Accountability and the Law

Anti-corruption Agencies in Australia

David Ipp will open the Accountability and the Law 2017 conference. This paper provides a summary of his remarks on anti-corruption agencies in Australia.

Conference Opening – Accountability and the Law 2017

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Summary

- Corrupt conduct has always been part of human society, and has caused the downfall of empires and societies including the Romans and the Ottomans. It erodes public trust in government and encourages citizens to also act unethically. We must remain absolutely intolerant of public corruption.
- It is wishful thinking that corruption is endemic in New South Wales (NSW) but not in other states or at a federal level. It is true that those who combat corruption in NSW were more successful in exposing evil in others, but this says more about NSW ICAC's success than the prevalence of corruption nationally.
- How to combat corruption is controversial, particularly the powers that anti-corruption commissions should be given and the processes that they should adopt. Complete liberty is not compatible with complete equality. The evil and destructive consequences of corruption must be weighed against the detraction of civil rights that a powerful anti-corruption commission may cause.
- The investigation and exposure of corruption is extremely difficult, as secrecy is at the core of corruption and those involved are usually experienced, well resourced, and well protected legally and politically.
- Specialist anti-corruption agencies with powers and resources are needed to fight corruption effectively. Internationally the police have failed due to lack of knowledge, resources and will. In the USA the FBI investigates corruption and in the UK, the Serious Fraud Office and the Organised Crime Office.
- NSW ICAC was once regarded as an international model of best practice, but recent changes to its powers and resourcing has damaged its effectiveness. The other anti-corruption agencies in Australia lag far behind in terms of powers, resourcing and demonstrated impact, some deserving the appellation of Clayton ICACs – the ICAC you have when you don't want a real ICAC.
- The decline of NSW ICAC is a salutary example of how political interference can harm an effective anti-corruption agency. In the creation of a federal ICAC, care needs to be taken to give it protection against this kind of interference.
- The principal statutory object of an anti-corruption agency, namely the exposure of corruption, cannot be achieved without public hearings.
- When discussing a possible restraint on a Royal Commission's public hearings, Sir Anthony Mason, former Chief Justice of Australia, said that the denial of public proceedings brings an atmosphere of secrecy, speculation, and stops potential witnesses coming forward. He said that publicity is the ultimate aim of a Royal Commission.

Introduction

Corrupt conduct has always been part of human society. There are those who believe that a serpent and an apple were involved in its creation. Recently a 7,000-year old clay tablet was found in the deserts of the Middle East which tells the story of a king's official who was executed for taking bribes from persons who needed his permission to buy land under the king's control. Developers were causing trouble even then.

Corruption has long been a major cause of the downfall of empires, dynasties and societies. The Romans, the Ottomans, the Bourbons and Romanovs are examples. In modern times, it has prevented the equitable development of vast natural resources in Africa and South America and has caused civil unrest there and in several countries in Europe and Asia. The United States and Great Britain have not been free from endemic corruption.

History demonstrates that, once the tentacles of corruption enter the fabric of society, they become ubiquitous unless eradicated. The proposition, sometimes heard, that corruption is endemic in New South Wales but nowhere else in Australia, is wishful thinking at fantasy levels. The same applies to the notion that there may be corruption at State level but not at Federal level. True it is that for a time those who combat state corruption in New South Wales were more successful in exposing the evil than others, but that says nothing about its national prevalence.

Once citizens believe that government is corrupt, and that the very people who make the laws and government decisions are corrupt, they lose interest in acting for the public good. They become more likely to engage in corrupt conduct themselves. Avarice and greed become their predominant passion and government systems fall apart. Money and resources, even food and water intended for the community, disappear into the maws of conniving, dishonest individuals.

Combating corruption

How to combat corruption is a controversial topic, and there is little unanimity on some of the thorny issues it raises, particularly the powers that anti-corruption agencies should be given and the procedures they should adopt. I suggest that one should bear in mind the philosophy of Isaiah Berlin. He pointed out that complete liberty is not compatible with complete equality. Most values clash. Freedom of speech is limited by the law of defamation, of contempt of court and by security requirements. Similar considerations apply to all other freedoms, such as the right to public assembly, to freedom of association, to privacy, to reputation, and so on. All of these rights are subject to limitations and boundaries necessary for the survival of society. A proper balance has to be achieved.

Berlin pointed out that the more wolves are given freedom to hunt, the more sheep will die. While the more sheep are protected, the more wolves will starve to death. Our way of life and our freedoms cannot be preserved if liberty to subvert them is permitted. Compromises, trade-offs, arrangements have to be made if the worst is not to happen. It is this kind of consideration that should inform those who determine the powers of an anti-corruption agency. Blind adherence to some ideology should not be a dominant factor.

One has to weigh against the evil and destructive consequences of corruption, and the difficulties in detecting and in prosecuting it, legitimate concerns that the powers of an anti-corruption agency detract from civil rights. I suggest that this kind of decision is best made on a case-by-case basis by a person of recognised integrity, with lengthy judicial experience, who has spent a lifetime in weighing up choices and deciding issues by reference to the needs of the community.

Anti-corruption commissions

The investigation and exposure of corruption is an extremely difficult task. Secrecy is at the core of corrupt conduct. Few paper trails are left and false paper trails are created. Electronic communications and continuously developing sophisticated technology are formidable means of concealing misconduct. The persons likely to be involved in large-scale corruption are usually experienced and astute and have deep pockets. They surround themselves with skilled lawyers, accountants and technical experts and are often protected politically. So, if corruption involving public office is to be fought effectively, specialist anti-corruption agencies are needed with special powers and resources. Thus, in the USA the investigation of corruption is largely in the hands of the FBI and, in the UK, the Serious Fraud Office and the Organised Crime Office. International experience has often shown that polices forces prove ineffective in this field as they lack the know-how and resources.

In Australia, we have a mixed bag of anti-corruption agencies. The New South Wales ICAC was once regarded as a model of best practice in this area, but recent legislative changes to its powers, reduction in resources and staff, have caused its effectiveness to decline sharply. The other anti-corruption agencies lag far behind in terms of powers, resources and history of accomplishments and some even deserve the appellation of Clayton ICACs – the ICAC you have when you don't want a real ICAC.

NSW INDEPENDENT COMMISSION AGAINST CORRUPTION

The decline of the New South Wales ICAC is a salutary example of how political interference can harm an effective anti-corruption body. This is an important topic when considering the creation of a federal ICAC, as care needs to be taken to give it protection against this kind of interference.

In December 2012, Barry O'Farrell, the then New South Wales premier, stated that, because of ICAC, "The State's citizens can sleep easily at night". Rarely did a month go by without delegations from different countries in Asia, Africa and the South Pacific (including New Zealand) visiting ICAC for training courses and general educational purposes. ICAC officers were invited all over the world to address anti-corruption conferences. While I was Commissioner, I received a communication from the French National Assembly. They were seeking advice from ICAC relating to the management of anti-corruption agencies as, according to the writer, "the New South Wales system

is often quoted as a model". At that time, ICAC had a national and international reputation as a leader in the field of fighting corruption. It had proved to be a highly professional and effective body.

Attack on NSW ICAC

Why then was it necessary to make far-reaching changes to its structures, its powers and its resources? One factor jumps out as the answer. Through subsequent investigations, ICAC caused some nine Liberal party members to resign from Parliament. This brought about intense anger on the part of many politicians, including many members of the PJC, the Parliamentary Judicial Committee, the body having parliamentary oversight over ICAC. These persons continuously published remarks attacking ICAC, and this led to ICAC being investigated by a panel constituted by the former chief justice of Australia, Murray Gleeson, and a senior barrister. This Panel recommended some sensible changes to the ICAC Act, but not those for which the political enemies of ICAC had hoped. Accordingly, the PJC was asked to second-guess the Gleeson Panel and again to investigate what changes to ICAC should be made. The Department of Premier and Cabinet (an organ of the cabinet), recommended drastic changes which the government adopted and turned into law. The DPC had no experience of investigating corruption or of anti-corruption agencies, or of managing them. They made no attempt to interview any member of ICAC and never visited ICAC to see how it operated. Nevertheless, their proposals were accepted virtually in their entirety. It was as if a ventriloquist was asking for and taking advice from his dummy.

In this way, the investigatory powers of ICAC were reduced, as were its resources. While on the one hand it was required to shed professional staff, on the other it acquired two extra commissioners. Instead of having one Commissioner, it now has three, each one having a veto over holding a public inquiry. Only one of the new commissioners has judicial experience. This set-up is contrary to the views expressed by the Gleeson Panel. The Panel specifically considered whether any additional requirements should be satisfied before ICAC decides to hold a public inquiry[1] and rejected the idea.

So, we now have a Hydra-headed monstrosity, unknown elsewhere in law enforcement and in fighting corruption. There is to be leadership and decision-making by committee and, as the aphorism has it, committees are likely to produce camels

[1] Report, Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption, p 59.

when attempting to design horses. The concept of three commissioners of varying experience and knowledge is a recipe for dissension and will seriously prejudice strong leadership and consistent policies. It will obstruct urgent decision-making, which is required in an agency such as ICAC, and makes it an expensive and top-heavy absurdity. It is curious that the government is prepared to spend so much in creating two extra commissioners when it refused for about a year, on the grounds of budgetary restraint, to replace the Assistant Commissioner who had retired, thereby seriously harming the day to day operations of the agency. Plainly, the government has an overriding desire to make it more difficult for ICAC to conduct public hearings and to place a brake on its freedom to go where politicians do not want it to venture. Regard is being had to the sense of absolute entitlement that many politicians have and their creed of noli me tangere - touch me not.

There is another feature of the legislative changes that is particularly disturbing. Much of the politicians' anger was vented against the then Commissioner who had presided over the inquiries which led to the resignation of so many Liberal members. She had been appointed pursuant to the ICAC Act which provided that she could only be removed by a majority vote of the two houses of Parliament sitting together. She also was employed under a contract which echoed these provisions. But the politicians wanted to get rid of her and they were not going to be deterred by such niceties. So, they amended the Act by deleting these provisions which, unlike those relating to judges, had not been entrenched. Her position was then abolished – she no longer had a job. What does this say about the independence of ICAC? Nothing good. It suggests that if a Commissioner does something that prejudicially affects the ruling political party, he or she is liable to be sacked. That is actually what happened. Many disillusioning events relating to ICAC have occurred over the last few years, but this is perhaps the worst. It demonstrates contempt for established democratic conventions.

Public hearings

Now to the contentious issue of public inquiries. The argument could not be better put than in the words of Sir Anthony Mason, former chief justice of Australia, when discussing a possible restraint on the public hearings of a Royal Commission[2]. He said:

> However, this restraint, limited though it is, seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public

[2] In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

> acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. ….
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> The denial of public proceedings immediately brings in its train other detriments. Potential witnesses …, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.
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> … Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.

The Canadian Supreme Court has laid down similar principles,[3] as has Lord Sumption, a month ago, in delivering a judgment with which the majority of the UK Supreme Court agreed[4]. Lord Sumption quoted the justification for the principle of open justice, which has been repeated by judges for more than 100 years, "namely the value of public scrutiny as a guarantor of the quality of justice"[5]. He stressed the right of the public to receive information about the functioning of the justice system. While accepting that this right has to be balanced against the right to privacy, he made it clear from his own statements and the cases he cited, that in practice the harm caused by the publication of personal information suggesting that a person might be guilty of a serious crime would ordinarily be outweighed by the right to open justice and the right of the public to receive information about the functioning of the criminal justice system.

ICAC is not a court, and whether it is part of our justice system is an arguable issue. Nevertheless, its proceedings are often a matter of public importance[6], and involve "an important contribution to the knowledge of the public and to informed debate about the administration of justice"[7]. These are matters which weighed heavily with Lord Sumption.

Significantly, Sir Anthony Mason's unequivocal remarks, which I have quoted, applied not to proceedings in a court but to those before a Royal Commission – a body having close similarity to ICAC. All these matters support the proposition that the principle of

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[3] *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 per Cory J, delivering the leading judgment.

[4] *Khuja v Times Newspapers Ltd* [2017] UKSC 49 at [4], [12]-[18], [22]-[23],[26]-[28], [31]-[32], [34]-[35].

[5] *Khuja* at [13].

[6] *In re Guardian News and Media Ltd* [2010] 2 AC 697 at [73] and Khuja at [27].

[7] *Khuja* at [32].

open justice, a cornerstone of our democratic system, should apply to ICAC public hearings. The notion that ICAC could properly expose corruption by secret proceedings is absurd. The ultimate worth of ICAC is bound up with the publicity that its hearings attract, and the public has a substantial and legitimate interest in knowing what is happening before the Commission.

In addition, the effect of public hearings in encouraging unknown witnesses to come forward is a valuable investigatory tool. This is a weighty matter stressed both by Sir Anthony Mason and Lord Sumption. Operation Jasper, which involved, amongst others, Edward Obeid, is a prime example of this. Had the proceedings been held in secret, the public would not have known the details of the corrupt machinations involved. Day after day, over a period of some three months, the media published reports that enthralled the public as the highly complex story unfolded. This had powerful effect on public attitudes, as well as potential witnesses. Witnesses unknown to ICAC came forward. Requests by politicians, government departments, local authorities and other agencies for educational classes on ethical behaviour flooded ICAC. The need to be careful and aware began to permeate the consciousness of public officials. Had the proceedings been held in secret, with no media reporting, the only means of knowledge the public would have had would have been the 172-page report issued by ICAC which, by necessity, contained only a summary of the evidence that had been led over many months. The report would have been the subject of scrutiny by the media for a few days during which the public would have been advised of the findings in further summarized form. The drama of the gradual revelations and the powerful impact of the investigation would not have existed and the effect of the report would have dissipated very quickly. The principal statutory object of ICAC, namely the exposure of corruption, could not have been achieved.

Conclusion

I would conclude this brief opening statement by reminding you of the need for the Australian people to be absolutely intolerant of public corruption. Intolerance of corruption is essential to the survival of our representative democracy and way of life. In many countries, public corruption is accepted and even taken for granted. That should never be allowed to happen here. The media, and educational and public interest institutions have a heavy responsibility to uncover, inform and teach the public about corruption. So far, despite all sorts of difficulties, they are doing an outstanding job. Long may it continue. I commend this conference to all of you.