

Corruption control and the pursuit of integrity:
Deserving the confidence and trust of the public must be the goal, merely
appearing to be worthy is not enough

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Introduction

I should make two points before commencing my presentation. First, the views expressed are mine and not necessarily those of my employer, the Independent Commission Against Corruption. Second, I will take the safe course of using local examples where they are positive and overseas examples where they are negative.

My presentation starts with the observation by Frank Anechiarico and James Jacobs in their book, “The Pursuit of Absolute Integrity”, that “Corruption is a problem and corruption control a constant challenge for all governments.”¹

Until the 1970s the public sector was a relatively calm place. Issues of corruption were an occasional and brief inconvenience to daily life that were quickly forgotten and most public servants went about their job uninterrupted. Little, if anything, changed. Since the 1970s New South Wales has been driven by cycles of corruption exposure and reform. Periods of tranquility between the cycles are less frequent today and when they do occur they tend to be shorter in duration.

It was the 1965 election and the Liberal's Robert Askin with his platform of more police to combat increasing crime that set the trend for future “law and order” auctions and set in train the events that would lead to the focus on police corruption and, eventually, corruption across the broader public sector. The 1970s saw several corruption scandals break, including exposures by the 1973-74 Moffitt Inquiry of the infiltration of organised crime into NSW registered clubs and, in particular, into gambling and entertainment in those clubs. The Neville Wran lead Labor Government came to power in 1976. It had been a law and order election. But unlike Askin's campaign a decade earlier, the Wran campaign not only added corruption to the law and order debate, it gave the fight against corruption centre stage.

The focus was the Police and they still tend to dominate the corruption debate. However, the past 15 years or so has seen the debate spread to greater and lesser degrees across the public sector, bringing down politicians, other public officials, both senior and junior, and their collaborators in the private sector. It has also seen an increasing focus on systems and processes, rules and regulations.

The Independent Commission Against Corruption

The ICAC was established in 1988 with both an investigative and preventive role. Its current jurisdiction extends to over 130 public sector organisations, employing about 300,000 people across the state, or just over 10 per cent of the entire NSW labour force.² In addition, the Commission has jurisdiction over some 159 local councils, comprising approximately 1,800 councillors and more than 40,000 employees³, as well as NSW-based universities and NSW boards and committees.⁴

¹ Frank Anechiarico and James B Jacobs, *The Pursuit of Absolute Integrity*, Chicago: University of Chicago Press, 1996, p xiii.

² Public Employment Office, NSW Premiers Department, July 2004.

³ Local Government and Shires Association, at <http://www.lgsa.org.au/site/councils.html>

⁴ There are 10 universities within the ICAC jurisdiction and it is estimated there are over 1000 NSW boards and committees.

The Commission's initial focus was police corruption; the priority of the time. In 1996 responsibility for investigating police corruption was taken away from the ICAC and the Police Integrity Commission, more commonly known as PIC, was born. I don't think the loss of responsibility for the investigation of police corruption was a particularly bad thing for the ICAC. Since that time the ICAC has refocused its efforts, giving more attention to the broader public sector than had been previously possible. But the removal of the police jurisdiction has had some interesting effects on complaints received by the ICAC.

Up until 1996 complaints against police comprised between 20-30 per cent of all complaints received by the ICAC. However, when the police jurisdiction was transferred to the PIC, as opposed to a significant decline in complaint numbers – one could have reasonably expected there to be a decline of 20 per cent or more – there was actually an increase. And, generally speaking, there has been a continued increase in the number of complaints received each year since. Complaints to the ICAC have risen from about 1,000 during 1990-1, the first full year of the ICAC's operation, to almost 2,000 in 2003-4.

The most likely explanation for the increase in non-police complaints has three parts. One is the expanding focus on corruption across the public sector in the early to mid 1990s, as instanced by the diversity of ICAC inquiries during that period. They included: development projects, local councils, Corrective Services, gaming and racing, unauthorized release of government information, transport, Aboriginal Land Councils, environmental protection, and even one inquiry into each of the Office of Director of Public Prosecutions and the Glebe Morgue. A second explanation is the heightened awareness of corruption that resulted from the Wood Royal Commission – almost three years of front-page headlines. And third, realization across the public sector that with the removal of the police jurisdiction the ICAC would be able to focus more specifically on the broader public sector corruption, corruption awareness and prevention.

The Chinese sage Kao Tzu

About 2300 years ago the Chinese sage Kao Tzu argued that human nature is inherently neutral and is what we make it, good or bad. He compared human nature to a pool of water: it can be made to flow towards east or west, depending on where the breach in the pool is made.⁵

Today, Tzu's argument goes something like this.⁶ In almost any modern society there is a small percentage of the population, probably something in the order of five to ten per cent, which is inclined or drawn to criminal activity and corruption. There appears to be little that can be done to eliminate this tendency completely. On the other hand, there is another segment of the population, also in the five to ten per cent range, which rejects criminality altogether, regardless of the conditions in which they live. This leaves eighty to ninety per cent, most of the population, in question. A variety of political, economic, and social conditions can influence the direction of this overwhelming majority. Some conditions are likely to increase susceptibility to crime and corruption while others are likely to support the rule of law.

⁵ Cited in Lau, *Mencius*, London: Penguin, 1970, pp 160-7, at <http://www.gened.arizona.edu/harrison/confucianasia/readings/mencius.htm>

⁶ See, for example, Dr Roy Godson, *Enhancing the Integrity of Justice and Security Officials: The Crucial Role of Society and Culture*, Executive Seminar on Transnational Crime, Georgetown University 2000, pp 1-2.

Tzu's observation and its modern day interpretation holds true both for the problem of corruption and the pursuit of integrity.

Public-private partnerships

There is an increasing trend to contract and tender-out government services, and for privatising or corporatising government enterprises. While strong working relationships with the private sector can provide clear benefits to both sectors, there are important differences between the two sectors in terms of their responsibilities, accountabilities, principles and goals that have the potential to undermine those relationships.

It is not and should not be the role of the ICAC to investigate corrupt conduct in the private sector. However, where there is a public-private partnership the same public sector standards of accountability should apply and come within the jurisdiction of the ICAC. This is because corruption in such a partnership is likely to undermine confidence in the public sector agency involved, and may have a flow-on detrimental effect on community confidence in the processes of the public sector and government as a whole.⁷ A number of ICAC investigations have revealed that a lack of understanding by public sector agencies and private sector contractors of the accountability differences can be extremely damaging. Among other things, Operation Cassandra highlights the significance of this failure as a corruption problem.

Operation Cassandra

Operation Cassandra was an ICAC investigation into aspects of safety certification and training in the state's construction industry. It commenced in February 2003 following an approach by WorkCover NSW, which is responsible for accrediting assessors who operate under the Occupational Health and Safety Act.

For most, at least at first glance, this would appear to be an area at little risk of serious corruption. However, certification provides opportunity for good employment and rewards for those accredited and the potential for significant corrupt profits by those who control the process. At the same time, workplaces where heavy machinery is operated are hazardous for both operators and other workers in the vicinity. The potential for human, social and economic harm caused by false certification is, therefore, significant.

The Commission's investigation targeted three distinct areas of operation: the assessment and certification for machinery operators, Occupational Health and Safety induction for construction work training and certification, and the training and certification of crane operators working in proximity to overhead power lines.

The investigation included the analysis of a large amount of documentation, interviewing a large number of witnesses and potential witnesses, the execution of a number of search warrants, the use of telephone interceptions and covert listening devices, and "rollovers". It was a rigorous and comprehensive enforcement investigation; even by police or PIC standards.

⁷ For a further discussion of these issues see the Independent Commission Against Corruption publications, *Developing a statement of business ethics* and *Our statement of business ethics*, available at www.icac.nsw.gov.au

Deliberate and widespread abuses of the competency assessment regulations by six accredited assessors were disclosed. Several thousand Notices of Satisfactory Assessment were issued without the specified assessment procedures having been properly conducted. In some cases individuals had been issued with Notices of Satisfactory Assessment without having undergone any assessment whatsoever. Occupational Health and Safety induction training certificates were issued where no induction had taken place and training and certification practices designed to ensure the safe operation of cranes and other heavy plant operating near overhead power lines were manipulated.

Specifically, the investigation found that:

- the corrupt assessors identified comprised less than two per cent of all accredited assessors – six out of more than 400
- the two per cent accounted for almost 13 per cent of the total number of Notices of Satisfactory Assessment issued in New South Wales between 1996 and 2003, and more than 20 per cent for the period 2000 to 2003
- more than 30,000 Notices are estimated to have been corruptly issued
- the six assessors are estimated to have profited by around \$4 million, and
- there are reasons to believe that the corrupt practices are not limited to the six assessors identified.

Operation Cassandra highlights the relevance of Tzu's observation today. We have a small percentage of the target population of accredited assessors responsible for the majority of the corruption, while a large proportion of the target population was swayed to corruption by the conditions and opportunities created by the few. Further, while the few shared the very significant corruptly obtained profits the many benefited financially to varying degrees by improvement in their employment and earning opportunities, but to far lesser degrees than the few. The many were, almost without exception, otherwise law abiding citizens who "flowed towards the breach in the pool". And, as we will see a little later, Operation Cassandra is not an isolated outbreak of corruption by either the few or the many.

Community perceptions of corruption

Since 1993 the ICAC has periodically undertaken surveys to determine the community's views on corruption. The 2003 survey found that, of those interviewed:

- 82 per cent believed corruption to be a problem
- 48 per cent believed that they or their families were affected by corruption in some way
- 19 per cent said they or their families had directly experienced corruption in the NSW public sector
- 60 per cent believed that people who report corruption are likely to suffer as a consequence: this is a continuing downward trend from 76 per cent in 1996
- the people with no opinion increased significantly in several categories while the number of people with negative opinions declined significantly, and
- the number of people who saw corruption as a major problem declined significantly while the number of people who saw it as a minor problem increased.

- In addition, those interviewed also expressed the following views about the ICAC:
- 94 per cent believed the ICAC is a good thing for the people of NSW
 - 74 per cent believed the ICAC has succeed in exposing corruption and 17 per cent expressed no opinion one way or the other, and
 - 55 per cent believed the ICAC has succeeded in reducing corruption and 26 per cent expressed no opinion one way or the other.⁸

Overall the large majority of those surveyed perceived corruption to be a problem but interestingly in comparison to previous years the community were more inclined to see it as a minor problem rather than as a major problem. This could indicate that the public believes anti-corruption activities are having some effect.

Public sector managers' and staff perceptions of corruption

The findings of the 2003 Profile of the NSW Public Sector⁹ presented a generally healthy picture of the sector's current identification and management of corruption risk, although organizations need to remain committed to monitoring and reviewing risk management functions. Of interest but perhaps not surprising, is where the views of management and staff converge and diverge. The Profile found that managers and staff identify the improper use of confidential information and breaches of tendering processes as significant corruption issues. However staff perceive improper practices in promotions to be a significant corruption issue while management doesn't. And management perceive the improper use of an agency's resources and equipment and fraud to be major corruption issues while staff don't.

Has the problem of corruption passed?

We have a picture of increasing complaints about corruption to the ICAC; ICAC investigations exposing examples of widespread systemic corruption; large numbers of people willingly taking advantage of corrupt practices; increasing regulation; swings between enforcement and prevention; community perception that corruption is a problem and that the community is suffering because of corruption; and increased confidence in the integrity of public administration, although there are some significant differences between public sector management and staff perceptions of corruption.

From an ICAC perspective another case of systemic corruption has arisen and we currently have public ICAC hearings into the issue of Building Contractor licenses pursuant to the *Home Building Act, 1989*, and deficiencies in the systems and processes for administering this legislation. A large number of applications for Contractor licenses have been supported by fraudulent documents, especially in relation to building licenses. In hearings to date, applicants are estimated to have made about \$800,000 in corrupt payments to obtain building licenses by fraudulent means.

⁸ Independent Commission Against Corruption, *Community attitudes to corruption and the ICAC*, December 2003, at www.icac.nsw.gov.au

⁹ Profiling the NSW Public Sector, *Report*, Independent Commission Against Corruption, January 2003, p x.

The potential problems created by this corruption are substantial. Buildings constructed defectively can lead to injury and the need for the demolition and rebuilding of such structures costing the consumer enormous amounts of money and personal hardship. Defects, which can require long-term repairs, may impact on the overall cost of buildings, including building insurance premiums. Building licenses issued in NSW may be the basis for applications for building licenses in other states. While there is currently no statistics indicating the number of clients of builders who are victims of this fraud; time will tell.

To the question, “Has the problem of corruption passed?” I think there is a simple answer: “No.” To the question, “What then should we do?” I don’t think there is a simple answer. There are however, a few guideposts that will, hopefully, generate discussion about future directions. I have grouped them under three broad areas: the cycle of corruption and reform; is corruption reducing, increasing or just being pushed around? and the compromise between regulatory overkill and opening the floodgates.

The cycle of corruption and reform

We need to break the cycle of corruption and reform and halt the enforcement-prevention pendulum. To break the cycle we must resist the temptation to unquestioningly attribute the absence of reported corruption to existing strategies and institutions or to assume that because more corruption is brought to light, more corruption exists, “proving” the need for additional laws and regulations.

To halt the enforcement-prevention pendulum we have to look at setting balances and integrating competing ideas more carefully. This includes recognition of the fact that failure to enforce the law swiftly and effectively against deliberate or persistent offenders undermines the incentives for compliance in the rest of the community and may bring the regulatory regime into disrepute. The complexity of this challenge was summarized by Malcolm Sparrow when he described the dilemma posed by the competing and often contradictory pressures placed on regulatory bodies, “... be less intrusive, but be more effective; be kinder and gentler, but don’t let the bastards get away with anything; be more focused, but be consistent; (and) be more responsive to the regulated community, but don’t get captured by them ...”¹⁰

Is corruption reducing, increasing or just being pushed around?

No one knows for sure whether public sector corruption has diminished or increased over time, particularly since the 1970s, and, if so, by how much. No corruption rate or trend has been calculated or even estimated. Nor do we know with any precision whether we are solving corruption problems or simply pushing them around and at what cost? If “solving” one problem merely creates another, the result might be called a “band-aid” but can hardly be called a success. Success should be a worthwhile achievement. As Peter Senge has observed, “solutions that merely shift problems from one part of a system to another often go undetected ... those who ‘solved’ the first problem are different from those who inherit the new problem.”¹¹

¹⁰ Malcolm K Sparrow, *The Regulatory Craft*, Council for Excellence in Government, : Washington, DC: Brooking Institution Press, p 17.

¹¹ Peter M Senge, *The Fifth Discipline: The Art and Practice of the Learning Organisation*, New York: Doubleday, 1990, p 58.

Localised successes might look good as a numerical count of localised solutions, but in the aggregate, might not amount to much or even worse, constitute a cost. For example, following an integrity audit the New York Department of Buildings imposed an anti corruption protocol that required all field inspectors to return to the borough headquarters at the end of each day, instead of leaving for home from the last inspection site. The policy was meant to ensure that inspectors did not leave work early. At the same time, no one knew how many inspectors were leaving early or how many hours were being lost. The result of the policy was that while no one knows how much, if any, corruption was prevented there was nearly a 30 per cent reduction in inspector productivity because of the time consumed returning to the office.¹²

The compromise between regulatory overkill and opening the floodgates

At what point do laws and regulations reach the point of over regulation or diminishing or even negative returns and become bureaucratic “red tape”? How do we know when that point has been reached? In his book, “Folded Lies: Bribery Crusades and Reforms”, Michael Reisman has observed:

Red tape tends to abound in those circumstances in which the general public or superiors in a bureaucratic system have lost confidence in the probity and judgment of the bureaucracy, ... In many circumstances, red tape is a response to corruption and an attempt to control it. And yet the very complexities and time-consuming factors introduced by a red tape control system invite enterprising people to find or bore shortcuts. In some cases, the remedies create new incentives for bribes.¹³

Perhaps we should simply focus our efforts on crucial matters, putting to one side unimportant matters. But if they are unimportant, surely we must question why they are in the rule book at all. Or does this simply highlight a more serious problem? We willingly add new laws and regulations to achieve compliance, but do not have a similar willingness to remove layers that have built up but which now have little or no relevance.

In his book, “The Regulatory Craft”, Malcolm Sparrow observed, “The nature and quality of regulatory practice hinges on which laws regulators choose to enforce, and when; on how they focus their efforts and structure their use of discretion; on their choice of methods for procuring compliance.”¹⁴ If we accept Sparrow’s observation, how do regulators chose the laws that they will and will not enforce? How should they communicate those priorities to those they regulate? How should the regulators account for their decisions; their selection of priorities? Does this mean giving regulators greater discretion and flexibility in what laws and rules they enforce while at the same time withdrawing that discretion and flexibility from those who are bound by those very same laws and rules and on whose shoulder the delivery of government services rests?

¹² Frank Anechiarico and James B Jacobs, op cit, pp 27-27.

¹³ In Frank Anechiarico and James B Jacobs, op cit, p 173.

¹⁴ Malcolm Sparrow, op cit, p 2.

Is it simply a case of doing everything right?

Finally, is it simply a case of “doing everything right” and corruption will be no longer a problem? The challenges of this proposition are answered quite humorously in an entry in Mel’s journal, in the novel “Picturing Will” by Ann Beattie:

Do everything right, all the time, and the child (your agency) will prosper. It’s as simple as that, except for fate, luck, heredity, chance, the astrological sign under which the child was born, his order of birth, his first encounter with evil, the girl who jilts him in spite of his excellent qualities, the war that is being fought when he is a young man, the drugs he may try once or too many times, the friends he makes, how he scores on tests, how well he endures kidding about his shortcomings, how ambitious he becomes, how far he falls behind, circumstantial evidence, ironic perspective, danger when it is least expected, difficulty in triumphing over circumstance, people with hidden agendas, and animals with rabies.¹⁵

I hope that I have provided an interesting snapshot of the ICAC and its investigations, and some issues and perceptions about corruption in NSW. It was not my intention to provide a definitive solution or way forward for corruption regulation and prevention in NSW – and that is largely because I don’t believe there is one – but to highlight some of the challenges ahead for the public sector, those in the private sector who wish to enter into public-private partnerships and regulatory agencies, and the costs of corruption to the community.

Thank you.

¹⁵ In Tom Peters, *Liberation Management*, Macmillan: London, 1992, p 481.