

C/- Independent Commission Against Corruption  
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12 December 2008

Dr Jacqueline Dewar  
Committee Secretary  
Parliamentary Joint Committee on the Australian  
Commission for Law Enforcement Integrity  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Dr Dewar,

Thank you for this late opportunity to make submissions on this important subject. Please note that, although I am a Principal Lawyer at the NSW Independent Commission Against Corruption (ICAC), these submissions are made in a private capacity, and the views expressed do not represent the views of my employer agency.

I have some significant experience as a legal practitioner involved in the conduct of commissions of inquiry in NSW:

- I was a senior lawyer in the team led by Counsel Assisting John Agius SC at the Royal Commission into the NSW Police Service (RCPS) between 1994 and 1997.
- I have been a Principal Lawyer at the NSW ICAC since October 2002.
- I have recently completed my Executive Masters of Public Administration (EMPA) through the Australian and New Zealand School of Government (ANZSOG) and the University of Sydney, Graduate School of Government (USGSG). I used these studies, where I could, to examine more closely the operations of my own agency and anti-corruption agencies generally.

I have been following the discussion that has been taking place through the Joint Committee forum. As the issues have crystalised, I have formed my own views which I thought I would convey for what they are worth. These are detailed below.

If I can be of further assistance in providing a practitioner perspective in relation to any relevant issue, please do not hesitate to contact me.

## **1. A Building Blocks Approach v A Critical Mass of Resources**

ACLEI is an anti-corruption agency. There is an important emerging distinction between anti-corruption agencies and complaint management agencies, such as some ombudsman offices. Complaint management agencies are generally process focused. They are about ensuring that each individual has meaningful recourse to the misapplication of authority. Management systems in the subject agency may improve on account of an effective complaints management process, but this is a secondary issue to ensuring that a worthwhile complaint process is in place and operating effectively.

Anti-corruption agencies are more outcomes focused. They are about impacting on the standards of integrity of designated agencies. Their actions may be based on complaints made to them, but these are a resource for them, note their *raison d'être*. They are not required to deal with all complaint matters/information sources equally. Rather, they steer their resources to where they can maximise their impact on integrity standards.

This approach is entrenched in both the ICAC Act and the LEIC Act in sections that provide their respective agencies with a discretion in relation to the matters they investigated, and which encourage them to focus on serious corruption and systemic corruption.

It is investigations into serious corruption and systemic corruption that are more likely to impact on organisational integrity through:

- removing the worst offenders
- deterring others who might be inclined to similarly offend; and
- reviewing and addressing systemic deficiencies that threaten organisational integrity.

For investigations into serious corruption or systemic corruption to succeed and have impact, there is generally a need for a critical mass of resources. It is my experience that investigations that count generally need access to a myriad of electronic surveillance options, physical surveillance capacity, computer forensics, covert capacity, a flexible and powerful coercive examination capacity, as well as a team of investigators who can collectively pursue a series of investigative opportunities. Preferably an agency will have a capacity to conduct more than one such investigation at a time, so that it cannot be taken out of action by a single investigation imperative.

With numerous anti-corruption agencies and other law enforcement agencies operating at State and Commonwealth levels, much can be achieved through sharing resources and co-producing investigation initiatives. However, it is difficult to see how ACLEI can provide a consistent impact on integrity standards without its own critical mass of resources.

## 2. Confined Jurisdiction v Broader Jurisdiction

ACLEI's jurisdiction is currently confined to the AFP and the ACC, or a government agency that has law enforcement functions and is prescribed by regulation. With respect to the latter category of agency, ACLEI's jurisdiction is confined to examining the performance of the agency's law enforcement functions. If there is corruption in the agency's procurement practices, promotional practices or any other area of its operation, ACLEI will have no jurisdiction.

A number of reasons have been suggested for confining jurisdiction in this way:

- The vulnerability of law enforcement operatives to transgression
- The fact that these agencies have access to exceptional and coercive powers
- The particular difficulties associated with investigating law enforcement officers who are familiar with relevant investigative techniques
- If ACLEI can regulate conduct of law enforcement agencies, these agencies will, in turn, be able to regulate the activities of the rest of the Commonwealth public service.

In my view, none of these reasons is particularly compelling. We know from experience in NSW, Queensland and Western Australia that, despite the particular circumstances that might enhance the vulnerability of law enforcement officers, people in other parts of the public sector are similarly vulnerable, particularly in areas such as procurement and licencing. Corruption in these other areas can be similarly damaging to individuals and the community generally, although they may not cause damage in the same way as law enforcement officers. The difficulty in exposing police corruption means extra care is required, however it does not mean that there should be different anti-corruption structures and processes pertaining only to that type of public officer. Finally, leaving the regulation of the rest of the public service to law enforcement agencies overlooks the inherent rationale of anti-corruption agencies, which is to go beyond just responding to complaints, and to confront the whole problem of corruption and to build public sector integrity.

From a practitioner perspective, there are, in my view, some further considerations.

As discussed above, it is important to have a critical mass of resources to sustain meaningful anti-corruption initiatives. This level of resourcing may sit more comfortably with an agency with broader responsibilities and the increased work-load that comes with this.

Staff need a regular turn-over of investigative opportunities to develop experience and hone skills. A broader jurisdiction facilitates this. My organisation, the NSW ICAC has certainly benefited in this way from its broader jurisdiction.

It is true that investigating law enforcement officers can be more difficult (although, from my experience at the RCPS and the ICAC this can be over-stated). As mentioned above, a broader jurisdiction will allow for ongoing capacity building

which is not confined to difficult law enforcement agency investigations. It will also mean that the agency will be seen to be operating and having impact, which is critical to the overall influence of the agency. As an academic I once interviewed said to me, “An anti-corruption agency must not only have teeth, it must be seen to be using them”.

### **3. Systems Analysis of Investigation Incidents**

I draw your attention to and support the important submission by Transparency International Australia (pages 3 & 4) about the need to merge corruption exposure and corruption prevention initiatives.

For my last subject in my EMPA studies, I conducted a research project into anti-corruption agencies, canvassing how these might have greater impact on public sector integrity. As with Ms Tucker from Cowan University, I had been planning a “Delphi” style research process. I planned two rounds of interview of a panel of persons from relevant, but different, perspectives with respect to the operation of anti-corruption agencies.

The first round of interviews was intended to be a “brain-storming” initiative. I asked participants to think broadly and innovatively about how anti-corruption agencies might enhance their impact. After drawing out ideas, I planned to “reality check” these through a second round of interviews where I was to seek their comment on other people’s ideas, and perhaps re-evaluate their own. The aim was to gain a considered, contemporary view of how anti-corruption agencies might proceed in the future so as to be more influential with respect to public sector integrity standards.

Unfortunately, time constraints meant that I had only completed the first round of interviews when I was called on to produce a final research essay. I did this and the project concluded early. My research essay is a confidential document. At the time that I was called on to submit a final essay, I had completed a document summarising the views expressed in the first round of interviews. I was intending to circulate this to my panel members to provide a basis for my second round of interviews. This was prepared in a manner that protected the identities of participants, this having been guaranteed as a condition of their participation. I have enclosed this document for your benefit. I hope you find it useful as something containing some interesting contemporary views about how anti-corruption agencies might develop. Please note that it was not prepared as an academic document, but rather as a document for people I had met and interviewed, and wanted to engage in further discussion. As such, it is sometimes casual, even conversational, as I tried to cram it with as many ideas as possible in manner that I hoped would be engaging to my target audience.

As I mentioned above, please let me know if I can be of any further assistance to the Committee or yourself.

Don McKenzie