



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPENDENT
INTEGRITY COMMISSION 2018

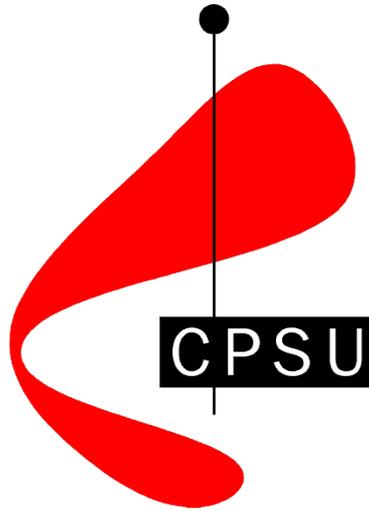
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Submission Cover Sheet

Inquiry into an Independent Integrity Commission 2018

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CPSU (PSU Group) Submission:

**Select Committee on Independent
Integrity Commission 2018**

August 2018

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 have previously put submissions in May 2017 to the inquiry into the establishment of an independent integrity commission for the ACT. These submissions should be seen as supplemental to our earlier ones and highlighting keys aspects of the governments Exposure Draft *Integrity Commission Bill 2018* ('Exposure Draft'). But we also reiterate our earlier recommendation that the ACT integrity Commission ("the Commission") is properly funded and staffed to cover the scope of activities that has been proposed.

The CPSU is broadly supportive of an ACT Integrity Commission being established. It supports the Government's Exposure Draft generally but has some concerns about certain elements of the Exposure Draft including potential unreasonable intrusion into the civil rights of public servants.

Regarding the Exposure Draft the CPSU provides the following comments and recommendations:

The CPSU supports the Exposure Draft, the functions of the Commission and coverage

The CPSU welcomes the Exposure Draft. The CPSU support the focus of the new Commission upon investigating and preventing corruption (clause 23 functions). The CPSU also support the coverage of the laws and the definition of 'public official' in clause 11, which ensures not just public servants but those who have a contracting connection to government have their conduct held to the appropriate standard. In this respect we note the *Anti-Corruption and Integrity Bill 2018* (Opposition Bill) is not clear in specifying that contractors to government, and employees of contractors are subject to these provisions.

The CPSU also broadly supports the structure and functions of the Commission as set out in the Exposure draft, including the conduct of preliminary inquiries, the retention of client-legal privilege in examinations and the establishment of an oversight body in the form of the Inspector.

Comment on the staffing of the Commission

The CPSU also supports that staff of the Commission will be public servants under the *Public Sector Management Act 2004* and this is consistent between the Exposure Draft and the Opposition Bill. However, regarding the Opposition Bill and engagement of staff, the CPSU does not believe it is appropriate for Commission staff to exclude membership of political parties as a selection criteria outlined in clause 112. Such an exclusion is at odds with proper management principles and ACT discrimination law. It is also at variance to the NSW ICAC Staff Code of Conduct 2018, which does not seek to prevent political engagement.

The CPSU is also concerned at clause 48 of the Exposure Draft which requires a staff member of the Commission to disclose any personal interests the Commission considers relevant. The CPSU says the ACTPS code of conduct already deals with conflicts of interest and this additional provision is unnecessary and potentially in conflict with the ACT *Human Rights Act 2004*.

Recommendation: Clause 48 be amended not to require disclosure by staff of any personal interests.

Comment regarding the definition of corrupt conduct and the intersection with employee misconduct

The May 2017 CPSU submission expressed concern that any Commission not be tasked with examining employee misconduct or disciplinary issues where those issues are not corruption. The CPSU supports the focus upon serious corrupt conduct present in the Exposure Draft.

The definitions in clause 9 and 10 broadly reflect an approach similar to the NSW *Independent Commission Against Corruption Act 1984* (the NSW legislation). One area of variance worth noting is that clauses 9 and 10 of the Exposure Draft define corrupt conduct by a person, or a public official by reference to whether, if proved, it would be an offence against a law of the Territory or reasonable ground for serious disciplinary action. The CPSU supports the restriction of corrupt conduct to 'serious disciplinary action' such as termination of employee and say this should assist with employee misconduct incorrectly being treated as corruption.

In the NSW legislation, s9 refers to a criminal offence and also corrupt conduct being sufficient to constitute a breach of parliamentary code of conduct. In comparison to the Exposure Draft definitions, the CPSU questions two aspects. Firstly whether criminal offence is a more appropriate standard and secondly whether potentially corrupt conduct of politicians is sufficiently identified in the Exposure Draft given it is separately dealt with in s9 of the NSW legislation.

While the CPSU supports how the Exposure Draft deals with corrupt conduct, in proposing a law to deal with issues of corruption and integrity, there is potential for allegations of employee misconduct to be mistakenly or inappropriately dealt with by the Commission as corruption. The CPSU accepts it is not the intention of the legislative scheme for non-corrupt breaches of the code of conduct to be subject to the Commissions processes. We also note in this respect the clause 10 definition of 'serious disciplinary action'. Nonetheless, the CPSU believe the intention not to deal with misconduct, as opposed to corruption, could be made clearer in the Exposure Draft.

It should be spelt out in the Exposure Draft that the Commission is not to use its time to investigate employee misconduct, as opposed to conduct by a public official that could constitute corruption.

Recommendation : Amend clause 65 to include a basis for dismissal of a corruption complaint if it relates to employee misconduct that does not constitute corruption.

Recommendation : That as part of the passage and implementation of a proposed Bill, the government, in consultation with staff and unions, update its guidance on dealing with employee misconduct so agencies correctly classify and appropriately deal with misconduct issues on the one hand and corruption on the other.

Comment regarding the definition of serious and systematic corruption

The CPSU supports the Exposure Draft's focus on 'serious' and 'systematic' corruption. However, the definition of 'serious corrupt conduct' in clause 17 is broad, dealing with 'conduct likely to threaten public confidence in the integrity of government'. The CPSU is concerned such a definition may be too broad and not effective as guidance to the nature and gravity of conduct which the Commission should focus upon. It could be seen to also include 'trivial' matters of public scandal that are not serious corruption.

In contrast for example, under the *Law Enforcement Integrity Commissioner Act 2006*, serious means conduct that could result in greater than 12 months imprisonment. The CPSU is not suggesting the adoption of this definition, but it is questioning whether greater certainty could be used for this important aspect of the Exposure Draft.

Comment on compulsory powers as part of a preliminary inquiry

The CPSU is not supportive of the Commission being given compulsory powers or authority as part of a preliminary inquiry. In this regard we note the ICAC does not have a statutory preliminary stage inquiries and its compulsory powers are exercised during investigation, examination, hearing, etc. The CPSU also notes this part of the Exposure Draft appears contrary to the Inquiry into an Independent Integrity Commission – Report (the Report) recommendation 22. The CPSU supports preliminary inquiries just not with the powers such as issuing preliminary inquiry summons outlined in the Exposure Draft.

Recommendation: The Commission not have power to issue preliminary inquiry summons.

Concern regarding the availability covert powers and surveillance

The May 2017 CPSU submission raised genuine concerns at the prospect that an Integrity Commission may be granted powers to conduct investigations through the use of covert surveillance, integrity testing and controlled operations. The CPSU suggested if such powers were deemed necessary, then strict protections should be put in place.

The CPSU notes the Report recommendation (32) said that warrants could be issued for listening devices and surveillance but went on to outline protections for such warrants as being authorised by judicial officers. Regarding controlled operations, the Report recommended (33) that prescriptive legislative criteria be included to allow the Commission to engage in such activities and measures against mis-use be strict. Recommendation 36 is that the Commission not have the power to conduct integrity testing or arm officers.

The Exposure Draft does not appear to fulfil the Report's recommendations regarding covert operations. The Exposure Draft amends the *Crimes (Assumed Identities Act) 2009*, *Crimes (Controlled Operations) Act 2008*, and the *Crimes (Surveillance Devices) Act 2010* to allow Integrity Commission staff to be persons covered by those pieces of legislation and whom can apply to utilise the powers provided by those laws. The Integrity Commission does not need a judicial warrant to authorise a controlled operation or an assumed identity contrary to recommendations in the Report.

The CPSU genuinely questions whether covert tactics like undercover surveillance, false identities, or covert surveillance could be justified or necessary in the investigation of corrupt conduct by the Commission, given any report arising from an investigation does not make findings of guilt (clause 181) and makes recommendations. It is not the role of the Commission to collect evidence to prosecute offences. This can be contrasted to a law enforcement officer who is collecting evidence of a crime and who are currently able to apply for relevant covert tactics under the relevant legislation. CPSU members would be alarmed at the prospect a body like the Commission would be granted such extraordinary powers.

The CPSU notes the opposition Bill contains similar consequential amendments to give powers under the *Crimes (Controlled Operations) Act 2008*, and the *Crimes (Surveillance Devices) Act 2010* to Commission staff. The CPSU does not support this.

If such undercover powers are deemed appropriate for the Commission to exercise, then the protections outlined in the Report's recommendations should be followed. Strict provisions should be contained in the Exposure Draft dealing with how the Commission can access these powers including judicial oversight.

Recommendation: The Exposure Draft remove the consequential amendments in Schedule 1 regarding covert operations and surveillance to ensure the Commission is not given such powers and any notes in the Exposure Draft that refer to such provisions also be removed.

Comment on examinations being conducted in public

The May 2017 CPSU submission pressed the view that hearings should only be conducted in public in exceptional circumstances. The Exposure Draft provides at clause 138, that in deciding whether to conduct a public or private examination, the Commission:

"must consider whether it is in the public interest to hold a public examination; and a public examination can be held without unreasonable infringing a person's human rights"

The CPSU supports the measures in the Exposure Draft for public hearings, or examinations only being conducted after certain tests as satisfied. While the CPSU accepts the importance of balancing fairness with the principle of open justice, we believe the test for the public interest could be made stronger. The Exposure Draft should ensure the conduct of a public examination is demonstrably in the public interest and outweighs any countervailing interests in confidentiality and privacy.

For example, in the NSW legislation (s31), the Commission must be satisfied it is in the public interest to conduct a public inquiry and consider: any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry), and whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The CPSU suggest specific consideration of the impact to privacy and reputation as relevant criteria be included in the Exposure Draft and public examinations only where it is positively in the public interest.

Recommendation: That specific reference to prejudice to reputation and privacy be included in the factors the Commission should consider in deciding whether it is clearly in the public interest for a public inquiry.

Comment on the right to silence and privilege against self-incrimination

The CPSU notes the Exposure Draft at clause 174 waives a person's right not to answer questions or provide documents under an examination summons on the basis of self-incrimination. The CPSU notes there are then protections (clause 175) for the person against the information given for being used directly or indirectly against that person.

As a matter of principle, the CPSU is concerned at the loss of long standing rights including those to a fair trial in a context where the purpose of the Commission is to investigate allegations of corruption. The CPSU is concerned at how this provision made abrogate a person's rights under the ACT's *Human Rights Act 2004*.

Also, the CPSU is concerned the 'derivative use immunity' protection contained in clause 175 does not adequately prevent other information gained indirectly from the disclosure being used against the person to whom protection from self-incrimination was not available. There is also the possibility of such disclosures having an impact upon other legal proceedings, as raised in *X7 v ACC [2013] HCA 13*.

The CPSU notes the Opposition Bill at clause 46 provides a similar waiver regarding compulsory powers and self-incrimination, but without the additional protections provided in the Exposure Draft. The CPSU is similarly opposed to such provisions.

Recommendation: The Exposure Draft not waive the privilege against self-incrimination, or, if such a provision is retained, greater protection be afforded to restricting the use of other information gained from the disclosure.

Comment of inadequate protection of complainants and witnesses

The CPSU is concerned the Exposure Draft does not provide adequate protection for witnesses or complainants. The protections in Chapter 6 only apply to complainants. Elsewhere the Exposure Draft says witnesses are afforded the same protections as supreme court witnesses. Both witnesses and complainants deserve protection against violence, termination of employment but also other administrative reprisals. The CPSU notes the Report recommendation 28 in this regard and protection from victimisation.

The Exposure draft only provides for protection for complainants from 'detrimental action' defined to include:

"discriminating against a person by treating or proposing to treat the person unfavourably in relation to the persons reputation, career, profession, employment or trade".

The difficulty in public sector corruption cases is the power relations and connections between managers and staff or contractors that may encourage mis-use of power and a 'culture of silence' around investigation though fear by workers of suffering adversely due to their complaint or participation in an investigation.

The CPSU believes both complainants and witnesses need to be provided adequate protection, not just against criminal behaviour, but against the insidious possibility of bureaucratic reprisals; denied promotions, changes of duties or hours of work, denial of leave or other beneficial conditions. Witnesses also should have protection against attempts to prevent them attending the Commission, similar to the NSW legislation.

We say detrimental action should be amended to include taking, or threatening to:

injures the employee in his or her employment; alters the position of the employee to the employee's prejudice, discriminates between the employee and other employees'.

Whether detrimental action has been taken against a person should be determined as an objective standard and not reliant upon the subjective state of mind of the person against whom the allegation has been made. The Commission should also be given power to bring prosecutions as well as the person affected where complainants or witnesses have suffered detrimental action.

On this issue the CPSU notes the Oppositions Bill provides protection for complainants and reporters but not clearly witnesses. The CPSU say, notwithstanding the differences, the Opposition Bill is problematic in this regard and is not supported by the CPSU.

Recommendation: Protection against reprisals apply to witnesses and complainants and the definition of 'detrimental action' in clause 274 be amended to expand protection for those involved in an investigation or examination and the Commission be given power to bring prosecutions for breaches of the protections.

Comment on guidance and procedures of public examination

The CPSU notes the Exposure Draft does not appear to deal with issues of how examinations are to be conducted, unlike the NSW legislation which in clause 31B empowers the ICAC to issue guidelines about the conduct of public inquiries. The CPSU questions whether it is appropriate the Commission be given a similar requirement in the interests of transparency and good process.

Comment on Investigation reports

The CPSU notes clause 181 of the Exposure Draft which restricts the Commission's ability to make recommendations for prosecution for an offence or disciplinary sanction. The CPSU notes this is at variance to the NSW legislation and questions whether it is appropriate not to allow the Commission to recommend advice be obtained regarding prosecution for an offence.

The CPSU also notes clause 186 of the Exposure Draft which provides for a relevant person or a public sector entity to be provided a copy of the proposed investigation report to comment upon prior to presentation to the legislative assembly. The CPSU is concerned that this requirement for consultation not be imposed in all circumstances. Instead the Commission should have the discretion not to provide the report where it would not be in the public interest or the interest of persons concerned.

Comment on information sharing

The CPSU is concerned clause 194 of the Exposure Draft is too broad and could permit irrelevant and unnecessary disclosure of information obtained by the Commission to other agencies or investigative bodies. A similar concern exists with clause 264 regarding the Inspector. The Explanatory Statement to the Exposure Draft says of clause 194:

This clause facilitates the cooperation and referral between the commission and other oversight agencies and investigative entities by authorising the sharing of relevant information necessary to appropriately accept, respond or deal with the matter.

The CPSU does not support routine sharing of information collected during an investigation or examination unless it is directly connected to the purpose of the matter under investigation. This is particularly important where it is intended for the Commission not to be properly subject to the *Information Privacy Act 2014*.

Recommendation: That clause 194 of the Exposure Draft be amended to permit disclosure of information where necessary or relevant to exercise of its investigative or examination powers.