.

- 3.29 The former Deputy Director-General, Corporate did not reply to the email, but forwarded the email to the former Director-General with the following additional message:

I have just received this. ... I am obliged to pass this onto you.

My suggestion is I meet with you with [the former Executive Director, Performance Information] to discuss. My perspective on this is I approached [the former Executive Director, Performance Information] in [their] office. ... [they were] in (sic) the phone with ahiw (sic) and I asked [them] to end the phone call to expedite the production of the draft performance agreement re Calvary.

[The former Senior Manager, Business Intelligence]'s interpretation is very interesting. I subsequently spoke with [the former Executive Director, Performance Information] following our chat re Calvary and there was no semblance of discomfort ... in fact quite the reverse.

I will discuss this with you later today and leave this with you to consider.

- 3.30 In relation to the events of the day, in an interview under oath or affirmation on 11 April 2018, the former Deputy Director-General, Corporate recalled:

... So what I ... did was I approached the office. I do remember [the former Executive Director, Performance Information] on the phone with AIHW. I asked [them] to hop off the phone ... but hopping off the phone didn't come with a scream, a shout, a kick, absolutely not. I think ... the way I would interpret it, it was a very opportunistic interpretation. And I'll say no more.

...

It was ... not a conversation with AIHW that looked like it was ... that important. It certainly wasn't my impression ... having [the former Executive Director, Performance Information] sitting down in the chair, from memory, and having [the former Senior Manager, Business Intelligence] standing at the door and [another senior officer] all having a laugh and a giggle outside the front door. ... my observation being, well, it can't be that important. So, ... tactfully, as tactfully as I could, and I may have been in a hurry that day, but I certainly didn't go in ... kicking, screaming, shouting or anything at all. Quite the reverse. And I did ask respectfully [the former Executive Director, Performance Information] to get off the phone so I could have a conversation with [them] about when was I going to receive the performance agreement, which I was being asked for by a third party, which I was being compelled to provide to a DG, and that was late.

3.31 In a response to the draft proposed audit report on 29 May 2018 the former Executive Director, Performance Information advised:

... the DDG notes, in response to claims that [they] acted in a threatening manner in directing me to end a call which I was on to the AIHW, that "there was no semblance of discomfort [from me] ... in fact quite the reverse". This is not true. I was distressed by [their] approach and the incident related to telling me to get off the phone (in a direct and angry manner) was part of pattern which included the DDG telling me that my "neck was in a noose" (for actions not completed for responsibilities outside of my role) and another statement following a meeting that [they were] "going to "pull my team apart". My understanding ... made it difficult to make my concerns known within the hierarchy.

3.32 In a response to the final proposed report on 27 July 2018, legal representatives on behalf of the former Director-General advised:

[The former Director-General] stands by [their] comments that upon being questioned about the exchange, [the former Executive Director, Performance Information] was relaxed about the exchange and indicated that it was no big deal. If [the former Executive Director, Performance Information] had added any further information, including any suggestion of inappropriate behaviour by [the former Deputy Director-General,], of course [the former Director-General] would have acted on that information, including by following the SOP if it was applicable. However, [the former Director-General] had a single email, where bullying is mentioned, though not alleged. [The former Director-General] reviewed the email carefully, and made further enquiries. At no time was a complaint made that [the former Senior Manager, Business Intelligence] or [the former Executive Director, Performance Information] were being bullied by [the former Deputy Director-General, Corporate].

3.33 In an interview under oath or affirmation on 16 April 2018, the former Director-General advised that following receipt of the email from former Deputy Director-General, Corporate:

... in the scheme of what I've witnessed in my life, that is not a hang-able offence. But it keeps getting raised. ... yes, [the former Deputy Director-General, Corporate] shouldn't have spoken to [the former Executive Director, Performance Information] like that. And yes, [they] did. But interestingly, it was [the former Senior Manager, Business Intelligence] who raised the issue ...

And I spoke to [the former Executive Director, Performance Information] about it. And [the former Executive Director, Performance Information] said it wasn't a big deal.

3.34 In an interview under oath or affirmation on 16 April 2018, the former Director-General also advised:

And I spoke to, ... I can't remember if it was [the acting Executive Director, People and Culture] or [the Executive Director, Human Resources] at that stage, but I spoke to HR about it, and I

thought the best way to deal with it was speak directly to [the former Executive Director, Performance Information], ... about what's happening.

...

But it didn't go anywhere, because it wasn't a – it was an issue of – and this is when I talk about the – what's the issue of, you know, the [people], you know, and just I could see there would have been ..., [the former Executive Director, Performance Information] would have had [their] feet up probably laughing on the phone. [The former Senior Manager, Business Intelligence] and the – I can see how it happened. [The former Deputy Director-General, Corporate] barked, "Get off the phone." [They] shouldn't have done it.

- 3.35 In a response to the draft proposed report on 1 June 2018 the former Deputy Director-General, Corporate advised:

When I became aware of [the former Senior Manager, Business Intelligence's] complaint regarding my conduct (which [they] emailed directly to me) I considered it would be inappropriate for me to involve myself in the resolution of [the former Senior Manager, Business Intelligence's] issue. Less than 20 minutes after receiving the complaint, I forwarded [the former Senior Manager, Business Intelligence's] email to the former Director-General, providing a brief explanation as to how I perceived the issues raised, and clearly stated that I would "leave this with [the former Director-General] to consider".

The former Director-General provided verbal feedback to me following discussions with the former Executive Director of Performance and Information, and indicated that there were no issues to pursue arising from [the former Senior Manager, Business Intelligence's] complaint.

- 3.36 In a response to the final proposed report on 27 July 2018 the former Deputy Director-General, Corporate advised:

I reiterate ... that I have not been trained by ACT Health about how to best manage complaints or respond to instances of misconduct, and rely almost entirely on advice from HR before acting. In my view, I took the most appropriate course of action in removing myself from the process, and relied on the former Director-General to manage the situation properly, given I was the subject of the former officer's concerns.

- 3.37 In a response to the final proposed report on 27 July 2018, legal representatives on behalf of the former Director-General advised:

... [the former Director-General] did in fact act on the information [they] received in the email. [They] immediately spoke to HR and made enquiries with the individuals that were directly involved in the exchange to satisfy [themselves] that that there was nothing more to the exchange than that that was reported by [the former Senior Manager, Business Intelligence] and admitted by [the former Deputy Director-General, Corporate]. The actions taken by [the former Director-General] reasonably established that the relevant conduct did not involve bullying ...

- 3.38 On 1 July 2016 the former Senior Manager, Business Intelligence sent an email to the former Deputy Director-General, Corporate complaining about their behaviour. The former Deputy Director-General, Corporate did not respond to the former Senior Manager, Business Intelligence but forwarded the email to their direct supervisor, the former Director-General, along with a suggestion as to how the complaint could be handled. In an interview under oath or affirmation, the former Director-General advised that they sought advice from ACT Health Human Resources and then spoke directly to the former Executive Director,

Performance Information about the incident. There is no evidence that a response was provided to the former Senior Manager, Business Intelligence in relation to the complaint.

3.39 The handling of the complaint by the former Deputy Director-General, Corporate and former Director-General did not align with existing ACT Health policy and was not effective. While the former Deputy Director-General, Corporate and former Director-General met some of the 'Information Gathering requirements' of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment (SOP)* (February 2011), there is no evidence of how other requirements of the policy were addressed, including:

- 'the expectations both parties had/have for resolving the issue';
- 'any actions each of the parties agreed to for gaining resolution'; and
- 'management follow up and any further recommendations'.

3.40 While the former Director-General states that they considered the allegation in the email dated 1 July 2016, consulted with ACT Health Human Resources staff and spoke to the former Executive Director, Performance Information directly on the matter, they did not meet the requirements and recommendations of the ACT Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (February 2011) to:

- inform the staff/s concerned that no disciplinary action will be taken, and that an investigation will not take place;
- discuss with all parties the behaviours expected from them to repair and maintain a professional working relationship; and
- arrange a follow up discussion to ensure expectations have been met.

3.41 There is no evidence that ACT Health considered informal resolution processes in response to the allegation of 1 July 2016 and it is apparent that principles of the ACT Health *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* were not met, specifically that:

- 'wherever possible, complaints should be resolved by a process or discussion, cooperation and conciliation. The aim is to reach an acceptable outcome that minimises any potential detriment to ongoing relationships'; and
- 'both the staff member raising the complaint (the complainant) and the person/persons against whom the complaint is made (the respondent) will receive appropriate information, support and assistance in resolving the grievance'.

3.42 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

In relation to the July 2016 "complaint about the formal Deputy Director-General" we deny that the email [the former Senior Manager, Business Intelligence] sent to [the former Deputy Director-General, Corporate] constituted a complaint for the purposes of the Standard Operating Procedures regarding Anti-Discrimination, Bullying and Harassment (**SOP**) or a

complaint about allegations of bullying. You will note the definition of Bullying in the SOP: *Bullying is the **repeated, unwelcome** behaviour of a person/s.* [our emphasis]

You will further note that [the former Senior Manager, Business Intelligence] raises concerns about what other people have said, though notes [that they have] not ever witnessed any behaviour first hand. This does not suggest that [the former Senior Manager, Business Intelligence] has been bullied or that [former Senior Manager, Business Intelligence] has witnessed [the former Deputy Director-General, Corporate] bully someone else given that [they state] this was the first time [they] had personally felt concern. While the term "bullying" is mentioned in the email, rumour and innuendo do not constitute a basis for anyone acting under the SOP. Simply asserting the word "bullying" does not make it so.

You will further note that the SOP contemplates that a complainant under the SOP is a person who raises a complaint with **their manager**. [The former Deputy Director-General, Corporate] was not [the former Senior Manager, Business Intelligence]'s manager, and nor was [the former Director-General] [the former Senior Manager, Business Intelligence]'s manager. The respondent is defined in the SOP as the staff member against whom a **complaint has been lodged**. No complaint of bullying was "lodged" with [the former Senior Manager, Business Intelligence]'s manager. For the formal and informal process under the SOP to be enlivened, [the former Deputy Director-General, Corporate] would have needed to raise allegations of repeated unreasonable behaviour involving [former Deputy Director-General, Corporate] with [their] **manager**, [the former Executive Director, Performance Information]. It would then have been [the former Executive Director, Performance Information]'s responsibility to conduct the information gathering process under the SOP, not [the former Director-General].

[The former Director-General] did not consider the email to be a bullying complaint, or a complaint containing allegations of bullying. [The former Director-General] rightly sought to clarify that the person about whom the concern was raised ([the former Executive Director, Performance Information]) did not wish to add anything further or raise any concerns about [the former Deputy Director-General, Corporate]'s behaviour. [The former Executive Director, Performance Information] was very relaxed about the exchange, informing [former Director-General] that it was 'no big deal.' These facts are not in dispute. [The former Director-General] acted with purpose and personally in relation to this issue - actions that should be commended rather than condemned in a report to be tabled in the Legislative Assembly.

You have made findings against [the former Director-General] for failing to follow a poorly drafted policy that had no application to [them] in the circumstances that you have identified.

There is no evidence to substantiate a finding that [the former Senior Manager, Business Intelligence] made "allegations of bullying" about the former Deputy Director-General in July 2016, and on the basis of the content of the SOP it is inappropriate for you to find that "the handling of the complaint by the former Deputy Director-General or Director-General was not effective or in accordance with existing ACT Health policy."

Given the issues outlined above, [the former Director-General] categorically rejects your overall conclusion that "ACT Health did not effectively manage ... allegations of bullying made by these officers against the former Director-General and former Deputy Director-General". No such allegations of bullying were made.

[The former Director-General] also categorically rejects your overall conclusion that "appropriate processes were not followed by the Former Director-General and Former Deputy Director-General" - for the reasons outlined above the SOP was simply not applicable to the information provided.

- 3.43 These comments are noted, as is the comment that the former Director-General 'did not consider the email to be a bullying complaint, or a complaint containing allegations of bullying'. The former Director-General asserts that the former Executive Director, Performance Information 'was very relaxed about the exchange, informing [former

Director-General] that it was 'no big deal''. This is disputed by the former Executive Director, Performance Information.

- 3.44 The legal representatives on behalf of the former Director-General noted that the definition of 'bullying' for the purpose of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) is 'repeated, unwelcome behaviour of a person/s' and because the former Senior Manager, Business Intelligence only raised one instance of witnessed behaviour the procedure did not apply. The legal representatives on behalf of the former Director-General also noted that the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) 'contemplates that a complainant under the SOP is a person who raises a complaint with their manager' and that because neither the former Director-General nor former Deputy Director-General, Corporate was the manager of the former Senior Manager, Business Intelligence they had no responsibility for actioning or responding to the information.
- 3.45 Such an interpretation of the *Standard Operating Procedure – Anti Discrimination, Bullying and Harassment* (SOP) (February 2011) misses the intent and spirit of the procedure and its emphasis on implementing appropriate processes to recognise and manage complaints of inappropriate behaviours. The language of the email makes it clear that a complaint was being made about the behaviours of the former Deputy Director-General, Corporate and this was not effectively managed for the reasons outlined in paragraphs 3.38 to 3.41.

Complaint about former Deputy Director-General, Corporate and former Director-General (July 2016)

- 3.46 In mid-July 2016 a complaint was made in relation to the actions of the former Director-General and former Deputy Director-General, Corporate. It was asserted that the complaint was made to the former acting Executive-Director of Human Resources at ACT Health.
- 3.47 The event the mid-July 2016 complaint related to is described in a letter from the Senior Manager, Business Intelligence's legal representative to the ACT Head of Service dated 29 June 2017. By way of context, the letter from the Senior Manager, Business Intelligence's legal representative noted 'In late June 2016, our client wrote to [the former Director-General] and requested a one-on-one meeting with [them] to discuss [their] concerns about [their] treatment and [their] future at ACT Health'. A telephone call was arranged for the afternoon of 18 July 2016 with the former Director-General, but this did not proceed and the acting Executive Director, People and Culture called instead.
- 3.48 According to the letter from the Senior Manager, Business Intelligence's legal representative to the ACT Head of Service dated 29 June 2017:
- ... [the former acting Executive Director, People and Culture] asked our client what [their] concerns were. [They] explained to [the former acting Executive Director, People and Culture] that [they] felt victimised by [the former Director-General] and [the former Deputy Director-General, Corporate] since [they] had made [their complaints]. [They] explained that since that time, [they] had been isolated by [the former Director-General] and [the former Deputy

Director-General, Corporate] and was no longer able to perform the functions necessary as a senior member of staff, a leader and an advisor. [They] explained that immediately prior to making the complaints [the former Director-General] had endorsed [their] ARIN and [they] had been a 'go to [person]' for [the former Director-General] and [the former Deputy Director-General, Corporate]. After making the complaints the ARIN had been withheld and [they were] immediately isolated and frozen-out by [the former Director-General] and [the former Deputy Director-General, Corporate] with no explanation as to why.

- 3.49 In an interview under oath or affirmation on 5 April 2018, the former acting Executive Director, People and Culture referred to their contemporaneous notes of the meeting and responded to the question 'did [the Senior Manager, Business Intelligence] make any assertions or allegations to you in relation to [the former Deputy Director-General, Corporate or former Director-General] of bullying on their part?' by saying:

... in this first phone call on 18 July [they] said that [they] gave feedback about the first restructure ..., the whole departmental restructure, and [they] thought that it was respectful, as in, [they were] respectful, but [they feel] victimised since. ... And then [they go] on to talk about how [they feel] [their] role has changed and ... basically [they were] – I think what [their] aim was, was to say that [their] role has changed so much that [they] should be considered for a redundancy.

- 3.50 When asked if this was interpreted as an allegation of inappropriate behaviour on the part of the senior ACT Health executives the former acting Executive Director, People and Culture advised:

... that's when I asked [them], "What do you mean?" And [they] said that [they feel] ... – as a SOG A – ... feels they no longer had the influence [they] once had, that this has been stripped away. It's no longer the job [they] applied for, where as a senior advisor, ... [they] would point out where things are heading in the wrong direction. [They had] evidence of what [their] previous role was. [They feel they have] been isolated and not invited to things. So when I asked [them] to flesh it out, that's what [they] provided me with.

- 3.51 When asked if the Senior Manager, Business Intelligence's assertions around victimisation were put to the then Director-General or then Deputy Director-General, Corporate the acting Executive Director, People and Culture advised:

... I believe I would have pretty much read out the theme of it, which – I've made a point of saying here ... I've written down the bottom that [they] said comments like, "[They want] to leave cleanly without making it noisy or messy." I would have relayed that ... back. As I said, when... I asked [them], and [they] said [they feel] victimised. ... I asked [them], "What does that mean? What does it look like?" That's when [they] talked about ... not having the influence [they] once had. ... which I'm not sure counts as being victimised. [They] said [they] was isolated and not invited to things. But when I asked [them] for that ... I haven't written if I asked [them] more about that.

- 3.52 In an interview under oath or affirmation on 5 April 2018 with the former acting Executive Director, People and Culture the following exchange took place:

Audit Office

In that conversation, or even the conversation in July, did you ever consider that as being potential misconduct or inappropriate behaviour on the part of the executives?

Former acting Executive Director, People and Culture

... on the first ... phone call, as I said, I asked [them] – when [they] said [they] feel victimised, I did ask [them], “What do you mean by that? What does that look like?” And then when [they] gave me that answer, ... I determined that that didn’t look like bullying to me. That was [their] perception of how [their] role had changed. It wasn’t about “Somebody had yelled at me. Somebody had directed me” ... it didn’t strike me as something that would stand up under the EA as bullying or misconduct behaviour.

- 3.53 In a response to the draft proposed report on 5 June 2018, legal representatives on behalf of the former Director-General advised:

In relation to the July 2016 "complaint," it is clear that [former acting Executive Director, People and Culture] did not consider the concerns raised by [former Senior Manager, Business Intelligence] in the context of [them] seeking a voluntary redundancy to be a complaint involving allegations of bullying. [Former Senior Manager, Business Intelligence] was agitating for payment of a redundancy to assist [them] to transition out of the organisation in circumstances where [their] family had already relocated interstate. There is no evidence to substantiate a finding that former Senior Manager, Business Intelligence made a "allegations of bullying" to ACT Health HR in July 2016.

- 3.54 On 18 July 2016, during a conversation with the acting Executive Director, People and Culture, the former Senior Manager, Business Intelligence raised concerns about their treatment by senior ACT Health executives (the former Director-General and former Deputy Director-General, Corporate). The conversation occurred in the context of the former Senior Manager, Business Intelligence seeking a ‘voluntary redundancy’ from the organisation and an associated payment. In an interview under oath or affirmation the acting Executive Director, People and Culture advised that they considered the information that was provided and asked for specific examples of the incidents. The acting Executive Director, People and Culture considered that the allegations were general and lacked specificity. The acting Executive Director, People and Culture made brief, handwritten contemporaneous notes associated with the conversation. They advised that they had a conversation in which they ‘would have pretty much read out the theme of [the complaints] to the former Director-General and former Deputy Director-General, Corporate’. There is no documentation of this conversation or of the consideration of the allegations i.e. why they did not amount to potential bullying.

Complaints to the former Commissioner for Public Sector Standards

Complaint about former Deputy Director-General, Corporate and former Director-General (August 2016)

Complaints about behaviours of former Deputy Director-General, Corporate and former Director-General

3.55 On 4 August 2016, the former Executive Director, Performance Information and former Senior Manager, Business Intelligence met with the Commissioner for Public Sector Standards to discuss their concerns about the behaviours of the former Director-General and Deputy Director-General, Corporate.

3.56 In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner outlined their recollection of these complaints:

... there were allegations from them about instances of which one – the one that I remember the most – well, there were two. And the others were kind of like this. So there were maybe three or four allegations. But the one that I remember in particular was that [the former Executive Director, Performance Information] and [Senior Manager, Business Intelligence] were sitting in an office, one of them was on the phone to someone, [the former Deputy Director-General, Corporate] came in and told whoever it was on the phone to get off the phone, that [they] needed to urgently talk to them about a matter, and that that was all done in a very rude manner. So there ... were a couple of other complaints about things like that. And there was a particular complaint from [the former Senior Manager, Business Intelligence] that [they] sent an email to [the former Director-General] about the proposed restructure that [they] didn't respond to.

3.57 The former Public Sector Standards Commissioner subsequently met with the former Director-General on 5 August 2016 and the former Deputy Director-General, Corporate on 9 August 2016 to discuss the complaints. In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner outlined their recollection of the discussion of 5 August 2016 with the former Director-General:

And on 5 August I put the allegations to [the former Director-General]. Most of them, as I recall, were about [the former Deputy Director-General, Corporate]. So of the three or four, ... there was that one that I've just talked to you about, and there were a couple of others. And then there was this one about the restructure, the email. So [the former Director-General] didn't know about ...the ones that related to [the former Deputy Director-General, Corporate], but [they] said, you know, "Please ask [them], you know, of course."

... I in some manner – and as I said, I can't recall if it was email or phone – put that back to [the former Senior Manager, Business Intelligence]. And I can't even recall if it was through [the former Executive Director, Performance Information], ... And they acknowledged that, yes, [the former Senior Manager, Business Intelligence] ... did send an inappropriate email about the restructure, and ... actually of the allegations, that one – you know, it was no longer the case. ... so that was, as I recall, the only sort of specific thing in relation to [the former Director-General].

3.58 In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner outlined their recollection of the discussion of 9 August 2016 with the former Deputy Director-General, Corporate:

When I put the allegations to [the former Deputy Director-General, Corporate], [they were] quite careful and clear about a different version of events, that really, to my mind, showed that these were officers who were being held up for their performance and were finding that very difficult to deal with.

3.59 In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner said:

So the complaints came to me after they were suspended. And of course I took them seriously. And I put them back to both [the former Director-General] and [the former Deputy Director-General, Corporate]. But at the end of the discussions, the separate discussions with [the former Director-General] and [the former Deputy Director-General, Corporate], I believed, given there was no other corroboration, I believed that they were a different version of events of what had happened, which is not unusual. So in my mind they were perceived by one party as threatening, dominating, bullying, and perceived by the other party as being possibly abrupt, but actually wanting information about the performance at hand. And given ... that there were I think three or four specific complaints, but weren't really – didn't show a pattern over a long period of time of ... intimidation or, ... anything that ... could be perceived as bullying, I really took them as a different perception of manner.

...

Clearly leading up to the time that they were suspended, things were fraught and fractious between officers.

3.60 In a response to the draft proposed report on 29 May 2018 the former Public Sector Standards Commissioner advised:

... I was not made aware of any witnesses to the incidents by the complainants and having interviewed them and the subjects of the complaints I understood the matters to have been exhausted as much as they could have been.

3.61 On 4 August 2016, the former Executive Director, Performance Information and former Senior Manager, Business Intelligence met with the Public Sector Standards Commissioner to discuss their concerns about the behaviours of the former Director-General and former Deputy Director-General, Corporate. In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner advised that they had separate discussions with the former Director-General and former Deputy Director-General, Corporate in relation to the issues that were raised. The former Public Sector Standards Commissioner advised that 'given that there were I think three or four specific complaints [that] didn't show a pattern over a long period of time of – of intimidation or, you know, anything that could – could be perceived as bullying, I really took them as a different perception of manner'. In doing this, however, it is noted that faced with conflicting stories of the events, the Commissioner decided that they would take no further action in relation to the allegations made by the former employees. In a response to the draft proposed report on 29 May 2018 the former Public Sector Standards Commissioner advised 'I was not made aware of any witnesses to the incidents by the complainants and having interviewed

them and the subjects of the complaints I understood the matters to have been exhausted as much as they could have been’.

Complaints about procedural fairness of investigation process

3.62 On 24 August 2016 the former Senior Manager, Business Intelligence emailed the former Public Sector Standards Commissioner to outline their concerns about a lack of procedural fairness associated with their treatment (and the treatment of the former Executive Director, Performance Information) as compared to the former Director-General and former Deputy Director-General, Corporate. The email stated in part:

Many thanks for meeting with [the former Executive Director, Performance Information] and I a few weeks ago regarding our concerns relating to our personal circumstances and the alleged misconduct process.

...

One thing that greatly concerns me is that formal advice provided to us is that the nature of the allegations made against us were very “broad” which has led to the PWC audit prior to it going to PSU for formal investigation. However, despite the allegations being broad and nonspecific, we were suspended immediately with no opportunity to discuss, make sense of, or refute whatever claims have been made.

Given this, how is it that the allegations [the former Executive Director, Performance Information] and I provided to you in our meeting regarding bullying and harassment from [the former Director-General] and [the former Deputy Director-General, Corporate] ... different? It strikes me as odd that both [the former Director-General] and [the former Deputy Director-General, Corporate] were not suspended on misconduct grounds immediately as had been done to us.

... can you confirm why [the former Executive Director, Performance Information] and I are faced with a different process and set of circumstances to that of [the former Director-General] and [the former Deputy Director-General, Corporate]? My understanding is that you discussed our concerns with [the former Director-General] and [they were] given the opportunity to look into these claims – why was this not afforded to us?

3.63 The former Public Sector Standards Commissioner responded to the email on 25 August 2016 stating:

As I said to [the former Executive Director, Performance Information] on the phone I can confirm that I put the allegations to [the former Director-General] soon after our meeting and [they] had the opportunity to respond to them.

[The former Executive Director, Performance Information] may have then referred to you the advice back from ... ACT Health which is that, as I understand it, when PwC has completed the assurance report, the matter will be referred to the Professional Standards Unit (PSU) in CMTEDD for investigation.

When the PSU investigation commences, you will of course receive the details of the allegations as well as the opportunity to respond to them.

Purported Public Interest Disclosure about former Deputy Director-General, Corporate and former Director-General (September 2016)

3.64 On 7 September 2016, a letter was sent to the former Public Sector Standards Commissioner from the legal representative of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence. The letter purported to make a public interest disclosure under the *Public Interest Disclosure Act 2012*. The letter stated, in part:

... The disclosure concerns behaviour towards or in relation to [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] of ACT by [the former Director-General] and [the former Deputy Director-General, Corporate].

...

The conduct is *disclosable conduct* within the meaning of section 8 of the Act because it is or amounts to action of public officials that is maladministration that adversely affects a person's interests in a substantial and specific way – which is defined to include 'an action about a matter of administration that was... unreasonable, unjust, oppressive or improperly discriminatory ... [and or] based wholly or partially on improper motives'.

That is, the behaviour of [the former Director-General] and [the former Deputy Director-General, Corporate] towards [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] as particularised in the attached Statements of Facts amounts to maladministration that has adversely affected [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] interests in a substantial way.

3.65 In an interview under oath or affirmation on 18 April 2018, the former Public Sector Standards Commissioner confirmed that the concerns raised in the e-mail were similar to those that they had discussed with the two officers on 4 August 2016. The former Public Sector Standards Commissioner said:

... I felt as though I had dealt with the complaints. So when, ... in September the PID came in from [officer's legal representative], and they were the same allegations, after liaising with the Government Solicitor's Office, ... I wrote back and said no, I didn't believe that these were a Public Interest Disclosure. They ... were better dealt with under a human resources process, and the misconduct process was underway. You know, I dealt with them.

...

They were very low level. They weren't able to – in my mind they weren't able to develop a case that this was bullying.

3.66 The former Public Sector Standards Commissioner did not consider that the matters raised constituted a public interest disclosure. In a letter of 24 October 2016 to the legal representative, the former Public Sector Standards Commissioner responded to the purported public interest disclosure. The response states in part:

In substance the allegations are of poor behaviour towards both [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] arising from the preparation and presentation of the ACT Health 3rd Quarterly Performance Report. It is also alleged that certain incidents demonstrate alleged improper motives on the part of [the former Director-General] and [the former Deputy Director-General].

In my opinion the matters raised concern the behaviour of Territory public officials within an ACT Government workplace. The concerns are more appropriately the subject of an independent investigation with the framework of the *Public Sector Management Act 1994* and the Administrative and Related Classifications Enterprise Agreement 2013-2017. I have accordingly decided pursuant to section 20 (g) of the *Public Interest Disclosure Act 2012* (the Act) not to investigate the alleged conduct as a public interest disclosure. I can advise that the investigation has commenced and your clients have been contacted by the investigator.

I received verbal complaints from [the former Executive Director, Performance Information] and [the former Senior Manager, Business Intelligence] on 4 August 2016 regarding the alleged “improper motives” of [the former Director-General] and [the former Deputy Director-General, Corporate]. As a result, I held separate discussions with both [the former Director-General] and [the former Deputy Director-General, Corporate]. As a result of those discussions, I am satisfied that the substance of these allegations has already been investigated. As such, pursuant to section 20 (f) of the Act, no further action will be undertaken. I have already advised both parties that I had assessed the allegations made against [the former Director-General] and [the former Deputy Director-General, Corporate] in this regard.

- 3.67 The former Public Sector Standards Commissioner replied by e-mail to the two officers (through their legal representative) on 24 October 2016. The former Public Sector Standards Commissioner advised that, in their opinion, the concerns they had raised:

... are more appropriately the subject of an independent investigation within the framework of the *Public Sector Management Act 1994* and the [relevant enterprise agreement]. I have accordingly decided pursuant to section 20(g) of the *Public Interest Disclosure Act 2012* ... not to investigate the alleged conduct as a public interest disclosure. I can advise that the investigation has commenced and your clients have been contacted by the investigator.

- 3.68 Notwithstanding that the former Public Sector Standards Commissioner advised that they did not consider the matters raised to be a public interest disclosure, the former Commissioner referred to aspects of the *Public Interest Disclosure Act 2012* as a rationale for not investigating the matter further. In this respect, section 20 of the *Public Interest Disclosure Act 2012* states:

An investigating entity may decide not to investigate a public interest disclosure, or may end the investigation of the disclosure, if—

...

(f) the investigating entity is reasonably satisfied that the substance of the disclosure has already been investigated under this Act or another law in force in the ACT; or

(g) there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure.

- 3.69 In relation to paragraph 20(f) of the *Public Interest Disclosure Act 2012*, in an interview under oath or affirmation on 18 April 2018 the former Public Sector Standards Commissioner advised that this was a reference to the conversations that were had with the former Director-General and former Deputy Director-General Corporate on 5 August and 9 August 2016.

3.70 Dr James Popple, Principal Reviewer, CPM Reviews was engaged by the Audit Office as a subject matter expert to review processes for the handling of complaints of inappropriate workplace behaviour on the part of ACT Health senior executives and the purported public interest disclosure. In relation to the handling of the purported public interest disclosure Dr Popple advised:

... the reference in the Commissioner's e-mail to the fact that an investigation had commenced raises concerns. In an interview under oath or affirmation, the former Commissioner confirmed that [the Commissioner] view was that the officers' concerns were better dealt with under a "human resources process" and that "the misconduct process was underway"; and (later) that "it's all picked up through the misconduct investigation". The e-mail and the interview suggest that the Commissioner saw the investigation into whether there had been misconduct by the two officers as a more appropriate way to deal with the disclosable conduct, for the purposes of s 20(g) of the Public Interest Disclosure Act. But the investigation was into the alleged misconduct of the two officers. It was not an investigation into the disclosable conduct, which was the alleged misconduct of the then Director-General and the then Deputy Director-General. Presumably the Commissioner's reference, in [the Commissioner's] e-mail, to the ongoing investigation was a non sequitur, and [the Commissioner] made [their] decision under s 20(g) on the basis that there was a more appropriate way reasonably available to deal with the disclosable conduct—apart from the investigation then underway. The e-mail is unclear.

In [their] e-mail, the then Commissioner also advised that, in response to earlier complaints from the two officers, [they] had had separate discussions with the then Director-General and the then Deputy Director-General, and added:

As a result of those discussion, I am satisfied that the substance of these allegations has already been investigated. As such, pursuant to section 20(f) of the [Public Interest Disclosure Act], no further action will be undertaken.

Under s 20(f), the Commissioner had the power to decide not to investigate a public interest disclosure if [they were] reasonably satisfied that "the substance of the disclosure has already been investigated under [the Public Interest Disclosure Act] or another law in force in the ACT". No other person had investigated the officers' allegations. So, the Commissioner cannot have meant that [their] discussions with the then Director-General and the then Deputy Director-General, Corporate had led [them] to be satisfied that the substance of the allegations had already been investigated by someone else. [The Commissioner] must have meant that those discussions were part of an investigation that [they] had undertaken—presumably, under the *Public Sector Management Act 1994*. Again, the e-mail is unclear.

3.71 In a response to the draft proposed report on 29 May 2018 the former Public Sector Standards Commissioner advised:

You state in the draft proposed report ... that my advice regarding the PID allegations was confusing. Respectfully, I disagree with this conclusion.

By letter, dated 24 October 2016 ... I advised that the allegations against the former DDG and former DG would not be investigated as a PID, by reference to subsection 20 (g) of the PID Act as they are matters more appropriately investigated through the ACT public service employment framework. I further advised that the allegations against the former DDG and former DG were the same allegations that the complainants made to me on 4 August 2016, which I as Commissioner, had investigated via separate interviews with the former DG and former DDG on 5 and 9 August 2016 respectively, and I was satisfied that the substance of the allegations had already been investigated and that the complainants had been previously advised of my assessment.

I also advised in the letter that even if the allegations did constitute a PID they a) had been dealt with by the August inquiry and b) would (assuming further information etc.) not be addressed under the PID Act, but rather that a misconduct process (the usual human resource process) would be a more appropriate approach.

The reference to "I can advise that the investigation has commenced and your clients have been contacted by the investigator" was not confusion or conflation of the misconduct allegations on-hand of the former DDG and former DG on my part (as Dr Popple concludes), but was meant to suggest to the complainants that if the PSU investigation of them indicates concerns about the former DDG and former DG, and further allegations come to light, then these could be addressed later on.

To return to my initial point, I argue that given the complainants were explicitly told that their complaints were not a PID the remainder of the information is irrelevant for this review.

- 3.72 On 7 September 2016, a letter was sent to the former Public Sector Standards Commissioner from the legal representative of the former Executive Director, Performance Information and former Senior Manager, Business Intelligence. The letter purported to make a public interest disclosure under the *Public Interest Disclosure Act 2012*. The former Public Sector Standards Commissioner made a decision that the purported public interest disclosure from the two officers in September 2016 was not a public interest disclosure under the *Public Interest Disclosure Act 2012*. In doing so, the former Public Sector Standards Commissioner advised the Audit Office under oath or affirmation that 'They were very low level. They weren't able to – in my mind they weren't able to develop a case that this was bullying'. This was a decision that was open and available to the Commissioner. Notwithstanding that the former Public Sector Standards Commissioner did not consider the matters raised to be a public interest disclosure, the former Commissioner referred to aspects of the *Public Interest Disclosure Act 2012* (paragraphs 20(f) and 20(g)) as the rationale for not investigating the matter further. Paragraph 20(f) refers to 'the investigating entity [in this case the former Commissioner] is reasonably satisfied that the substance of the disclosure has already been investigated under this Act or another law in force in the ACT' and Paragraph 20(g) refers to 'there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure'. The use of two different sections of the Act is considered to create ambiguity.

RECOMMENDATION 3 RECEIVING AND MANAGING ALLEGATIONS OF INAPPROPRIATE WORKPLACE BEHAVIOURS

ACT Health should implement awareness training for Executives and managers to reinforce requirements for receiving, documenting and managing reports of inappropriate workplace behaviours.

APPENDIX A: ACT AUDIT OFFICE REPORTS RELEVANT TO PERFORMANCE INFORMATION AND REPORTING

ACT Health performance information and reporting

Since July 2012 the ACT Audit Office has conducted two audits of relevance to ACT Health's performance information and reporting:

- *Emergency Department performance Information (July 2012)*; and
- *Integrity of data in the Health Directorate (June 2015)*.

ACT Audit Office report – Emergency Department performance information

On 3 July 2012 the ACT Auditor-General report *Emergency Department performance Information* was tabled in the ACT legislative Assembly.¹² The objective of the audit was to provide an independent opinion to the Legislative Assembly on:

- the circumstances associated with the alleged misreporting of Canberra Hospital Emergency Department performance information;
- the effectiveness of the Health Directorate's systems and processes for reporting Emergency Department performance information; and
- the financial implications for the Territory associated with any potentially misreported Emergency Department performance information.

The audit concluded in part that:

Hospital records at the Canberra Hospital have been deliberately manipulated to improve overall performance information and reporting of the Canberra Hospital's Emergency Department. The very poor controls over the relevant information system means that it is not possible to use information in the system to identify with certainty the person or persons who have made the changes to the hospital records.

In relation to systems and practices for preparing performance information for public reporting the audit concluded:

The very poor systems and practices in place in the Canberra Hospital and the Health Directorate for preparing and publicly reporting performance information created the opportunity for persons to manipulate the hospital records. The Emergency Department's management information system, which is used to prepare the performance information, has very poor system access and user controls. There is a lack of governance and administrative accountability for this system, which means that there is no identifiable system owner with

¹² Auditor General Performance Audit Report: Emergency Department Performance Audit Report 6/2012.

responsibility for ensuring the integrity of the system and the appropriateness of its access and user controls.

In relation to assuring the integrity of publically reported performance information, the audit concluded:

There was also a lack of monitoring, review and assurance of the integrity and accuracy of the Health Directorate's publicly reported Emergency Department performance information. Various data validation processes are in place within the Health Directorate, but these processes have not been designed to provide assurance over the integrity and accuracy of publicly reported Emergency Department performance information.

Audit notes that the current monitoring, review and assurance processes over the publicly reported Emergency Department performance information are not consistent with the apparent importance of the performance information, as demonstrated by the significant Health Directorate management and stakeholder interest.

ACT Audit Office report – Integrity of data in the Health Directorate

On 19 June 2015 the ACT Auditor-General report *Integrity of data in the Health Directorate* was tabled in the ACT legislative Assembly. The objective of this audit was to provide an independent opinion to the Legislative Assembly on the integrity of data reported by the Health Directorate to the Independent Hospital Pricing Authority (IHPA), and to report on the effectiveness of the management of the data. The scope included the governance framework and the collection, management and reporting processes for Activity Based Funding (ABF) data.

The audit concluded in part that:

The integrity of Activity Based Funding (ABF) data reported by the ACT Health Directorate to the Independent Hospital Pricing Authority (IHPA) for Admitted Patient and Emergency Department services is adequate.

Non-admitted Patient data integrity is inadequate. The Health Directorate needs to continue to address the root causes and impacts of errors in Non-admitted Patient data, and develop and implement policies and procedures for improvement, as a high priority. This is needed to improve the integrity of data for management information purposes and for presenting accurate information to IHPA so the ACT receives the appropriate funding. The Health Directorate estimates that for the last six months the errors in Non-admitted patient data, detected by the Audit Office, could have resulted in 'around \$2 million to \$3 million' being under claimed. The Health Directorate has an opportunity to correct this data before its next submission, which is due in September 2015.

With the exception of Non-admitted Patient data the Health Directorate's management of ABF data is generally effective; however, there are opportunities for improvement.

In relation to governance and accountability arrangements for the preparation and reporting of ACT Health performance information, the report concluded:

Improvements have been made in relation to governance over the integrity of health data since the ACT Auditor-General's report on *Emergency Department Performance Information* in 2012. However, there is scope for further improvement. Governance arrangements need to be strengthened by ensuring greater clarity in the allocation of roles and responsibilities across the Health Directorate, its Performance Information Branch, Canberra Hospital and Calvary Public Hospital in relation to data integrity. Further, the lack of outcome measures and Key

Performance Indicators (KPIs) by which to manage data integrity, and the lack of assurance activities targeted at managing the key data integrity risks associated with ABF data submissions, need to be addressed.

Considerable effort has been directed to addressing most of the findings in the Audit Office's *Emergency Department Performance Information* report. Improvements in areas such as training staff in systems usage, managing user access to the systems, procedural improvements and data integrity routines implemented in the Health Directorate data warehouse environment have contributed to improved data integrity. However, there is more work to be done with respect to training, documentation and allocation of responsibilities, outcome measures, evaluation, corrective actions and assurance.

In relation to the reporting of ACT Health performance information, the report concluded:

The ACT Health Directorate's internal controls for the reporting of ABF data are inadequate for both the ABF six monthly and annual costing data submissions, in addressing the relevant data integrity risks.

The informality of procedures adversely affects the integrity of the reporting process and places a heavy reliance on a few key individuals. The lack of analytical review of the ABF six monthly data submission, and limited validation activities for the ABF costing submission, need to be addressed.

APPENDIX B: LEGISLATIVE REQUIREMENTS

Legislative requirements relating to workplace behaviours for the ACT Public Service are outlined in:

- the *Public Sector Management Act 1994* (the PSM Act); and
- *Public Sector Management Standards 2016* (the Standards).

On 1 September 2016 a number of parts of the *Public Sector Management Act 1994* were amended, including parts relating to expected workplace behaviours.

On 1 September 2016 the *Public Sector Management Standards 2016* were implemented. These replaced the *Public Sector Management Standards 2016*. A number of parts of the standards relating to expected workplace behaviours and conduct of workplace investigations were changed with the implementation of the new standards.

Values and behaviours

Public Sector Management Act 1994

The *Public Sector Management Act 1994* outlines requirements for the expected values, behaviours and conduct of ACT Public Service employees.

Post September 2016

Public Sector Values

Section 7 of the *Public Sector Management Act 1994* outlines the ACT public sector values and how they are to be applied by ACT Public Service employees:

- (1) The **public sector values** are—
 - (a) respect; and
 - (b) integrity; and
 - (c) collaboration; and
 - (d) innovation.
- (2) The public sector values must be—
 - (a) demonstrated by a public servant when acting in connection with the public servant's job; and
 - (b) applied in a way that is appropriate to the public servant's job; and
 - (c) used to inform and evaluate the operation of the service.

Public Sector Conduct

Subsection 9(1) of the *Public Sector Management Act 1994* outlines expectations for ACT Public Service employees' conduct:

- (1) A public servant must—
 - (a) take all reasonable steps to avoid a conflict of interest; and
 - (b) declare or manage a conflict of interest that cannot reasonably be avoided; and
 - (c) when acting in connection with the public servant's job—
 - (i) comply with laws applying in the Territory; and
 - (ii) comply with any lawful and reasonable direction given by a person with the authority to give the direction; and
 - (iii) if dealing with a member of the public—make all reasonable efforts to help the person to understand the person's entitlements, and any requirement the person is obliged to meet, under a territory law; and
 - (d) treat all people with courtesy and sensitivity to their rights and aspirations; and
 - (e) do the public servant's job with reasonable care and diligence, impartiality and honesty.

Subsection 9(2) of the *Public Sector Management Act 1994* provides further guidance on expectations for ACT Public Service employees' conduct:

- A public servant must not—
 - (a) behave in a way that—
 - (i) is inconsistent with the public sector values; or
 - (ii) undermines the integrity and reputation of the service; or
 - (b) take improper advantage of the public servant's job or information gained through the public servant's job; or
 - (c) improperly use a Territory resource, including information, accessed through the public servant's job; or
 - (d) without lawful authority—
 - (i) disclose confidential information gained through the public servant's job; or
 - (ii) make a comment that reasonably appears to be an official comment; or
 - (e) when acting in connection with the public servant's job—bully, harass or intimidate anyone; or
 - (f) when doing the public servant's job—apply improper influence, favouritism or patronage.

Subsection 9(3) of the *Public Sector Management Act 1994* specifically outlines that a failure to comply with subsections 9(1) and 9(2) of the *Public Sector Management Act 1994* may amount to misconduct:

For a misconduct procedure, failing to act in a way that is consistent with subsection (1) or (2) may be misconduct.

Pre September 2016

General Principles of Management

Prior to 1 September 2016, section 8 of the *Public Sector Management Act 1994* outlined general principles of management to apply to ACT Public Service employees:

In employment matters, government agencies shall be administered with an objective of giving effect to the following principles:

- (a) selection processes shall be directed towards and based on a proper assessment of merit;
- (b) all officers shall be afforded equal opportunities to secure promotion and advancement in their employment on the basis of relative merit;
- (c) best practices shall be adopted in the training and development of staff;
- (d) public employees shall be provided with safe and healthy working conditions;
- (e) public employees shall be afforded opportunities for appropriate participation in the decision-making processes relating to the administration of the government agencies in which they work.

General Obligations of Public Service Employees

Prior to 1 September 2016, section 9 of the *Public Sector Management Act 1994* outlined the general obligations of ACT Public Service employees:

A public employee shall, in performing his or her duties:

- (a) exercise reasonable care and skill;
- (b) act impartially;
- (c) act with probity;
- (d) treat members of the public and other public employees with courtesy and sensitivity to their rights, duties and aspirations;
- (e) in dealing with members of the public, make all reasonable efforts to assist them to understand their entitlements under the territory laws and to understand any requirements that they are obliged to satisfy under those laws;
- (f) not harass a member of the public or another public employee, whether sexually or otherwise;
- (g) not unlawfully coerce a member of the public or another public employee;
- (h) comply with this Act, the management standards and all other territory laws;
- (i) comply with any lawful and reasonable direction given by a person having authority to give the direction;
- (j) if the employee has an interest, pecuniary or otherwise, that could conflict, or appear to conflict, with the proper performance of his or her duties—
 - (i) disclose the interest to his or her supervisor; and
 - (ii) take reasonable action to avoid the conflict;

as soon as possible after the relevant facts come to the employee's notice;

- (k) not take, or seek to take, improper advantage of his or her position in order to obtain a benefit for the employee or any other person;

- (l) not take, or seek to take, improper advantage, for the benefit of the employee or any other person, of any information acquired, or any document to which the employee has access, as a consequence of his or her employment;
- (m) not disclose, without lawful authority—
 - (i) any information acquired by him or her as a consequence of his or her employment; or
 - (ii) any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment;
- (n) not make a comment that he or she is not authorised to make where the comment may be expected to be taken to be an official comment;
- (o) not make improper use of the property of the Territory;
- (p) avoid waste and extravagance in the use of the property of the Territory;
- (q) report to an appropriate authority—
 - (i) any corrupt or fraudulent conduct in the public sector that comes to his or her attention; or
 - (ii) any possible maladministration in the public sector that he or she has reason to suspect.

Performance management

Public Sector Management Act 1994

The Public Sector Standards outline the processes to be undertaken in relation to potential non-performance by ACT Public Service executives.

Post September 2016

Section 125 of the *Public Sector Management Act 1994* states:

- (1) The procedures that apply to underperformance by an officer are—
 - (a) if an industrial instrument applies to the officer and includes procedures for underperformance—the underperformance procedures in the industrial instrument; or
 - (b) in any other case—the prescribed underperformance procedures.
- (2) In this section:

underperformance, by an officer, includes failure by the officer to exercise the functions of an office to the standard reasonably required.

Public Sector Standards

The Public Sector Standards outline the processes to be undertaken in relation to potential non-performance by ACT Public Service executives.

Public Sector Standards 2016

Section 45 of the *Public Sector Standards 2016* outlines the processes to be applied in the event that an ACT Public Service executive has not met expected levels of performance:

- (1) This section applies if an SES member's engager believes the SES member failed to meet an expectation set out in the SES member's approved performance agreement (a **performance expectation**).
- (2) The engager must, in writing—
 - (a) tell the SES member why the engager believes the SES member failed to meet the performance expectation; and
 - (b) if appropriate, ask the SES member to show the SES member has met the performance expectation; and
 - (c) tell the SES member that if the SES member does not show that the SES member meets the performance expectation, or does not take action to meet the performance expectation, within a stated period—
 - (i) the SES member's SETs will be changed under the [Act](#), section 34 (Circumstances when SETs must be changed); or
 - (ii) the SES member's employment will be ended under the [Act](#), section 38 (d) (End of SES member's engagement); and
 - (d) tell the SES member that giving false information may be misconduct.
- (3) At the end of the period mentioned in subsection (2) (c), the engager must—
 - (a) if the engager is satisfied the SES member meets the performance expectation—tell the SES member, in writing, the under-performance procedure is completed; or
 - (b) if the engager is satisfied the SES member does not meet the performance expectation but has taken action to be able to meet the performance expectation—
 - (i) if the engager is satisfied it is in the interests of the service—set a date to review the SES member's performance; or
 - (ii) change the SES member's SETs under the [Act](#), section 34; or
 - (c) if the engager is satisfied the SES member does not meet the performance expectation and has not taken action to be able to meet the performance expectation—end the SES member's employment under the [Act](#), section 38 (d).

Public Sector Standards 2006

Prior to 1 September 2016, section 636A of the *Public Sector Standards 2006* outlined the processes to be applied in the event that an ACT Public Service executive has not met expected levels of performance:

- (1) This section applies if the relevant person for an executive employee considers that the employee—
 - (a) has not met or is not meeting requirements or targets set out in the employee's approved performance agreement; or
 - (b) has not complied with section 621 (Executive employee functions—financial management); or
 - (c) is otherwise not working to a satisfactory level.

- (2) The relevant person for the executive employee may decide to manage the employee's performance but may only do so by following—
- (a) if the head of service has made a policy under section 636B—the policy; or
 - (b) principles of natural justice and procedural fairness.

Section 636B of the *Public Sector Standards 2006* further guidance:

- (1) The head of service may approve a policy setting out the procedures for dealing with underperformance by an executive employee.
- (2) The head of service must ensure the procedures are consistent with principles of natural justice and procedural fairness.

Misconduct investigations

The *Public Sector Management Act 1994* provides some guidance in relation to the management of allegations of misconduct by ACT Public Service non-executive employees. (The *Public Sector Management Act 1994* identifies the relevant Enterprise Agreement as identifying and outlining the relevant procedures to be followed).

The Public Sector Standards provides detailed guidance in relation to the management of allegations of misconduct by ACT Public Service executive employees.

Public Sector Management Act 1994

Post September 2016

Section 295 of the Public Sector Management Act 1994 states

- (1) This section applies if, before the commencement day—
- (a) a person engaged in alleged misconduct; and
 - (b) a procedure in relation to the alleged misconduct (a ***pre-amendment misconduct procedure***) has been started but not completed.
- (2) The pre-amendment misconduct procedure must be completed under the pre-amendment Act as if the pre-amendment Act were still in force.

Pre September 2016

Prior to 1 September 2016, section 9A of the *Public Sector Management Act 1994* stated:

The misconduct procedures that apply to a public employee are—

- (a) if an industrial instrument applies to the employee and includes procedures for misconduct—the misconduct procedures in the industrial instrument; or
- (b) in any other case—the prescribed misconduct procedures.

Public Sector Standards 2016

Section 47 of the *Public Sector Standards 2016* states:

- (1) This section applies if an SES member's engager receives an allegation, or becomes aware, that the SES member has acted in a way that may be misconduct under the Act.
 - (2) The engager must—
 - (a) ask the commissioner, in writing, to investigate the misconduct; or
 - (b) investigate the allegation in accordance with—
 - (i) if the engager has made a misconduct and discipline policy—the policy; and
 - (ii) principles of natural justice and procedural fairness.
 - (3) The engager may, if satisfied it is in the interests of the service, until the end of the investigation—
 - (a) suspend the SES member; or
 - (b) change the SES member's SETs.
 - (4) For a suspended SES member, the engager may at any time, if satisfied it is reasonable to do so—
 - (a) change the suspension—
 - (i) for a suspension with pay—to suspension without pay; or
 - (ii) for a suspension without pay—to suspension with pay; and
 - (b) change the day on which the suspension ends.

Public Sector Standards 2006

Section 636C of the *Public Sector Standards 2006* states:

- (1) This section applies if the relevant person for an executive employee receives an allegation that the employee has engaged in misconduct.
 - (2) The relevant person for the executive employee may, by written notice to the employee, do 1 or more of the following:
 - (a) suspend the employee from work without pay;
 - (b) suspend the employee from work with pay;
 - (c) transfer the employee to other duties.
 - (3) If, after investigating the allegation, the relevant person for the executive employee is satisfied on reasonable grounds that the employee has engaged in misconduct the relevant person may do 1 or more of the following:
 - (a) counsel the employee;
 - (b) give the employee a warning;
 - (c) transfer the employee to other duties;
 - (d) deduct a monetary penalty from the employee's salary.
 - (4) In taking action under subsection (2) and (3), the relevant person for the executive employee must follow—
 - (a) if the head of service has made a policy under section 636D—the policy; or
 - (b) principles of natural justice and procedural fairness.
 - (5) For subsection (2) (a) and (b), notice of suspension must state—
 - (a) the day on which the suspension starts; and

- (b) the reason for the suspension; and
- (c) the day on which the suspension ends.
- (6) In this section:

misconduct includes—

- (a) conduct that harms, or is likely to harm, the reputation of the service or the Territory; and
- (b) a breach of the [Act](#), section 9.

Section 636D of the *Public Sector Standards 2006* states:

- (1) The head of service may approve a policy setting out the procedures for dealing with misconduct by an executive employee.
- (2) The head of service must ensure the procedures are consistent with principles of natural justice and procedural fairness.

The Public Sector Standards Commissioner

Section 144 of the Public Sector Management Act 1994 describes the functions of the Public Sector Standards Commissioner:

- (1) The commissioner has the following functions:
 - (a) to conduct investigations—
 - (i) about a matter declared by the Chief Minister in the way prescribed; and
 - (ii) under an industrial instrument in accordance with subsection (2);
 - (b) to provide advice to the Chief Minister about matters arising from an investigation conducted by the commissioner;
 - (c) in connection with an investigation conducted by the commissioner—to promote and provide advice about the public sector values, the public sector principles and the conduct required under this Act;
 - (d) to exercise any function given to the commissioner under this Act or another law applying in the Territory.
- (2) A function given to the head of service under an industrial instrument in relation to an investigation, appeal or review (an investigation function) may be exercised by the commissioner.
- (3) The commissioner may delegate an investigation function to a public servant or another person.
- (4) Nothing in this section limits the exercise of an investigation function by the head of service.
- (5) A declaration of a matter by the Chief Minister is a notifiable instrument.

APPENDIX C: ENTERPRISE AGREEMENT REQUIREMENTS

Application of the Enterprise Agreement

Section H1.2 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

Managers/supervisors and employees have a common interest in ensuring that workplace behaviours are consistent with, and apply the values and general principles set out in section 9 of the PSM Act 1994 and the ACT Public Service Code of Conduct and Signature Behaviours. This involves the development of an ethical and safe workplace in which managers/supervisors and employees act responsibly and are accountable for their actions and decisions.

Section H1.3 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The following provisions of Section H contain procedures for managing workplace behaviours that do not meet expected standards, including the management of cases of unsatisfactory work performance and misconduct.

Section H1.4 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

These procedures for managing workplace behaviours and values must be applied in accordance with the principles of natural justice and procedural fairness, and in a manner that promotes the values and general principles of the ACTPS set out in section 9 of the PSM Act 1994.

Preliminary Assessment

Section H2.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

In cases where an allegation of inappropriate behaviour is made, the manager/supervisor will initiate a preliminary assessment process to determine whether further action is required. The manager/supervisor may inform and/or seek the assistance of an appropriate Human Resources Manager.

Section H2.2 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

Following this process if the manager/supervisor determines that the allegations:

- a) require no further action, then no further action needs to be taken;
- b) can be resolved through counselling, other remedial action, or assistance to the employee then the manager/supervisor will implement such action;
- c) are better resolved through Internal Review procedures set out in this Agreement or appropriate external mechanisms the manager/supervisor will refer the matter accordingly;

- d) relate to underperformance processes the manager/supervisor will commence an underperformance process where this is warranted;
- e) require investigation the manager/supervisor will recommend to the head of service that the matter be investigated;
- f) may be vexatious or knowingly false, the manager/supervisor will consider whether further action needs to be taken in relation to the person who made the allegations.

Section H2.3 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The manager/supervisor will inform the employee where a preliminary assessment process is commenced under subclause H2.1 if it is appropriate to do so.

Misconduct procedures

Section H6.3 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The objective of these procedures is to encourage the practical and expeditious resolution of misconduct issues in the workplace.

Section H6.4 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

All parties have an obligation to participate in misconduct processes in good faith.

Misconduct

Section H6.5 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

For the purposes of this Section, misconduct includes any of the following:

- a) the employee fails to meet the obligations set out in section 9 of the PSM Act 1994 (this includes bullying and harassment or discrimination);
- b) the employee engages in conduct that has brought, or is likely to bring, the Directorate or ACTPS into disrepute;
- c) a period of unauthorised absence and the employee does not offer a satisfactory reason on return to work;
- d) the employee is convicted of a criminal offence or where a court finds that an employee has committed an offence but a conviction is not recorded, taking into account the circumstances and seriousness of the offence, the duties of the employee and the interests of the ACTPS and/or of the Directorate;
- e) the employee fails to notify the head of service of criminal charges in accordance with clause H11; or
- f) the employee makes a vexatious or knowingly false allegation against another employee.

Dealing with allegations of misconduct

Section H7.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

If, after receiving a recommendation from the manager/supervisor under paragraph H2.2(e), the head of service is of the opinion that the alleged misconduct cannot be resolved without recourse to investigation, the head of service will:

- a) inform the appropriate Human Resources Manager that an investigation is to take place;
- b) with the assistance of the appropriate Human Resource Manager make arrangements for an appropriately trained or experienced person (the investigating officer) to investigate the alleged misconduct in accordance with clause H9; and
- c) inform the employee in writing of the alleged misconduct and that the matter is to be investigated.

Section H7.2 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

Depending on the nature of the alleged misconduct the head of service may immediately transfer the employee to other duties, re-allocate duties away from the employee or suspend the employee with pay in accordance with clause H8. Where serious misconduct is alleged the head of service may suspend an employee without pay.

Investigations

Section H9.1 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The role of the investigating officer is to establish the facts of the allegations and to provide a report of those facts to the head of service.

Section H9.2 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The investigating officer will:

- a) inform the employee in writing of the particulars of the alleged misconduct, and details concerning the investigative process; and
- b) give the employee a reasonable opportunity to respond to allegations, in writing and/or at a scheduled interview, before making a finding of fact; and
- c) provide the employee with at least twenty four hours written notice prior to conducting an interview, and advise the employee if the interview is to be recorded electronically; and
- d) advise the employee that the employee may have a second person present during the interview, who may be the employee's union representative or other individual acting as support person and will allow reasonable opportunity for this to be arranged; and
- e) as soon as practicable take any further steps considered necessary to establish the facts of the allegations; and
- f) provide a record of the interview to the employee to correct any inaccuracies in the record and to provide any further response in relation to the allegations before signing the record. If the employee elects not to sign the record, then details of the offer will be noted; and

g) provide a written report to the head of service setting out the investigating officer's findings of fact.

Section H9.3 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

The investigating officer's findings of fact will be made on the balance of probabilities.

Section H9.5 of the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* states:

After considering the report from the investigating officer, the head of service will make a determination on the balance of probabilities as to whether misconduct has occurred.

APPENDIX D: ACT GOVERNMENT POLICIES AND PROCEDURES

ACTPS Code of Conduct

The ACTPS Code of Conduct states:

A key determinant of that performance is how we do our jobs, and how we behave towards each other and those we serve. The citizens of the ACT and governments of the day rightly have high expectations of us that not only will we do the right thing, but we will do it the right way.

In 2011 the ACTPS was reconstituted as a single enterprise led by the Head of Service. It was recognised at the time that the cultural and behavioural changes inherent in that structural change would take time and effort to develop and nurture. This Code has been developed through a process of consultation with staff and unions and provides a clear statement of how people employed under the PSM Act are expected to behave.

This Code is founded on the ACTPS values of *Respect, Integrity, Collaboration and Innovation* and ten signature behaviours that all people employed under the PSM Act are expected to demonstrate. The ACTPS signature behaviours embody the principles of decency, courtesy, professionalism and fairness and exemplify ways of working and the workplace culture that the ACTPS strives to nurture.

The ACTPS Code of Conduct states:

The Code was launched in October 2012, and is the first step in a comprehensive set of reforms to our service that will be founded on the ACTPS Values and Signature Behaviours.

The ACTPS Code of Conduct states:

The ACT Public Service (ACTPS) Employee Values and Signature Behaviours define who we are as an organisation. They are the touchstones by which we should measure our own – and others' – behaviour. In a service as diverse as ours, how those values and behaviours are given life will look different depending on our particular professional and organisational context, but those unifying Values and Signature Behaviours will still be recognisable.

The ACTPS Employee Values of Respect, Integrity, Collaboration and Innovation are enshrined in the Public Sector Management Standards and carry the endorsement of the Head of Service and the Strategic Board.

Respect

Respect in the ACTPS means treating others with the sensitivity, courtesy and understanding we would wish for ourselves, and recognising that everyone has something to offer. It means thinking “would I be happy if this was happening to me” and rests on a foundation of fundamental decency in our dealings with colleagues and clients alike.

Integrity

Integrity in the ACTPS means being apolitical, honest, dependable, and accountable in our dealings with ministers, the Parliament, the public and each other. It means recognising achievement, not shirking uncomfortable conversations and implies a consistency in our dealings with others.

Collaboration

Collaboration in the ACTPS means actively sharing information and resources, working together towards shared goals and asking “who else do I need to talk to get this right”. It means actively seeking opportunities for breaking down unhealthy silos and relies on genuine engagement with colleagues in the ACTPS and with the broader community.

Innovation

Innovation in the ACTPS means asking “but why”, actively seeking out new and better ways of doing what we do (as well as better things to do), and not settling for how it has always been. It means empowering colleagues at all levels to raise new ideas and necessitates sensible and thoughtful engagement with risk.

The ACTPS Code of Conduct states:

While managers and senior staff have a heightened responsibility to model the values and signature behaviours, the obligation on all of us is to continually test our own behaviours against the descriptions set out in this Code. It gives both permission to raise concerns and a language in which to have a conversation about improving our workplaces. These should be ongoing conversations, as well as a focus of regular performance management and professional development discussions.

Respect, Equity and Diversity Framework

The Respect, Equity and Diversity Framework states:

The ACT Public Service (ACTPS) is committed to creating a positive, respectful, supportive and fair work environment where employee differences are respected, valued and utilised to create a productive and collaborative workplace.

The Respect, Equity and Diversity Framework states:

A workplace that is respectful, courteous, and fair and that values individual differences is a core aspect of building a positive workplace culture. Managing equity and diversity is a key component of managing employees and by focusing on building a positive and respectful culture we will enhance the performance of all employees.

Fostering a positive workplace environment makes good business sense. A positive workplace is characterised by respect that supports employee engagement. It also creates a high performance culture that encourages innovation and creativity.

The Respect, Equity and Diversity Framework states:

The ACTPS commitment to Respect, Equity and Diversity is reflected in the following principles:

- Leaders value and promote Respect, Equity and Diversity;
- Strategic and operational plans incorporate Respect, Equity and Diversity strategies;
- Attracting and retaining a diverse ACT Public Service;
- Improving the capability of our workforce;
- Respect and courtesy in the workplace is practised;
- Promoting Equity in our employment practices; and
- Work/life balance is promoted and supported.

The Respect, Equity and Diversity Framework states:

ACTPS employees have described what respect looks like in the workplace as:

- Courtesy including saying 'hello' to colleagues;
- Having your contributions valued;
- Good manners between colleagues;
- Valuing and considering a person's position in the organisation;
- Respectful relationships in the workplace (up, down and across in an organisation);
- Fair treatment;
- Consistency in management decisions;
- The freedom to make mistakes as part of a learning process rather than being blamed;
- Not being publicly humiliated; and
- Being kept informed about relevant workplace information.

The Respect, Equity and Diversity Framework states:

A positive work environment is characterised by:

- a high degree of trust and respect between all levels of staff;
- a warm and friendly climate in which colleagues feel valued, and have a strong sense of loyalty to the organisation;
- high quality leadership and management;
- open and honest communication;
- a measure of self-determination over how work is undertaken;
- a culture where diversity is respected and valued;
- a lack of exclusive 'clubs' and cliques;
- opportunities for personal development and career progression; and
- a high level of creativity and job satisfaction, arising from teamwork and cooperation.

The Respect, Equity and Diversity Framework states:

All staff have a responsibility to:

- act in accordance with the ACTPS Code of Ethics and uphold the values and principles of the ACTPS and their own agency values;
- show courtesy and treat all others at work with respect;
- undertake work in a way that is fair and inclusive by acknowledging the skills, abilities and background of others;
- not tolerate and actively prevent any forms of work bullying, harassment and/or discrimination;
- support actions identified in the Respect, Equity and Diversity Framework Action Plan;
- recognise the need to be open minded and listen to the views of others; and
- contribute to a positive work culture.

The Respect, Equity and Diversity Framework states:

Manager/Supervisors have additional responsibilities including:

- consistently modelling appropriate behaviours;
- demonstrating personal commitment to respect, equity and diversity principles;
- developing an awareness and familiarity with respect, equity and diversity legislative requirements and related policies and procedures;
- actively preventing work bullying and harassment by addressing conduct that is inappropriate and taking necessary corrective and preventative action;
- actively encouraging staff to contribute their ideas and providing opportunities for staff to participate in workplace discussions and decision-making;
- supporting and encouraging staff to balance their work and personal lives;
- promoting the benefits of respect, equity and diversity in the workplace;
- demonstrating commitment to the ACTPS and agency specific values;
- ensuring respect, equity and diversity principles are integrated into everyday management practice; and
- promoting cultural awareness and respect.

The Respect, Equity and Diversity Framework states:

Executives have additional responsibilities including:

- demonstrating personal leadership and commitment to Respect, Equity and Diversity issues;
- promoting the benefits of Respect, Equity and Diversity to the agency;
- supporting the role of the agency Respect, Equity and Diversity Contact Officers and Network co-ordinator;
- promoting an 'open door' protocol across the ACTPS and making time to see staff members with Respect, Equity and Diversity issues;
- supporting Managers and Supervisors in managing Respect, Equity and Diversity issues in the workplace;
- ensuring Respect, Equity and Diversity principles are integrated into everyday management practice; and
- ensuring compliance with Respect, Equity and Diversity legislative requirements.

The Respect, Equity and Diversity Framework states:

Chief Executives have additional responsibilities including:

- providing leadership on the implementation of respect, equity and diversity actions;
- actively promoting the agency's respect, equity and diversity successes;
- ensuring that strong links exist between Respect, Equity and Diversity principles and the strategic/business/operational plans of their agency;
- actively preventing work bullying, discrimination and harassment by adopting the whole of government policy, providing awareness raising and training for staff, and undertaking ongoing risk management analysis; and
- contributing to the annual Respect, Equity and Diversity report provided to the Chief Minister.

ACT Executive Handbook

The ACT Executive Handbook states:

In performing their duties, all ACTPS employees, including executives, must comply with the general obligations, or code of ethics, set out in section 9 of the PSM Act.

A breach of section 9 may constitute grounds for suspension or termination of employment. The executive contract also includes provisions about disclosure of confidential information and the requirement that executives provide information about their financial interests.

The ACT Executive Handbook states:

5.7.1 General principles

The suspension and misconduct provisions for executives are provided in the contract.

There are no provisions in the contract or the PSM Act or PSM Standards to enable an appeal against a decision to suspend or to terminate employment on grounds of misconduct.

5.7.2 Suspension

The employer can suspend an executive from duty at any time after having formed the reasonable opinion that the executive is, or may be, guilty of misconduct. The executive will be provided with a written notice of suspension containing the reason for the suspension and the expiration or review date.

The suspension may be with or without pay. While it would normally be expected that a suspension would be without pay the employer may have regard to the reasons for the suspension and the potential for financial hardship.

Ultimately, an executive's contract may be terminated on the grounds of serious or gross misconduct.

The contract includes further details regarding suspension and termination.

Resolving Workplace Issues: Overview

The *Resolving Workplace Issues: Overview* document states:

The ACT Public Service (ACTPS) is committed to maintaining a positive working environment and safe, healthy workplaces free from workplace issues such as inappropriate behaviour or misconduct. All employees have a responsibility to ensure they are aware of, and comply with, the standards of behaviour expected of them. Directorates, through their managers, have a responsibility to support employees in meeting their obligations and to take appropriate action to address behaviour that does not meet the expected standards.

This resource provides information for employees, supervisors and managers on how to identify and resolve workplace issues from low level, one-off incidents through to more serious or ongoing issues that may constitute misconduct. By using this resource, employees, managers and supervisors will:

- increase their awareness of inappropriate behaviour and misconduct;
- understand their responsibilities in relation to preventing and resolving inappropriate behaviour and misconduct;
- understand the mechanisms available within the ACTPS to manage and resolve workplace issues; and
- understand the consequences of inappropriate behaviour and misconduct.

The *Resolving Workplace Issues: Overview* document states:

There are four guiding principles by which workplace issues are to be managed and resolved in the ACTPS:

- 1) Respect at Work;
- 2) Natural Justice;
- 3) Procedural Fairness; and
- 4) Confidentiality and Privacy.

With respect to 'respect at work' the *Resolving Workplace Issues: Overview* document states:

The ACTPS operates under a 'no tolerance' approach to work bullying, harassment and discrimination. Respect at Work sets the expectation for all employees to nurture positive workplace cultures, where the inherent uniqueness and dignity of individuals is respected and we treat each other in a fair, courteous manner. Under Respect at Work:

- work bullying, discriminatory or harassing conduct will not be tolerated;
- appropriate action will be taken against individuals who engage in work bullying, discriminatory or harassing conduct; and
- all forms of inappropriate behaviour and/or misconduct will be treated seriously, promptly and fairly with due regard to procedural fairness, natural justice and confidentiality.

With respect to 'natural justice' the *Resolving Workplace Issues: Overview* document states:

Natural Justice means that individuals involved in resolving a workplace issue are given the right to respond and that the resolution process is managed with an absence of bias. No one in the ACTPS should make decisions about any case of inappropriate behaviour or misconduct in which they may be, or may fairly be suspected to be, biased.

Bias does not only relate to actual bias – it can also relate to perceived bias. Actual bias is where it is established that the delegate (that is, the relevant decision-maker involved in resolving workplace issues) was prejudiced for or against a party. Perceived bias is where a reasonable person would have a view that the delegate could be reasonably suspected to be biased.

With respect to 'procedural fairness' the *Resolving Workplace Issues: Overview* document states:

Adhering to Procedural Fairness means ensuring that fair and proper procedures are used by supervisors and managers when managing inappropriate behaviour and/or misconduct, and by delegates when making decisions relating to the resolution of workplace issues.

Ensuring that an employee responding to allegations of inappropriate behaviour or misconduct is granted Procedural Fairness requires that:

- the employee receives a hearing appropriate to the circumstances;
- there is no bias in the process or decisions resulting from that process;
- there is sufficient evidence to support a decision; and
- that enquiries are made into any disputed matters.

Procedural Fairness includes the employee's right:

- to reasonable advance notice and the offer of a support person where formal discussions relating to workplace issues are scheduled;
- to reply in a way that is appropriate for the circumstances;
- that their reply be received and considered before any decision is made; and

- to receive all relevant information before preparing their reply.

For Procedural Fairness to be met when making decisions about a particular case, the employee must receive the following information:

- a description of the possible decision;
- the criteria for making that decision; and
- the facts/evidence upon which any such decision would be based.

With respect to 'confidentiality and privacy' the *Resolving Workplace Issues: Overview* document states:

Confidentiality and Privacy means ensuring that the management and resolution of workplace issues is treated confidentially by all parties involved in the process, and that any disclosure of information relating to the workplace issue is limited to those legitimately involved in resolving it. Appropriate records must also be maintained in line with relevant legislation.

The *Resolving Workplace Issues: Overview* document states:

Workplace issues are incidents that are seen as inappropriate by the person experiencing or observing the issue; they can arise every day and in many different situations (e.g. social networking forums, face-to-face). Workplace issues can vary in terms of seriousness; they may be low level or a one off incident that is inappropriate in nature, or they may be more serious incidents such as work bullying. Workplace issues include a wide range of behavioural, environmental, cultural, relationship and performance issues, such as:

- communication – staff attitudes, assumptions, rudeness, misunderstandings;
- information – inadequate or incorrect information;
- process – inadequate procedures, failure to provide sufficient information, or a failure to consult in decision-making; and
- professional conduct.

The *Resolving Workplace Issues: Overview* document states:

Managers and supervisors have a responsibility to direct and maintain work flow and ensure both service delivery and client outcomes are achieved. Reasonable managerial actions may include:

- providing reasonable directions about work and setting reasonable goals;
- providing appropriate and constructive feedback about an employee's work performance and managing the performance;
- allocating work in a fair and equitable way;
- ensuring workplace policies are implemented;
- addressing unacceptable workplace behaviour;
- allocating particular hours of work to meet operational requirements (e.g. 8.30am commencement, having regard to the employment framework);
- making justifiable decisions related to recruitment and selection for an employee's promotion and/or other opportunities;
- applying organisational change or restructuring;
- transferring or re-deploying an employee for operational reasons;
- being objective and confidential when informing an employee of unreasonable or inappropriate behaviour;
- following the principles of Respect at Work, Natural Justice, Procedural Fairness and Confidentiality and Privacy; and

- acting in accordance with the ACTPS Values and policies.

The *Resolving Workplace Issues: Overview* document states:

Workplace issues relating to how we treat each other in the workplace tend to occur on a sliding scale of severity; at the lower end of the scale is behaviour that is inappropriate but still needs to cease and not reoccur, while on the higher end of the scale the behaviour may amount to misconduct – that is, behaviour that may justify disciplinary action if it is found to have occurred.

Inappropriate behaviour is generally a one-off event that is not serious in nature, or a repetitive pattern of low level actions that disturbs the work environment. A reasonable person, having regard to the circumstances, would find the behaviour to be unacceptable or unreasonable. Inappropriate behaviour can usually be resolved locally in a non-disciplinary way.

Inappropriate behaviour can escalate to misconduct if the individual conducting the behaviour does not cease or adjust their actions to meet the expected standard.

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties. In the ACTPS, an intentional or reckless breach of employee obligations/standards amounts to misconduct. Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employee's employment and usually warrants termination of employment or the suspension of the employee without pay. Employees found to have engaged in misconduct or serious misconduct may have disciplinary action imposed against them.

The *Resolving Workplace Issues: Overview* document states:

The seriousness of a workplace issue and the appropriate options for resolution can be determined by categorising the offending behaviour/s into one of three levels, as per the below diagram. This process is founded upon the ACTPS commitment to creating positive workplaces and promotes the resolution of workplace issues at the lowest possible level wherever appropriate.

The *Resolving Workplace Issues: Overview* document states:

Resolving workplace issues that are inappropriate at Level One is a key means by which all employees can contribute to the ACTPS goal of creating positive work cultures. The features of a Level One workplace issue can include:

- one-off or irregular occurrence;
- not serious in nature;
- a series of low level, minor events;
- inappropriate in nature;
- does not appear to constitute misconduct as outlined in ACTPS Enterprise Agreements; or
- able to be resolved easily and quickly at the local level.

Level One workplace issues can generally be resolved quickly, locally, and directly by the employee who experienced or observed the behaviour. The employee may seek the assistance of their supervisor or manager, but this is not mandatory.

The *Resolving Workplace Issues: Overview* document states:

Workplace issues of inappropriate behaviour and some instances of misconduct may be resolved at Level Two. The features of a Level Two workplace issue can include:

- the nature of the workplace issue is complex;

- there are disputed facts;
- it involves a one off event that is serious in nature;
- there is a pattern of ongoing behaviour/s that are inappropriate;
- Level One or Two options for resolution have already been attempted without success; or
- a Preliminary Assessment is required to determine the best way forward.

At Level Two, employees seek the assistance of their manager or supervisor to resolve the workplace issue. For a workplace issue to be resolved at Level Two, the manager or supervisor must undertake a Preliminary Assessment, the outcome of which must indicate that the matter can potentially be resolved using non-disciplinary measures at the local level.

It should be noted that this is not the only possible outcome of a Preliminary Assessment; other outcomes include the issue being escalated to Level Three or resolved through other processes (e.g. Internal Review procedures underperformance processes). However, if the workplace issue is to be managed at Level Two, then a range of restorative processes and resolution techniques (RPRT) are available to support resolution

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- a Preliminary Assessment is required to determine the best way forward.

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It should be noted that this is not the only possible outcome of a Preliminary Assessment; other outcomes include the issue being escalated to Level Three or resolved through other processes (e.g. Internal Review procedures underperformance processes). However, if the workplace issue is to be managed at Level Two, then a range of restorative processes and resolution techniques (RPRT) are available to support resolution.

At Level Three, employees seek the assistance of their manager or supervisor to resolve the workplace issue. The manager or supervisor undertakes a Preliminary Assessment to determine the best way forward. For a workplace issue to be managed at Level Three, the outcome of this assessment must indicate either substance to the allegation, or that more information is required. The manager or supervisor forwards this recommendation to the delegate for consideration and consultation with the local HR team. This may result in an investigation being undertaken in accordance with Section H (Workplace Values and Behaviours) of ACTPS Enterprise Agreements. Following the investigation, the relevant delegate will make a decision based upon the findings regarding the alleged misconduct, which may involve imposing disciplinary action against any employee/s found to have engaged in the alleged behaviour/s.

The *Resolving Workplace Issues: Overview* document states:

Directors-General/Directorates

- Must promote the ACTPS Values and Signature Behaviours as per the ACTPS Code of Conduct to create positive workplace cultures where workplace issues are resolved efficiently and effectively at the local level as they arise, where appropriate.
- Must actively prevent workplace issues of an inappropriate or misconduct nature, including work bullying, discrimination and harassment by adhering to whole-of-government procedures and guidelines, providing supervision and training for staff and undertaking ongoing risk management.
- Must identify, assess, and eliminate or control the risk factors that contribute to a work culture where work bullying is likely to occur.
- Must ensure that directorate specific guidelines and procedures are in accordance with ACTPS Enterprise Agreements and whole-of-government resources to support employees to raise workplace issues and access mechanisms to resolve inappropriate behaviour and misconduct.
- Must ensure that executives, managers, supervisors and employees know what to do if work bullying, discrimination or harassment occurs.
- Must investigate work bullying, discrimination or harassment as soon as possible in accordance with the procedures set out in ACTPS Enterprise Agreements and other applicable procedures.
- Must ensure that all parties of an investigation under Section H of ACTPS Enterprise Agreements are aware they will be informed of the outcome with due regard being given to privacy concerns, the nature of the complaint and the proportionality of information applicable to each party.
- Must keep accurate records of complaints of work bullying, discrimination and harassment.
- Must provide data on work bullying, discrimination and harassment to the Commissioner for Public Administration as part of the annual Agency Survey process.

The *Resolving Workplace Issues: Overview* document states:

Executives, Manager and Supervisors

- Must model and promote the ACTPS Values and Signature Behaviours as per the ACTPS Code of Conduct to create positive workplace cultures where workplace issues are resolved efficiently and effectively at the local level as they arise, where appropriate.
- Must treat staff with respect and ensure that their own conduct is above reproach, examining their own preconceptions, biases and stereotypes concerning workplace issues that are of an inappropriate nature or may constitute misconduct.
- Must “call out” inappropriate behaviour as soon as they see it or become aware of it.
- Must communicate the whole-of-government resources and related procedures to staff to ensure that they are aware of their rights and responsibilities.
- Must actively prevent work bullying, discrimination and harassment by addressing workplace issues and taking necessary corrective and preventative action.
- Must treat all issues of work bullying, discrimination or harassment seriously and respond promptly and confidentially in accordance with ACTPS Enterprise Agreements and whole-of-government resources.
- Must take all reasonably practicable steps to prevent employees that are involved in the management and resolution of workplace issues from being victimised.

The *Resolving Workplace Issues: Overview* document states:

All employees

- Must commit to and promote the ACTPS Values and Signature Behaviours as per the ACTPS Code of Conduct to create positive workplace cultures and treat others with respect.
- Must comply with lawful and reasonable directions given to them by any person having the authority to give the direction.
- Must understand their own behaviour and consider how it may be perceived by, and impact upon, others at work.
- Should actively prevent workplace issues from recurring by talking to the person/s conducting inappropriate behaviour, or raising concerns about workplace issues with their manager, supervisor or executive, a RED Contact Officer, Work Safety Representative or relevant HR team.
- Should familiarise themselves with their directorate's relevant guidelines and procedures relating to management and resolution of workplace issues.
- Should offer support to anyone who is subject to inappropriate behaviour or misconduct, and if possible let them know where they can obtain help and advice.
- Must not raise workplace issues that are frivolous or malicious.
- Must participate in the management and resolution of workplace issues in good faith and with confidentiality.

Resolving Workplace Issues: Misconduct and Investigations

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

In the ACTPS, there are three levels at which workplace issues can generally be managed and resolved, as illustrated in the diagram below. This process is founded upon the ACTPS commitment to creating positive workplaces and is designed to have matters resolved at the lowest possible level wherever appropriate.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Level One — Employees manage and resolve the issue locally in a timely and respectful manner, with or without the assistance of their manager or supervisor. Workplace issues of inappropriate behaviour can usually be resolved at Level One.

Level Two — Employees raise the issue with their manager or supervisor, who then undertakes a Preliminary Assessment and determines that the use of restorative processes and resolution techniques (RPRT) at the local level is the appropriate means of resolution. Workplace issues of inappropriate behaviour and some instances of misconduct may be resolved at Level Two in a remedial (i.e. non-disciplinary) way.

Level Three — Inappropriate behaviour that has not been successfully resolved at Level One or Two, or other workplace issues such as misconduct, repeated behavioural lapses or continuing underperformance are resolved at Level Three, using the processes outlined in Section H (Workplace Values and Behaviours) of ACTPS Enterprise Agreements. At this level, disciplinary action may be taken against employees found to have engaged in the alleged behaviour/s.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

This resource provides comprehensive information on the resolution of Level Three workplace issues, with a primary focus on managing and resolving allegations of misconduct. The aim of this resource is to:

- provide a set of clear and comprehensive guidelines on the procedures for managing allegations of misconduct and clearly outline roles, responsibilities and possible outcomes;
- help reduce the incidence of employee grievances in relation to Section H procedures by helping to ensure that the processes are undertaken in a fair and transparent manner; and
- contribute to fairness, integrity and good public administration in relation to the management of allegations/complaints of a workplace performance, behaviour, disciplinary and/or administrative nature.

Remember that at any point throughout the process of managing and resolving workplace issues, advice and support can be obtained from supervisors, managers, Executives and local HR teams.

In relation to 'why is it so important to get Level Three right?' the *Resolving Workplace Issues: Misconduct and Investigations* document states:

Findings resulting from the processes in Section H have the potential to significantly affect decisions regarding non-disciplinary, disciplinary, or underperformance action. A flawed process might result in an individual being unfairly disciplined. Alternatively, errors in the process could increase the risk that an otherwise appropriate outcome is overturned on appeal.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Misconduct occurs when an employee's behaviour is wilfully or deliberately unsatisfactory, breaches their contract of employment, or intentionally fails to meet the requirements of their duties. In the ACTPS, an intentional or reckless breach of employee obligations/standards will amount to misconduct, and includes the following:

- the employee fails to meet the obligations set out in Section 9 of the Public Sector Management Act 1994 (the PSM Act) (this includes bullying and harassment or discrimination);
- the employee engages in conduct that has, or is likely to, bring the Directorate or ACTPS into disrepute;
- a period of unauthorised absence where the employee does not offer a satisfactory reason on return to work;
- the employee is convicted of a criminal offence or a court finds that an employee has committed an offence but a conviction is not recorded, taking into account the circumstances and seriousness of the offence, the duties of the employee and the interests of the ACTPS and/or of the Directorate;
- the employee fails to notify the Head of Service of criminal charges in accordance with H11 (Criminal Charges); or
- the employee makes a vexatious or knowingly false allegation against another employee.

Misconduct may justify a warning, demotion, financial penalty or termination of employment, as per H10 (Disciplinary Action and Sanctions).

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Serious misconduct is misconduct of such a nature that it would be unreasonable or inconsistent for the employer to continue the employee's employment and usually warrants termination of employment or the suspension of the employee without pay. The ACT Government Solicitor (ACTGS) should be advised of all cases where summary dismissal or suspension without pay is being considered.

Some examples of serious misconduct, as outlined within the *Fair Work Regulations 2009*, include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- engaging in theft, fraud or assault, or being intoxicated at work;
- employees refusing to carry out a lawful and reasonable instruction that is consistent with their contract of employment; and
- conduct that causes imminent and serious risk to: the health or safety of a person; or
- the reputation, viability or profitability of the organisation's business.

Serious misconduct can result from instances not outlined above which are made serious due to the type or nature of employment. Each case needs to be looked at individually because what may constitute an act of misconduct or serious misconduct in one work environment may not constitute an act of misconduct or serious misconduct in another work environment.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

All ACTPS employees have a responsibility to contribute to positive work cultures and not engage in behaviour that is inappropriate or may constitute misconduct. In addition to the responsibilities outlined in *Resolving Workplace Behaviour: Overview*, which apply to all employees, managers and supervisors play an important role in setting, monitoring and adjusting expectations regarding acceptable workplace behaviour. In particular, managers and supervisors are expected to role model the ACTPS Values and Signature Behaviours, educate their staff regarding acceptable behaviour, and take action to address inappropriate behaviour or misconduct that they either observe directly or suspect, or that is brought to their attention by another employee or member of the public who makes an allegation against someone under their supervision.

Managers or supervisors might not need to conduct a Preliminary Assessment for a workplace issue where it is clear that the issue is inappropriate and can be resolved by the employee/s involved at the local level. In most other instances, managers or supervisors will need to conduct a Preliminary Assessment of the allegation or incident to determine what further action, if any, is required.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

The Preliminary Assessment determines what the workplace issue is really about, whether it has substance and whether it justifies the commencement of action such as an underperformance process or investigation under Section H.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

The most appropriate person to conduct a Preliminary Assessment is usually the relevant manager. However, if any of the parties involved in the workplace issue have a concern about the independence of the manager conducting the assessment, the next level of management within the relevant section may nominate an appropriate person (who may be themselves), to complete the assessment. Alternatively, the matter can be raised with the relevant Executive.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Informing Employees: It will usually be appropriate to advise the employee subject to the allegations that a Preliminary Assessment is underway so that they can provide a response or comment on any proposed course of action before a decision is made. Situations where it may not be appropriate to advise the employee include where:

- the Preliminary Assessment is undertaken quickly and it is impractical to advise the employee;
- there is a reasonable prospect that no further action will be required;

- relationships may be damaged, affecting the opportunity for harmonious operation in the workplace between employees into the future;
- an employee may destroy or remove evidence; or
- the manager believes the allegation may be frivolous, trivial or vexatious.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

A Preliminary Assessment is **not** an investigation; it is an expedient means of determining if, and how, to proceed with the matter. The assessment should be conducted as soon as possible, be as short as is practical and should cease as soon as it becomes evident how best to handle the issue.

A Preliminary Assessment may be as simple as considering the workplace issue and appropriate options for resolution, or it may extend to obtaining additional documents or records, talking to the complainant to clarify the issue/s, and perhaps briefly talking to witnesses to get further information. In some circumstances it may be necessary to adopt a more detailed approach, particularly to identify all individuals who may be involved.

The following factors should be considered in any Preliminary Assessment:

- whether there is sufficient information to determine how to handle the workplace issue/s raised;
- whether alternative remedial action at Level One or Two (e.g. an apology or mediation) is a satisfactory means of redress;
- whether the workplace issues/s should be managed via the Underperformance, Internal Review or Appeal processes within ACTPS Enterprise Agreements;
- how much time has elapsed since the workplace issue/s occurred;
- the seriousness of the workplace issue/s and, if proven, the potential ramifications for the directorate and ACTPS;
- whether the issue/s imply the existence of a systemic problem;
- whether the issue/s are inconsistent with the obligations of public employees set out in section 9 of the PSM Act;
- whether criminal conduct may be present;
- if the workplace issue/s is serious, but the facts are known, whether the matter can be managed rather than investigated;
- whether fraud may be present and the involvement of SERBIR is necessary (see the ACTPS Integrity Policy);
- whether other risks are identified (e.g. health and safety of employees, detriment to members of the ACTPS or community, reputation of the ACTPS, security of documents, employees and community members etc.); and
 - if the Preliminary Assessment is regarding an allegation made by an employee: what the employee's expectations are regarding actions and outcomes for themselves and other person/s involved; and/or
 - whether the allegation may be trivial, frivolous or vexatious.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

The following outcomes of a Preliminary Assessment are possible:

- if the manager is satisfied that no further action is necessary, no further action need be taken; or

- if the manager is of the view that counselling or other alternative action is appropriate, the manager should implement that action; or
- if the allegations are better resolved through the Internal Review procedures set out in ACTPS Enterprise Agreements or through some alternative mechanism (e.g. as a Public Interest Disclosure), the manager may refer the matter accordingly; or
- if the manager considers the allegations relate to performance issues, the manager may commence an underperformance process in accordance with H4 (Underperformance); or
- if the manager determines that that the allegations require investigation the manager/ supervisor will recommend to the delegate that the matter be investigated under the misconduct and discipline process in H6 (Misconduct and Discipline); or
- where the manager considers the allegation/s to be vexatious or knowingly false, the manager/ supervisor will recommend to the delegate that action may be taken in relation to the person who made the allegations.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Underperformance means a failure to perform the duties of the position or to perform them to the required standard, including non-compliance with workplace policies, rules or procedures, poor interaction with colleagues. It is rarely a wilful or deliberate act. In the first instance, underperformance can be dealt with through the provision of advice and support and a fair and transparent framework for action to improve the performance in accordance with H4 (Underperformance) of ACTPS Enterprise Agreements and the ACTPS Performance Framework.

Borderline situations between misconduct and underperformance may require an in depth Preliminary Assessment to determine the best course of action. Resolution via the underperformance processes is the preferred course because it gives the employee a better opportunity to learn and to improve. Sometimes, the particular circumstances of the case at hand may warrant a misconduct process instead. For example, underperformance may constitute misconduct if there is an additional degree of wilfulness or deliberateness, or if the pattern of underperformance continues despite directions to the contrary.

In the case of continued underperformance, managers should seek assistance from their Directorate's Human Resources team.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

While investigations should not normally be the first option, they are sometimes necessary and appropriate. However, they are not a tool to devolve responsibility for managing workplace issues, nor should they be used to address minor matters that could be resolved using non-disciplinary options. When used to resolve lesser disputes or minor issues, investigations can unnecessarily delay the resolution of a matter, restrict managerial initiative, and limit the opportunity for open dialogue and apologies between disputing parties.

If the workplace issue is minor, does not appear to amount to misconduct, and there are known facts, the manager can opt to resolve the matter by utilising options such as counselling, training and education, performance management, mediation, or RPRT. Situations where investigations are appropriate include:

- the alleged behaviour, if substantiated, would be sufficiently serious to justify a sanction as outlined within ACTPS Enterprise Agreements;
- the allegations are serious and there is disagreement about what happened and little prospect of remedial action being agreed to or being practicable;
- the alleged behaviour may constitute a criminal act; or

- the allegation is indicative of a pattern of behaviour by the employee, especially where the employee has been subject to other disciplinary or remedial action for the same kind of matter in the past.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

As soon as it is decided that an investigation will be conducted, the relevant employee should be notified in writing. The letter of notice should contain the following details:

- where possible, the complete details of the alleged act(s) of misconduct, noting that the allegations may be further refined during the investigation and the employee will be advised accordingly;
- if possible, why those allegations may, if substantiated, constitute misconduct;
- the sanctions that may apply, including an indication that an employee's employment may be at risk if the act of misconduct is sufficiently serious;
- who the investigating officer will be;
- who the delegate will be (i.e. who will make the final determination regarding any possible disciplinary or non-disciplinary action);
- whether the employee is to be reassigned, transferred, or suspended (with or without pay), during the investigation;
- how the investigation will be conducted, including a copy of Section H and section 9 of the PSM Act or other relevant policies/legislation that the employee may have breached;
- that the employee will have an opportunity to meet with the investigator and respond to the allegations, prior to any decision being made as to their veracity; and
- that the employee has a right to have a support person or union representative to accompany them throughout all aspects of the process.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

ACTPS Enterprise Agreements provide for employees who are under investigation to be suspended, either with or without pay. When determining whether to suspend an employee, the following should be considered:

- the delegate being satisfied that it is in the public interest, or the interest of the ACTPS and/or Directorate to do so;
- any potential risk to the health and safety of other employees and/or clients;
- any potential for the employee to interfere with the investigation;
- any risk that the misconduct may be continued or repeated; and
- the severity of the alleged act of misconduct.

Suspension with pay may be appropriate where the allegations are of inappropriate interpersonal behaviour or represent a risk to health and safety. Suspension without pay should only be used where serious misconduct is alleged and there is a very real possibility that the termination of employment will occur if the allegations are substantiated. The intention to suspend without pay must be discussed between the delegate and the ACTGS.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

It is important for a manager not to prejudge, or be perceived to prejudge, the findings of the investigation. It is also important for managers to remember that suspension is not a sanction and should not be used as one. The employee's welfare and reputation must be considered before a decision to suspend is made, especially during the investigation stage where no

findings of wrong-doing have yet been made. To this end, investigations should be completed as soon as reasonably practicable.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Ideally, an employee should be informed of the reasons for a proposed suspension and be given the opportunity to respond before a decision to suspend is made. Where this is not practicable, an employee may be suspended with pay for a short period and then offered the opportunity to provide reasons why the suspension should not continue. Only in the most serious cases would it be appropriate to suspend an employee without pay without first giving them notice and an opportunity to provide reasons as to why they should not be suspended without pay. An employee who is suspended without pay has the right to appeal that decision under ACTPS Enterprise Agreements.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Suspending an employee with pay for a significant period raises governance and probity issues, as public money is being expended on wages without any work being provided in return. Where an investigation is prolonged, it is preferable to transfer the employee to a position where they can be productive – provided this can be done with minimal risk to other workers or the reputation of the ACTPS and/or Directorates – rather than suspend the employee. The continuation of an employee's suspension **should be reviewed every 30 days** unless exceptional circumstances apply. Suspension must end immediately when the organisation no longer believes the employee may have committed an act of misconduct, or as soon as a sanction is imposed or other action is taken.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

The purpose of an investigation is to examine and evaluate all relevant facts and to determine whether, on the balance of probabilities, the alleged behaviour took place. An investigation does not result in a sanction or other outcome being imposed on an individual – instead, it provides information that can assist the delegate in determining the appropriate sanction, if applicable, to apply at the conclusion of the investigation.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

The exact nature of the investigation will impact the resources that will be needed, the authorisation necessary to undertake the investigation and possible outcomes of the investigation. It is therefore important to quickly establish the scope and focus of the investigation, including:

- the nature and seriousness of the alleged misconduct being investigated;
- whether it has occurred in the past or is still occurring; and
- whether there are any known witnesses, documents and/or physical evidence to support the allegations.

Understanding these factors will enable the terms of reference to be drafted, which will define the boundaries of the investigation and identify relevant, realistic and achievable objectives. An investigation can be concluded when the terms of reference have been fulfilled.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Shared Services Employee Relations have developed an Investigation Categorisation model, categorising cases into one of three categories, dependant on the nature and seriousness of the allegations, with a projected timeline of between 21 and 95 days to resolve. This model is a guide only, developed as a best case scenario with no delays in process. The duration of an investigation will largely depend on the complexity and seriousness of the allegations, the need to engage an external investigator or expert, the availability of support people, the availability and number of witnesses to interview, and foreseeable delays such as holiday breaks. The taking of extended sick leave by the employee under investigation may also inhibit the progress of the investigation. Dependent on the nature of the employee's illness,

investigators may request additional medical evidence to establish whether it is reasonable to postpone or progress an investigation under the circumstances.

The duration of an investigation can also be affected by the need to comply with the requirements of natural justice, which require that the employee be given a 'reasonable opportunity' to respond and opportunity to obtain a support person or union representative. In most situations, the more serious the allegations, the more reasonable it would be to provide the employee with extra time. Importantly, a 'reasonable opportunity' is not necessarily what the employee under investigation believes to be reasonable; it is determined by an objective standard of what a prudent person would believe is reasonable within the circumstances.

Investigators and delegates should take action if it is likely there will be delays in the investigative and decision-making process, such as:

- providing written notification to the parties concerned about the delay, and the proposed or revised timing for dealing with the matter;
- ensuring interim support and contact for the parties; and
- offering reassignment of duties or transfer to one or more of the parties, pending the outcome of the investigation.

Investigators and delegates should always consider the impact of any delay on the:

- fairness of the process;
- affected workplace and complainant; and
- welfare of the employee who is the subject of allegation, especially if the employee has been suspended.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Any decision affecting an individual that has been made without affording that individual procedural fairness is liable to be challenged and set aside. In broad terms, procedural fairness requires an employer to:

- inform people against whose interests a decision may be made of the allegations against them or grounds for adverse comment in respect of them;
- provide those people with a reasonable opportunity to put their case forward;
- hear all parties to a matter and consider submissions;
- make reasonable inquiries or investigations before making a decision;
- ensure that no person decides a case in which they have a direct interest;
- act fairly and without bias, and
- conduct the investigation without undue delay.

There are limited circumstances where there may be an overriding public interest in short-circuiting certain procedural fairness requirements. These occasions are rare and normally involve serious risks to personal safety or substantial amounts of public funds.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Providing reasons for a decision is one of the basic principles of natural justice and a fundamental aspect of the administrative review process. There is a general common law obligation to provide reasons for a decision and a statutory obligation to do so where an Act states that a person may be adversely affected by an administrative decision. Providing a statement of reasons enables the delegate to explain and defend their decision if necessary, and supports diligent decision making. For the individual in receipt of the statement, it

provides them with the opportunity to have the decision properly explained and helps them determine whether they wish to seek a review or appeal and on what grounds.

Providing a statement of reasons is therefore an essential part of the post-investigation process. There is no standard template for a statement of reasons as the language used and the length of the statement will be dependent upon the audience, nature, importance and complexity of the issues at hand. However, the statement should include at a minimum:

- a decision as to whether the employee has engaged in misconduct and the nature of that misconduct;
- the reasons for the decision;
- a statement about the evidence relied on;
- findings on the facts that arose, including inferences drawn from those facts;
- whether, in relation to the facts, the evidence was accepted or rejected – where the evidence is conflicting, reference should be made to the available evidence and why certain evidence is preferred or given more weight; and
- any rights of the person affected, including any rights of objection, review or appeal.

The statement of reasons must go further than to simply state conclusions; the actual reasons for those conclusions must also be clear. This may include reference to relevant policy statements and guidelines, or Directorate/ACTPS practices taken into account.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

Many of the principles discussed within here are applicable during the Preliminary Assessment, Investigation and Post-Investigation processes. During investigations and when taking disciplinary action in relation to repeated acts of underperformance (i.e. when the situation moves from non-disciplinary to disciplinary action), the following principles must all be applied.

The *Resolving Workplace Issues: Misconduct and Investigations* document states:

When conducting an investigation, ensuring that all procedures are followed correctly helps prevent an employee being treated unfairly or unreasonably and having to seek an avenue of redress. In the context of alleged misconduct and action taken in relation to cases of repeated underperformance, procedural fairness requires that:

- the employee be made aware of the allegations and the process to be followed in investigating those allegations;
- the investigator provide the employee with an opportunity to comment on all evidence that is credible, relevant and significant;
- that the investigator conduct the fact finding process with an open mind, free from bias or other interest in the outcome of the process;
- that the delegate be similarly unbiased and free from any interest in the outcome of the process; and
- that the delegate offer the employee an opportunity to comment on the proposed findings as to misconduct and any proposed sanction before making a final decision.

Decisions regarding misconduct may later be overturned if it becomes evident that there were flaws in the investigative process, including if the investigator: fails to comply with proper procedures; acts for the wrong purpose; exercises power in bad faith; fails to take into account relevant information; or takes into account irrelevant information or acts unreasonably. Having to conduct a new investigation is traumatic and stressful for the parties involved, and costly in terms of time, resources and money. It is therefore important that procedural fairness is afforded and the investigation conducted properly.

Workplace Behaviours Toolkit: The Preliminary Assessment

The *Workplace Behaviours Toolkit: The Preliminary Assessment* document states:

A preliminary assessment is not a formal investigation; it is an expedient means of determining if, and how, to proceed. The assessment should be conducted as soon as possible, be as short as is practical and should cease as soon as it becomes evident how best to handle the issue. An employee should be told that the assessment is being conducted if it is appropriate to do so.

The most appropriate person to conduct the preliminary assessment is usually the relevant manager. However, in cases where the complainant, or individual subject to a complaint, has a concern about the independence of the manager conducting the assessment, that individual may request that the next level of management within the relevant section nominate an appropriate person (who may be themselves), to complete the assessment. Alternatively, they may raise the matter with the relevant Executive.

The following factors should be considered in any preliminary assessment:

- whether there is sufficient information to determine how to handle the incident/s;
- whether there is an alternative and satisfactory means of redress (e.g. an apology or mediation);
- whether the incident/s should be managed via the Underperformance, Internal Review or Appeal processes within ACTPS Enterprise Agreements;
- how much time has elapsed since the incident/s took place;
- the seriousness of the incident/s and, if proven, potential ramifications for the Directorate and broader ACTPS;
- whether the incident/s implies the existence of a systemic problem;
- whether the incident/s are inconsistent with the obligations of public employees set out in Part 2 of the Public Sector Management Act (1994);
- whether criminal conduct may be present;
- if the incident is serious, but the facts are known, whether the matter can be managed rather than investigated;
- whether other risks are identified (e.g. health and safety of employees, detriment to members of the ACTPS or community, reputation of the ACTPS, security of documents, employees and community members etc.); and
- if the preliminary assessment is regarding an allegation or complaint:
 - what the complainants' expectations are regarding actions and outcomes for themselves and other persons involved; and/or
 - whether the complaint is trivial, frivolous or vexatious.

The *Workplace Behaviours Toolkit: The Preliminary Assessment* document states:

Upon conclusion of the preliminary assessment, managers must make a determination regarding the incident/s. Under Section H2 of ACTPS enterprise agreements, the options available to managers are:

- a) if the manager is satisfied that no further action is necessary, no further action need be taken; or
- b) if the manager is of the view that counselling or other remedial action is appropriate, the manager should implement that action; or

- c) if the allegations are better resolved through the internal review procedures set out in the Agreement or through some alternative mechanism (e.g. as a public interest disclosure), the manager may refer the matter accordingly; or
- d) if the manager considers the allegations relate to performance issues, the manager may commence an underperformance process in accordance with H4; or
- e) if the manager determines that that the allegations require formal investigation the manager/supervisor will recommend to the delegate that the matter be investigated under the misconduct and discipline process in section H6; or
- f) where the manager considers the allegation/s to be vexatious or knowingly false, the manager/supervisor will recommend to the delegate that action may be taken in relation to the person who made the allegations.

The *Workplace Behaviours Toolkit: The Preliminary Assessment* document states:

Investigations are, depending upon the nature of the matter at hand, sometimes necessary and appropriate. However, managers must use their judgement, assess the facts and clearly understand the process for managing workplace behaviour to determine whether an investigation is necessary.

Investigations are not a tool to devolve responsibility for managing incidents of inappropriate behaviour, nor should they be used to address minor matters that could be resolved by managerial action of a less formal nature. An investigation simply uncovers all material related to an incident; it does not impose an administrative or disciplinary sanction, which is the responsibility of the relevant manager or delegate. When used to resolve lesser disputes or minor incidents, investigations can unnecessarily delay the resolution of a matter, restrict managerial initiative, and limit the opportunity for open dialogue and apologies between disputing parties.

If the incident is minor, does not appear to amount to serious misconduct, and there are known facts, the manager can opt to resolve the matter through remedial action such as counselling, training and education, performance management or mediation. The below diagram is a useful guide for managers to aid these decision-making processes.

Resolving Workplace Issues: Work Bullying, Harassment and Discrimination

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Every ACT Public Service (ACTPS) employee has the right to work in an environment free from work bullying, discrimination and harassment and to be treated with dignity and respect. The ACTPS is committed to building positive work environments and inappropriate behaviour or misconduct such as work bullying, harassment and discrimination will not be tolerated. This resource aims to:

- ensure that all employees meet their obligations under section 9 of the Public Sector Management Act 1994 (the PSM Act) and uphold the ACTPS Values and Signature Behaviours;
- raise awareness regarding work bullying, discrimination and harassment and ensure employees are aware that such conduct will not be tolerated;
- assist employees to create and maintain positive and safe working environments free from all forms of work bullying, discrimination and harassment;
- ensure that employees are aware of the mechanisms available to them in managing and resolving work bullying, discrimination and harassment; and

- support directorates to meet their obligations under ACTPS Enterprise Agreements, the PSM Act and the Work Health and Safety Act 2011 (the WHS Act).

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

In the ACTPS, work bullying is defined as unreasonable, undesirable behaviour that:

- is repeated;
- is unwelcome and unsolicited;
- creates, or could create, a risk to health and safety (including physical or psychological harm);
- occurs between workers of an organisation (i.e. it is internal rather than being initiated by a client or a person outside of the organisation); and
- a reasonable person would consider to be offensive, intimidating, humiliating or threatening.

Work bullying can happen in any organisation and can be carried out by anyone in the workplace in any position. Similarly, anyone in the workplace may be the target of work bullying. Work bullying includes a range of behaviours that may be overt or subtle and intended or unintended and could occur verbally, physically or in writing. The behaviours may be aggressive and violent, such as shouting and physical confrontations, or more subtle behaviours such as repeated, unreasonable and inappropriate behaviour.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Table D-1 *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination – Understanding bullying*

Understanding bullying
Single incident
A single incident of bullying does not fall within the definition of work bullying but must be responded to appropriately because it may escalate into work bullying if ignored. The procedures discussed in the <i>Resolving Workplace Issues: Information for Employees</i> resource can be used to effectively and efficiently respond to single incidents of work bullying behaviour.
Repeated
'Repeated' refers to the nature of the behaviour, not the specific behaviour that has occurred. Repeated, unreasonable behaviour towards one person may form a pattern of diverse incidents that can escalate over time. Repeated may also be the sum of single incidents directed at several workers over time. For example, verbal abuse on one occasion, intentional damage to personal property on another, and later being threatened with employment termination. These events form a series of repeated behaviours that may constitute work bullying.
Mobbing
Mobbing refers to work bullying behaviour perpetrated by a group of co-workers and targeted towards another worker. Sometimes they may mob numerous other workers.
Intended
Work bullying can be intended to humiliate, offend, intimidate or distress – regardless of whether or not the behaviour had the desired effect.
Unintended

Understanding bullying
Work bullying can be unintended, where the behaviour/s cause humiliation, offense, intimidation or distress or could reasonably have been expected to have that effect – even if the person conducting the behaviour/s did not intend to have that effect.

Source: *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination*

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Direct bullying includes: verbal abuse; putting someone down and humiliating them through gestures, sarcasm, criticism, teasing and insults (often in front of others); aggressive or intimidating conduct; practical jokes and ‘initiation ceremonies; or spreading rumours and innuendo about someone.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Indirect bullying includes: unjustified criticism or complaints; unreasonable work expectations (including too much or too little work or work below or above a worker’s skill level); deliberately excluding someone from workplace activities or deliberately denying access to information or other resources.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Disagreement or differences of opinion between employees do not always equate to work bullying. The ACTPS promotes respectful, robust discussion between employees to enhance productivity, which is a characteristic of a mature workplace culture. This can involve challenging each other’s opinions, and may sometimes be frustrating for those involved. Ensuring these interactions occur respectfully can help minimise the likelihood of the interactions being perceived as bullying in nature.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

It is important to differentiate between a person’s legitimate work authority and work bullying. All employers have a legal right to reasonably direct and control how work is done, and managers have a responsibility to monitor work flows and give feedback on performance.

Reasonable management action is action to direct and control how work is done that is carried out in a fair way. Legitimate managerial actions do not constitute work bullying.

Examples of reasonable management action include:

- providing constructive feedback on an employee’s work performance (although an employee may find this process confronting or upsetting, this does not constitute work bullying);
- transferring, terminating or taking action to make an employee redundant where the process is conducted fairly and equitably and in accordance with relevant legislation and ACTPS Enterprise Agreements;
- counselling employees in relation to underperformance;
- making justifiable and reasonable decisions related to recruitment, selection, promotion and development opportunities;
- setting reasonable performance standards and achievable deadlines;
- allocating particular hours of work to meet operational requirements (e.g. 8.30am commencement, having regard to the employment framework);
- ensuring workplace policies are implemented and adhered to;
- allocating work and rostering/allocating work hours;

- taking action to manage and resolve workplace issues in accordance with whole-of-government guidelines and ACTPS Enterprise Agreements, including implementing disciplinary action;
- talking to an employee about workplace issues such as inappropriate behaviour or misconduct, including work bullying, harassment and discrimination;
- leaving an employee out of meetings that are not relevant to their duties; and
- taking other action in line with ACTPS Enterprise Agreements.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

While an action may be reasonable, the manner, tone and motivation of managerial actions will be also perceived by employees. Executives, managers and supervisors need to be aware of how their words and actions may be perceived by staff. They should model and practice the ACTPS Values and Signature Behaviours since they set the tone for how things get done in the workplace and provide a consistent point of reference across the ACTPS regarding what is, and what is not, acceptable behaviour.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Raising awareness that work bullying is unacceptable is an important step in preventing it. Work bullying, if left unchallenged, can become the “norm”. Directorates can raise awareness in many ways, including training and development strategies, communications campaigns, top-down modelling of acceptable workplace behaviour from leaders and so on.

Work bullying training should be tailored in content depending upon its audience, as per the below table:

Table D-2 *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination- Training Requirements*

All Employees
Ensure they understand the concepts of work bullying, harassment and discrimination, how to report work bullying, the process of managing and resolving work bullying and how to access support and advice. Ensure they understand expectations regarding appropriate workplace behaviour as outlined in ACTPS policy and procedure.
Managers/Supervisors
Ensure they have the skills to appropriately manage and resolve work bullying, harassment and discrimination, and know how to recognise these behaviours and respond to allegations of work bullying, harassment and discrimination
Respect, Equity and Diversity Contact Officers (REDCOs)
Ensure REDCOs have the necessary skills and knowledge to fulfil their role, including the ability to provide information to support to ACTPS employees regarding work bullying, harassment and discrimination

Source: *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination*

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

In the ACTPS, work bullying, harassment and discrimination can be reported through:

- 1) Supervisors and managers
- 2) Executives through the Open Door Protocol
- 3) Local HR teams

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Employees can approach their local supervisor or manager for advice and support regarding workplace issues of any kind. If the issue they are experiencing is with their own supervisor or manager, employees can approach the next level of management, or seek support from another Executive through the Open Door Protocol (see below). Directorate HR teams also have staff equipped to provide advice and assistance to employees on workplace issues, including those of work bullying, harassment and discrimination.

The *Resolving Workplace Issues: Work Bullying, Harassment and Discrimination* document states:

Open Door is a work practice in which managers and Executives leaves their door “open” (figuratively speaking) to encourage productive communication among employees. It aims to ensure that every individual has a genuine impartial avenue to bring forward concerns in relation to respect, equity and diversity issues by being able to approach their direct supervisor or senior leader to discuss their concerns and possible means of resolution.

Under Open Door, employees may approach their RED Executive Sponsor, their directorate’s HR area, or any other supervisor, manager or executive for advice or to lodge a complaint.

Audit reports

Reports Published in 2017-18	
Report No. 08 – 2018	Assembly of rural land west of Canberra
Report No. 07 – 2018	Five ACT public schools' engagement with Aboriginal and Torres Strait Islander students, families and community
Report No. 06 – 2018	Physical Security
Report No. 05 – 2018	ACT clubs' community contributions
Report No. 04 – 2018	2016-17 Financial Audits – Computer Information Systems
Report No. 03 – 2018	Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson
Report No. 02 – 2018	ACT Government strategic and accountability indicators
Report No. 01 – 2018	Acceptance of Stormwater Assets
Report No. 11 – 2017	2016-17 Financial Audits – Financial Results and Audit Findings
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