

Select Committee on the Establishment of a National Integrity Commission

Submission

Hannah Aulby
April 2017

ABOUT THE AUSTRALIA INSTITUTE

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals and commissioned research. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

OUR PHILOSOPHY

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

OUR PURPOSE - 'RESEARCH THAT MATTERS'

The Institute aims to foster informed debate about our culture, our economy and our environment and bring greater accountability to the democratic process. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

The Institute is wholly independent and not affiliated with any other organisation. As an Approved Research Institute, donations to its Research Fund are tax deductible for the donor. Anyone wishing to donate can do so via the website at <https://www.tai.org.au> or by calling the Institute on 02 6130 0530. Our secure and user-friendly website allows donors to make either one-off or regular monthly donations and we encourage everyone who can to donate in this way as it assists our research in the most significant manner.

Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601
Tel: (02) 61300530
Email: mail@tai.org.au
Website: www.tai.org.au

INTRODUCTION

The Australia Institute welcomes the opportunity to make a submission to the Select Committee on the Establishment of a National Integrity Commission. With recent polling conducted by the Australia Institute revealing 85% of Australians believe there is corruption in federal politics¹, and ongoing scandals showing evidence of this, it is time for a National Integrity Commission (federal ICAC) to be given the powers to systematically investigate corruption at a federal level.

A federal ICAC would help restore trust in government. Designed correctly, with a broad jurisdiction and the power to conduct public hearings, a federal ICAC would publicly expose and deter systemic corruption, and fill the gaps in our current integrity system.

THE CASE FOR A FEDERAL ICAC

The case for the establishment of a national integrity commission, or a federal anti-corruption commission (federal ICAC), is well established and has broad support within the public and the legal profession. A recent poll commissioned by the Australia Institute found that 82% of respondents were supportive of establishing a federal ICAC.² A summary of the core arguments for the establishment of a federal ICAC is provided below.

Restore confidence in government

Recent polls, studies and surveys show that trust in government is at a record low in Australia and still falling.³ A study conducted by the University of Canberra in 2016 found only 5% of Australians trust government.⁴ A similar study by the Australian National University in 2016 found that 74% of Australians think politicians are 'too

¹ Polling reported in Farr, 17th January 2017, Overwhelming majority believes polities are corrupt, <http://www.news.com.au/finance/work/leaders/overwhelming-majority-believes-polities-are-corrupt/news-story/0f181019b1f1dcdd1485e262f5419b13>

² Ibid

³ See Andrew Leigh, *Explaining distrust: Popular attitudes towards politicians in Australia and the United States*, in *The Prince's New Clothes: Why do Australians Dislike their Politicians?* edited by David Burchell and Andrew Leigh, UNSW Press, UNSW, Sydney, 2002, Chapter 2; and <http://www.abc.net.au/news/2016-06-24/trust-in-australian-political-system-at-lowest-level/7539706>

⁴ <https://theconversation.com/now-for-the-big-question-who-do-you-trust-to-run-the-country-58723>

often interested in themselves'.⁵ A recent poll commissioned by the Australia Institute revealed that 85.3% of respondents thought that there is corruption in federal politics.⁶

The establishment of an anti-corruption commission would contribute to restoring people's confidence by sending an unambiguous signal that government takes corruption and accountability seriously.⁷

Gaps in current integrity system

The current system of scrutinising the public sector in Australia consists of the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Ombudsman, the Auditor General, and the Australian Public Service Commission (APSC).

The ACLEI is limited to investigating the Australian Crime Intelligence Commission, the Australian Federal Police, the Department of Immigration and Border Protection, and other agencies covered by the *Law Enforcement Integrity Commissioner Act*.⁸ The Ombudsman and the Auditor General are restricted to responding to complaints about administrative decisions and financial reporting.⁹ Neither have the jurisdiction to investigate Ministers, or the wide investigative powers needed to effectively pursue individual corruption allegations.¹⁰ The APSC cannot investigate politicians and has only limited inquiry functions. In addition, Australian Public Service agencies only account for approximately half of the total Commonwealth public sector activity and agencies.¹¹

⁵ <http://www.abc.net.au/news/2016-12-20/2016-australian-election-disaffected-study/8134508>

⁶ <http://www.smh.com.au/federal-politics/political-news/federal-corruption-watchdog-needed-say-80-per-cent-of-australians-poll-20170113-gtqva3.html>

⁷ <http://www.themandarin.com.au/31553-anti-bribery-measures-beefed-up-but-the-case-for-a-federal-icac-remains/?pgnc=1>

⁸ <https://www.aclei.gov.au/acleis-role>

⁹ Tim Prenzler and Nicholas Faulkner, *Towards a model public sector integrity commission*, The Australian Journal of Public Administration, vol. 69, no. 3, pp. 251–262

¹⁰ <http://www.themandarin.com.au/64049-federal-icac-look-like/>

¹¹ Professor AJ Brown, *Committee Hansard*, 21 April 2016, p. 10, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/fd9ab3c0-79be-433d-be89-91ccb912ae48/toc_pdf/Establishment%20of%20a%20National%20Integrity%20Commission_2016_04_21_4378_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/fd9ab3c0-79be-433d-be89-91ccb912ae48/0003%22

This piecemeal arrangement has been described as an ‘integrated and multi-faceted’ model by its proponents.¹² Transparency International disputes this assertion. It explains that “The recent adoption of the term ‘model’ suggests that current Commonwealth arrangements reflect a degree of pre-existing planning or coherence which, in TIA’s assessment, is factually and historically inaccurate. The Commonwealth’s present arrangements are the result of decades of largely uncoordinated developments in administrative law, criminal law and public sector management, together with political accident.”¹³

Accountability of politicians is even more lacking than the system overseeing the public sector. Politicians’ conduct is scrutinised only through elections, the courts and parliamentary committees. Public elections are held too infrequently to act as a day-to-day watchdog on politicians, and people do not vote solely on accountability and integrity issues. The courts have limited power to dismiss members of parliament under section 44 of the constitution, but the scope is narrow and requires the member to have been convicted first through a criminal court. The system of Parliamentary Privileges committees is ineffective and amounts to politicians assessing themselves. History makes it clear that this arrangement often results in minimal or no sanctions being imposed.¹⁴

Political scandals

A growing number of scandals involving federal politicians are a constant distraction from the core business of policy making and governing. Craig Thomson, Peter Slipper, Arthur Sinodinos, Bronwyn Bishop, Jamie Briggs, Mal Brough, Stuart Robert, Sam Dastyari and Susan Ley are among a long list of federal politicians who have allegedly been involved in corruption or misconduct in recent years.¹⁵ This list of names is not exhaustive.

In addition to these cases involving politicians, the Interim Report of the Senate Committee on the Establishment of a National Integrity Commission lists other high-level corruption allegations at a federal level: ‘In 2005, the Australian Wheat Board

¹²http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission/NIC/Interim%20Report/c03

¹³ Transparency International Australia, Submission to the National anti-corruption plan discussion paper, 2012

¹⁴ Alysia Blackham & George Williams (2013) The Accountability of Members of Australia's Federal Parliament for Misconduct, *Oxford University Commonwealth Law Journal*, 13:1, 115-156

¹⁵ See for example ‘Misbehaving MPs who’ve made an exit’, *The Age*, January 14 2017, and Alysia Blackham & George Williams (2013), *The Accountability of Members of Australia's Federal Parliament for Misconduct*, *Oxford University Commonwealth Law Journal*, 13:1, 115-156

made headlines for allegedly violating United Nations sanctions and Australian law by paying bribes to Iraqi leader Saddam Hussein to retain business. In 2009, allegations emerged in the media that Securency, a note-printing company half-owned by the Reserve Bank of Australia (RBA) and another company—Note Printing Australia, fully owned by the RBA—had engaged in corrupt conduct to secure contracts. In 2015, an Australian Bureau of Statistics (ABS) employee was imprisoned for using unpublished official data to derive personal gain on the financial markets'.¹⁶

The evidence from Australian states that have anti-corruption agencies suggests that these cases are just the tip of the iceberg. They are made public through media attention, not because of any in depth investigation from current federal integrity agencies. Weak disclosure and regulation, and the absence of a well-resourced and powerful anti-corruption commission make it difficult for other cases to be revealed in any systematic way.

Preventing corruption at federal level

Opponents of a federal anti-corruption commission argue that because the federal government is responsible for broader policy issues and adopts a multi-pronged system of scrutiny, there is less corruption at a federal level.¹⁷ But the growing number of corruption allegations and scandals show this argument has little credibility. As former Commonwealth Ombudsmen Allen Asher pointed out 'there is such a large range of Commonwealth programs, and programs where the Commonwealth is directly funding activities, there are incentives around for corruption, and corruption really results from incentive plus opportunity. Those incentives and opportunities are clearly increasing quite considerably.'¹⁸

The lack of evidence of corruption at a federal level is partly due to the poor investigation and reporting mechanisms. These could lead to systematic corruption going unnoticed or remaining hidden, particularly with many federal agencies currently being encouraged to self-manage their governance and accountability.¹⁹ Weak federal regulations and disclosures laws make it unsurprising that more evidence of corruption

¹⁶

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission/NIC/Interim%20Report/c03

¹⁷ Professor Boyce, 'The three monkeys syndrome and possible remedies', paper presented to the Third Conference of the Samuel Griffith Society, Fremantle, 5–6 November 1993

¹⁸ Joint Select Committee on the Australian Commission for Law Enforcement Integrity, *Report on the Operation of the Law Enforcement Integrity Commissioner Act 2006*, 2011, p. 31.

¹⁹ *Promoting Integrity: Evaluating and Improving Public Institutions*, edited by Brian Head, Alexander Jonathan Brown, Carmel Connors pg 119-120

has not been revealed federally. As Associate Professor Joo Cheong Tham explains ‘placing strong, conclusive weight on the absence of reported cases may very well reflect the mentality of ostriches—what we do not know does not exist.’²⁰

There is no reason to believe that the sort of corruption unveiled in NSW through ICAC is not happening federally. Former NSW ICAC Commissioner David Ipp agrees, saying on Four Corners in 2014 that there is ‘no reason to believe that the persons who occupy seats in the Federal Parliament are inherently better than those who occupy seats in the NSW Parliament’²¹. In fact, state and federal party branches are highly integrated, sharing fundraising strategies and personnel (for example Arthur Sinodinos was Assistant Treasurer of the Abbott government at a time when the NSW Liberals branch he was secretary of allegedly received illegal donations²²).

The ‘nothing to see here’ argument was also made by Victorian and Tasmanian governments facing pressure to set up anti-corruption agencies.²³ Now that these agencies are in place, however, cases of misconduct and corrupt conduct have been found.²⁴ Strengthening these bodies, including by introducing a broader jurisdiction and conducting regular public hearings, would likely lead to more significant cases being revealed.

THE DESIGN OF A FEDERAL ICAC

As shown by our research report, *Queensland Watchdog Asleep at the Gate* (attached as an Appendix), design features are critical to the success of an anti-corruption commission in fulfilling its role of investigating and exposing systemic corruption. In defining the scope of a federal ICAC, we urge the committee to take note of the evidence available from anti-corruption commissions operating in Australian states. The TAI report compares the design and effectiveness of the NSW ICAC and the

²⁰ <https://meanjin.com.au/essays/the-crisis-of-political-money-or-what-the-rest-of-australia-can-learn-from-new-south-wales/>

²¹ <http://www.abc.net.au/4corners/stories/2014/06/23/4028997.htm>

²² <https://meanjin.com.au/essays/the-crisis-of-political-money-or-what-the-rest-of-australia-can-learn-from-new-south-wales/>

²³ See <https://www.accountabilityrt.org/establishment-of-a-national-integrity-commission/>, and Tasmanian Integrity Commission, *Annual Report 2014–15*, Tasmania, 2015, p. 46

²⁴ See <http://www.ibac.vic.gov.au/investigating-corruption/past-investigation-summaries> and <http://www.themercury.com.au/news/tasmania/integrity-commission-exposes-dodgy-public-service-gifts/news-story/31d462ae2240feacda473fc14f613e90>

Queensland CCC and finds that a broader definition of corrupt conduct and the execution of public hearings render NSW ICAC far more effective.

The report found that, from 2012-2016, NSW ICAC made corrupt conduct findings against 123 people and held 28 public inquiries, while Queensland's CCC made corrupt conduct findings against just 37 people and held no public hearings. In addition to higher numbers of hearings and corruption findings, NSW ICAC also pursued investigations in systemic large scale cases, including ministers issuing corrupt mining licenses and major parties taking illegal donations. In contrast the Queensland CCC investigated minor fraud involving one or two individuals, including public servants lying on their timesheets or issuing dodgy drivers licenses. The report also found that design features including a broader definition of corrupt conduct, and a lower threshold for the conduct of public hearings contributed to the greater success of the NSW ICAC. These design features should be adopted by a federal ICAC.

Definition of corrupt conduct

As demonstrated by NSW ICAC, a broad definition of corrupt conduct in the jurisdiction of a federal ICAC is critical to ensuring success in investigating and exposing systemic corruption.

Official misconduct is a critical term in the NSW ICAC Act that allows the NSW ICAC to pursue many cases at a parliamentary and ministerial level that may otherwise not be investigated. Many cases of public interest have been investigated under this term, which covers cases of breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition.²⁵ The removal of this clause from the Qld CCC Act in 2011 is one reason that they pursue cases of minor fraud as opposed to systemic corruption within the political system. In order to be successful, a federal ICAC would need to include official misconduct in its definition of corrupt conduct.

As well as the scope of corrupt conduct, the Queensland and NSW Acts have separate thresholds to what level of corrupt conduct is worthy of investigation. The *Crime and Corruption 2001 Act* (QLD) states that conduct will only be investigated if it would, if proven, lead to a criminal offence or grounds for dismissal.²⁶ In its application, the interpretation of this by the CCC is narrowed to focus on criminal offences, raising a concern that the CCC is focussing on cases that could be pursued by the judicial system, rather than fulfilling its role as investigating and exposing corruption. This is

²⁵ *New South Wales Independent Commission Against Corruption Act 1988*

²⁶ *Queensland Crime and Corruption Act 2011*

demonstrated by the CCC's decision not to investigate certain cases stating 'the assessment found insufficient evidence to support the allegations or to raise a reasonable suspicion of a criminal offence.'²⁷ This response also places the onus of evidence on the complainant. It is further demonstrated on the CCC website in its statement that 'the performance of the official duties of a person elected to office could not amount to corrupt conduct unless the conduct would, if proven, amount to a criminal offence.'²⁸ The NSW ICAC Acts makes the same statement regarding criminal corruption but with an important addition – conduct can be investigated if it would result in a disciplinary offence. A disciplinary offence is defined as: any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.²⁹ In practice, this allows NSW ICAC to investigate cases regardless of whether there is evidence of criminality from the outset. This often means that seemingly weak leads are investigated that uncover complex and serious cases of corrupt conduct.

A low threshold to begin investigations is important as it creates public confidence that an ICAC takes corruption seriously, and allows an ICAC to act as a deterrent for future corrupt conduct. For example, if a politician or a public official has little belief that an ICAC will actually begin an investigation into a matter that is not clearly criminal corruption, they will not be deterred from acting dishonestly or against public interest. To be successful in investigating and exposing corrupt conduct, a federal ICAC should have a low threshold to be able to begin investigations, and should have full discretion in this decision on whether to investigate.

Public hearings

The key role of an anti-corruption commission is to investigate and expose corruption. Public hearings are an important investigative tool, and an effective mode of exposing corruption. Our *Queensland watchdog asleep at the gate* report finds that NSW ICACs regular conduct of public hearings greatly contributed to its success in investigating and exposing corruption, in contrast to Qld CCC which has not held a public hearing since 2009.

According to former and current state commissioners in NSW and Victoria, many investigations at a state level would not have been successful without members of the

²⁷ Queensland CCC, *Annual Report 2015-16* pg 42

²⁸ CCC, *What the CCC investigates*, accessed 9th March 2017, <http://www.ccc.qld.gov.au/corruption/what-the-ccc-investigates>

²⁹ *New South Wales Independent Commission Against Corruption Act 1988*

public coming forward with additional evidence at public hearings.³⁰ Former assistant NSW ICAC Commissioner Anthony Whealy QC has said “there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.”³¹

An ICAC has two main tools available to it in order to expose corruption: public reporting and public hearings. Reports on investigations are usually tabled in Parliament at the end of an investigation when findings have been finalised. As well as leaving large discrepancy to the author of such report in what evidence to leave in and what to leave out, reports are tabled months or even years after an investigation has finished.³² They also require journalists and members of the public to sift through hundreds of pages of legal document, providing a barrier to full transparency.

In comparison, public hearings provide a transparent, timely and accessible form for an ICAC to expose corruption. They allow members of the public to hear for themselves the allegations and evidence, and see how ICAC investigations function. Despite reservations about public hearings based on ‘reputational risk’ from some academics, public hearings allow allegations to be heard and judged by all. If unfair allegations are indeed made, the public and media will see that the person in question is being treated unfairly. As the role of anti-corruption commissions is to investigate and expose corruption, and much of the content of investigations comes out in hearings, the act of hiding hearings from public view threatens the proper function of the commission. Former NSW ICAC Commissioner David Ipp QC has said that “Its main function is exposing corruption; this cannot be done without public hearings.”³³

At a functional level, ICACs rightly have no power to prosecute based on their findings. The investigations lead to corrupt conduct findings that can be recommended for further action by the Director of Public Prosecutions if there is a strong case that criminal offences have been committed. As the public view of corruption, and corruption reflected in the anti-corruption legislation, is broader than the corruption

³⁰ <http://www.ibac.vic.gov.au/media-releases/article/ibac-shines-light-on-serious-corruption-in-its-third-year>, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

³¹ <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

³² See, for example, NSW ICAC 2016, Report - INVESTIGATION INTO NSW LIBERAL PARTY ELECTORAL FUNDING FOR THE 2011 STATE ELECTION CAMPAIGN AND OTHER MATTERS, <http://www.icac.nsw.gov.au/component/investigations/article/5031?Itemid=4196>

³³ <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

as defined by the criminal code, the strength of the non-criminal corrupt conduct findings is mostly in the public exposure of these findings as a deterrent.

CONCLUSION

There are gaps in our current integrity system, with no body currently able to investigate systemic corruption at a parliamentary or ministerial level. In places where this body exists in the form of an ICAC, serious cases of systemic conduct involving the highest levels of government have been revealed. Ongoing scandals at a federal level show that this systemic corruption may be happening in our federal government, but we have no way of knowing if this is the case.

A federal ICAC with a broad jurisdiction and the power to hold public hearings would be able to investigate and expose systemic corruption in our federal government.

Polling shows 85% of Australians think there is corruption in federal politics, and 82% support the establishment of a federal ICAC. It's time to get on with the job.