

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PUBLIC SECTOR MANAGEMENT BILL 1994

**PUBLIC SECTOR MANAGEMENT (CONSEQUENTIAL AND
TRANSITIONAL PROVISIONS) BILL 1994**

PUBLIC INTEREST DISCLOSURE BILL 1994

**Report by the Select Committee on the Establishment
of an ACT Public Service**

June 1994

PREFACE

The Select Committee on the Establishment of an ACT Public Service was formed on 17 June 1993 to examine the establishment of a separate Public Service for the ACT. The Committee had a number of issues that it wanted to investigate, including:

- the distribution of agency functions and the structure of these agencies;
- the desirable roles and responsibilities of the separate service;
- accountability mechanisms of the service to the community, the government and the legislature;
- the role of community consultation in establishing a code of conduct for the service; and
- the most appropriate transitional arrangements to the new service.

On 11 May 1994 the Assembly referred the Public Interest Disclosure Bill 1994 to the Committee for investigation and report at the same time it presents its report into the establishment of an ACT public service.

A key problem encountered by the Committee in the course of the inquiry has been that the public sector management legislation had been unavailable to the public before 21 April 1994. The intention of the Government to bring on debate of the legislation in the Budget sitting week commencing on 14 June effectively limits the inquiry to 7 weeks, precluding any significant consideration of major issues outside the provisions of the three bills. Issues raised in submissions received by the Committee, and during the public hearings are, however, complex and require detailed analysis and consideration.

In making this report to the Assembly, the Committee recognises that the work of the Select Committee will cease. In view of the complexity and importance of the issues raised during the inquiry, the Committee considers that another Committee should be established to investigate further these concerns and to oversee the implementation of the Public Sector Management Bill 1994 and related legislation, and the transition to a separate ACT Government Service.

The Committee concentrated exclusively on issues raised in submissions made to the inquiry and at the four public hearings. No clause by clause examination of the bills has been possible in the time available.

The key issues raised concerned the independence of the Director of Public Prosecutions, the Legal Aid Commission and the ACTEW from the centralised management structure envisioned in the bills. The Committee shared the concern of these bodies and has recommended that further consideration of these issues be undertaken before the legislation is passed by the Assembly. Further concerns were raised in evidence about the role and powers of the Commissioner for Public Administration, mobility provisions between the ACT and Commonwealth public services and the creation of a Senior Executive Service Staffing Committee.

In reviewing the evidence the Committee notes that the issues raised cover both the technical details of the proposed legislation and, more importantly, the administrative model to which the legislation gives effect. Taken collectively, the concerns expressed to the Committee by

all witnesses would suggest that the imposition of the Public Sector Management Bill with its centralised control structure would be ill advised.

The creation of a separate public service for the ACT will have a far reaching effect not only on the employees of the Government, but also on the community that the proposed Service was created to serve. In the view of the Committee the administrative structure and the client focus of the proposed Service needs to be carefully considered after full consultation with all affected persons and organisations involved, including the public.

The criticisms of the legislation made by witnesses to this inquiry indicate to the Committee that the consultative process needs to continue before the final form of the administrative structure of the proposed ACT Government Service is set in legislation, and that legislation enacted. The Committee does not believe that this process could be completed before the 1 July start date for the new Service envisioned by the Government.

The Committee therefore concludes that the Public Sector Management Bill and the Public Sector Management (Consequential and Transitional Provisions) Bill should not be enacted until the consultative process is complete.

In examining the Public Interest Disclosure Bill, the Committee recognised the need for specific whistleblowing provisions for public servants but considered that there should be wider coverage for others than that offered in the Public Sector Management Bill. The most appropriate form to grant protection for whistleblowers both inside and outside the public sector is by stand alone legislation. The Committee has recommended that stand alone legislation be developed, using the Public Interest Disclosure Bill as a basis for this legislation.

The Committee received 20 submissions, not including supplementary submissions, and received six exhibits. In the course of the inquiry the Committee met with officials from South Australia and the Northern Territory to discuss legislative and administrative matters which it believed to be important to the inquiry.

The Committee held four public hearings in late May and early June. Witnesses included representatives from the ACT Department of Public Administration, the Trades and Labour Council, the Law Society of the ACT, the Director of Public Prosecutions, the Legal Aid Commission (ACT), ACTEW and Professor Roger Wettenhall.

Mr De Domenico was discharged from the Committee on 22 February 1994. I was appointed in his place and was later elected Chairman of the Committee. Mr Lamont, by motion of the Legislative Assembly, was discharged from the Committee and Mr Berry appointed in his place on 19 April 1994.

I thank Mr De Domenico and Mr Lamont for their valuable contribution to the work of the Committee, and all of those people who have contributed their time and effort to the inquiry.

Trevor Kaine, MLA
Chair
June 1994

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TERMS OF REFERENCE

On 17 June 1993 the ACT Legislative Assembly appointed a Select Committee to inquire into and report on:

The Establishment of an ACT Public Service.

On 11 May 1994 the ACT Legislative Assembly referred to the Select Committee to inquire into and report on:

The Public Interest Disclosure Bill 1994.

COMMITTEE MEMBERS

Chairman: Mr T De Domenico, MLA (to 22 February 1994)
Mr T Kaine, MLA (from 25 February 1994)

Members: Mr W Berry, MLA (from 19 April 1994)
Mr D Lamont, MLA (to 19 April 1994)
Ms H Szuty, MLA

Secretary Mr R Cavanagh

Other staff who assisted the Committee in the course of the inquiry:

Ms S Shaw
Ms C Campbell

ACRONYMS/ABBREVIATIONS

ACTEW	ACT Electricity and Water
ACTGS	Australian Capital Territory Government Service
APESMA	Association of Professional Engineers, Scientists and Managers, Australia
CEO	Chief Executive Officer
COAG	Council of Australian Governments
DPP	Director of Public Prosecutions
GBE's	Government Business Enterprises
SES	Senior Executive Service
TLC	Trades and Labour Council

RECOMMENDATIONS

Recommendation 1

The Committee recommends that a Committee of the Assembly be established to inquire into and report from time to time on the implementation of legislation establishing the Australian Capital Territory Government Service, and the transition to the Australian Capital Territory Government Service.

Recommendation 2

The Committee recommends that:

- the Government examine the amendments suggested to the Committee by the Legal Aid Commission (ACT) and contained at Appendix IV of this Report with specific reference to the interests of the administrative support staff of the Commission; and
- the Legislative Assembly Committee reviewing the implementation of legislation establishing the Australian Capital Territory Government Service and the transition to the Australian Capital Territory Government Service consider the Government response to ensure that the legislation serves the public interest.

Recommendation 3

The Committee recommends that:

- the Government examine the amendments suggested to the Committee by the Director of Public Prosecutions and contained at Appendix V of this Report with specific reference to the interests of the administrative support staff of the Office; and
- the Legislative Assembly Committee reviewing the implementation of legislation establishing the Australian Capital Territory Government Service and the transition to the Australian Capital Territory Government Service consider the Government response to ensure that the Act enables the Director of Public Prosecutions to provide the level of services needed to protect the public interest and the independence of action of the DPP.

Recommendation 4

The Committee recommends that:

- ACTEW should be exempted from the legislation pending further review, with the review to be completed by 30 September 1994; and
- The Committee established to oversee the implementation of the public sector management legislation and the transition to the ACT Government service review the operations of the ACTEW to assess the impact of the legislation on the ability of ACTEW to compete with the private sector in the provision of energy and water services.

Recommendation 5

The Committee recommends that, until the matters dealt with at recommendations 2, 3 and 4 are adequately addressed, the passage of the Public Sector Management Bill and the Public Sector Management (Consequential and Transitional Provisions) Bill be deferred (but not beyond the 1994 Spring Sittings of the Legislative Assembly).

Recommendation 6

The Committee recommends that:

- whistleblower protection legislation should protect whistleblowers both inside and outside the public sector;
- this legislation should be enacted as stand alone legislation; and
- in drafting the stand alone legislation consideration be given to whether the existing provisions of the Public Sector Management Bill should, or should not, be incorporated into it.

Recommendation 7

The Committee recommends that the whistleblowing provisions of the Public Sector Management Bill (Division XII) should remain in place until such time as stand alone legislation is passed by the Assembly.

Recommendation 8

The Committee recommends that the Public Interest Disclosure Bill 1994 be considered as a basis for stand alone whistle blower protection legislation.

Recommendation 9

The Committee recommends that clause 237 of the Public Sector Management Bill be incorporated into the stand alone whistleblower protection legislation.

Recommendation 10

The Committee recommends that:

- where appropriate, the terminology used in the Public Sector Management Bill be adopted for the stand alone whistleblower legislation; and
- the government review the definitions of public servant used in the Crimes (Offences against the government) Act 1989, the Public Sector Management Bill and the stand alone whistleblower legislation to determine whether it is desirable or necessary that they be consistent.

Recommendation 11

The Committee recommends that the stand alone whistleblower legislation should incorporate the disclosure clause contained in the Public Sector Management Bill which requires a person making a public interest disclosure to also reveal their identity .

Recommendation 12

The Committee recommends that the stand alone whistleblower legislation, when drafted, should be referred to the Committee referred to in Recommendation 1 of this report for consideration before being debated by the Legislative Assembly.

CHAPTER 1.

INTRODUCTION

1.1. On 17 June 1993 the Legislative Assembly voted to establish a Select Committee to examine the establishment of a separate public service for the ACT.

1.2. In speaking to the motion creating the Committee, the opinion of one member was that:

"... formation of a separate ACT public service is perhaps the most important issue that is going to be faced by this Assembly and perhaps assemblies after this one. The proposal to establish a separate ACT public service needs to take into account ... the financial obligations of the Commonwealth Government, the terms and conditions of employment of current Commonwealth officers and the future entitlements of current employees and future employees of any future ACT public service. The importance of open, detailed and full public consultation of this matter must be recognised ... the opportunity of establishing a highly professional, innovative, flexible and cost-effective public service for the benefit of the ACT community requires input from all interested parties.

The best way for them to have that input is to have a select committee made up of elected members of the people of the ACT".¹

1.3. Once established, the Committee sought evidence from the Commonwealth Public Service Commissioner, State Governments, key bodies and the public. Among the key concerns of the Committee were:

- the distribution of agency functions: would the ACT be best served by a few large agencies or a number of small agencies;
- the desirable roles and responsibilities of the separate service;
- accountability mechanisms of the service to the community, the government and the legislature;
- the role of community consultation in establishing a code of conduct for the service; and
- the most appropriate transitional arrangements to the new service.²

1.4. The Committee was briefed by officials from the Chief Minister's Department and the Office of Public Sector Management on a number of occasions, enabling the Committee to be informed of progress on negotiations of the "20 points" or 20 draft resolutions which needed to be resolved before the separate service can be established.

¹De Domenico, T: *Debates of the Legislative Assembly for the Australian Capital Territory: Weekly Hansard*; 17 June 1993 pp 2003-4

²*ibid.*, 9 December 1993 p 4454

1.5. During these briefings, the Committee was made aware that elements of the South Australian *Government Employment Management Act 1985* were being considered as the basis of the ACT legislation. The Committee further noted that the Northern Territory had already established a separate public service. The Committee travelled to South Australia and the Northern Territory in early November 1993 to meet with officials to discuss legislative and administrative matters which it believed to be important to the inquiry.

1.6. The points made to the Committee by officials from the South Australian Government were that:

- it was desirable to have most staff employed under a single piece of legislation;
- the ACT Government has a 'once in a lifetime' opportunity to consolidate its public employment legislation;
- the South Australian Government is moving beyond the ideas embodied in the 1985 Act towards a more flexible public sector, for example with greater direct employment responsibility residing with Chief Executive Officers of government agencies and the move to agency bargaining;
- careful consideration needs to be given to public sector management matters which could be managed centrally; and
- legislatures have a major leadership role to play in ensuring the accountability of the public service to the community.³

1.7. The Committee also met with officials in the Northern Territory to discuss the operation of the Territory's *Public Sector Employment and Management Act 1993*. The Northern Territory officials made similar observations to their South Australian counterparts, informing the Committee that:

- uniform legislation with wide coverage and greater flexibility was a prime consideration when formulating their public sector reforms;
- Chief Executive Officers needed to be given greater responsibilities to achieve operational flexibility;
- consultation and negotiation with unions is vital to effective public sector reform; and
- worker awareness and education is a key element in the successful management of change in the public sector.⁴

1.8. On 22 February 1994 Mr De Domenico was discharged from the Committee and Mr Trevor Kaine appointed in his place. On 25 February Mr Kaine was elected Chairman of the Committee.

1.9. On 19 April 1994, by motion of the Legislative Assembly, Mr Lamont was discharged from the Committee and Mr Berry appointed in his place.⁵

1.10. The Chief Minister, Ms Rosemary Follett, introduced the Public Sector Management Bill 1994 into the Legislative Assembly on 21 April 1994, with the intent of establishing the ACT Government Service on 1 July 1994.

³ibid., p 4455-7

⁴ibid.

⁵*Minutes of Proceedings of the Legislative Assembly for the Australian Capital Territory No. 101*

1.11. The Assembly referred the Public Interest Disclosure Bill 1994 to the Committee for consideration on 11 May 1994. This Private Member's Bill deals with the issue of 'whistleblowing' and exposing corrupt practices in government agencies. The Public Sector Management Bill 1994 also contains provisions dealing with this issue, and the Assembly requested that the Committee report on this Bill at the same time as it reports on the public sector management legislation.

1.12. With the Bills establishing a separate service publicly available, the Committee conducted public hearings on 24 and 26 May, and 6 and 8 June 1994. Witnesses included representatives from the ACT Department of Public Administration, the Trades and Labour Council, the Law Society of the ACT, the Director of Public Prosecutions, the Legal Aid Commission (ACT), ACTEW, APESMA and Professor Roger Wettenhall.

1.13. The Committee also heard evidence from Mrs Kate Carnell, Leader of the Opposition, concerning the Public Interest Disclosure Bill 1994. A full list of witnesses appearing before the Committee is at Appendix I.

1.14. A key problem encountered by the Committee in the course of the inquiry has been that the public sector management legislation was unavailable to the public before 21 April 1994. The Committee acknowledges the assistance of the Government in providing a draft copy of the Bill to the Committee, but the confidential nature of the Bill in draft form precluded the Committee from generating any public discussion of that document.

1.15. The introduction of the Bill into the Assembly on 21 April enabled public discussion of the issues associated with the establishment of a separate service, and the treatment of these issues in the legislation, to take place. However, the intention of the Government to bring on debate of the legislation in the Budget sitting week commencing on 14 June effectively limits the inquiry to 7 weeks, precluding any significant consideration of major issues outside the provisions of the three bills⁶. Further, the issues raised in submissions received by the Committee, and during the public hearings are complex and require detailed analysis and consideration.

1.16. While noting the Government timetable on this issue, the Committee is determined that full consideration and discussion of these issues should take place.

1.17. When speaking to the motion establishing the Committee this determination was expressed from the outset:

"... it is not appropriate for the Government ... to do everything in advance, come to this Assembly with a piece of legislation ... and expect it to be passed within a certain time frame without the Assembly having had a proper look at what has gone on ... [should this timetable not be adhered to] we have an assurance from backbench government members that the life of this Committee may be extended."⁷

⁶The Public Sector Management Bill 1994, the Public Sector Management (Consequential and Transitional Provisions) Bill 1994 and the Public Interest Disclosure Bill 1994.

⁷De Domenico, T: op cit., p 2004

1.18. In making this report to the Assembly, the Committee recognises that the work of the Select Committee will cease. However, in view of the complexity and importance of the issues raised by the Committee and witnesses at the public hearings and in submissions, the Committee considers that another Committee should be established to investigate further these concerns and to oversee the implementation of the Public Sector Management Bill 1994 and the transition to an ACT Government Service.

Recommendation 1

The Committee recommends that a Committee of the Assembly be established to inquire into and report from time to time on the implementation of legislation establishing the Australian Capital Territory Government Service, and the transition to the Australian Capital Territory Government Service.

CHAPTER 2.

PUBLIC SECTOR MANAGEMENT BILL 1994 PUBLIC SECTOR MANAGEMENT (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 1994

2.1. In view of the limited time available to the Committee to examine the legislation establishing the ACT Government Service, the Committee concentrated exclusively on issues raised in submissions made to the inquiry and at the four public hearings. No clause by clause examination of the bills has been possible.

2.2. The Committee received 19 submissions which are listed at Appendix II. The key issues raised in these submissions relate to the role of the Director of Public Prosecutions and the Legal Aid Commission (ACT) in relation to the operation of the legislation and the applicability of the legislation to Government Business Enterprises, specifically ACT Electricity and Water.

2.3. Further issues raised in the public hearings concerned the dispute between public sector unions and the ACT and Commonwealth Governments, the powers of the Commissioner of Public Administration and the possibility of retrospectively applying some sections of the Public Sector Management Bill.

THE LEGAL AID COMMISSION (ACT)

2.4. Currently the Legal Aid Commission (ACT) acts as an independent legal firm providing legal services for clients unable to afford services offered by the private sector. Each practitioner in the 'firm' is bound by all the professional ethics, obligations and rights of any solicitor. They are answerable to a professional body in accordance with an established code of conduct.⁸

2.5. The Legal Aid Commission identified three areas of concern with the proposed public sector management legislation:

- The Public Sector Management Bill threatens the independence of the representation of clients of the Legal Aid Office;
- The Commission cannot properly conduct a legal practice if its staff are public servants. A public servant has to respond to the needs of Government. A solicitor must act for a private client in the client's interest unconditionally within the law; and
- the Commission funds and takes on cases that are contrary to the desires of Government. It is therefore inappropriate that the Government that is being opposed in court should also be the employer.⁹

⁸Staniforth, C and Crebbin, L: Submission 3 p 2

⁹Legal Aid Commission (ACT): Supplementary Submission 18.1 p 1

2.6. The key concern of the Commission and other witnesses associated with the operation of the Commission was the intent of the Government to include lawyers and administrative support staff of the Commission as public sector employees for the purposes of the Public Sector Management Bill. This concern was expressed as:

"the client base of the ACT Legal Aid Office have got no choice. They are people without means and they do not have the choice of an independent lawyer. Secondly, the clients of the ACT Legal Aid Office are facing criminal prosecutions and it is the same entity that is employing the defence lawyers who is going to conduct the prosecution. ... one of the fundamental tenets of justice is not only that justice is done, it must be seen to be done and ... perhaps even potential clients ... are going to look askance at a Government lawyer representing them in a prosecution where the Government is prosecuting".¹⁰

2.7. A related issue was the difficulties associated with recruiting staff quickly, and the potential impact of delays in filling vacancies on the workload of the Legal Aid Office:

"In the Public Service it is not uncommon for an employment process to take three months. In that time the Legal Office needing to fill a staff vacancy will have been unable to provide legal services to 289 people seeking help in domestic violence, 355 people in police custody or 124 in family law disputes."¹¹

2.8. In response to these concerns Ms Linda Webb, Acting Secretary, and Mr Peter Burnett, Assistant Secretary, Department of Public Administration pointed out to the Committee that the Legal Aid Commission was identified as an "autonomous instrumentality" for the purposes of the legislation:

"In the case of the Legal Aid Commission it has previously had its own employment powers and as you would know its independence is very important so that it can be sure that it can defend people, and quite often defend them against the Government, with complete independence. It was therefore felt appropriate that it have the powers over classifications in terms of setting the types of jobs and the wage rates, setting the conditions of employment with more flexibility than is necessary for the other authorities and other Government agencies."¹²

2.9. The Committee considers that, in examining this issue, two elements need to be addressed: the actual and visible independence of the Legal Aid Commission (ACT), and the desirability of having publicly employed staff work under the same terms and conditions that apply to other public sector employees. The Committee notes that the Legal Aid Commission is staffed by approximately 20 lawyers and 30 administrative support staff.¹³

¹⁰Clynes, R, President, ACT Law Society: Transcript p 57

¹¹Todd, R, President, Legal Aid Commission (ACT): Transcript pp 157-8

¹²Webb, L, Acting Secretary, and Burnett, P, Assistant Secretary, Department of Public Administration: Transcript pp 5-6

¹³Clynes, R, President, ACT Law Society: Transcript p 58

2.10. The Legal Aid Commission suggested to the Committee in evidence that a number of amendments could be made to the Public Sector Management Bill 1994 and the Public Sector Management (Consequential and Transitional Provisions) Bill 1994 to achieve the balance between independence and parity in employment conditions. These amendments are at Appendix IV of this Report (pp 30 - 33).

2.11. The Committee therefore considers that the Government should review the Public Sector Management Bill and the Public Sector Management (Consequential and Transitional Provisions) Bill in conjunction with the amendments suggested by the Legal Aid Commission.

2.12. The Committee further considers that the Committee proposed to be established by Recommendation 1 review the operation of the subsequent legislation to ensure that, in application, it serves the public interest.

Recommendation 2

The Committee recommends that:

- the Government examine the amendments suggested to the Committee by the Legal Aid Commission (ACT) and contained at Appendix IV of this Report with specific reference to the interests of the administrative support staff of the Commission; and
- the Legislative Assembly Committee reviewing the implementation of legislation establishing the Australian Capital Territory Government Service and the transition to the Australian Capital Territory Government Service consider the Government response to ensure that the legislation serves the public interest.

THE DIRECTOR OF PUBLIC PROSECUTIONS

2.13. The Director of Public Prosecutions (DPP) raised similar concerns to the Legal Aid Commission relating to the independence of the office under the public sector management legislation. The DPP stated in his submission that:

"All Australian States and Territories together with the Commonwealth of Australia now have Directors of Public Prosecution. They were introduced for the express purpose of making the prosecution process immune from political interference. Hence, corrupt public officials and even ministers of the Crown may be prosecuted without fear that the process will be thwarted by party political considerations. ... Independence is critical to the maintenance of a prosecuting service which fearlessly pursues justice and which rightly enjoys the confidence of the community."¹⁴

¹⁴Director of Public Prosecutions: Supplementary Submission 14.1 p 1

2.14. In response to this concern the Government stated to the Committee:

"The DPP has never had independent employment powers. The staff of that office have always been employed under the Public Service Act. There is, as we understand it, no office of the DPP around Australia which is not staffed under core Public Service legislation.

The DPP's need for independence relate to his or her ability to operate independently within the provisions of the [DPP] Act, but they are primarily a prosecutor for the Government ... It is the performing of a function that is historically one of central government".¹⁵

2.15. The Director of Public Prosecutions saw this view as being an outdated perspective on the role of the DPP:

"That was the view that prevailed throughout Australia up until about ten years ago when governments on both sides of the political fence began to acknowledge that there needed to be a real independence in the prosecuting function."¹⁶

2.16. In a supplementary submission to the Committee, the DPP also pointed to the restriction of the independence of the office through budgetary constraint:

"the tenuous nature of my independence from the Attorney-General's Department has again been demonstrated by an arbitrary decision to reduce my budget allocation for the ensuing financial year ... the Secretary of the Department has simply treated the Office of the Director of Public Prosecutions as if it were one of the branches under his direction. This typifies the constant problem in maintaining the independence which all parties intend that it should have."¹⁷

2.17. As with the Legal Aid Commission, the Committee considers that the need for actual and visible independence of the DPP needs to be balanced against the employment terms and conditions that the Government wishes to apply to all public employees.

2.18. While the Committee acknowledges that the DPP's office is around Australia staffed under Public Service legislation, the Committee considers that the point being made by the DPP is that external decisions regarding the staffing structure of the Office of the DPP limit the prosecutorial independence of the Office.

2.19. Further, the Committee accepts that, while the DPP is subject to budgetary constraint, this constraint should not restrict the independence of the DPP in carrying out the duties stipulated in the DPP Act.

¹⁵Webb, L, Acting Secretary, Department of Public Administration and Hunt, C, Secretary, ACT Attorney-General's Department: Transcript pp 7-8

¹⁶Crispin QC, K, Director of Public Prosecutions: Transcript p 51

¹⁷Director of Public Prosecutions: Supplementary Submission 14.3 pp 1-2

2.20. The DPP provided the Committee with suggested amendments to the public sector management legislation, which is at Appendix V of this Report (p 34). The Committee considers that these amendments should be examined in conjunction with the public sector management legislation in order to ensure that a proper balance is struck between the independence of the office and the need to maintain parity in employment terms and conditions between public servants working for the DPP and the wider ACT Government Service.

2.21. The Committee also considers that, as with the Legal Aid Office, the impact of the public sector management legislation on the ability of the DPP to provide the level of services needed to protect the public interest and upon the independence of action of the DPP should be examined by the Committee which was the subject of Recommendation 1.

Recommendation 3

The Committee recommends that:

- **the Government examine the amendments suggested to the Committee by the Director of Public Prosecutions and contained at Appendix V of this Report with specific reference to the interests of the administrative support staff of the Office; and**
- **the Legislative Assembly Committee reviewing the implementation of legislation establishing the Australian Capital Territory Government Service and the transition to the Australian Capital Territory Government Service consider the Government response to ensure that the Act enables the Director of Public Prosecutions to provide the level of services needed to protect the public interest and the independence of action of the DPP.**

ACT ELECTRICITY AND WATER

2.22. The Committee heard evidence from the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) expressing concern over the application of the public sector management legislation to government business enterprises, particularly ACT Electricity and Water (ACTEW).

2.23. The key concerns of APESMA were that:

"The Government ... does not recognise that highly commercialised Government Enterprises like ACTEW, ACTTAB etc are essentially businesses which will only deliver best practice results when freed from the shackles, controls and bureaucracy which invariably accompany a core public service. ... Over time they will destroy well developed business cultures, which other states are currently expending great effort to develop in their utility GBE's.

The utility industries (both electricity and water) are cohesive national entities in respect of skills. By the monopolistic nature of these industries, many of these skills are unique to (or are predominantly found in) these industry

organisations. As a consequence, career and skills streams are typically constrained within the industry, if not the organisation. Where skills paths and careers extend outside the industry, this is typically to associated private industries (eg electrical trades, electrical and civil engineering, consulting engineering) rather than to other elements of various public services.

Competencies and career structures are evolving on industry bases, not a public service basis. Linking employees in the ACTEW closely with the ACTGS provisions will place barriers to their careers in those industries by imposing a core public service framework and controls on career streams.¹⁸

2.24. APESMA also pointed out to the Committee that Totalcare Industries Ltd, which could be considered a government business enterprise, is excluded from the legislation. In making this exemption the Government, in the view of APESMA, recognises that some enterprises competing in a commercial environment need to operate outside the Act.¹⁹

2.25. The Committee invited ACTEW management to respond to these concerns at its public hearing held on 8 June 1993. Mr Peter Phillips, Chairman, ACTEW stated to the Committee that the Government had advised the ACTEW that it intended to preserve the continued independence of the ACTEW.

2.26. Mr Phillips further stated that the ACTEW could operate most effectively and efficiently in a commercial environment, to achieve optimal outcomes in terms of service provision for the Canberra community and revenue generation for the Government. In Mr Phillips' view this situation was not recognised by public sector managers involved in the development of the public sector management bills.²⁰

2.27. Mr Phillips also pointed to the trend among state utilities towards corporatisation, and the increasing shift in focus of these organisations as participants in the energy industry, rather than as public servants.

2.28. In line with this continuing trend, the Council of Australian Governments has agreed, at its 1994 Hobart meeting, to increase flexibility in service delivery, and that the best way to achieve this was to adopt a commercial focus.²¹

2.29. Mr Phillips stated that the legislation under which ACTEW currently operated provided the scope necessary to provide for both the flexibility needed to compete in the energy industry, and the accountability requirements that are appropriate for a public sector organisation. In Mr Phillips view, applying the public sector management legislation to ACTEW would significantly reduce the flexibility needed by the organisation to compete in the energy industry, thereby reducing the level of services being offered to the Canberra community.²²

¹⁸APESMA: Supplementary Submission 16.1 p 1; Supplementary Submission 16.2 pp 1-2

¹⁹APESMA: Submission 16 p 2

²⁰See Transcript, 8 June 1994

²¹ibid.

²²ibid.

2.30. The Committee notes that ACTEW has achieved significant advances in productivity and performance since its establishment in 1988. These gains have occurred against a background of public sector reform that has seen an increase in autonomy for utilities and other Government Business Enterprises.

2.31. The Committee further notes the COAG agreement which sets a framework for granting greater autonomy to energy and water utilities to improve efficiency in the provision of these services.

2.32. The Committee shares the concern of Mr Phillips that the inclusion of ACTEW in the public sector management bills may reverse the trend towards greater flexibility, and impede ACTEW in the efficient performance of its function.

2.33. As with the Legal Aid Commission and the Director of Public Prosecutions, however, a balance must be struck between the independence of a Government body and the Government's wish to ensure that all public employees enjoy equivalent terms and conditions of service regardless of where they work.

2.34. The Committee therefore considers that ACTEW should be exempted from the legislation pending further investigation of the impact of the Public Sector Management Bill on its ability to compete in the supply of energy and water services to the Canberra community.

2.35. The Committee further considers that the Committee referred to in Recommendation 1 of this report assess the impact of the legislation on the ability of ACTEW to compete with the private sector in the provision of energy and water services.

Recommendation 4

The Committee recommends that:

- ACTEW should be exempted from the legislation pending further review, with the review to be completed by 30 September 1994; and
- The Committee established to oversee the implementation of the public sector management legislation and the transition to the ACT Government service review the operations of the ACTEW to assess the impact of the legislation on the ability of ACTEW to compete with the private sector in the provision of energy and water services.

DISPUTE BETWEEN GOVERNMENT AND PUBLIC SECTOR UNIONS

2.36. The Committee was informed of ongoing negotiations between public sector unions, the Federal Government and the ACT Government concerning a number of issues, including mobility provisions between the ACT and Federal Government public services, Section 50 transfers between the services, leave credits and the status of temporary and casual employees.

2.37. Ms Maureen Sheehan, Assistant Secretary, ACT Trades and Labour Council informed the Committee that these matters were currently before the Industrial Relations Commission:

"both the Commonwealth and the ACT Governments have been asked ... to consider whether they would delay passing their legislation until such time as the differences could be resolved in the Industrial Relations Commission. The Commonwealth has said that they will not delay their legislation and therefore, given the tight time frame, that shows that they have no interest in allowing the Commission to resolve these matters prior to 1 July.

So the unions have put it to the Commission that if the Commonwealth does not come to the party, that the Commission use the powers that it has to make an award in settlement of a dispute which would override the Commonwealth legislation."²³

2.38. Further meetings between the various parties to the dispute were held on Friday, 3 June and Wednesday, 8 June 1994. At the time that this report was being prepared, the outcome of the dispute was unknown.

2.39. The Committee notes with concern that the dispute has occurred and is proving difficult to resolve. The Committee further notes the TLC's acknowledgment of the cooperative approach taken by the ACT Government in the dispute.²⁴ The nature of the dispute, however, falls outside the terms of reference of the inquiry, except in so far as it impacts upon the effectiveness of legislation yet to be enacted. The Committee is unable to make any further comment on the matter at this stage.

PREJUDICIAL RETROSPECTIVITY

2.40. The Legislative Assembly Scrutiny of Bills and Subordinate Legislation Committee, in reviewing the public sector management legislation, identified the possibility of prejudicial retrospectivity in relation to the regulatory powers granted to public servants by the Public Sector Management Bill.

2.41. The Report of the Committee stated:

Subclause 18(1) gives the Commissioner for Public Administration power to make a declaration under subsection 18(2) relating to an existing staff member who was:

²³Sheehan, M, Assistant Secretary, Trades and Labour Council: Transcript p 42

²⁴ibid.

- "(a) a member of the transitional staff;
- (b) appointed or employed by a prescribed entity;
- (c) taken to have been appointed or employed by the Territory under section 21 of the *Health (Consequential Provisions) Act 1993* as in force immediately before [the commencement] day or
- (d) otherwise employed by the Territory, a Territory instrumentality or a statutory office holder."

Subclause (18)2 provides:

- "(2) The Commissioner may, in writing, declare that a person shall, on or after the day specified in the declaration, be taken to be employed
 - (a) as an officer or employee in a specified government agency under the Public Sector Act; or
 - (b) by the Territory on indefinite tenure in a specified government agency under this Act;

and such a declaration has effect according to its tenor."

Then subclause 18(3) goes on to provide as follows:

- "(3) A declaration under subsection (2) may be expressed to have taken effect on a day that the Commissioner certifies was the day on which the person was appointed or employed by the person's employer for the purposes of paragraph (1)(a), (b), (c) or (d)."

It appears that a declaration may thus be retrospective in effect. There are protective provisions in later subclauses of clause 18 and subclause 18(10) provides that the powers under clause 18 may only be exercised for 12 months after the commencement day.²⁵

2.42. In response to this, the Government stated:

"It is actually intended as a beneficial clause and if we did not allow for some element of retrospectivity then potentially officers might be deprived of their existing entitlements. ... the Commissioner will need to appoint some specific groups of employees ... because terms and conditions such as long service leave depend on one's length of service it is necessary to recognise all their benefits with retrospective effect.

Also we have built in some protections. One is that we have drafted the clause in a way that invited the Commissioner to declare what the facts are rather than exercise a discretion ... secondly, we have built limitations into the clause ... requiring disclosure of the exercise of these powers in the annual report and [there is] a 12 month limitation on it".²⁶

2.43. The Committee concluded that, although there could be some possibility of prejudicial retrospectivity, there was no such intent on the part of the Government, and the risk was low.

2.44. Clause 20 of the Public Sector Management Bill provides as follows:

- "(1) The Executive may make regulations amending the provisions of this Act (other than this section), the Public Sector Act or any other Act in relation to

²⁵Legislative Assembly Standing Committee on the Scrutiny of Bills and Subordinate Legislation: Exhibit 3

²⁶Burnett, P, Assistant Secretary, Department of Public Administration: Transcript p 200

- any matter arising from, connected with or consequential upon the establishment of the Government Service.
- (2) Regulations made under subsection (1) may be expressed to have taken effect on a day earlier than the day of the making of the regulations, not being a day earlier than the commencement day.
 - (3) The Executive may only make regulations under subsection (1) during the period of 12 months commencing on the commencement day."

Subsection (1) permits the Executive to alter Acts by subordinate legislation without those alterations being subject to Parliamentary debate. Further, subsection (2) provides that the regulations may make amendments that are retrospective in effect.

However, three ameliorating points can be made about the provisions:

- the power is not a continuing power, but is sunsetted after 12 months and this period cannot be extended by the use of the present power;
- although there is power to make retrospective amendments to Acts, the regulations cannot make amendments to Acts that take effect before the commencement day; and
- the power is to be exercised by the making of regulations, which would, of course, have to be tabled in the Legislative Assembly if they are to remain valid. The regulations would be subject to disallowance by the Assembly. Thus the Assembly would retain ultimate control over any amendments that are made.²⁷

2.45. In relation to the ability to amend the legislation by regulation the Committee was informed:

"there are good reasons for including it and I suppose you could sum them up by saying that it is simply the very large size of this exercise. The Consequential Provisions Bill proposes amendments to some 83 Acts and 6 regulations. It is quite possible even with the best will in the world and with all due care and attention that something will slip between the cracks.

... there are some protections ... The first is that there is a 12 month sunset clause on that power. The second is that retrospective effect is limited only back to the commencement day not back into the past and the reason for that is that other Acts will be amended from 1 July and this is simply a power to create the same effect if something does slip between the cracks."²⁸

ROLE AND POWERS OF THE COMMISSIONER FOR PUBLIC ADMINISTRATION

2.46. The Public Service Commissioner will have two roles in the ACT Government Service: that of Chief Executive responsible for a department, and as a Commissioner responsible for the maintenance of an independent and non political public service.²⁹

²⁷Legislative Assembly Standing Committee on the Scrutiny of Bills and Subordinate Legislation: Exhibit 3

²⁸ibid., p 201

²⁹ACT Government: Supplementary Submission 1.2

2.47. In the Chief Executive role, the Commissioner would have the normal responsibilities of a departmental head of the public service, including responsibility for the overall management and operation of the ACT Government Service.

2.48. The second role of the Commissioner is to ensure the independence and impartiality of the Government Service through the setting and interpretation of rules and actual personnel decisions in accordance with the Public Sector Management Act and approved management standards.³⁰

2.49. The Government stated in its submission that the rationale to have both roles reside in one office is that:

"it is consistent with the concept of a unified cohesive ACT public service constituted under a single employing authority, located in only one city for there to be one position to undertake this dual role. The former Public Service Commissions and Boards had become too distant from real public sector management reform and the problems of day to day management. Given the nature of the ACT administration the combination of roles provides the "best of both worlds"; a real responsibility for public service administration and reform while retaining the independence required in staffing decisions."³¹

2.50. The dual role of the Commissioner grants him or her extensive powers over the public service. The extent of these powers was raised by a number of witnesses with, for example, the Trades and Labour Council pointing out to the Committee that the Commissioner may have the power to define employment streams within the Service without recourse to the Industrial Relations Commission³², and the Leader of the Opposition stating that the powers of the Commissioner allow him or her to overrule or undermine the authority of a Chief Executive Officer of another department.³³

2.51. In addition, concern was expressed over the proposal to establish an Executive Staffing Committee to review SES appointments. The Leader of the Opposition stated:

"SES officers are subject to the recommendation of an Executive Staffing Committee, which consists of (i) the Commissioner, (ii) the relevant CEO and (iii) the Chief Executive of the Chief Minister's Department. ... Since all three owe their positions to the Chief Minister, and (i) and (ii) are directly answerable to the Chief Minister, the effect ... is to make the appointments to the SES blatantly politicised."³⁴

2.52. The observation was also made that the individual members of the SES Staffing Committee could effectively "blackball" the appointment of particular individuals to the SES by not unanimously endorsing their promotion.

³⁰ibid.

³¹ibid.

³²Sheehan, M, Assistant Secretary, Trades and Labour Council: Transcript p 34

³³Leader of the Opposition: Submission 19.1 p 4

³⁴ibid., p 5

CONCLUSION

2.53. In reviewing the evidence the Committee notes that the issues raised cover both the technical details of the proposed legislation and, more importantly, the administrative model to which the legislation gives effect.

2.54. While some of the technical issues raised with the Committee may be resolved by negotiation, as is currently being undertaken in the dispute between public sector unions and the ACT and Commonwealth governments, other issues of contention will not be resolved as easily.

2.55. The attention that the Committee can give to these issues has, however, been severely limited by the intention of the Government to bring on debate about the Bills only seven weeks after being introduced into the Assembly.

2.56. The major concerns over fundamental aspects of the legislation expressed by the DPP, the Legal Aid Commission, APESMA and the Leader of the Opposition question the very structure of the model that the Government has decided to adopt for the administration of the ACT, and need to be addressed by the Government before the legislation is implemented.

2.57. Further, the Committee notes that, following public hearings held as part of this inquiry, the Government has re-opened negotiations with the DPP and the Legal Aid Commission, and acknowledged the possibility of amending the Public Sector Management Bill in the light of the DPP's concerns expressed to this Committee.³⁵

2.58. Taken collectively, the concerns expressed to the Committee by all witnesses would suggest that the imposition of the Public Sector Management Bills in their present form with a centralised control structure would be ill advised.

2.59. The creation of a separate public service for the ACT will have a far reaching effect not only on the employees of the Government, but also on the community that the proposed Service was created to serve. In the view of the Committee the administrative structure and the client focus of the proposed Service needs to be carefully considered after full consultation with all affected persons and organisations involved, including the public.

2.60. The criticisms of the legislation made by witnesses to this inquiry indicate to the Committee that the consultative process needs to continue before the final form of the administrative structure of the proposed ACT Government Service is set in legislation, and that legislation enacted. The Committee does not believe that this process could be completed before the 1 July start date for the new Service envisioned by the Government.

2.61. The Committee therefore concludes that the Public Sector Management Bill and the Public Sector Management (Consequential and Transitional Provisions) Bill not be enacted until the consultative process is complete.

³⁵See Supplementary Submission 1.3

Recommendation 5

The Committee recommends that, until the matters dealt with at recommendations 2, 3 and 4 are adequately addressed, the passage of the Public Sector Management Bill and the Public Sector Management (Consequential and Transitional Provisions) Bill be deferred (but not beyond the 1994 Spring Sitzings of the Legislative Assembly).

CHAPTER 3.

PUBLIC INTEREST DISCLOSURE BILL 1994

3.1. The Public Interest Disclosure Bill 1994 was introduced into the Legislative Assembly on 23 February 1994 by the Leader of the Opposition. The key provisions of this bill are the:

- establishment of procedures to encourage disclosure of corrupt, illegal or improper conduct or to identify wastage of public resources;
- protection of 'whistleblowers' from reprisals; and
- protection of persons who resist efforts by employers to make them commit a crime or conceal an offence.³⁶

3.2. The Government's Public Sector Management Bill also incorporates whistleblower provisions. The key elements of the Government's whistleblower provisions are that, where officers or Government contractors have reason to believe that they have information which indicates:

- an indictable offence against a law of the Territory, the Commonwealth or of a State or another Territory;
- a gross mismanagement or waste of public funds, or
- a substantial danger to public health or safety

that information may be brought to the attention of the Auditor-General or the Ombudsman.³⁷

3.3. The major difference between the Bills stems from the Public Interest Disclosure Bill being conceived of as stand alone legislation covering anyone who may wish to come forward, as opposed to the Public Sector Management Bill which deals specifically with government employees and contractors.

3.4. The Public Interest Disclosure Bill also stipulates procedures for making and handling disclosures. The Public Sector Management Bill does not specify any procedures for handling disclosures, as these matters will be included in subordinate legislation and the Public Sector Management Standards.³⁸

3.5. The key issue involved in examining the bills lay in determining what form whistleblowing legislation should take, and the extent of coverage of the legislation.

³⁶Carnell, K, Leader of the Opposition *Debates of the Legislative Assembly for the Australian Capital Territory: Weekly Hansard*; 23 February 1994 p 140

³⁷Public Sector Management Bill 1994: Explanatory Memorandum Part II p 35

³⁸ACT Government: Supplementary Submission 1.1 p 1

3.6. The Public Sector Management Bill affords protection to past and present employees, statutory office holders and government contractors of the Territory who blow the whistle.³⁹ The Public Interest Disclosure Bill extends this coverage to any person.⁴⁰

3.7. The Committee considers that it is possible for people who are not officers or government contractors as defined in the Public Sector Management Bill to become aware of information that, in the public interest, it would be appropriate to disclose.

3.8. In evidence to the Committee the Acting Secretary and Head of Administration, stated that the reason for not extending coverage beyond public sector employees is that existing (common) law protects any private citizen who discloses information in the public interest.⁴¹

3.9. In response to this the Leader of the Opposition stated that access to proper investigative procedures is not guaranteed to private citizens under common law, and that inclusion of all people in the Public Interest Disclosure Bill overcomes this barrier to whistleblowing.⁴²

3.10. The Committee recognises the need for specific whistleblowing provisions for public servants but is concerned that there should be wider coverage than that offered in the Public Sector Management Bill. The most appropriate form to grant protection for whistleblowers both inside and outside the public sector is by stand alone legislation.

3.11. The Committee further considers that the enactment of stand alone legislation would preclude the necessity for whistleblowing provisions to be included in the Public Sector Management Bill. The Committee therefore concludes that, following the enactment of stand alone whistleblowing legislation, the whistleblowing provisions of the public sector management bill should be deleted.

Recommendation 6

The Committee recommends that:

- **whistleblower protection legislation should protect whistleblowers both inside and outside the public sector;**
- **this legislation should be enacted as stand alone legislation; and**
- **in drafting the stand alone legislation consideration be given to whether the existing provisions of the Public Sector Management Bill should, or should not, be incorporated into it.**

3.12. The Committee recognises that the drafting and enacting of stand alone legislation could take some time, and delay the enactment of the Public Sector Management Bill. The Committee considers that whistleblowing protection should be afforded to public sector employees at least from the establishment of the separate ACT Public Service.

³⁹Public Sector Management Bill 1994, s 236

⁴⁰Public Interest Disclosure Bill 1994, s 15(1)

⁴¹Townsend, J, Acting Secretary, Chief Ministers Department: Transcript p 70

⁴²Carnell, K, Leader of the Opposition: Transcript p 124

3.13. Accordingly, the Committee considers that the current whistleblowing provisions of the Public Sector Management Bill should remain in place until such time as stand alone legislation is passed by the Assembly.

Recommendation 7

The Committee recommends that the whistleblowing provisions of the Public Sector Management Bill (Division XII) should remain in place until such time as stand alone legislation is passed by the Assembly.

3.14. The Committee considers that, in developing stand alone legislation, the Public Interest Disclosure Bill should form the basis of the legislation. However, the Committee has a number of concerns which would preclude the adoption of this Bill in its current form.

Recommendation 8

The Committee recommends that the Public Interest Disclosure Bill 1994 be considered as a basis for stand alone whistle blower protection legislation.

DISCLOSURE OF INFORMATION

3.15. The Public Interest Disclosure Bill adopts a broad definition of what type of information could be disclosed. Part III of the Bill states:

A person may make a public interest disclosure -
(a) about conduct in which a person is engaged, or about matters arising, before the commencement of this act"⁴³

3.16. The Public Sector Management Bill, however, defines specifically the type of information that may be disclosed under the Bill:

- an indictable offence against a law of the Territory, the Commonwealth or of a State or another Territory;
- gross mismanagement or gross waste of public funds; or
- a substantial danger to public health and safety.⁴⁴

3.17. The Committee considers that the adoption of a broad definition of what type of information may be disclosed under the bill is not appropriate, and the definition adopted in the Public Interest Disclosure Bill may result in the inappropriate use of the legislation.

3.18. The Committee considers that the definition for the disclosure of information contained in clause 237 of the Public Sector Management Bill should be incorporated into the stand alone whistleblower protection legislation.

⁴³Public Interest Disclosure Bill 1994 s. 15(2)(a)

⁴⁴ibid., s 237(1)

Recommendation 9

The Committee recommends that clause 237 of the Public Sector Management Bill be incorporated into the stand alone whistleblower protection legislation.

DEFINITION OF CORRUPT CONDUCT

3.19. The Public Interest Disclosure Bill states:

For the purposes of this Act, conduct is taken to be corrupt if -
(b) it could constitute -

- (i) a criminal offence;
- (ii) a disciplinary offence; or
- (iii) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is in engaging in it.⁴⁵

3.20. The Committee considers that this definition is too broad in its scope, and could be open to misinterpretation. The Committee therefore considers that this definition for corrupt conduct should not be used in the stand alone legislation, and the definition of corruption for the purposes of the legislation be the subject of further debate.

THE ROLE OF THE OMBUDSMAN

3.21. Both Bills regard the Ombudsman as a proper authority to whom information may be disclosed.⁴⁶

3.22. A critical difference is the unusual power granted under section 14 of the Public Interest Disclosure Bill for the Ombudsman to give procedural directions to public sector units.⁴⁷ The Committee considers that this is not a function that the Ombudsman should perform.

3.23. The Committee therefore considers that clauses 14 and 38 of the Public Interest Disclosure Bill constitute an unusual and inappropriate provision and would extend the powers of the Ombudsman beyond what is customary for such an office.

3.24. The Committee concludes that the role of the Ombudsman in relation to whistleblowers requires careful consideration by the Assembly when debating stand alone whistleblowing legislation.

⁴⁵Public Interest Disclosure Bill 1994 s 4(1)(b)

⁴⁶Public Sector Management Bill 1994, s 237(1), Public Interest Disclosure Bill 1994, s 12

⁴⁷ACT Government: Supplementary Submission 1.1 p 1

TERMINOLOGY

3.25. In examining the Public Sector Management Bills and the Public Interest Disclosure Bill the Committee noted that there were a number of instances where differing terminology was used to refer to Government officers, employees and contractors. The Committee considers that the same terminology should be used in both the Public Interest Disclosure Bill and the stand alone whistleblower legislation to avoid confusion in the application of the legislation.

3.26. The Committee also notes that the definition of Government officers, employees and contractors differs between the Public Sector Management Bill, the Public Interest Disclosure Bill and Section 10 of the *Crimes (Offences Against the Government) Act 1989*. The Committee considers that the discrepancies between this Act, the stand alone whistleblower legislation and the Public Sector Management Bills should be examined to determine whether it is desirable or necessary that the definitions used in all three pieces of legislation be consistent.

Recommendation 10

The Committee recommends that:

- where appropriate, the terminology used in the Public Sector Management Bill be adopted for the stand alone whistleblower legislation; and
- the government review the definitions of public servant used in the *Crimes (Offences against the government) Act 1989*, the Public Sector Management Bill and the stand alone whistleblower legislation to determine whether it is desirable or necessary that they be consistent.

LIMITED LIABILITY

3.27. The Public Interest Disclosure Bill states that, in relation to a person making a public interest disclosure, that person will not be subject to any liability for making that disclosure. The Bill further states that in proceedings for defamation against a person making a public interest disclosure, there is a defence of absolute privilege for that person.⁴⁸

3.28. The Committee considers that this clause, in granting absolute privilege to a person making a public interest disclosure goes beyond what could be considered to be reasonable protection, and may be abused by people making frivolous or vexatious accusations.

3.29. The Committee considers, therefore, that the issue of limiting liability for persons making public interest disclosures is one that needs further consideration by the Legislative Assembly when debating the stand alone whistleblower legislation.

⁴⁸Public Interest Disclosure Bill 1994 s 34

ANONYMITY

3.30. A key issue in the application of public interest disclosure legislation is the prevention of frivolous or vexatious accusations against government employees by anonymous persons.

3.31. The Public Interest Disclosure Bill stipulates that a person making a public interest disclosure should also make his or her identity known at the same time.⁴⁹ The Public Interest Disclosure Bill, however, is silent on this point.

3.32. The Committee does not consider that anonymous complaints should be investigated, and that the stand alone whistleblower legislation should incorporate a disclosure clause requiring a person making a public interest disclosure to also reveal their identity to the appropriate authority.

3.33. The Committee considers that there is a need for further consideration of whether, where a breach of conduct warrants a public disclosure, the name of the person making the disclosure should also be disclosed.

Recommendation 11

The Committee recommends that the stand alone whistleblower legislation should incorporate the disclosure clause contained in the Public Sector Management Bill which requires a person making a public interest disclosure to also reveal their identity .

ROLE OF THE AUDITOR-GENERAL

3.34. The Public Sector Management Bill allows for the disclosure of public interest information to the Auditor-General, whereas the Public Interest Disclosure Bill limits the proper authorities for making a disclosure to public sector units and the Ombudsman.

3.35. The Committee considers that the function of the Auditor-General is more properly concerned with the financial management practices and procedures of Government departments, rather than the investigation of corrupt conduct, although the Committee recognises that there could be circumstances where corrupt conduct involves financial mismanagement.

3.36. The Committee therefore considers that the Auditor-General should not be included as a proper authority to receive and investigate public interest disclosures.

CONCLUSION

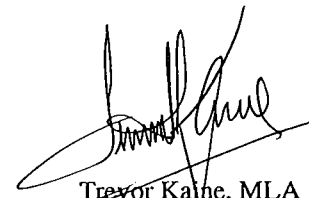
3.37. The Committee recognises that the development of whistleblower legislation is a relatively new area of public administration, and one that requires careful consideration. The Committee commends both the Leader of the Opposition and the Government for the care and attention that has gone into framing the legislation under examination by the Committee.

⁴⁹Public Sector Management Bill 1994 s 239(d)

3.38. The Committee considers that the stand alone whistleblowing legislation recommended by this Committee should be carefully considered by both the Legislative Assembly and the public before it is enacted. The Committee therefore proposes that the stand alone whistleblower legislation, when drafted, should be referred to the Committee referred to in Recommendation 1 of this report for consideration before being debated by the Assembly.

Recommendation 12

The Committee recommends that the stand alone whistleblower legislation, when drafted, should be referred to the Committee referred to in Recommendation 1 of this report for consideration before being debated by the Legislative Assembly.



Trevor Kalne, MLA
Chair

14 June 1994

DISSENTING REPORT FROM MR WAYNE BERRY

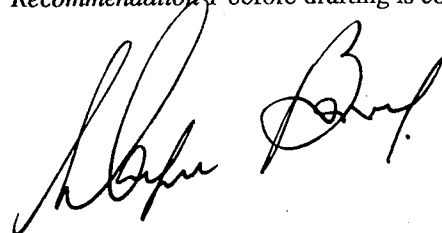
The legislation which the Committee was appointed to deal with is one of the most important matters that the Government and the Assembly will have to address. It concerns the good management of the ACT but the Committee's consideration had to be against the background of the need for detailed negotiations between the ACT Government and the Commonwealth Government. It is therefore a complex issue as is the proposed bill which sets up the Australian Capital Territory Government Service.

At the outset the Chairman of the Committee made it clear that it was not his aim to upset the Government's timetable on the introduction of this bill. I agree with that sentiment emphatically and I have not seen any argument that would cause me to agree to delay this bill and thus interfere with the Government's program. I am therefore disappointed that *Recommendation 5* of the Committee seeks to delay the implementation of the Public Sector Management Bill and the Public Sector Management (Consequential Transitions) Bill.

This is, in my view, without justification as the Committee established by *Recommendation 1*, if it were agreed to by the Assembly, could quite adequately examine the legislation in accordance with *Recommendations 2 and 3* and ensure that a critical oversight of the introductory period could be undertaken in the most effective way and where difficulties emerged, report to the Assembly the means by which they may be addressed.

In relation to *Recommendation 4* the Committee heard impassioned argument that the proposed bill would create an impediment to the operations of ACTEW. However witnesses offered no convincing evidence that there would be a discernible difference in the way that ACTEW would operate into the future. I do not support *Recommendation 4*.

In respect of *Recommendations 6-12* inclusive, the whistleblower provisions of the Public Sector Management Bill form a comprehensive package to deal with this matter as it may apply in the government service. On the evidence submitted to the Committee I remain unconvinced that further stand-alone legislation is required to extend beyond the public sector. These issues of principle require further examination by the committee referred to in *Recommendation 1* before drafting is commenced.



WAYNE BERRY, MLA
14 June 1994

APPENDIX I LIST OF HEARINGS AND WITNESSES

Canberra, 24 May 1994

Department of Public Administration

Ms Linda Webb, Acting Secretary

Mr Peter Burnett, Assistant Secretary

Ms Margaret Henderson, Director Policy Management

ACT Attorney-General's Department

Mr Chris Hunt, Secretary

Trades and Labour Council

Ms Maureen Sheehan, Assistant Secretary

Director of Public Prosecutions

Mr Ken Crispin QC

ACT Law Society

Mr Robert Clynes, President

Canberra, 26 May 1994

Chief Minister's Department

Mr Jeffrey Townsend, Acting Secretary and Head of Administration

Department of Public Administration

Ms Linda Webb, Acting Secretary

Mr Peter Burnett, Assistant Secretary

Dr Helen McKenna, Director, Reform Projects Section

Mr Michael Hopkins, A/g Assistant Director, Reform Projects Section

Association of Professional Engineers, Scientists and Managers

Mr Col Miller, President, ACT Branch

Mr Frank O'Donnell, Senior Federal Industrial Officer

Leader of the Opposition

Mrs Kate Carnell

Mr Ian Wearing, Chief of Staff, Office of the Leader of the Opposition

Legal Aid Commission (A.C.T.)

Mr Robert Todd, President

Ms Linda Crebbin, Assistant Executive Officer

Private Citizen
 Dr Roger Wettenhall, Professor of Public Administration University of Canberra

APPENDIX II LIST OF SUBMISSIONS

Canberra, 6 June 1994

Department of Public Administration
 Ms Linda Webb, Acting Secretary
 Mr Peter Burnett, Assistant Secretary
 Ms Margaret Henderson, Director Policy Management

ACT Attorney-General's Department
 Mr Chris Hunt, Secretary

Canberra, 8 June 1994

ACT Electricity and Water
 Mr Peter Phillips, Chairman
 Ms Sue Hamilton, Corporate Manager Human Resources

Submission No.	Date	Person or Organisation
1.	August 1993	A.C.T. Government
1.1	20 May 1994	Supplementary to Submission 1
1.2	27 May 1994	Supplementary to Submission 1
1.3	31 May 1994	Supplementary to Submission 1
2.	15 September 1993	Mr Geoff Ballis
3.	24 September 1994	Ms Linda Crebbin
4.	26 September 1993	Mr Terry O'Donnell
5.	27 August 1993	SoftLaw Community Projects
6.	22 October 1993	Professor Roger Wettenhall
7.	28 October 1993	The Hon Ralph Willis, MP Minister for Finance
8.	22 October 1993	Professor Roger Wettenhall
9.	2 November 1993	Mr Peter Kennedy Public Service Commission
10.	10 November 1993	Mr R Clynes The Law Society of the ACT
10.1	27 May 1994	Supplementary to Submission 10
11.	28 September 1993	Ms Ann Hamdorf Jobless Action
12.	29 November 1993	Mr Charles McDonald Trades and Labour Council of the ACT
12.1	24 May 1994	Supplementary to Submission 12
13.	6 December 1993	Professor Roger Wettenhall
14.	20 December 1993	K J Crispin, QC Director of Public Prosecutions
14.1	17 May 1994	Supplementary to Submission 14
14.2	18 May 1994	Supplementary to Submission 14
14.3	27 May 1994	Supplementary to Submission 14
14.4	6 June 1994	Supplementary to Submission 14
15.	6 February 1994	Mr Brendan Bailey
16.	16 May 1994	Association of Professional Engineers, Scientists and Managers, Australia
16.1	25 May 1994	Supplementary to Submission 16
16.2	30 May 1994	Supplementary to Submission 16
17.	19 May 1994	B J Salmon, QC The Australian Capital Territory Bar Association
17.1	23 May 1994	Supplementary Submission
18.	18 May 1994	Mr Robert Todd AM Legal Aid Commission (A.C.T.)
18.1	28 April 1994	Supplementary to Submission 18
18.2	31 May 1994	Supplementary to Submission 18

Submission No.	Date	Person or Organisation
19.	26 May 1994	Mrs Kate Carnell, Leader of the Opposition
19.1	6 June 1994	Supplementary to Submission 19
20.	8 June 1994	ACT Electricity and Water

APPENDIX III LIST OF EXHIBITS

Exhibit No.	Title/Document
1.	Letter from Mr Richard Coates, Director, Northern Territory Legal Aid Commission to Mr C J Staniforth, Chief Executive Officer, Legal Aid Commission (A.C.T.), dated 28 March 1994
2.	Letter from Mr Colin Brown, Director, Legal Aid Commission of Tasmania to The Director, Legal Aid Commission (ACT), dated 13 April 1994
3.	Legislative Assembly Standing Committee on the Scrutiny of Bills and Subordinate Legislation, undated
4.	Letter from Mr C Hunt, Secretary, ACT Attorney-General's Office to The Secretary, Select Committee on the Establishment of an ACT Public service, dated 31 May 1994
5.	Notes re. staffing arrangements for Director of Public Prosecutions and Legal Aid Commission, undated
6.	Organisational Structure, ACTAID Pty Ltd

**APPENDIX IV
LEGAL AID COMMISSION (ACT)
PROPOSED AMENDMENTS TO THE PUBLIC SECTOR
MANAGEMENT BILL 1994**

1. Sub-clause 3(1): definition of "autonomous instrumentality" delete:

"one of the following Territory instrumentalities:
(a)"

and delete

"(b) the Legal Aid Commission (A.C.T.)."
2. Paragraph 5(f): Insert the following:

"(l) the Legal Aid Commission (A.C.T.) and the staff thereof".

and amend lettering of sub-paragraphs accordingly.
3. Clause 43: Insert new sub-clause (2):

"(2) the provisions of sub-sections 40(1), 41 (1) and 42 (1) shall apply mutatis mutandis to the Legal Aid Commission (A.C.T.) as if it were for the purpose of those provisions an autonomous instrumentality under this Act".
4. Clause 64: In sub-section 64(1) delete:

"and the Legal Aid Commission (A.C.T.)" and

"or the Commission, as the case may be"

In sub-section 64(2) delete:

"or the Legal Aid Commission (A.C.T.)".
5. Add new sub-clause 64(3):

"This part does not apply to the Legal Aid Commission (A.C.T.)".
6. Clause 68:

In sub-paragraph 68(1)(a) delete:

"or in the Legal Aid Commission (A.C.T.)".

In sub-paragraph 68(1)(b) delete:

"or the Legal Aid Commission (A.C.T.)".
and
"or the Commission, as the case may be".

7. Clause 75:

In sub-clause 75(1) delete:

"or the Legal Aid Commission (A.C.T.)".
and

"or the Commission, as the case may be".

8. Clause 235:

Insert new sub-section 235(3):

"This section applies to the Legal Aid Commission (A.C.T.) as if it were a Territory instrumentality under this Act specified in Schedule 2".

9. Schedule 2: Delete:

"Legal Aid Commission (A.C.T.)".

**PROPOSED AMENDMENTS TO PUBLIC SECTOR
MANAGEMENT (CONSEQUENTIAL AND TRANSITIONAL
PROVISIONS) BILL 1994**

1. In the definition of "prescribed entity" in sub-clause 4(1):

Delete paragraph (h).

2. In Schedule 1 Part 53:

Omit all words after the heading "*Legal Aid Act 1977*" and substitute:

Section 5 -

At the end of the definition of statutory officer of the Commission add the words:

'or the Public Defender if a person has been appointed to the office of Public Defender by the Commission'.

Section 17(1) -

Amend to add at the end thereof the words 'except for those functions which are performed personally by a person appointed under Section 17A'.

New Section 17A -

After Section 17 insert the following section:

- '17A (1) The Commission may appoint a person, who has been admitted to practice as a barrister and solicitor of the Supreme Court, to the office of Public Defender if at the time that such appointment is being considered, it determines that it will be in the interests of the efficient and economic performance of its functions that a person be appointed to that office.
- (2) Section 18 and sub-section 22(1) of this Act shall not apply to a person appointed under this section.
- (3) A person appointed under this section shall act as Counsel for legally assisted persons and if instructed by the Commission, as Counsel for the Commission.
- (4) A person appointed under this section may appear in Courts and before Tribunals for a legally assisted person.
[See Public Defenders Act 1969 (New South Wales) section 4(2) previously 4(1)].

(5) A person appointed under this section may be instructed by a solicitor employed by the Commission or a private legal practitioner. [See Public Defenders Act 1969 (New South Wales) Section 4(3) previously 4(2)].

(6) A person appointed under this section, when practicing as, or performing any of the functions of, a Barrister or exercising a right of audience in a Court or before a Tribunal, in pursuance to this Act, and with any qualification arising from sub-section (3) of this section:

- (a) shall observe the same rules and standards of professional conduct and ethics as those that a private legal practitioner is, by law or the custom of the legal profession, required to observe in the practice of this profession; and
- (b) is subject to the same professional duties as those to which a private legal practitioner is subject, by law or the custom of the legal profession, in the practice of his profession.'

Sections 63 to 68A (inclusive)

Repeal the sections, substitute the following section:

Terms and conditions generally

63(1) The terms and conditions of employment of members of staff of the Commission are, subject to this Act, such as are from time to time determined by the Commission with the approval of the Commissioner for Public Administration.

(2) A member of staff of the Commission shall have in respect of Territory employment all the rights of appointment transfer and promotion of a permanent employee pursuant to the Public Sector Management Act."

APPENDIX V
DIRECTOR OF PUBLIC PROSECUTIONS
PROPOSED AMENDMENTS TO THE PUBLIC SECTOR
MANAGEMENT BILL 1994 AND THE PUBLIC SECTOR
MANAGEMENT (CONSEQUENTIAL AND TRANSITIONAL
PROVISIONS) BILL 1994

- *Public Sector Management Bill 1994*

Change clause 5 by inserting the following new paragraph (f) -

(f) the Office of the Director of Public Prosecutions.

Comment: This new paragraph is intended to ensure that the Bill does not apply to the Office of the Director of Public Prosecutions.

- *Director of Public Prosecutions Act 1990*

Amend by repealing section 30 and substituting the following new section -

*Staff

30.(1) The Director may appoint such officers as are necessary to assist the Director to perform his or her functions.

- (2) The Director, by instrument in writing -
 - (a) may create and abolish offices within the staff of the Office; and
 - (b) shall declare in relation to any office created under paragraph (a) the classification, being a classification specified in any -
 - (i) determination made under the *Public Service Act 1922* of the Commonwealth, or
 - (ii) management standard made under the *Public Sector Management Act 1994*; applicable to the office.

(3) Officers appointed under subsection (1) are employed by the Territory upon the same terms and conditions that would be applicable to a public officer of the corresponding classification employed under the *Public Sector Management Act 1994*.

- (4) In relation to -
 - (a) staff appointed under subsection (1); and
 - (b) offices created or abolished under subsection (2);
 the Director has the same powers as are exercisable by the Commissioner of Public Administration and Chief Executives in relation to offices and employees under the *Public Sector Management Act 1994*.

(5) The staff employed in the Office immediately before the commencement of the *Public Sector Management Act 1994* shall be taken to have been appointed under subsection (1).*

Comment: These substitute provisions are intended to ensure that staff of the Office of the Director of Public Prosecutions are employed by the Territory on comparable terms and conditions to public officers employed under the Public Sector Management Act 1994, but are separate from the ACT Government Service with the Director of Public Prosecutions being vested with all employment powers.

OPTION 2 - MINIMAL POSITION

Public Sector Management Bill 1994

• Subclause 3(1)

change definition of "autonomous instrumentality" by -

- deleting the words "the following Territory instrumentalities";
- and
- inserting the following new paragraph -
 - (c) the Office of the Director of Public Prosecutions established under the *Director of Public Prosecutions Act 1990*,"

Comment: This substitute definition is intended to ensure the status of the Office of the Director of Public Prosecutions as an autonomous instrumentality.

• Clause 5

Renumber as subclause 5(1) and insert the following new subclauses -

"(2) The following provisions of this Act do not apply to the Office of the Director of Public Prosecutions -

- (a) paragraphs 6(b) and (c);
- (b) Division 3 of Part II;
- (c) subsection 20(2) and sections 21, 22, 24, 25 and 26;
- (d) Division 3 of Part III;
- (e) subsections 36(4) and (5) and section 37;
- (f) Division 7 of Part III;
- (g) subsection 58(2);
- (h) sections 73 and 74 and paragraph 77(1)(b);
- (j) sections 88, 89, 90 and 96;
- (k) subsection 108(4);
- (m) Division 1 of Part VI;
- (n) Division 2 of Part IX; and
- (o) paragraphs 251(2)(f), (h) and (j)."

"(3) For the purposes of the application of this Act to the Office of the Director of Public Prosecutions, references in the following provisions of this Act to the Commissioner shall be read as a reference to the Director of Public Prosecutions -

- (a) subsections 40(1), 41(1) and 42(1);
- (b) subsection 57(1);
- (c) section 78 and 80; and
- (d) section 144."

"(4) For the purposes of the application of this Act to the Office of the Director of Public Prosecutions, references in provisions other than those specified in subsection (2) to the Chief Executive or the relevant Chief Executive shall be read as a reference to the Director of Public Prosecutions."

Comment: New subclause 5(2) is intended to exclude in relation to the Office of the Director of Public Prosecutions provisions inconsistent with an independent prosecution authority [cc. 6(b) and (c), Division 3 Part II, cc.20(2), 21, 22, 24-26, 36(4) and (5), 58(2), 73, 74, 77(1)(b), 96 and 251(2)(f), (h) and (j)], unnecessary because the Director of Public Prosecutions is a statutory officer [Division 3 Part III, Division 1 Part VI and Division 2 Part IX], conferring a power presently exercisable by the Attorney-General on the Commissioner [c.108(4)] or having no application [Division 7 Part III].

New subclause 5(3) is intended to ensure functions and powers relating to EEO, Access & Equity and ID programs [cc. 40(1), 41(1) and 42(1)], SES [cc. 57(1), 78 and 80] and reduction of classification [c.144] can only be performed or exercised in relation to the Office of the Director of Public Prosecutions by the Director of Public Prosecutions.

New subclause 5(4) is intended to ensure that Chief Executive powers are exercisable by the Director of Public Prosecutions.

Clause 10

renumber as subclause 10(1) and insert the following new subclause -

"(2) Sections 6, 7, 8 and 9 in their application to -

- (a) the Legal Aid Commission (A.C.T.); and
- (b) the Office of the Director of Public Prosecutions;

have effect subject to the duties of and the rules concerning the professional conduct of legal practitioners.

Comment: This clause is intended to ensure that notwithstanding the Bill Legal employees in the Legal Aid Commission (A.C.T.) and Office of the Director of Public Prosecutions remain bound by professional legal obligations.

• *New Clause 73A*

Insert following new clause -

***Senior Executive Service Vacancies in Office of Director of Public Prosecutions**

73A (1) On receiving a recommendation for filling a vacancy in a Senior Executive Service office in the Office of the Director of Public Prosecutions, the Director of Public Prosecutions shall, after considering the recommendation -

- (a) approve the recommendation; or
- (b) reject the recommendation; and
- (c) in either case, notify the Commissioner accordingly."

"(2) Upon receiving a notification of an approval under paragraph (1)(a), the Commissioner shall, by exercising his or her powers under this Act, give effect to the approval."

Comment: This clause is intended to ensure that, as is the case in respect of non-SES vacancies, the Director of Public Prosecutions has the power of determining appointments, transfers and promotions.