

## **Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity Inquiry into Law Enforcement Integrity Models.**

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This submission begins by giving a brief overview of what is commonly termed civilian oversight bodies, also referred to as integrity models and anti-corruption agencies. Such bodies are external to and independent of the organisation they oversight and report to the parliament or a dedicated parliamentary committee and not to a government minister. The latter is considered important as reporting directly and only to a minister means that an oversight body's report may not be made public. This compromises the oversight body's independent citizens' watchdog role and impacts negatively on their credibility with the community.

My submission begins by discussing some of the core features an oversight body needs to be effective. It excludes a discussion on coercive powers, as most oversight bodies in Australia have the necessary coercive powers needed to deal with organized crime and serious misconduct and corruption issues, or have ready access to those powers. The submission concludes by addressing matters specifically relevant to the Australian Commission for Law Enforcement Integrity (ACLEI).

The external, independent models used to oversight police in Australia vary considerably.<sup>1</sup> Some states have a dedicated police oversight agency, others have created powerful anti-corruption agencies that oversight police and other public servants and in one state a dedicated police oversight agency and the Ombudsman both oversight the police. A few states have what could be classified as relatively weak oversight models, where the Ombudsman alone has jurisdiction for overseeing the conduct of police and/or other public servants.

There are strengths and weakness in most models but arguably the most effective are those where a police oversight agency and the Ombudsman share the role (a multi-layered approach as in New South Wales) or where a powerful anti-corruption agency has jurisdiction over police and other public servants (a one-stop-shop approach as in Queensland and Western Australia). The one-stop-shop approach has the advantage of not implying that police and other law enforcement agencies are so prone to serious misconduct and corruption that they require special attention. It also allows for a more wide-ranging approach to public sector integrity and acknowledges that organized crime, serious misconduct and corruption extends to other public servants. While it may not allow for the degree of specialization that police-specific oversight agencies acquire, oversight bodies that have jurisdiction over the broader public sector (including police) often have personnel who are dedicated to investigating police complaints and hence acquire expertise in the area.

Comparing the effectiveness of the various models, even like models, can be difficult for a number of reasons, not the least being the different legislative frameworks which

determine the role and functions of various Australian oversight bodies, the resources allocated to them by their respective governments and the public support governments give to the oversight bodies they have established (this has not always been positive).

Since 1986 every police service/force in Australia has been subjected to some form of external oversight and today most have the powers needed to effectively undertake their investigative role (this was not always the case). But there are other core features that an external, independent body needs to effectively perform its oversight role. These include the ability to:

- be the central receiving point for all complaints;
- assess and classify all complaints;
- monitor, review and supervise complaints which are investigated by police;
- investigate complaints in their own right and from the initial stage of the complaints process;
- have police explain to the parliament, and hence to the community, why a policy recommendation of an oversight body has not been implemented; and
- undertake a strong, proactive-preventive function.

A brief discussion of why these core features are considered important follows.

An independent, external oversight body should be the central point for receiving citizens' complaints and for complaints made by police against other police. They should also assess and classify complaints to determine which ones should be returned to police for investigation, which investigations they should supervise and which complaints should be investigated by the oversight body's staff. An important reason why these gatekeeper functions should be undertaken by the oversight body relates to citizens' lack of confidence in a complaints process in which police control or have significant control over the process.<sup>ii</sup> This lack of confidence goes to the heart of why oversight bodies were established in the first instance. Many citizens are deterred from lodging a complaint about police when they have to lodge it with a member of the police organization they are complaining about. They also have little if any confidence in police to process a complaint about another officer dispassionately.

It is recognized that the vast majority of complaints are minor in nature and would be handed to the police to resolve, however it should be for the independent body to make that decision and not the police. Of course, it is imperative that a government adequately funds the independent oversight body to undertake this clearing house function.

To maintain independent control over the complaints process, an oversight body must be able to determine when it will monitor and review a complaint being investigated by police and have the power to take over an investigation at any time. This capacity has a preventive element as it can dissuade police from conducting a less than rigorous or improper investigation.

Most Australian oversight bodies are able to recommend to a police organization that it modify a particular policy or procedure. Such recommendations are overwhelmingly the result of investigations into police misconduct or in some instances emerge from independent research undertaken by the oversight agency. Most police organizations respond positively to these recommendations, however in instances when this is not the case, the police should be obliged to report to the parliament, and therefore to the community, why it has decided not to implement the oversight body's recommendation. There may well be sound, practical reasons for the police decision but the public have a right to know what those reasons are. This process would also help to ensure that the recommendations of an oversight body are well grounded.

While certain reactive powers are essential for an oversight body to fulfill its citizens' watchdog role, on their own they only deal with problems after the event. Reactive powers by themselves adopt the 'big stick' approach and address the symptoms and not the cause of police misconduct. To be effective an independent civilian oversight body also needs to have a strong corruption prevention arm. I stress strong, as currently the prevention functions undertaken by some oversight bodies in Australia are confined to giving lectures at police academies to recruits or to senior police and presenting papers at conferences. This comment is not meant to devalue those activities or to criticize oversight bodies for this rather limited approach to prevention. Oversight bodies understand the value of prevention and would welcome the opportunity to undertake a meaningful proactive-preventive role, but to do so they need to be properly resourced. Meaningful corruption prevention is not cheap and includes the ability to undertake independent research. A body which has the capacity to adopt a reactive and proactive holistic approach to misconduct and corruption related issues has a greater chance of modifying behaviour than one that concentrates most of its energies and resources on reacting to problems after they have occurred.

This brings me to the important issue of resources. It does not matter how powerful an oversight body is - powers without adequate resources translates into no powers. While this may be stating the obvious, the history of civilian oversight in Australia (and beyond) is littered with examples of oversight bodies being poorly resourced and therefore being constrained in exercising the powers granted to them by the community through the parliamentary process.<sup>iii</sup>

The consequences under-resourcing has on effective, independent oversight can be significant. When resources and not the nature of a complaint dictate an oversight body's course of action, it is failing, through no fault of its own, to fulfill its statutory watchdog obligations. Inadequate funding can also have negative consequences for those who are the subject of a complaint. Delays in finalising complaints due to lack of resources places undue stress on police officers and can put their careers on hold for a period of time. Delays also undermine complainants' confidence in the system as they become disillusioned with the process when it takes an inordinate amount of time to bring their complaint to a conclusion.

Some oversight bodies are prevented from undertaking public awareness campaigns because of inadequate funding. This seems to contradict the reason why oversight bodies are established. Indeed, there seems little point in establishing an independent watchdog body if the majority of the public does not know that it exists, what its role and functions are and how to access it.

If an oversight body has insufficient funds to adequately perform its reactive functions, it will prove almost impossible for it to devote appropriate resources to broader systemic issues and to engage in meaningful proactive activities. Inadequate resourcing can also lead to internal tensions within an oversight body. When the reactive and proactive arms find themselves competing for too few resources it is usually the preventive arm which suffers.

Before moving on to address matters concerning the Australian Commission for Law Enforcement Integrity, I would like to raise a matter which all law enforcement oversight bodies in Australia, including the ACLEI, should address, and that is the need for a common complaints-related language and common categories for compiling complaints data.

The current disparate approach means that it is virtually impossible to use complaints statistics to undertake a comparative analysis of complaints data across Australia. For example, attempts to compare something as simple as the number of complaints received and matters finalized has proved to be a futile exercise. The problem is exacerbated when there is a change to the way an oversight body compiles its statistics.<sup>iv</sup> While complaints data on its own is a crude measurement of an oversight body's effectiveness, the ability to be able to conduct a comparative analysis could be useful in highlighting matters which are impeding a particular oversight body's effectiveness.

### **Australian Commission for Law Enforcement Integrity**

The ACLEI has been operational for a little over 18 months and therefore is very much in the formative phase of its development. As such, it may not yet be in a position to fully appreciate any unintended legislative impediments to its operations. However, mechanisms are in place to respond positively to request by the ACLEI for legislative changes should the oversight body request them. Like the Crime and Misconduct Commission in Queensland, the Police Integrity Commission in New South Wales, the New South Wales Ombudsman and the Corruption and Crime Commission in Western Australia, the ACLEI is monitored and reviewed by a dedicated parliamentary committee: the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJC). The committee, through its monitor and review role, can support and advocate for amendments to Acts of Parliament which impact negatively on the role of the ACLEI. It can also argue against and reject requests for increased powers if it feels they are inappropriate. The PJC will be undertaking a three-year review of the ACLEI and this process will provide an important opportunity to analyse and evaluate the strengths and weaknesses of the ACLEI's legislative framework and its operations.

However, one issue needs attention immediately, for despite only being operational since 1 January 2007, it is already abundantly clear that the ACLEI requires a significant increase to its budget. At this early stage of its life the ACLEI is already operating at a loss. In 2007-08 that loss was a little over half a million dollars. The government has responded positively to the need to provide additional resources to the oversight body by granting it, in the 2008 budget, an additional \$7.5 million over four years.<sup>v</sup> But it seems that these additional resources are not sufficient to allow the ACLEI to operate effectively. The ACLEI has a unique geographical jurisdiction in the Australian context, and there is a very strong likelihood that its workload will increase significantly over the next few years. It also needs to adopt a meaningful proactive-preventive function.

The need for increased staff was taken up by the former (acting) commissioner for the ACLEI, Professor John McMillan. In 2007 he estimated that ‘the organization probably needs a staff of around 50 in order to exercise all the functions it has been given’.<sup>vi</sup> As Professor McMillan explained:

*ACLEI has significant investigation powers, including the power to conduct telephone interception and covert surveillance...But the reality is that ACLEI does not have to budget to exercise those powers. When the government is so rapidly expanding the size and responsibility of law enforcement agencies to counter the threat of terrorism, we must be able to reassure the public that those agencies operate with integrity. Active external oversight of policing, by bodies that are adequately resourced, is necessary to give that reassurance.*<sup>vii</sup>

The recently announced budgetary increases will not go anywhere near meeting the need for additional staff. During the debates about the Appropriation Bill (No. 1) 2008-2009, the Minister for Home Affairs indicated that, as he understood it, ‘there will be three to four more staff during this year’. That leaves a huge gap between what the then head of the ACLEI claims the organization needs and what they can currently afford.

At the moment the ACLEI is based only in Canberra but as noted in its first annual report, it is faced with the task of overseeing the conduct of law enforcement personnel who function nationally and internationally. This is rarely an issue for state-based oversight agencies and the ACLEI and PCJ are going to have to work out how best to address this challenge. Whatever the solution, it is going to be expensive.

As mentioned above, an oversight body can be prevented from achieving its full potential if it does not have the resources needed to operationalise its legislative powers. Also, the establishment of an under-resourced oversight body can, rightly or wrongly, be perceived by the community as little more than symbolic politics.

Accountability is not cheap and I appreciate that governments and parliaments must weigh up competing demands on the public purse. However, a high priority needs to be given to the accountability of law enforcement personnel who wield the coercive power of the state. The powers of the Australian Federal Police, Australian Crime Commission and other Federal law enforcement organisations have increased in recent times and in

some instances their powers can be used covertly. Failure to give priority to such an important matter as the effective accountability of those who exercise these powers could endanger the fundamental democratic rights which citizens and residents are entitled to in Australia's liberal democratic political system.

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<sup>i</sup> When the term police is used in this submission it includes, where appropriate, other law enforcement personnel.

<sup>ii</sup> This lack of confidence is not confined to police. Citizens do not trust a complaints process in which 'Caesar is judging Caesar'.

<sup>iii</sup> See for example Lewis, C. 2000 'The Politics of Civilian Oversight: Serious Commitment or Lip Service?' in Andrew Goldsmith & Colleen Lewis (eds) *Civilian Oversight of Policing: Governance, Democracy and Human Rights*, Hart, Oxford.

<sup>iv</sup> Lewis, C. 1999, *Complaints Against Police: The Politics of Reform*, Hawkins Press, Sydney, pp 69-71; Criminal Justice Commission, 1996, *External Oversight of Complaints Against Police: A Cross-jurisdictional Analysis*, CJC, Brisbane.

<sup>v</sup> Parke, Melissa, (Freemantle, Australian Labor Party), *Hansard*, Monday, 23 June 2008.

<sup>vi</sup> Stewart, Cameron, 'Police watchdog toothless', *The Australian*, July 12, 2007, <http://www.theaustralian.news.com.au/story/0,20867,22059735-601,00.html>, 20 July 2008.

<sup>vii</sup> Stewart, Cameron, 'Police watchdog toothless', *The Australian*, July 12, 2007, <http://www.theaustralian.news.com.au/story/0,20867,22059735-601,00.html>, 20 July 2008.