4. Australia’s official corruption challenges

4.1. The issues

Even if Australia still ranks relatively high on international governance indices, reduced trust and elevated scandals in Australian government in recent years have focused attention on the scale of our official corruption problems – and the issue of how corruption itself is understood, measured and defined. Achieving a clearer picture of the nature of these challenges, and the adequacy of operating definitions of corruption, legal categories and agency responsibilities, is pivotal to identifying whether and how integrity systems may need to be strengthened.

For Australia there are four main issues:

- The changing profile of the types of misconduct and integrity violations classified by the community as ‘corruption’ – especially increasing concern about ‘grey corruption’ and ‘undue influence’;
- The extent of corruption risks going under-addressed, or unaddressed, in particular government and industry sectors – especially at Commonwealth level;
- Wildly varying legal definitions of official corruption across Australia, creating problems of inconsistency, confusion and uncertainty about the right systems and processes for responding to corruption; and
- As a consequence, disjunctions between the amount of official misconduct that is known or perceived to occur, and amount and effectiveness of official action to deal with and prevent that misconduct – given that only some of these definitions cover, or propose to cover, the spectrum of corruption risks relevant to modern-day Australia.

These definitions are central not only to whether justice is achieved, accountability is upheld and trust is maintained. They also define what preventive strategies are triggered, to reduce reliance on a retrospective ‘damage control’ model of integrity; whether corrupt and high-risk misconduct is properly identified, measured and monitored; and whether it is detected and stopped before taking hold, through comprehensive reporting frameworks.

These issues have special significance for design of the proposed Commonwealth / National Integrity Commission. They determine whether its scope and mandate will be narrow, criminal, fragmented and confusing, as proposed – or broader and systemic to meet these challenges. However, these are also issues for State governments, given the variations in legal definitions of corruption already confusing the Australian public sector landscape. Arriving at a more unified understanding of our corruption challenges is the second fundamental step in identifying reform priorities.
4.2. The state of the debate

Types of official corruption in Australia

Corruption, defined by Transparency International as ‘the abuse of entrusted power for private gain’, takes a wide variety of forms – including ‘grand’, ‘petty’ and ‘political’ corruption. ¹ Australian experience confirms that serious threats also lie in conduct which crosses these categories; and, especially, conduct which is widely seen as corrupt but treated as minor by law, and/or where rules and laws are considered ambiguous: ‘grey corruption’. ²

Grand corruption

As outlined in chapter 3, Australia is at extremely low risk of converting to kleptocracy or total systemic capture of public decision-making by non-public interests, as is the norm in some countries. However, the potential is demonstrated by a history of exposure to near-grand corruption at State level, for example in pre-Fitzgerald Queensland or under ‘WA Inc’.

At a federal level, the relative speed of adoption of a foreign interference regime in 2018, including the banning of foreign political donations following the resignation of Senator Sam Dastyari³, reflects a recognition that acceptance of grand corruption in other jurisdictions can lead rapidly to capture of policymakers in ways that may seem individual and minor, but could rapidly become systemic, and lead to similar practices.

‘Petty’ corruption

Individual acts of official bribery, kickbacks, embezzlement of public funds or self-enrichment by public officials are also not the norm in Australia. TI’s Global Corruption Barometer confirms that on average, less than two per cent of adult citizens have had to give a bribe, gift or favour to obtain a public service or decision to which they are entitled. Nevertheless, individual level corruption is real, ever-present and carries serious risks:

- Bribery, kickbacks and self-enrichment offences are routinely encountered and dealt with by all of Australia’s State anti-corruption agencies;⁴

---

¹ https://www.transparency.org/cpi2010/in_detail. For analysis teasing out distinctions between corruption as a political system or democratisation problem, and those who see it as a structural, principal-agent problem, see Heywood (2017, pp. 22-25).


• Individual-level corruption has recently been found not only among junior and frontline officials, but senior elected officials at local and State level, convicted and imprisoned for serious corruption offences – for example, in New South Wales through the work of the Independent Commission Against Corruption,\(^5\) and in Queensland through the work of the Crime and Corruption Commission;\(^6\)

• These risks also present in Commonwealth administration, as discussed below;

• Abuse of travel and other ‘entitlements’ by politicians, most visibly at the Commonwealth Government level, has been a serious recurring problem; including use of travel for family holidays, normal commuting to work, attendance at party-political events, and engaging in business activities such as purchasing investment properties;\(^7\)

• These kinds of abuse of position are also associated with a range of others with highly ‘corruptive’ effects on decision-making and public confidence, including:

  — Gifts and benefits to politicians and public servants (often seen as thinly veiled bribery, especially in procurement), including theatre and concert tickets, tickets to sporting events, and free travel and holidays;

  — Excessive expenditures in areas such as consultancies, ‘vanity’ public work programs, mismanaged infrastructure projects, office refurbishments, luxury travel, chartered use of military aircraft instead of commercial flights, overly generous pensions and ‘life gold’ travel passes for retired politicians; and

  — ‘Cronyism and ‘nepotism’ associated with employment positions being assigned without open advertising and competitive selection, including electoral office positions, ministerial media positions, diplomatic and trade posts (including as perceived rewards for political loyalty or for vacating office) – and including judicial and tribunal appointments, with the further ‘corruptive’ effect of politicising these independent bodies, undermining their purpose and effectiveness.\(^8\)

**Political corruption**

Further, like all democracies, Australia is directly exposed to political corruption risks, in which entrusted power may be corrupted for illegitimate gains, in the form of party-political, organisational or ideological gain, or favouritism of a particular industry or social group. As

---


seen above, many forms of ‘petty’ corruption can cross over into, or accompany, the more serious and damaging problem of political corruption.

However, political corruption can also involve integrity violations which, in any other context, would not necessarily be regarded as improper or unlawful, and may even be applauded. The main categories are:

- Political donations and campaign resources – where private support for the political process can be positive, but in reality, accusations and suspicions of undue influence abound due to liberal political donations laws that lack adequate bans or limits on high-risk donors, are easily circumvented or not enforced, and lack real-time disclosures;\(^9\)

- Undue influence associated with lobbyists’ access to politicians, by ‘purchasing access’ at expensive party funding raising events, and through a ‘revolving door’ of politicians and their senior staff joining lobbying firms and exploiting political contacts, or vice versa;

- Abuse of political control over spending, to either influence political outcomes or repay political debts, including use of ‘government’ advertising and ‘electorate’ communication expenses as de facto party-political advertising, especially when ramped up prior to the official election period; and ‘pork barrelling’ involving excessive and unjustified promises at election times without proper scrutiny of policy merits.\(^10\)

Political corruption risks facing Australia, especially at the Commonwealth level, have been widely documented\(^11\) and are further discussed in Chapter 6.

**Grey corruption**

The above types of alleged misconduct, on top of historical and international issues listed in chapters 1 and 3, have contributed to a rolling crisis of confidence across all levels of government in recent years. Deterioration in Australia’s integrity ratings and public confidence in government are associated not only with these recurring scandals in state and local jurisdictions, and their escalation at the federal level since 2013, but with perceptions – especially at the national level – that institutions and accountability are not keeping up.\(^12\)

---


As can be seen, much uncertainty stems from the fact that while some forms of corruption are both wrong and clearly illegal (e.g. bribery), their true prevalence and scale can be difficult to establish. However, many of these types of conduct are not clearly illegal, and often not even hidden, because they involve conduct which ‘normally’ is either lawful or only represents a minor infraction at law, or about which laws and rules are ambiguous (‘grey corruption’).

Much of the ‘influence trading’ in political corruption involves no current breach of law, and may seem built into the political process. Corruptive conduct by individuals or industries aimed at securing undue influence over decision-making, or officials inviting or acting on that influence, is defended on the basis that it is not only lawful, but pursued purely (or mostly) for public benefits and not any individual, commercial or political gain. Even nepotism and cronyism in appointments are defended on the basis that open selection and merit procedures were simply unnecessary, as the result was still the ‘best person for the job’, and the decision-maker did not individually ‘benefit’ as a result of this minor deviation from procedure.¹³

Recognising this wider spectrum of corruption is vital, because it identifies both where the highest risks of more ‘serious’ corruption may lie, and also where many of the real, most serious and damaging forms of corruption as perceived by the community, already lie.

In international rankings, the 2017 World Economic Forum Global Competitiveness Index (see in chapter 3), Australia ranked 16th out of 137 countries for overall ‘ethics and corruption’ (a score of 5.5/7). However, within this score, while Australia ranked relatively well for ‘irregular payments and bribes’ (12°/137, 6.2/7), it ranked less well for ‘diversion of public funds’ (14°/137, 5.7/7), ‘favouritism in decisions of government officials’ (21°/137, 4.5/7), and ‘public trust in politicians’ (22°/137, 4.6/7).¹⁴

Within Australia, the true range of problems as defined by the community, is directly revealed by the 2018 Global Corruption Barometer (Appendix 2). For the first time worldwide, our assessment asked Australian citizens to nominate the types of conduct that concerned them, when they identified official corruption as being any level of problem in Australia. Figure 4.1 sets out the results. Of the 1,932 respondents (86 per cent) who said that official corruption was a very big, quite big, or quite small problem in Australia, the vast majority (92 per cent) were able to give examples – with a very large majority (at least 83 per cent) nominating types of conduct matching the broad definition of corruption at the start of this chapter. Significantly, very few (4 per cent) mentioned only issues that appeared to relate to policy or political disaffection with government, as opposed to some concept of corruption. In addition, of those who did nominate corruption issues, very few (2.5 per cent) mentioned issues that related

¹³ This issue was at the heart of the ICAC investigation in 1992, which led to the resignation of NSW Premier Nick Greiner. See Prenzler, T. (2013) Ethics and Accountability in Criminal Justice, Australian Academic Press, Brisbane, p. 23.

¹⁴ http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/#series=GCI.A.01.01.02
mostly to non-government corruption, such as banking misconduct or institutional responses to child sexual abuse.

The result was strong evidence that Australians see corruption in government as falling into three main groups of problems, consistent with the spectrum described above. General accountability failures associated with political dishonesty, deceit or non-disclosure by government were identified by 17 per cent of respondents. Self-enrichment by politicians and officials (and their family and friends), ranging from embezzlement to abuse of expenses to nepotism and cronyism, was identified by 40 per cent of respondents.

However, the largest group of concerns (42 per cent of respondents) were those associated with undue influence, access and perversion of decision-making by particular interests. Whether this occurred through ‘hard’ corruption in the form of direct bribery (i.e. purchased decisions), or ‘soft’ or ‘grey’ corruption in the other forms described above, was less significant than the underlying purpose and effect of the actions or behaviour identified (undue influence).

Figure 4.1. Types of corruption perceived by Australian citizens

B4. ‘What kind of corruption do you think is the main problem in government – please tell me the kind of actions or behaviour you have in mind?’ (n=1,932)

Source: Griffith University & TI Australia, Global Corruption Barometer Australia, May-June 2018 (n=2,218).

Note: Columns add to more than 100 per cent, as respondents could nominate more than one kind.
As shown in Figure 4.2, a similar pattern was revealed when all respondents were asked if they had specifically witnessed or suspected evidence of corruption, even if they had not themselves had to pay a bribe. As already indicated, while few reported that they personally had to pay a bribe (2 per cent), over half of respondents (53 per cent) said they had personally witnessed or suspected this to be occurring. Concerns about self-enrichment and undue influence were even higher. Indeed, respondents who had ever worked in the federal government were more likely than other respondents to report having witnessed or suspected an official or politician of making a decision in favour of someone who provided political donations or support (68 per cent, against the national average of 56 per cent).\textsuperscript{15}

\textbf{Figure 4.2. Incidence of witnessed/suspected corruption (2018)}

In the past 12 months, how many times have you personally witnessed, or suspected, a government official or politician doing the following things? (n=2,218)

The key lesson from the above findings is that a narrow or selective focus on corruption as simply petty/criminal, or grand/criminal, is not going to reveal or explain what is really going on, or where the main challenges lie.

\textsuperscript{15} Those who had ever worked in federal government (n=245) had seen more instances of an official or political making a decision in favour of someone who gave them a political donation or support (M = 2.34, SD = 1.15) compared to those who had not worked in federal government (M = 2.09, SD = 1.16), t = 3.19 (df = 2212), p = 0.14.
High risk areas (activities and sectors)

As identified in chapter 3, official corruption challenges are also not uniformly distributed across society, but vary across industry and public sectors. For example, dealings between government and the natural resources sector are well known internationally for their concentration of corruption risks, and this is confirmed by some of the above cases, and more generally, for Australia.16

At the hard end of criminal corruption, the Australian Criminal Intelligence Commission has identified areas of the public sector – both federal and state – as most at risk of corruption by serious and organised crime: primarily ‘procurement across all levels of government’, ‘frontline agencies’, and ‘agencies without established anti-corruption practices’.17

Applying these criteria together, it becomes easier to see why most if not all States have been strengthening their integrity and anti-corruption systems over the past decade, as described in chapter 2 – as well as why the Commonwealth has come under such strong pressure to follow suit. The question is how well these reforms are aligned to addressing the actual types and risks of corruption described above.

For example, in procurement of goods, equipment, facilities and services, the proposed inclusion of the entire Commonwealth public sector in the jurisdiction of an anti-corruption agency is clearly long overdue. While it is the fourth largest government in Australia in terms of employment (Figures 4.4 and 4.5 below), the Australian Government is the single largest public procurer, with Commonwealth contracts over $10,000 amounting to $251.9 billion in 2012-2017, disbursed through up to 70,000 procurement actions per year.18

In 2016-17 alone, Defence procurement amounted to $32.7 billion. The ANAO has commented on the failure of defence procurement procedures to mitigate corruption risks,19 which are plainly high, with Australia letting contracts to at least two suppliers subject to criticism in recent years: French submarine maker DCNS and German military vehicle supplier Rheinmetall.20 However, as Table 4.1 shows, Defence procurement has not been subject to any overall system of anti-corruption oversight within the Commonwealth.

Moreover, nor is whole-of-government travel, the second largest area of procurement – despite being the subject of recent scandal, including the coincidences that one major travel

20 Both companies received a “D” categorisation in Transparency International’s most recent Defence Companies Anti-Corruption Index (2015), meaning that they exhibited limited evidence of ethics and anti-corruption programmes based on publicly available material; see http://companies.defenceindex.org/view-report-dataset/.
supplier was a large political donor to the Coalition party/government that let the contract, and had then also chosen not to charge the relevant Finance Minister and his family for their personal travel.\(^{21}\) The only one of these agencies whose procurement fell within the oversight jurisdiction of the Commonwealth’s only specialist anti-corruption agency (ACLEI), in this period, was Department of Home Affairs (formerly Immigration and Border Protection).

**Table 4.1. Commonwealth procurement: top 10 agencies (2016-17)**\(^{22}\)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Value $m</th>
<th>% of total Value</th>
<th>2016-17</th>
<th>2015-16</th>
<th>2014-16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Defence*</td>
<td>32,721.7</td>
<td>89.1</td>
<td>1</td>
<td>1</td>
<td>N/A*</td>
</tr>
<tr>
<td>Commonwealth of Australia#</td>
<td>2,555.5</td>
<td>5.4</td>
<td>2</td>
<td>Null</td>
<td>Null</td>
</tr>
<tr>
<td>Department of Education and Training</td>
<td>1,347.9</td>
<td>2.9</td>
<td>3</td>
<td>6</td>
<td>28</td>
</tr>
<tr>
<td>Department of Health</td>
<td>1,183.8</td>
<td>2.5</td>
<td>4</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Department of Human Services</td>
<td>1,122.9</td>
<td>2.4</td>
<td>5</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Department of Immigration and Border Protection</td>
<td>1,016.6</td>
<td>2.2</td>
<td>6</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Australian Taxation Office</td>
<td>713.1</td>
<td>1.5</td>
<td>7</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Department of Foreign Affairs and Trade - Australian Aid Program</td>
<td>565.6</td>
<td>1.2</td>
<td>8</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Department of Foreign Affairs and Trade</td>
<td>519.8</td>
<td>1.1</td>
<td>9</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td>Department of the Environment and Energy</td>
<td>432.6</td>
<td>0.9</td>
<td>10</td>
<td>N/A*</td>
<td>N/A*</td>
</tr>
</tbody>
</table>

Red boxes indicate agency/area not subject to the jurisdiction of ACLEI or independent anti-corruption agency to date.

Notes:
* Formation of new entities following Machinery of Government changes means they can’t be compared to entities of previous financial years.
# Whole of Australian Government Air Travel Services, including entities’ estimate of air travel spend across a five year period from 2016 to 2021.

**Law enforcement** is a specific sector of recognised risk, at both federal and state levels. The Australian Criminal Intelligence Commission identifies corruption as one of the six enablers of serious and organised crime in Australia, even while assessing there to be, currently, ‘limited evidence of serious and organised crime involvement in public sector corruption.’\(^{23}\)

---


At state level, where police corruption has been a primary focus in the creation and subsequent mandate of all anti-corruption agencies, the risk has continued to manifest in a number of ways, including the detection and prosecution of a senior NSW (and former federal) crime commissioner for drug importation in 2012.24

While the Australian judiciary continues to be free of evidence of any significant level of corruption, the legal system in general is open to corruption risks, especially in State criminal law enforcement areas. This is highlighted by the current Victorian Royal Commission into the Management of Police Informants, including examination of allegations that a high-profile defence lawyer in the area of organised crime simultaneously served as a long-term police source and informed on her clients.25

At a federal level, the importance of addressing law enforcement integrity risks was central to the creation of ACLEI in 2006, overseeing the Australian Federal Police and Australian Crime Commission – and the subsequent expansion of its jurisdiction to include AUSTRAC, Australian Customs and Immigration enforcement areas (now the Australian Border Force and Department of Home Affairs, as mentioned above), and enforcement officers in the Commonwealth Department of Agriculture and Water Resources (including the former Quarantine service).

As discussed in chapter 2, these progressive expansions have come as a result of recommendations from ACLEI’s parliamentary oversight committee, and, in each case, the extension has confirmed the reality of corruption, uncovering more of it in each additional agency. However, there has been recent evidence of both continuing risks and continuing inadequacy of this incremental response.26

This forms the background to all political parties’ commitment to reform at the federal level, including the current Government’s proposal to establish a Commonwealth Integrity Commission under which another four regulatory agencies would be added to ACLEI’s current jurisdiction, as also recommended by the parliamentary committee for many years:

- Australian Taxation Office (ATO)
- Australian Securities and Investments Commission (ASIC)
- Australian Prudential Regulatory Authority (APRA), and
- Australian Competition and Consumer Commission (ACCC).27

---


At all levels of government, all types of corruption risk are known to be higher among **frontline and outlying** agencies, especially those lying beyond the ‘core’ public service.

This is confirmed by experiences in the Australian states, where all agencies are covered by anti-corruption agency oversight, but where the bulk of corruption investigations over the past decade have ended up focused not only on high-risk core public sector agencies, but on the statutory authorities and controlled entities of the ‘outer’ public sector, as shown in Figure 4.3. A review of 135 publicly reported investigations from State anti-corruption agencies over the period 2007 to 2017 showed that over half of reported corruption investigations focused on statutory authorities and independent entities, especially in the major jurisdictions (NSW, Queensland and to a lesser extent WA).  

**Figure 4.3. Focus of State anti-corruption agency reports by sector (2007-17)**

![Pie chart showing the distribution of focus on different sectors in anti-corruption agency reports.](chart)

Local government, a sector which is frontline and dispersed, and involves a high degree of discretionary decision-making power, is also generally recognised as high risk – as borne out by investigations in all States.  

This distribution of risk is also evident at the federal level – also contributing to the major current momentum for enlargement of anti-corruption agency jurisdiction beyond law

---


enforcement (see above). In addition to corruption in law enforcement areas such as Border Protection, some of the worst corruption involving any Australian government entities (bribery of foreign officials) has been conducted by outlying Commonwealth-licensed and owned, or formerly owned, companies: the Australian Wheat Board and Reserve Bank of Australia’s banknote printing enterprises.

Such events have contributed to a general realisation of the weak and fragmented approach to dealing with all types of corruption risk across the federal public sector. Despite repeated official claims to the contrary over many years, including recently, there is little question that corruption risks extend across this sector no less than others, in addition to being highly concentrated in some areas as noted.

The special exposure of the parliamentary or political sector, highlighted above, is also a core issue in the proposed Commonwealth reforms – discussed further in chapter 6.

However, how different corruption risks are assessed and recognised in different sectors, across government, leads directly to questions about the nature of formal systems for doing so. The key question is: to what extent are legal institutions and frameworks configured to ensure the full spectrum of risks is capable of being recognised, identified and acted on?

The salience of this issue is demonstrated further in Figures 4.4 and 4.5, showing the very different distribution of risk, in terms of sophistication of anti-corruption oversight and control, across the federal public sector and all States. As shown, the Commonwealth employs approximately 240,000 of the nation’s 1.9 million public officials and employees. However, in almost all States, corruption risk is met by making all public employees subject to the jurisdiction of a central anti-corruption agency with scope and mandate capable of spanning the full range of corruption types – including criminal and non-criminal, and both hard and ‘softer’ (grey corruption) matters.

30 Commissioner Terence Cole, Report of the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme, 24 November 2006, Attorney-General’s Department (Australia).


33 In 2017, 5% of 98,943 Australian Public Service employees said they had witnessed another employee engaging in corrupt behaviour (of whom 64% reported cronyism; 26% nepotism in the workplace; and 21% official decisions that improperly favoured a person or company): https://stateoftheservice.apsc.gov.au/2018/01/aps-values-code-conduct-2/. This was despite the APS Employee Census survey defining a high threshold for corruption: ‘The dishonest or biased exercise of a Commonwealth public official’s functions. A distinguishing characteristic of corrupt behaviour is that it involves conduct that would usually justify serious penalties, such as termination of employment or criminal prosecution’.
In the Commonwealth, however, only approximately 22,537 or **nine per cent** of all employees are partly covered by an equivalent regime, in the five agencies oversighted by ACLEI. Instead, another 136,000 or **57 per cent** are employed in Australian Public Service (APS) agencies which remain subject only to the central Code of Conduct regime under the **Public Service Act 1999**. The remaining 81,000 or **34 per cent** are located in separate, outlying parts of the sector, subject to separate disciplinary and integrity regimes with no central, coordinated anti-corruption oversight or support at all.

In all cases, agencies and employees are also subject to criminal law and the jurisdiction of police (for the Commonwealth, since 2014, through the Australian Federal Police Fraud & Anti-Corruption Centre). However, this is only for criminal offences and clearly does not deal with the full spectrum of risks discussed above, nor involve central reporting or oversight mechanisms for identifying risks.

This state of affairs helps further explain the shift to reform at the federal level. However, not all the proposed reforms would address this situation.

**Figure 4.5** shows how the public sectors would compare, under the current Commonwealth government proposals. As noted in chapter 2, as well as adding the above four additional APS and non-APS agencies to the ACLEI jurisdiction, all other Commonwealth agencies would become subject to oversight by the ‘public sector division’ of the Government’s proposed Commonwealth Integrity Commission – but only in respect of revised criminal offences. This criminal corruption jurisdiction would therefore replicate the existing criminal law jurisdiction of the Australian Federal Police.

However, as Figure 4.5 shows, this would represent only a marginal difference, since it would not address the spectrum of corruption types described above, especially those relating to grey corruption.

---


35 In total 87,705 employees (37 per cent of the sector) are in these entities. The largest is the Australian Defence Force (58,612 employees), subject to its own **Defence Force Discipline Act 1982**, and its own statutory Inspector-General, providing a military justice, grievance and redress system rather than anti-corruption oversight: see [http://www.defence.gov.au/mjs/organisations.asp](http://www.defence.gov.au/mjs/organisations.asp#1). Also in the non-APS group are Australian Security and Intelligence Organisation (ASIO) and Australian Secret Intelligence Service (ASIS), subject to oversight by the Inspector-General of Intelligence & Security, but this is again primarily a complaints body (to ensure these agencies ‘act legally and with propriety, comply with ministerial guidelines and directives and respect human rights’) rather than an anti-corruption body. NB the 1,154 employees of the Parliamentary Departments are non-APS but have the same conduct regime and Commissioners as for the APS, and so are less separate.
**Figure 4.4. Anti-corruption coverage: public sector employees (Australia) 2017**

![Graph showing anti-corruption coverage by government and coverage type.]

**Figure 4.5. Proposed coverage (Commonwealth Integrity Commission proposal)**

![Graph showing proposed anti-corruption coverage by government and coverage type.]

Confused legal definitions of corruption

The major challenge becomes how well-placed Australia’s integrity systems are to recognise and respond to these corruption risks, in terms of legal definitions. Other questions about integrity institutions, such as their functions, powers and resources, are the focus of later chapters. Here, there are two key questions. How well do current statutory approaches to how corruption is defined and identified align with the above issues and risks? And, how well do current reform proposals align?

Legal definitions of official corruption vary widely Australia, with most current and proposed approaches not well matched to these risks and challenges. While variety is not unusual in a federal system, for Australia it now means inconsistency, confusion and uncertainty have become serious impediments to effective response, and threaten to become worse.

There are currently two main approaches: narrow and broad. For both, however, a major problem is the extent to which most definitions hinge either on the type or seriousness of the response to particular behaviour (e.g. whether a particular act is a crime), or on growing lists of such types of behaviour (including crimes), with only secondary or unclear reference to why this conduct is deemed corrupt.

- Under narrow definitions, the only conduct captured is particular, existing crimes. Indeed, broader definitions evolved from the late 1980s in direct response to the inability of the normal criminal justice system to deal adequately with corruption in this way, as traditional offences requiring proof beyond reasonable doubt in a criminal court.

More recently, revival in use of the common law offence of ‘misconduct in public office’ – and its codification; albeit in sometimes quite inconsistent ways, in some jurisdictions – has restored some flexibility to the criminal prosecution of corruption, and breadth to these definitions. Nevertheless, for practical purposes, agency jurisdictions are confined to what might be able to be proved in a criminal court. In a turning back of the clock, Victoria (2011) and South Australia (2012), two of the more recent states to create anti-corruption agencies, confined themselves to this remit, with the role of the SA ICAC modelled on a closed-door, federal law enforcement agency.


38 See Figure 4.4 and 4.5 above. The practical jurisdiction of the SA ICAC is somewhat broader, because the agency was also given power to investigate ‘maladministration’ (albeit, confusingly, with an overlapping mandate, different powers and different definition to that of the State Ombudsman); and because an Office of Public Integrity was also created, overseen by the ICAC, to which any form of misconduct must be reported for triaging to different agencies as necessary. See Independent Commissioner Against Corruption Act 2012 (SA).
• **Broad definitions** define corruption as either a criminal or a serious disciplinary breach capable of justifying termination of employment, which satisfies a number of criteria consistent with a broader concept of corruption. The substantive criteria usually follow the form of the NSW ICAC Act 1988 and can involve any of: 

- conduct of an official that involves the dishonest or partial exercise of official functions
- conduct of an official that involves a breach of public trust
- conduct of an official that involves the misuse of official information or material
- conduct of any person that adversely affects, or could adversely affect the honest or impartial exercise of official functions by a public official or authority.

NSW also includes a long list of criminal offences that can constitute corrupt conduct by any person, if it ‘adversely affects’ or could adversely affect ‘the exercise of official functions by any public official’ – a section that famously saw the NSW and High Courts decide that this did not mean any exercise of official functions, such as affecting the ‘efficacy’ of public administration, but only the *honest and impartial* exercise or ‘probity’ of official functions.\(^{40}\) This narrowing led to addition of a further category:

- conduct of any person that impairs, or could impair, public confidence in public administration and could involve any of a further list of (mostly) criminal conduct, including collusive tendering, fraudulent applications for licences, and other dishonest use of public funds, assets, revenue or employment.

However, no States or territory follows this broad approach the same way. Queensland has long been similar to NSW, but used the term ‘official misconduct’ from 1991 until 2014, when it was narrowed to ‘corrupt conduct’ along with requirements that this must also always be intended for someone’s personal benefit, akin to a criminal standard. These were much criticised, and removed in 2018.\(^ {41}\) The result is now a similar, though simpler version than NSW, which does not focus so heavily on criminal offences.

Some variations are narrower, such as the WA Corruption and Crime Commission’s jurisdiction over ‘serious misconduct’ (defined somewhat circularly as either a criminal offence or when an officer acts ‘corruptly’), with all other ‘misconduct’ (much of which would be ‘corrupt’ in NSW or Queensland) referred to the Public Sector Commission.\(^ {42}\) However,

---


approaches can also be even broader – Tasmania’s Integrity Commission investigates any ‘misconduct’, as low as any breach of an applicable code of conduct.

At the Commonwealth level, National Integrity Commission Bills introduced but not passed by the Parliament have all tended to propose a broad approach, based on NSW – including those introduced by the Greens in 2017 and prior. After the NSW Cunneen decision, above, the Australia Institute’s National Integrity Committee has advocated that the definition be even broader still, and go well beyond corruption or wrongdoing to include any conduct of any person ‘that has the potential to impair the efficacy’ of any exercise of an official function.43

The *National Integrity Commission Bill 2018*, introduced by Cathy McGowan MP, copied the NSW ICAC definition but without going so far, extended corrupt conduct to mean any official conduct that involved ‘dishonest or partial exercise’ of any functions, breach of trust, etc, if it represented a breach of any applicable code of conduct, rather than if only a criminal or sackable offence.44

These definitions are a cause for confusion. Even the broad definitions retain a focus on criminal offences which limits their scope; while the inconsistencies mean a high risk that conduct which would be reportable in one jurisdiction, is not reportable in another.

Proposals at the Commonwealth level demonstrate the confusion, and potential pitfalls, most clearly of all. Since 2011, parliamentary committees have argued for a ‘more detailed and comprehensive definition’ of corruption under Commonwealth legislation.45 At present, however, rather than sorting this out, the proposed approach is a bifurcated one, in which the Commonwealth would *simultaneously* take:

- A very **broad approach** to corruption among the nine federal agencies to be covered by the *Law Enforcement Integrity Commissioner Act 2006 (Cth)* – which has long defined ‘corrupt conduct’ and ‘corruption issues’ as relating to any abuse of office by an official,46 going well beyond criminal offences and providing a very flexible jurisdiction; and

- A very **narrow approach**, in which for the remaining 81 per cent of the federal public sector, including parliamentarians, corruption would be defined only in relation to a revised list of criminal offences, with a very explicit intention to exclude everything other than criminal matters from the Commonwealth Integrity Commission’s jurisdiction and funnel all complaints through government departments.

---


45 Parliamentary Joint Committee on ACLEI (2011): see Senate Select Committee, 2.26. Abuse of public office is also a broad offence, hinging on use of office to dishonestly obtain a benefit or cause a detriment, under s.142.2 of the Commonwealth Criminal Code.

46 See ss.6-7 of the Act.
While the Government claimed that this proposed threshold ‘avoids a broad and confusing swathe of potentially minor irregularities or misconduct’, it is plainly unworkable, and has been much criticised. Indeed, within the nine agencies covered by ACLEI, different officials engaging in the exact same type of grey corruption (e.g. making decisions in the presence of an undisclosed conflict of interest) might be subject to wildly different standards and consequences depending on whether they were seen as exercising a law enforcement function, or not – itself a very unclear line.

Table 4.1, from an Attorney-General’s Department discussion paper in 2012, confirms the impracticality. It shows how even on the most narrow conception of corruption, the types of, and responses to, misconduct work on a continuum which bleeds into one another, given the spectrum of issues and remedies involved. Setting standards and processes which seek to prevent high-risk, non-criminal misconduct from coming onto the ‘corruption’ radar is fraught with danger.

Table 4.1. Maladministration, Impropriety and Corruption (AGD 2012)

<table>
<thead>
<tr>
<th>Maladministration</th>
<th>Improper behaviour</th>
<th>Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Managing badly</td>
<td>• Inappropriate personal behaviour (e.g. harassment)</td>
<td>• Misuse of entrusted power or office for private gain</td>
</tr>
<tr>
<td>• Inefficiency</td>
<td>• Misuse of government systems</td>
<td></td>
</tr>
<tr>
<td>• Bad judgement and decisions</td>
<td>• Misuse of government resources (could also be corruption)</td>
<td></td>
</tr>
<tr>
<td>• Incompetence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Lack of due process</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Behaviour that may be administrative misconduct

Behaviour that may be criminal

Problems arising from misaligned definitions and processes

Recent high-profile controversies serve to further highlight the deficiencies in current legal definitions of corruption and misconduct in public office – especially where a reversion to reliance on the criminal process is concerned. Experience is pointing to a mismatch between the problem of ‘grey corruption’ discussed above, and need for clearer rules and more efficient and effective responses, and the way such cases are playing out:


• **Onus of proof** – Peter Slipper

In 2012, the former Speaker of the House of Representatives visited three wineries in the Canberra region via taxi at a cost to taxpayers of $954. A Federal Police investigation led to Slipper being convicted of an offence of ‘dishonestly caus(ing) a loss’ to the Commonwealth, under section 135.1(5) of the *Commonwealth Criminal Code Act 1995*. He successfully appealed to the ACT Supreme Court, with the Judge accepting the claim that it could not be proven that the visits did not involve ‘parliamentary business’.\(^{49}\) The decision was seen as a major setback to enhanced political accountability, and a case of judicial reasoning at odds with common sense and public opinion.\(^{50}\)

• **Intent to privately gain** – Ian MacDonald and John Maitland

This case has founndered on uncertainty over the intent needed to prove improper favourable treatment by a politician and financial gain by the associate. Following an ICAC investigation, in 2017 former NSW Minister for Minerals MacDonald was found guilty of ‘wilful misconduct in public office’ by granting a coal exploration licence to his friend Maitland. The latter obtained a benefit of approximately $6 million from the sale of shares related to the licence,\(^{51}\) and was convicted of being an accessory. In 2019 the NSW Court of Criminal Appeal quashed the convictions and ordered a retrial, on the basis that the trial judge had not adequately informed the jury of the lack of evidence of intent by both men.\(^{52}\)

• **Private conduct which impairs confidence** – Margaret Cunneen SC

Already mentioned, this case showed how a public servant used conflict over the scope of the definition of corrupt conduct to escape consequences for actions outside their employment, alleged to potentially bring the relevant office into disrepute. In 2014, Cunneen SC, a senior NSW prosecutor, was accused of wrongdoing by advising the girlfriend of one of her sons to claim chest pains in order to avoid a breathalyser test following a car crash. The ICAC’s intent to investigate this as corrupt conduct was successfully challenged in the NSW Court of Appeal and High Court, on the basis this was not conduct that ‘could adversely affect, either directly or indirectly, the exercise of official functions by any public official’ (see earlier). The DPP later assessed there to be no case for a criminal charge of perverting the course of justice, but the issue generated enormous controversy, including allegations of oppressive conduct by the ICAC, while some felt that a serious issue of public sector misconduct was left unresolved.\(^{53}\)

---

\(^{49}\) Slipper v Magistrates Court of the ACT and Turner and Commonwealth Director of Public Prosecutions [2014] ACTSC 85 (9 May 2014).


\(^{53}\) E.g., https://www.abc.net.au/news/2015-04-16/bradley-cunneen-icac-and-unintended-
• **Abuse of power, not for direct gain** – Nassir Bare

This Victorian case highlighted the discretion available to integrity commissions in selecting cases for investigation, and the threat this can pose to ensuring integrity and justice. In 2009 the Office of Police Integrity (OPI) refused to investigate allegations of a racially charged serious assault by police on a teenager. This was despite the OPI’s responsibility under its governing legislation to investigate ‘serious misconduct’,\(^54\) and the high risk of more serious corruption unfolding where such abuses of power go unchecked. A community legal centre sought a review of the decision in the Supreme Court, arguing that the OPI’s remit of the matter to the Victoria Police violated the *Victorian Charter of Human Rights and Responsibilities*. In 2015, the Victorian Court of Appeal eventually ordered the review, in the form of referral of the complaint for a fresh decision by the Independent Broad-based Anti-Corruption Commission (IBAC), which subsumed the OPI.\(^55\) The IBAC elected to investigate and found there was insufficient evidence of an assault. However, the implication remained that Victorians had no right to an independent investigation of alleged police misconduct of a serious nature.\(^56\)

• **Under the carpet or through the cracks?** – Commonwealth Fraud Control

Finally, one of the most immediate consequences of misaligned definitions and over-reliance on criminal standards is that of high-risk misconduct simply falling through the cracks. At Commonwealth level, in a preview of what seems likely if corruption is restricted only to criminal offences, prioritisation of the tangible concept of ‘fraud’ over the idea of ‘corruption’ has long been seen the latter classed as just part of the former.\(^57\) *Commonwealth Fraud Control Policy* defines ‘fraud’ broadly, to include any conduct which involves ‘dishonestly obtaining a benefit or causing a loss’,\(^58\) but the imputation of criminal intent and exclusion of wider concepts such as partiality or breach of trust results in a narrow picture. Moreover, despite the creation of the Australian Federal Police Fraud & Anti-Corruption Centre in 2014, Commonwealth agencies are not under any obligation even to report fraud to the AFP – rather they are simply ‘encouraged’ to seek guidance in serious or complex fraud matters.\(^59\) Between July 2014 and April 2017, the Fraud & Anti-Corruption Centre received only 34 referrals related to corruption for the

---

\(^54\) *Police Integrity Act 2008*, s.6(2)(a).

\(^55\) Bare v IBAC [2015] VSCA 197.


\(^59\) Commonwealth Fraud Guidance, pars.71-72, p.C16.
entire Commonwealth Government.60 The Commonwealth’s chief misconduct handling guide reminds agencies that they ‘will need to consider referral’ to the AFP if investigations concern ‘fraud or other criminal behaviour’ under ‘the agency’s fraud control policy and procedures’ – but makes no mention of corruption.61

The common element of such examples is the concern that due to the legal rules and processes, the intended independent scrutiny and accountability of persons in official positions may not be being achieved. Because of how corruption is understood and defined, breaches can go unresolved, unaddressed or undetected in the first place, leaving perceptions of impunity and a failure of accountability. The question becomes what to do about it.

4.3. The way forward

The above data and discussion highlights the need for reforms at federal, state and local government levels to improve probity, put a stop to scandals, demonstrate accountability when ethical breaches occur, and improve confidence in the integrity of the public sector by addressing issues of concern to the public.

The primary issue of ‘coverage’ can be conceptualised in terms of ‘breadth’ and ‘depth’, or ‘horizontal’ and ‘vertical’ dimensions of the jurisdiction of integrity systems. To extend the metaphor, criminal matters represent only ‘the tip of the iceberg’. Horizontally, there is a need for all public entities to be subject to common ethical standards and enforcement. Vertically, there is a need for an enforceable set of values that includes criminal, civil and disciplinary matters, without the capacity for offenders at any level to evade accountability. Properly identifying corruption risks is also the first step in the move away from a ‘high trust’ model of accountability, based on ad hoc retrospective ‘damage control’, to a model of preventive behaviour management and full accountability, further discussed in the next chapter.

Further, the debate over a new Commonwealth approach to defining corruption brings the problems into sharp relief. It confirms the extent to which concern over the process for how corruption should be handled62 – i.e. criminally, via administrative processes or otherwise – has been used to turn back the clock in terms of thinking about what it is, narrowing the concept quite inconsistently with the risks described earlier in this chapter. Moreover, this loss of perspective on what amounts to “corruption”, as opposed to other crimes or integrity violations, was well demonstrated when the Attorney-General confused the terms ‘partial’ and

60 Senate Select Committee Report, 2017, par.2.64-2.65. Two-thirds were not even investigated, the reasons being lack of evidence, no Commonwealth offence identified, and not meeting AFP criminal investigation thresholds.


‘impartial’ – long standing features of all the existing State definitions of corruption – the concept of political ‘balance’ that defines duties of journalists such as the ABC’s Andrew Probyn. Not only is it insufficient to assume that corruption is always criminal, but this assumption seems to be blinding policymakers to the range of forms that it actually takes, and hence the scope of responses needed.

The first purpose of a clear conception of corruption – even ahead of seeing it stopped and prevented – is to see it detected. And on this issue, too, existing debates have clear lessons for reform. In all jurisdictions, except Tasmania, the definition of corruption is accompanied with comprehensive obligations on public officials and agency heads to report that corruption through to a central point, to ensure it cannot slip through the cracks or be swept under the carpet, in the manner suggested by the AFP Fraud & Anti-Corruption Centre statistics.

Comprehensive mandatory reporting obligations are only recent in some jurisdictions, but they are the pivotal first step in addressing our challenges. Conduct or issues that are morally or ethically questionable but not (yet) criminal, as typical of grey corruption, are only likely to come to the fore in any systematic way through such reporting. Jurisdictions which lack this kind of regime, providing at least one oversight agency with a unified picture, lack the ability to estimate the possible incidence and changing nature of integrity concerns, to monitor them, to take them over when needed, and to provide assurance regarding the quality and consistency of agency responses.

The choice is again stark due to the Commonwealth’s options. As one senior Commonwealth policy official confirmed, most of the sector is without any such system:

Well, there’s not a central requirement to report to one place all anti-corruption matters. So, there are certain requirements on agencies about obviously dealing with corruption that they identify, but they don’t necessarily need to report it. If they’re dealing with it themselves, … there’s no current requirement for them to report it to a single central space in government (Interview 6).

However, ACLEI’s jurisdiction already involves a well-developed mandatory reporting framework, in support of its broad definition of corruption, requiring that ‘as soon as practicable after the head of a law enforcement agency becomes aware of an allegation, or


64 See recent amendments to Victoria’s IBAC legislation to establish mandatory agency reporting, following NSW and, originally, Queensland. In Tasmania, a mandatory reporting framework was recommended but not adopted by Government: see: https://www.integrity.tas.gov.au/__data/assets/pdf_file/0003/361713/Government_Response_to_Independent_Review_of_the_Integrity_Commission_Act.pdf

information’ raising a corruption issue, she or he must notify ACLEI, with details and an assessment. Options then follow for direct investigation by ACLEI, joint investigation, referral back with oversight, or referral back with an obligation to report the outcome.

However, the current Commonwealth Integrity Commission proposal would extend that system to only nine agencies and 21 per cent of Commonwealth employees. For the remaining heads of departments, agencies, Commonwealth companies and corporations, the mandatory obligation to report would only kick in for issues ‘considered to meet the requisite threshold’ – meaning only criminal offences. Further, only agency heads would be obliged to report matters to the Integrity Commission, with no obligation or mechanism proposed to require individual officers to report these concerns to the CIC.

Mandatory reporting is an important aspect of reform, with a clear need to ensure misconduct at all levels is subject to disclosure to properly constituted authorities. With these issues now acute at the national level, there is opportunity for the Commonwealth to provide the new best practice benchmark for other jurisdictions to follow – not simply on reporting frameworks but the very concept of corruption itself.

### 4.4. Conclusions and recommendations

Action is needed to eliminate the disjunctions between the amount of official misconduct that is known or perceived to occur and official action taken on cases, flowing from the limits and inconsistencies of legal definitions – current and proposed.

Only some of the definitions proposed or currently in practice cover the spectrum of corruption risks relevant to modern-day Australia. None are well framed for triggering the full range of responses to ensure corruption is identified, reported and prevented. Further remedies for this mis-alignment are proposed through later chapters. Chapter 5 pays attention to how ‘graduated’ responses to unethical conduct can be tied into more effective preventive strategies. Chapter 6 addresses undue influence in politics. Chapter 7 addresses the need to match mandatory reporting requirements with adequate whistleblower protections, while chapter 8 recommends a wider range of mechanisms for dealing with public sector misconduct well beyond the fraught path of criminal prosecutions.

Here, meeting the challenge starts with a modernised definition of corrupt conduct which does not revolve around the response type or seriousness (e.g. criminal or non-criminal), as currently mostly the case and proposed by the Commonwealth Government; nor, as in NSW, around growing lists of types of behaviour (including crimes) which can be corrupt, without reference to why. The central focus of a broad but simplified definition should be the risk posed by any type of conduct that could have a “corruptive” effect on public decision-making, or on public confidence in its integrity.

The place to start is the Commonwealth, where the need has long been recognised, but where current proposals are fragmented and inconsistent. However, it is also time for a consistent national approach; one which might also lead to greater consistency and coordination in

---

66 Law Enforcement Integrity Commissioner Act 2006, s.19(2).
criminal offences and other responses. Its development could be a first objective of the National Integrity and Anti-Corruption Advisory Committee, described in chapter 3.

**Recommendation 3: A modern, national definition of corrupt conduct**

That the Commonwealth lead the States in developing a modernized, broad definition for triggering anti-corruption processes, aimed at any ‘corruptive’ conduct which undermines public trust – including:

- all violations with significant potential to corrupt, or impair public confidence in the integrity of, public decision-making (whether intentionally or recklessly; and whether by public officials or private businesses and citizens);
- any breach of, or failure to have, enforceable codes of conduct covering high-risk activities including gifts and benefits, lobbying, conflicts of interest including political party and electoral interests, and principles for transparency, competition, fairness and value for money in procurement;
- not only criminal, but disciplinary or administrative misconduct of those kinds;
- equal application across all government agencies and functions.

This recommendation relates to: the Commonwealth government and to all States and Territories, especially South Australia and Victoria.

While Australia’s definitions of corrupt conduct should be broad, to address the full spectrum of our challenges, they also need clearer content. Concepts of ‘partiality’, while still relevant for controlling improper favouritism and bias, have proved confusing and no longer help address major areas of concern about ‘undue influence’. Stronger rules and guidance for regulating influence-trading are needed, as discussed in chapter 6 – but a clear concept of ‘undue influence’ itself is usually missing, leaving these as paper compliance exercises rather than genuine anti-corruption controls.

**Recommendation 4: ‘Undue influence’ as a new corruption marker**

That the Commonwealth and States include, in their revised statutory definitions of corrupt conduct, clear principles affirming why the pursuit or granting of ‘undue influence’ constitutes potential corruption on its own right, for application in all systems protecting the integrity of decision-making including:

- Transparency and regulation of access to decision-makers
- Lobbying
- Political donations, support and endorsements
- Pre-appointment and post-separation employment
- Personal and professional relationships.

This recommendation relates to: the Commonwealth and all States and Territories.

Corruption challenges cannot be addressed if they are not identified, if the level of corruption or high-risk conduct is not measured properly, if there are no requirements to report it. Reporting requirements must enable independent authorities to ensure corruption issues are not played down, mishandled or swept under the carpet. Dealing with our corruption challenges begins with comprehensive mandatory reporting frameworks, which recognise the
full spectrum of high-risk conduct, and apply equally to all agencies and officials. This is not the case with the present Commonwealth Integrity Commission proposal.

**Recommendation 5: Comprehensive mandatory reporting**

That the Commonwealth, and all States not already doing so, ensure a statutory system under which **all public agency heads and individual public officials must report any suspected/potential corrupt conduct**, in real time, to:

- Their own agency, or directly to the anti-corruption agency, in the case of all public officials; and
- Directly to the anti-corruption agency, in the case of all agency heads.

*This recommendation relates to:* the **Commonwealth** and **Tasmanian** governments.