



RULE OF LAW
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Committee Secretary

Select Committee on the establishment of
a National Integrity Commission

By email: nic.sen@aph.gov.au

Dear Secretary

Submission regarding the establishment of a National Integrity Commission

The Rule of Law Institute of Australia thanks the Select Committee for the opportunity to make a submission regarding the establishment of a National Integrity Commission.

The Institute is an independent, non-partisan, not-for-profit body formed to promote and uphold the rule of law in Australia.

The Patron of the Institute is the Honourable James Spigelman AC QC, and the Governing Committee includes Richard McHugh SC, Professor Geoffrey de Q. Walker, David Lowy AM, Nicholas Cowdery AM QC, Professor Martin Krygier, and Hugh Morgan AC.

The objectives of the Institute include promoting good governance in Australia by the rule of law, and encouraging transparency and accountability in State and Federal government.

The Institute firmly considers that Australia does not need a National Integrity Commission.

The Institute favours strong anti-corruption institutions, mechanisms, and laws, but there is no demonstrated need for an overarching federal anti-corruption body, and there are many drawbacks to such a body.

Please find our submission enclosed.

Yours faithfully

Robin Speed
President

Submission Regarding the Establishment of a National Integrity Commission

I. Introduction

The Rule of Law Institute of Australia thanks the Select Committee for the opportunity to make a submission regarding the establishment of a National Integrity Commission.

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II. Executive summary

Australia does not need a federal National Integrity Commission.

The Institute favours strong anti-corruption institutions, mechanisms, and laws, but there is no demonstrated need for an overarching federal anti-corruption body, and there are many drawbacks to such a body.

First, any National Integrity Commission that is based on the model of the NSW Independent Commission Against Corruption (ICAC) will inevitably encounter the same serious problems in operation that that agency has, including undermining the presumption of innocence and the right to a fair hearing.

Secondly, any National Integrity Commission would need to justify why it is needed, amongst Australia's already existing web of integrity and anti-corruption bodies and mechanisms, and how it would interact with those bodies and mechanisms to prevent turf-wars and inefficient duplication of oversight.

Thirdly, any National Integrity Commission would need to identify precisely what alleged problems of corruption and misconduct it is supposed to target, and why a Commission is a better way of targeting those problems than some other law reform approach. Not all instances of perceived unfair practice or conduct are appropriately, or most effectively, pursued by a National Integrity Commission.



III. Problems of NSW ICAC

Australia does not need a federal National Integrity Commission, particularly if such a Commission were going to bear any resemblance to the NSW ICAC.

The NSW ICAC's recent missteps have received considerable media attention, but, for the Select Committee's ease of reference, they include:

- The loss of an effective and well-respected Premier, based not on any findings – or even allegations – of corrupt conduct, but on a failure to recall the receipt of a bottle of wine;
- Allegations of a culture of withholding exculpatory evidence from targets of ICAC investigations, both during the investigation, and later during court proceedings;
- The conduct of public hearings that, by mere association, tarnish the reputations of those called to give evidence;
- A public rebuke from the High Court of Australia, citing ICAC's overreach of its powers during its investigation into NSW Crown Prosecutor Margaret Cunneen; and
- A public rebuke from the Inspector of the ICAC, David Levine AO RFDQC, citing the poor quality and conduct of ICAC's investigation into NSW Crown Prosecutor Margaret Cunneen.

The NSW ICAC's abuse of its extraordinary coercive and investigatory powers marks it as a fundamentally problematic model for any National Integrity Commission. It creates a parallel system of justice to the traditional criminal court system, initially with all the credibility of a court, but without any of the protections that have been built up around the court system over many generations, including the presumption of innocence, the high standard of proof beyond reasonable doubt, and the privilege against self-incrimination.

In particular, the Select Committee should be wary of recommending any Commission that has powers to make explicit findings of corrupt conduct, withhold evidence from targets of investigations, commence prosecutions in its own name, or hold public hearings.

To adapt Vice-Chancellor Sir James Knight-Bruce's judgment in *Pearse v Pearse*:

The discovery and vindication and establishment of truth are main purposes certainly [of any integrity or anti-corruption body]... [however] the obtaining of these objects... cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.¹

The Institute considers that the Select Committee ought not to recommend the establishment of any National Integrity Commission that aligns too closely with the model of the NSW ICAC. This model

¹ (1846) 63 ER 950, at 957



too often degenerates into trial by media. The Institute considers that this is almost inevitable when people are given such powers without the protections surrounding police investigations and interrogations, and court trials.

IV. Existing integrity and anti-corruption bodies and mechanisms

The current federal system already contains a host of integrity and anti-corruption bodies.

For example, bodies with law enforcement functions – from the Australian Federal Police through to the Department of Agriculture – are overseen by the Australian Commission for Law Enforcement Integrity. The ATO's administration of the tax system is reviewed by the Inspector-General of Taxation. The compliance of the federal public service with their Code of Conduct is overseen by the Australian Public Service Commission. Electoral fraud is investigated by the Australian Electoral Commission. Compliance with workplace laws is overseen by the Fair Work Ombudsman. The involvement of organised crime in assisting corruption and misconduct is investigated by the Australian Crime Commission and the Australian Federal Police. The Commonwealth Ombudsman provides oversight of and investigation into issues across government, including into private health insurers, the postal industry, and the provision of education to overseas students. The Australian Sports Anti-Doping Authority oversees the Australian sporting world. The Australian Competition and Consumer Commission and the Australian Securities and Investments Commission investigate and prosecute a variety of corporate and commercial misconduct. The Inspector-General of the Australian Defence Force and the Defence Ombudsman oversee and investigate misconduct issues relating to defence and military justice. The Australian National Audit Office oversees and investigates financial management and public administration across the federal government. The Inspector-General of Intelligence and Security oversees the conduct of the Australian intelligence community.

The current system also includes collaborations like the AFP's Fraud and Anti-Corruption Centre – which includes agencies from ASIC to the Australian Border Force to the CDPP – and the Australian Anti-Corruption Commissions Forum, which gathered integrity and anti-corruption bodies from across Australia to discuss best practice in identifying corruption risks and building resistance to corruption and misconduct.

Parliamentary committees also play an important role. Committees ranging from the Joint Committee on Public Accounts and Audit, to the Standing Committees on Members' and Senators' Interests, maintain a level of public scrutiny of government action and potential conflicts of interest.

Finally, the federal administrative review system – including internal merits review mechanisms, appeals to administrative tribunals, and judicial review – provides a transparent mechanism for individuals and entities affected by government decisions to challenge those decisions, and accordingly help to prevent corruption or misconduct.



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This web of integrity and anti-corruption bodies and mechanisms provides specialised oversight of a range of different aspects of possible corruption and misconduct across Australia. The apparent absence of serious visible corruption at the federal level is, in part, tribute to these agencies' effective work.

V. No demonstrated need for a Commission

The Institute considers that a National Integrity Commission is an inappropriate response to most concerns about corruption and misconduct, and that any substantiated concerns about integrity or anti-corruption at the federal level could best be dealt with through modifications to existing institutions or laws.

Two examples illustrate this. First, Transport Workers Union national secretary Tony Sheldon has recently publicly called for a national anti-corruption body modelled on the NSW Independent Commission Against Corruption, citing concerns over political donations "by major companies in retail, financial services and banks".²

The Institute considers that – assuming the validity of such concerns – they would be better dealt with by legislative amendment to federal political donation disclosure laws, rather than through the establishment of an entirely new government agency with potentially invasive and coercive powers.

Similarly, Senator John Madigan has also recently publicly called for a national anti-corruption body, saying he was aware of "many complaints from constituents about corruption, unfair practices and misconduct among banks, financial planners, lawyers, accountants, valuers, doctors, major supermarket chains and government departments."³

Again, the Institute considers that a National Integrity Commission is not an appropriate response to concerns like those raised by Senator Madigan. The Senator's constituents raise important issues, but they are not necessarily best served by a National Integrity Commission. The corruption risks posed by banks, for example, may be substantially different from those raised by doctors. As such, those two sets of concerns ought to be dealt with in different ways. Similarly, the behaviour of major supermarket chains may be more effectively managed through amendments to competition law, rather than through a federal anti-corruption body. In addition, there already exist a range of bodies appropriate to overseeing some of the concerns raised by Senator Madigan's constituents, including Law Societies, Bar Associations, Legal Services Commissions, the ACCC, the Financial Planning Association, the Australian Health Practitioner Regulation Agency, and so on.

The details of these two examples are not necessarily key – the important point to be made is that a National Integrity Commission is not an appropriate response to every allegation of corruption or misconduct. Supporters of such a Commission must make a clear case for the precise mischief against which it would be directed, and how it would interact with the existing agencies and mechanisms of Australia's federal integrity system.

² 'Public submissions open on proposed national anti-corruption body', Gabrielle Chan, The Guardian, Friday 4 March, accessed at <<http://www.theguardian.com/australia-news/2016/mar/04/public-submissions-open-on-proposed-national-anti-corruption-body>>

³ Ibid.



VI. Conclusion

Australia already has a host of federal integrity and anti-corruption bodies and mechanisms. Barring a fundamental re-organisation of the entire federal government, any National Integrity Commission would simply have to take its place in this already-existing network of bodies and mechanisms.

Accordingly, no Commission would be the be-all and end-all, the alpha and omega, of Australia's national integrity system in any event. Such a system ought always – as it does currently, at both federal and state level – to consist of a web of different agencies, with different focuses and capacities. Some may focus on investigations, some on training and compliance, in the various areas in which they have built staffing expertise.

In the absence of any demonstrated deficiency in this web of federal bodies and mechanisms, a National Integrity Commission runs the risk of being either just a duplicate of pre-existing oversight, or an agency with no clear purpose or mischief to target. The Institute suggests that neither outcome is appropriate.

The Institute considers that the Select Committee should recommend against the establishment of any National Integrity Commission.

