

Briefing Note:

A National Integrity Commission

Introduction

There is now abundant evidence that Australians have very low or low levels of trust in Federal parliamentarians and the public service. Polling by The Australia Institute (TAI) last week showed that 80% of Australians want a strong National Integrity Commission, and more than 75% wanted it to be able to hold public hearings.

All political parties (Labor, Greens, cross-benchers and even the Coalition) now support the view that Australians should have a National Integrity Commission, or similar body.

The obvious principal purposes of such a body are to strengthen integrity in the Federal area, and to investigate, discover and expose corruption. The powers such a body should have, have been investigated at length by The Australia Institute's National Integrity Committee of retired judges, which has published a series of papers, all available on the TAI website, for that purpose.

All political parties excluding the Coalition agree that a National Integrity Commission requires a broad jurisdiction to investigate any conduct that impartially impacts the exercise of public office, and the strong investigative powers of a Royal Commission, including the ability to hold public hearings. The Coalition's proposed Commonwealth Integrity Commission will not be able to investigate and expose corruption and therefore should not be called an anti-corruption commission.

The benchmark for an effective National Integrity Commission

Broad jurisdiction

The NIC must have a broad jurisdiction to investigate any person whose conduct adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration if the Commissioner deems the conduct to be serious or systemic. Corruption is not limited to criminal conduct: it includes the consequences of making donations to politicians or political parties, or secret lobbying, for example. The NIC's jurisdiction cannot be limited by obstacles to be

surmounted before an investigation can commence, nor can corruption be limited to particular instances of criminal conduct.

When the IBAC (Victoria) was established in 2013, its jurisdiction was so limited that the Commissioner had to ask his staff, “What is the indictable crime?” before an investigation could commence. If the NIC’s remit is similarly limited, any suspect, upon discovering that he, she or it is being investigated, will immediately seek a court injunction to stop the investigation. The NIC will then be forced to produce in evidence all information it has uncovered, to establish its right to investigate. Even if the NIC can pass this obstacle, the result is that the suspect will have learnt what information the NIC has already obtained, and will be able to hide or destroy essential evidence. The cost and delay of such a course will inevitably work to the suspect’s advantage.

Investigative powers

The NIC must have all the powers of a Royal Commission, including the ability to intercept telephone or internet communications, enter and search premises, and compel the production of documents and exercise arrest warrants.

The NIC must be an independent statutory body, safe from interference or the influence of the Federal Executive, or any partisan body. The NIC’s office-bearers should be appointed by a cross-party parliamentary committee.

It is essential that anyone should be entitled to make a complaint to the NIC. There will be thousands of complaints, many - if not most - anonymous, often by a telephone call or email. The vast majority will be quickly eliminated by NIC staff, but vital relevant information is often given by such contact. Even so, most such tip-offs will at the outset have little explicit information, and the NIC must not be prevented from pursuing such hints because it cannot then point to a particular criminal offence that might be involved.

The NIC should be entitled to investigate complaints from all parties, including the public at large, directed at all Commonwealth Public Servants, Ministers, Members of Parliament and their staff, and the Judiciary and their staff. If objections are made as to the constitutional propriety of investigating members of the Federal Judiciary, any such investigations should be conducted under a Federal Judicial Commission.

The investigations of the NIC should be supervised by an inspector, by a cross-party Parliamentary Committee, and by the right to seek the intervention of a court, including a right of appeal against findings of fact made by the NIC.

The NIC should be entitled at the end of, or during, an investigation to produce a report to Parliament containing findings of fact - but NOT findings of corruption - and including recommendations that the report be referred to the Commonwealth Director of Public Prosecutions in appropriate cases. The conviction of those guilty of corruption is not a principal aim of the establishment of a NIC, but there should be a separate branch of the DPP's office created to deal with such referrals.

Public hearings

In its investigations, the NIC must have the power to conduct private and public hearings. Public hearings are critical to the ability of anti-corruption commissions to discover and expose corruption. Not all hearings will be held in public, and the NIC should not decide to hold a public hearing until it has established sufficient facts to enable it to identify the party or parties responsible for the serious misconduct involved. Only thus can the reputations of the innocent parties be protected.

Public hearings are critical to making the public aware of the existence of corruption; the exposure of corruption; making the investigation more effective by bringing forward new witnesses; educating the public sector; deterring others from engaging in corruption; and increasing public trust that the NIC is performing its functions properly and fairly. The NIC will be required to ensure that parties are treated with fairness and have access to representation at any such hearings.

The importance of public hearings can be demonstrated by the IBAC hearing into the Victorian Education Department (Operation Ord). That public hearing exposed corruption in the Department to the Victorian public, led to numerous other complaints being made to IBAC, and caused the Department immediately to change its procedures so that such corruption could never recur. The Hayne Commission could not have been conducted in private, denying to the public the evidence of corruption and flaws in the Australian Banking Industry. No-one suggested either of these investigations should be held in private. There would be no point to an NIC investigation if it was carried out in private and the only outcome was a report to the DPP which might never be acted upon.

The Coalition's Proposal for a Commonwealth Integrity Commission

The Coalition's proposal is set out in a document of 13 pages headed "Proposed Reforms" and which has not yet been reduced into a draft Bill for Parliament.

Weak public sector division

The Coalition proposal divides the CIC into a "law enforcement integrity division" which is to have jurisdiction over those agencies already within the remit of ACLEI, and other additional public sector agencies such as the ACCC, APRA, ASIC and the ATO. This division has wide power to undertake investigations, compel production of documents, seize evidence, undertake controlled operations, including with assumed identities, and hold public hearings.

The second division, the "public sector division," is to have jurisdiction over public service departments and agencies, Commonwealth service providers and subcontractors they engage, and parliamentarians and their staff. It is not to have jurisdiction over the judiciary nor outsiders at large dealing with Federal agencies. The public sector division's function is to be the investigation of serious criminal conduct that represents corrupt conduct in the public sector, and the powers of this division are substantially less than the powers to be given to the law enforcement division.

There is no basis or justification for this division of the CIC into two halves. Nor is there any sensible explanation why the public sector division should be much weaker than the other. The effect of this division will be to produce uncertainty, confusion, demarcation disputes and costly litigation and delays.

Jurisdiction

The jurisdiction of the public sector division is very carefully limited. Pages 5-7 of the Coalition's proposal show that the jurisdiction is limited to investigating criminal offences where "the Commissioner has a reasonable suspicion that the conduct in question constitutes a criminal offence" being "serious or systemic corrupt conduct." Furthermore the CIC will not investigate complaints about Ministers, MPs or their staff received from the public at large (page 10).

The effect of these restrictions will be that the CIC will only be able to investigate a matter if it has already received sufficient information to form a reasonable suspicion

that a serious or systemic criminal offence is involved. The CIC would not be entitled to investigate the so-called “Watergate Scandal,” or the events leading to the approval of the Adani mine, or the grant to the Great Barrier Reef Foundation of \$440 million, or the murky events surrounding Helloworld or the suggestion by someone that “Hockey owes me” because in none of these cases is there any basis for reasonable suspicion of any crime. Any attempted CIC investigation would immediately be terminated by court injunction.

The CIC would therefore need a tip-off, with precise information of a crime before being entitled, in most cases, to commence investigation. For example, a person might know that a politician had made an apparently corrupt communication, but the CIC will not be able to receive a complaint from that person. That person will be required to communicate not to the CIC but to a different agency such as the AFP. But that is a most unattractive course for any whistleblower, who would usually wish to communicate only with the anti-corruption agency, thus reducing the prospect of his or her identity being discovered.

Furthermore, it is necessary to emphasize that corruption is not necessarily criminal at all, as stated in par. 5 above. When government grants licences, contracts or benefits to large donors after repeated lobbying, there will usually be no evidence of any criminal offence to justify the commencement of a CIC investigation.

Nor will the CIC’s powers of investigation entitle it to investigate procurement, such as occurs in the Defence or Health Departments, unless there is “evidence of corrupt conduct that meets the relevant criminal threshold proposed” (page 4). It is doubtful that the CIC could investigate the contract made with the French Naval Group to supply submarines to Australia. It is not clear that that Group is properly described as a “Commonwealth Service Provider” but even if it is, there is no obvious basis for suggesting that any serious or systemic criminal conduct is involved.

Public hearings

The powers of the public sector division are significantly less than the powers of the law enforcement division, in particular the absence of any power to hold public hearings. If the CIC conducts a lengthy investigation into an area of serious or systemic, arguably criminal, corruption there will be no public hearing at any stage; compare the effectiveness of the Hayne Commission’s exposure of Australia’s major banks. At the end of the CIC investigation, the CIC will refer any finding to the

Commonwealth DPP which may decide not to prosecute. In this case, the public may never receive information as to what was disclosed in the investigation. In any event the public is unlikely to receive information as to what has been discovered until long (even years) after the events have been investigated by the CIC.

The result is that the public at large will be unable to complain directly to the CIC about Ministers, MPs or their staffs. If a person is prepared to complain to a different agency, and if that agency is prepared to pass the complaint on to the CIC (which the agency is not bound to do unless the complaint reaches the CIC's criminal threshold), the complainant and the public will hear nothing of any investigation unless and until the Commonwealth DPP embarks on a prosecution based on the CIC's inquiries.

In 2012, the Commonwealth Parliament passed the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act, which provides a means of dealing with misbehaviour on the part of members of the Federal Judiciary. Section 23 of this Act provides that the hearing of proceedings against a Federal judge for misbehaviour shall take place in public. It is noteworthy to contrast the public hearing of Federal judges accused of misbehaviour with the secret investigation of Federal ministers and MPs against whom allegations of criminal misconduct are made.

Inadequate funding

The funding presently proposed for the CIC is in the order of approximately \$140 million over a 4 year period, or roughly \$35 million per year. The present funding for Victoria's IBAC is approximately \$40 million per year. If the CIC is to be adequately funded, one might reasonably expect that the required funding would exceed \$100 million per year.

Conclusion

The Coalition's proposal at page 12 states that "The CIC model avoids a number of deficiencies that have emerged from the experience of established state anti-corruption commissions, like the NSW ICAC..." This statement provides the obvious explanation for the Coalition's whole approach. The ICAC has certainly achieved a track record of exposing a number of scandals in NSW, including a number of members of parliament. But if the purpose of an ICAC or NIC is to investigate, discover and expose corruption, the CIC on the Coalition's present proposal will

- a. be unable to investigate or discover Federal corruption for the reasons already stated; and
- b. certainly not be able to expose any corruption it might accidentally discover because of its obligation to act in secret - as the star Chamber did - from start to finish. The Coalition's proposed body will not, and could not, function as an anti-corruption commission, and certainly could not be called one.

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Which leaves the question: just what, or whom, is the Coalition trying to hide?