

XIIIth IACC Conference

Athens, 30 October 2008 to 2 November 2008

IGEC Workshop

Re: Government Interference in Corruption Investigations

1. The fact that there is a dedicated anti corruption body in a given jurisdiction does not, of itself, ensure that corruption in government will be adequately and effectively investigated and that the corrupt are dealt with in accordance with law.
2. There are many ways in which a government may impede or frustrate the effective investigation of corruption or its outcomes, whether that corruption be by politicians, bureaucrats or those who deal with them in their public sector capacities.
3. The most blatant way in which this can occur is where the anti-corruption body is not independent of government and so government can direct that a given investigation not be undertaken or even disband the body, as has recently occurred in Italy and in South Africa with the Scorpions. Alternatively in such cases the government may direct that an investigation be undertaken in relation to those who are regarded as enemies of the government, even though there may not be adequate grounds for undertaking such an investigation.

I had no such instance occur whilst I was Commissioner of the Independent Commission Against Corruption in New South Wales.

4. Even where the body is theoretically independent of government there may still be pressures brought to bear either not to investigate or not fully to investigate certain matters involving high level members of the government. Whilst this may not take the form of a direction, subtle influences can be exerted. The effect, if any, of such influences will depend very much on the standing of the agency and the calibre of its leadership. If the body is strong and its leadership yobust, such attempts at influence could well be counter-productive.
5. Another way in which the investigative process can be impeded is by government not providing an adequate budget for the anti corruption body. This has proved to be relatively common. After initial enthusiasm and a fanfare of publicity the budgetary allocation is gradually whittled down.

6. This has a number of effects. First it sends a negative message to the anti corruption body, to those who are or may be the subject of investigation and to the community at large. The message is that eradicating corruption is not a priority for the government. Secondly, it is likely to have the effect of downgrading the anti corruption body as a place of employment in the eyes of potential employees and of the community.
7. Factors that should operate to assist an anti-corruption body include that its rates of pay and status attract a high number of applicants for employment and thus give a wide selection to the body, enabling it to employ the best talent. Downgrading rates of pay (which is a likely consequence of budget cuts) tends to result in talented investigators not wanting to seek employment with the body.

Secondly a significant limitation on budget is likely to mean that the salaries payable to those already employed will be unlikely to be attractive for the best of its investigators. Attrition of the best is therefore likely. They will go to where they are appreciated and paid accordingly.

Thirdly it will mean that the body will only be able to investigate a limited number of cases and, as a consequence, it may be tempted to investigate the easy cases which may be lower down in the order of seriousness and leave un-investigated the more difficult cases that deal with the top echelons of government.

Fourthly a low budget for an anti corruption body is likely to impact adversely on its morale. Most people want to be employed by an organisation of which they can be proud and which they feel is of value to, and valued by, the community. If a government treats its anti-corruption body as unimportant (as occurs when significant budget cuts are effected) the status of the body will be reduced in the eyes of the public and of the employees of the body itself.

8. Experience shows that whereas a government may start off by providing an adequate budget for an anti corruption body, it may (and frequently does), over the course of time gradually reduce the budget. This can occur by not increasing the actual amount allocated, notwithstanding the effects of inflation and/or gradually reducing the amount by reference to what in Australia is described as "an efficiency dividend".

In the Independent Commission Against Corruption in New South Wales of which I was Commissioner for five years there was a constant battle with government that sought to reduce our budget in real terms. So this factor can operate even in countries where corruption is not as great a problem as in some other parts of the world. I believe that budgetary reductions can be expected to be even more pronounced in those countries in which the need for an effective anti-corruption body is greater.

9. Another way in which government may impede the process of investigation of corruption is in the appointment of the person or persons who head the anti corruption body. Experience teaches that the head of an anti corruption body is very important for the ethos, enthusiasm and efficiency of the body. A body that investigates the conduct of politicians and senior bureaucrats will not make friends in political or bureaucratic circles.

Whilst making friends is not part of such a job, regrettably doing ones job properly tends to make enemies particularly, in the political arena. This tends to result in criticisms, (frequently unjustified), being made under the cover of Parliamentary privilege, with consequent widespread publicity. This can be both upsetting and destabilising, unless the head of the anti corruption body is robust, steadfast and secure in his/her post position both during and after his/her tenure. This can occur where Judges are appointed to such positions and have the right, by statute (rather than as a result of executive goodwill), to return to their judicial offices at the end of their terms as head of the anti corruption body or in other cases have pension rights that are both secure and adequate.

10. The appointment of "friends of the government" to anti corruption agencies is not uncommon, particularly when the appointment is made by the Executive. This can be true even where there is a Parliamentary Committee that may make a recommendation, since such Committee frequently, indeed usually, has a majority of government members. The appointment of "friends of the government" tends to result in such appointees not undertaking investigations that might be embarrassing to a government or its ministers or not being robust in its investigations or in the way in which they are reported.

My own experience was that where an enquiry was held into the conduct of Members of Parliament they were at times uncooperative in the investigation and quite commonly antagonistic to the outcomes, even when they (as individuals) had no adverse findings made against them. Even such Members of Parliament appeared to resent scrutiny of their behaviour and tended thereafter to be unfriendly to the anti corruption body and its needs.

11. Yet another way of frustrating the workings of an anti corruption body is for government not to act to enforce its recommendations, where the body does not have the power or function of enforcing its own recommendations.
12. In New South Wales, where I was the Commissioner of the Independent Commission Against Corruption for the maximum statutory term of five years from 1994 to 1999, this was regrettably not uncommon.

13. In a number of cases findings of corruption or cognate conduct, or criticisms of the behaviour of bureaucrats, were either not acted on or the subjects of such findings were promoted or otherwise favoured.

14. The following cases illustrate this point.

(i) **Report on Charter of Aircraft by Police Airwing (October 1996);**

This investigation examined whether some officers attached to the Police Airwing had engaged in corrupt conduct by improperly allocating charter work for fixed wing aircraft to a particular company.

A sergeant of police had been the Police Airwing Coordinator from 1986. The investigation found that this officer had engaged in corrupt conduct which resulted in a particular company, with which he was associated, obtaining an effective monopoly over the fixed wing charter work of the New South Wales police force with consequent considerable cost to the tax payers (p3).

The Report stated that the officer in question had:

"acted dishonestly, partially and in breach of public trust in the exercise of his functions... and misused information which he acquired in the course of his official duties" (p55).

The Report recommended that he be prosecuted for a criminal offence and that disciplinary action be taken against him under the relevant legislation (pgs 56-59).

The case was clear. The cost to the tax payer both of the corrupt conduct and the investigation substantial. But the police officer was not prosecuted, was not dismissed from the service and was not demoted or otherwise disciplined - an outcome that was very disappointing for the ICAC and in particular the officers who had carried out an excellent investigation.

(ii) **Report on the Public Employment Office (November 1996);**

This investigation into the Public Employment Office of New South Wales was a consequence of the down grading and removal of the then

Director General of the Office and was concerned with a number of managerial and ethical aspects of public administration.

The enquiry involved a preliminary investigation, a formal private hearing and a full public hearing in which evidence under oath was taken. The enquiry was extensive and expensive.

At the conclusion of the public hearing, Counsel Assisting the Commission submitted that "the manner in which (one of the officers in question) gave his evidence, and the conflicting accounts he gave, is capable of supporting a conclusion that he was deliberately attempting to avoid disclosing his full knowledge of relevant events".

The Commissioner's Report included a statement that:

"That submission...was well grounded and I accept it" (p86)

and continued by making the following finding against the relevant senior officer of the department:

"(his) evidence was...loaded with inconsistencies and was marked by an unwillingness to disclose knowledge of material facts on the occasion he was interviewed... (and) in the private hearing" held by the ICAC.

The Public Employment Office was disbanded and reorganised but the officer in respect of whom the above findings were made was not disciplined, indeed he was promoted and at one stage had the benefit of more than one high position in the New South Wales public sector at the one time. He appears not to have suffered for his deliberate attempt to avoid disclosing his full knowledge of relevant events. As you may well appreciate the adverse effect on the investigating officers was quite marked.

(iii) **Investigation into Parliamentary and Electoral Travel (First Report) (April 1998);**

This investigation involved examining the conduct of certain Members of Parliament in relation to claims for travel allowances made by them over a period from 1990 to 1997. A number of them were cleared of any wrong doing but one member, who was a Minister of the Crown, had findings made against him that:

- (a) that he had acted dishonestly and in bad faith (p74);
- (b) that he had made false statements and concealed facts relevant to his claims (p75);
- (c) certain action taken by him in relation to a claim was "deliberate, dishonest and wilful" (p76);
- (d) his conduct "constitute(d) or involve(d)" the dishonest exercise by him of his official functions as a Member of Parliament (p82);
- (e) his conduct "involved dishonesty. It involved untruthfulness. The dishonest and untruthfulness were related to the functioning of the Parliament, in that he repeatedly told lies to the Parliamentary Accounts Department. As a result of those lies, he received the benefit of credits from the funds of the Parliament which he would not otherwise have received" (p84);
- (f) he "engaged" in corrupt conduct in the respects detailed in (the) Report (p85);
- (g) "consideration should be given to the prosecution of (the Minister) for breaches of...the Crimes Act, and for the common law offence of breach of public trust (p85)
- (h) "consideration should be given to the taking of action against (him) in respect of his membership of the legislative assembly" (p86);

No action was taken by the Parliament against the Minister. He was permitted to resign both as a Minister and as a Member of Parliament and to take his full pension. Furthermore he was thereafter appointed by the government, of which he had been a member at various times, to different (and at times more than one) quangos at levels of remuneration that were very advantageous. Indeed he appeared to have benefited financially following the adverse outcome of the investigation.

He was never prosecuted.

The effect on the morale of the ICAC as a result of this response by the government was not good.

(iv) **Report on Investigation into the disposition of funds remaining in the accounts of the former Illawarra Development Board (October 1999);**

This investigation concerned an allegation that a senior public official employed by the Department of State and Regional Development in one of the department's regional offices had wrongly used for his own benefit a substantial sum of public monies to pay for family holidays, trips overseas, department store accounts, credit card statements, alcohol and other expenses of a personal nature. The officer in question had control of a fund which amounted to over \$AUD 180,000 in 1990 but by 1993 had been reduced to a little over \$AUD 5,000. Just over \$AUD 102,000 of the money was unaccounted for, but at least \$AUD 70,000 had been expended by the officer in the manner indicated above.

In its report there was a finding by the Commissioner that "public monies were illegally obtained by him and used for his own personal benefit and that of his family" (p59), that he had "engaged in corrupt conduct" and that consideration should be given to prosecuting him for a raft of criminal offences. In addition it was recommended that consideration be given to terminating his employment and taking action against him for a series of disciplinary offences.

The officer in question was permitted to resign and he was never prosecuted.

(v) **Investigation into Aboriginal Land Councils concerning travel allowances and expenses (October 1999);**

In New South Wales there is a large number of Aboriginal Land Councils which administer large sums of money and have control over extensive areas of valuable land. The ICAC investigated the operation of these Land Councils and in the course of its investigation exposed corrupt conduct that departed from proper standards on the part of officials.

The investigation revealed a sorry state of affairs in relation to administration, accountability and a failure of those in positions of power and trust to give appropriate leadership. It also revealed widespread corrupt conduct in respect of which express findings were made against a number of public officials. Recommendations were made both for the prosecution of such persons and for the taking of action against them with a view to their dismissal as public officials.

No action was taken on these recommendations. The officials were not removed from office or otherwise disciplined, nor were they prosecuted. Furthermore the monies which they had improperly used were never repaid nor was there repayment sought. Not surprisingly the problems persisted. The effect on the morale of the anti-corruption body was adverse.

15. The foregoing examples are not exhaustive they all occurred in a jurisdiction which is part of a country that is amongst the most favoured nations in Transparency International's Corruption Perception Index. One but can speculate as to how much worse the situation may be in countries that are not in as favourable position in such index.

CONCLUSION

16. There are remedies for the problems revealed above but they are beyond the ambit of this paper. However what I have said is intended to demonstrate that just because there is a dedicated anti-corruption body that is independent of government does not mean that it will be fully effective or as effective as it could be because of the factors referred to in this paper. None-the-less it is my firm belief, based on my experience as the ICAC Commissioner and as a Judge of the Supreme Court of New South Wales that the fight against corruption is still likely to be more effective if there is a dedicated anti-corruption body that is independent of government. I know from my experience at the ICAC that, notwithstanding the problems that can arise and did arise in some cases in relation to enforcement, the ICAC in New South Wales was, and I hope continues to be, an effective anti-corruption body.


The Hon Barry O'Keefe AM QC