

## **Committee Secretary**

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity  
PO Box 6100  
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CANBERRA

## **Submission: Inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006***

### **Introduction**

This submission is founded on the premise that sustaining public trust in the integrity of Australia's public institutions ought to be an issue of paramount importance for Australian governments, based on the widely accepted view that 'public office is a public trust', and that public confidence in the integrity of our public institutions underpins our democratic system of government.

This Submission addresses the following matters relevant to the Terms of Reference for this Inquiry:

1. The continuing and significant under-estimation of the extent of public sector 'corruption', 'official misconduct', and non-compliance with established ethical standards, and its impact on the National Anti-Corruption Plan and public sector corruption prevention activities;
2. The opportunity potentially afforded by an expansion of ACLEI to enable Australia to fully comply with the UN Convention Against Corruption (UNCAC), to which Australia is a State Party.

### **"Corruption"**

For ease of reference, I restate here the position I take in relation to the way in which the term 'corruption' is used in Australia: we tend to adopt uncritically the conceptualisation favoured in the Anglo/Western world (under the influence of the World Bank and the OECD), which is characterized by a '*Disease model*', in which corruption is regarded as monolithic, and akin to an infection or a cancer, for which one day 'the cure' will be discovered. This can seriously mislead thinking about policy responses to corruption

I propose an alternative conception, which might be called the '*Termite infestation*' model, in which corruption is recognised as opportunistic, active, and deliberately covert. When well-resourced and organised, corrupt *conduct* by individual officials can feed Organised Crime, defeat the rule of law, support State Capture, create porous national borders, undermine markets and the provision of state services, compromise the integrity of public institutions, support trafficking and Terrorism, sustain money-laundering, and encourage clientilistic networks of patronage and mutual obligation for mutual benefit, in a self-reinforcing system. There is no single 'cure' for such infestations: they must each be dealt with individually and actively, on a continuous basis.

Australian responses over the past three decades to perceived corruption and misconduct in both public sector and business have generally been to prefer to establish new independent 'watchdog'

regulatory institutions, such as ICAC-style bodies or Integrity Commissioners (or increasingly, hybrids of the two forms), ACCC, ACC, and ACLEI, for *ex post facto* investigation and prosecution of cases.

This Submission takes the view that the Commonwealth's approach to dealing with corruption on the basis of multi-agency overlapping jurisdictional efforts to detect and prosecute cases of 'corruption' which constitute a criminal offence, is inadequate as the basis of a national corruption-prevention strategy. This is so, in this Submission's view, not least because prosecution and conviction, if achieved, are generally too uncertain, delayed, uncoordinated, and unfocused to be effective in providing educative outcomes for prevention.

Two examples suffice to make this point in different ways. There has been no criminal prosecution of anyone involved in the Australian Wheat Board scandal of 2006, which related to events of 5 years earlier, despite the series of findings and recommendations by the Cole Inquiry, and enormous damage to Australia's interests. The prosecutions of bribery allegations involving executives of Securrency Corporation and Note Printing Australia occurred some five years after the events, and then only after exposure by *The Age* Newspaper and ABC's *Four Corners*.

The need for a positively co-ordinated and active national program is recognised by the UN Convention Against Corruption:

## **Chapter II**

### **Preventive measures**

#### *Article 5* *Preventive anti-corruption policies and practices*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

#### *Article 6* *Preventive anti-corruption body or bodies*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
  - (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
  - (b) Increasing and disseminating knowledge about the prevention of corruption.

At least at the national level, the lack of a dedicated Commonwealth institution with responsibility for taking an active role in prevention of forms of corruption other than crime, means that it is arguable that Australia is not compliant with its obligations under UNCAC, which Australia ratified in 2005.

The UN Review Committee which assessed Australia's compliance with the Convention in 2012 appears to have concurred with this view, as it reported, in typically diplomatic terms, that Australia still has work to do in two important areas:

**“ Challenges and recommendations**

The following steps could further strengthen existing anti-corruption measures:

- ....
- The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistleblower protection and to expedite access to existing protections for private sector whistleblowers.
- Continue the consultative process for the development of a comprehensive national anti-corruption action plan, which will include an examination of how to make anti-corruption systems more effective.

<http://www.ag.gov.au/anticorruptionplan>

The first response to the UN Assessment by the Australian government was more positive, even if it was significantly inaccurate: in a media release published by the Attorney General's Department on the same day as the UN Committee released its findings, 18 June 2012, the government claimed -

*“The findings of a United Nations review released today have commended Australia for its comprehensive and proactive anti-corruption arrangements.*

*The review, conducted by a team of experts from the United States and Turkey, and facilitated by the United Nations Office on Drugs and Crime found Australia fully compliant with chapters III and IV of the United Nations Convention against Corruption.*

...

<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/18-June-2012-Australia-receives-top-marks-for-anti-corruption-practices.aspx>

It is a concern that the Australian government appears not wish to recognise that its institutional approach to corruption prevention is regarded as inadequate, and that the government's expressed intention to remedy deficiencies is being taken on trust by the UNCAC assessors.

## The National Anti-Corruption Plan and Corruption Risk

The development of Australia's first National Anti-Corruption Plan was announced in September 2011, identifying the Australian Government's commitment of \$700,000 to develop and implement the Plan. A key objective of the Plan was stated as being "...to strengthen Australia's existing governance arrangements by developing a whole-of-government policy and plan on anti-corruption", based on a multi-agency approach, which would vest responsibilities for anti-corruption policies and initiatives with a number of Commonwealth agencies, under a cohesive framework and strengthen the Government's capacity to identify and address corruption risks. ( See: <http://www.ag.gov.au/Crimepreventionandenforcement/Corruption/Pages/NationalAntiCorruptionPlan.aspx> )

The Discussion Paper issued by the Department observes, correctly, that:

*"— Corruption has the potential to undermine Australia's reputation for high standards of governance, robust law and justice institutions, and transparent and fair markets. ... Effective anti-corruption measures discourage bribery of public officials and uphold clean government.' However, even one corruption or bribery matter can damage Australia's international standing. For example, the [Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme](#) (the Cole Inquiry, 2006) found that the adverse consequences of the Australian Wheat Board's (AWB) bribery of Iraqi officials were "immense." Trade with Iraq worth more than A\$500 million per annum was forfeited, and AWB cast a shadow over Australia's reputation in international trade. Transparency International attributed this scandal to Australia temporarily losing its place in 2007 as one of the ten least corrupt countries in the world...." (page 9).*

The Discussion Paper further acknowledges that:

*"...The Australian Government identified serious and organised crime as a national security priority in the [Commonwealth Organised Crime Strategic Framework](#). The framework identifies corruption as a major challenge in addressing organised crime. Criminal networks actively seek out individuals within law enforcement and other public sector entities to corruptly undertake and conceal illicit activities, and to launder the proceeds of crime. Similarly, the Australian Crime Commission's 2011 report, [Organised Crime in Australia](#), analysed the international convergence of corruption, political instability and violent extremism. This convergence provides an enabling environment for moving and exchanging drugs, arms, people, stolen or pirated goods and for funding criminal and extremist activities..." (page 9).*

Even so, the Discussion Paper has been the subject of recent criticism, which this Submission endorses, for lacking an adequate focus on strategic interventions, while concentrating on the institutional *status quo* in the form of the existing system of institutions whose main mandate is to deal with crime. *Corruption Prevention*, as envisaged by the UNCAC, garners little attention.

The justification for this lack of attention to Corruption Prevention may be found in the assessment, carried in the Discussion Paper, that public sector corruption is not a significant threat in Australia.

*"...Data from the most recently published Australian Public Service Commissioner's [State of the Service Report](#) shows the level of misconduct in the Australian Public Service continues to be low, with less than four in every 1,000 employees being found to have breached the APS Code of Conduct.*

*Any instances of fraud, however, can be damaging to the Australian Government, both financially and in terms of reputation.”* (page 10)

On the basis of a total of 160,000 APS employees, that points to some 640 individual employees being found in breach the Code of Conduct.<sup>1</sup>

As reported by the Commission, some 2188 investigations of various breaches of the APS Code of Conduct in that year. Breaches were found proved in up to 92% of cases in the various categories of breach. Misconduct cases investigated included 72 Conflict of Interest cases (86 % of which were proved), and 64 “Fraud other than theft” cases (83% of which were proved).<sup>2</sup>

The data which stand behind table 3.2 and 3.3 of the Report are provided by individual APS agencies, and assumed by the Commission to be accurate and valid. The Commission does not collect the background data on which agency reports are based. The APSC conclusion about the level of misconduct assumes that the figures give an accurate picture of the integrity across the whole of the APS.

But there is sound evidence and reasoning to suggest that it does not. In consequence, the comforting picture painted by the Attorney General’s NAP Discussion Paper in relation to corruption, or corrupt conduct by APS officials, may be unwarranted.

First, the APSC’s conclusion that “*less than four in every 1,000 employees [were] found to have breached the APS Code of Conduct*” is problematic. The equivalent rate of public sector misconduct in other Australian jurisdictions is generally understood to be of the order of 1%, or more than twice the APS rate given by the State of the service Report as 0.4%. It appears to be the case that the APSC conclusion that it has a low rate of misconduct is a simple mis-statement: the figure of 4/1000 is the rate of *proven* misconduct, not the figure for the APS-global *incidence* of misconduct as claimed.

Further, the assumption that misconduct occurs in an even distribution across the entire APS is not warranted: experience in other systems suggest that it is managers, not low-level employees, who abuse their power, because they can. So the figure of 4/1000 should be something more like 4/500, based on the 75,000 employees in supervisory and management roles, rather than the entire APS.

The actual *incidence* of misconduct could actually be much higher: the willingness and ability of APS managers to initiate disciplinary action is a factor to be considered. The public sector industry assumption is that only about 5-10% of instances of misconduct are actually detected and actioned as misconduct cases. A great deal depends on the quality and effectiveness of an agency’s Code of Conduct as an enforceable standard for disciplinary purposes.

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<sup>1</sup> Centre for Policy Development, The State of the Australian Public Service - An alternative Report, (2011) p 22

<sup>2</sup> APS State of the Service Report 2010-2011, Tables 3.2, 3.3, APSC, Canberra

Definitional difficulties apply also: not all public sector Code of Conduct breaches necessarily involve 'corrupt conduct', but hopefully all relevant forms of corrupt conduct would be a breach of the applicable Code. It is impossible to know without researching every applicable Code in the system.

Also relevant to this assessment is the effectiveness of actual disciplinary and enforcement processes: a "conviction" rate in a public sector disciplinary system can range from as little as 10% to over 75%, depending on the quality of the process and the competence of the people involved.

Further, the seriousness of the misconduct involved in the cases investigated should be taken into account if an accurate picture is to emerge: not all offences are equal. The offender's position in the power hierarchy, and in particular the offender's power to make discretionary decisions, is also relevant to the assessment of 'seriousness'. A breach by an agency head is likely to have more far-reaching consequences for their organisation than if the same breach were to occur at a lower level.

In this respect, some 2120 APS employees were investigated in 2010-2011 over serious breaches involving dishonesty, theft (including identity theft), misuse of Commonwealth resources, misuse of information for private gain, misuse of authority or power, conflict of interests, non-compliance with lawful directions, lack of due diligence, and failure to comply with applicable laws. A breach was found in 1680 cases (79%).

On this basis, the actual *incidence* of misconduct in the APS, or any other Australian public service, can only be guessed at. But it is clear that it is higher than 0.4%, and may easily exceed 10% - no-one knows. It is arguably reasonable to conclude that the APS State of the Service Report data reveal that proven *serious* misconduct cases represent a significantly large tip to an iceberg of unknown dimensions.

Lest this conclusion seem unduly pessimistic, it should be noted that others have shared the same view based on evidence. For example the report for Minister Garrett on risk factors related to the government's 2009 home insulation scheme, prepared by Minter Ellison consultants, identified as a serious risk the likelihood that APS officials would conspire, either with other officials or with contractors, to corrupt the payments scheme. Organised Crime, in its many forms, costs Australia \$15Bn a year, according to current estimates by the Attorney General's Department: public officials are likely to be involved in many of the stages of such criminal activity if they perform regulatory or other 'gate-keeping' functions on behalf of the State. The NSW ICAC has recently reported that Public Procurement functions have been compromised across the entire sector.

There was publicity in 2011<sup>3</sup> of a Victorian company selling unjustifiably large quantities of computer printer cartridges to agencies of the Western Australian and Victorian government, having corrupted their staff to its considerable advantage. It would be surprising if it had not tried to sell the same

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<sup>3</sup> "Corruption and Crime Commission reveals more into gifts-for-printer-ink scandal" Amanda O'Brien, The Australian, November 25, 2011; John R Taylor, Deputy Ombudsman, Victoria "Both sides of the fence: A case study on Corrupt Conduct", paper presented at Australia's Public Sector Anti-Corruption Conference 2011 – Fremantle WA 16 November 2011.

equipment to Commonwealth agencies. It is unclear as to whether any independent investigation been carried out into the activities of that company in relation to Commonwealth agencies.

## **Conclusion**

There has been no action to legislate for a national anti-corruption commission, notwithstanding comparable bodies in most Australian States, nor is such a body contemplated by the present government in the foreseeable future.

Prosecution as an anti-corruption strategy can be only one approach, and cannot replace good intervention and management strategies. Risk of corruption going undetected or unaddressed can arise in every aspect of an organisation's management: the leadership can be self-interested or conflicted, Codes of Conduct and the like are not self-enforcing, detection systems can break down in response to unforeseen challenges.

Governments can affect anti-corruption strategies through inadequate provision of program resources, and individual managers can be too busy to "see" corruption and misconduct. In many cases, personal and institutional priorities provide serious disincentives to take action, when misconduct occurs on their watch.

Public sector employment authorities are thus institutionally conflicted when it comes to assessing and responding to corruption - from petty opportunistic misconduct to endemic State Capture. An expert, independent, and adequately resourced institutional response to *preventing* corruption – as envisaged by UNCAC - must be considered. Its mandate should aim at controlling or eliminating environments which foster corrupt and corruptive personal conduct, conflicts of interest, corrupt management practices which are supported by management, (such as unsanctioned breaches of the organisation's Ethics Code by managers), suppression of disclosure of wrongdoing, and corrupted administrative systems (for example: uncompetitive procurement, fraudulent claims, improper discretionary approvals).

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10 August 2012

## AUTHOR BACKGROUND

### BACKGROUND

The author is a Fellow in the ANZSOG Institute for Governance in the University of Canberra, and a specialist in Public Sector Ethics, with a career of over 20 years in three Australian public services, and ten years as an international consultant. Howard Whitton served in the Department of the Senate and various central personnel agencies such as the Australian Public Service Board and Merit Protection Agency (MPRA), the Public Sector Management Commission of Queensland, the Electoral and Administrative Review Commission (EARC), Queensland, and the ACT Chief Minister's Department.

From 2000 to 2009 Howard worked as a specialist policy adviser on Public Sector Ethics, Conflicts of Interest, and Whistleblower Protection with various international organisations, including the OECD's Public Governance Directorate, UNESCO, UNDP, the UN Secretariat, and a wide range of national governments and anti-corruption agencies. His work on Ethics and Integrity in Government has been presented at numerous UN Global Forums and international conferences on Public Sector Ethics. In 2004 he was principal author of the highly regarded OECD *Guidelines and Toolkit on Managing Conflicts of Interest*, now published in over 30 languages. In 2006 Howard was a member of the implementation team which established the UN Ethics Office in New York, in response to the Oil-for-Food scandal.

Howard is an invited member of the editorial boards of the US-based journals *Public Integrity* and the *Journal of Public Affairs Education*, and was recently invited to be a member of the Board of the Ethics Section of the American Society for Public Administration.

Howard has consulted widely in Australia and internationally on Conflict of Interest policy, Whistleblower protection, anti-corruption strategies, and Ethics training for appointed and elected officials, and is currently engaged in projects to develop new video-based materials for strengthening institutional Integrity and personal 'Ethical Competence' in the public sector in several countries including Australia. Howard originally qualified as a teacher, and he has also worked in professional theatre management and University administration.

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