



**Submission by the
Commonwealth and Law
Enforcement Ombudsman**

**PARLIAMENTARY JOINT COMMITTEE
ON THE AUSTRALIAN COMMISSION
FOR LAW ENFORCEMENT INTEGRITY**

Commonwealth and Law Enforcement Ombudsman, Prof. John McMillan

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INTRODUCTION

This submission discusses the role that an Ombudsman's office can play in curbing corruption in government, including in law enforcement agencies. This established role of an Ombudsman's office is relevant in considering the appropriate arrangements for dealing with corruption in government and in law enforcement.

This submission does not discuss all issues noted in the terms of reference for the present inquiry by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity. Two such issues were discussed in a submission by this office to an earlier inquiry undertaken by the Parliamentary Joint Committee: the arguments for extending the jurisdiction of ACLEI to cover corruption occurring in law enforcement in Australian Government agencies other than the Australian Federal Police (AFP) and the Australian Crime Commission (ACC); and the importance of ACLEI's corruption education and prevention function.

The purpose of this submission is to draw the attention of the Committee to the role of the Commonwealth and Law Enforcement Ombudsman in the integrity framework that applies to Commonwealth law enforcement agencies. The Ombudsman's wide-ranging external oversight role, together with ACLEI's specialist investigation role, are both necessary and pivotal in maintaining integrity in law enforcement.

BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Ombudsman's office has been handling complaints against law enforcement agencies since the creation of the AFP in 1979, and the establishment of the ACC in 2003 and its predecessor, the National Crime Authority, in 1984.

Legislation in 2006 to confer the special title of Law Enforcement Ombudsman on the Commonwealth Ombudsman reflected the role of this office in the new legislative arrangements for oversight of law enforcement agencies, that included the creation of ACLEI. These arrangements gave the Ombudsman the new function of undertaking a review of AFP complaint handling at least once every twelve months, and required that I be notified of all complaints to the AFP alleging serious misconduct. My office inspects AFP records twice a year and reports our findings to the AFP. A report to the Parliament is made annually. The last such report was in November 2008. We are presently completing our fourth review of AFP complaints and, in this review, 100% of the serious misconduct complaints finalised in the relevant period were reviewed.

Our jurisdiction in respect of the ACC remained unchanged by the legislative changes in 2006. This role includes complaint investigation and own motion investigations. In the last year two own motion investigations have been undertaken into the administrative practices of the ACC. One investigation is currently underway, into the information and document management practices of the ACC. The other investigation was into the ACC's use of certain examination powers under division 2, part II of the ACC Act 2002, focusing on summonses and notices issued under ss 28 and 29 of the Act: see Report No 10/2008.

These functions are in addition to our longstanding oversight of the use of covert powers by law enforcement and other agencies under the *Telecommunications (Interception and Access) Act 1979*, *Surveillance Devices Act 2004*, Part 1AB of the *Crimes Act 1914*. The Ombudsman is required to conduct a regular inspection of the records of the AFP and ACC (as well as some other agencies). In reviewing those records, the Ombudsman reports on whether there is compliance by the agencies with the requirements of those Acts concerning the exercise of coercive powers.

The Ombudsman is also required by s 55AA (1) of the *Australian Crime Commission Act 2002*, at least once in each year, to brief the Parliamentary Joint Committee on the Australian Crime Commission about the ACC's involvement in controlled operations under Part IAB of the *Crimes Act* during the preceding 12 months.

The objects of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) are, broadly, to detect, investigate and prevent corrupt conduct in law enforcement agencies. The Integrity Commissioner's functions are specifically related to dealing with corruption arising in the AFP and ACC. The LEIC Act ss 5 and 6 anticipate that a regulation can be made under the Act to extend ACLEI's jurisdiction to cover corrupt conduct in the performance of law enforcement functions in other agencies that have a law enforcement function.

THE ROLE OF THE OMBUDSMAN IN CURBING CORRUPTION

Corruption is at the more serious end of a continuum of inappropriate behaviour. As that suggests, the most effective strategy for thwarting corruption is to suppress misconduct. Corruption is less likely to occur in an administrative system that does not tolerate misconduct – and, conversely, is more likely to flourish where integrity and oversight are diminished.

The broad objective should be to build a 'corruption resistant culture'.¹ A special danger in policing is that minor incidents of misuse of power – bullying a suspect, exchanging a favour, or falsifying evidence – can take root and become a systemic problem of misbehaviour or corruption.

The connection between corruption and inappropriate administrative behaviour has been noted by others, as illustrated in the following two observations:

'Officers learn to evaluate the seriousness of various types of misconduct by observing their organisation's diligence in detecting it and dealing appropriately with those found to have engaged in misconduct. If a department or region welcomes complaints about misconduct, thoroughly investigates those complaints, and takes appropriate and timely action for any misbehaviour, then officers conclude that such misconduct is unacceptable. However if a department ignores or discourages complaints and fails to

¹ Victorian Office of Police Integrity, *Past Patterns – Future Directions* (2007) at 2.

investigate or fails to address unacceptable behaviour, officers learn to not take those violations seriously'²

'Most findings of serious corrupt conduct have been preceded by conduct that did not appear to be serious at the time but which, because they were ignored, tended to escalate to misconduct'.³

The complaint handling and investigation role of the Ombudsman can make an important contribution to curbing corruption in law enforcement, by preventing misconduct and poor administrative behaviour generally.⁴ Law enforcement officers are aware that anything they do can be complained about and investigated by the Ombudsman. Any member of the public can make a complaint – informally, without charge, and even anonymously.

By looking constantly and unpredictably at the actions of law enforcement officers, the Ombudsman's role provides a constant reminder to officers of the need to act lawfully and with integrity. The importance of this complaint role is bolstered by the Ombudsman's power to demand access to internal documents, require evidence under oath, and publish the findings of an investigation.

The sanctions that can follow an adverse finding by an Ombudsman are a realistic worry for government officers. Foremost is the Ombudsman's power to criticise an officer's conduct, including by publishing an adverse report. This can bring discomfort to those at fault, and even damage their career prospects. This is usually a more real and practical worry for government officers than criminal prosecution or a judicial determination of wrongdoing. The financial loss from a damaged career can be greater than the hard-edged penalties that are the deterrent to corruption in the criminal law.

Two other features of the Ombudsman's role also make a contribution to curbing corruption in government. One is the Ombudsman's power to conduct an own motion investigation. This enables the Ombudsman to deal with systemic administrative problems that can undermine integrity and probity in government. An example is an own motion investigation report published by the Commonwealth Ombudsman in 2008 on the AFP's procurement guidelines for engaging consultants: see Report No 8/2008.

Another role of the Ombudsman is to work generally and informally with agencies to strengthen their administrative systems. Ombudsman officers meet regularly with officers of the AFP and ACC to discuss complaint issues and trends, and to participate in the integrity training programs of those agencies. An objective of the Ombudsman's office is to promote good administration and respect for democratic values. This is reflected in recent publications of the office that deal with principles of good complaint handling and good administration. Examples are the *Better Practice Guide to Complaint Handling*, *Ten Principles for Good Administration* (Fact Sheet 5), *Providing Remedies* (Fact Sheet 3), and *Administrative Deficiency* (Fact Sheet 2).

² *Promoting Integrity Awareness* Group Activity, A Kit for Facilitators, Office of Police Integrity Victoria p 2

³ *Ignore misconduct and pay price with corruption* Jerold Cripps Commissioner, Independent Commission Against Corruption, NSW, Sydney Morning Herald, 9 December 2009

⁴ The following discussion draws from a paper by the Ombudsman, 'Fighting Corruption while Safeguarding Human Rights' (2006), published at www.ombudsman.gov.au.

THE RELATIONSHIP BETWEEN THE ROLE OF ACLEI AND OTHER OVERSIGHT AGENCIES

The important role that ACLEI plays in promoting integrity and preventing corruption in law enforcement needs to be viewed in the context of the role discharged by the Ombudsman and other oversight agencies. Indeed, in a formal sense, the main point of distinction between the role of the Ombudsman and that of ACLEI is the special investigation powers that ACLEI can exercise, such as telephone interception, electronic surveillance, undercover and controlled operations, search warrants, and passport confiscation.

This point needs to be borne in mind in considering any addition to or expansion of ACLEI's role. As noted earlier in this submission, the Ombudsman has expressed support for an extension of ACLEI's jurisdiction to cover corruption in law enforcement in other Australian Government agencies. However, the terms of reference for the present inquiry invite submissions on the options for a broader role for ACLEI, in two areas. Specifically, the terms of reference query whether ACLEI's jurisdiction should be extended to Australian Government agencies that exercise coercive powers, and whether ACLEI's anti-corruption education and prevention role should be expanded to cover all Australian Government agencies.

Coercive investigation powers are commonly conferred by statute upon agencies that do not have a law enforcement function. For example, the *Ombudsman Act 1976* (Cth) ss 9, 13 and 14 confers coercive powers upon the Ombudsman to obtain information and documents, examine witnesses and enter premises. The range of coercive powers that are exercisable by agencies is indicated in a report of the Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48/2008. Other examples of coercive powers exercised by agencies that, on one view, fall outside the scope of law enforcement, are powers to restrain the movement of goods and people, quarantine people and items, confiscate property and impose administrative penalties.

As those examples indicate, whether the jurisdiction of ACLEI should extend generally to the exercise of coercive powers in government raises large and important issues that arguably go beyond the scope of the present inquiry. It would be necessary to consider the other mechanisms that exist within government to oversight the exercise of coercive powers. The Ombudsman's office, for example, has undertaken a number of own motion investigations into the exercise of coercive powers within government, in areas such as immigration, taxation, customs and income support. The issue is also taken up in an Ombudsman publication, *Ten Principles for Good Administration* (Fact Sheet 5). Principle No 2 in that publication is 'Place adequate controls on the exercise of coercive powers'. As noted, the issue of coercive information gathering powers is also discussed in a recent Administrative Review Council publication that specifies twenty best practice principles.

The same observation can be made about the other issue raised by the terms of reference, namely whether ACLEI's role in anti-corruption education and prevention should be expanded to cover all Australian Government agencies. Many other oversight Australian Government agencies already discharge an education and prevention role. Examples are the Ombudsman, Auditor-General and Australian Public Service Commission. If ACLEI's role was to be expanded, it would need to be integrated with the role of those other agencies. Larger questions could also arise as to whether the preferred means of doing so is the creation of a more general anti-corruption agency, akin to the NSW Independent Commission Against Corruption, Queensland Crime and Misconduct Commission or WA Corruption and Crime Commission.