



Community and Public Sector Union
Michael Tull  Assistant National Secretary

1 February 2019

A Commonwealth Integrity Commission – proposed reforms
Attorney-General's Department

Email: anticorruption@ag.gov.au

Dear Sir/Madam

The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to this consultation about a proposed Commonwealth Integrity Commission. As the primary union representing Australian Public Service (APS) employees, the CPSU is committed to providing a strong voice for our members in key public policy and political debates.

The CPSU supports efforts to prevent corruption in APS agencies. Corruption issues compromise 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 APS to implement strategies which uphold the integrity of these agencies and try to ensure that they are free of corruption.

While the CPSU has publicly advocated for the creation of an integrity commission at the Commonwealth level,¹ we have concerns over the proposed Commonwealth Integrity Commission.² We have also supported and been involved in the development of the design of the ACT Integrity Commission.³

The CPSU is happy to provide information on the matters raised in this submission. Please contact Osmond Chiu, Senior Policy and Research Officer, osmond.chiu@cpsu.org.au or (02) 8204 6913 for further information.

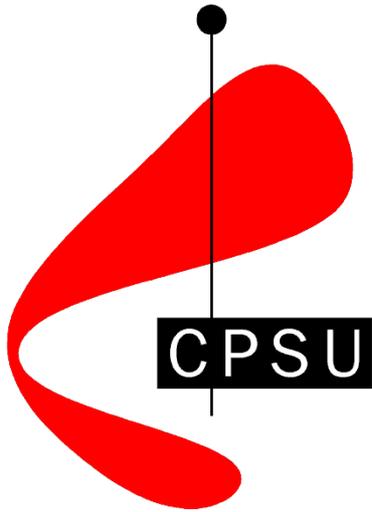
Yours sincerely

Michael Tull
ASSISTANT NATIONAL SECRETARY

¹ CPSU (2018, 18 January). Public sector workers back Labor's plan for a National Integrity Commission. Retrieved from <https://www.cpsu.org.au/content/public-sector-workers-back-labor-plan-national-integrity-commission>

² CPSU (2018, 13 December). Morrison Government falls short with Commonwealth Integrity Commission. Retrieved from <https://www.cpsu.org.au/content/morrison-government-falls-short-commonwealth-integrity-commission>

³ Select Committee on an Independent Integrity Commission (2017, October). Inquiry into an Independent Integrity Commission. ACT Legislative Assembly. Retrieved from https://www.parliament.act.gov.au/data/assets/pdf_file/0008/1123388/9th-Select-Committee-on-IIC-Final-print-version.pdf



Community and Public Sector Union (PSU Group)

**A Commonwealth Integrity Commission –
proposed reforms**

February 2019

The CPSU supports a new integrity commission being established. Our ACLEI members strongly support the creation of a new integrity commission at the Commonwealth level and believe a commission would be an improvement on what currently exists. ACLEI members are strongly of the view that a new integrity commission must be independent and resourced properly. There are, however, a range of concerns with the proposed Commonwealth Integrity Commission model.

There are several issues with the proposed Commonwealth Integrity Commission that need to be addressed. The CPSU believes that any integrity commission should:

- have appropriate resourcing, funding and staffing;
- be operationally independent with appropriate oversight;
- have a wide enough scope to ensure it covers not just APS employees but also contractors, subcontractors, and anyone working for a contracted provider that exercises regulatory delegations such as jobactive providers and consultants engaged on project work;
- be able to examine corruption issues prior to the commencement of enabling legislation;
- have coercive powers to investigate and refer corruption for prosecution or misconduct to agencies;
- make public findings that focus on broader strategic and policy issues;
- conduct private hearings when dealing with corruption issues that have the potential to be subjected to future court processes to ensure procedural fairness;
- conduct public hearings to probe corruption at the broader strategic/policy level;
- undertake surveillance but have oversight of any integrity testing regime to ensure due process and accountability;
- have a mechanism to allow direct referrals;
- ensure there is adequate funding to establish and run an effective anti-corruption/public outreach unit;
- have pay and conditions that will attract and retain skilled staff; and
- involve staff directly in its development.

Appropriate resourcing, funding and staffing

Corruption, by its very nature is a very difficult and covert form of criminality to detect, investigate, prosecute and prevent. Corruption investigations are resource-intensive and can take a considerable amount of time, if the goal in any particular matter is to assemble sufficient evidence in support of a criminal prosecution.

Regardless of the model of integrity commission that is adopted by the Commonwealth, it is essential that staff are trained and resourced appropriately. If the new commission is under-resourced, it will struggle to perform its key operational, corporate and strategic functions.

The Government's proposed Commonwealth Integrity Commission indicated an average staffing level of 150.⁴ ACLEI members were of the view that would be adequate for the Law Enforcement side but not full the size of a new entity. Rather, members stated that staffing in the vicinity of 400 would be needed. Moreover, there will be a need to expand the Commission's geographic footprint to establish additional offices in Melbourne, Brisbane, Adelaide, Hobart and Perth.

To illustrate, ACLEI's current jurisdiction covers approximately 20,000 Commonwealth public sector employees. With the expanded remit for Law Enforcement proposed by the Commonwealth Integrity Commission, this would expand to 50,000. When adding the remainder of the Commonwealth public sector to the mix, additional resourcing as well as sufficient public awareness campaigns will be required to ensure that all stakeholders know exactly what would constitute a corruption issue.

⁴ Attorney-General's Department (2018, December). A Commonwealth Integrity Commission— proposed reforms. P.10. Retrieved from <https://www.ag.gov.au/Consultations/Documents/commonwealth-integrity-commission/cic-consultation-paper.pdf>

Scope of an integrity commission

Corrupt conduct by any person – whether or not a public official – that impairs, or that could impair, public confidence in public administration should be covered by the proposed Commonwealth Integrity Commission.

The CPSU supports the new entity having a wide scope rather than being limited to only APS departments, agencies, parliamentarians and their staff. It should have the scope to adequately cover the growing forms of contracting and subcontracting.

The CPSU has been particularly concerned about the increasing risk of corruption and misconduct outside of public sector agencies as a result of the huge increase in the privatisation and the outsourcing of public services. Our conservative estimate is there are at least 23,000 non-APS employees, including contractors and labour hire workers undertaking APS work and exercising the delegations associated with that work. There are also thousands of people working through programs such as jobactive that exercise delegations in relation to access Commonwealth program and monetary assistance, and whose own funding can be influenced by how they apply those delegations.

Public accountability and transparency are eroded by privatisation and outsourcing. Privately run services, including those run by non-government organisations, do not have the same requirements of disclosure to parliament and to the general public, nor do they have the same levels of independent oversight and audit. They make decisions every day that impact the lives of often vulnerable Australians with little accountability.

It is also unclear how cronyism in internal appointments would be treated and dealt with. For example, would contractors and consultants recommending work be given to other contractors and consultants rather than being done by APS employees constitute serious criminal conduct that represents corrupt conduct? This form of conduct is the most common form of potential corruption witnessed according to 2017-18 State of the Service,⁵ made more urgent by Government attempts to change employee selection processes.

Therefore, any integrity commission needs the extensive scope, resources and power to deal with these corruption risks associated with the huge increase in contractors, consultants, labour hire and other forms of outsourced service provision, beyond serious criminal conduct.

Furthermore, ACLEI members were also strongly of the view that the ability to investigate up to a decade before the commencement of the Act, as proposed under the National Integrity Commission model, is necessary.

Structure of the commission

ACLEI members were neutral on the exact model proposed so long as the entity had the appropriate powers and was properly funded.

The CPSU notes that integrity commissions often maintain a separation between assessment and investigation, despite sharing leadership teams. For example, in South Australia, the Office of Public Integrity can receive and assess complaints but does not have powers of investigation. Assessments and recommendations are then referred to the Independent Commission Against Corruption (ICAC).⁶ This form of structural separation should be considered.

⁵ Australian Public Service Commission (2018). State of the Service Report 2017-18. Retrieved from https://www.apsc.gov.au/sites/g/files/net5296/f/18583_-_apsc_-_sosr_-_web.pdf

⁶ Independent Commissioner Against Corruption (South Australia). Office of Public Integrity. Retrieved from <https://icac.sa.gov.au/content/office-public-integrity>

The CPSU supports the Commission being subject to oversight by a Parliamentary Joint Committee, assisted by a Parliamentary Inspector to ensure compliance with the law, due process and standards of probity. It should also be subject to judicial review by the Federal and High Courts of Australia.

Agency independence

The current ACLEI model involves an “integrity partnership” where ACLEI works closely with agencies within and external to current its jurisdiction in order to carry out its investigations. It is argued that a new integrity commission should have enough resources, capabilities and access to information, to enable it to operate more independently. At the same time the ‘partnership’ can continue to exist particularly in the area of corruption prevention and public outreach.

The experience of ICAC in NSW shows that a government can also cut funding. While maintaining a base level of funding is important to ensuring independence, issues with supplementary funding show that the independence of a commission can still be affected. Past cuts to the supplementary funding of the NSW ICAC highlights the importance of a funding structure that ensures independence and is not left to the whims of the Government of the day. A statement issued by the ICAC said that as a result of these cuts its staff budget would be reduced by approximately 9.5 per cent for the next financial year, which means it will be forced to drop its workforce from 124 to 103 positions.⁷ It meant greatly reduced investigative capacity resulting in less scrutiny of the actions of the NSW Government.⁸

Powers

ACLEI members reported they believe ACLEI has all the powers it needs, and such powers should transfer across into the new Commission. The key question remains one of funding and resources.

While members have no opposition to a model that distinguished between law enforcement and the broader public sector, they are of the view that coercive powers should apply to both, in order to target and investigate to a criminal standard, whether a parliamentarian, agency head or a front-line worker in the Department of Home Affairs.

As a corruption issue is quite broad and captures more things than a serious criminal allegation, members noted that even where evidence for serious criminal proceedings may not be met, it is important that evidence gathered, which may be enough to show misconduct, should be able to be referred back to relevant agencies.

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

The CPSU would expect that any proposed integrity commission exercise due consideration and caution when making findings of corrupt conduct, even if it is serious corruption, noting that a finding may violate principles of procedural fairness. It is far more preferable that corruption and other associated criminal conduct should be investigated and either a) be dismissed (no evidence of criminality found) or b) referred for prosecution without making public statements that would affect the right to a fair trial. A jury must determine the case before it based on admissible evidence before the court, and not on *adverse public information*.

⁷ ABC News (2016, 4 June). NSW corruption watchdog forced to fire staff following State Government funding cut. Retrieved from <http://www.abc.net.au/news/2016-06-04/nsw-corruption-watchdog-to-fire-staff-as-government-cuts-funds/7477796>

⁸ Public Service Association (2016, 20 June). Budget must restore ICAC funding to stop privatisation corruption. Retrieved from <http://psa.asn.au/budget-must-restore-icac-funding-to-stop-privatisation-corruption/>

Private or public hearings

Public hearings should be allowed as they can play an important role in exposing systemic issues involving weaknesses on governance that can allow corruption to occur.

Decisions about whether to hold public hearings need to strike the right balance between the competing interests of individual privacy and public transparency and open justice. The conduct of a public examination should only occur if it is demonstrably in the public interest and outweighs any countervailing interests in confidentiality and privacy.

Private hearings, however, should be the default mode of hearing when corruption issues involve the alleged criminality of individuals that may become the subject of future charges before the Court. Public hearings can simultaneously play an important role in uncovering organisations weaknesses and governance failures that enable corruption to occur. Similarly to what has recently transpired with the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

The CPSU notes that the Inspector of NSW ICAC raised concerns about public hearings, stating that having private hearings “does not prevent the exposure of found conduct at the end of the investigation and the referral to prosecuting authorities.” Further “it will prevent the undeserved trashing of reputations and will still permit a proper focus and a fairly managed forensic process, without the distraction of temptation for flamboyance or theatre.”⁹

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

“The impact lasts and in particular comes into play when labelled persons apply for a position initially equivalent to the position they held when investigated, and it continues as they seek positions of less and less value over the years to come. I have had two people in my office just in really recent times who have applied for over 400 jobs over a period of, say, two or three years who still find that people are googling their name and finding the report in the Illawarra Mercury or the Lismore gazette.”¹⁰

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

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

Oversight of surveillance and integrity testing

The use of covert tactics such as listening devices, optical surveillance, undercover agents and targeted integrity tests, in particular, by an integrity commission, rather than a partner agency, should be allowed but only under strict oversight and must not involve the arbitrary use of

⁹ Office of the Inspector of the Independent Commission Against Corruption (2016, 12 May). Report to the Premier: The Inspector's Review of ICAC. Retrieved from <http://www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf>

¹⁰ Select Committee on a National Integrity Commission (2017, 12 May) Adequacy of the Australian government's framework for addressing corruption and misconduct. Retrieved from <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22committees%2Fcommsen%2Ff253b3da-ecda-4a0f-8884-a9eab3b9a546%2F0004%22>

coercive powers. Any powers granted to the proposed integrity commission should have proper oversight, ensuring there is due process.

While noting the integrity testing is currently allowed under the ACLEI legislation, the CPSU does not support the current integrity testing regime that applies to the Department of Home Affairs. That regime, which removes rights to procedural fairness and undermines the level of trust in the workplace, is not an appropriate model for the rest of the public sector and should be overhauled.

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

- The selection and oversight of integrity testing authorities;
- Timeframes to conduct an integrity test after authorisation;
- Use of information acquired through integrity testing;
- The potential for entrapment of employees;
- Arbitrary requirements of drug and alcohol tests at any time; and
- No access to unfair dismissal or independent reviews.

The CPSU would bring to the Panel's attention that the current regime in Home Affairs is draconian and lacks procedural fairness. In Home Affairs, employees can be terminated on the basis of an extremely broadly defined "serious misconduct". The definition goes beyond corruption to include "any other seriously reprehensible act or behavior" and is having, or likely to have a "damaging effect" on the reputation of the agency. The termination can occur without the staff member having any rights to procedural fairness or internal or external independent review of the decision and employees are exempted from access to unfair dismissal remedies.

The CPSU recognises that in cases where corruption is suspected there may be an imperative to remove an employee from the workplace as soon as possible. There are, however, other means to achieve this which preserve procedural fairness. Without a right of review, there are no checks and balances on this power to ensure that decisions are not abused or used for purposes outside those intended.

Protections must be in place to ensure that the rights of individuals are upheld during any investigation of corruption and that processes are not abused to entrap APS employees.

In the public sector, any integrity testing regime should:

- be fair and responsible with appropriate oversight mechanisms in place;
- have precisely defined definitions;
- include the right of independent review; and
- only ever be implemented where employees have had a genuine say about development and implementation of the scheme and accompanying guidelines.

Ensuring public understanding about the Commission's role

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

The CPSU is supportive of a mechanism for direct referrals, something not allowed under this proposed model, balanced by significant penalties for false or misleading complaints and for contempt of or obstructing and failing to comply with directions given by an integrity commission. This is particularly important if referrals to the integrity commission can be made by anyone instead of by agencies as proposed by the Commonwealth Integrity Commission.

Given the likely comparison to state-based jurisdictions such as ICAC in NSW, it will be important that the establishment of an integrity commission includes a public education process to ensure that the new entity is not inundated, and its role is properly understood.

Attracting and retaining skilled staff

The attraction and retention of skilled staff will need to be prioritised. A new Commonwealth Integrity Commission will need more staff who can undertake criminal investigations and investigate to that standard. ACLEI members warned that if recruited staff do not have the right skill set, their effectiveness will be quite limited. Attracting and retaining staff with experience investigating corruption will be a challenge unless ACLEI grows significantly prior to the establishment of any integrity commission.

A barrier to achieving this will be the Commonwealth's 2018 Bargaining Policy. Members noted that more competitive pay rates and conditions for non-APS staff in the AFP and at a state and territory government level could affect the recruitment of skilled staff for a Commonwealth Integrity Commission. The Bargaining Policy imposes a below inflation pay increase of no more than an average of 2% p.a. with no scope for backpay or improved conditions.

Members also did raise concern about the impact of machine of government changes if it shifted parts of other agencies into a Commonwealth Integrity Commission. A repeat of the situation in Home Affairs, where staff at the same classification level are on different agreements with different pay rates and conditions, must be avoided. An effective workforce requires a unified agreement and all staff should be on the agreement that provides the most attractive pay and conditions.

Involving staff in establishing an integrity commission

ACLEI members recommended that in establishing the new entity, there is a proper process. It will be important to get the right people in from government to plan and set this thing up. A reliance on contractors and consultants will undermine the capacity of the entity from the get-go. ACLEI members also recommended that rather than starting on a set date, it may be preferable for the integrity commission to be built up, expand and grow.

The CPSU is supportive of efforts to strengthen public confidence in the APS, however, it cannot be a top down process. Staff at ACLEI should be directly involved with the development of a Commonwealth Integrity Commission model. Their expertise and knowledge of the benefits and limitations of the current model can help to ensure the most effective scheme. A consultative process to get the views of staff to have a say to identify any issues before it is finalised. The CPSU is willing to facilitate this process as an independent representative of APS employees, allowing staff to ability to talk in all workplaces.