

## A NATIONAL INTEGRITY COMMISSION

*The Hon Michael Murray AM QC\**

*Integrity has no need of rules*  
– Albert Camus

### The need

Sadly, there is no level of government bureaucracy, federal or state, where the activities of public officers, in the wide sense of that term, display the level of integrity to which Camus referred. There are those for whom the temptation to engage in corrupt behaviour, in the belief that they can achieve a benefit by illegitimate means without detection or by creating a systemic web involving others who will not blow the whistle, is strong enough to cause them to 'have a go'.

Most of the Australian jurisdictions have now, in one way or another, moved to create investigative agencies with the general remit of anti-corruption in the broad sense, whether the conduct in question is criminal in nature or not. They are armed with extraordinary powers, enabling evidence to be gathered, tested and ultimately used against malefactors in ways not permitted by the general law, particularly as available to the police and other agencies of the state which have the power to initiate and prosecute criminal proceedings and/or to pursue compensation or other civil remedies for breaches of the law.

The public perception is that federal agencies of government are no less prone to this danger than other Australian jurisdictions and there is no point in waiting for cases to occur so as to demonstrate that the public perception is well grounded in fact. The incidence of corrupt activity may be occasional and on the fringe of public service, and corruption may never be able to be entirely eliminated, but that is no reason to decline to seek a remedy.

The generally available collection of agencies at work in areas of specific subject-matter will not suffice. They work best because they are concerned to deal with specific areas in ways which seek to provide a remedy without substantial interference with our rights as citizens. I have in mind an admittedly incomplete list of matters and agencies, as follows:

- financial accountability — Auditors-General;
- fair public administration — Ombudsmen;
- public sector ethical standards — Public Sector Commissioners;
- political ethical standards — parliaments and governments; and
- criminal activity — the police and Directors of Public Prosecutions.

Of course, matters may come to light in various ways by means of complaint or authorised forms of whistleblower processes and, for those with standing (a concept which today is more relaxed than was formerly the case), the courts may be approached by way of various forms of judicial review, both as to the merits of a matter and procedural issues, including the rather old-fashioned prerogative processes, for injunctive or declaratory or other relief, if due process has not been observed.

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Subject to a measure to which I will shortly refer, I see no need to interfere with any of that, provided the exercise of their powers by integrity or anti-corruption agencies is not constrained by questions of standing. It is invariably the case that such agencies may exercise their powers no matter whether a matter comes before them by way of complaint, any form of notification or of their own motion. Under s 83 of the *Corruption, Crime and Misconduct Act 2003* (WA), the consent of the Parliamentary Inspector is required before prerogative or injunctive relief can be sought or obtained or a declaratory judgement can be given. I make no comment upon that provision.

### **Corruption**

So far as I am aware, the term 'corruption' is not defined in legislation, but, as is the case in the definition of the relevant criminal offences, its meaning is taken from the common law. That seems to me to be appropriate. The term should bear its natural meaning and allow for some flexibility. Corrupt officials are inventive in the ways in which they misbehave and in their motivation. As the saying goes, 'You will know corruption when you come across it'.

Under the Western Australian Corruption, Crime and Misconduct Act, corruption involves the use of the status conferred upon the person by the public office held, the exercise of a power incidental to the office, or the failure or refusal to do so, for a purpose foreign to that for which the power was conferred, or for an improper purpose, with the intention to obtain some private (not necessarily financial) advantage or benefit for the officer or another, or to cause some detriment (not necessarily financial) to another.<sup>1</sup>

The corrupt conduct may be an act or acts, or the omission to act, and, absent the intention or motive, it may be entirely lawful. The necessary breadth of the concept shows why effective anti-corruption may not be left to the general civil and criminal law and the investigation processes available there, which may lead to accepted remedies after processing a matter through the courts, although, of course, access to such remedies after investigation by an integrity commission — if necessary, using its expanded, more draconian powers — has produced an appropriate conclusion, is not foreclosed.

In my opinion the breadth of the concept should not make it susceptible to constitutional challenge in the federal sphere because the functions and exercise of power of the integrity agency will be concerned with the oversight of the proper functioning of federal agencies established in areas of clearly available legislative power at the federal level. The 'incidental power' under the *Constitution* is available to support a properly constructed federal integrity agency.

### **Challenging an integrity agency**

Where the decisions and processes of integrity agencies have been overturned, it has been effectively on the ground that the agency has arrogated power and jurisdiction to itself which in fact it did not possess. In Western Australia the recent case of *A v Maughan*<sup>2</sup> provided a timely reminder that the Corruption and Crime Commission (CCC) was entirely a creature of its statute and could not, by the use of concepts of statutory construction concerning accretion of power by way of necessary intendment, provide itself with a power to initiate and conduct criminal prosecutions which was not expressly contained within its Act.

I think that is also a fair description of the point at issue before the High Court in *ICAC v Cuneen*,<sup>3</sup> where the plurality of four judges held that, for conduct to be lawfully subject to investigation and the use of ICAC's extensive powers, it must be capable, if proved, of having an adverse connection to the exercise of the public office in question in one of the

ways described in the jurisdictional section of the New South Wales Act, s 8. Where such sweeping powers, abrogating ordinary rights, were to be available, it could only be because the statute clearly expressed the intention to make it so.

### **The role of the integrity agency**

In my view the proper role of an integrity agency is to use the powers available to it, as required in its judgement, to ascertain what in its opinion are the primary facts concerning alleged corrupt behaviour and to refer the matter to an appropriate agency or agencies to consider in the ordinary way whether the matter should be prosecuted criminally and/or civilly against such persons as that agency considers should be prosecuted. In addition, there will be cases where the proper course is to refer corrupt conduct to an agency which is the home of the corruption, whether systemic or not, so that it may take appropriate remedial action within its power to remedy the matter.

The people amenable to its reach will be involved public officers and the ultimate remedy is publicity, which should only name those about whose conduct an opinion is expressed where that is necessary to remedy the harm done or to instruct other public officers. A properly constructed integrity agency is, in effect, a super-investigator with enhanced powers to expose the facts about which it expresses its opinion, recognising that it is not a court applying accepted standards of proof to overcome the presumption of innocence as if it was a prosecutor.

It is necessary that the agency has enhanced powers of investigation which may override the protections and privileges ordinarily available to a person who is accused of wrongdoing. Commonly, such agencies may be invested with extraordinary powers:

- the power to act upon notification (sometimes compulsory), upon complaint or of their own motion;
- enhanced powers of entry and search of places, vehicles and people;
- use of assumed identities;
- controlled operations of secret surveillance of various kinds, including undercover involvement in criminal activity and integrity testing;
- the power to require the attendance of persons upon the integrity agency and the production of documents, et cetera;
- the power to work cooperatively with, or prevent the involvement of, other investigative agencies; and
- the compulsory examination of witnesses, who may be legally represented, and claim legal professional privilege but, generally speaking, not the privilege against self-incrimination.

### **Secrecy**

It is generally the case that integrity agencies are subject to comprehensive non-disclosure provisions, other than when a matter is referred to an appropriate authority for consideration of, and to take, action by way of prosecution or civil claim.

When that is done, care is taken to preserve the ordinary privileges and rules applicable to parties to litigation and witnesses. For example, under the Western Australian Act information provided under compulsion to the CCC is inadmissible in evidence against the person making the statement except when testing the witness's evidence, when it may be put as a prior inconsistent statement.

Otherwise, public disclosure is, in Western Australia and generally, confined to circumstances where it is considered to be in the public interest to advance the fight against corruption in particular circumstances. It ordinarily occurs by way of the process of reporting to Parliament (usually by way of a report to its bipartisan standing committee) and even then it should be the case that an opinion or finding formed in respect of the conduct of an individual public officer or other person who is found to be party to or in some way involved in the corruption should not name the individual unless necessary for the purpose mentioned above.

The principle that the privacy of an individual should only be breached where necessary to deal appropriately with the corruption is, in Western Australia at least, central to the process of investigation. If I, as Parliamentary Inspector, hold an inquiry into an allegation concerning a public officer, it must be conducted in private, although I am given all relevant powers of a Royal Commission.

To a substantial degree the same holds good for our CCC. Its examinations are not open to the public unless, in the discretion of the Commission, it considers that it is in the public interest to open all or part of its proceedings to the public, 'having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements'.<sup>4</sup> In my opinion, that is as it should be, and that approach provides the best protection possible against 'collateral damage' to the reputations and careers of those caught up in the process of investigation until their implication is established and the case is one where it is considered necessary to reveal identities.

### **Oversight of an integrity agency**

I am convinced that, rather than seek to rely on the engagement of processes of procedural and merits review, in a haphazard way, through the courts, the effective mechanism of overview of the work of an integrity agency is by the Parliament itself through its entirely independent officer, the Parliamentary Inspector.

My office is established in common form. I have wide powers to audit the work of the CCC to ensure its compliance with the law and the appropriateness and effectiveness of its processes. I have the function to deal with misconduct by the CCC and its officers and I may act upon complaint, upon compulsory notification of allegations concerning the CCC and its officers or of my own motion. My investigations or inquiries may involve complete access to the CCC's files, the production of anything relevant to a matter, and the gathering of evidence.

I may take over an investigation of the CCC; in some circumstances I may correct its findings; and I may make recommendations for remedial action. I may refer matters to other appropriate agencies such as the police and the Director of Public Prosecutions. The process of reporting to Parliament, generally via the joint standing committee, is an effective mechanism to achieve remedial action where fault is established. Although the Commission is ordinarily not bound to accept my views, it generally does so and, in any event, the public has the assurance of independent scrutiny of its work.

### **Endnotes**

<sup>1</sup> *WA v Burke, Grill and Hondros* (2011) 42 WAR 124, [278]–[287], [329]–[332], applying *Willers v The Queen* (1995) A Crim R 219, 225, 231.

<sup>2</sup> [2016] WASCA 128, [103]–[151] (Martin CJ).

<sup>3</sup> [2015] HCA 14.

<sup>4</sup> *Corruption, Crime and Misconduct Act 2003* (WA) ss 139, 140.