



# TRANSPARENCY INTERNATIONAL AUSTRALIA

*Affiliate of Transparency International, the Coalition against Corruption*

PO Box 2041  
Blackburn South Vic 3130  
AUSTRALIA

[www.transparency.org.au](http://www.transparency.org.au)

20 April 2016

**Submission by Transparency International Australia**  
**Re: Establishment of a National Integrity Commission.**

Committee Secretary  
Select Committee on the establishment of a National Integrity Commission  
PO Box 6100  
Parliament House  
Canberra ACT 2600

[nic.sen@aph.gov.au](mailto:nic.sen@aph.gov.au)

The enquiry is concerned with the adequacy of the Australian Government's legislative institutional and policy framework in addressing all facets of corruption and misconduct. It is also concerned with this question: 'Should a national integrity commission be established? If so what should the scope of its powers and the contents of its charter include?' The terms of reference include questioning the effectiveness of the current federal and state/territory agencies and commissions in preventing, investigating and prosecuting corruption and misconduct; the interrelation between those agencies or commissions, and whether the coercive powers of existing agencies and commissions are consistent with fundamental democratic principles.

## OVERVIEW

Transparency International Australia (TIA) is aware of the significant public reaction in recent times to validated reports of corruption and criminal misconduct in the private sector, at both corporate and individual level. These extend to bribery of foreign officials in the oil industry; the setting up of secret shell companies to conceal beneficial ownership; tax evasion possibly on a massive scale; money laundering and illicit flows both in and out of Australia. In addition, the Heydon Royal Commission confirmed criminal activity and misconduct in the construction industry. Finally, the lack of ethical behaviour and the suggestion of market manipulation of rates in the banking industry has aroused community anger and concern, leading to calls for a Royal Commission.

These events demand urgent attention.

Against this background, TIA, the leading anti-corruption NGO in Australia, sets out a two-phase plan for the Federal Government to honour its broad anti-corruption commitments in the area of the criminal law; and to improve integrity and behaviour within the Federal Government.

The plan is:

1. Establish a new Australian Serious Fraud & Corruption Office (ASFACO) to investigate and prosecute serious criminal corruption and wrongdoing. This agency could umbrella the AFP Fraud & Anti-Corruption Centre and coordinate closely with other agencies such as AFP, ATO, ASIC, AUSTRAC, ACC and state agencies and commissions.

The Australian Building and Construction Commission's proposed powers and objectives could be blended into ASFACO so that one body, not a host of piecemeal bodies, would be tasked to tackle criminal corruption wherever it occurs. This would extend to the business and private sectors as well as unions, examining serious criminal behaviour of all Australians whether here or abroad.

It would be subject to the oversight jurisdiction of the Australian Commission for Law Enforcement Integrity as are the AFP and other federal organisations.

2. Initiate separate reforms to better coordinate integrity, good behaviour and anti-corruption measures within the Federal Government, especially by examining options for a National Integrity Commission and a Parliamentary Integrity Commissioner.

These latter reforms would be principally concerned with non-criminal corruption and serious misconduct falling short of criminality. They would embrace conflict of interest questions, the issues of entitlement and the vexed issue of donations to political parties. The commission would have an education and advisory role.

TIA has long advocated a new National Integrity System analysis as a major contributor to finding answers, filling gaps in our integrity systems. TIA sees the work of this Select Committee as an important step in advancing the need for a broad research-based approach to achieve these aims.

In aid of this submission, TIA includes the following material:

1. TIA position paper No. 3 (2016): *Anti-Corruption Agencies in Australia*
2. *A New Anti-Corruption Blueprint for Australia*: Article by TIA Chair Anthony Whealy QC (Published in the Australian Newspaper) 14 April 2016
3. Press Release re: *New anti-corruption blueprint can solve policy deadlock*
4. *A Ten-Point Integrity Plan for the Australian Government* (TIA Submission May 2012)
5. *Best Practice National Integrity System Structures, Systems and Procedures* (TIA Supplementary Submission August 2012)

We commend this brief submission to you, emphasising the importance of these reforms to the integrity and prosperity of our nation.

The Hon. Anthony Whealy QC  
Chair, TI Australia

# ANTI-CORRUPTION AGENCIES IN AUSTRALIA

---

## PURPOSE

To ensure Australia has effective legal and institutional capacities for preventing, detecting, exposing and remedying (including by prosecution) official corruption and corruption risks at all levels of government – especially through appropriate independent agencies.

## THE PROBLEM

Anti-corruption agencies (ACAs) are a vital part of Australia's national integrity system, relied on by community and government to lead the exposure of official corruption, head off emergent corruption risks, and ensure action to build confidence in Australia's corruption resilience.

However there is growing confusion – in government and publicly – about the adequacy of Australia's institutional arrangements for fighting corruption, including:

- variable, inconsistent or missing **legal definitions of official corruption**;
- whether ACA's efforts are properly **prioritised, proactive** and **coordinated** with other agencies;
- insufficient confidence that action is being taken to deal properly with **individuals who engage in or benefit** from corrupt conduct that is uncovered;
- whether ACAs have the **right powers, sufficient resources** and **necessary independence from government**;
- adequacy of **accountability, oversight** and **performance assurance** arrangements; and
- gaps in **arrangements at the Australian federal government** level.

## HISTORY AND PREVIOUS RECOMMENDATIONS

Under Articles 6 and 36 of the UN Convention Against Corruption (2004), the Australian Government has committed to having 'a body or bodies or persons specialised' in combatting corruption, through prevention and enforcement.

Australia has a long history of specialist anti-corruption agencies including the NSW Independent Commission Against Corruption (NSW ICAC) (1988), the Queensland Crime & Corruption Commission (1991), the WA Corruption & Crime Commission (1992), the Tasmanian Integrity Commission (2010), the Victorian Independent Broad-based Anti-corruption Commission (IBAC, 2012) and the SA Independent Commissioner Against Corruption (SA ICAC, 2012).

In 2006 and 2014, the **Australian Government** strengthened its anti-corruption capacity, establishing the Australian Commission for Law Enforcement Integrity (ACLEI, now overseeing Australian Federal Police (AFP), Australian Crime Commission, Australian Border Force and others) and then an AFP Fraud & Anti-Corruption Centre. Since ACLEI's inception, parliamentary committees have also called for 'a Commonwealth integrity commission of general jurisdiction'<sup>1</sup>

and review of the integrity system 'with particular examination of the merits of establishing a Commonwealth integrity commission' with oversight of all Commonwealth agencies.<sup>2</sup>

This review has not occurred. Development of a **National Anti-Corruption Plan** was commenced in 2011 but was never finalised. Like state governments, the Australian Government takes a 'multi-agency approach',<sup>3</sup> but one with significant gaps and weaknesses:

- Most federal agencies' anti-corruption efforts continue to go unsupervised (other than clear criminal conduct reported to the AFP), including around half of the total federal public sector not in the jurisdiction of the Australian Public Service Commission;
- There are no independent mechanisms supporting federal parliamentary integrity (other than AFP investigations into criminal conduct);
- Corruption prevention, risk assessment and monitoring activities are patchy and uncoordinated; and
- The criminal law enforcement focus of the AFP Fraud & Anti-Corruption Centre, while important, includes foreign bribery, anti-money laundering and other criminal cases, and cannot provide the necessary oversight of 'softer' or 'grey area' corruption investigation and prevention activity across the federal sector.

At the same time, across Australia at both **federal and state level**:

- Definitions of official corruption differ substantially, with confusion over the proper jurisdictions of ACAs highlighted by the High Court decision in *ICAC (NSW) v Cunneen*;<sup>4</sup>
- There are unresolved debates about how to ensure ACAs are proactive, focused on catching serious corruption issues before they turn systemic, and preventing corruption, rather than simply reactive, complaint-handling bodies;
- There are growing differences in the powers available to ACAs, e.g. ranging from the NSW ICAC's powers to conduct public hearings on any matter it chooses, to the SA ICAC (2012) having no power to conduct public hearings at all;
- Some ACAs have some prosecution powers and capacities (e.g. Queensland) when others have none (e.g. NSW), contributing to public scepticism when corruption is 'found' but action either does not follow or is delayed; and
- Debate continues over where ACAs and other integrity agencies 'fit' in our system of government, including how they are best oversighted and kept accountable<sup>5</sup> – often with little awareness of international trends and experience.<sup>6</sup>

Public confidence in Australia's integrity systems relies on clearer answers to all these issues. Transparency International's *National Integrity System (NIS)* approach<sup>7</sup> – now well-known worldwide – is a strategic way of evaluating these problems. As well, a new TI *Anti-Corruption Agency Strengthening Initiative* offers new insights into possible solutions.

Along with 91 countries, Australia conducted a first exploratory NIS assessment in 2005,<sup>8</sup> but is yet to join more than 45 countries who have conducted these assessments using a new 2009 methodology. Some states have since attempted their own similar reviews and assessments (e.g. Queensland 2009, Victoria 2010, South Australia 2012). It is time for a national approach.

## TI AUSTRALIA'S POSITION

- **The Australian Government should establish a broad-based federal anti-corruption agency**, as one element of an enhanced multi-agency strategy – to ensure a comprehensive approach to proven and emergent corruption risks beyond the criminal investigation system, ensure effective anti-corruption oversight across the entire federal public sector, and support stronger parliamentary integrity.

- **Legal definitions of corruption** need to be overhauled by Australian and State parliaments, to make them simpler, nationally consistent, and more comprehensive for present-day contexts – not only for investigation and prosecution purposes, but prevention and resilience-building.
- **Australian governments should agree on, and implement, best practice principles for the powers and accountabilities of their ACAs** through the Council of Australian Governments (COAG) Law, Crime and Community Safety Council, including:
  - a. aspects of the scope of investigatory powers,
  - b. comprehensive frameworks for corruption prevention and resilience building,
  - c. responsibility for, and coordination with, prosecutions,
  - d. parliamentary and public oversight arrangements, and
  - e. ensuring bipartisan support for the independence of anti-corruption agencies, and for the content and implementation of anti-corruption strategies.
- **TI Australia is planning a new National Integrity System (NIS) assessment of Australia** as a major contribution to finding answers, filling gaps in our integrity systems, ensuring efficient and accountable integrity agencies, and supporting more effective prevention and remediation of corruption internationally. We call on Australian and State governments, including lead integrity agencies, to support this important initiative.

<sup>1</sup> Australian Senate (2006), *Provisions of Law Enforcement Integrity Commissioner Bill 2006* [and related measures], Report of the Senate Legal and Constitutional Legislation Committee, Parliament House, Canberra, May 2006, p.28.

<sup>2</sup> Parliament of Australia, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, July 2011, Recommendation 10.

<sup>3</sup> Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, Prepared as part of the development of the National Anti-Corruption Plan, March 2012, p.12; Australian Government Response to the 2011 Report of the PJC on Australian Commission for Law Enforcement Integrity (February 2012).

<sup>4</sup> See *ICAC v Cunneen* [2015] HCA 14 (15 April 2015); G Griffith, '*ICAC v Cunneen*: the power to investigate corrupt conduct', NSW Parliamentary Research Service, May 2015, e-brief 3/2015.

<sup>5</sup> E.g. Hon Wayne Martin CJ, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', 2013 Whitmore Lecture, (2014) 88 *Australian Law Journal* 106; cf C Wheeler, 'Response to the 2013 Whitmore Lecture', (2014) 88 *Australian Law Journal* 740; A J Brown, 'The integrity branch: a 'system', an 'industry', or a sensible emerging fourth arm of government?' in M. Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context*, Cambridge University Press, 2014, pp.301-325.

<sup>6</sup> See e.g. *Jakarta Statement on Principles for Anti-Corruption Agencies* (2012), Jakarta, 26–27 November 2012 <http://www.unodc.org/eastasiaandpacific/en/2012/12/corruption-kpkl/story.html>.

<sup>7</sup> See <http://www.transparency.org/whatwedo/nis>.

<sup>8</sup> *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, Final Report, National Integrity Systems Assessment (NISA), December 2005 [http://transparency.org.au/wp-content/uploads/2012/08/nisa\\_final.pdf](http://transparency.org.au/wp-content/uploads/2012/08/nisa_final.pdf).

## A NEW ANTI-CORRUPTION BLUEPRINT FOR AUSTRALIA

### Anthony Whealy

Never has Australia had a better time to think seriously about how it wants to tackle the real problems and risks of corruption.

For three years in a row, Australia has been slipping on the worldwide Corruption Perception Index, compiled by Transparency International. In January, we announced our reputation has fallen to being the 13<sup>th</sup> cleanest country in the world – from 6<sup>th</sup> position as recently as 2012.

Failure to upgrade our institutions to deal with issues like foreign bribery by government-owned companies, fix our mess of political donation laws, and tackle union and business corruption, are helping feed this fall in reputation.

The current Senate deadlock over re-establishment of the Australian Building and Construction Commission, a mainstay in the Government's bid to stem union corruption, is a good opportunity to think about solutions.

Australia's prosperity will benefit enormously if we can rebuild our reputation as a country of clean and fair institutions, in the interests of all Australians – not just union members, but business owners, investors, consumers and citizens alike.

What's also clear, is that our strategy should not be piecemeal.

But unfortunately, the risks of a piecemeal response have been increased by confusion over what needs to be done.

Current debate has confused many issues – union corruption, business corruption, public and private sectors, particular industries, workplace law reforms – making it important and timely to separate them and deal with each issue properly.

Many commentators are also confusing the need for a federal *government* anti-corruption agency – which is very real – with the Commonwealth's lead role in fighting criminal corruption across *the wider society*, including unions and business.

Both are needed, but the key issue right now is how to do the second of these things: whether it is better to combat *society-wide* criminal corruption on an industry-by-industry basis, or take a broader approach, recognising that corruption can arise in any industry and moves between them.

Transparency International Australia sees the answer as clear – we need to take a broader approach.

The Government's seriousness about fighting corruption in the building industry makes it the perfect time to deal with economic and industrial corruption as a whole, in a coherent, holistic way that aligns with Commonwealth responsibilities.

As a result, we suggest the Government needs to take two relatively simple steps:

1. Broaden the proposed re-establishment of the Australian Building & Construction Commission to create a body which is better equipped to tackle criminal corruption across a wider range of industries, and in unions and business alike; and

2. Initiate separate reforms to better coordinate anti-corruption measures within the federal government itself, including proper processes for examining options like a national integrity commission and parliamentary integrity commissioner.

Transparency International's recommendation is to go forwards, rather than back, and create an Australian Serious Fraud & Corruption Office (ASFACO).

This would be a law enforcement agency with not only the anti-corruption roles proposed for the Building & Construction Commission, but also the wider roles and existing work of the Australian Federal Police's Fraud & Anti-Corruption Centre.

This Centre was only established in 2014, but is already overwhelmed, confirming the need for a larger and more independent commitment.

In other words, the Government should use this opportunity to upgrade resources for fighting bribery, extortion and money-laundering, *wherever* it breaches Commonwealth law, whether by unionists, business or officials, whether domestic or foreign.

Such an agency would follow in the footsteps of the United Kingdom and New Zealand Serious Fraud Offices (SFOs), and other countries, in giving independence and permanence to these specialised law enforcement functions.

The Government could also still adjust the powers of the existing Fair Work Building Industry Inspectorate to better enforce workplace relations laws in that industry – but this is a different issue to properly fighting corruption in that or any other industry.

To ensure its effectiveness, the Government could also give the ASFACO directions to prioritise particular industries with corruption issues, from time to time. Building and construction could be one. Or commercial sport, or banking and finance.

But corruption does not respect artificial boundaries between jurisdictions, industries or industrial roles. So it is time for a holistic approach.

Another benefit of the plan would be to give greater independence to corruption and fraud investigations involving senior Commonwealth officials, including parliamentarians, rather than these being handled internally by government.

However, the ASFACO would not meet all the needs for overdue anti-corruption reform within government itself. It would help deal with *criminal* corruption in the federal public sector, but public sector anti-corruption – including dealing with non-criminal corruption and serious misconduct – requires a wider range of policy, education and oversight roles which still have to be done by someone else.

Fortunately, we now have a Senate Select Committee examining the options for a National Integrity Commission, and the Government should get behind it.

Meanwhile, there are at least nine other things the Government can do now to progress its own anti-corruption strategy, starting with creating an internal office of integrity and anti-corruption coordination to lead the necessary change.

Previous efforts by Australia to develop a national anti-corruption plan have never seen the light of day. Ironically, we can thank the challenges of union and building industry corruption for provoking the opportunity to squarely tackle these needs, in a considered rather than knee-jerk way.

*The Hon Anthony Whealy QC is chair of Transparency International Australia. TI Australia's plan can be found at [www.transparency.org.au](http://www.transparency.org.au).*





# TRANSPARENCY INTERNATIONAL AUSTRALIA

*Affiliate of Transparency International, the Coalition against Corruption*

PO Box 2041  
Blackburn South Vic 3130  
AUSTRALIA

info@transparency.org.au  
[www.transparency.org.au](http://www.transparency.org.au)

Media Release

**Embargo 12am FRIDAY 15 APRIL 2016**

## **New anti-corruption blueprint can solve policy deadlock.**

Transparency International Australia (TIA), the leading anti-corruption NGO, has set out a two phase plan for the federal government to honour its anti-corruption commitments and resolve the Senate deadlock over building industry integrity reforms.

TI Australia chair, the Hon Anthony Whealy QC said the answer is relatively simple:

1. Broaden the proposed re-establishment of the Australian Building & Construction Commission into a new **Australian Serious Fraud & Corruption Office (ASFACO)** to tackle criminal corruption in unions and business alike;
2. Initiate separate reforms to better coordinate integrity and anti-corruption measures **within the Federal Government**, including examining options for a national integrity commission and parliamentary integrity commissioner.

“If the government is serious about fighting corruption in the building industry – and I am sure it is – then it is time to deal with economic and industrial corruption as a whole, in a coherent, holistic way that aligns with Commonwealth responsibilities.”

“Recent events have demonstrated corruption does not respect artificial boundaries between jurisdictions, industries or industrial roles. We have seen this again and again. It is now time for a comprehensive approach.”

Many commentators are also confusing the need for a federal *government* anti-corruption agency, like those at state level, with the Commonwealth’s lead role in fighting criminal corruption across *the wider society*, including unions and business.

Mr Whealy said: “both need to be done, but the present debate should stay focused on whether it is better to combat *society-wide* criminal corruption on an industry-by-industry basis, or take a broader approach, given that corruption can arise in any industry.”

“Transparency International Australia firmly believes that to be efficient and effective, and avoid being piecemeal, the approach to combatting corruption should be a broad one.”

In January, it was announced that Australia had slipped further on Transparency International’s worldwide Corruption Perception Index, from 6<sup>th</sup> to 13<sup>th</sup> position since 2012. The result reflects inaction from successive governments who have failed to address weaknesses in Australia’s laws and legal processes.

“Australia’s prosperity will benefit enormously if we can rebuild our reputation as a country of clean and fair institutions, in the interests of all Australians – union members, business owners, investors, consumers and citizens alike,” Mr Whealy said.



Transparency International Australia has turned its mind to how this could work in Australia and is recommending a broad **Australian Serious Fraud & Corruption Office** to strengthen enforcement and action across both unions and business.

“This new Office would take over not only the anti-corruption roles proposed for the Building & Construction Commission, but also the Australian Federal Police Fraud & Anti-Corruption Centre, which is only recently established but already overwhelmed.”

“The Office would follow the footsteps of the United Kingdom and New Zealand Serious Fraud Offices (SFOs), and other countries, in giving independence and permanence to the specialised law enforcement functions needed.”

“The Government should use this opportunity to upgrade resources for fighting serious bribery, extortion, fraud and money-laundering -- *wherever* it breaches Commonwealth law, whether by unionists, business or officials, and whether domestic or foreign.”

“Under the plan, the Commonwealth Government could also still adjust the powers of the existing Fair Work Building Industry Inspectorate, to better enforce workplace relations laws in that industry – but it needs to be understood, this is a different issue to properly and fully fighting corruption in that or any other industry,” Mr Whealy said.

“To ensure effectiveness, the Government could also give the ASFACO directions to prioritise particular industries with corruption issues, from time to time. Building and construction could be one. Or commercial sport, or banking and finance.”

Mr Whealy said another benefit of the plan would be to give greater independence to corruption and fraud investigations involving **senior Commonwealth officials**, including parliamentarians, rather than these being handled internally within government.

However, the new Australian Serious Fraud & Corruption Office would not replace the need for overdue anti-corruption reforms within government itself, especially in preventing and dealing with non-criminal corruption.

“While the new Office would help ensure *criminal* corruption in the federal public sector is better dealt with, public sector anti-corruption efforts require a wider range of policy, education and oversight roles which still have to be done by someone else.”

“As a result, this is still the time for the Government to map out its own, internal anti-corruption strategy – especially since previous efforts to develop a national anti-corruption plan have never seen the light of day.”

“The Government should create its own Office of Integrity and Anti-Corruption Coordination, and commit to expanding and supporting the work of the Senate Select Committee on a National Integrity Commission, in order to squarely tackle these important issues in a considered rather than knee-jerk fashion,” Mr Whealy concluded.

#### **Media Contacts:**

Mr Anthony Whealy QC, TI Australia Chair

Mr Phil Newman, TI Australia CEO

## THE TRANSPARENCY INTERNATIONAL AUSTRALIA PLAN

### 1. Broaden the proposed re-establishment of the Australian Building & Construction Commission into a new Australian Serious Fraud & Corruption Office (ASFACO) to tackle criminal corruption in unions and business alike.

- Objectives: enforcing federal laws against criminal corruption (especially domestic and foreign bribery, extortion, frauds and misappropriations involving serious breaches of trust, and money laundering)
- Has a holistic jurisdiction applying to all individuals irrespective of sector, type of industry or workplace, role in industry or workplace, or official position – but could be directed to priorities particular sectors or industries of demonstrated corruption risk (building, sport, finance)
- Combines the proposed anti-corruption powers and resources of the ABCC with the existing roles and broader remit of the AFP Fraud & Anti-Corruption Centre; with increased resources
- Elevate into a new independent law enforcement agency akin to the United Kingdom or New Zealand Serious Fraud Office (SFO), but with a stronger anti-corruption focus than either of those SFOs
- Would retain a close operating and coordinating relationship with the AFP and other agencies (including ATO, ASIC, AUSTRAC, ACC) and state agencies
- Special role of the ASFACO in fighting criminal corruption across all sectors could be reflected in it reporting to the Special Minister of State / Prime Minister, rather than to the Minister for Workplace Relations or Minister for Justice
- Would be subject to the jurisdiction of the Australian Commission for Law Enforcement Integrity, like the existing AFP and Australian Crime Commission.

### 2. Initiate separate reforms to better coordinate integrity and anti-corruption measures within the Federal Government

- Government to agree to expand membership and support the work of the Senate Select Committee on a National Integrity Commission
- Establish an *Office of Integrity and Anti-Corruption Coordination* in the Department of Prime Minister & Cabinet, to lead effective whole-of-government approach to transparency and accountability reforms, including:
  - A special integrity advisor, charged with coordinating and filling present gaps in the Commonwealth's integrity system
  - Secretariat to the Open Government Partnership, and
  - A refocused and revived Office of the Australian Information Commissioner.
- Create an independent mechanism for oversight of parliamentarians' entitlements and interests, and integrity complaints against parliamentarians, including consideration of an independent parliamentary integrity commissioner

- Initiate a COAG-level review to identify and establish national, consistent, best practice approaches to:
    - Political donations, finance and disclosure regimes;
    - Legal definitions of public sector corruption;
    - Investigative powers and accountabilities of anti-corruption bodies.
  - Review the powers, capacity and ability of the Australian Electoral Commission to enforce an effective, consistent national regime for transparency and accountability in political donations and finance
  - Implement a mandatory reporting framework for serious misconduct across all Commonwealth officeholders (including non-APS agencies) to ensure a coordinated response to corruption risks and inform anti-corruption strategy, especially with respect to non-criminal corruption (e.g. conflicts of interest, favouritism, misuse of resources or information)
  - Expand the jurisdiction of the Australian Commission for Law Enforcement Integrity to include Australian Taxation Office, ASIC and all Commonwealth agencies engaged in law enforcement
  - Simplify, strengthen and close the gaps in the *Public Interest Disclosure Act 2013*
  - Accept and implement the 2014 recommendations of the Senate Economics Committee inquiry into the Performance of ASIC on private sector whistleblower protection.
-



# **A Ten-Point Integrity Plan for the Australian Government**

**Submission by Transparency International Australia  
on the Proposed National Anti-Corruption Plan**

May 2012

## A Ten-Point Integrity Plan for the Australian Government

### Submission by Transparency International Australia on the Proposed National Anti-Corruption Plan

#### 1. Summary

Transparency International is the global coalition against corruption. Transparency International Australia (TIA) welcomes the commitment of the Australian Government of \$700,000 to the 'development and implementation' of a National Anti-Corruption Plan, and is pleased to make this response to the Discussion Paper released by the Commonwealth Attorney-General's Department in March 2012.

Transparency International Australia considers that the draft Plan, when published, will need to satisfy five basic criteria if it is to make a significant contribution to the nation's anti-corruption efforts:

- Precise definition of the Australian Government's anti-corruption **policy responsibilities**
- Clear understanding of the relationship between an **anti-corruption plan** and an **integrity plan**
- Detailed attention to gaps and inconsistencies in the framing and coverage of **legal definitions of corruption-related conduct** (criminal and non-criminal; federal, State and local; government and non-government) as a necessary prerequisite of enhanced anti-corruption strategies
- Measurable commitments to the strengthening of **operational capacity** in corruption resistance-building, detection and enforcement (not simply improved policy coordination and leadership)
- A clear **action plan** including timeframes, resources required, resources committed, lead agency responsibilities, and processes for evaluation and review.

Transparency International Australia is concerned that the Discussion Paper did not disclose sufficient detail to provide confidence as to whether or not, as yet, the proposed plan will meet such criteria. For example, TIA is concerned by the implication that \$700,000 may be sufficient to support the 'implementation' of any meaningful coordinated national anti-corruption plan. TIA is also concerned about the absence of any specified mechanisms (eg, COAG) for more effective collaboration across jurisdictions and between the Commonwealth and the States. In these circumstances the plan should perhaps be designated a 'Commonwealth' rather than a 'national' plan.

Based on its own research and appreciation of the above issues, TIA nevertheless considers that a strong, credible, forward-looking national anti-corruption plan is necessary and achievable.

In TIA's view, such a plan would address these criteria with respect to, as a minimum, the following 10 priority issues:

- A. A strengthened Commonwealth **parliamentary integrity** regime
- B. Strengthened oversight of **non-criminal misconduct** matters across all Commonwealth agencies
- C. Standing capacity for review and report on **alleged failures in corruption prevention**
- D. Comprehensive **whistleblower protection** across the public and private sectors
- E. Best practice **anti-bribery laws** and enforcement
- F. Reformed **electoral integrity** regime
- G. Reformed **disclosure and political finance** regimes
- H. More coherent **parliamentary oversight** of Commonwealth integrity agencies
- I. More effective international engagement (**Open Government Partnership**)
- J. A robust and transparent anti-corruption plan **monitoring regime**

## 2. Background

Transparency International is the global coalition against corruption.

Transparency International Australia (TIA) welcomes the commitment of the Australian Government of \$700,000 to the 'development and implementation' of a National Anti-Corruption Plan, and is pleased to make this response to the Discussion Paper released by the Commonwealth Attorney-General's Department in March 2012 (AGD 2012).

TIA considers the single largest corruption risk in Australia to be that of complacency – the frequent assumption that because things do not 'appear' to be as bad in Australia as elsewhere, or as bad in some Australian jurisdictions as others, that specific corruption risks are either lower, or being effectively managed, or simply that no significant corruption-related conduct is occurring. As publishers of the annual global Corruption Perception Index (CPI), Transparency International is conscious that transnational *perceptions* of corruption do not provide an objective, let alone relative measure of corruption or anti-corruption efforts in any given nation in *actuality*.

Contrary to international perceptions that Australian public and corporate life is relatively 'corruption-free', Australian public affairs since the 1980s have continued to feature major corruption scandals, on an annual or more frequent basis, affecting all levels of government as well as Australian-controlled businesses. These include:

- reminders of the risks of official corruption on the scale of pre-Fitzgerald Queensland, with the conviction of former Queensland Minister Gordon Nuttall for corruption-related offences;
- the uncovering of systemic corruption in the NSW Police Service in the 1990s, followed by more recent corruption in NSW local government and other circles;
- the discovery of serious criminal conduct at senior levels of the NSW Crime Commission;
- major and unresolved concerns regarding organized crime-related corruption in Victoria;
- abuses of power and position, including by former Commonwealth parliamentarians, in the nation's immigration and taxation systems;
- systemic rorting of Commonwealth-controlled programs such as the 2008-2010 home insulation scheme;
- recurring questions regarding adequacy of oversight of parliamentarians' personal interests and official entitlements, including at Commonwealth level; and
- the involvement of former or current Commonwealth-owned or controlled entities in alleged or proven international bribery – most notably the Australian Wheat Board Limited, Securrency and Note Printing Australia – along with enduring questions regarding the failures in governance, oversight, regulation and risk management that have allowed such events to occur.

This history combines with apparent consensus that corruption risks are only likely to intensify for the foreseeable future in the modern globalized economy, given ever-increasing competitive pressures on business, the sophistication of modern organized criminal and security threats, and the intensity of politics and public administration in the age of the new media, public expectations and financial volatility.

TIA supports the Australian Government's approach of using the National Anti-Corruption Plan to examine the adequacy of current anti-corruption arrangements, in light of 'a risk analysis of current and emerging corruption risks' (AGD 2012, p.4). This risk identification and risk management focus implies a focus on prevention and mitigation, which is the fundamental goal of anti-corruption policies and operations.

TIA also notes separate advice from the Commonwealth government that it intends to consult TIA on its draft risk assessment and management framework – at which time more detailed comment on its approach will be possible.

While looking forward to that opportunity, TIA notes that it is unfortunate that some of the considerable work already undertaken by the Australian government which bears on these questions, such as Australia's Self-Assessment Report for the purposes of review for compliance with the UN Convention Against Corruption, could already have been released for public assessment and comment, yet has not been. Such circumstances make it difficult to contribute to a meaningful discussion about the scope of risks which the Australian government intends to analyse.

While the Discussion Paper sets out a large number of Commonwealth agencies with greater or lesser involvement in pro-integrity and anti-corruption programs, there are also further factors bearing on the complexity of assessing whether this institutional framework is sufficient to address current and emerging corruption risks. This includes the absence of systematic research and intelligence needed to understand the full extent of corruption in Australia. The Discussion Paper cited no such research.

This reinforces why actions to address corruption tend to be reactive rather than proactive, and highlights the extent of the information vacuum in which the Commonwealth's risk analysis must necessarily occur. This in turn increases the likelihood of continuing gaps in the response, if 'objective' risk analysis alone is used to determine the response – as opposed to other more overarching and subjective criteria, such as requirements of public confidence. This problem is well recognized internationally, through decisions of governments to frame assessments of anti-corruption strategies around their apparent effectiveness in bolstering *integrity* in institutions and governance, rather than simply trying to respond to evidence of current or likely *corruption* (however defined) (OECD 2005, p.13).

TIA's own assessment of major areas of risk, of direct relevance to the Commonwealth Parliament and Australian Government in light of discussion in the next section, is reflected in Part 4 of this submission.

While welcoming and supporting this initiative, however, the above factors combined with the lack of detail in the Discussion Paper give TIA cause for concern regarding how the Commonwealth intends to arrive at a robust, meaningful and implementable plan. Unless the assessment of the existing situation involves both comprehensive and critical analysis, descriptions of anti-corruption efforts involving many agencies and much activity may contribute to, rather than alleviate, existing problems of complacency.

For a strong plan to be achieved, which escapes these pitfalls, TIA considers that the draft Plan will need to meet a number of criteria, in addition to addressing the substantive issues listed in Part 4. These criteria are discussed in the following section.



### 3. Criteria and Concerns

Transparency International Australia considers that the draft Plan will need to satisfy the following five basic criteria if it is to make a significant contribution to the nation's anti-corruption efforts.

#### ***Precise definition of the Australian Government's anti-corruption policy responsibilities***

Corruption, as broadly defined by TIA and in the Discussion Paper, is a ubiquitous phenomenon and risk. To be effective, an anti-corruption plan must systematically address the many institutional contexts in which corruption occurs: in the government sector, the non-government sectors, and at the interface between sectors; within government, at Commonwealth, State and local government levels; and at international and transnational levels. As a signatory to the UNCAC and OECD Conventions (and the APEC Code of Conduct for Business) Australia has obligations to the private sector, civil society and all levels of government.

While describing many anti-corruption related elements of Australia's system of government at a high level of generality, the Discussion Paper provides no systematic framework for identifying, with any precision, how corruption risks and response needs are to be assessed and addressed with reference to each of these contexts, for purposes of planning and action.

Nor is TIA aware that development of the plan is engaging the political or policy interest of State or local government; or for which there is any clear framework of engagement. The Discussion Paper includes some welcome recognition of operational mechanisms for intergovernmental consultation and coordination between law enforcement and integrity agencies. However, at a political and policy level, there are more complex issues regarding:

- the adequacy of anti-corruption efforts in different jurisdictions (for example, continuing controversy over minimum standards of institutional design for an anti-corruption commission in Victoria); and
- the accountability and integrity of intergovernmental programs (including, for example, the reach of integrity agencies such as Auditors-General from one jurisdiction into the operations of others: see COAG Reform Council 2012).

TIA considers it vital that national anti-corruption efforts include stronger support for more effective collaboration across jurisdictions and between the Commonwealth and the States. To this end, TIA would support the identification of integrity and accountability as a priority issue for collaborative investigation and action through the Council of Australian Governments (COAG).

However, the fact that this has not occurred within the timeframe of this Plan makes the suggestion of a genuinely 'national' plan somewhat illusory. It may be more appropriate for the Australian Government to designate the plan to be a 'Commonwealth Anti-Corruption Plan' rather than a national one. For even that to occur, however, the Plan must delineate with greater specificity, the Australian Government's different interests or policy responsibilities with respect to anti-corruption – for example, with respect to:

1. Prevention, detection and enforcement of corruption offences by Australian private individuals and businesses, in their private and business conduct, at home and overseas;
2. Prevention, detection and enforcement of corruption-related actions within Australia by foreign individuals, governments or businesses (e.g. international organized crime, money laundering and proceeds of corruption);
3. Commonwealth responsibility for the integrity and accountability of Commonwealth public officials, agencies and programs; and
4. The Commonwealth's interests in the integrity and accountability of government as a whole across Australia, including State and local officials, agencies and programs.

Unless these interests are defined with greater precision, and the adequacy of current institutions and strategies mapped against the risks affecting each function or interest, it is difficult to envisage how concrete plans and commitments for the future will be identified.

Given the likelihood that the Plan can only truly claim to be a Commonwealth plan, the 10 priority issues emphasised in Part 4 have been chosen with a view to actions within the direct control of the Commonwealth Parliament and Australian Government.

***Clear understanding of the relationship between an anti-corruption plan and an integrity plan***

As noted earlier, it is widely accepted that the adequacy of anti-corruption efforts may be best assessed by evaluating integrity efforts, rather than simply corruption itself. This is especially the case because corrupt behaviours are often categorized in terms of specific criminal offences (such as bribery), which may differ between jurisdictions and sectors, only represent the worst types of abuse of power, and are proved far more rarely than they are either prosecuted or suspected – providing a narrow, fragmentary and piecemeal focus on what is actually a more systemic set of risks and problems.

For these and other reasons, Transparency International has proposed since the late 1990s that the most effective way to combat corruption is to evaluate and strengthen the ‘national integrity system’ (Pope 1996; 2000). The first major ‘national integrity system assessment’ (NISA) was undertaken in Australia (Griffith University & Transparency International Australia 2005).

This approach seeks to consider **all** the major elements which make up a national integrity system (i.e. the national anti-corruption system), recognizing that effective anti-corruption measures cannot be found in a single institution or single law, but in the totality of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power, and how they operate together. An effective integrity system functions to ensure that power is exercised in a way that is true to the values, purposes and duties for which that power is entrusted to, or held by, institutions and individual office-holders – the reverse of corruption.

The majority of priority issues identified as relevant today by TIA, in Part 4, were issues among the recommendations of the 2005 NISA report.

The Discussion Paper recognizes corrupt conduct as lying at one end of a spectrum or ‘continuum’ of behavior (AGD 2012, p.7) – in other words, it seeks to present corruption in context. However, it appears to remain predicated on assumptions that an anti-corruption plan can or should be addressed simply to risks of corrupt conduct, rather than to the promotion of integrity.

This may be a recipe for a piecemeal or fragmented approach, especially when the Commonwealth has a unique and unusual history of primarily defining corruption in terms of fraud and theft, to the exclusion of other forms of corrupt behaviour (rather than defining fraud and theft as possible examples of corruption: see Griffith University & Transparency International Australia 2005, pp.35-36). TIA considers that unless the plan takes a holistic view of risks to integrity, and institutional strategies for ensuring integrity, the Commonwealth’s anti-corruption strategies may remain overly limited.

***Detailed attention to gaps and inconsistencies in the framing and coverage of legal definitions of corruption-related conduct***

In diagnosing risks and identifying areas for action, TIA considers that the plan must give detailed attention to gaps and inconsistencies in the framing and coverage of legal definitions of corruption-related conduct (criminal and non-criminal; federal, State and local; government and non-government).

This requires specific engagement with the differing legal triggers which define the interest and jurisdiction of regulatory and integrity agencies for the purpose of monitoring, detection, investigation and action against corruption-related behavior. It is a necessary prerequisite of enhanced anti-corruption strategies, because it forces government to confront the detail of how detection and enforcement efforts are currently organized and resourced.

At present, the Discussion Paper presents a broad definition of corruption (as does Transparency International) but neither presents nor flags an intent to review, in more detail, the specific legal definitions required to operationalize that broad definition. This is despite the diversity of approaches currently used in Australia, and the fact that they are a matter of public controversy.

At federal level, there is unresolved divergence between:

- a traditional reliance on ‘narrow’ offences (such as bribery and secret commissions) in criminal law, supplemented by offences of theft and fraud, to provide operational definitions (some of which are referred to on p.17 of the Discussion Paper); and
- the introduction of a broader criminal offence of ‘abuse of public office’ by a Commonwealth public official who (*Criminal Code Act 1995 (Cth)*, s.142.2(1)) (referred to on p.17):
  - (i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or
  - (ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or
  - (iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official;  
with the intention of:
    - (i) dishonestly obtaining a benefit for himself or herself or for another person; or
    - (ii) dishonestly causing a detriment to another person; and
- the introduction of even broader definitions of ‘corrupt conduct’ for integrity oversight, investigation and reporting purposes in limited circumstances, such as the *Law Enforcement Integrity Commissioner Act 2006 (Cth)*, s.6(1) (not mentioned on p.17):
  - (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
  - (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
  - (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

At State level, different approaches are being taken again, with their adequacy a matter of controversy (e.g. currently in the creation of Victoria's Independent Broad-based Anti-Corruption Commission). Integrity agencies in at least four States have now worked for varying periods with definitions of ‘corrupt conduct’, ‘improper conduct’, and ‘official misconduct’ of varying degrees of inconsistency. Neither the Commonwealth's broad legal definitions, nor its methods of operationalizing them (e.g. via criminal versus administrative methods) are consistent with any of these.

In particular, there is a serious mismatch between the type of definition in *Criminal Code* s.142.2 (which at State level would be found in administrative or integrity legislation) and the means used to ultimately carry out its enforcement (i.e. criminal investigation, with all its limitations, versus the types of administrative or integrity investigation used by ACLEI and at State level). As discussed further in part 4, this mismatch cannot be overcome by the Australian Public Service Code of Conduct regime as long as that regime involves such weak central oversight and independent investigation capacity, and lacks comprehensiveness by only applying to Australian Public Service (APS) agencies, rather than all Commonwealth agencies and entities.

TIA considers that even in respect of public sector corruption (above), the statement that 'Australia has a strong legislative regime criminalising corrupt behaviour' (AGD 2012, p.17) is an overstatement of dubious accuracy, at the present time. This is without attempting to review the consistency and comprehensiveness of relevant definitions governing private sector behaviour.

TIA is particularly concerned that the Discussion Paper makes no reference to the recent recommendation of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity that relevant Commonwealth agencies (including the Attorney-General's Department) review the current ACLEI corruption definition (PJC 2011, rec. 6).

As recently as February 2012, the Australian Government's response to this recommendation was to agree in principle to such a review, including public consultation on the issue, noting that 'the definition has relevance beyond' ACLEI. That the same government would release an anti-corruption plan discussion paper the following month, making no mention of this recommendation or response, gives cause for concern.

In TIA's view, the Anti-Corruption Plan is the logical vehicle through which to take stock of the adequacy or inadequacy of these fundamental definitions, as a necessary precursor to assessment of the adequacy of the administrative and enforcement mechanisms used to carry them out.

TIA supports the principle that the Commonwealth needs to develop the most effective possible statutory definition(s) for Commonwealth purposes. However, TIA considers that unless the proposed Plan deals in adequate detail with the question of how corruption-related conduct is defined and framed in Australia, it may give a potentially false impression of the extent to which comprehensive and effective anti-corruption strategies are in place, and gloss over the real gaps and challenges in detection, monitoring and enforcement.

***Measurable commitments to the strengthening of operational capacity in corruption resistance-building, detection and enforcement (not simply improved policy coordination and leadership)***

TIA is concerned that the Australian Government only appears to be asking the Australian people, through the Discussion Paper, 'whether and how *policy co-ordination and leadership* could be improved' in the nation's anti-corruption arrangements (emphasis added).

TIA does consider that policy coordination and leadership can and should be improved, both at a Commonwealth level and more broadly. TIA has previously recommended (GU&TIA 2005, p.93) that each Australian government requires a designated body or agency, with membership from all 'core' integrity agencies in the jurisdiction, with responsibility and resources to:

- (i) Promote policy coherence and operational coordination in the work of core integrity institutions;
- (ii) Coordinate research, evaluation and monitoring of the implementation of ethics, accountability and administrative review legislation, including the balance between different aspects of integrity systems (e.g. education, prevention and enforcement);
- (iii) Report to the public on the 'state of integrity' in the *entire* jurisdiction;

- (iv) Ensure operational cooperation and consistency in public awareness, outreach, complaint-handling, workplace education, prevention, advice and investigation activities, including greater sharing of information between integrity bodies;
- (v) Foster cooperation between public sector integrity bodies, sector-specific or industry-specific integrity bodies and like integrity bodies in the private sector;
- (vi) Provide ongoing advice to government and the public on institutional and law reforms needed to maintain and develop the jurisdiction's integrity regime; and
- (vii) Sponsor comparative research, evaluation and policy discussion regarding integrity mechanisms in other jurisdictions, nationally and internationally.

Indeed, TIA is concerned that the Australian Government is understating the need for greater coordination, by having recently described its anti-corruption approach as constituting a 'multi-agency model' (AGD 2012, p.12). 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 would be better understood as the result of decades of largely uncoordinated developments in administrative law, criminal law and public sector management, together with political accident.

TIA is even more concerned, however, at the implication that improved policy coordination and leadership may be sufficient to address whatever deficiencies might be identified in Commonwealth arrangements. It is well established that any credible review and plan should address not simply coordination or *coherence* in the arrangements, but *capacity*, including (GU&TIA 2005, p.62):

- Legal capacity (are integrity institutions properly constituted, and do integrity institutions and practitioners have the formal powers or jurisdiction they need to fulfil their tasks?)
- Financial capacity (are the budgets of integrity institutions right for their tasks, and is the right share of financial resources across society and within organisations being devoted?)
- Human resource capacity (are sufficient numbers of employees dedicated to integrity functions either in core institutions or distributed among organisations?)
- Skills, education and training (do integrity practitioners or staff in general have the right professional training and background to discharge their important roles?)
- Political/community will (do senior political and business officeholders possess, or are they sufficiently empowered by the community to find, the will to provide genuine leadership?)
- Community capacity (is there sufficient broader social or community understanding and support for integrity processes?)
- Balance (are financial, human, legal and management resources being adequately shared between the different positive and negative strategies in the integrity system, such as effective leadership training as against criminal investigations?).

TIA is concerned that the language of a multi-agency 'model' may be being incorrectly used as justification for overlooking fundamental questions of capacity, and distribution of capacity.

In its February 2012 response to the Parliamentary Joint Committee on ACLEI, above, the Australian Government cited its so-called multi-agency approach as a basis for *not* accepting the PJC's recommendation for 'a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anti-corruption oversight of all Commonwealth public sector agencies' (PJC 2011, rec 10). In its response, the Government's position was that its multi-agency response is based 'on the premise that **no single body** should be responsible', and that there is 'no convincing case for the establishment of **a single over-arching** integrity commission'.

TIA is concerned that by confusing issues of coherence and capacity, the Australian Government is at risk of failing to properly address either of these issues in the development of its Plan.

Transparency International is the most prominent originator of the idea that anti-corruption efforts should be framed through a comprehensive ‘integrity system’, rather than single anti-corruption laws and institutions.

This is especially the case when as recently as July 2010 and May 2012, the Australian Government has substantially expanded the jurisdiction of ACLEI to fill *some* of exactly these types of gaps in anti-corruption capacity. TIA welcomes these extensions of jurisdiction, and associated expansions of resources.

However, given the longstanding concerns of successive Senate Legislation Committees and the Parliamentary Joint Committee about the fragmented nature of the Government’s approach, TIA is concerned that the government would exclude any particular institutional option – such as extension of ACLEI-type oversight of corruption-related conduct across all Commonwealth operations – on the incorrect assumption that this would somehow necessarily conflict with retaining a ‘system’ or ‘multi-agency’ approach.

TIA therefore supports the Commonwealth’s ‘multi-agency model’ (to the limited extent that one actually exists), but is concerned at the risk of this approach being used to mask an uncoordinated, incoherent and weak anti-corruption effort, if, in fact, the multiple agencies are not functioning as a coherent system, and if gaps in capacity between them are not addressed.

Irrespective of the institutional models chosen, the Australian Government’s Plan needs to convince the Australian public that effective capacity exists, and is being deployed, to achieve the prevention, detection and investigation of corruption, to a common and coherent standard, across **all** areas of Commonwealth employment and responsibility, including APS agencies, non-APS agencies, parliamentarians, Ministers and the judiciary. At present this is not the case.

***A clear action plan including timeframes, resources required, resources committed, lead agency responsibilities, and processes for evaluation and review***

TIA welcomes the assurance that the Plan will include “an ‘action plan’ with proposals to ensure the Commonwealth can effectively tackle corruption risks in the future” (AGD 2012, p.5).

TIA looks forward to an action plan which includes all the mechanisms necessary for ensuring public confidence that the Plan will make a real difference to bolstering the nation’s corruption resistance, including detail as to the timeframes, resources, tasking, and evaluation and monitoring processes needed to guarantee effective implementation.

TIA notes that the implementation task, alone, mitigates in favour of the creation of new dedicated, guaranteed resources and institutional support beyond that which currently exists. At present there is no readily identifiable co-ordination mechanism for core integrity agencies or for distributed integrity efforts, nor a readily understood mechanism for managing the relationships between them.

TIA looks forward to playing whatever roles may assist in this process, as reflected in Part 4. However, some of the Government’s public statements include advice that the \$700,000 committed to the Plan was for both ‘development and implementation’. TIA is concerned by the implication that \$700,000 may be sufficient to support the ‘implementation’ of any meaningful coordinated national anti-corruption plan, and looks forward to learning of the commitment of new resources commensurate with the actions to be undertaken under the Plan.

## 4. Priority Issues – A Ten Point Integrity Plan

### A. A strengthened Commonwealth parliamentary integrity regime

Most public jurisdictions and much of the corporate sector now function under statutory schemes requiring development of enforceable codes of conduct or statements of official responsibilities, but the development of legislative and ministerial ethics regimes has been a saga of avoidance, delay, resistance and doubt. The Commonwealth parliament's system, in which "neither house has a code of ethics or conduct, and there is no move towards an ethics or integrity commissioner" is one of "puzzling self-regulation" (Uhr 2005: 147). This lack of enforceable parliamentary and ministerial standards contrasts strongly with the systems in place for other public officials and most private sector officeholders.

In its negotiations with the independents following the 2010 election the Government committed to pursue the principles of more 'transparent and accountable government [and to] improved process and integrity of parliament' (ALP-Greens & Wilkie Agreements, 1 & 2 September 2010, cl. 4.3; ALP-Windsor-Oakeshott Agreement, 7 September 2010, cl.2, cl. 4, Annex A (Agreement for a Better Parliament: Parliamentary Reform, cll. 16, 18, 19. 20)). Specifically, the Government committed to 'establishing within 12 months a **Parliamentary Integrity Commissioner**, supervised by the Privileges Committees from both houses to:

- provide advice, administration and reporting on parliamentary entitlements to report to the Parliament
- investigate and make recommendations to the Privileges Committees on individual investigations, to provide advice to parliamentarians on ethical issues; and
- uphold the Parliamentary Code of Conduct and to control and maintain the Government's lobbyists register.'

Very limited progress has occurred on the code of conduct, and no progress on a Parliamentary Integrity Commissioner.

On 18 May 2012 Senator Milne announced that the Greens will re-introduce the National Integrity Commissioner Bill, first introduced into Parliament in 2010. This Bill provides for ACLEI to continue, establishes an 'Independent Parliamentary Advisor' (a lesser role than the proposed Parliamentary Integrity Commissioner) and creates a chief National Integrity Commissioner to investigate and deal with corruption issues involving any Commonwealth public official or agency.

The recent Slipper and the Thomson events have brought the issue of Commonwealth Parliamentary integrity front and centre. The Government and the Parliament risk irreversible public scepticism about their integrity if they do nothing. The development of a National Anti-Corruption Plan is also at risk if there is a perception that the executive and legislature – the core pillars of our democratic system - are not prepared to take sustained, coherent and robust action to address corruption within their own institutions. In such circumstances, how can any action they propose to take elsewhere not seem hypocritical?

#### Action required:

- the establishment of a Parliamentary Integrity Commissioner (as per government commitments) and/or Parliamentary Advisor embedded within a National Integrity Commission framework (as per Greens Bill);
- the Commonwealth integrity regime needs to include more robust and independent investigation and reporting capacities, not just advice;
- an independent panel should be established to advise on and preferably draft a code of conduct for ministers and members of parliament; this panel could include a representative of Transparency International Australia and the Queensland Parliamentary Integrity Commissioner.



## **B. Strengthened oversight of non-criminal misconduct matters across all Commonwealth agencies**

One of the most robust elements of Australia's anti-corruption systems is the growing presence, at State level, of coordinated capacity for the independent investigation, oversight and review of serious non-criminal misconduct risks across the entire public sector. All Australian States have now either introduced or are introducing regimes of this kind, including 'mandatory reporting' obligations whereby agencies must centrally report all suspected corrupt or high risk official misconduct, including non-criminal matters, to an agency with power to investigate such misconduct – even though in practice, the investigative load continues to be shared between agencies.

The Commonwealth Government lacks such a system, although since 2006, it has possessed one with respect to officials exercising law enforcement functions in designated law enforcement agencies. TIA welcomes the significant expansions of this system in July 2010 and May 2012.

Instead, in other respects, the Commonwealth Government relies on:

- the interest of all agencies and the Australian Federal Police in prosecuting corrupt conduct for themselves (where it reaches a criminal standard of seriousness), and
- the interest of *some* (Australian Public Service) agencies in identifying and remedying other non-criminal misconduct – from minor to serious – through the APS Code of Conduct regime, supported by a valuable but limited regime of standard-setting, capacity-building and *ex post facto* monitoring by the Australian Public Service Commission.

This system is inadequate because:

- It leaves in place significant jurisdictional gaps depending on whether a Commonwealth agency is or is not an APS agency;
- It continues to rely too heavily on assumptions that corrupt conduct is criminal, when in relation to much high risk misconduct, that is not the case; and when even if it is arguably criminal, many matters are not likely to excite the investigative or prosecutorial priorities of the AFP or DPP; and when even fewer matters are likely to be found to meet the high evidentiary standards required for proof of criminal activity;
- In APS agencies, the system relies too heavily on the interest of APS agency managers in determining appropriate responses to different forms of misconduct for themselves, with insufficient operational oversight or alternatives -- especially, when, in relation to corruption-related misconduct such as abuse of office and conflict of interest, how agencies perceive their institutional self-interest may become especially complex; and
- It encourages inconsistency and compromises transparency in the identification of 'real' levels of high risk misconduct, reducing the ability for corruption resistance building efforts to be targeted where they may be most needed.

The Australian Government routinely cites evidence of the low apparent incidence of misconduct in APS agencies as a reason for preserving this system. For example, the Discussion Paper (p.8) cites 'less than four in every 1,000 employees' as having been found in breach of the APS Code of Conduct.

However, such a statistic is meaningless unless placed in comparative, relative or analytic context. This includes a system which is inadequately conducive to reliable reporting of Code breaches, and to distinguishing between high risk and lower risk forms of breach, even when reported. It is complicated by the Commonwealth's tradition of identifying corrupt conduct purely or primarily in terms of fraud and theft, as noted in Part 3.

Where it exists, comparative data tends to show no reason for believing that misconduct risks, even if different and differently distributed, are lower overall than in State administration (see e.g. Brown 2008, p.180). Moreover, even using the existing system, the 2011 APS data shows a dramatic increase in suspected and/or substantiated high risk misconduct over the previous year (Figure 1 below). Such variations – even on a year to year basis – could equally suggest that the incidence of such misconduct is not as low as previously argued, or that its incidence or seriousness is on the rise (which suggests the system may not be working), or in either case, that there is a volatility in integrity standards, or detection, or reporting, or all three, which warrants closer scrutiny.

**Figure 1: Types of misconduct in finalised APS Code of Conduct investigations, 2009–10 and 2010–11**  
Source: APSC (2011)

Type of misconduct	Employees investigated for this type of misconduct (no.)			Cases where a breach was found (%)		
	2009–10	2010–11	% change	2009–10	2010–11	% change
Conflict of interest	59	72	+22%	61	86	+41%
Fraud other than theft (e.g. identity fraud)	54	64	+19%	61	83	+36%
Theft	17	11	-45%	47	64	+36%
Improper use of position status (e.g. abuse of power, exceeding delegations)	69	58	-16%	30	50	+67%
Unauthorised disclosure of information (e.g. leaks)	19	24	+26%	42	71	+69%

It is also noteworthy that the statistics do not provide more detailed information about specific activities highly vulnerable to corruption, collusion, fraud and manipulation, such as procurement. It would also appear that training in procurement lacks a specific focus on improving skills in preventing corruption in procurement processes.

#### Action required:

- A statutory misconduct framework for the Commonwealth public sector covering all agencies and entities;
- Clearer statutory guidance on forms of misconduct best dealt with by Commonwealth agencies and entities without recourse to central agencies, and higher risk official misconduct (especially higher corruption risk) subject to immediate mandatory reporting to an appropriate, and common, central agency;
- A common, independent central agency with power to oversight the investigation of, and where necessary itself investigate, higher risk criminal and non-criminal official misconduct; set more rigorous standards for investigative responses; and monitor compliance with those standards; acting in cooperation with existing agencies;
- A common central agency with strengthened resources and coordination capability in respect of corruption-related misconduct intelligence, risk analysis, education and prevention, corruption resistance building, and public reporting.

### C. Standing capacity for review and report on alleged failures in corruption prevention

The Discussion Paper (p.11) suggests that Royal Commissions can be established to inquire into and report on matters of public concern, including allegations of systemic corruption. However, the effectiveness of these inquiries depends very much on the terms of reference.

Systemic issues such as why existing oversight arrangements did not work, whether existing governance arrangements are adequate, whether institutional responses were timely or sufficient may not be addressed. The narrow terms of reference of the Royal Commission into the Australian Wheat Board kickback allegations is an example of a lost opportunity for greater and more effective transparency and accountability.

The Commonwealth also appears to have not responded to the set of weighty recommendations of the ALRC in its 2009 report (ALRC 2009a) designed to modernize the framework for Royal Commissions and statutory inquiries and in this context calling for action as part of a national plan to counter corruption.

There remain enduring public questions about what senior Reserve Bank executives and the Board knew or didn't know, or should or shouldn't have done to prevent Securrency and Note Printing Australia from continuing their corrupt activities. Within the public service proper, we have seen the Palmer and Comrie investigations into how DIMIA/DIAC officers got themselves into a position where they were detaining and deporting Australian citizens. It appears at present that forensic responses into what went wrong and how it can be prevented in the future get triggered only in response to the most major and intractable public scandals. Even in these situations, there is no assurance that the terms of reference drafted by the government will not be too limited to allow proper scrutiny of agencies, individuals or issues. A capacity for independent forensic investigation and reporting is required.

Many ICACs and similar agencies established at state level have an education and prevention mandate, as well as their investigation role. They can take a systemic approach as well as investigating specific allegations of corruption. These functions appear more fragmented at the Commonwealth level, either because of a narrow jurisdictional focus (eg, ACLEI, although we note the recent announcement of additional agencies to come within ACLEI's purview) or because they are spread across a number of different agencies. This means at the least an increased risk that identification and handling of systemic issues will be more difficult, or that it will not happen at all. A broadly based independent anti-corruption agency to lead the prevention, detection and investigation of corruption across **all** areas of Commonwealth employment and responsibility would mitigate this risk. It would also address the risk of gaps in the coverage of the national integrity agencies.

#### Action required:

- The development of an independent standing capacity for education and prevention as well as systemic forensic investigation, review and reporting of prima facie failures in corruption prevention across **all** areas of Commonwealth employment and responsibility, including Ministers, judiciary and Members of Parliament;
- Early Government response to the ALRC recommendations in its 2009 report *Making Inquiries: A New Statutory Framework*.

## D. Comprehensive whistleblower protection across the public and private sectors

TIA considers it crucial that the Australian Government moves promptly to plug the gaps in whistleblower protection, wherever public interest disclosures of wrongdoing are made by Commonwealth public officials or employees or organization members in institutions subject to regulation by the Commonwealth. This includes but, for the sake of comprehensiveness, should not be limited to corrupt and corruption-related conduct.

In respect of the Commonwealth public sector, the Discussion Paper (pp. 18-19) notes the Government's commitment to introduce a comprehensive Public Interest Disclosure Act. While welcoming this continuing commitment, TIA notes that it is 18 years since a Senate Select Committee first recommended such legislation; it will soon be five years since this particular administration committed itself to the objective; it is more than three years since the House of Representatives Legal and Constitutional Affairs Committee made its bipartisan recommendations for a comprehensive scheme; and within the last two years, the Government has failed to meet its own deadline for introduction of the Bill more than three times.

TIA also notes with concern the statement in the Discussion Paper that 'whistleblower protection in the Commonwealth public sector is provided by law, including under section 16 of the *Public Service Act 1999* and section 16 of the *Parliamentary Service Act 1999*.' Given the widely established limitations and partial coverage of these provisions, giving rise to the necessity of the more comprehensive approach to which the Government is committed above, this statement is both confusing and inaccurate.

TIA also notes with concern the statement in the Discussion Paper (p.19) that the proposed legislation will 'facilitate reporting and provide for investigation of alleged wrongdoing in the public sector'. TIA is concerned that no mention is made of an intention to offer effective legal protections, compensation rights and employment remedies to officials who suffer detriment as a result of having made a public interest disclosure.

TIA also notes that the Government's last known policy position on this issue, in February 2010, was to *decline* the Legal and Constitutional Affairs Committee's recommendation that federal whistleblowers be entitled to seek compensation under the *Fair Work Act*. Since that time, however, the Government has been unable to offer any indication of what alternative remedial avenues it proposes.

In respect of whistleblower protection in the non-government sectors, regulated by the Commonwealth, the Discussion Paper notes that limited protection is included in some provisions such as Part 9.4AAA of the *Corporations Act 2001*. However, TIA notes that in 2008 the Government commenced a public review of these provisions – whose inadequacy is widely known – with that review having never been completed or released. Compared with the public sector, there is also a clear lack of independent research into whistleblower protection needs and options in the private sector.

TIA welcomes the recent advice of Minister Brendan O'Connor (6 December 2011) that the work to reform these provisions 'will be progressed following the finalisation of the Public Interest Disclosure Bill'. However, TIA also notes that even when that occurs, the *Corporations Act* governs only one, albeit major area of private sector regulation in which stronger whistleblower protection is justified, with other areas including competition and consumer regulation being at least equally important, including with respect to the prevention and remediation of the effects of corrupt conduct.

**Action required:**

- Prompt introduction and passage of a comprehensive Public Interest Disclosure Act governing all Commonwealth officials, including (i) effective central oversight and coordination, (ii) provision for disclosure to the media as a last resort or in exceptional circumstances, and (iii) accessible, enforceable and realistic employment remedies for officials who suffer detriment as a result of having made a public interest disclosure;
- Implementation of the Australian Law Reform Commission's recommendations on secrecy laws and open government (ALRC 2009b), including reform of s.70 of the *Criminal Code Act 1995*;
- Prompt action to comprehensively review, including on the basis of new research, options for comprehensive reform of whistleblower protection in non-government and business organisations which are subject to Commonwealth regulation.

## **E. Best practice anti-bribery laws and enforcement**

The provisions of the UK Bribery Act, particularly those creating a corporate offence of passive bribery, effectively require companies to show that they have put in place adequate measures to prevent bribery by themselves or their employees agents or associates. These provisions are already having a real influence amongst Australian companies doing business in Australia and abroad, and are rapidly becoming the standard for corporate behaviour. To remove uncertainty, stimulate prevention measures and support effective enforcement in the corporate sphere, TIA recommends that the Australian Government adopt a similar approach. At the least this would provide much more certainty as to corporate obligations. The Government should also publish a guide for corporations similar to the UK Guidance Statement with its 6 principles.

The government could also usefully open a discussion about the provision of clear incentives for companies to self-report and, as defendants, to make an early plea where their own investigations uncover likely bribery of this type. At present the relevant executives responsible for acting or causing the bribery continue to face their own prosecution risk. TIA suggests that it is time to publicly consider what incentives authorities can give to companies to encourage early and full co-operation and disclosure.

TIA also recommends that the government also address the issue of company responsibility for bribery committed by their subsidiaries and other intermediaries. In reviewing and clarifying the foreign bribery provisions of the Criminal Code, doubts as to their application to all subsidiaries and intermediaries in the supply chain of Australian companies should be resolved. In relation to facilitation payments, TIA recommends that the Government act to remove existing regulatory ambiguity by banning such payments outright, as they are bribes and should be eliminated. We do acknowledge that this is a sizeable challenge for most companies and that zero tolerance of facilitation payments can only be achieved over time; however this should not deter the Government from taking action in this area to clarify and strengthen the law and provide incentives for companies to self report.

Finally, the Government should consider the establishment of an independent government agency similar to the UK's Serious Fraud Office, which can investigate and prosecute serious fraud and corruption. The UK Serious Fraud Office has special compulsory powers to require any person or corporation to provide any relevant documents and to answer any relevant questions. Such an office could also be responsible for enforcement and guidance in relation to bribery.

### **Action required:**

- Provide clear incentives for companies to encourage early and full co-operation and disclosure of suspected bribery;
- Review and clarify the foreign bribery provisions of the Criminal Code with a view to resolving doubts as to their application to all subsidiaries and intermediaries in the supply chain of Australian companies;
- Publish a guide for corporations similar to the UK Guidance Statement with its 6 principles
- Review the extent of technical hurdles in achieving a successful prosecution in foreign bribery cases;
- Initiate a discussion about the benefits of establishing a specialist government agency similar to the UK Serious Fraud Office.

## **F. Reformed electoral integrity regime**

Australia enjoys a generally high reputation for electoral integrity, founded on a long history of independent, professional electoral administration. It does not suffer from what might be called retail-level malpractice or institutional failures, of the kinds that bedevil some systems (Birch and Carlson 2012). A central feature of Australian electoral democracy has been compulsory voter registration and turnout. This ensures high turnout by international standards. But in recent years the compulsory registration system has been under strain. In 2009, the Australian Electoral Commission estimated that 1.2 m eligible citizens were not enrolled (over 8% of the eligible population). The traditional paper based registration system is not well serving newer, younger or re-enrolling electors; yet sophisticated continuous data-matching by electoral authorities has been purging rolls of electors who move homes. Further, until a 2010 court case, registration closed within hours of a national election being called (there is now a grace period of a week after the election is called – see Orr 2010 and Hughes and Costar 2006).

Integrity is served as much by the comprehensiveness of the electoral roll as by erecting barriers to deter fraudulent enrolment. Overhaul of legal and administrative systems is essential to address the problem of a significantly under-inclusive roll. Several state systems have responded by (a) effectively permitting people to enrol up until state election day, putting Australia on a par with Canada and New Zealand, and (b) allowing electoral authorities to ‘automatically enrol’ a potential voter based on reliable government data as to their place of living, and subject to giving that person a chance to correct the data. Such measures should be implemented nationwide, to ensure simplicity and uniformity.

### **Action required:**

Nationwide implementation of reforms to allow people to enroll up to election day and to allow electoral authorities to automatically enroll a potential voter based on reliable government data as to their place of living, giving the person the chance to correct the data if necessary.



## **G. Reformed disclosure and political finance regimes**

There has been a plethora of political party funding reform at state level in recent years, both in relation to the mechanisms for the public funding of election campaigns and the monitoring and public disclosure of parties' receipts and expenditures and donations by individuals and companies. A welcome recent initiative in NSW has been to restrict donations to individuals.

The public and private funding of political parties, whether within or beyond election campaigns, is a highly contested issue. There is considerable disquiet about the extent to which money buys access and influence.

One immediate and simple step the Government can take is to pass the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010* (which passed the House of Representatives and was introduced into the Senate in November 2010). Among other things this Bill reduces the disclosure threshold to \$1000; requires certain persons making gifts at or above the threshold to furnish returns within specified time periods; ensures that for the purposes of the disclosure threshold related political parties are treated as one entity; prohibits the receipt of a gift of foreign property and certain anonymous gifts by registered political parties, candidates and members of a Senate group; and introduces new offences and penalties and increase penalties for existing offences.

### **Action required:**

Passage of the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010*

## **H. More coherent parliamentary oversight of Commonwealth integrity agencies**

Special-purpose parliamentary committees have an increasingly important role in Australia's integrity and anti-corruption systems. They function as both a performance assessment mechanism in relation to integrity agencies of many kinds, and an accountability mechanism for ensuring that the often strong powers and functions of independent integrity agencies continue to be exercised in the public interest. They also function to:

- support integrity agencies by helping ensure that their activities are properly resourced, and remain insulated from changing government priorities;
- bolster public confidence by positioning appropriate agencies as properly accountable to the people through the Parliament, rather than simply to the government of the day, whose operations are often likely to be those which integrity agencies are scrutinizing; and
- increase the policy and operational coherence of the integrity system, by providing a central point or points for coordinating the flow of information between Parliament, government and integrity agencies.

At the Commonwealth level, there is little coherence to this important element of the integrity system. At present the Parliamentary Joint Committee for Law Enforcement Integrity is a statutory committee which oversees ACLEI, as noted by the Discussion Paper (p.11). However little reference is made to the wider importance of these structures, and their potential. For example, the Parliamentary Joint Committee for Law Enforcement oversees the ACC and the AFP. The Parliamentary Joint Committee on Corporations and Financial Services oversees ASIC's operations. The Auditor-General works closely with the Joint Committee of Public Accounts and Audit.

TIA considers that there may be important opportunities for rationalization and greater coherence among these committees as a means of strengthening the Commonwealth's anti-corruption approach, especially with respect to its own integrity system.

By contrast, the Parliament currently provides no oversight committee for either the Commonwealth Ombudsman or the Australian Information Commissioner, despite these being important independent integrity agencies within the Commonwealth's current 'multi-agency' approach.

### **Action required:**

- Review and rationalization of the Commonwealth Parliament's Joint Parliamentary Committee structures to provide a lesser number of more integrated, and better resourced, statutory committees with integrity, accountability and anti-corruption oversight functions;
- Specific inclusion of the Commonwealth Ombudsman and the Australian Information Commissioner within statutory Parliamentary Committee oversight arrangements.

## **I. More effective international engagement (Open Government Partnership)**

The Discussion Paper (pp. 23-25) sets out a range of international anti-corruption activities in which Australia is engaged. TIA notes the Government's engagement with G20, and its support for international efforts against corruption, including EITI, UNCAC, Stolen Assets Recovery, the International Anti-Corruption Academy, and Transparency international itself. We urge that it is in Australia's interests that this support and engagement continue and increase. (In this context we note the Government's recent budget decision to delay its commitment to increase aid spending to 0.5% of gross national income.)

Australia should aim to lead by example in this arena by the quality of its National Anti-Corruption Plan and the commitment to its implementation. It should take all opportunities to affirm its commitment to fighting corruption both domestically and internationally. It is therefore puzzling that Australia has declined to join the Open Government Partnership, launched in September 2011 by 8 governments including the US and the UK. The Government says it is continuing to consider and to consult. To become a member of OGP, participating countries embrace a high-level Open Government Declaration; deliver a country action plan developed with public consultation; and commit to independent reporting on their progress going forward. An additional 47 countries have committed to the OGP.

The statements of principle and intent set out in the NACP Discussion Paper align closely with the OGP Declaration. It is hard to see what is holding Australia back from joining the OGP.

### **Action required:**

Early Government decision and announcement of its commitment to join the OGP.

## **J. A robust and transparent anti-corruption plan monitoring regime**

At the least the NACP will provide a valuable overview of perceived gaps, emerging risks and national priorities of current and proposed Commonwealth Government anti-corruption agencies. There is also an opportunity for the NACP to set out how and when the government proposes to implement and monitor progress in addressing emerging risks and anti-corruption priorities. In doing this it will be helpful if the NACP sets out in detail some robust performance measures, and how the Government proposes to engage key stakeholders in monitoring progress. The Plan should also include a commitment to an annual reporting process.

Part of the objective of the Plan is to achieve greater civil society and stakeholder engagement in the issues raised in the Plan. It would be an indication of the seriousness of this commitment if the Plan were to include an opportunity for civil society representatives to monitor and to report on progress of implementation. Certainly TIA would be interested in contributing to an assessment of progress in implementation.

The work that TIA has undertaken in developing this submission has highlighted again the paucity of reliable information about the nature and extent of corruption in key sectors. It would also be worthwhile commissioning an update of the 2005 NISA study, focusing on the coherence and robustness of current anti-corruption institutional arrangements and policy responses, especially at the Commonwealth level. The NIS methodology has evolved since the 2005 study. A system analysis undertaken with a clearer understanding of the context within which the integrity systems operate would also enable greater citizen understanding of and engagement with integrity and anti-corruption plans.

### **Action required:**

- Invite civil society representatives to monitor and report on progress of implementation of the National Anti-Corruption Plan.
- Undertake an independent assessment of the nature, extent and impact of corruption in Australia.
- Commission an update of the 2005 NISA study, focusing on the coherence and robustness of current anti-corruption institutional arrangements and policy responses, especially at the Commonwealth level

## 5. References

- ALRC (2009a). *Making Inquiries: A New Statutory Framework*. Report 111, Australian Law Reform Commission, Sydney.
- ALRC (2009b). *Secrecy Laws and Open Government in Australia*. Report 112, Australian Law Reform Commission, Sydney.
- APSC (2011). *Trends from the State of the Service Report 2010-11*, Presentation to National Anti-Corruption Plan Public Consultation, Australian Public Service Commission, Canberra, 9 December 2011
- Attorney-General's Department (2012). *Discussion Paper: The Commonwealth's Approach to Anti-Corruption*, Australian Government, Canberra, March 2012.
- Birch, Sarah and Jeffrey Carlson. *Electoral Malpractice Primer: Insights and Priorities* (Electoral Integrity Framework Project, Creative Associates International, January 2012
- Brown, A. J. (2008). 'Towards a Federal Integrity Commission: The Challenge of Institutional Capacity-Building in Australia', in Head, B., Brown, A.J. & Connors, C. (eds), *Promoting Integrity: Evaluating and Improving Public Institutions*. Ashgate, UK.
- COAG Reform Council (2012). *Accountability in a federal system: a question of principle or pragmatism?* Papers from COAG Reform Council Keynote Event, Sydney, 30 March 2012  
<<http://www.coagreformcouncil.gov.au/excellence/events.cfm>
- Griffith University & Transparency International Australia (2005). *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, National Integrity Systems Assessment (NISA) Final Report, December 2005. <[http://www.transparency.org.au/nisa\\_reports.php](http://www.transparency.org.au/nisa_reports.php)>.
- Hughes, Colin A and Brian Costar. *Limiting Democracy: the Erosion of Electoral Rights in Australia* (UNSW Press, 2006) chs 3-4.
- OECD (2005). *Public Sector Integrity: A Framework for Assessment*. Organisation for Economic Development and Cooperation, Paris.
- Orr, Graeme. *The Law of Politics* (Federation Press, 2010) ch 4
- Parliamentary Joint Committee (ACLEI) (2011). *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Parliament House, Canberra, July 2011.
- Pope, J. (1996) (ed). *Confronting Corruption: The Elements of a National Integrity System (The TI Source Book)*. Berlin & London, Transparency International.
- Pope, J. (2000) (ed). *Confronting Corruption: The Elements of a National Integrity System (The TI Source Book)*. 2<sup>nd</sup> Edition, Berlin & London, Transparency International. <[www.transparency.org](http://www.transparency.org)>.
- Uhr, J. (2005). *Terms of Trust: Arguments Over Ethics in Australian Government*. UNSW Press.



# **Best Practice National Integrity System Structures, Systems and Procedures**

**Supplementary Submission by  
Transparency International Australia  
on the Proposed National Anti-Corruption Plan**

August 2012

## **Best Practice National Integrity System Structures, Systems and Procedures**

### **Introduction**

This supplementary submission has been prepared by Transparency International Australia (TIA) following a teleconference on 1 August 2012 between Elizabeth O’Keeffe (on behalf of TIA), Tim Smith (on behalf of Accountability Round Table - ART) and members of the Commonwealth Attorney-General’s Department International Crime – Policy and Engagement Branch and Anti-Corruption Section. During the teleconference TIA’s and ART’s views were sought about possible structures, systems and procedures, especially on the following issues:

- possible structural options, which might include: a new anti-corruption commission; an extension of ACLEI’s jurisdiction; or working within the existing structural architecture. How would a new Commission or an extended ACLEI fit with the Government’s multi-agency approach?
- what are the critical areas which a new anti-corruption commission or an extended ACLEI would address? Is the establishment of a new Commission with its attendant legislation and costs justified by the level of risks identified in the development of the Plan?
- while more can be done about corruption/misconduct trends, research and analysis and prevention, why couldn’t this be achieved without establishing a new Commission?
- what might be done short of establishing a new or extended lead anti-corruption agency?

### **Summary of conclusions and recommendations**

**TIA has concluded that the existing gaps in the national integrity system cannot easily be performed by existing agencies, and certainly not within existing resources and legislative frameworks.**

**TIA therefore recommends the development of an explicit integrity regime to ensure that the Commonwealth is in the best possible position to deal effectively with current and emerging corruption risks. Such a regime should include:**

- **a strengthened parliamentary integrity regime;**
- **the explicit identification of a lead policy co-ordination agency; and**
- **the establishment of a lead operational anti-corruption agency with oversight of non-criminal misconduct and a standing capacity for independent forensic investigation into alleged failures of corruption prevention, working in partnership with existing agencies,**
- **together with a new statutory policy and operational co-ordinating body.**

**TIA believes such a regime represents a proportionate response to the challenge of fighting corruption in areas of Commonwealth responsibility.**

### **Background**

In its previous submission, TIA identified 10 priority issues for a National Anti-Corruption Plan. This supplementary submission focuses on three of these priority issues, which recommend changes to the existing institutional arrangements. These priority issues and TIA’s recommendations are:

- **A strengthened Commonwealth parliamentary integrity regime**, to redress the current lack of enforceable parliamentary and ministerial standards. TIA recommended the establishment of a Parliamentary Integrity Commissioner (which the Government committed to after the 2010 election) and/or a Parliamentary Advisor embedded within a National Integrity Commission framework (as per the Greens Bill).

- **Strengthened central oversight and co-ordination of non-criminal misconduct across all Commonwealth agencies.** TIA recommended a statutory misconduct framework covering all Commonwealth public sector agencies and entities, and the establishment of a common, independent central agency with investigative, standard-setting and monitoring powers, and with strengthened resources and co-ordination capability in respect of intelligence gathering, risk analysis, education and prevention, corruption resistance-building and public reporting.
- **A standing capacity for independent forensic investigation, review and report on alleged failures in corruption prevention.** TIA recommended this capacity cover all areas of Commonwealth employment and responsibility, including Ministers, MPs and judiciary.

The critical question is whether the Commonwealth's current institutional framework is sufficient to effectively address current and emerging corruption risks.

### **Is the current national integrity system approach sufficient?**

The Anti-Corruption Plan Discussion Paper sets out a conceptual framework for the Commonwealth's multi-agency approach to fighting corruption, based on the following activities: standards and oversight; detection and investigation; prosecution; and international co-operation.

The obvious gaps in the Commonwealth's multi-agency approach are those identified in TIA's priorities – a Parliamentary integrity regime, strengthened central oversight and co-ordination of non-criminal misconduct across all Commonwealth agencies, and a standing capacity for forensic investigation, review and report of alleged failures of corruption prevention at the Commonwealth level. How might these gaps be best addressed institutionally?

One option is to **establish additional statutory positions or agencies to address identified gaps as the need arises** – eg, the establishment of a Parliamentary Integrity Commissioner. These new positions or agencies would slot into the Commonwealth's existing multi-agency approach. This approach provides an inbuilt likelihood that the institutional response is proportionate to perceived risks of corruption; there would be some additional costs but these are likely to be relatively small and contained; and it does not challenge the conceptual framework underpinning the Government's existing multi-agency approach. However, it allows the gaps in institutional coverage identified above to continue to exist, and it's a reactive rather than a proactive approach – an institutional response to allegations or evidence of corruption rather than taking positive steps to bolster integrity in Commonwealth institutions and governance. The Government would always be perceived to be on the back foot and there would be low public confidence in the strength of the Government's commitment to combat corruption.

A second option is to **expand the jurisdiction of existing relevant agencies**, eg, extending ACLEI's jurisdiction beyond law enforcement integrity to additional activities such as non-criminal misconduct across all Commonwealth agencies, and/or extending the Ombudsman's jurisdiction to deal with serious misconduct, and/or providing the APSC with stronger co-ordination and investigation powers in relation to public service misconduct.

Expanding the jurisdiction and powers of existing agencies to fill the gaps identified above would require significant new investment and changes to legislation.

This is particularly the case in relation to the APSC, given that it currently covers only public service and selected other agencies. TIA has seriously considered whether the APSC could expand to cover the gaps identified, but the existing major jurisdictional constraints would need to be rectified. The APSC could certainly undertake additional research, education and corruption prevention functions, if its jurisdiction were expanded to all Commonwealth agencies and entities, and if it were properly resourced. However, the substantive investigation, case monitoring and case-handling functions involved in filling the major gaps



do not sit well with the APSC's existing functions and role as the public sector management agency. In TIA's opinion, other institutional solutions would be preferable.

A more realistic option is to consider the expansion of ACLEI's jurisdiction beyond its current focus on law enforcement integrity. The Government's previous decisions to expand ACLEI's jurisdiction to cover a broader interpretation of law enforcement integrity functions provide some precedent for this.

A third option is the **nomination or establishment of agencies to:**

- lead the whole-of-government policy approach to anti-corruption
- oversight and co-ordinate prevention and investigation of non-criminal misconduct across all Commonwealth agencies; and
- independently investigate, review and report on alleged failures in corruption prevention in all areas of Commonwealth employment and responsibility, including Ministers, MPs and the judiciary.

It is important to distinguish between a lead agency in the policy responsibility sense and any new agency or agencies like a new or expanded anti-corruption body, which would have **operational** roles and duties, but wouldn't be the lead agency for anti-corruption **policy**. TIA notes that the Attorney-General's Department currently leads the Commonwealth IDC on anti-corruption, which meets quarterly to discuss the co-ordination and management of anti-corruption initiatives. As a matter of good governance, policy co-ordination should remain with a department of state rather than with an independent statutory agency. **TIA recommends that the Attorney-General's Department role as the lead anti-corruption policy agency should be formalised, with a clear mandate to lead the whole-of-government approach to anti-corruption.**

The lead agency option has the advantage of addressing the existing institutional inconsistencies and deficiencies in serious but non-criminal misconduct in Commonwealth agencies. It covers the anti-corruption field, and provides a safety net if particular failures in corruption prevention appear not to fall within the jurisdiction of existing bodies; and it provides an institutional, proactive focus for bolstering integrity as well as responding to allegation of corruption.

[A lead policy agency would, for example, have the opportunity to effect significant cultural change outside government by mobilizing Commonwealth spending power through co-ordinating the building of anti-corruption conditions and codes of conduct into contracts and grants, as has already been done (for other purposes) in government construction tendering and contracting. No legislation is needed to achieve this.]

This model would allow for ACLEI to remain much as it is, with its own statutory commissioner, as one element of a lead operational agency (another element covering the broad-based prevention and investigation of allegations of non-criminal misconduct and corruption in the non-law enforcement agencies and a third element covering research, prevention, and intelligence support, each with statutory commissioners). There are precedents for having multiple statutory appointments within the one agency (eg, the APSC Commissioner and the Merit Protection Commissioner both located in the APSC). All three commissioners should be members of the statutory anti-corruption board recommended below.

This model would require additional human and financial resources, noting that one new agency is likely to cost less than two. It would also require new legislation to establish the agency and equip it with the necessary investigation, prevention and reporting powers. Locating ACLEI within a new larger agency would deliver economies of scale not available if ACLEI and the new agency remained separate. This model would represent an extension of the Government's current multi-agency model, and is clearly TIA's preferred approach.

**What can be done short of establishing a new or extended lead operational agency?**

It would be possible for the Attorney-General's Department to have an explicit lead agency policy co-ordination role, and to expand and resource the APSC and ACLEI to undertake increased education and prevention activities. The APSC's role could be expanded in relation to overseeing serious misconduct matters across the public sector and undertaking investigations, but the problems noted above of reconciling these functions with the APSC's existing roles remain.

These expanded functions could possibly be handed to PM&C or to Finance & Deregulation, as the only other whole-of-government public administration agencies, but it would be a conceptual and practical stretch for these agencies to take on hands on education and prevention activities in relation to serious misconduct. It sits uneasily with these central agencies' core functions.

While it is theoretically possible to expand the jurisdiction and activities of existing agencies, it is difficult to see how, in practical terms, the functional gaps and operational needs identified can be met without either transforming the basic mandate of an existing statutory agency (whether the APSC, Ombudsman or ACLEI) or tasking them to a new agency.

**TIA has concluded that the existing gaps in the national integrity system identified above cannot easily be performed by existing agencies, and certainly not within existing resources and legislative frameworks.**

### **Extending the Government's existing multi-agency model**

All jurisdictions, both in Australia and overseas, operate some form of multi-agency model, where a series of core integrity agencies and other agencies for whom integrity is to a greater or lesser extent an ancillary function to their core business, combine together to form an integrity system. As we noted in our earlier submission, effective anti-corruption measures are found in the totality of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power, and how they operate together. Best practice jurisdictions tend to include in their integrity systems a lead anti-corruption policy co-ordination agency as well as an operational broad-based, independent anti-corruption agency with considerable powers of investigation and reporting, as well as prevention and research functions.

The broad-based anti-corruption agency functions as the lead operational agency within the national integrity system. Lead agencies have the promotion of integrity and combatting corruption as their core business, unlike many of the other agencies which make up the operational arm of a national integrity system. These other agencies may have great expertise in specific areas of corruption, but promoting integrity and combating corruption is not their core business.

The operations of lead anti-corruption agencies at state level in Australia are well-known and do not need to be repeated here. At the Commonwealth level, a lead operational agency could 'cover the field', and avoid the need to forum-shop. It could also operate as a centre of excellence in relation to anti-corruption education, prevention and research.

### **Strengthening Parliamentary integrity**

TIA has previously recommended the establishment of a Parliamentary Integrity Commissioner (which the Government committed to after the 2010 election) and/or a Parliamentary Advisor embedded within a National Integrity Commission framework (as per the Greens Bill). Regardless of whether the other institutional arrangements canvassed here are adopted to strengthen the national integrity system, **TIA recommends that the Parliament should have its own integrity mechanism (covering both advisory and complaint/investigative functions), supported by the lead operational anti-corruption agency**, as, for example, the Department of Parliamentary Services is currently supported by the AFP in relation to criminal allegations.

### **Policy and operational co-ordination at the national level: a statutory anti-corruption co-ordination board**

Regardless of which institutional option the Government adopts, achieving policy and operational coherence at the national integrity system level poses a significant co-ordination challenge. The coherence of the national integrity system is so important that it should not be left to chance, or to the varying enthusiasms of individual agencies, or the personal rapport between individual agency heads. Current co-ordination arrangements include the IDC on anti-corruption, and the Heads of Law Enforcement Agencies Group. These arrangements are not sufficiently entrenched or robust as to inspire the necessary levels of confidence. An anti-corruption co-ordination board needs to be established on a statutory basis, to help ensure its continuing existence and to authorize information sharing. The legislation to establish such a body could be included in whatever legislation is required to strengthen the national integrity system.

Among the most important policy issues requiring co-ordination are research, performance measurement, capacity-building and capacity-sharing, as identified in the 2005 NISA Study and in TIA's earlier submission, as well as the capacity to monitor long-term trends and to ensure coherence in the development of new integrity-related laws and institutions.

Among the most important operational issues are the public's interest in more seamless and user-friendly complaint services, outreach and community education, shared information, research and intelligence, and better co-ordination of integrity policies at the coalface of public sector management by better integrating and simplifying the diverse accountabilities which the national integrity system imposes on individual public sector employees.

**TIA recommends strengthening the government's multi-agency approach by establishing a formal, statutory co-ordination body, which would comprise the Attorney-General's Department and the heads of the core integrity institutions, plus representatives of related agencies, to co-ordinate anti-corruption policy and operational issues.**