

## **Seeing, believing and trusting: Governance challenges for a future anti-corruption agency**

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I recently watched a documentary on SBS on the global financial crisis – Inside Job. It depicts collusion, fraud, corruption, conflict of interest, and misconduct by the financial services industry, Wall St, government (across the Reagan, Clinton, Bush and Obama administrations) and eminent economics professors from the US's most prestigious universities.

As I watched this I found myself empathising with the women who knitted as they watched the guillotine fall in the French Revolution: Heads should roll I thought.

But I know my administrative law colleagues are there for a reason and that is to curb such base instincts. I respect them and trust them. But even so, where is the justice?

An elite group of people in key positions in US institutions became extraordinarily wealthy selling dodgy (high risk to the point of irresponsible) financial products, with the support of the ratings agencies that gave triple AAA credit ratings to the financial institutions involved, and then those selling the products bet against the viability of these financial products. The game destroyed the lives of millions of people not only in the US but globally. In Asia factories closed as their parent companies veered toward bankruptcy; in Australia we were affected less than most, but there is no guarantee that we will escape next time. And we are told that this will happen again by many commentators. The world financial system is unstable in the same way as it was before the GFC.

What about our learning to prevent this? On this basis were changes made to the structures that allowed such predatory behaviour to happen? It did not happen. Where was the process of holding individuals to account for acting fraudulently and corruptly? That did not happen either.

I raise the case of the GFC because this is the scale of the problem that we are dealing with in the 21<sup>st</sup> century. White collar crime has reached a whole new level and we are ill equipped to manage it.

You might say this is a US problem, not ours. But we see our own Australian versions of economic predation that involves both private and public enterprises. Think of the scandals and the harm caused to consumers and citizens that we have witnessed in the past few years - vocational education where people acquired debts and lost money for studies they never received, nursing homes where abuse and neglect are rife, the disability insurance scheme where the power imbalance between agency providers and clients so often prevents a fair deal. Exploitation of frontline workers and clients, both vulnerable groups in different ways, has occurred in all these cases, while corporations benefit from taxpayer funds. Think of the human misery caused by government and debt collectors through

Robodebt. And then we have memories of the Banking Royal Commission, an inquiry into financial services in Australia that we were denied by government for so long. All of these issues have been supposedly addressed by government, but they have not made a dent on the predatory behaviour that we are all living with in our midst.

Australians don't trust their institutions: Nor should they. Indeed, one of the strongest messages to come from the many inquiries taking place at government level is consumer beware!

And what is happening to citizens in these times? Suzanne Karstedt and Stephen Farrell talk about the crimes of everyday life. Ordinary folk too are eschewing norms of "playing fair and true". Crimes of everyday life include insurance fraud, tax evasion, not paying fines, not paying sanctions and penalties imposed by authorities, welfare fraud and identity fraud.

How is government responding? By domination. They are responding to their own loss of authority and public distrust through coercing good behaviour – at least that is what they intend, based on wrong-headed thinking that deterrence is the answer to their woes. But punishment by an authority that is not trusted will only elicit compliance under conditions of high surveillance and threatening consequences. In the process freedom is lost. Democracy is lost.

So can an anti-corruption commission at the federal level respond effectively to these new bold forms of corruption, fraud and misconduct that is occurring from bottom to top of our social strata?

The first question and a most important one I will leave to our administrative lawyers to address, and that is where would such a commission sit amidst all the governance apparatus that is currently in place. It seems counterproductive to weaken for instance what is happening at state level, and even more counterproductive to enter competition with other agencies. The stakes are too high and the resources too limited to allow this kind of wastage to occur.

What I would like to focus on in the remainder of this talk is the contribution that an anti-corruption commission needs to make if it is to help shift public distrust to a modicum of trust and strengthen the legitimacy of public institutions.

First, an anti-corruption agency needs to actively promote integrity. Integrity is not the absence of corruption in the eyes of the public. Integrity is seeing a public institution that has soundness of purpose, soundness of process, and is willing to make itself accountable to the Australian public. To those who think this is a tall ask, I would refer you to the plenary address at this conference by the Honourable Jennifer Coates. You would recognise that the Australian public saw the Royal Commission into Institutional Responses to Child Sexual Abuse as having integrity. People came forward in increasing numbers because they understood that this was a genuine effort to understand what had happened and that it was important for people to tell their story. It was not a waste of time. They trusted the Commissioners, they trusted the process. The numbers who came forward showed that. And the Commission demonstrated their sincerity through offering different pathways for

“speaking” to the Royal Commission. Australians were brave. The Commission was brave. The Royal Commission delivered for those who had suffered abuse by telling their story, making recommendations and committing to follow up on what is happening. The presentation of the Honourable Jennifer Coates in giving the opening address to the Australian Public Service Anti-Corruption Conference is evidence of a determination to stick with it for the long term so that recommendations are not forgotten.

We can deliver high integrity institutions and an anti-corruption commission should aspire to that. I will argue that such a commission needs to facilitate prosecution, be able to push along improving structures to prevent corruption, fraud and misconduct, and address issues of ethics – all are important.

On prosecutions, we need to acknowledge how hard this can be in institutions that are highly bureaucratized. Hannah Arendt described bureaucracy as the most tyrannical form of governance because it is government by nobody – nobody is ever responsible. Sometimes that is true, but not always. Prosecutions of those responsible for inflicting harms is an important responsibility for law enforcement. That said, prosecuting scapegoats and those who are known by the public to be falling on their sword to save those more culpable does nothing more than to deepen public cynicism.

On structure, the Royal Commission on Child Sexual Abuse identified a set of characteristics that were shared by institutions that concealed corruption (Honourable Jennifer Coates, Plenary address, APSACC, 30 November 2019). Such institutions were hierarchical, they cultivated an alternative moral universe, information was withheld from outside scrutiny, there were inadequate mechanisms for dealing with complaints, they were driven by desire for institutional status and prestige, and they enlisted distinguished people beyond reproach in the public eye. In short, they were sectioned and encased like an oil tanker. Just as oil is prevented from being swished around everywhere, these organizations made it hard for a critical voice to be projected into or out of or across barriers of status and control.

A lot of institutions have at least some of these characteristics. They hide behind tradition, confidentiality, task and information complexity, efficiency and commercial advantage. Some may be justified, some will be bogus. This organizational structure is at the very least a risk factor for misconduct. An integrity commission needs to crack open these organizations and facilitate change.

In so doing, an integrity commission must guard assiduously against adopting these same characteristics. How does it do that?

The principle of transparency in how it engages and makes itself accountable to the public is the highest priority. The public must hear and see that the integrity commission is pursuing its goals in a publicly beneficial way, that it is being fair and reasonable in its dealings with people and that it can be trusted to protect whistleblowers and those at risk of being further harmed by corrupt or fraudulent activities or misconduct. Republican Senator Grassley’s commitment to qui tam legislation in the US and John Braithwaite’s (2012) proposals for qui tam to be combined with restorative justice expands on these themes of practicing transparency for the public benefit.

Next is the need to embrace a plurality of ethical frameworks. It is of note that law and courts are among the institutions that suffer from trust deficits. In this regard, Professor Christine Parker from Melbourne University has done some interesting work on distilling the essence of ethical frameworks used by lawyers. She recognises four such frameworks each of which brings together a distinctive set of values. There is a traditional adversarial lawyering approach, a responsible lawyering approach which prioritises safeguarding the integrity of the institution above all else, an activist approach which prioritises social justice, and an ethics of care approach that seeks to acknowledge and repair harms and restore relationships. These approaches may be used in different contexts or by different lawyers. The important and challenging conclusion of this work by Parker is what is not an ethical approach to lawyering. She argues that a sole reliance on the law of professional responsibility and rules of professional conduct is not an ethical base.

This way of thinking has relevance to contributions to public service more generally. To those concerned with the role of the public service, the most dangerous place to be may be to deny ethical frameworks. To carry out duties solely according to rules and codes of conduct means a failure to reveal what one stands for to the public. Soundness of purpose and of processes cannot be judged by a rule book. Integrity cannot be inferred from a rule book. Consideration and wisdom are required. Consider the taxpayer who is paying for the services of government and its public servants. It is reasonable for the taxpayer to ask, what do you stand for? Is it reasonable to answer in terms of what consultants advise and what ministers may want? Arguably not. The public may look to their public servants to be across the complexity of the question and to be asking: what is the best course of action for ordinary Australians.

The answer to such a question is not going to yield a consensus nor should one wish for this outcome. Different circumstances require different value frames for resolution, and many times compromises must be built from different ethical frames. Unless an integrity commission has access to this variability of thought within its ranks, its capacity to deal with a range of issues will be seriously limited.

The final related point is that the diversity of issues that the public are likely to want an integrity commission to address will need careful triaging. Some will be the result of a lapse of judgment, some will be intentional and calculating. Some will seriously erode institutional integrity, others less so. Some will be very costly and demand public accountability. Such judgments need to be made wisely. They also need to meet public expectations of fair, reasonable and timely treatment.

If an integrity commission is to have the confidence of the people, the guardians of the commission have to be the people. Guardianship needs to have the properties of a board that offers advice, requests explanations and reviews decisions about how a matter is to be dealt with.

There are various ways in which the people's voice is being included in governance processes. Deliberative democracy offers a variety of models used in various contexts globally for giving people a say in governance processes. There is widespread recognition

that the gap between the people and democratic governments has become dangerously large. Deliberative democracy models offer an important pathway back to building relationships and trust.

But there are more conservative options as well. For instance, a board could comprise distinguished Australians nominated by the people. Each year Australians invest heavily in nominating people they respect for Australia Day awards and Queen's birthday awards. There will be a substantial number who view this cynically, undoubtedly with justification. Even so, it constitutes a resource of well-respected citizens who have gone above and beyond in support of their fellow Australians. It is not unreasonable to assume that many would be willing, if not honoured, to serve on the board of an integrity commission, specifically with the purpose of reinvigorating the integrity of our institutions. To be part of this project, nominees would have to understand trust norms, that is what citizens expect government officials and their partners to do to meet community standards of trustworthiness. The objective would be to bring community trust norms to the centre of government. There is nothing more powerful for bringing change than leading by example.