

ENSURING INTEGRITY AGENCIES HAVE INTEGRITY

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The question 'quis custodiet ipsos custodes' translated as 'who shall guard the guardians themselves?' was posed in a satire by Juvenal. It has remained a vexed problem for the many countries which have created anti corruption agencies, Offices of Ombudsman and special Commissions of Inquiry, tasked with responding to various forms of corruption and misconduct in public office.

In this paper I will canvas portion of the range of integrity agencies that exist in this country, the possibilities for their misuse or diversion from their proper function and explore whether there is a sufficient system to guard these guardians.

Integrity agencies

In this country there are now a number of such agencies, including for example:

New South Wales

- The Independent Commission Against Corruption (ICAC)
- The Police Integrity Commission (PIC)
- The Office of the Ombudsman.

Queensland

- The Crime and Misconduct Commission (CMC)
- The Queensland Ombudsman

Western Australia

- The Corruption and Crime Commission (CCC)
- The Ombudsman WA (also known as the Parliamentary Commissioner for Administrative Investigations).

Victoria

- The Office of Police Integrity (OPI)
- The Ombudsman - whose functions are effectively combined.

Commonwealth

- The Australian Commission for Law Enforcement Integrity (ACLEI)
- The Commonwealth Ombudsman

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These agencies possess to a greater or lesser degree, far reaching intrusive and coercive powers which if abused, can significantly impinge on individual civil rights and occasion great personal harm to those caught up in their investigations.

The powers include those of

- Search and seizure under statutory warrants;
- Requiring the production of documents and things pursuant to notice;
- Requiring the production of statements of information pursuant to notice;
- Recording private conversations pursuant to listening device warrants;
- Intercepting telecommunications pursuant to warrants;
- Conducting physical surveillance;
- Using tracking devices;
- Accessing information held by a wide variety of government agencies, such as Austrac, the Australian Tax Office, gaming and racing regulatory authorities and many other government bodies.
- Accessing police records including criminal records;
- Conducting covert searches;
- Entering public premises to inspect and take copies of documents;
- Conducting coercive interrogations under oath, in which the right of freedom from self incrimination is suspended;
- Conducting controlled operations and carrying out integrity tests.
- Conducting hearings either in public or in private which are not bound by the rules of practice or evidence;
- Obtaining injunctions restricting the conduct of persons under investigation;
- Initiating proceedings for the recovery of the proceeds of serious crime related activities and for the confiscation of the property of those who are engaged in such activities;
- Making assessments and forming opinions which may be published as to whether misconduct or corrupt conduct has occurred;
- Making recommendations as to whether consideration should be given to prosecution or disciplinary action in relation to affects persons;
- Prosecuting persons for contempt or for interference with the legitimate investigations and activities of these agencies or for disobedience to their lawful requirements;
- Disseminating information to other law enforcement agencies and to bodies such as the Australian Taxation Office for potential investigation or prosecution or for the recovery of monies properly due to the State;
- Creating significant databanks of intelligence on individuals which are protected by secrecy obligations but which are available for future use;
- Arranging witness protection and the establishment of assumed identities;
- Effecting arrests;
- Reporting on potential promotions.

These powers extend well beyond the scope of legally acceptable criminal investigations and sometimes they are called upon in aid of joint task forces or of investigations conducted by other law enforcement agencies in a way which is potentially capable of abuse.

In addition the legislation creating these agencies usually creates a series of specific offences applicable to agency officers, for example in relation to abuse of their office, breaches of secrecy and so on, as well as a separate series of offences which might be committed by other persons, for example, involving bribery of agency officers, or interference with the agency's investigations or making vexatious, false or frivolous complaints.

The width of potential interest of these agencies varies. For example, the jurisdiction of the Ombudsmen in general terms extends to responding to complaints in relation to the conduct of public officials, monitoring the police management of complaints or investigating such complaints, performing some audit and advisory functions in relation to a variety of public bodies and agencies, and responding to complaints in relation to those bodies and agencies:

That of the ICAC extends to investigating, exposing and preventing serious corruption involving or affecting public administration, promoting the integrity and accountability of public administration.

That of the Queensland and Western Australian Crime and Misconduct Commissions in broad terms embraces the combating of major crime as well as the investigation or coordination of investigations of police and other misconduct and the investigation of or monitoring the way in which the police investigate or deal with police misconduct. The Queensland Commission has a function of helping to prevent major crime and misconduct and of investigating major crime referred to it by the Crime Reference Committee. It also has a responsibility to improve the integrity of, and to reduce the incidence of misconduct in the public sector and in that regard, to build the capacity of units of public administration to prevent and deal with misconduct.

That of the NSW Police Integrity Commission and the Victorian Office of Police Integrity is essentially confined to the police service of those States, in relation to the investigation of serious misconduct and corruption by their members, in monitoring the investigation of complaints the management of which is left to Police, and in relation to Police practices and methodologies that may have an impact on Police integrity.

That of the Commonwealth Law Enforcement Integrity Commission will from the commencement of the enabling legislation on 30 December 2006 extend to the investigation and reporting of corruption within the Australian Federal Police, the former National Crime Authority, the Australian Crime Commission and any other Commonwealth law enforcement agencies that may be prescribed.

Royal commissions

To a lesser extent, there are the occasional Royal Commissions of Inquiry created for a finite term to investigate abuses of power and wrongdoing by public officials and others. In recent times we have seen significant Royal Commissions including:

- The Fitzgerald Commission of Inquiry into possible illegal activities and associated Police misconduct (OLD) which reported in 1989.
- The Royal Commission into NSW Police which reported in 1997.
- The Kennedy Royal Commission into Police in Western Australia which reported in 2004.
- The Australia Wheat Board Inquiry of 2005/6.

In most instances, they share some of the powers of the agencies mentioned and similar considerations arise for ensuring their integrity and procedural fairness. They are amenable to administrative law review on procedural fairness grounds: *Mahon v Air New Zealand*¹.

Self regulation

The combination in the one agency of anti-corruption and major crime investigation functions as is the case with the Queensland and Western Australian Commissions is potentially problematic. It is in the area of investigations of major crime, particularly where the agency is part of a joint task force, or lends its assistance to another law enforcement body that has a

significant potential for corruption exists. An agency with those powers will have to act carefully and have proper controls, if it is to avoid any compromise of its operations or of its staff which would destroy its primary integrity enforcement role.

Each of these agencies has its own responsibility to act with integrity and fairness. For the most part that can be achieved through the adoption of specific guidelines and practice manuals to be applied in each aspect of their work, by the creation of internal audit and risk committees. But the adoption of a code of conduct; by the implementation of an IT system with suitable firewalls, controls as to permitted access and capacity for an audit trace and by an obligation on the part of staff to report breaches. They are obviously expected to apply high levels of ethical behaviours lest their reputation and capacity for setting an example to the bodies which they oversee is destroyed. They need to resist efforts by government or policing agencies to curtail their powers and capacity to operate effectively; they need to be scrupulously careful in their staff recruitment and training; and they need to be prepared to discipline, dismiss or prosecute any staff members who disobey their guidelines or commit relevant offences.

External supervision and oversight

The use by these agencies of listening devices and telecommunication intercepts is generally subject to statutory external audit, for example in NSW both by the Inspector and the Ombudsman in relation to listening devices and by the Ombudsman in relation to telecommunication interceptions. If the Surveillance Bill (NSW) is passed into law, the Ombudsman will have an even wider audit role for other aspects of surveillance.

Otherwise there are additional levels for the general oversight of these agencies via Inspectors or monitors and Parliamentary Committees.

a. Inspectors

In almost every instance it is recognised that the public interest in securing the independence of these integrity agencies and the need for confidentiality of their operations and intelligences means that direct parliamentary oversight is precluded. In the main, the solution has been to establish a structure which interposes an Inspector or Monitor between the agency and any relevant bipartisan Parliamentary Committee that may exist. Taking a selection of the agencies, such an office has been created in:

New South Wales – in the form of

- The Inspector of the Independent Commission Against Corruption
- The Inspector of the Police Integrity Commission

Notably there is no independent Inspector to oversee the activities of the NSW Ombudsman or the NSW Crime Commission. These Inspectors have similar functions which extend to auditing the operations of the relevant Commission so as to monitor compliance with the law, dealing with complaints of abuse of power and of misconduct by the Commission or its staff and to assess the effectiveness and appropriateness of its procedures. Each has wide powers to investigate, to have access to Commission records, to require officers to supply information and answer questions, to hold inquiries and to recommend disciplinary action or criminal prosecution against Commission officers.

Western Australia - in the form of the:

- Parliamentary Inspector of the Corruption and Crime Commission

With functions of auditing the operations of the CCC, dealing with misconduct on the part of the Commission or its staff, ensuring the effectiveness of the CCC's procedures, making recommendations to the CCC and reporting to Parliament and the Statutory Committee. The powers given to the Inspector are extensive and are similar to those vested in the NSW Inspectors.

Victoria – in the form of:

The Special Investigations Monitor whose task it is to monitor compliance with the law by the OPI to assess the relevance of the Office's requirements for persons to produce documents or other things and to investigate complaints against the Office.

Queensland – in the form of:

The Public Interest Monitor who has a particular function in testing the appropriateness and validity of applications by the CMC for a surveillance warrant or covert search warrant.

The Queensland Parliamentary Commissioner has the function of auditing records and operational files of the CMC for the purpose, inter alia, of deciding whether it has exercised its powers in an appropriate way, whether matters under investigation are appropriate for investigation and whether there has been compliance with any necessary authorisation for the use of the powers and with policy or procedural guidelines.

The holder of that office also has a function on behalf of the Parliamentary Committee to investigate complaints made against or concerns expressed about the Commission or a Commission officer to exercise other functions in support of the integrity of the Commission including conducting an annual review of its intelligence holdings (a useful function in the light of the extensive and questionable holdings of the former Special Branch in NSW). A wide power is conferred to do all things necessary or convenient for the performance of those functions including a power to hold private hearings with the authority of the Parliamentary Committee.

The Commonwealth – has not made provision for the creation of any comparable Inspector or Monitor.

b. Parliamentary committees

In *New South Wales* at a Parliamentary level there are Committees to which the ICAC and PIC, the two Inspectors and the Ombudsman are accountable in the form of the Joint Committee on the Independent Commission against Corruption and the Committee on the Office of the Ombudsman and the Police Integrity Commission.

Similar Committees exist in other States. For example in *Western Australia* there is a Joint Statutory Committee on the Corruption and Crime Commission.

In *Queensland* there is the Parliamentary Crime and Misconduct Committee.

In *Victoria* there is no Parliamentary Committee although the OPI and the Special Investigations Monitor are required to report to Parliament on an annual basis.

At a *Federal* level, there is the

- Parliamentary Joint Committee on the Australian Crime Commission, and a
- Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.

These Committees have a generally comparable role in being Committees to whom the Inspectors and Commissions report, which act on behalf of the government in ensuring, although without access to operational detail or involvement in investigative decision-making, the integrity of the system and in ensuring that appropriate persons are appointed to the offices of Inspector, Monitor and Commissioner.

The *Queensland* Parliamentary Committee has particularly extensive powers and functions in monitoring and reviewing the CMCs about the integrity functions, participating in the election or removal of the Commissioner and issuing guidelines and directions to the CMC including the giving of a direction to the CMC to investigate a matter involving misconduct.

Where it receives a complaint or has other concerns in relation to the conduct or activities of the CMC, it may ask the Parliamentary Commissioner to investigate the matter on its behalf.

Otherwise it appears to have a particularly extensive hands-on approach through its regular meetings with the CMC and the Parliamentary Commissioner in receiving information concerning any complaints that are made against the CMC and through the rolling audits which it asks the Parliamentary Commissioner to make as its agent.

Concerns or complaints about the integrity of integrity agencies

Several responses are available where there is a complaint in relation to the way in which one of the integrity agencies has dealt with a person affected by its inquiries or activities. They include:

- Complaint to an Inspector or Monitor where one exists, followed by investigation and report by that Inspector or Monitor;
- Complaint to any relevant Parliamentary Committee which may refer the matter back to the Inspector or Monitor;
- Complaint to the media with consequent exposure to public judgement;
- Challenge to any decision made, for example by a Commissioner of Police involving the dismissal or other disciplinary action taken against a serving Police officer consequent upon the Commission Report which, in New South Wales could be heard in the Industrial Relations Commission.

In *Queensland* a person who claims that a CMC investigation into official misconduct is being conducted unfairly may apply to a Supreme Court judge for an order in the nature of a mandatory or restrictive injunction addressed to the CMC. The Court may, if satisfied as to the applicant's claim, require the CMC to conduct the investigation in accordance with guidelines specified by it, or to stop or not proceed with the investigation.

In *Western Australia* there is a prohibition on judicial intervention by way of a prerogative writ, injunction or declaration in respect of the performance by the CCC of its functions (except with the consent of the Parliamentary Inspector) until after completion of the investigation.

In *NSW* while each of the ICAC and the PIC can make findings on the civil standard of proof of corrupt conduct (ICAC) or of misconduct (PIC) and can make recommendations that consideration be given to the bringing of a prosecution or disciplinary action, neither can make actual findings of guilt.

Merits review is not available. The Courts have, however, accepted that they have a jurisdiction to intervene in the event of such an agency acting in excess of its statutory powers to conduct an inquiry or to make findings or in the event of failing to carry out its

functions in accordance with the law: *Shaw v Police Integrity Commission*² overruled on other grounds in *Police Integrity Commission v Shaw*³ and see also *Greiner v The Independent Commission against Corruption*⁴. The Courts also have a supervisory jurisdiction arising from the operation of the principles of procedural fairness for example in relation to the *audi alteram partem* rule or in relation to actual or apprehended bias: *Re Royal Commission on Thomas Case*⁵, *Annetts v Mc Cann*⁶.

The extent to which administrative law review might otherwise exist, in respect of the making of factual findings or recommendations by these agencies not amounting to determinations of liability or otherwise altering rights and falling short of extreme irrationality or illogicality is open to lively debate: cf *Australian Broadcast Tribunal v Bond*⁷, *Hill v Green*⁸ and note the discussion in Hall⁹ and in Aronson, Dyer and Greves¹⁰, as well as *Re Minister for Immigration and Multicultural Affairs, ex parte applicants S20/2002*¹¹.

This could potentially be regarded as a weakness in the integrity system as findings within a permitted area of jurisdiction, can have a very significant impact on an affected person particularly if criminal or disciplinary proceedings do not follow in which a further opportunity could be available, to meet the relevant concerns. It is true that an Inspector can recommend reconsideration by the relevant agency but it would not appear that such reconsideration could be directed or a merits review undertaken.

Conclusion

Ultimately the integrity of these agencies and particularly that of the Inspector and Monitor appointed to act as their guardian depends upon the willingness and capacity of government to appoint as Commissioners and as Inspectors or Monitors, people who are competent, independent, experienced, ethical and free of any question as to their integrity. Clearly there is a capacity in government, if it so wishes and is able to nobble any Parliamentary Committee, which has power to approve or disapprove a particular appointment, to subvert the process by making an inappropriate appointment, or by limiting the powers of the relevant agency or Inspector, or by limiting the budget and resources of either.

However, the bipartisan nature of these Committees and their independence of executive government tend to provide an answer to any such concerns.

Moreover the responsibility has to end somewhere and it appears to me that the jurisdictions surveyed in this paper have adopted a suitable model. That model retains some general accountability to Parliament via the relevant Committee, without the need for it to be exposed to, or have access to, operational details.

The Inspector or Monitor have to be trusted with access to that level of detail. Whether the holder of that office is effective in detecting improper or corrupt conduct by the agency or its officers, however, depends entirely on the extent of the audit and access powers, on how thoroughly they are exercised, on the extent to which operations are vetted and on a readiness seriously to consider and investigate complaints against the Commission or its officers. It is a process that could also be frustrated by a corrupt or ineffective Commissioner in charge of those agencies who decided to withhold access or to conceal information.

It also depends upon the powers available to the holder of the relevant offices, which are cast in somewhat general terms in NSW and in more direct terms in other States which empower the Inspector to require the relevant Commission to take specific action. In NSW and in Victoria the power of the Inspectors and of the Monitor is confined to making recommendations to the relevant Commission and if necessary to report to Parliament if those recommendations are ignored. In these States the absence or determinative or directive powers means that the utility of the oversight agency is dependent on a mutual

relationship of trust and openness which seems to have worked well so far, and may, in fact, be more beneficial than systems which allow for confrontation and direction. In the relevant Commission to do something or to refrain from doing something against its wishes.

Additionally of value is the extent to which inter jurisdictional cooperation and exchange of information, on intelligence and strategies, has been developed via the several National Conferences which have now been held.

In similar vein the existence in NSW of a Corruption Prevention Network, a semi official and voluntary body of public officials concerned in fraud and corruption prevention and investigation, has proved a useful model in building bridges, identifying emerging areas of corruption and risk management tools, improving the available level of skills and information and communication technologies as well as promoting the objectives of integrity and accountability. This is also an area where Transparency International has a potential role to play in enhancing an understanding and acceptance of the need for integrity and the avoidance of corruption.

All in all, I believe that Juvenal could be satisfied that the guardians in this country are capable of ensuring that the integrity agencies maintain their integrity and that, within the integrity agencies themselves, there are available mechanisms to secure the effective discharge of their functions.

Relevant legislation

New South Wales:

The Ombudsman Act 1974

The Police Integrity Commission Act 1996

The Independent Commission Against Corruption Act 1988

Queensland:

The Crime and Misconduct Act 2001

Western Australia:

The Corruption and Crime Commission Act 2004

Victoria:

The Police Regulation Act 1958

Commonwealth:

The Ombudsman Act 1974

The Australian Crime Commission Act 2002

The Law Enforcement Integrity Commissioner Act 2006

Endnotes

¹ (1984) IAC 808

² (2005) NSWSC 782

³ (2006) NSWSC 165

⁴ (1992) 28 NSWLR 125

⁵ (1982) 1 NZLR 252

⁶ (1990) 170 CLR 596

⁷ (1990) 170 CLR 321

⁸ (1999) 48 NSWLR 161

⁹ *Investigating Corruption and Misconduct in Public Office* at 712 to 716

¹⁰ *Judicial Review of Administrative Action* 3rd ed 245-251

¹¹ (2003) 198 ALR 59