The Darkest Corners

The case for a federal integrity commission

Geoffrey Watson SC will present this keynote address to the Accountability and the Law 2017 conference

Conference keynote: Accountability and the Law 2017

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Summary

- There is a compelling case for a federal integrity commission: there is strong public support for such a body, and there is evidence that corruption is endemic in our federal public service, with 3000 cases being reported by the public service's own survey.
- State-based anti-corruption bodies have found corruption in Brisbane, Sydney, Melbourne and Perth, and there is no reason it will not be found in Canberra once a federal integrity commission is established.
- Australia has international obligations as a signatory to the *United Nations Convention Against Corruption.* Article 36 of UNCAC obliges Australia to create and maintain an independent anti-corruption agency.
- The multiplicity of our current agencies is not effective. There are gaps and some conduct is beyond examination by any federal agency. Different standards of conduct are being applied to different classes of federal public officials.
- A federal integrity commission needs both direct and indirect jurisdiction to be effective. Indirect jurisdiction allows the commission to investigate a situation where a public official was acting innocently but was lured into making a bad decision by private interests acting corruptly, for example two businessmen colluding for personal gain in respect to a public contract.
- A federal integrity commission needs to be completely independent of those persons and bodies who might come under investigation. Queensland, South Australia and New South Wales state governments have all intervened in the operation and resourcing of their state anti-corruption commissions.
- Public sector corruption is an extraordinary crime and it is almost impossible to detect or expose it using ordinary investigative powers. A federal integrity commission needs the powers of a Royal Commission.
- A federal integrity commission needs the power to hold public hearings in order to be effective. Direct experience has shown me that critical information arises through members of the public coming forward at public hearings. Public hearings also build public trust in the investigations.

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Introduction

The case for the creation of a federal integrity commission is compelling.

Public sector corruption is obviously a serious crime and there is evidence that corruption is endemic in our federal public service. In a 2016 census 3,000 federal public servants reported witnessing conduct of fellow public servants which was inappropriate or illegal. The conduct included nepotism, blackmail, bribery, fraud, and collusion with criminals. That was in only one year. And that is a startling figure given the nature of corruption; if that is the corruption actually being observed, the actual rate of corruption would be orders of magnitude higher.

Corruption in Australia is already a serious problem and it is becoming more serious. The well-respected annual study by Transparency International shows that Australia has slipped dramatically in its international rating in recent years. This accords with public opinion – several recent polls show that only 15% of Australians trust our federal politicians, and 85% believe there is corruption at a federal level. Perceptions are important, but even more so when the problem is real.

The state-based anti-corruption bodies have demonstrated widespread and deep-rooted corruption in the public sector in those states. It is block-headed to think that corruption is occurring in Brisbane, Sydney, Melbourne and Perth, while Canberra remains immune to the illness.

Recent polling demonstrates that 82% of Australians support the creation of a federal anti-corruption agency.

In considering the need for a federal integrity commission it is wrong to consider it by reference to purely domestic factors. There are several issues in this respect – the most obvious is that we owe international obligations. In 2005 Australia signed the United Nations Convention against Corruption (UNCAC). Article 36 of UNCAC obliges Australia to create and maintain an independent anti-corruption agency. We remain in breach of that obligation.

We also have international trade and international aid obligations. Breaches of these obligations can only be investigated and controlled at a federal level. I will mention a few examples. Do you recall the Australian Wheat Board scandal involving relations with a hostile and dangerous regime? What about the Securency scandal – where federal bodies were paying bribes to secure lucrative international contracts. I just mention the words – “the Panama Papers”. And what about the revelation in the last

fortnight regarding the use of our banking system as a means of laundering international drug funds?

It is only through the appointment of a federal anti-corruption agency that can we fulfil our international obligations. Australia has a role to play as a leader and as a model to other countries. So consider these facts. Corruption is the most serious crime on the face of the planet; it dwarves the international drug trade – which, incidentally, could not continue to prosper without corruption in the public sector. In 2014 the World Economic Forum estimated that the international cost of corruption was more than $3 trillion annually – that is more than 5% of the global GDP and twice the size of the Australian GDP. The World Economic Forum has estimated that corruption increases the cost of doing business by up to 10%.

It is not just a matter of money. We are talking about lives. This is especially relevant to our international aid programs. Twenty thousand human beings die each day from starvation and preventable diseases. In 2005 the World Bank estimated that between 20% and 40% of all official development assistance was simply stolen. Researchers have conservatively estimated that if corruption could be reduced 5,000 human lives could be saved each day.

I will leave our international obligations on that disturbing note, and now come back home to Australia.

We also need a federal agency as a matter of comity between the Commonwealth government and state governments. Consider the recent investigative work undertaken by the Four Corners program, demonstrating that a carefully planned solution to long-term water distribution problems in the Murray-Darling Basin had been ignored or corrupted, thereby interfering with a balance of rights between the federal government, the New South Wales government and the South Australian government. I then heard the federal Minister for Water, Barnaby Joyce, brush the matter aside because it would be referred to the NSW ICAC. How do South Australians feel about that?

Today I propose to deal with five issues in this order:

- First, I will address why we need a federal agency, and a single agency rather than the piecemeal approach the federal government has hereto taken in fighting corruption;
- Secondly, I am going to address the jurisdiction which should be given to such a federal agency – I am afraid this is a rather boring issue, but it is of fundamental significance;

- Thirdly, I am going to point up some of the difficulties in maintaining the independence of such an agency, and what we should be expecting from our politicians in relation to this;
- Fourthly, I will briefly address the reason why a federal agency must be given exceptional powers if it is to do its job; and
- Fifthly, I am going to say why I believe it is essential that a federal anti-corruption commission should be given the power to conduct certain of its inquiries in public.

A single, federal agency

I have already explained why I say it is necessary for Australia to get a federal anti-corruption agency – and I will not repeat those matters. What surprises me is that there is any opposition to the creation of such an agency. I am also surprised by some of the strange reasons advanced as to why such an agency is unnecessary or inappropriate. Two of the strongest opponents are the Attorney-General's Department and the Australian Public Service Commission. Hostile campaigns have also been organised through The Australian and the Institute of Public Affairs. The reasons proffered as to why there is no need for such a Commission are puzzling. In substance there are three reasons given: that there is no corruption at a federal level; that, given current budgetary issues, such an agency would be too expensive; and there is no need for such an agency as there is a multiplicity of different organisations already attending to the task.

Each of these arguments is, with respect, wrong.

NO CORRUPTION AT THE FEDERAL LEVEL

This argument is not only absurd, it is circular.

Without a federal agency armed with the appropriate investigative tools, it is unlikely that corruption will be detected, much less exposed. So in a strange sense, the argument must be right: and, along the same lines, the longer we postpone creating an agency with the ability to find any public sector corruption, the less corruption there will be.

It is untenable to contend that while there is corruption elsewhere, somehow, federal government remains pristine. In 2014 the then Prime Minister, Tony Abbott, dismissed the need for a federal anti-corruption agency out of hand – he said that was because, to his mind, Canberra was a "pretty clean polity". That sounds more like a creed, rather than a policy.

An even stranger view was advanced by John Lloyd, the Australian Public Service Commissioner. In his submission to a Senate Select Committee Mr Lloyd explained that a national integrity commission was unnecessary because the incidence of corruption in the federal public service was inconsequential – as he put it, in 2016 "only 4% of Australian public service employees reported having witnessed another employee in engaging in behaviour they regarded as corrupt". In 2016

there were over 155,000 federal public servants suggesting, using Mr Lloyd's figure, that something like 6,200 had witnessed corrupt conduct. That level of corruption would seem to me to call for urgent action.

We have seen this same argument play out in the real world in recent times. For many years a succession of Labor and Coalition governments in Victoria claimed there was no need for anti-corruption body because there was no corruption. Despite the confidence of those assertions, since its inception in 2012 Victoria's IBAC has proceeded to reveal rampant corruption in several government departments, particularly in Education and Transport.

I will stop this now – it is frankly ridiculous to assert that there is no corruption in the federal public service.

TOO EXPENSIVE

This argument is not only implausible, it is bad economics.

As he explained in his evidence to the Senate Select Inquiry, the respected economist Richard Denniss sees an effective national integrity commission as an essential component in encouraging and maintaining foreign investment. Dr Denniss relied upon international studies to demonstrate that any kind of corruption was a principal deterrent for foreign investment. According to Dr Denniss a federal integrity agency would quickly pay for itself.

And if it really is truly a question of preserving public money, then possibly some or all of the funds currently allocated to the National Windfarm Commissioner could be diverted. Another means might be to cut back the current spending on the federal body known as the Independent Scientific Committee on Wind Turbines. Fighting corruption is more important than tilting at windmills.

The need is pressing – surely the money for a federal agency can be found.

NO NEED FOR A CENTRAL AGENCY

This is a more complicated issue. It is not widely known, but we already have several federal agencies which can examine aspects of corruption. The submission made by the Attorney-General proudly described the current regime as a "multi-faceted approach". That may be true, but multi-faceted does not mean effective. One facet is our powerful anti-international bribery legislation – which, after 18 years in operation, has so far secured two convictions.

Several highly qualified commentators have pointed out that the current scheme is too diffuse, unfocussed and ineffective. For example, Professor A J Brown has described the current regime as "under-inclusive and unwieldy". Professor George Williams describes it as "resulting in under reporting and confusing". Both professors have pointed out a major problem – how the current scheme is hardly comprehensive. In particular, as Professor Brown says, the current scheme means that federal politicians are not subject to legally enforceable accountability mechanisms.

This means that some conduct, even conduct of a corrupt kind, is beyond examination by any federal agency. You may not be surprised to find, for example, that before the establishment of the Independent Parliamentary Expenses Authority (IPEA) there was no agency which has the power to examine federal Parliamentarians misusing their entitlements. Some recent cases have attracted a lot of publicity and led to the creation of IPEA, but that is due to the work of the free press, rather than an investigative agency. Along similar lines, there is no federal power to conduct an inquiry into federal funding irregularities. As you will have noticed, the power to examine these matters has proved important in New South Wales. The controls at the federal level are so inadequate that, according to Professor Anne Twomey, "at a federal level you can get away with almost anything".

The multiplicity of agencies leads to another complication: different standards of conduct are being applied to different classes of federal public officials, and even then different standards are being applied to different departments. The different agencies are applying different statutory tests, and conducting their investigations and hearings in accordance with different protocols. Surely it would be better to prescribe a single standard of conduct which would be applicable to all.

Design of a federal agency

JURISDICTION

The actual work of an anti-corruption agency is widely misunderstood.

To an outsider, it would seem as though the principal role of an agency was investigating the conduct of politicians and high profile businessmen. This is wrong: those case are relatively rare. An incorrect impression is gained simply because those are the activities which attract nearly all of the attention of the press. In truth, the daily grind of an anti-corruption agency is far more routine. The real work of such an agency is more in the area of examining the probity of public decision-making; devising systems with a view to eliminating the potential for corruption; and educating public officials on anti-corruption techniques. And then there are the private inquiries – investigations completed without a public hearing. These are usually directed at close analysis of public sector contracting.

All of this work might properly be described as the agency's "private" work.

An agency's "public" work are the public hearings. And as where this might only be about 10% of the work, it attracts, as I say, much more public interest.

This is where jurisdiction becomes important. If an anti-corruption agency is going to be effective in its private work as well as its public work, then it needs to have the right jurisdiction.

Traditionally, an anti-corruption agency was given a jurisdiction comprised of two closely related but separate limbs:

- A direct jurisdiction – where a public official was acting corruptly in the course of his or her public duties; and
- An indirect jurisdiction – where a public official was acting quite innocently, but was lured into making a bad decision by private interests acting corruptly.

Each limb is as important as the other. The need for the direct jurisdiction is obvious – we need to expose public officials acting corruptly. But the indirect jurisdiction is just as important – two businessmen colluding for personal gain in respect of a public contract can only be caught by the indirect jurisdiction.

Now bear the importance of this jurisdiction in mind when considering the variety of tasks to be undertaken by an anti-corruption agency: the agency's work on probity checking, advising and education needs to address both aspects of public sector corruption.

Unfortunately, when a case like the celebrated case of ICAC v Cunneen comes to a Court, only the public work of an anti-corruption agency is being considered – not its private work. The effect of the decision of the High Court in ICAC v Cunneen was to eliminate ICAC's indirect jurisdiction. And once that was done, it really came as no surprise that politicians were reluctant to restore ICAC's jurisdiction completely. Practice has shown that if the Courts are willing to restrain the operations of an anti-corruption agency, the parliaments are unwilling to release the restraint.

Without questioning the correctness of the legal result in ICAC v Cunneen, I would like to demonstrate that the idea of providing an anti-corruption agency with only a direct jurisdiction leads to some terrible consequences. Before ICAC v Cunneen, no one had ever doubted that the NSW ICAC had both jurisdictions – direct and indirect. As a consequence, just before ICAC v Cunneen was decided, the NSW ICAC conducted an investigation resulting in a public hearing – Operation Nickel. This was an investigation into a scam where a licensing authority had delegated responsibility for assessment of the suitability of candidates for heavy trucking licences to a private contractor. That private contractor then took bribes from people obviously unsuited to driving dangerous heavy trucks – these were people who were criminals, unwell, addicted to drugs or alcohol, or simply dangerous drivers. The officers of the regulatory authority – acting entirely innocently – issued the trucking licences.

In an exercise of its indirect jurisdiction, ICAC exposed the scam and brought it to an end. It is hard to imagine something closer to the public's heart than safety on the roads. It was an effective investigation and a superb outcome for the public.

A result of the decision in ICAC v Cunneen means there would have been no power for ICAC to even examine the complaint.

So, I say, this fundamental question of jurisdiction is one of vital importance.

INDEPENDENCE

The word "independence" is bandied about in discussion like this, but it really begs two questions: from whom does the agency need to be independent? And how is that independence to be secured?

Obviously the agency needs to be completely independent of those persons and bodies who might come under investigation – but, given that such an agency would only ever be a creature of statute, and could only be funded by the grace of Parliament, it is difficult to see how independence can ever be completely secured. It is an area where we will always be obliged to trust our politicians.

Regrettably, this has not proved entirely satisfactory. The experience around the States has demonstrated an uneven political will in this respect. I will provide a few examples.

In Queensland a powerful anti-corruption agency, the Criminal Justice Commission, was created in 1989 in the wake of the Fitzgerald Royal Commission. When Campbell Newman came to power in 2013 he set about retrospectively removing the corruption prevention and official misconduct functions of the Commission. These meant that before the Commission could undertake any real anti-corruption activities, it required ministerial approval. More recently the Palaszczuk government has reintroduced some, but not quite all, of the Commission's original powers.

In South Australia the ICAC Commissioner, the Hon Bruce Lander QC, has repeatedly asked the South Australian government for the power to conduct public hearings. Specifically, in October 2016 Commissioner Lander wanted to conduct a public hearing into the Gilman land sale; in May 2017 he sought a public hearing into the Oakden Nursing Home scandal. Both those matters were of deep public concern in South Australia. Both involved high level bureaucrats, politicians, and friends of politicians. In both instances the government declined to give Commissioner Lander the power to conduct public hearings. A private members bill designed to allow the Oakden Nursing Home scandal to be ventilated in public was rejected along party lines.

In New South Wales the former Premier, Mike Baird, made two important announcements on the one day in June 2016. The first was to make a public statement of his total commitment to strengthening the NSW ICAC – he proclaimed that he and his government had "zero tolerance for corruption". His second announcement was to cut ICAC's funding. As a result ICAC has lost 15% of its staff, and is continuing to struggle with insufficient funding. The practical effect of Mr Baird's commitment has been to damage ICAC's investigative abilities. It was probably merely by chance that the funding cuts coincided with an ICAC investigation which had severely damaged the Liberal Party.

So, as I say, it will be forever impossible to secure total independence – but I call upon those who will eventually create a federal integrity commission to do what they can so that at least the legislation will pay lip service to the concept.

EXCEPTIONAL POWERS

Public sector corruption is an extraordinary crime, and it is almost impossible to detect or expose using ordinary investigative powers.

There are several reasons why this is so. Perhaps the most fundamental is that corruption has many of the characteristics of a "victimless crime". If, for example, private contractors are skimming money from a major public contract, it is difficult to notice that this has occurred. Often it requires a very careful analysis of the detail of the contracts. More often than not the corruption will go undetected.

Another special difficulty is that corruption is one of those crimes which is organised by persons who are usually the most knowledgeable about the processes and, hence, most likely to be aware of the loopholes. Think about it: starting with the Minister and working your way down – who would be best armed to know the intricacies of the manner in which a coal mine licence could be granted? Experience has also shown that those involved are careful to lay down potential excuses in preparation for the ultimate decision. Think back to the recent conviction of the former NSW Mining Minister, Ian Macdonald, who had granted a coal mine licence improperly, but laid the groundwork so that it was said that the grant of the licence was for the creation of a "training mine". He claimed that a training mine was designed to train and protect the mine workers from injury. A noble purpose – if it was true. It was not true. In the end, that excuse was not accepted by the jury – but you could see how it may have carried force.

So, to investigate crimes of this intricacy and complexity requires high skills and substantial resources. It also requires the provision of two exceptional powers, a power to compel the production of evidence which otherwise would have been protected by the legal professional privilege; and a power to compel a person to give evidence even though that evidence may tend to incriminate them.

Before explaining why those powers are particularly necessary here, it should be pointed out that these powers are routinely granted to Royal Commissioners. It is true that, on their face, the application of such powers may interfere with ordinary protections provided in the criminal justice system, but there are adjustments in place to protect against any damage to the individual. When the exceptional powers are exercised it is pursuant to a qualification which allows the individual to take an objection so that, in the event any criminal or other proceedings are pursued, the privilege over the evidence and documents is restored. So the temporary relaxation in the operation of the privileges does no permanent damage to the individual. In this respect I think it is salutary to note that Civil Liberties Australia and the NSW Council

for Civil Liberties both addressed the Senate Select Committee and supported the creation of a federal anti-corruption agency with exceptional powers.

I will now explain the need for the exceptional powers by reference to some practical considerations. Corruption is a money crime. Often it involves a lot of money. Often it involves moving currencies between jurisdictions. Experience has shown that the larger the scale of the corruption the more likely it is that lawyers will be involved. It is a further complication that the conspirators do not fully trust each other, and often need a lawyer to intervene to divide the spoils.

So it was that in Operation Jasper ICAC was able to acquire the critical information from lawyers who had been retained on conveyancing and contractual matters relevant to the financing and purchasing of the farming properties upon which a corrupt coal licence was granted. The actual lawyer suffered a full memory failure, but he was a careful note taker. I remember my elation reading the solicitor's earnest note that certain transactions had to be completed swiftly because confidential government information would become public knowledge in six weeks' time.

The power to compel testimony is just as important. Bear in mind that the process is an investigation, not a prosecution – and it is an investigation which is designed to get to the truth. Where you have a corrupt conspiracy, unless one of the conspirators breaks ranks, the only way to get to the truth is to compel those involved to give evidence. And this can lead to some strange circumstances. At one point in Operation Jasper the former Minister, Eddie Obeid, took an opportunity while giving evidence to belittle me by pointing out, in effect, that he spent more in a year than I would earn in a lifetime. Sadly, this part of his evidence was one part which was truthful and accurate.

PUBLIC HEARINGS

I have been counsel assisting in several investigations, not just in ICAC but other places as well, including the Police Integrity Commission. Some of those investigations have led to public hearings, but just as many did not. In each instance it was only decided to progress to a public hearing when it was in the public interest to do so.

In my experience the ability to call a public hearing is a critical power for any anti-corruption agency. It is a power which must be given to any new federal integrity commission – without it, the agency will never gain public trust. Just imagine for one moment that the work of the Royal Commission into Institutional Child Abuse had been conducted privately, not publicly: no-one would have trusted the processes, and the fine work done by that Royal Commission would have been lost to us – it would

have been a pointless exercise. Worse – it would have perpetuated the secrecy which has surrounded those terrible activities.

Ordinary people engage with a public inquiry. The public hearing creates a general sense that something can be done; that something is being done; and that wrongs can be righted. I add that the public engagement has a powerful positive influence on the investigation – when the matters become open, it is my experience that members of the public come forward with important information. Some, who previously thought there was no point in doing so, finally get their opportunity to speak out. Others, who were previously scared to do so, are emboldened into action.

Again, I will speak with a little experience. In Operation Spicer the NSW ICAC was looking at election funding irregularities amongst Liberal Party politicians. While the investigation was in progress we would receive new information on a near daily basis. It was because witnesses came forward that the inquiry had to be broken into two parts. Originally it was only directed at irregularities occurring on the Central Coast, but when some witnesses came forward the inquiry expanded and looked at some problems with the funding in the Newcastle district. I can assure you that the resources at ICAC were stretched just to collect and collate the new information coming to hand. The most extraordinary source of information came when a gentleman asked to see me during the luncheon break because he held significant information. He was a Liberal Party Senator who was disturbed by certain of his party's practices, and wanted to see them eradicated.

Again, it is an investigation, not a prosecution. You should never underestimate the positive impact that the publicity surrounding a public hearing can create in terms of the production of further evidence.

An additional difficulty arises in determining whether the power to order a public hearing should be exercised. The different anti-corruption agencies are given different statutory powers in this respect. As I mentioned earlier, the South Australian ICAC is prevented from conducting any public hearings. The Victorian IBAC has a limited power – it can only order a public hearing when the circumstances are exceptional. In New South Wales the power is more ample – a Commissioner can order a public hearing when, in his or her judgment, it is in the public interest to do so.

In my view the NSW model is clearly the best model. No-one – apart from the current South Australian government – thinks that the South Australian model is appropriate. Several leading commentators have spoken against the restrictions imposed on the Victorian model: in this respect there have been substantial submissions attempting to liberate the Victorian IBAC made by the Accountability Round Table and Transparency International. Meanwhile the NSW model has been considered and

approved by most of the leading commentators – including when under review by the Hon Murray Gleeson AC and Bruce McClintock SC. So what should be the proper statutory test? What is wrong when a trusted commissioner, in some instances subject to peer advice, makes a judgment that it is in the public interest to conduct a particular investigation in public? There is nothing exceptional in this, it is the power granted to all Royal Commissioners and to other investigating commissioners in other circumstances. It is the model that should be adopted for any new federal integrity commission.

Conclusion

I am confident that we will soon get a federal integrity commission – we need it, and the public wants it.

As I see it the real battle will be around assuring that such a federal agency is given the appropriate jurisdiction, sufficient funding to ensure its independence and its efficacy, and the necessary powers to do its job. We cannot afford anything less.