12 April 2016

Dr Jane Thomson
Committee Secretary
Senate Select Committee on the Establishment of a National Integrity Commission
Parliament House
CANBERRA ACT 2600

Dear Dr. Thomson,

I make this submission to the Senate Select Committee on the Establishment of a National Integrity Commission as an individual citizen. I acknowledge the development of series of senate committees surrounding this subject and the call by the Senate independents to seek a broader national anti-corruption body.

My background includes twenty years as a regular Army officer, fifteen years as an Australian Public Servant and Army Reserve Officer. The last three years as an Australian Public Servant I was engaged as the Inspector General of Defence, responsible for fraud control and anti-corruption within the Department of Defence. In this position, I developed a more responsive approach to fraud and anti-corruption, including taking a leadership role in developing a Five Eyes anti-corruption network. I am currently studying a Masters of Arts in Anti-Corruption at the International Anti-Corruption Academy in Vienna, an initiative of the United Nations Office of Drugs and Crime. Australia is a signatory of and provides funding to this Academy.

I also make myself available to answer questions from the committee.

Yours sincerely,

Michael Callan

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Establishment of a National Integrity Commission

"...corruption holds back every aspect of economic and civil life. It's an anchor that weighs you down and prevents you from achieving what you could. If you need to pay a bribe and hire somebody's brother -- who's not very good and doesn't come to work -- in order to start a business, well, that's going to create less jobs for everybody. If electricity is going to one neighborhood because they're well-connected, and not another neighborhood, that's going to limit development of the country as a whole. If someone in public office is taking a cut that they don't deserve, that's taking away from those who are paying their fair share."(Obama 2015)

Introduction

Australia's performance in anti-corruption has been inconsistent and uncoordinated with perceptions of corruption having increased in recent years. The inconsistent performance of the state based anti-corruption agencies and the view that Australia is a preferred money laundering location leads to the conclusion that at a national level Australia's response to corruption has been less that effective. What is surprising about this conclusion is that Australia has in place the institutions to effectively fight corruption.

Internationally, there are consistent calls for a national anti-corruption agency to be set up in each nation's jurisdiction (Sousa 2008). However, when this occurs these agencies are constrained by their respective governments, through limited mandates and resourcing. In the Australian context this is no different considering the South Australian and Victorian experiences.

As with most situation, the challenge is not finding the solution, but actually defining the problem. This committee was established to inquire into and report, on the adequacy of the Australian Government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral, and individual corruption and misconduct. This is a very broad remit and in some respects highlights quite clearly the current state of confusion both international and domestically. What do these terms mean and what is the issue the committee is attempting to address?

Australia's Performance

Australia has been dropping in the Corruption Perception Index for the last three years and a study by ANU in 2012 indicates that 43% of Australians believe there is corruption, and that in the main, trade unions, political parties and the media are the most corrupt institutions (McAllister, I. Pietsch, J. Graycar 2012). The current royal commission report into trade unions would support that proposition.

In 2013 the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia stated:

> *While the Working Group on Bribery welcomes Australia's recent efforts, it has serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery*

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> *referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges. (OECD 2012)*

While Australia is a country that abides by the rule of law it still seems hard to understand why the prosecution rate is so low. In 2105 Australia received a follow up report from the OECD that in the quietest of terms again criticized our lack of action in prosecuting foreign bribery offences. The original OECD report in 2013 showed that Australia received 28 referrals of foreign bribery, of which 21 concluded without charges. In October 2012 Australia had 7 active foreign bribery investigations, and by 2014 this had increased to 17 active investigations (OECD 2012; OECD 2015). However, the down side to what appears to be a doubling of cases, is that Australia had referred only one case to the DPP.

In 2011, the US Department of Justice prosecuted 275 foreign bribery cases at the Federal level. So based on the USA being ten times bigger than us, we should have prosecuted at least 27 odd cases in 2011. Yet Australia still not prosecuted even one since 2011.

This, in some respects goes to the adequacy of the Australian Government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral, and individual corruption and misconduct. This is not an issue around the current government's performance but about how the current situation has developed over a number of governments over decades. Indeed, the Royal Commission into Trade Union Governance and Corruption came to the conclusion that the corrupt behaviours of trade union officials and commercial entities was not the behaviours of rogue actors but the misconduct was deep seated and wide spread built up over decades (Dyson 2015).

In terms of performance the comments made by the head of Papua New Guinea's anti-corruption unit Task Force Sweep likened Australia to the Cayman Islands as an easy location to launder corrupt money. His comments made in a speech in 2012 reflected his frustration with the lack enforcement of a proper governance regime in Australia;

> *"That is one way Australia can help prevent corruption from happening in PNG because Australia is fueling it by allowing it to happen, allowing money to cross countries and come in. ... [Right now] they're not keeping checks and balances to see where the source of the finance is and how the people have money – are they public servants and politicians or are they just ordinary citizens?"*(Mason 2012)

In other words, Australia's enforcement of its own laws and due diligence is poor. However, the upshot of this poor performance does not affect Australia, but has a damaging effect on the poorest citizens of our near neighbours. PNG suffers from human trafficking, drugs, violence and unrest fueled by corruption (Wickberg 2013), which Australia is enabling through its lax enforcement (Bronitt 2013).

Defining Corruption

Up until the introduction of the Public Governance, Performance and Accountability Act (Commonwealth of Australia 2013) Australian government departments were required to comply with the Australian Standards 8001-2008 Fraud and Corruption Control (Standards Australia 2008) which provided the requisite definition for corruption:

> *Dishonest activity in which a director, executive, manager, employee or contractor of an entity acts contrary to the interests of the entity and abuses his/her position of trust*

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in order to achieve some personal gain or advantage for him or herself or for another person or entity. The concept of 'corruption' within this standard can also involve corrupt conduct by the entity, or a person purporting to act on behalf of and in the interests of the entity, in order to secure some form of improper advantage for the entity either directly or indirectly.

(Standards Australia 2008)

I would ask the committee to note that the above definition takes the concept of corruption beyond mere bribery. Bribery is a mechanical aspect of corruption and can take many forms itself but in itself it is not the only mechanism.

However, with the implementation of the PGPA Act this standard is no longer relevant leaving public agencies without a government endorsed definition. However, while this may appear difficult it should be noted by the committee that the United Nations Convention Against Corruption to which Australia is a signatory has no definition of corruption in it. Essentially the driving international agreement for global anti-corruption efforts against which Australia is measured has no definition of the term corruption. The only time the term definition appears in the convention is at Article 61.2 *Collection, exchange and analysis of information on corruption* which states:

States Parties shall consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption.

The above Article has the term *insofar as* possible meaning that depending on the culture and political state of a nation, a common definition of corruption between two nation states may not be possible. This creates a difficulty for law enforcement and other bodies to operate effectively across borders, leaving gaps for corrupt actors to exploit. This condition also remains in Australia where the Federal, State and Territory jurisdictions do not have a common definition of corruption.

The committee should also note that the key challenge facing this committee and any agency that may be established to operate in this field is defining the problem not defining the efficacy of Australia's response.

In terms of defining corruption, the 8001-2008 Fraud and Corruption Control definition captures most by not all aspects of corruption. Essentially, defining corruption is defining behaviour (Johnston 2005) and in that respect my simple definition of corruption is:

Corruption is any action by an individual or entity whether legal or illegal, moral or immoral that perverts an agency from its purpose.

There is a need to outline the concept of corruption being caused by an action which is legal or moral. While this seems counter-intuitive institutional corruption as defined by Lawrence Lessig is:

Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness

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> *by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.*(Lessig 2009)

Lessig was researching the behaviour of institutions such as Congress when he made this definition and he was clearly outlining the impact of the political comprises made which were legal but damaged the organisation and diverted it from its purpose. Hence when the committee's terms of reference talks about institutional, organisational, political and electoral, and individual corruption and misconduct there could be many meanings in this and without an internationally recognized definition the committee itself will need to be clear in what these elements mean.

Defining Misconduct

Misconduct is also a broad term that covers many things and again legal definitions are available. I have made the assumption that the committee is more interested in serious misconduct. The *Fair Work Regulations 2009* defines serious misconduct as:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment
- conduct that causes serious and imminent risk to the health and safety of a person, or the reputation, viability or profitability of the employer's business
- theft
- fraud
- assault
- the employee being intoxicated (alcohol or drugs, other than prescribed drugs) at work
- the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

This is a definition under federal law and state based laws in the main show little harmonization with this definition. The NSW *Independent Commission Against Corruption Act, 1988* has a simple definition of misconduct that is similar to the *Fair Work Regulations 2009*. However, like corruption definitions there is no one standard as to what misconduct, serious or otherwise means. The *Fair Work Regulations 2009* definition pertains only to employees.

I note that Justice Dyson was clear in describing corrupt behaviour as misconduct in his report into trade union corruption. Hence, in terms of determining an efficient definition of misconduct the committee may be best placed to determine a broader definition that covers all manner of actors in the community.

Effects of Corruption

The effects of corruption have been repeatedly outlined by a variety of agencies, in particular the World Bank, United Nations, and the Organisation for Economic Cooperation and Development. These agencies provide clear indicators of the effects of corrupt regimes, organised crime and individual behaviours. Some estimates indicate that corruption costs the world economy 5% of its worth. However, I would point out three salient effects:

1. First and foremost, The World Bank estimates that bribes alone reach $1 trillion per annum (KPMG International 2015). That is money in the black economy not generating

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tax, not being used in business, not available as capital to build the infrastructure and the services Australia needs for its own national interests.

2. Secondly, corruption sends money to places that represents a threat to Australian interests. Money funding ISIS had its genesis in corrupt payments and the drug trade (which thrives on corruption). Funds that should have gone to building schools and hospitals is being used to conduct a violent conflict across border, affecting our ability to trade peacefully and protect our national interests.

3. Thirdly, corruption by politicians doesn't just steal money from us, it steals confidence in our government and our political system. This leads to lack of confidence in the rule of law which in turn makes business avoid investing in a less than stable country or one where the returns require a corrupt act. This type of corruption gives rise to countervailing behaviour by society (Alam 1995) which impacts upon the operations and capability of our institutions.

However, I contend that these indicators are the symptoms and not the real effects felt by Australia. The true effect of corruption in Australia is that it

1. Reduces Australia's resilience through reducing the capability of our economic institutions and business by:

    a. Reducing our revenue generating capability through stifling business development and investment. Rent seeking behaviour and corrupt officials remove competition in the market place reducing the ability for more innovation and capability to be generated.

    b. Reducing our revenue collection capability through ensuring taxes are lost to money laundering and illegal tax avoidance measures supported by a less than capable law enforcement and public services.

    c. Undermining key institutions that rely on a robust economy such as defence, the police and revenue collection agencies

2. Reduces Opportunity for the those in Australian society who have no voice, voiding the advantages of a robust democracy and independent institutions and developing a debilitating countervailing behaviour within our society (Alam 1995).

3. Undermines our flexibility in dealing with crises such as the Global Financial Crisis in an effective manner. Under performing institutions, poor governance and rent seeing behaviour by government and government officials ultimately reduces the availability of options to deal with emerging crises. Noting the criticisms of the first Rudd government in possibly squandering the Howard government surplus, the fact that good economic management and governance led to the Rudd government having that flexibility and multiple options.

Australia needs to view corruption not from an economic perspective, but from a capability perspective. In doing so there is more likelihood that elements that are overlooked as being a threat will not be missed. By focusing on protecting our capability to generate and collect revenue, as well as reinforcing the strength of our governance institutes, Australia can maintain its current strong economic and social stability.

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Elements of a National Integrity System

Viewing a national integrity strategy as a means of protecting our national capabilities and therefore interest, requires taking a systems approach to developing a response to corruption and misconduct. While Australia has the resilience at present to take action to deal with fragile elements of its national integrity system with some impunity, it is not fragility that is the risk but the unintended consequences of these actions (Johnston 2010). A more integrated and coordinated approach, especially given the federated nature of Australian government is required. Transparency International has suggested a National Integrity System, including the following pillars (McCusker 2006) to support anti-corruption objectives:

- Executive
- Legislature/Parliament
- Parliamentary public accounts committee
- Public service
- Judiciary
- Media
- Civil society
- Ombudsman
- Anti-corruption/watchdog agencies (Federal/State/Territory)
- Private sector
- International

Using these pillars presents an opportunity to develop a more integrated approach but may not be enough. There remains a risk of individual pillars gaining in strength while others languish. Indeed, given the natural approach of Australian democracy to legislate first before seeking action from civil society, there is a risk of lumpy implementation of laws across the Australian Federation, leading to gaps in the basic institutions and therefore areas than can be exploited by criminal elements.

To make a national integrity system effective requires that laws and regulations are harmonized at the Federal and State levels to ensure no ability for corrupt actors to shop around in different jurisdictions. This closing of doors into each jurisdiction should begin the process of developing a safe political space, and the flow on to a safe economic space to prevent corruption. In addition, coordinating the differing pillars into a comprehensive whole would release resources to deal with matters more effectively.

An Approach to Tackling Corruption and Misconduct through a National Integrity Strategy

Many anti-corruption campaigns fail due to the lack of a clear strategy. Corruption and misconduct thrive in an environment where there is no accountability and lack of action against corrupt players. Running an education or ethics campaign is not the answer as these focus on individuals. Australia needs to undertake a systemic approach to prevent corruption and misconduct.

The United Nations Convention Against Corruption makes two salient points in the opening preamble:

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> *...Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential,*
>
> *...Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,(United Nations 2004)*

Why these points are salient in the Australian context is that while the United Nations is convinced that corruption is a transnational problem, what could be said is for Australia it is a trans-border problem. Australia's unique geographical position along with a federation of states and territories is a microcosm of the international arena. Australia's state borders and eight jurisdictions lead to a patchwork of effort in law enforcement and prevention with eight different jurisdictions with eight differing objectives. This stovepipe situation allows criminal elements, in particular organised crime to operate in the boundaries between jurisdiction.

The second point is particularly pertinent given our poor track record in prosecuting corruption cases in Australia and the inconsistent performance of the state based anti-corruption commissions. An approach based on law enforcement alone is not enough to protect our revenue generating capability. Australia must adopt a broader, more comprehensive approach that tackles the problem earlier than currently undertaken. There is a need for a national preventative strategy in dealing with corruption and misconduct with clear long-term objectives.

Robert Klitgaard developed the formula: Corruption = Monopoly+ Discretion-Accountability(Klitgaard 2015). In other words, if one part of society has a monopoly over goods and services and the discretion on who will gain these services, and cannot be held to account then corruption will flourish. Accordingly, any strategy must look to breaking monopolies, reducing discretion and increasing accountability. This requires a concerted systemic approach and not an ethics or education approach. An effort has to be made to develop the legislative, institutional and policy framework that addresses all facets of institutional, organisational, political and electoral, and individual corruption and misconduct at a systemic level. What should not occur is the development of a response that sees more laws or policies that tackle the individual but fails to tackles the system.

In my opinion the approach is to develop a ***National Integrity Strategy.*** The objective of a National Integrity Strategy would be to protect Australia's interests by ensuring that the capability of its institutions is strengthened and improved, including maintaining the overall integrity of these institutions and their activities. To enact this strategy there needs to be the development of a ***National Integrity Plan.*** The implementation of a national integrity plan, with integration and coordination of state and territory integrity plans would be the leading step in developing the appropriate reforms to enhance the current integrity enforcement regime. The plan would ensure that the other enhancements outlined below are integrated into a collective whole that provide international and national strategic leadership in this field:

- ***Building Political Will and Political Capital.*** None of the above will either be implemented or succeed unless there is a strong political will at all levels of government, and a reserve of political capital to reform the system. Noting that in recent years the current Federal government has expressed that there is no corruption in the Federal government, there is a long road to travel to resolve the lack of political will. In terms of political capital, at the federal level neither the Coalition Party (who believes

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there is no corruption) and the Labor Party (who is tainted by its association with corrupt trade unions) have the political capital to implement major changes.

- *Institute a National Integrity Commission*. An appropriately resourced federal level integrity commission, with independent powers to oversight the national integrity system, coordinate activities under the national integrity plan, and harmonize anti-corruption and misconduct legislation of federal, state and territory agencies as required. This commission should also have strong powers to investigate, and refer for prosecution in limited circumstances. By placing a central agency as an oversight of federal and state level agencies would enhance cooperation and information sharing, ensuring that anti-corruption activities are made transparent to the general community and civil society. However, this should not be a broad based anti-corruption commission as this would run the risk of ending up being a tool of vested interest within government and other parties.

- *Conduct of a National Anti-Corruption Evaluation and Plan:* There should be an evaluation of the current environment to determine the best strategies at the national and state levels (McCusker 2006). This evaluation should focus on finding all elements of the national integrity system and would be the first action of the National Integrity Commission. The intent of this evaluation is to determine the long term national goals, and ensure clear responsibilities for action at the federal, state and territory levels.

- *Harmonization of Anti-Corruption Legislation.* Much like the harmonization of work health and safety laws, harmonization of anti-corruption laws would do much to assist in closing holes in jurisdictions, and allow better sharing of information as there would be common definitions and common data sets. Harmonization of legislation would also ensure more not less transparency in some jurisdictions. Finally, harmonization would ensure that as more agile criminal elements change tactics, legislation can be changed across jurisdictions to meet new challenges rather than jurisdiction by jurisdiction. Hence, there would be less choice of action for corrupt actors.

- *Improve and enhance cooperation*. Along with legislative harmonization, improving and enhancing mechanisms for cooperation amongst general law enforcement and anti-corruption agencies would improve transparency of the actions of corrupt actors, reduce choices for corrupt actors to avoid prosecution and increase understanding of tactics used by corrupt actors across jurisdictions.

- *Engage Civil Society*. The engagement of civil society in the oversight of the operation of anti-corruption agencies, along with transparent reporting to the community and government alike would assist with a better understanding for the Australian community in the behaviour and performance of politicians and governments. This would allow greater input into the development of legal instruments that fit with community standards. In addition, civil society could also be a method of reform within federal and state based agencies. The use of ex-law enforcement officers or ex senior public servants inside civil society organizations could provide a less antagonistic approach to reform. Finally, the engagement of civil society could also lead to greater political will in implementing a more effective anti-corruption enforcement regime.

- *Mainstreaming anti-corruption into sectors:* By engaging with each sector of the Australian economy and supporting the development of key anti-corruption activities

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tailored to that sector there is a greater chance of success than driving a one size fits all approach (Boehm 2014; McCusker 2006). The National Integrity Commission would coordinate this engagement to assist industry sectors to identify key threats and the development of their own preventative responses.

- ***Increase Prosecutions or Sanctions.*** Australia needs to increase its prosecution and sanction rate. In the United States of America, the use of deferred prosecutions while marginally effective has had the effect of making companies and individuals review their systems and behaviour. The use of administrative sanctions, freezing assets and recovering illicit funds in a more aggressive manner, requires more resources provided to anti-corruption agencies with a singular focus. The focus of these sanctions should be on deterrence, and therefore should focus on companies and individuals that present the greatest risk to Australia's national interests.

You will note that I place increased prosecutions and sanctions last in the list of possible activities. I do so on the basis that while our performance is poor in this space it is only one element and not the most effective. Australia needs to "fry a big fish" to remove any idea that corrupt actors can behave with impunity but without the supporting structures to coordinate a national response, this will have little long term impact. This approach is also not the remit of a National Integrity Commission but the responsibility of the relevant police, in particular the Australian Federal Police. While the Hong Kong ICAC and the Singaporean Corrupt Practices Investigation Bureau (CPIB) are powerful organizations with the ability to arrest and charge corrupt individuals, in the main their establishment was due to corruption in the police force (OECD 2013). In the Australian context there is the Australian Commission for Law Enforcement Integrity which fulfills the function of police oversight.

While the suggested approach above indicates that the National Integrity Commission should have strong investigative powers, these are secondary to its core objective to oversight and coordination of the national integrity system. The core objective should not be to undertake investigations, except in limited circumstances and then these should be joint efforts with other anti-corruption and law enforcement agencies. The commission should focus on a preventative strategy, which requires coordinating and oversighting the activities of the national integrity system, and its constituent elements. Examples of what the National Integrity Commission may investigate are:

- Cross jurisdictional matters which require a national response.

- Matters which represent a clear risk to Australia's national capabilities that are not clearly criminal but require a national response.

- Matters involving Parliaments that at the request of that Parliament require an independent investigation that would not be appropriate for law enforcement agencies.

- Matters relating to performance or behaviour of elements of the national integrity system, not normally covered by an extant agency or represent a clear risk to the national integrity system.

Finally, by taking a coordination, support and oversight role, a national integrity commission can allow state and local governments and agencies to devise and implement anti-corruption actions appropriate to their circumstances. By allowing for a decentralized response to

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corruption under a national strategy, there is a greater chance that the response will be effective (Shah 2006).

The above list is not exhaustive and there may be other initiatives or elements that can become a part of the national strategy. However, I believe these are a solid foundation from which to begin the process of coordinating limited resources available to implement a national integrity strategy.

Conclusion

While Australia can be proud of its record in developing strong institutions to support its society and protect its national interests, there still remains a great deal to be done in terms of closing gaps in our national integrity system through which corrupt actors move. This is not something that will be done in short order, but will take many years and a great deal of political will from all parties of the Parliament, as well as the States and Territories. To start this process Australian needs to implement a national integrity strategy designed to protect its capability in generating the conditions upon which our society thrives. The most appropriate mechanism to design and implementation of this strategy would be a national integrity commission.

Australia also has some moral responsibility as a good neighbour to deal with its own performance, to avoid the unintended consequences of lax enforcement. While there may be some view that it is not a priority, corruption weakens the institutions of our near neighbours making them prime targets for terrorism and radicalization. These are outcomes which are not in Australia's best interest.

As cautioned in this submission, a national integrity commission is not a broad based anti-corruption agency, nor a political tool to focus on only select elements of interest of the government of the day. A national integrity commission should focus on coordination, support and oversight role to mobilize a national response to corruption and misconduct from all sectors of Australian society.

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