

Speech - 31 July 2024

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The Hon Paul Brereton AM RFD SC, National Anti-Corruption Commissioner, delivered this keynote address at the Australian Public Sector Anti-Corruption Conference. Darwin, Australia, 31 July 2024.

I acknowledge the Larrakia people, the traditional custodians of the lands on which we gather, and their deep and abiding connection to the magnificent lands and waters of this region, for which they have cared since time immemorial. I pay my respects to their Elders past and present, and to all First Nations people joining us today.

Today, a day short of the thirteenth month since our inception, I'm first going to give an overview of our origins, mission, structure and jurisdiction. Some among you may already have heard this, but many have not, and I hope above all it may assist those who are, as we speak, embarking on establishing new anti-corruption commissions. Then, I'll describe what we are seeing, and in general terms what we are doing; I'll also address some of the issues that have arisen. Finally, I'll elaborate what is presently the focus of our corruption prevention agenda: reinforcing ethical decision-making in the Commonwealth public sector.

Origins

Although the states and territories of Australia have had anti-corruption commissions, some of them for many years, the absence of a national anti-corruption commission with broad-based jurisdiction in respect of the Commonwealth public sector became increasingly controversial, and was a prominent issue in our last federal election in 2022. The legislation which establishes the Commission – the National Anti-Corruption Commission Act 2022 – was enacted following the convergence of several streams. First, and

foremost, was the clearly expressed will of the Australian people at the last federal election, for an independent anti-corruption body with broad jurisdiction in respect of the Commonwealth public sector. Secondly, a government was elected with a mandate to act on that desire, and an agenda to strengthen integrity across the Commonwealth public sector. And thirdly, the leadership of the Australian Public Service embraced the objective of embedding a pro-integrity culture throughout the service.

Purpose and mission

The National Anti-Corruption Commission was established to provide “independent assurance to the people of Australia that corrupt conduct involving Commonwealth public officials is prevented, detected, investigated, and responded to appropriately”. To generate that effect, we have adopted as our mission: “to enhance integrity in the Commonwealth public sector, by deterring, detecting, and preventing corrupt conduct involving Commonwealth public officials, through education, monitoring, investigation, reporting and referral.” To achieve that mission, we have two main lines of operation:

- deterring corrupt conduct through detection, investigation and exposure; and
- preventing corrupt conduct through education and engagement.

Organisation

We currently have about 210 staff, ultimately growing to 270. We have offices in Canberra, Sydney, Melbourne, Brisbane and Perth. There are three Deputy Commissioners, and a Chief Executive Officer who is the accountable authority for the purposes of the PGPA Act.

We are organised in six branches. The Operations Branch conducts our investigations. The Capabilities Branch houses our intelligence and surveillance capabilities. The Evaluation Branch has the crucial role of intake, triage and assessment of referrals, to inform decisions as to what we will and will not investigate. The Legal Branch supports both our operations, and our corporate functions. Our Communications and Corruption Prevention and Education Branch includes our Media and Communications team, and our Corruption Prevention and Education Team, which is responsible for delivering corruption prevention and education outcomes through Education and Outreach, Research and Analysis, and Policy and International. Enabling Services covers Property, ICT, Finance, Security and HR.

Jurisdiction – corrupt conduct

The touchstone of the Commission’s jurisdiction is a “corruption issue”. That means a question of whether a person has engaged, is engaging, or will engage in, corrupt conduct.

Corruption, as we understand it, is essentially about the misuse of public power, position, privilege or property, for private purposes. It results in the diversion of public resources, and the undermining of trust in our public institutions.

Under our Act, a public official engages in corrupt conduct if they **breach the public trust, abuse their public office, or misuse official information**. In addition, any person – not confined to public officials – engages in corrupt conduct if they **do something to cause a public official to behave other than honestly and impartially** in performing their public duties. In this way, it captures conduct by any person that could adversely affect a public official’s honest or impartial exercise of powers or performance of duties, such as offering a bribe or inducement. This extends to conduct of public

officials themselves that affects the honest and impartial performance of their own functions. The definition of corrupt conduct extends to attempting, conspiring, or planning to engage in any of those types of conduct, and participating in another's corrupt conduct; these notions are analogous to accessorial liability in the criminal law.

Although it is not the only form of corrupt conduct within the definition, breach of public trust lies at its core. The concept of public trust recognises that public powers are conferred on public officials for the public benefit; and it will be a breach of that public trust – within the definition of corrupt conduct – if a power is not exercised honestly for the purpose for which it is conferred. The term is not defined, but the Revised Explanatory Memorandum provides guidance, stating:

“Public office is a public trust — public officials hold their official powers, functions and duties on trust for the public, and are expected to exercise their powers, and to perform their functions and duties, for the purpose for which those powers, functions and duties were conferred. Public officials are also expected to exercise official powers in the public interest. If a public official exercises their official powers for an improper purpose or exercises their powers or performs their functions and duties contrary to the purpose for which those powers, functions or duties were conferred, their conduct would amount to a breach of public trust.”

The concept of a breach of public trust does not depend on personal gain, or benefit for a third party; the key feature of a breach of trust

is the exercise of a power, or the performance of a function or duty, **for an improper purpose or in bad faith**. Examples could include the use of official powers to advance a personal interest; or using, applying, or awarding public resources to achieve a purpose for which those resources were not appropriated, designated or otherwise given. But the concept does not include making a decision that the public, or a segment of the public, does not want or like. A trustee commits a breach of trust if they use their trust powers for an improper purpose, but if they act in good faith it does not matter that they act contrary to the wishes of their beneficiary. Indeed that is often why there is a trustee.

Often overlapping with breach of public trust, it will be an abuse of office for a public official to use their powers or office improperly to obtain a benefit for themselves or to inflict a detriment on someone else. Again, the term is not defined, but it is informed by common law notions of misconduct in public office. The Revised Explanatory Memorandum provides the following guidance:

“Paragraph 8(1)(c) would provide that conduct of a public official that constitutes, involves, or is engaged in for the purpose of abusing the person’s office as a public official would constitute corrupt conduct. The concept of an abuse of office by a public official involves the official engaging in improper acts or omissions in their official capacity, that the public official knows to be improper, with the intention of gaining a benefit for themselves or another person or causing a detriment to another person. However, conduct may still constitute corrupt conduct even if it were not for the personal benefit of the public official or other persons involved in the conduct In the context of an abuse of office,

this means that a public official may still abuse their office if the public official intended to cause a benefit that was indirect, intangible, or several steps removed from themselves or the other persons involved in their conduct. An abuse of office can be committed through the exercise of influence arising from the person's public office or the use of information obtained in their capacity as a public official.”

However, it is crucial to recognise that mistakes, bad decisions, negligent maladministration, and monumental stuff ups, are not in themselves corrupt conduct. Generally speaking, an element of bad faith and/or personal benefit (for the perpetrator or another) is necessary to make it corrupt.

It is also important to realise that the Act does not legislate new standards of behaviour. The conduct it characterises as corrupt conduct has always been regarded as improper, at least by right-minded people. The difference is that now there is an agency with the function and powers of detecting, investigating and exposing it. Through the Commission, the Act provides a vehicle for upholding standards of integrity and conduct that already exist. For that reason, it is entirely appropriate that our jurisdiction extends to corrupt conduct that occurred before the Commission's establishment.

Jurisdiction – Commonwealth public official

From what I have said about the definition of “corrupt conduct,” it will be apparent that the Commission's jurisdiction is concerned with corrupt conduct that involves Commonwealth public officials: either by them, or affecting their honesty and impartiality. “Public official” is defined to include Commonwealth Parliamentarians (including ministers of state), and staff members of Commonwealth agencies.

In turn, the definition of staff member of a Commonwealth agency includes not only individuals employed by the agency, but also those engaged in any way in assisting the agency (which in my view clearly captures those retained as consultants and advisers – including for example a lawyer in a private law firm retained to act for or advise a Commonwealth agency). It also includes individuals involved in delivering services to or on behalf of the agency under a contract with the Commonwealth. In light of the extent to which governments have in recent years retained external consultants, and the extent to which the delivery of many Commonwealth services has been outsourced to contracted service providers, this is a large field, which has already attracted the Commission’s considerable attention.

Referrals to the Commission

Anyone can refer a matter to the Commission. Agency heads must refer corruption issues of which they become aware, if it concerns the conduct of a staff member of the agency, and the agency head suspects that the issue could involve corrupt conduct that is serious or systemic. We can also investigate matters of our own motion.

Our jurisdiction is focussed on potentially “serious” or “systemic” corrupt conduct. I have recently issued a guideline under s279 of the Act, to the effect that “serious” means something that is significant: something more than “negligible” or “trivial”, but it does not have to be “severe” or “grave”; while systemic means something that is more than an isolated case; something that involves a pattern of behaviour, or something that affects or is embedded in a system. Factors can include whether the conduct is potentially criminal, and if so the penalty; the seniority of those involved; the egregiousness of the conduct; its potential impacts; and the amount involved.

- Referrals – whether mandatory or voluntary – can be made online, by phone, or by post. We strongly encourage referrals to be made online through our website and/or via the 1300 phone number. This is because the webform is designed to prompt referrers to provide the key information we need to decide whether it is within our jurisdiction, and whether a corruption issue arises. The webform has been modified and now permits a limited amount of documentary material to be attached. However, hard copy referrals can also be mailed to us, at the address located on our website.

Operations to date

Initially, our operational efforts were focussed on receiving and assessing reports of corruption. This began on day one. Increasingly, as these referrals have been triaged and assessed, our main effort has shifted to the conduct of investigations.

In our first year to 30 June 2024, the Commission received **3189** referrals of suspected corrupt conduct. About 90% are excluded at the triage stage, because they do not concern a Commonwealth public official or do not raise a corruption issue. In the assessment process, we opened **29** preliminary investigations to help us decide whether there was a corruption issue and if so whether and how to deal with it. Of them, **seven** were completed, **all** resulting in a conclusion that no corruption issue arose. We opened **26** corruption investigations, **seven** of them jointly with other agencies, and we referred **9** corruption issues to other agencies for investigation. In **252** cases which passed triage, we decided to take no further action. Typically, this was because there were insufficient prospects of finding corrupt conduct, or the matter was already being adequately investigated by another agency, or a corruption investigation would not add value in the public interest.

One of our investigations has already resulted in an individual being charged with soliciting a secret commission. We also progressed 7 active investigations that were commenced by the former Australian Commission for Law Enforcement Integrity. Of them, three have resulted in convictions and one in a committal for trial.

To assist in prioritising our efforts on a logical basis, the Commission established six [Strategic Corruption Priorities \(SCPs\)](#). These are the thematic areas we want to focus on, to have the greatest impact on corruption in the Commonwealth public sector. These priorities are not inflexible: the Commission continues to pursue matters that fall outside the priority areas where there is reason to do so. But a matter that is covered by a priority is more likely to gain our interest, all else being equal.

Our current strategic corruption priorities are:

- the Australian border
- complex procurements
- senior public official decision-making
- contractors and consultants
- the environmental sector
- corruption affecting vulnerable people.

There are three main domains in which we are seeing both perception and actuality of corrupt conduct. They are in the fields of procurement, recruitment and promotion, and at the interface of the public sector and the private sector. In all those areas, the perceived and actual mechanisms of corruption are typically (1) the preferring of family, friends and associates; and (2) the misuse of official information to gain an advantage. These mechanisms produce a subversion of the public decision-making process, to serve a private benefit. Almost invariably, they have their origin in a conflict of interest.

Corruption prevention and education

The world's best investigation and enforcement processes can rarely recover the whole of what is lost through corrupt conduct, so the ancient adage that 'Prevention is better than cure' holds especially true in the context of corruption. Corruption prevention and education can help governments, agencies and individuals avoid deviating from the integrity track. We are approaching this via three strategies.

- First, we seek to provide those who might be exposed to potentially corrupting individuals and influences – essentially, decision-makers – with the wherewithal to recognise and resist them.
- Secondly, we seek to encourage individuals who may become aware of corrupt conduct to report it, and to ensure they know how to do so, and of their rights and protections.
- Thirdly, through building awareness in the public sector, officials and the public about corrupt conduct and corruption risks and vulnerabilities, we seek to grow a culture in which corrupt conduct is considered unacceptable and intolerable by individuals, institutions and communities.

To these three ends, in our first year we made 124 presentations to stakeholders across the Commonwealth public sector: starting with parliamentarians, agency heads and senior public servants, and extending to other stakeholders, including relevant professional associations and civil society organisations.

We can also conduct public inquiries into corruption risks and vulnerabilities, and measures to prevent corruption, in Commonwealth agencies. We have not opened a public inquiry yet, but are considering a couple of possibilities. As an extension of this,

we are establishing an audit and monitoring function, to examine and audit the processes and procedures of Commonwealth agencies for corruption risks and vulnerabilities.

Three pervasive themes provide the focus for our corruption prevention and education work.

The first is conflicts of interest: Everyone in public life will sometimes encounter situations where they may have a private material or personal interest or connection that is relevant to their public duty. Not every such situation results in corrupt conduct; most do not. Yet at the heart of almost every case of corruption is a conflict of interest, where someone prefers their own interest to the public interest. We will shortly issue guidance for public officials on identifying and declaring conflicts and managing them so that they do not infect the decision-making process.

The second is ethical decision-making, to which I shall return.

The third theme is corruption risks and vulnerabilities that are likely to arise in the context of an election, which is particularly relevant with a federal election due in less than a year. These include issues such as political donations and fundraising, government advertising, appointments, and pork-barrelling, particularly through grants schemes. Grants in particular have already attracted our interest and are a current focus of both our investigatory and prevention lines of operation.

Issues

Transparency and secrecy

I turn now to some of the issues that have confronted us. Sometimes we hear complaints that people do not know what we are doing, and

more especially who and what we are investigating. Such disclosure would not be expected of an intelligence agency and should not be expected of us. Doing so has the potential to compromise the efficacy and fairness of investigations. To provide as much transparency as we can, each week we publish statistics about the number of referrals, assessments and investigations. But we will generally not disclose their subject matter or status, unless they otherwise enter the public domain.

The legislation that governs us requires that ordinarily our proceedings be conducted in private. This is chiefly to avoid the risk of unfair and premature damage to reputations that can be caused when unproven allegations of corruption are publicised. In accordance with the legislation, we will conduct public hearings where the circumstances and the public interest justify an exception to the general rule that they be held in private. As you would expect, what are “exceptional circumstances” will emerge on a case-by-case basis and will not be prescribed in advance. They have not arisen yet. Our hearings are meant to be a means of gathering evidence and information; not a show trial from which many of the protections of a criminal trial are absent. Moreover, many witnesses are more comfortable – and give more helpful evidence – in private than in public.

At the conclusion of an investigation, the Commission reports to the Attorney-General. Where the Commission has held a public hearing, our report must be tabled in Parliament. We can also publish reports if satisfied it is in the public interest to do so. We favour transparency wherever possible, especially if a corruption finding results, but we are also conscious of the potential unfair impact of publishing reports in some circumstances. Generally, it is likely to be in the public interest to publish a report if a corruption finding has

been made, or where it is appropriate to ‘clear the air’ of an unfounded allegation.

How we decide what to investigate

As I have mentioned, in our first year we received 3189 referrals; obviously we cannot and should not investigate all of them; indeed only a very small proportion can and should be investigated by us. Issues have also arisen as to how we chose what to investigate: typically, why we decide not to investigate a matter.

The legislation provides that we can deal with a corruption issue, by: (1) investigating it, solely or in conjunction with another agency, if it could involve corrupt conduct which is serious or systemic; (2) referring it to another agency, for investigation or for consideration; or (3) taking no further action. It is specifically provided that we have no duty to consider whether to deal with any referral, in any circumstances, and it must follow no duty to give reasons for not doing so.

The decision-making process on referrals is ultimately made by our Senior Assessment Panel, in which I am advised by the three Deputy Commissioners, and the heads of our legal, operational, capabilities and evaluation branches. But before a matter reaches that stage, we first triage and assess referrals. There are two tiers to this process. The first we call “triage” and involves asking whether the matter is within jurisdiction (that is, does it concern a Commonwealth public official), and whether it raises a corruption issue. At this stage, the question whether a corruption issue arises is whether it articulates, expressly or implicitly, all the elements of a corruption issue, in a more than merely colourable way. Or, does it found a viable hypothesis that someone has engaged in corrupt conduct? To date, about 90% of referrals are excluded at this stage.

The second tier is assessment, in which we decide whether a referral raises a corruption issue that could be serious or systemic, and whether and if so how to deal with the issue. To help decide whether a corruption issue arises, and if so how to deal with a matter, we can conduct preliminary investigations, in which we can exercise some of our powers to compel production of documents and provision of information.

Then, in deciding what we will investigate, we consider the prospects of whether an investigation will discover corrupt conduct – many referrals that on their face raise corruption issues contain allegations which are so fantastically conspiratorial as not to warrant further investigation. Then we prioritise our efforts, usually according to the gravity, scale and egregiousness of the conduct, our strategic priorities, and above all whether and to what extent an investigation is likely to add value in the public interest. For example, historical matters are less likely to add value in the public interest – so I have reluctantly declined to exercise my extraordinary powers to investigate the alleged conspiracy that resulted in the dismissal in 1975 of the Whitlam Government. And where a matter has already been investigated and exposed in another forum, or another process can provide remedies that we cannot, it may not add value to conduct another investigation simply for the sake of characterising the conduct as corrupt. On the other hand, where other agencies might encounter obstacles in gaining access to information, our additional powers may be a reason for us to open an investigation.

Sometimes, the value may lie in “clearing the air”; a conclusion that there was not corrupt conduct, where there has been an allegation or perception of corruption, may assist in restoring public confidence and reputations. An important corollary of this is that just because we open an investigation does not mean that we necessarily think there is corruption to be found.

Our function

In the light of some views that have been expressed, I think it is necessary to emphasise that the Commission is an anti-corruption commission, concerned with serious and systemic corruption in the Commonwealth public sector. We are not a complaints-handling agency, nor an administrative decisions review authority. Making a referral to us is not like making a referral to the Ombudsman or an application to the AAT; we do not adjudicate on individual complaints. Referrals to us are not individual initiating processes on which a referrer is entitled to an adjudication, but a source of information to assist us to decide what we should investigate in the public interest.

Integrity and ethical decision-making

Now, I turn to the theme of ethical decision-making. Integrity in the Commonwealth public sector is critical to ensuring that public power is exercised honestly, impartially and in the public interest. It is also critical to ensuring that programs that are intended to deliver benefits to the people, deliver those benefits, and are not eroded by the diversion of resources along the way for improper purposes. I explain integrity, for our purposes, as involving making decisions and giving advice honestly and impartially, on the evidence and the merits, in the public interest and without regard to personal interest; accepting responsibility for it, including for mistakes; and reporting honestly.

The public perception of corruption greatly exceeds the actuality. That is not a cause for complacency, for two reasons: first, because the perception itself bespeaks a lack of trust and confidence in our institutions; and secondly, because there is still an actuality that underlies the perception. The disproportionately high perception of corruption correlates with the decline in public trust, worldwide, and

in Australia. In this context, I speak of 'public trust' in a wider sense than it has in the definition of corrupt conduct: here, it means the extent to which the public trusts our institutions of government.

The National Anti-Corruption Commission is a guardrail institution, established in part to restore public trust in the Commonwealth public sector. We do so by investigating, monitoring, detecting and deterring corrupt conduct that can erode public trust in government. We also do so through engagement and education, which attracts less attention but potentially has a greater impact in bringing about systemic change. As I've mentioned, our current focus is on ethical decision making, to support decision-makers to make decisions that serve the public interest, in a context where public servants will be exposed to many pressures.

Public servants are rightly expected to be responsive to Government: to support the Government of the day to achieve its intent within lawful constraints, rather than finding obstacles to their doing so: the Government of the day represents the people of the Commonwealth, and is entitled to implement its policies, within the law. But that does not extend to circumventing the laws, which constrain governments as they do individuals; nor to extracting collateral benefits from their decisions. Balancing these considerations is no easy task. It is an inevitable consequence that public servants will sometimes face difficult ethical dilemmas and questions of conscience.

Recent controversies, such as Robodebt, have illuminated the challenges that can confront public servants in an environment where they are expected to be responsive to Government. Corruption involves subverting the public decision-making process to serve a private or collateral purpose. So equipping decision-makers to exercise their functions ethically, in an environment where they can be many pressures, is vital. Rather than reinvestigating what has already been exposed, we are addressing this both through our

prevention and education work, and through investigating similar types of behaviour elsewhere.

How people respond to these ethical dilemmas is determined more by organisational culture than by policy and protocol. Culture is the sum total of ways of living built up by a group of humans, which is transmitted from one generation to another. It establishes accepted bounds and decision points for behaviour. It provides organisational norms and boundaries for value-based decisions that affect the group and the society in which it operates. *Culture is what people do; not what formal policies might tell them to do.*

Leaders are instrumental in shaping a public service that demonstrates integrity in everything it does. Leaders must foster in our institutions, from the top down and at every level, a culture in which decisions are made and advice is given honestly, impartially and in the public interest; in which matters are reported honestly, without embellishment or omission; and in which responsibility is accepted, including for the inevitable mistakes.

It is pertinent to refer to the recent amendment of the Public Service Act, to introduce a new APS value - stewardship. This is important within our jurisdiction, and something we are seeking to embed culturally across the Commonwealth public sector, but all organisations benefit from consideration of this concept. Stewardship was very well described by Minister Gorman in the second reading speech:

“Stewardship involves learning from the past and looking to the future. It involves conservation and cultivation—leaving things in a better place than you found them. It involves seeing your role as part of the whole—preserving public trust and the public good. Stewardship has deep roots

here in Australia. First Nations Australians are this country's original stewards—caring for country over tens of thousands of years and multiple generations.”

At the core of the notion of stewardship is the idea that you have a responsibility to care for the agency you have joined, and when you come to depart, to leave it better and stronger than when you inherited it. It gives priority to the welfare of the organisation, rather than the career of the individual.

However, the public interest must not be equated with populism. Many public decisions require balancing competing considerations and interests. Correct or reasonable decisions will not infrequently be unpopular. Populism is about doing what the people – or a vocal segment of the people – say they want. Integrity is about doing the right thing – even when it will be unpopular, and especially when you know it will be unpopular. Integrity may often involve making difficult decisions which will be unpopular – even some which may cause an uproar.

We recently conducted a workshop of experts to refine our thinking about ethical decision-making, before developing and issuing guidance. While this work is in its early stages, I want to conclude by sharing an early version of our thinking about a framework for ethical decision-making. I propose the following as sound precepts:

- Take time to consider and consult. Listen to advice; depart from it with caution; but be prepared to depart from it for good reason.
- Base your advice and decisions on the evidence and the merits – not on what you think might be expected of you, or what might be popular. Identify the relevant and discard the irrelevant

considerations. Keep your duty, not your career, at the forefront of your mind.

- Bifurcate the decision-making process: decide first what is right (the ethical question), and then whether it is to be implemented (the integrity question).
- Legality is not optional.
- You can depart from established processes and policies, but do so with caution
- Maintain “a degree of independence”. Don't assume that the Minister wants a particular outcome regardless of its legality and good governance - point out the problems. Be prepared to be unpopular.
- Assume your decisions will be tested and scrutinised.
- Record your decisions in writing and the reasons for them. They don't need to be lengthy, like some of the judgments some of us were once accustomed to write; but at least record to dot points that you have considered. A reasoned decision explained to those it affects is easier to accept. And recorded reasons assists to support the decision if it later comes under scrutiny.

Finally, I would like to mention that in August the Commission will be conducting a voluntary Commonwealth Integrity Survey, which aims to survey all Commonwealth public officials to obtain an understanding of their observations and perceptions of integrity and corruption, and to identify potential areas of risk. Participation in the Survey is voluntary; however, its utility and reliability will be affected by the response rate and a representative coverage. Once complete the data will be provided back to agencies in de-identified, aggregated reports to help inform them of potential risk and vulnerabilities and guide the development of policies and systems to better guard against corruption and enhance integrity in their organisation. If you are a member of the Commonwealth public

sector or you are interested, please visit our website for more information.

<https://www.nacc.gov.au/news-and-media/national-anti-corruption-commission-one-year>