Attachment 1

Comments
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FEDERAL ANTI-CORRUPTION POLICY TAKES A NEW TURN … BUT WHICH WAY? ISSUES AND OPTIONS FOR A COMMONWEALTH INTEGRITY AGENCY

Introduction

In June 2004, a quiet revolution took place in the Commonwealth's approach to federal public sector corruption with the unexpected announcement by the Attorney-General and Minister for Justice of a federal anti-corruption commission, to be titled the Inspector-General of Law Enforcement (IGLE).[1] Since the announcement, little has been heard publicly of the Commonwealth's plans. However, this fact itself highlights strategic issues of institutional and legislative design, on which careful deliberation is needed if Australia's federal public integrity infrastructure is to be effectively boosted rather than unnecessarily complicated by this change. What are the key issues raised by this, arguably the most significant development in the Commonwealth integrity system in 20 years?

The long road to reform

The question of the right institutional and legislative architecture for preventing and combatting wrongdoing in the federal public sector is not a new one. Since 1976, when the Commonwealth Ombudsman was established, the general trend has been to entrust that office with the functions of overall integrity "watchdog" through its role as office of final resort for complaints about defective administration. Thus in 1981, the *Complaints (Australian Federal Police) Act 1981* (Cth), implementing some early reports of the Australian Law Reform Commission, saw the Ombudsman cemented as the civilian oversight body for police integrity matters; and in 1991, recommendations of the Senate Standing Committee on Finance and Public Administration led to a modest increase in the Ombudsman's "major project" resources to boost its capacity to review or investigate any major cases of corruption or systemic maladministration.

Under this regime, the frontline capacity for investigation of bribery, fraud, theft or other clearly criminal corrupt behaviour involving Commonwealth officials lay with the criminal investigation functions of the Australian Federal Police (AFP) and later the National Crime Authority (NCA); now

[1] Ruddock Hon P (Commonwealth Attorney-General) and Ellison Hon C (Minister for Justice), "Commonwealth to Set Up Independent National Anti-Corruption Body", Joint Media Release (16 June 2004).

the Australian Crime Commission (ACC). Only where questions arose regarding the adequacy or propriety of these investigations, or the Ombudsman's own administrative investigations uncovered evidence of serious wrongdoing, did the Ombudsman become directly involved. Meanwhile, the Ombudsman also routinely audited the AFP's and NCA's use of telephone intercept (phone tapping) powers under the *Telecommunications (Interception) Act 1979* (Cth).

A major departure was proposed from this arrangement in 1996, when the Australian Law Reform Commission (ALRC) recommended that "a new single agency to be known as the National Integrity and Investigations Commission (NIIC) should be established to investigate or manage/supervise the inves tigation of complaints against the AFP and the NCA".[2] This recommendation proposed transfer of the Ombudsman's law enforcement oversight functions to a new, specialist body. The report was directly informed by a bifurcation in the approach undertaken by State governments, in which Victoria, Tasmania and South Australia had retained oversight by either the Ombudsman or a similar but specialist Police Complaints Authority, but NSW (in 1988), Queensland (in 1990) and Western Australia (in 1991) had also added new stand-alone anticorruption commissions. In 1994 to 1996, moreover, the NSW Wood Royal Commission into Police Corruption had re-legitimised the notion of independent specialist police oversight by recommending creation of the NSW Police Integrity Commission, *in addition to* the 1988 Independent Commission Against Corruption. However, neither the first or second Howard Coalition governments elected to implement the ALRC's 1996 recommendations.

The catalyst for the 2004 announcement was party-political debate in Victoria over the response to a substantial upsurge in organised crime-related violence in Melbourne, in which police corruption was also implicated.[3] Initially, the Victorian Coalition Opposition endorsed the Bracks Labor government's response of massively expanding the Victorian Ombudsman's office, which now also includes an Office of Police Integrity. However, in late May 2004, the Victorian Opposition changed its policy to a preference for introduction of a separate, new anti-corruption commission of the kind adopted in New South Wales, Queensland and Western Australia. The Commonwealth Government's announcement on 16 June 2004 followed two events: first, a request by members of the Victorian Opposition that the Commonwealth refuse telephone interception powers for the expanded Victorian Ombudsman; and second, an ABC television *Four Corners* documentary in which the Commonwealth itself was criticised for retaining the same police oversight model as the Coalition Opposition was now rejecting in Victoria.[4] Accordingly, the Commonwealth announced it would establish "an independent national anti-corruption body … with telephone intercept powers which, if required, would be able to address corruption amongst law enforcement officers at a national level"; and that it had rejected Victoria's request for telephone intercept powers for the Victorian Ombudsman, but that "if Victoria was to raise a properly-formulated independent Commission – similar to those in WA, New South Wales and Queensland – the Government would move quickly to confer telephone intercept powers on this body".[5]

Little further has been said publicly regarding the Commonwealth's plans, but in January 2005 the Prime Minister's office confirmed the government was "currently in the process of establishing a new independent statutory anti-corruption body equipped with royal commission powers". Provisionally styled the "Inspector-General of Law Enforcement (IGLE)", the body is expected to "prevent, detect and investigate corruption in the Australian Crime Commission (ACC) and Australian Federal Police (AFP) … collect and analyse intelligence on corruption within or incidental

[2] Australian Law Reform Commission, *Integrity: But Not By Trust Alone: Australian Federal Police and National Crime Authority Complaints and Disciplinary Systems*, Sydney, ALRC Report No 82 (Commonwealth of Australia, 1996) Recommendation 6.

[3] See Bottom B and Medew J, "The Unfair Fight: Why Corruption's Unchecked", *The Age* (23 May 2004) p 8; Gilchrist M and Bachelard M, "Stopping The Rot", *The Australian* (26 May 2004); Lewis C, "How Best to Use Fitzgerald", *The Age* (4 June 2004); Skelton R and Shiel F, "The Myth of the Clean Police Force", *The Age* (12 June 2004); Gray D et al, "Victorians Want Crime Panel: Poll", *The Age* (17 June 2004); Victoria, Parliament, Legislative Assembly, *Debates*, *Ombudsman Legislation (Police Ombudsman) Bill* Second Reading Speech (13 and 27 May 2004), pp 1317ff, 1364ff; Victoria, Parliament, Legislative Council, *Debates*, "Police: Corruption and Organised Crime" (9 June 2004) p 5ff.

[4] Australian Broadcasting Corporation, *Four Corners* (ABC Television, 14 June 2004).

[5] Ruddock and Ellison, n 1.

to Australian Government law enforcement generally" and "work collaboratively with the Commonwealth Ombudsman, the AFP and the ACC to present a comprehensive anti-corruption regime".[6]

The Commonwealth has no apparent plan to consult publicly on the institutional form or legislative mandate of the new body – a regrettable fact given the importance of any such body for the fabric of federal public accountability. However, based on the chequered history of the proposal and what is known about it so far, at least three major issues arise that are clearly instrumental to its design.[7]

1) Is an "Inspector-General" the right model?

The first uncertainty surrounding the new Commonwealth body is whether, or how, it will achieve its objective of proactive corruption prevention. This objective, also increasingly framed in terms of building corruption resistance in organisations, is frequently identified as distinguishing the mandates of the newer anti-corruption bodies from the complaint-handling work of the older integrity bodies, especially Ombudsman's offices. Part of the rationale for new institutions, prior to and including ALRC Report No 82, has been the largely reactive nature of complaint-handling agencies, whose capacity to proactively self-identify important areas of administrative investigation is constrained by their dependency on complaints as information sources, and whose capacity to investigate is often constrained by the generalist nature of their expertise and the fact their resources are dedicated primarily to complaint resolution. By contrast, more serious corruption matters involve more active and resource-intensive investigation methods, more akin to those needed to sustain complex organised crime prosecutions. Similarly, corruption prevention relies on:
(a) resource-intensive intelligence gathering functions in relation to suspect individuals or networks;
(b) the collection and analysis of data pointing to areas of corruption risk or low corruption resistance; and
(c) positive programs for proactively reviewing and building integrity standards in target organisations, rather than waiting for complaints or identified misconduct cases to disclose problems.

These positive, proactive research and prevention functions are implicitly (and sometimes explicitly) recognised as important in the Commonwealth's statements so far. The Commonwealth's initial choice of title for the new body, "Inspector-General", nevertheless raises some question as to how exactly these functions will be institutionalised, and how effectively they will be resourced. In Australia, the title "Inspector-General" is unique to the Commonwealth sphere and has two main applications: in defence, where both the Department of Defence and the Australian Defence Force possess Inspectors -General to oversee responses to internal integrity, administrative and disciplinary problems; and the Inspector-General of Intelligence and Security (IGIS), established in 1986 to ensure that Commonwealth intelligence agencies conduct their activities within the law and behave with propriety.

Is the choice of Inspectorate-General for the new body an indication that it will follow a similar role? If so, the degree of its likely proactivity in corruption research and prevention needs further consideration, since the existing experience of the IGIS is predominantly as a reactive complaint handling body, in effect a specialist Ombudsman in the intelligence field. Only relatively recently has the IGIS begun developing proactive inspection regimes,[8] and then taking a compliance-based (or audit) approach rather than the type of strategic, research and/or intelligence based approach required for anti-corruption efforts. On one hand, there is no reason in principle why either Ombudsman's

[6] Burford S, Senior Advisor, Office of the Prime Minister to Transparency International Australia, Correspondence, 20 January 2005.
[7] Sections of this analysis are drawn from the results of the first National Integrity System Assessment (NISA) of Australia, an Australian Research Council-funded linkage project led by Griffith University and Transparency International Australia: see http://www.griffith.edu.au/centre/kceljag/nisa viewed 21 January 2005.
[8] Inspector-General of Intelligence and Security, *Annual Report 2003–2004*, at [50] – [54].

offices or inspectors-general could not develop greater capacity in these proactive approaches, given the right legislative responsibilities, resources, skills and appointments. However, if the intention is to escape the reactive complaint-handling constraints placed on such matters by the role of the Ombudsman's office, then it seems debatable whether the Inspector-General model, being similar to the Ombudsman model, is automatically appropriate.

2) Should the new body be limited to the Australian Federal Police and Crime Commission?

Although the original announcement was headed "Commonwealth to Set Up Independent National Anti-Corruption Body",[9] any implication that the new agency would have a comprehensive jurisdiction to deal with corruption throughout national government is clearly misplaced. At the time, the only references to likely jurisdiction related to Commonwealth law enforcement officers. The move towards an Inspectorate-General of Law Enforcement (IGLE) has made this limitation even clearer, with no reference to any federal agencies under the new body's jurisdiction other than the AFP and ACC.

This limited jurisdiction appears to be a somewhat illogical by-product of the political circumstances that triggered the announcement in May–June 2004, in which public debate focused only on police corruption. Concerns emanating from Victoria, to the effect that at least three other States now remedied police corruption with a specialist anti-corruption commission, appear to have been taken literally by the Commonwealth – without recognition that all three of these States also remedy *other* forms of official corruption using the same commissions, and indeed, that the trigger for creation of the ICAC (NSW), Crime and Misconduct Commission (Qld) and Corruption and Crime Commission (WA) or their predecessors was as much wrongdoing in other areas of government, including among elected officials, as among police services.

If the Commonwealth is to enhance its official anti-corruption capacities, should this be limited to two agencies? The answer reached by the recent three-year National Integrity System Assessment (NISA), funded by the Australian Research Council and Transparency International Australia, is "no".[10] Any argument that no broader capacity is necessary tends to rely on a supposed insufficiency of evidence that there is serious wrongdoing among federal agencies, but such arguments should be viewed with caution, for at least five reasons. First, were this true, it would only reinforce our current dependency on the investigations made by the Australian Federal Police into other agencies, provoking the question why the expertise of the new body should not also be directed towards these "original" corruption risks and so reduce dependency on the middleman. Second, however, there is plenty of evidence that Commonwealth administration is no more inherently immune from corruption risks than equivalent types of officialdom elsewhere;[11] and of course, any such assumption is itself inherently dangerous. Third, is a review function in relation to only two agencies sufficient to warrant the level of resources and number of staff with expertise to carry out these complex investigations, or will it be left languishing as a small office unable to achieve critical mass? Fourth, even if law enforcement is accepted as particularly deserving of anti-corruption scrutiny, there is no logical reason why only the AFP and ACC should be regarded as relevant – the investigation and enforcement functions of the Australian Customs Service, Australian Taxation Office and Commonwealth Department of Immigration are at least as extensive and sensitive, certainly in their direct impacts on businesses and communities.

Fifth and finally, who will investigate those cases of suspected serious wrongdoing that may arise from time to time in relation to these or any other agencies, that do not fall clearly within the criminal

[9] Ruddock and Ellison, n 1.

[10] Brown A J et al, " Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's National Integrity Systems", Draft Report of the National Integrity System Assessment, Griffith University and Transparency International Australia; 5th National Investigation Symposium (November 2004) www.griffith.edu.au/centre/kceljag/nisa viewed 21 April 2005. See pp 19-24, 37, 60 (Recommendation 1).

[11] A comprehensive picture is currently difficult to attain, but the Australian National Audit Office's 2002–2003 Fraud Survey identified 22.5% of reported fraud against Commonwealth agencies in 2001–2002 as "internal fraud", valued at $2.6 million: see Roberts P, "Don't Rock The Boat: The Commonwealth National Integrity System Assessment" *Proceedings of the Australasian Political Studies Association* (University of Adelaide, September 2004).

investigation functions of the AFP or the new agency? At present, the answer remains the Commonwealth Ombudsman, meaning that as long as the jurisdiction of the anti-corruption agency remains limited, then even if it is well resourced, there will still *also* be the need for the boosting of major investigation skills and resources in the Ombudsman's office of the kind frequently argued since the mid-1990s.[12] In response to the June 2004 announcement, the Commonwealth Ombudsman took the relatively clear position that "in broad terms … the Ombudsman should not be the chief agency responsible for investigating corruption allegations".[13] However, this only tends to highlight the potential inadequacies of a fragmented situation in which the Ombudsman's office nevertheless continues to be forced to do so, perhaps in a deficient de facto way, or alternatively no one does, because the Commonwealth's new anti-corruption body has such a narrow focus.

3) How can, and should, the new body be effectively integrated with the existing integrity system?

While the government has indicated its desire for the new agency to work collaboratively with other agencies to present a "comprehensive anti-corruption regime", experience shows that achieving an effective balance between the roles of multiple integrity agencies can be more complex than this simple intention suggests. Some of this complexity was demonstrated in June 2004 when the Commonwealth refused telephone intercept powers to the Victorian Ombudsman, ostensibly on the basis that this would involve a conflict of interest – in each jurisdiction, one of the Ombudsman's roles is to monitor how other agencies (including anti-corruption commissions) use such powers, rather than possessing such powers themselves. This arrangement, which has evolved administratively over time rather than through any high theory, highlights the extent to which Australian governments' current matrices of multiple integrity agencies serve to share, complement, and cross-regulate each others' powers in a variety of ways. In newer democracies these institutional interrelationships have been described as systems of "horizontal accountability",[14] and in Australia they disclose a system of "mutual accountability"[15] recently also described by NSW Chief Justice Jim Spigelman as constituting a "fourth branch" of government.[16]

As theory continues to follow practice in the development of Australian integrity systems, the prospect of an expansion of interrelationships at the Commonwealth level revives a suite of questions demanding careful legal thought, as well as wider public debate. For example, if even the present system of telephone intercept audit is to be maintained by the Commonwealth Ombudsman, so the new anti-corruption body may be entrusted with intercept powers, this presumes the Ombudsman will have at least some power of oversight over the new body. Indeed, if complaints about defective performance or inadequate investigations were to arise against the new body – as seems likely – then would the Ombudsman have power to review its cases? While this prospect can conjure up concerns about a never-ending stream of complaint mechanisms, in theory and practice there are more reasons why this *should* be the case, than not. Rather than attempting to segment and fragment the jurisdictions of different integrity agencies, experience suggests that there are benefits in acknowledging the inevitability of concurrent de facto jurisdictions. In other words, the reality of

[12] For more on integrity agency resourcing across jurisdictions, see Brown A J and Head B, "Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems" *Proceedings of the Australasian Political Studies Association* (University of Adelaide, September 2004); Brown A J and Head B, "What Price Integrity? Funding Australia's integrity systems" Occasional Paper, Democratic Audit of Australia (January 2005) http://democratic.audit.anu.edu.au/ viewed 21 April 2005; Brown A J and Head B, "Institutional Capacity and Choice in Australia's Integrity Systems" (2005) 64 *Australian Journal of Public Administration* (forthcoming).

[13] Australia, Commonwealth Ombudsman, *Annual Report 2003–2004*, Ch 1 "Year in Review".

[14] Schedler A, Diamond L, and Plattner M (eds), *The Self-Restraining State: Power and Accountability in New Democracies*, (Lynne Rienner, 1999); Pope J (ed), *Confronting Corruption: The Elements of a National Integrity System (TI Source Book)* (2nd ed, Transparency International, 2000) pp 24-26.

[15] Braithwaite J, "Institutionalizing Distrust, Enculturating Trust" in Braithwaite V and Levi M (eds), *Trust and Governance* (Russell Sage Foundation, 1998) p 354; Mulgan R, *Holding Power to Account: Accountability in Modern Democracies*, (Palgrave McMillan, 2003) p 232; Sampford C, Smith R and Brown A J, "From Greek Temple to Bird's Nest: Towards A Theory of Coherence and Mutual Accountability for National Integrity Systems" (2005) 64 *Australian Journal of Public Administration* (forthcoming).

[16] Spigelman CJ, "The Integrity Branch of Government" (2004) 78 ALJ 724.

misconduct, maladministration and corruption matters is that they easily and frequently defy the artificial legal divides sometimes sought to be placed around them through the delineation of jurisdictions by subject matter (as opposed to the skills specialisations needed to resolve them). Similarly, integrity agencies (or governments) that seek to resist public pressure for them to also carry out their functions in respect of other integrity agencies, often end up fighting an unproductive and losing battle.

The question becomes how an expanded but still "comprehensive" and "collaborative" Commonwealth integrity regime will be progressed in practice. More debate is clearly needed about how shared legal jurisdictions can be achieved and managed between key investigation and review agencies, including the new body, Ombudsman, AFP, Australian National Audit Office (ANAO), Australian Public Service Commission, the internal integrity areas of Commonwealth agencies generally, and the integrity mechanisms of the Commonwealth Parliament, should these ever develop in a manner consistent with State and international experience. Further consideration needs to be given to the operational mechanisms for coordination of these agencies, in a policy and practical sense, as well as their evaluation and oversight. These should include simple institutional reforms which build on existing State and Commonwealth practice, such as extension of the Administrative Review Council to include more of the Commonwealth's key integrity agencies (including the new body), and review of parliamentary standing committee arrangements for ongoing monitoring and support for public integrity bodies, which currently exist for some agencies such as the ANAO, but not for others such as the Ombudsman.

Conclusions: More debate needed?

The addition of the first major new Commonwealth integrity institution in 20 years provides an opportunity for considered renewal and enhancement of the integrity system as a whole. Clearly this opportunity should not be wasted, yet taking full advantage of it – and ensuring public confidence in the results – would appear to deserve more public discussion and consultation than currently seems planned. Sooner or later, it seems likely that the main reforms canvassed here will be necessary at a Commonwealth level: the need to ensure a proactive rather than simply reactive anti-corruption body; the need for that body to have a comprehensive jurisdiction covering all Commonwealth officeholders rather than simply two agencies; and the need for integrity policy coordination and oversight mechanisms to be brought up-to-date with contemporary practice. While any enhancement in the Commonwealth's integrity systems is welcome, the real test at present may be whether the opportunity to bolster public confidence through a transparent, comprehensive approach is taken now, or an important but piecemeal reform is completed, with loose ends left to unravel and be tied up later.

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