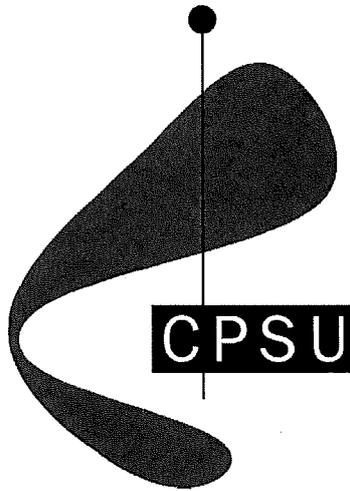


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## **CPSU (PSU Group) Submission:**

# **Inquiry into the establishment of an independent integrity commission for the ACT**

**May 2017**



As the primary union representing Australian Capital Territory Public Service (ACTPS) employees, the Community and Public Sector Union (CPSU) is committed to providing a strong voice for members in key public policy and political debates.

The CPSU takes issues of corruption and misconduct very seriously and supports efforts to prevent corruption and misconduct in ACTPS agencies. Corruption and misconduct compromises the work of CPSU members who take pride in the work that they do. The CPSU has been, and will continue to, work with the ACTPS to implement strategies which uphold the integrity of these agencies and try to ensure that they are free of corruption.

The CPSU is broadly supportive of an ACT integrity commission being established, however, there are a number of issues that need to be addressed. The CPSU believes that an ACT integrity commission should:

- have appropriate resourcing, funding and staffing;
- Include oversight of commission powers to ensure due process and accountability;
- Have default private hearings to ensure fairness;
- Refer corruption for prosecution but not make public findings;
- Avoid duplicating existing integrity frameworks;
- Broaden the scope so the commission does not just cover ACTPS employees;
- Ensure a clear definition of misconduct that relates to criminal and corrupt activities; and
- Improve ACTPS reporting on integrity and misconduct.

**(a) the personnel structure of the commission to ensure the appropriate carriage of workload**

Regardless of the model of integrity commission that is adopted by the ACT, it is essential that the staff of any ACT integrity commission are trained and resourced appropriately.

The experience in the Commonwealth is that ACLEI has a low level of staff. ACLEI works at the moment because they cover quite a narrow scope of employees, however, the agency's role has broadened a bit recently which has been difficult on staff. The ACT needs to avoid this situation if it creates an integrity commission.

There is a risk that unless an integrity commission is appropriately staffed, it will not be able to do the wide range of work that has been suggested from investigation to research and educative functions.

**Recommendation:** The ACT integrity commission is properly funded and staffed to cover the scope of activities that has been proposed.

**(b) governance and funding that delivers independence**

The CPSU has no strong stance on specific governance structures and funding to ensure independence, however, recent changes to ICAC in NSW highlight issues that need to be considered as part of any discussion about an ACT integrity commission.

While maintaining a base level of funding is important to ensuring independence, issues with supplementary funding show that the independence of a commission can still be affected. Recent cuts to the supplementary funding of the NSW ICAC highlights the importance of a funding structure that ensures independence and is not left to the whims of the Government of the day. A statement issued by the Independent Commission Against Corruption (ICAC) said that as a result of these cuts its staff budget would be reduced by approximately 9.5 per cent for the next financial year, which means it will be forced to drop its workforce from 124 to 103 positions.<sup>1</sup> It will mean greatly reduce investigative capacity resulting in less scrutiny of the actions of the NSW Government.<sup>2</sup>

<sup>1</sup> ABC News (2016, 4 June). NSW corruption watchdog forced to fire staff following State Government funding cut. Retrieved from <http://www.abc.net.au/news/2016-06-04/nsw-corruption-watchdog-to-fire-staff-as-government-cuts-funds/7477796>

<sup>2</sup> Public Service Association (2016, 20 June). Budget must restore ICAC funding to stop privatisation corruption. Retrieved from <http://psa.asn.au/budget-must-restore-icac-funding-to-stop-privatisation-corruption/>

The CPSU also notes recent changes to NSW ICAC where it is now led by three commissioners instead of one, with two having to agree before a public inquiry can be held.<sup>3</sup> These changes have been opposed by previous ICAC commissioners. The CPSU understands that in most other jurisdictions with an integrity commission equivalent, there is a single commissioner, with Queensland being the exception. The CPSU also notes the recent inquiry into an integrity commission in the Northern Territory that also recommended a single commissioner.<sup>4</sup> The benefit of a single versus multiple commissioners should be explored in future consultation.

The CPSU notes that integrity commissions often maintain a separation between assessment and investigation, despite sharing leadership teams. For example, in South Australia, the Office of Public Integrity can receive and assess complaints but does not have powers of investigation. Assessments and recommendations are then referred to ICAC.<sup>5</sup> This form of structural separation should be considered.

**Recommendation:** The ACT integrity commission should maintain a separation between the assessment of allegations and investigations.

**Recommendation:** The ACT integrity commission should have guaranteed base funding over the forward estimates to ensure independence.

### **(c) the powers available to a commission**

#### Own motion investigation and requiring attendance

While the CPSU is supportive of own motion investigation, it is important that there is external oversight of the matters of selection for investigation to ensure accountability. The oversight must be independent of the political process.

The CPSU supports an independent office to oversee the integrity commission and conduct audits and inspections where necessary. The oversight by the office should, however, be clearly defined.

Additional accountability could be provided by an all party Legislative Assembly committee that oversees the performance and activities of the integrity commission.

**Recommendation:** An independent office provides oversight of the ACT integrity commission.

**Recommendation:** An all-party Legislative Assembly committee is established to provide additional external scrutiny of the ACT integrity commission.

#### Hearings

The CPSU supports requirements for hearing attendance, however, it is essential that persons are informed about the nature of the allegations or complaints. Only in exceptional circumstances should a person not be informed before the commencement of an inquiry about the nature of the allegation or complaint being investigated.

The CPSU does not support public hearings except in extraordinary circumstances. Private hearings should be the default mode of hearing. The CPSU consulted with members who work in ACLEI who

<sup>3</sup> Sarah Gerathy (2016, 15 November). ICAC: Sweeping changes to NSW watchdog might see Megan Latham lose job. Retrieved from <http://www.abc.net.au/news/2016-11-15/sweeping-changes-to-icac-might-see-megan-latham-lose-job/8027442>

<sup>4</sup> Brian Ross Martin AO QC (2016, May). Anti-Corruption, Integrity and Misconduct Commission Inquiry - Final Report. NT Government. Retrieved from <https://acimcinquiry.nt.gov.au/?a=292252>

<sup>5</sup> Independent Commissioner Against Corruption (South Australia). Office of Public Integrity. Retrieved from <https://icac.sa.gov.au/content/office-public-integrity>

have direct experience with ensuring the integrity of public sector staff. There was a general consensus that private hearings work better than public hearings:

- The standard of proof for ICAC in NSW is “on the balance of probability” and findings cannot be made about guilt, a far lower bar than in criminal cases.
- Public hearings can impact on the ability to prosecute corruption afterwards because of the media attention they get;
- Public hearings have an impact on reputation, considering the vast majority of people ACLEI bring in to talk to are just witnesses.

The CPSU notes that the Inspector of ICAC raised concerns about public hearings, stating that having private hearings “does not prevent the exposure of found conduct at the end of the investigation and the referral to prosecuting authorities.” Further “it will prevent the undeserved trashing of reputations and will still permit a proper focus and a fairly managed forensic process, without the distraction of temptation for flamboyance or theatre.”<sup>6</sup>

The CPSU notes that the ACT is a particularly small jurisdiction with public administration being the largest industry. The CPSU notes recent testimony from Mr John Nicholson SC, Acting Inspector, Office of the Independent Commission Against Corruption that highlighted the impact that investigations can have:

*“The impact lasts and in particular comes into play when labelled persons apply for a position initially equivalent to the position they held when investigated, and it continues as they seek positions of less and less value over the years to come. I have had two people in my office just in really recent times who have applied for over 400 jobs over a period of, say, two or three years who still find that people are googling their name and finding the report in the Illawarra Mercury or the Lismore gazette.”*

Reputational damage from association with hearings is likely to be far greater than elsewhere and should be a consideration in favour in private hearings.

**Recommendation:** Persons required to attend integrity commission hearings are informed of the nature of the allegation or complaint except in extraordinary circumstances.

**Recommendation:** ACT integrity commission hearings are private by default except in extraordinary circumstances.

#### Covert tactics

The use of initiate covert tactics such as listening devices, optical surveillance, undercover agents and targeted integrity tests, in particular, by an integrity commission should only occur under strict oversight and avoid the arbitrary use of coercive powers. Any powers granted to the proposed integrity commission should have proper oversight, ensuring there is due process.

The CPSU would be concerned about the introduction of any integrity testing. The CPSU does recognise that other jurisdictions such as NSW have integrity testing as part of their anti-corruption commission. Regarding integrity testing, issues of concern to the CPSU include:

- The selection and oversight of integrity testing authorities
- Timeframes to conduct an integrity test after authorisation
- Use of information acquired through integrity testing
- The potential for entrapment of employees.

<sup>6</sup> Office of the Inspector of the Independent Commission Against Corruption (2016, May 12). Report to the Premier: The Inspector's Review of ICAC. Retrieved from <http://www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf>

<sup>7</sup> Select Committee on a National Integrity Commission (2017, 12 May) Adequacy of the Australian government's framework for addressing corruption and misconduct.

It is important that integrity testing is implemented in a fair and responsible manner and there are appropriate accountability and oversight mechanisms in place. Agencies should work with staff and the CPSU to ensure that employees have a genuine say about how this is implemented. This will ensure that the implementation of the scheme and accompanying guidelines are developed effectively and understood by staff.

The CPSU does not support excessive coercive powers and any integrity commission must go through proper legal processes when investigating corruption to ensure confidence in the process. Protections must be in place to ensure that the rights of individuals are upheld during any investigation of corruption and that processes are not abused to entrap ACTPS employees.

**Recommendation:** Protections that ensure due process and judicial oversight are included if an ACT integrity commission can initiate covert tactics.

#### Disciplinary decisions and mediation

An ACT integrity commission should not be given power to commence prosecutions for corruption, it should be a purely investigative body. The CPSU is wary of any integrity commission being able to make findings of corrupt conduct, even if it is serious corruption, noting that it may violate principles of procedural fairness. Corrupt and criminal conduct, it should be investigated then dismissed or referred for prosecution without making any statements that would affect the right to a fair trial. A jury must determine the case before it based on admissible evidence before the court, and not on adverse public information.

An integrity commission should be able to make disciplinary decisions such as referring matters for criminal prosecution, however, it is unclear why if there is insufficient evidence to proceed to corruption, why a mediation program is necessary. The CPSU notes that no other jurisdiction includes a mediation program and any misconduct that is not criminal or corrupt should be referred to the relevant agency.

**Recommendation:** The ACT integrity commission does not make public determinations of corruption conduct but instead is able to refer cases for prosecution.

#### Vexatious claims

It is important that there is broad confidence in the process by both the public and the employees it covers. The CPSU believe it is important that there are protections against vexation claims and supports sanctions such as fines to deter them.

The CPSU is supportive of significant for false or misleading complaints and for contempt of or obstructing and failing to comply with directions given by an integrity commission.

**Recommendation:** Penalties to deter vexation claims are included if an ACT integrity commission is introduced.

#### Scope of coverage

The CPSU would be concerned if the scope of any anti-corruption approaches is limited to only ACTPS departments, agencies, parliamentarians and their staff.

The CPSU has been particularly concerned about the increasing risk of corruption and misconduct outside of public sector agencies as a result of increasing privatisation and the outsourcing of public services. Public accountability and transparency are eroded by privatisation and outsourcing. Privately run services, including those run by non-government organisations (NGOs), do not have the

same requirements of disclosure to parliament and to the general public, nor do they have the same levels of independent oversight and audit.

A 2012 Independent Commission Against Corruption (ICAC) report into NGO delivery of services in NSW highlighted some examples of misconduct and corruption within NGOs receiving government funding. These included:

- staff using government resources and money for their own benefit;
- staff using funds to deliver a different service to the one contracted;
- organisations receiving funding for the same service from multiple funders;
- theft and inappropriate use of government funded assets;
- services provided to favoured clients of the organisation's manager;
- collusion between government frontline staff and the organisation's staff; and
- false reporting on service delivery.<sup>8</sup>

Corrupt conduct by any person – whether or not a public official – that impairs, or that could impair, public confidence in public administration should be covered by an integrity commission.

**Recommendation:** The ACT integrity commission should cover any corrupt conduct that affects public administration by a person whether or not a public official.

### Misconduct

The CPSU notes that the Issues paper suggests that an ACT integrity commission would cover both corruption and misconduct. The CPSU has concerns that unless the definition of misconduct is tight, activities that do not relate to corrupt or criminal behaviour may fall under the scope of an ACT integrity commission.

The CPSU notes that misconduct is defined as 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.<sup>9</sup>

It is essential that the definition of misconduct covered by any integrity commission is not too broad and ill defined. For the purposes of any integrity commission, it should not go beyond corrupt and criminal behaviour. Although the CPSU does not condone misconduct, we believe strongly that staff have a right to a proper process in how those allegations are dealt with.

<sup>8</sup> Independent Commission Against Corruption (2012, December). Funding NGO Delivery of Services in NSW: A Period of Transition. Retrieved from <http://www.icac.nsw.gov.au>

<sup>9</sup> ACT Government (2015). ACT Public Service: Resolving Workplace Issues - Misconduct and Investigations. Retrieved from [http://www.cmd.act.gov.au/data/assets/pdf\\_file/0011/830189/160121\\_Resolving\\_Workplace\\_Issues-MI.pdf](http://www.cmd.act.gov.au/data/assets/pdf_file/0011/830189/160121_Resolving_Workplace_Issues-MI.pdf)

Conduct that falls short of corrupt conduct and amounting to misconduct or maladministration be referred to the relevant agency for investigation.

**Recommendation:** The ACT integrity commission does not duplicate existing integrity and Code of Conduct processes and focuses solely on corrupt and criminal behaviour.

**(d) the educative functions of a commission**

The CPSU notes that currently there is no consistent process for ethics training in the ACTPS. While there are documents that provide guidance, staff more broadly do not receive education about integrity and ethics.

The CPSU would be supportive of an integrity commission engaging in public sector ethics training so long as additional funding is provided and other training to improve professional development is cut to fund it.

The CPSU would also be supportive of research and risk reviews being conducted in the ACTPS aimed at improving procedures and preventing misconduct. Strengthening processes and public confidence in the ACTPS is important. An integrity commission should be able to examine wider government and administrative practices that allow corrupt conduct to develop. It needs, however, to be funded and conducted independently.

It is, however, unclear how this work would interact with work currently undertaken by the ACT Auditor-General. Further information would be required to avoid duplication of work.

As the key union representing ACTPS employees, the CPSU believes it can play an important role in the education process about any new integrity framework so people are aware of process and protections and add to the role played by any integrity commission.

**Recommendation:** The ACT integrity commission conducts training, research and risk reviews that do not duplicate work done by the Auditor-General.

**Recommendation:** The ACT integrity commission work with the CPSU to educate ACTPS employees on any new integrity measures adopted.

**(f) the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT**

It is important that an integrity commission is solely focused on criminal and corrupt matters, not Code of Conduct procedures. Existing processes include the ACT Integrity Policy, ACTPS Code of Ethics, ACTPS Code of Conduct and Public Interest Disclosure Act 1994.

The *Public Sector Management Act 1994* (PSM Act) set out the expectations about the professionalism and the integrity of the ACTPS. The important values and principles in the Act guide public administration. These principles are set out in detail in section 6 of that Act but broadly cover:

- service to the public
- responsiveness to the government and the needs of the public
- accountability
- fairness and integrity
- efficiency and effectiveness.

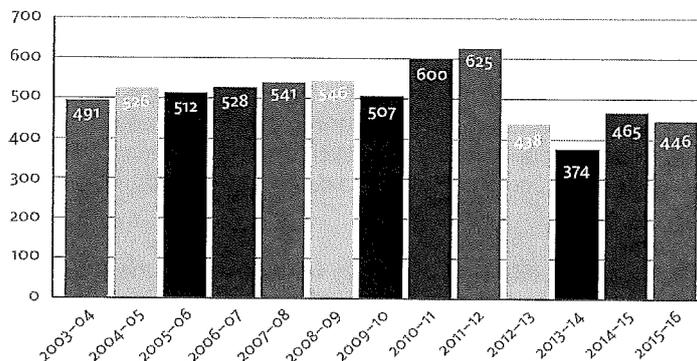
The Public Sector Management Act bans public servants from taking improper advantage of information to benefit themselves or someone else, and binds them to confidentiality. The Code of Conduct for ACT public servants calls on public servants to manage conflicts, although does not say how. More detail is in the Code of Ethics, which covers issues such as the use of confidential information after leaving the public service.

The CPSU notes that the NT repealed the Public Interest Disclosure Act (NT) and absorbed disclosures into the NT Anti-Corruption Commission as the Office for Public Integrity. The CPSU does not support including whistleblowing as well as misconduct and performance issues in an integrity commission's role.

The CPSU does not support an overly onerous process that duplicates what is already set up. There could be better central oversight across the entire service about misconduct and performance but should not lie with an anti-corruption agency.

While the ACT Government does not report on integrity and misconduct in its State of the Service report (as the Commonwealth does<sup>10</sup>), the CPSU does note that complaints about directorates (excluding ACT police) are lower than they were a decade ago.<sup>11</sup>

Figure 1: Approaches received about directorates (excluding ACT Policing), 2003-04 to 2015-16



The CPSU is supportive of having better ACTPS performance and misconduct measures, including stakeholder satisfaction, prosecution outcomes and case study reports. The CPSU recommends that the ACT State of the Service report could include similar reporting on misconduct and perceptions of corruption to the APS State of the Service report to ensure transparency.

**Recommendation:** The ACT integrity commission does not duplicate existing integrity processes related to ACTPS employees' Code of Conduct and performance but works with the CPSU to strengthen these existing processes.

**Recommendation:** The ACT State of the Service Report includes integrity performance measures, including reporting on misconduct and perceptions of corruption.

#### (g) any other relevant matter

The CPSU is supportive of efforts to strengthen public confidence in the ACTPS, however, it cannot be a top down process. Staff must be involved directly to ensure the most effective scheme. A consultative process to get the views of staff to have a say to identify any issues before it is finalised. The CPSU is willing to facilitate this process as an independent representative of ACTPS employees, allowing staff to ability to talk in all workplaces.

**Recommendation:** The ACT Government work with the CPSU to consult ACTPS employees about the most effective integrity commission model including scope and powers.

<sup>10</sup> Australian Public Service Commission (2016, 28 November). State of the Service Report: 2015-16. Retrieved from <http://www.apsc.gov.au/about-the-apsc/parliamentary/state-of-the-service/stateoftheservice2015-16/integrity>

<sup>11</sup> ACT Ombudsman (2016, 4 October). Annual Report 2015-16. ACT Government. Retrieved from [http://ombudsman.act.gov.au/data/assets/pdf\\_file/0027/42579/act\\_ombudsman\\_annual\\_report\\_2015-16.pdf](http://ombudsman.act.gov.au/data/assets/pdf_file/0027/42579/act_ombudsman_annual_report_2015-16.pdf)