

Senate Select Committee on a National Integrity Commission

This submission is made in response to the Senate Select Committee on a National Integrity Commission inquiry into the establishment of a national integrity commission.

I am a current a doctoral student at Edith Cowan University in Western Australia undertaking research in the area of the effectiveness and need for government oversight agencies.

In 2011 I conducted post graduate research into the operations of police oversight agencies in Australia. The Master of Criminal Justice research, titled *Police oversight agencies: A model analytical tool for comparative evaluations*, identified a best practice model to assist governments in establishing or reviewing an oversight agency.

I would like to thank the Committee for providing an opportunity to make a submission and trust the information provided is useful.

Sincerely

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Introduction

Within Australia, current integrity agencies include Ombudsmen, Inspectors, agency specific oversight agencies and mixed oversight models. However, since the introduction in 1972 of the first Australian Ombudsman, regulatory oversight has expanded significantly with every Australian State and Territory now having access to some form of oversight at either a State or Federal level.

Development of independent oversight in Western Australia

In 1972 in Western Australia (WA) the first Ombudsman for Australia was established. Then, in the mid 1980s the original Ombudsman powers were expanded that coincided with the surfacing of allegations of corruption by government officials. The Ombudsman's Office remained and in 1988, a new statutory body titled the Official Corruption Commission (OCC) was created. The OCC had no original legislative powers to investigate complaints and was never designed as an oversight or investigatory body. The primary function of the OCC was to receive, consider and if it thought fit, refer the complaint to a person or agency for investigation. Then in 1992, as a result of political scandals and the WA Government's conduct with businesses coming under scrutiny, the Western Australian Royal Commission into the Commercial Activities of Government and other Matters (WA Inc Royal Commission) commenced that led to a number of senior public officials and business leaders being prosecuted and imprisoned. Due to the narrow scope and effect, the OCC received heavy criticism in the final report that saw the OCC abolished and eventually replaced with the Anti-Corruption Commission (ACC).

However in 2001, another Royal Commission was established in WA by the Government to inquire into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, otherwise known as the Kennedy Royal Commission. This was the second Royal Commission for Western Australia in 9 years, a somewhat unusual event by government standards. The ACC functions and powers were heavily criticised for having an inability to investigate serious and organised crime, failure to conduct public hearings and a lack of ability to make findings or recommendations. Following the outcome of the Kennedy Royal Commission, the Corruption and Crime Commission (CCC) was created in 2004.

Of significance is that the CCC has been subjected to intense media and political scrutiny over the years, predominantly emanating from the 'Smiths Beach Inquiry' in 2006. This inquiry investigated the alleged corrupt conduct of a former WA Premier and local

government Councillors over improper approvals and planning processes. Then, in 2015 the WA State government enacted legislative amendments restricting the jurisdiction of the CCC to matters involving serious corrupt conduct and police misconduct. The shortfall became the responsibility of the Public Sector Commission and created gaps in accountability, specifically some elected member conduct.

Development of independent oversight in Queensland

The introduction of the first Ombudsman's Office into Queensland occurred in 1974, two years after WA, and was tasked with investigating complaints regarding government administration. Then, due to high level corruption allegations surfacing in the late 1970s and early 1980s, the Queensland government established the Police Complaints Tribunal (PCT) to relieve the pressure on a number of government departments and bureaucrats. Although the role of the PCT was to address corruption issues, allegations continued to surface and eventually led to the Fitzgerald Royal Commission being established in 1987. Fitzgerald (1989) concluded the PCT was "an illustration of an administrative body with the superficial trappings of quasi-judicial impartiality and independence, set up as a facade for Government power".

As a consequence, Fitzgerald recommended to Government the PCT be abolished and a new agency, called the Criminal Justice Commission (CJC) be established. In 1990, the CJC was established and empowered to investigate public sector misconduct and worked alongside police to investigate major and organised crime. However, in 1997 the major and organised crime function was separated away from the CJC and conferred upon a new agency, called the Queensland Crime Commission, only to be amalgamated again a few years later. This amalgamation caused the CJC to be renamed the Crime and Misconduct Commission (CMC). In 2004, the infamous 'Palm Island Inquiry' revealed deficiencies in the CMC legislation as no mechanism was, or is still, in place to appeal the non-commencement of disciplinary action by a public sector agency. A further inquiry in 2013 titled the 'Callinan Review' identified 23 recommendations for improvement (see Callinan and Aroney 2013) and provided the catalyst for the CMC to transition into a new agency now called the Crime and Corruption Commission. Like WA, this new agency is responsible for the investigation of serious corruption, police conduct and organised crime leaving lower level complaints managed by other agencies.

Development of independent oversight in New South Wales

New South Wales (NSW), like Queensland also adopted an Ombudsman model in 1974. However, again similar to the timing of Queensland's corruption allegations, NSW also experienced claims of corruption in the 1980s that caused the Government to expand the Ombudsman's authority; a move that failed to abate the public's concerns. As a response, the New South Wales Government introduced a new agency in 1989 called the Independent Commission Against Corruption (ICAC) to address the lack of integrity in public administration in NSW.

In 1992, the Greiner Liberal government in New South Wales offered employment to a disgruntled former Liberal Member of Parliament. Subsequent findings by the ICAC revealed corruption surrounding the job offer, a lack of impartiality and how the process breached the public trust (Macknay, 2012) and resulted in the ICAC Act being amended and each House of Parliament to have a Ministerial Code of Conduct (Macknay, 2012).

Like other integrity agencies across the country, the ICAC underwent further changes because of a public crisis. In 2014, Crown Prosecutor Margaret Cunneen was alleged by the ICAC of perverting the course of justice by providing advice on how to avoid a drink driving charge (Heerey 2015). However, Cunneen was successful in an appeal to the High Court that determined Cunneen's alleged conduct fell outside of ICAC's jurisdiction as their definition of 'corrupt conduct' was flawed. Not surprisingly, this cast doubt over the validity of other ICAC investigation and resulted in the NSW government to amend legislation to authenticate previous determinations. Further changes ensued in 2015 when the NSW government established an Independent Panel who went on to recommend several significant changes such as ICAC only being able to make corruption findings in matters involving serious corruption curtailing their once extensive scope (Independent Commission Against Corruption n.d.).

Development of independent oversight in the Australian Capital Territory

In 1977 the Federal government established the Commonwealth Ombudsman and five years later was invested with the power to oversee police complaints and in limited situations, conduct their own investigations into police complaints (Australian Law Reform Commission 2010). In 1995, the Australian Law Reform Commission tabled a report in Federal Parliament finding the Ombudsman had failed to adequately address complaints and corruption due to a lack of external oversight and recommended a new agency called the

National Integrity and Investigations Commission (NIIC) to assume responsibility for investigating Australian Federal Police (AFP) complaints from the Commonwealth Ombudsman. Further, it recommended the NIIC be the first external agency to investigate complaints against the National Crime Authority (NCA), replaced later by the Australian Crime Commission. It was envisaged that the NIIC would be a hybrid investigative body developed from other oversight models focusing on the accountability requirements of the AFP and the NCA (Australian Law Reform Commission 1996). Responding to criticism of the recommendation, the Federal Government decided against implementing the NIIC and preserved the role of the Commonwealth Ombudsman.

Around the same time, a Ministerial Inquiry into allegations of corruption involving the AFP commenced. This stemmed from the Wood Royal Commission in NSW where it was alleged officers associated with the AFP drug unit in Sydney had engaged in corrupt activities. Mr Ian Harrison SC was appointed the inquiry officer and received 89 allegations in respect of 54 AFP officers. The final report of the Harrison Inquiry highlighted the need to implement an effective external oversight mechanism of police complaints and recommended the Commonwealth Ombudsman's powers be increased to provide for a more active role (Australian Commission for Law Enforcement Integrity, 2007).

It wasn't until 1981 that the AFP came within the jurisdiction of the Commonwealth Ombudsman with the legislation regularly modified so that the agency could have more vigour in police accountability (Australian Commission for Law Enforcement Integrity 2007). However, there continued to be discontent with the complaints system and a Senate Committee subsequently recommended a review. This led to the appointment of Justice William Fisher AO QC to evaluate the current system. Known as the Fisher Review, a report was tabled in Parliament in 2003 that recommended retaining the Ombudsman's role (Australian Commission for Law Enforcement Integrity, 2007).

Around this period, the media was continually reporting on the Kennedy Royal Commission of Inquiry occurring in Western Australia. This event, combined with the previous Royal Commissions of Inquiry in Queensland and New South Wales, caused the Federal Government to reconsider the implementation of an independent police oversight agency. Further, members of the Victorian Parliament were calling for a Royal Commission to inquire into the conduct of Victorian Police. Six months after receiving the Fisher Review, the Government publicly announced its intent to establish the Australian Commission for

Law Enforcement Integrity (ACLEI) with Royal Commission powers, tasked to investigate corruption within the AFP and the Australian Crime Commission. Although the announcement to implement an anti-corruption agency for the Commonwealth occurred around 2004, it was two years later before the ACLEI was established. It was the “lessons learned from the State bodies, as well as a clearer perspective on the potential for corruption at the Commonwealth level, [that gave] rise to the establishment of an anti-corruption body” (Commonwealth of Australia, 2006, p.5).

Discussion

In Australia, every State or Territory has similar forms of oversight. Rather than being static, these oversight agencies constantly evolve in response to large public scandals and their legislation amended accordingly. And like Britain, Canada and Hong Kong, Australia has implemented similar anti-corruption agencies and although they haven’t always been received well, have become a well-established and accepted part of society. Other than the two Australian Territories (the Australian Capital Territory and the Northern Territory), every Australian State has some form of anti-corruption commission. The two Territories have limited public sector oversight by the Australian Commission for Law Enforcement Integrity (ACLEI) who focuses more on the Australian Border Force, Australian Federal Police and the Department of Immigration and Border Protection with the remaining government agencies coming within the scope of an Ombudsman model.

Importantly, there is a need to understand that the development of anti-corruption agencies in Australia have been heavily influenced by findings in Royal Commissions of Inquiry based predominantly on inquiries into police conduct. Furthermore, each anti-corruption agency has been developed and structured mostly on models preceding it. For example, the Corruption and Crime Commission in WA adopted similar legislation and powers to the Police Integrity Commission (PIC) in New South Wales and the Crime and Misconduct Commission (CMC) in Queensland. The PIC itself was influenced by the Criminal Justice Commission, the predecessor to the CMC. The latest anti-corruption agency established in Australia, the Tasmanian Integrity Commission, examined the CMC and the ICAC in NSW before deciding on an appropriate structure. Therefore, recommendations for the establishment of an anti-corruption agency originating from a Royal Commission, has invariably been adopted and tweaked from pre-existing models resulting in an eclectic mix of practices that have no connection, similarity or resemblance to each other. This then creates

an atmosphere when any problems associated with earlier models have the potential of being replicated in subsequent models (Ross & Tucker, 2008).

Is there a need for a Federal oversight agency?

There is a clear argument for improved public sector accountability; establishing the correct framework is the challenge. Looking at accountability measures through an alternative viewpoint, through a Corporate Social Responsibility lens, provides an alternative and arguably a more sophisticated method to examine why the current anti-corruption agencies have failed to eliminate corruption from the public sector and to reveal other improvement strategies that may be necessary to mitigate corruption risks.

According to Ghosh and Chakraborti (2014), CSR has two distinct sides. Firstly, there is the strategic and commercial approach that directly benefits a company with the second side focusing instead on moral and ethical responsibilities including an increased call for integrity management and transparency. This second side of CSR is the public face of business and showcases the moral compass of an organisation which, according to Chan (1999), makes accountability an image management issue. Examining existing Australian anti-corruption arrangements identifies the CSR phenomena as a valid methodology for examining oversight effectiveness as these agencies provide an avenue for public exposure of corruption whilst promoting public sector integrity and accountability.

As corruption is regarded as a primary barrier to economic success, it follows then that image management has the potential to mitigate any reputational damage, both personally and corporately, and can be used to showcase successes. Image management strategies promoting ethical and moral decision-making practices have emerged in various forms including risk management frameworks, corporate governance processes, codes of conduct and integrity departments. Importantly though, even with the implementation of these types of approaches corruption has not been abated and new allegations continue to appear in media reports.

Not surprisingly, Gentile, Wetzel and Wolf (2015) reported that managing moral issues had become one of the biggest impacts on decision-making. Viewed in a public sector context, administrative ethics has become ever more significant and the 'public value' being questioned more. Australian Royal Commissions of Enquiry and other integrity agency investigations such as political lobbying, policing practices and corruption scandals have questioned the

‘public value’ and in some cases eroded the public’s trust of some public sector agencies which in turn distorts public priorities. In response, governments have implemented more oversight structures, such as Ombudsmen and amended current integrity agency legislation to address a range of collective interests and promote increased transparency. Indeed, the call for new integrity agencies may be viewed as a response to public concerns and ‘doing the right thing’, and can be equally viewed as a protection mechanism to safeguard government reputations.

The integrity safeguarding strategy of implementing integrity agencies has established an onus on the public sector for mandatory reporting thereby triggering, in approximately 2% of cases, an investigation by the integrity agency. Therefore, to mitigate any potential investigation and avoid public scrutiny, public sector agencies have developed their own internal integrity departments to show that they are ‘doing the right thing’. This not only promotes a good relationship with the oversight agency but potentially creates an environment of regulatory capture where the agency and regulatory body become accustomed to the operations of the other. This in turn has the opportunity to create a bias where the public sector agency only reports certain matters to the integrity commission – basically telling them what they want to hear. In reality, public sector behaviour has not changed and misconduct has not been reduced. Rather, what has emerged is an increased call for more transparency in decision making.

Viewing this development through a Corporate Social Responsibility lens shows that organisational conduct is based on how organisations view their business-society relationships rather than ‘doing the right thing’ (Krichewsky, 2014). In essence, business processes have changed based on how they think others are observing them – not because it’s the right thing to do. For example, the public sector has adapted business processes based on information and understanding of other significant areas like the political arena with decisions being made in favour of the government of the day. In a similar fashion, governments have responded to public pressure and implemented integrity strategies such as mandatory reporting and integrity agencies. Although on the surface this appears to be reasonable, further examination reveals difficulties in agencies implementing integrity strategies on a micro level. Gentile, Wetzel and Wolf (2015) reported that moral and social issues were seldom addressed in operational logic and more attention was focused on communication strategies that resulted in ‘what is being said’ and ‘what is being done’ decoupled from each other.

The Australian oversight landscape has adapted over time and now calls for public sector agencies to implement codes of conduct, non-financial reporting practices and install complaint reporting mechanisms. The difficulty with having a requirement for a code of conduct, although imposing an obligation to act in a certain way, is not always accepted or enforced. This was highlighted in a recent report by the Ombudsman of Victoria (Glass, 2016) who identified that many failed to recognise the codes applied to them, simply ‘didn’t care’ and that enforcement of employee behaviour under a code of conduct was inconsistent. Importantly though, it is difficult to establish how successful, if any, codes of conduct have been in getting people to modify their behaviour in the workplace.

Additionally, the New Public Management (NPM) approach of the 1980s saw public sector practices influenced with an increased focus on productivity and short-term outcomes (Omari and Paull, 2015). However, this approach resulted in an increase in public scrutiny and performance targets always moving (Caverley 2005) with negative workplace environments created where public sector workers were pressured to achieve outcomes through the constant reprioritisation and reorganisation of current workflows (Omari and Paull 2015). The negative workplace culture was also created when communication strategies failed to be implemented at the lower end of an organisation. The lack of synergy between communicating expectations and understanding current work practices and pressures, created an environment that appeared to be nothing more than organisational rhetoric used to produce external legitimisation (Gentile, Wetzel and Wolf 2015).

The NPM approach also created a competitive environment where promotional opportunities were influenced by short-sightedness and self-promotion. Today, personal preferences have emerged as a leading factor that outweighs any respect for rules and where personal interests overcome any public interest (De Vries and Sobis 2016). Likewise, self-serving behaviour has been shown in a political context where election campaigns and government policies have been influenced by market driven politics. For example, the political manipulation of policies, integrity legislation and oversight agencies especially during an election, has given rise to self-preservation. This is supported by Leys (2013) who reported that having the ability to manage and restructure policies in response to market forces has helped political survival. This political interference in public administration is a case of ‘being seen to be doing good’ and creates a “win-win rhetoric and promises of value creation” (Vallentin and Murillo 2012). However, changing the operational arrangements of any integrity agency requires a political will to do so which can be difficult to establish (Tucker

and Larsen 2016). Aulich (2012) explained that political involvement and bureaucratic preferences often fluctuated over time due to governments seeking the right balance between the need for “central political control and accountability and pressures for agency autonomy and professional independence”.

Although the NPM isn't as influential as it was in the 1980s, the adoption of private sector strategies for managing State owned agencies has created accountability failures (Chan 1999) still being felt today. Current public sector processes are seen more of a procedural approach to managing public sector behaviour and fail to prevent fraud and corruption from occurring (Gottschalk 2011). Scott (2012) reported that this may be due to people developing new and inventive ways to avoid regulation, policies or procedures, especially if the exact behaviour hasn't been expressed as being inappropriate.

Today there is an increased emphasis on external oversight arrangements with the public accepting these agencies and expecting information regarding investigations, prosecutions and sanctions to be publicly available. The difficulty is, people subject to investigations often do not agree their conduct was inappropriate and rationalise the behaviour was a reward earned or part of normal business processes (De Vries and Sobis 2016). Current Australian oversight approaches rely heavily on dealing with corruption and misconduct through legislative redress and fails to take into account individual perception, organisational culture and self-serving behaviour from individuals. This is emphasised by a recent study into European anti-corruption agencies that identified them as being ineffective in corruption prevention and doubted any ethical improvements would result (De Vries and Sobis 2016).

Clearly, Australia's wide acceptance of integrity agencies provides some level of comfort that governments are serious about addressing corruption and misconduct in the public sector. As can be seen over the last 30 years, as corrupt practices have been revealed governments have developed regulatory accountability processes in response (Tucker and Larsen 2016). However, the structure for any new integrity agency should be carefully considered to ensure other factors identified above are considered and that previous models are not simply copied and 'tweaked'. It is important that problems associated with earlier models are not replicated for a new national integrity commission. Although some researchers have cast doubt on developing a 'best model', an international Delphi study I undertook in 2011 identified an agreed model for an integrity agency.

The Delphi study comprised of 22 panel members from police agencies, those agencies who oversight police and leading academics. Six Australian policing agencies participated as did the following organisations:

- Australian Commission for Law Enforcement Integrity, Commonwealth of Australia;
- Corruption and Crime Commission, Western Australia;
- Independent Police Conduct Authority, New Zealand;
- Crime and Misconduct Commission, Queensland;
- Police Complaints Authority, South Australia;
- Ombudsman Tasmania; and
- Police Ombudsman for Northern Ireland.

In addition, the following leading Australian academics were involved in this research:

- Dr Frank Morgan, Director, Crime Research Centre, University of Western Australia;
- Associate Professor Colleen Lewis, Criminology, Monash University
- Tim Prenzler, Chief Investigator, Australian Research Council Centre of Excellence in Policing and Security, Professor, School of Criminology and Criminal Justice, Griffith University;
- Rick Sarre, Professor of Law and Criminal Justice, University of South Australia; and
- Dr Darren Palmer, Associate Professor in Criminology, Faculty of Arts and Education, Deakin University.

The Delphi research consisted of three rounds of iterative questions until consensus was reached on the topics. High consensus was reached on 18 of 24 questions asked with four receiving a moderate consensus score and two failing to reach any level of agreement. Although this study was focused on police corruption and misconduct, these findings may be useful when establishing a new National Integrity Commission.

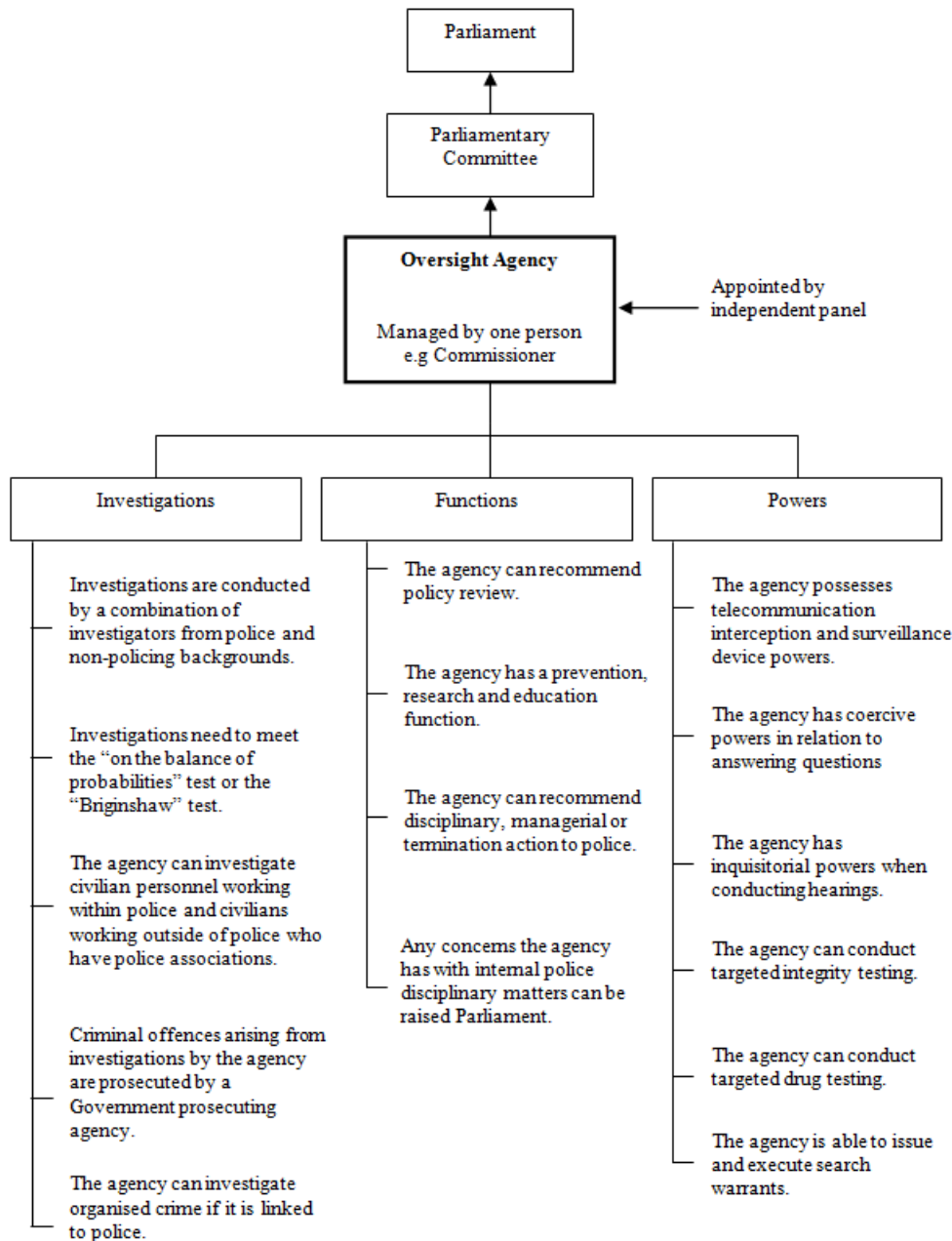


Figure 1. A best practice model

Although many may believe an oversight agency is an effective tool in preventing corruption and misconduct from occurring in the public sector, more attention should be directed towards prevention initiatives (Prenzler 2011) and the impact on managerial motivation along with moral and ethical management. Focusing on these areas will increase integrity, transparency and accountability in the public sector and promote ‘public value’ for governments. To expect all public sector corruption and misconduct to be eliminated is naïve. The challenge is to discover and enforce an approach that reduces the desire to engage in this behaviour.

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