

Closing the gap: the case for a Commonwealth Anti-Corruption and Misconduct Commission

Brian Toohey

Brian Toohey is a journalist and author who writes for *The Australian Financial Review* and other publications

Commonwealth politicians and public servants want us to believe they differ from other mortals. They claim to be so incorruptible — unlike their state and local government counterparts — that they don't need a watchdog. Even suspect state officials, it seems, are immune to temptation once they take a job in Canberra. The states either have, or are getting, formidable watchdogs to reduce the risk of corruption and misconduct among their officials. But the Gillard government in 2012 rejected a parliamentary committee's recommendation that it should look at establishing a similar federal body. The commentators focused more attention on the lesser issue of whether federal politicians need a code of conduct after the alleged misdeeds of Labor's Graig Thomson and the Liberal's Peter Slipper. The general consensus seems to be that they don't need oversight from a corruption body because 'everyone knows right from wrong' — a not entirely reassuring claim in the circumstances. Although it was never clear why Australian Federal Police (AFP) was less susceptible to bribery than its state equivalents, the Howard government only established the Australian Commission for Law Enforcement Integrity (ACLEI) in 2006. In 2007 the government confined the commission's initial targets to the AFP and the Australian Crime Commission with a budget of just \$2M and a staff of 9. Customs and Border Protection was added in 2012. While Labor's justice minister, Jason Clare later added the Quarantine service, AUSTRAC (the money tracking or anti-money laundering agency), CrimTrac (the body that facilitates information sharing between various police and security) and DAFF biosecurity. Until the ACLEI is properly funded, there is no way it can conduct the resource-hungry surveillance, telephone intercept and other operations essential to containing corruption at the law enforcement level. However, Clare didn't accept a recommendation from the joint parliamentary committee on the ACLEI when it was chaired by the then Labor backbencher Melissa Parke, that the Commission also cover the tax office and the immigration department. Yet both offer serious opportunities for corruption. In immigration, the minister has an unusual degree of discretion about individual cases.

It would be a brave call to claim that a former immigration minister and supporter of Griffith's 'Calabrian Mafia', Al Grasby, was immune to bribery. After the murder of the Griffith anti-drug campaigner, Donald Mackay, Grassby tried unsuccessfully to have read under parliamentary privilege his false assertion that Mackay's family was responsible, contrary

the solid grounds for believing the Honoured Society order the hit. In February 2012, the government bluntly rejected the ACLEI committee's most important recommendation — that it consider establishing an anti-corruption commission to oversee all commonwealth public sector bodies. The committee's final report quoted the then Queensland premier Anna Bligh's reflections on that state's approach to integrity when it established what is now its Crime and Misconduct Commission in the aftermath of the Fitzgerald inquiry into deep rooted corruption. Bligh said, 'Despite the inevitable embarrassment from time to time, I would much rather a system which is not afraid to pick up the rock and discover the ugliness underneath than one that is content to . . . assume that an undisturbed rock is a sign of good health'. The committee said, 'There could be a lot of 'undisturbed rocks' that need to be overturned if the public is to be fully assured that integrity in the [federal] public sector is being properly maintained and safeguarded'. The Greens leader Christine Milne subsequently resurrected the committee's idea for wide ranging commonwealth integrity commission, but to no avail. The government's formal response to the committee's recommendation took the opposite approach — 'On the available evidence, there is no convincing case for the establishment of a single overarching integrity commission'. The answer assumes the existing system for detecting corruption works well.

However, with rare exceptions, nobody has taken a hard look at whether corruption or misconduct exists in a wide range of departments, agencies and ministers' offices that deal with decisions involving areas such as defence procurement, immigration, communications policy, overseas aid, foreign investment, mining development, infrastructure contracts, tax and favoured treatment for the finance and manufacturing sectors. Major Australia mining companies, or their employees, have been investigated for alleged corruption in overseas countries— resulting in some convictions. Big international arms manufacturers have paid bribes overseas. There is no compelling reason why that would not have done so in Australia. A senior politician in the 1970s was later reported to have accepted an expensive boat from a foreign company wanting to win a major contract. The donor did not win the contract. Normally, if you refuse to look, you don't find anything. In contrast, the state integrity commissions — apart from acting as a deterrent — have exposed corruption that eluded police. Yet senior journalists, who've never looked much beyond the daily drama of federal politics, assert there is no corruption at the commonwealth level, because no one has ever been convicted. Never mind that this is not correct. The *Melbourne Age*, not the AFP, unmasked the bribery scandal that engulfed two Reserve Bank subsidiary companies exporting currency-printing technology. The *Age*'s articles finally prompted a complacent RBA to call in the AFP. It found what had eluded RBA's own inquiries, namely, that corruption offences had allegedly occurred. The court processes are not finalised. Although the department of

**The state integrity commissions
— apart from acting as a deterrent
— have exposed corruption that
eluded police. Yet senior journalists,
who've never looked much beyond
the daily drama of federal politics,
assert there is no corruption at the
Commonwealth level.**

foreign affairs and trade (DFAT) approved all AWB Ltd contracts to sell wheat to Saddam Hussein's Iraq, it was the UN that uncovered that the company was paying kickbacks to the regime. Neither DFAT nor the AFP detected what was happening.

The existing system mainly relies on the AFP to unearth corruption at the federal departmental and ministerial level. Given the prevailing view at the highest levels of federal politics that corruption is not a problem, the AFP doesn't have strong incentive to take a good look—a partial exception being the RBA case after the bank belatedly invited it to do so. As police don't have the same distance from their political masters as independent statutory commissions, they may sometimes appear inhibited about investigating politicians. Until the ACLEI recommended a change, the AFP's standard practice had been to inform the prime minister or the justice minister of 'politically sensitive matters' involving members of parliament. In one example, the AFP told the then PM John Howard of its intention to execute a search warrant the following day on a Liberal backbencher's office. The Integrity Commissioner Philip Moss found that no one 'tipped off' the backbencher, but recommended the AFP differentiate between investigations into MPs and others when informing ministers of its activities. Marian Wilkinson's book *The Fixer* gives a detailed account of the background to an AFP inquiry involving the then federal minister Graham Richardson. The AFP accepted the evidence of Queensland's then Criminal Justice Commission that Richardson had been supplied with prostitutes by a Gold Coast businessman whose partner was attempting to win commonwealth government contracts. But the AFP found no reason to investigate further, because it said being supplied with prostitutes is not a crime. It can be, depending on the purpose.

A subsequent judicial inquiry by Russell Hanson QC said it would have been better if the AFP had tried to find why Richardson had been supplied with the prostitutes. He noted that the AFP's chief investigator had reported to his superiors that he set out to lay many of the CJC's allegations 'to rest once and for all'. The AFP has been given new powers since 2001, and many more staff, to gather security intelligence—a job previously the preserve of ASIO. At the time, an Inspector General, as well as special parliamentary oversight committee, scrutinised ASIO and five other intelligence bodies. Nothing similar applied to the AFP until after 2006.

The case of Mohamed Haneef, who was helping overcome the shortage of doctors in Australian hospitals, underlined the continuing dangers of combining intelligence gathering and expanded police powers in the one body. The AFP displayed a far more disturbing mix of incompetence, zealotry and disregard for the rights of an innocent man than any corruption commission. To its credit, ASIO advised the Howard government from the start that there was no reason to suspect Haneef of supporting terrorism. Yet the government continued to let the AFP have its head, and ministers, such as Kevin Andrews, were adamant the AFP was right. Unfortunately, the Rudd Government dumped its 2007 election promise to set up a proper judicial inquiry into the Haneef debacle.

As far as I am aware, the Inspector General of Intelligence and Security has not suffered any undue interference because of parliamentary oversight. But there will always be a risk that MPs will seek to pre-judge the outcome of an investigation by one of their own committees.

After the 2003 invasion of Iraq, the Parliamentary Joint Committee on ASIO, ASIS and DSD investigated the Intelligence on Iraq's Weapons of Mass Destruction (WMD). One committee member Kim Beazley publicly stated before it started that it should not criticise any of the Australian intelligence agencies because they all did a good job. This Committee, thanks to its Chairman, the late Liberal member David Jull, and its staff, did a good job. It rightly criticised the performance of the Office of National Assessments, which basically supported the John Howard's repeated claim that the government 'knew' Iraq possessed WMD at the time of the invasion. It also rightly praised the Defence Intelligence Organisation, which concluded that IRAQ had no WMD that could threaten other countries. Examples may exist of political attempts to muzzle state anti-corruption watchdogs. As far as I can recall, that has mainly entailed trying to prevent their establishment in the first place. Successive federal governments have been much more successful than their state counterparts in this regard. Yes, there can be dangers in having permanent watchdogs with the powers of a royal commission, unless there are checks and balances to prevent abuses of power. But a core reason not to rely on one-off royal commissions to investigate allegations of corruption is that governments who fear the outcome will not set one up.

With the watchdog approach, the original legislation, parliamentary oversight committees, counsel for witnesses, and ultimately the courts usually provide the checks and balances. Critics need to understand that these watchdogs are not meant to behave as courts. Nor is their role confined to criminal behavior. They can cover misconduct that stops short of criminality and also act as constraint on malfeasance by other public officials. Corruption watchdogs, rightly, can't send anyone to jail, nor fine or otherwise punish them; beyond making a finding of corrupt behaviour or misconduct. Only DPPs can launch prosecutions; not watchdogs. Normally, self-incriminating evidence can't be later used in court. Despite understandable public concerns that blatantly corrupt politicians may avoid a jail sentence, this safeguard is worth maintaining. Perhaps there should be greater leeway in some of the grey areas surrounding the use of subpoenaed documents and so on. However, traditional legal protections are important. Which is why I find it disappointing that most parliamentarians pay so little attention to areas that don't directly affect them, such as the abolition of these protections for sports people. Labor's Justice minister Jason Clare succeeded in passing new legislation giving the Australian Sports Anti-Doping Authority powers not available to police in criminal investigations. The law now lets ASADA to deny its 'targets' the long established 'right to silence'. Suspected murderers, major drug dealers, paedophiles, bank robbers etc don't have to answer questions during police interrogations. But ASADA can compel sports people to answer questions about whether they, or other players, took substances such as supposedly 'performance enhancing' peptides. It is far from clear that peptides enhance performance. More importantly, taking them does not break the criminal law, even if violates various sporting codes. However, in language not normally used by a justice minister about a non-criminal investigation, Clare said the government had given ASADA the powers and the resources it needs to 'hunt these people down'.

Corruption commissions can compel answers, but the evidence gained can't be used for subsequent charges. In contrast, ASADA can conduct the investigation, compel answers and, in effect, punish those it finds guilty with bans on players earning their living. In some

case, this amounts to a fine if over \$1 million before lost endorsements are included. White collar criminals often severely hurt other people, but are fined much less. Compared to anything ASADA may achieve, there is an entirely different dimension to the inquiry the NSW Independent Commission Against Corruption concluded on July 31. ICAC found that two former NSW Labor ministers Ian Macdonald, Eddie Obeid, and several wealthy businessmen, had engaged in corrupt conduct in relation to a coal mining tenement covering rural properties owned by the Obeid family. Macdonald, while mines minister, issued the mining exploration lease. ICAC said the Obeid family stood to make tens of millions of dollars from the sale of their farming properties — four times their market value— and had also received \$30 million in relation to the lease. Another \$30 million, and potentially much more, was due to follow. As well as recommending that the DPP examine possible charges, ICAC said it had provided relevant information for possible action to the NSW Crime Commission, Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Stock Exchange. ICAC's hearings gave the public a detailed insight into how the NSW Labor Party let a factional boss effectively control a state government, including the appointment and removal of premiers. ICAC showed large sums of money passing through Obeid family companies and trusts. Nevertheless, Obeid's pecuniary interest statements during his 20 years in parliament showed his MP's salary as his only income. Before entering parliament, Obeid favourably impressed Graham Richardson, Labor's state secretary in the late 1970s and early 1980s, with his fund raising and branch stacking abilities. Richardson was instrumental in Obeid gaining a seat in the upper house, which he held for 20 years. ICAC's public hearings and findings have shaken the Labor's parliamentary rump in NSW into promising much tougher internal standards, plus a call for ministers to publish their diaries online and disclose all meetings, phone conversations and interactions with lobbyists or private companies. However, there is no hint that the federal parliamentary Labor party, nor the Coalition, will now embrace calls to set up an anti-corruption and misconduct watchdog such as the states have.