



Why we need a Commonwealth commission against corruption

By Geoffrey Watson SC

The Hon T F Bathurst AC and N A Wootton recently presented an important paper at a symposium on Australia's public integrity institutions. The Bathurst and Wootton paper traced the purposes, activities, powers, and challenges facing integrity commissions around Australia, with a view to identifying particular issues which might confront the creation of a national anti-corruption agency. None of the problems are insurmountable. The real issue is not whether we can have a federal agency, it is whether we should have such an agency.

I say the case for the creation of a federal integrity commission is compelling.

Public sector corruption is the most serious crime on the planet. It dwarfs the international drug trade – which, incidentally, could not continue without corruption in the public sector. In 2014 the World Economic Forum



estimated that the international cost of corruption was more than \$3 trillion annually – that is more than five per cent of the global GDP and twice the size of the Australian GDP. The World Economic Forum has estimated that corruption increases the cost of doing business by up to 10 per cent.

It is not just a matter of money; we are talking about lives. Twenty thousand human

beings die each day from starvation and preventable diseases. In 2005 the World Bank estimated that between 20 per cent and 40 per cent of all official development assistance was simply stolen. Researchers have conservatively estimated that if corruption could be reduced 5,000 human lives could be saved each day.

'So what' – you say – 'that is the third world'. Well, I accept that corruption in Australia is less than it is in the third world, but it is still a serious problem here, and it is becoming more serious. A well-respected annual study by Transparency International rates nations in terms of their public sector corruption. The recent studies show that Australia's rating has fallen year after year (incidentally – yet another area where we badly trail New Zealand). This is an independent study by a highly respected body and it shows that corruption in Australia is worsening. This accords with public opinion

– recent polls show that only 15 per cent of Australians trust our federal politicians, and 85 per cent believe there is corruption at a federal level.

Perceptions are important, but even more so when the problem is real. The problem is real. In a 2016 census 3,000 federal public servants reported witnessing conduct of fellow public servants which was inappropriate or illegal. The conduct included nepotism, blackmail, bribery, fraud, and collusion with criminals. That was in only one year. And that is a startling figure given the secret nature of corruption – if that is the corruption being observed, then the actual rate of corruption would be orders of magnitude higher.

We need a federal anti-corruption agency for two principal reasons. The first is noble – it is to help restore public confidence in the federal public sector. The second is more visceral – it is to actually catch and punish the criminals profiting from corruption.

I might add that there is also a practical need for such a federal agency. Think about the current inquiry initiated by the South Australian government into the rotting of allocation of water in the Murray-Darling scheme. The work of the commissioner, Bret Walker SC, has been stymied by the reluctance of other governments, federal and state, to cooperate with his inquiry. It seems that only an overarching federal agency will be able to solve this problem.

Why don't we already have a federal anti-corruption agency?

I might be naïve, but it surprises me is that there is any opposition to the creation of a federal anti-corruption agency. Why would you oppose measures to fight crime? Why would you oppose fighting public sector corruption? The fact of the existence of any opposition is disturbing. It is even more disturbing when you look at the identity of some of the opponents.

Two of the strongest opponents to the creation of a federal anti-corruption have been the Australian Public Services Commission and the free-enterprise think tank, the Institute of Public Affairs. There are connections between them.

In 2017 the Australian public services commissioner, John Lloyd, made a submission to a Senate Select Committee denouncing the call for a federal anti-corruption agency (his statistical basis for doing so was deeply puzzling – as I explain below). In 2018 Mr Lloyd resigned from his position following controversy over his relationship with – you guessed it – the Institute of Public Affairs.

Meanwhile the Institute of Public Affairs will not reveal the identity of those persons funding its relentless campaign to forestall a federal anti-corruption agency. It really makes you wonder.

And the reasons proffered as to why there is

no need for such a commission are puzzling. Three are given: that there is no corruption at a federal level; that such an agency would be too expensive; and that there is no need for such an agency as there are organisations already attending to the task.

Each of these arguments is obviously wrong.

No corruption at the federal level

It is foolish to contend that while there is corruption elsewhere, somehow, federal government remains pristine. In 2014 the then prime minister, Tony Abbott, dismissed the need for a federal anti-corruption agency out of hand – he said that was because, to his mind, Canberra was a *'pretty clean polity'*. That sounds more like a creed, rather than a considered statement of policy.

In accordance with the Abbott creed, it has repeatedly been said that there is no data supporting corruption at a federal level. This argument is not only absurd, it is circular. We have no data because we have no agency collecting the data. Without a federal agency armed with the appropriate investigative tools, corruption remains undetected. On the Abbott argument the longer we postpone creating an agency with the ability to find any public sector corruption, the less corruption there will be.

An even stranger view was advanced by the gentleman I mentioned before – John Lloyd, the Australian Public Service Commissioner. In his submission to a Senate Select Committee Mr Lloyd explained that a national integrity commission was unnecessary because the incidence of corruption in the federal public service was inconsequential – as he put it, in 2016 'only 4 per cent of Australian public service employees reported having witnessed another employee in engaging in behaviour they regarded as corrupt'. What? What do you mean – *'only'* 4 per cent? In 2016 there were over 155,000 federal public servants. Using Mr Lloyd's figure, something like 6,200 had witnessed corrupt conduct. That level of corruption is serious – it warrants urgent action.

We have seen this same argument play out in the real world in recent times. For many years a succession of Labor and Coalition governments in Victoria claimed there was no need for an anti-corruption body because there was no corruption. Despite the confidence of those assertions, since its inception in 2012 Victoria's IBAC has proceeded to reveal rampant corruption in several government departments.

The state-based anti-corruption bodies have demonstrated widespread and deep-rooted corruption in the public sector. It is block-headed to think that corruption is occurring in Brisbane, Sydney, Melbourne and Perth, while Canberra remains immune to the illness. I will stop this now – it is frankly ridiculous to assert that there is no corruption in the federal public service.

Too expensive

This argument is not only implausible, it is bad economics.

The leading economist Richard Denniss sees an effective national integrity commission as an essential component in encouraging and maintaining foreign investment. International studies demonstrate that any kind of corruption will act as a deterrent for foreign investment; foreign and institutional investors want certainty and protection. A common question relates to anti-corruption controls and regulations. Other countries competing for the money point to their own independent agencies as a lure to investors. We do not have one. According to Dr Denniss a federal integrity agency would quickly pay for itself.

And if it really is truly a question of preserving public money, then possibly some or all of the funds currently allocated to the National Windfarm Commission could be diverted toward a National Integrity Commission. Another means might be to cut back the current spending on the federal body known as the Independent Scientific Committee on Wind Turbines. I sense that actually fighting corruption is more important than tilting at windmills.

The need is pressing. Surely the money can be found.

No need for a central agency

This is a more complicated issue. We already have several federal agencies which can examine aspects of corruption – described as a *'multi-faceted approach'*. That may be true, but multi-faceted does not mean effective. One facet is our powerful anti-international bribery legislation, which, after 18 years in operation, has only secured two convictions. Meanwhile, international bribery flourishes.

Several highly qualified commentators have pointed out that the current federal scheme is too diffuse, unfocussed and ineffective. Professor A J Brown has described the current regime as *'under-inclusive and unwieldy'*. Professor George Williams describes it as *'resulting in under reporting and confusing'*. In particular, as Professor Brown says, the current scheme means that federal politicians are not subject to legally enforceable accountability mechanisms. The controls at the federal level are so inadequate that, according to Professor Anne Twomey, *'at a federal level you can get away with almost anything'*.

Think about a recent instance where a federal minister, Stuart Robert, had to repay tens of thousands of dollars previously successfully claimed by him from the public purse. The repayment only occurred after the matter had been exposed by investigative journalists. It appears there will be no investigation or even basic inquiry as to how this occurred. It is so much worse because Mr Robert – a politician with a history of unusual financial activities – is the assistant treasurer and charged with

protecting our public purse.

The principle in Mr Robert's case might be important, but the sums are trivial. But some of the matters of concern involve very large sums. Two recent examples. Earlier this year the federal government allocated \$443 million to a shadowy, inexperienced body to protect the Great Barrier Reef, one of our greatest assets. The money was given to an inexperienced body outside government guidelines. Why? More recently the government suppressed an auditor-general's finding that hundreds of millions of dollars could have been saved had negotiations with defence contractors been conducted differently. Why? In both instances, the information only came to light through the work of investigative journalists. Maybe there is nothing wrong with either deal, but without the ability to investigate how would we know?

The extraordinary powers of investigation

The Bathurst and Wootton paper addresses one vexing issue surrounding the creation of a federal anti-corruption agency: whether or not it should be given 'extraordinary powers'. The extraordinary powers are the ability to pierce legal professional privilege and to override, for limited purposes, the privilege against self-incrimination. The Bathurst and Wootton paper examines how these powers have been provided to similar investigative bodies and how protective devices are put in place in the event the matter enters the criminal justice system.

If a national integrity commission is to be effective it needs the extraordinary powers of investigation. Public sector corruption is an extraordinary crime and it is almost impossible to detect or expose using ordinary investigative powers.

There are several reasons why this is so. Perhaps the most fundamental is that corruption has many of the characteristics of a 'victimless crime'. If, for example, private contractors are skimming money from a major public contract, it is difficult to notice that this has occurred. Often it requires a very careful analysis of the detail of the contracts. More often than not the corruption will go undetected.

Another special difficulty is that corruption is one of those crimes which is organised by persons who are usually the most knowledgeable about the processes and, hence, most likely to be aware of the loopholes. Think about it. Starting with the minister and working your way down. Who would be best armed to know the intricacies of the manner in which a mining licence could be granted? Experience has also shown that those involved are careful to lay down potential excuses in preparation for the ultimate decision. Go back to the recent conviction of the former NSW mining minister, Ian Macdonald, who had granted a coal mine licence improperly, but

laid the groundwork so that it was said that the grant of the licence was for the creation of a training mine. He claimed that a training mine was designed to train and protect the mine workers from injury. A noble purpose: if it was true. A jury found that it was not true. But you can see how it may have carried force.

And cutting through legal professional privilege is essential when investigating corruption. Corruption is a money crime. Often it involves a lot of money. Often it involves moving currencies between jurisdictions. Experience has shown that the larger the scale of the corruption the more likely it is that lawyers will be involved. It is a further complication that the co-conspirators do not fully trust each other and often each will need a lawyer to intervene to divide the spoils.

So it is that an investigative agency is able to acquire the critical information from lawyers who had been retained on conveyancing and contractual matters relevant to the corrupt transaction. The actual lawyer may (commonly) suffer a full memory failure, but by habit they are usually careful note takers.

The power to compel testimony is just as important. Bear in mind that the process is an *investigation*, not a *prosecution*. And it is an investigation which is designed to get to the truth. Where you have a corrupt conspiracy, unless one of the conspirators breaks ranks, the only way to get to the truth is to compel those involved to give evidence.

It is true that, on their face, the application of such powers may seem to interfere with ordinary protections provided in the criminal justice system, that is, your civil liberties. But there are adjustments in place to protect against any damage to the individual. When the extraordinary powers are exercised it is pursuant to a qualification so that, in the event any criminal proceedings are pursued, the privileges are restored. In this respect I think it is salutary to note that Civil Liberties Australia and the NSW Council for Civil Liberties both addressed a recent Senate select committee and supported the creation of a federal anti-corruption agency armed with extraordinary powers.

Public hearings

The Bathurst and Wootton paper also addresses another difficult issue: the benefits and detriments from an anti-corruption agency conducting part of its process through a public hearing.

The ability to call a public hearing is a critical power for any anti-corruption agency. Unless there is the power to hold public hearings any new federal agency will not gain public trust.

Just imagine for one moment that the work of the Royal Commission into Institutional Responses to Child Abuse had been conducted privately, not publicly. No-one would have trusted the processes and the fine work

done by that royal commission would have been lost to us. It would have been a pointless exercise. Worse, it would have been perceived to have perpetuated the secrecy which has surrounded those terrible crimes.

Ordinary people engage with a public inquiry. The public hearing creates a general sense that something can be done, that something is being done and that wrongs can be righted. I add that public engagement has a powerful positive influence on the investigation. When matters become open it is my experience that members of the public come forward with important information. Some, who previously thought there was no point in doing so, finally get their opportunity to speak out. Others, who were previously scared to do so, are emboldened into action.

Again, an anti-corruption inquiry is an *investigation*, not a *prosecution*. You should never underestimate the positive impact that the publicity surrounding a public hearing can create in terms of the production of further evidence.

The ability to hold public hearings is essential. Corruption is a crime which occurs in the dark. The public hearing is the chance to shine light into the darkest corners.

What is happening?

A federal anti-corruption agency is on its way. Polling has demonstrated, time after time, that a large majority of Australians favour the creation of a national integrity commission. It is a vote-winner. Maybe that is why it now seems that a majority of parliamentarians also support the creation of such an agency.

True, some politicians have held the creation of a federal anti-corruption body as policy for some long time, notably the Greens, the Nick Xenophon Party and some influential independents such as Andrew Wilkie, Cathy McGowan and Derryn Hinch. It appears Kerry Phelp will also support the proposal.

More recently the Australian Labor Party has announced that it is going to the next federal election on a promise of creating a powerful and independent national integrity commission. The position of the Coalition remains unresolved. It would be so much better if this could be a bi-partisan move.

In conclusion

I am confident that we will soon get a national integrity commission. Australia needs it and the public wants it.

The real battle will be around assuring that such a federal agency is given the appropriate jurisdiction, sufficient funding to ensure its independence and its efficacy, and the necessary powers to do its job. We cannot afford anything less.