

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity: Submission by the Commonwealth Ombudsman

The Ombudsman's office has been handling complaints against law enforcement agencies since the creation of the Australian Federal Police 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 upon 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 also gave the Ombudsman the new function of undertaking a review of AFP complaint handling at least once every twelve months, and required that we be notified of all complaints to the AFP alleging serious misconduct. Our jurisdiction to investigate complaints about the ACC remained unchanged and our jurisdiction to deal with complaints about the AFP was broadened to include internal complaints. These functions are in addition to our longstanding role of inspecting AFP and ACC records relating to telephone interception, use of surveillance devices and authorisation of controlled operations.

Functions and Powers of ACLEI

A specialised anti-corruption body

The objects of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) are, broadly, to detect, investigate and prevent corruption in law enforcement agencies. The Integrity Commissioner's functions are specifically related to dealing with corruption, although allowance is made for other functions to be added by legislation. The trend in police oversight in Australia has been to establish oversight bodies tasked to deal specifically with corruption in law enforcement agencies, separate from bodies set up to handle complaints about actions of law enforcement personnel and agencies that fall short of corruption. This is the situation in New South Wales and Victoria, for example, and we submit that it is appropriate also at the national level.

Extension of jurisdiction

Parliament has already accepted that as a matter of principle the jurisdiction of ACLEI can appropriately extend to allegations of corruption against law enforcement in other Aust Govt agencies. 'Law enforcement agency' is defined in s 5 of the LEIC Act as the AFP, the ACC, the former NCA or any other Commonwealth government agency that has a law enforcement function and is prescribed by the regulations. The extension of jurisdiction can thus be achieved by a regulation and does not require amendment by the legislature. No other Commonwealth government agency has yet been so prescribed and it is a matter of policy for the Executive Government whether to make a regulation to extend ACLEI's jurisdiction. However, in this submission we note that there are weighty arguments for adopting that course.

- Firstly, the same arguments of principle and expediency that warranted the establishment of ACLEI can apply as well to law enforcement in other areas of government activity. These were outlined in the Preface that I wrote as Acting Integrity Commissioner in the first *Annual Report of the Integrity Commissioner 2006-07* (p 2):

[T]he law enforcement function in government is especially vulnerable to transgression. That is not to say that law enforcement officers lack the integrity of other government officials, but that they face unusual temptation in different circumstances. By the nature of their function, law enforcement officers associate closely with members of society who see crime, inducement and bribery as a way of life that can bring uncommon reward. Law enforcement activities are sometimes undertaken secretly and away from close supervision. Strong loyalty and peer group influence can develop among officers and overwhelm other obligations.

Another strand of misconduct – that also now comes within the definition of official corruption – is misuse of the exceptional and coercive powers that are granted to law enforcement agencies. Examples are the powers to interrogate, to arrest, to observe, to pry, and to assemble and present evidence before prosecutors and courts. There is a risk in government that any power can be misused. The danger can be greater when the powers are exercised within a career force by officers who become accustomed over decades to deciding when it is appropriate to use the powers.

- Secondly, it is now common to have joint law enforcement operations between, on the one hand, the AFP and ACC and, on the other hand, Australian government agencies such as Customs, Immigration, ATO and Centrelink. It is possible that a corruption allegation relating to the joint operation will relate to one or more, and possibly all, of the officers engaged upon it. Under present arrangements, the actions of the AFP and ACC officers could fall within the jurisdiction of ACLEI, and the actions of other officers could fall within the jurisdiction of the Commonwealth Ombudsman. This could unnecessarily complicate the investigation of the corruption allegation. It would be complex if the Ombudsman decided to refer to the AFP the corruption allegations against agencies such as Customs, while the Integrity Commissioner decided directly to investigate the allegations as they affected the AFP. The same problem of divided jurisdiction may arise if an AFP officer is seconded to work with another agency such as Customs.

Those complications could be avoided and a seamless investigation process could be undertaken if the jurisdiction of the Integrity Commissioner extended to the entire joint law enforcement operation.

- Thirdly, the LEIC Act confers special powers on ACLEI to investigate corruption in law enforcement, such as telephone interception, controlled operations, assumed identities, passport control etc. The conferral of these powers was in recognition of the fact that special investigation powers are needed to penetrate more deeply into corruption occurring in law enforcement. The Ombudsman does not have those special investigation powers, and nor is there any proposal that they should be conferred upon the Ombudsman. The extension of ACLEI's jurisdiction to investigate corruption in other law enforcement activities in government would ensure that the same powers were available in respect of all law enforcement activities.
- Fourthly, ACLEI does not currently have the resources to establish the machinery to exercise its special investigation powers. Unlike many counterpart State bodies, ACLEI does not have a covert operations unit, or the capacity to undertake telephone interception or electronic surveillance. Moreover, ACLEI has an office only in Canberra, and yet its function is to oversight law enforcement activities undertaken both nationally and internationally. This point

was noted as a special challenge facing ACLEI in the recent Annual Report (p 4):

The second – and unique – challenge facing ACLEI is to discharge its functions on a national basis. Australia is a large country. National law enforcement activity occurs across the continent, and internationally. Even the simple task of interviewing a single complainant or witness in a distant or remote location can be a time-consuming and resource intensive activity for ACLEI, which operates from a single office in Canberra. This geographical dimension in ACLEI’s work is not faced to the same extent by State anti-corruption agencies. It will take time for ACLEI to decide how best to operate on a national basis.

The point is that ACLEI would be better placed to discharge its present functions if there was an extension of its jurisdiction that enabled it to grow to a critical enough mass to develop the exercise of its special investigation powers.

Definition of corruption

‘Corruption’ is a key concept used in the legislation to delineate the roles of the Ombudsman and ACLEI, but the definition is not sufficiently spelt out, and it would be helpful if it were enunciated in some greater detail. We envisage that the definition would also serve other operational purposes, such as of delineating the jurisdictional boundary between ACLEI and AFP and ACC, and defining the scope of the duty cast by s 19 of the LEIC Act on the heads of AFP and ACC to notify ACLEI of corruption issues. It would therefore be desirable if a more fulsome definition was agreed to by the Ombudsman, the AFP and the ACC, and published more generally.

Prevention and Education

We note that the objects of the LEIC Act (s 3(1)(c) and (d)) include ‘to prevent corrupt conduct in law enforcement agencies’ and ‘to maintain and improve the integrity of staff members of law enforcement agencies’. A State anti-corruption body will typically have three broad functions — operational, including detection and investigatory functions; corruption prevention; and public education. Prevention and education are now recognised in the model of Australian anti-corruption bodies as essential activities. Section 14 of the NSW *Police Integrity Commission Act 1996*, for example, makes legislative provision for the Commission’s role in police education. Those activities are a low-cost and strategically sound means of promoting integrity in law enforcement and ACLEI needs to be in a position to devote resources to those activities, as well as to corruption investigation.

Oversight of ACLEI

The existence of the Parliamentary Joint Committees on ACLEI and ACC add considerably to the transparency and accountability of these agencies. It is an anomaly that the largest and most significant law enforcement body - the Australian Federal Police - is not subject to such scrutiny. There would be considerable advantages in extending Parliamentary oversight to the AFP and having all these bodies then subject to one Parliamentary Committee – particularly in terms of a consistent and informed approach to oversight and identifying common trends or areas of overlap. Conversely, there seems no good reason for the AFP to be excused from this level of scrutiny.

In terms of day to day accountability, the Ombudsman has jurisdiction over ACLEI in respect of complaint handling and inspection of its use of coercive powers. This is

effective and appropriate. Given the Ombudsman's cross-agency responsibilities, it allows us to take advantage of common practices and procedures and economies of scale in dealing with such matters.

Legal rights and obligations of State law enforcement integrity agencies to investigate corruption issues involving law enforcement officers seconded to national law enforcement agencies

The responsibility for dealing with corrupt conduct or even ordinary misconduct by secondees to national law enforcement agencies warrants scrutiny.

In a review of the operational and corporate implications for the Australian Crime Commission arising from alleged criminal activity by two former secondees carried out by this office in 2004 (Report 2/2004) we noted that matters of performance management and discipline were defined by the consent agreements between the ACC and the secondees' home police service. We noted further that we had historically expressed reservations about the inability of these arrangements to provide a robust framework for the management of secondees, in relation to integrity and accountability. We did not make any recommendation in this regard in that review but there have since then been occasions which have again highlighted the problems in ensuring the accountability of secondees to national law enforcement agencies, particularly when they have returned to their home service. In this sense the issue is as much about the legal rights and obligations of the national agency to enforce accountability as about the rights and obligations of the state law enforcement agencies.