

**SUBMISSION BY THE COMMONWEALTH OMBUDSMAN**

**Inquiry into the Provisions of the  
Law Enforcement Integrity Commissioner Bill 2006,  
the Law Enforcement Integrity Commissioner  
(Consequential and Transitional Provisions) Bill  
2006 and the Law Enforcement (AFP Professional  
Standards and Related Measures) Bill 2006**

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## **Background**

The office of Commonwealth Ombudsman is created by the *Ombudsman Act 1976* and the Ombudsman is tasked by that Act with investigating and reporting on the administrative actions of almost all Commonwealth agencies. Investigations can follow a complaint, or can be instituted on the Ombudsman's own motion.

The Commonwealth Ombudsman is also given functions by the *Complaints (Australian Federal Police) Act 1981* in relation to actions of the Australian Federal Police (AFP).

The Ombudsman's investigations are generally conducted on a cooperative basis, but the Ombudsman has power to require the provision of documents or information or that a person attend and answer questions.

The Ombudsman has also been given a range of inspection and oversight roles by:

- the Telecommunications (Interception) Act 1979
- Part 1AB of the Crimes Act 1914 in relation to law enforcement controlled operations;
- the Surveillance Devices Act 2004;
- Part 8C of the Migration Act 1958.

The Commonwealth Ombudsman is also the Defence Force Ombudsman and the Taxation Ombudsman. Under ACT Self-Government legislation, the Ombudsman is also the ACT Ombudsman, with responsibilities under the *Ombudsman Act 1989* (ACT) and other ACT legislation. More recently, under the *Migration and Ombudsman Legislation Amendment Act 2005*, the Ombudsman became the Immigration Ombudsman, and under the *Postal Industry Ombudsman Act 2006* the Ombudsman will become the Postal Industry Ombudsman.

Two Deputy Ombudsmen and a staff of about 160 support the Ombudsman. Most members of staff are located in the ACT, but the Ombudsman's office is represented in every state capital and in Darwin.

The office is organised by function as well as by location, with major areas of responsibility (for example, social security, child support, taxation, immigration, law enforcement, defence) being allocated to a team that specialises in that area.

The Ombudsman received over 17,000 complaints and over 12,000 other approaches in 2004-05 and conducted about 6,500 investigations. As well as investigations following complaints, the Ombudsman conducted a number of systemic investigations on his own motion.

### **Complaints (Australian Federal Police) Act 1981 (Complaints Act)**

The Complaints Act set up a joint complaints handling model for complaints about the conduct of AFP officers between AFP Professional Standards and the Commonwealth Ombudsman.

The AFP has primary responsibility for conciliating or investigating complaints while the Ombudsman has responsibility for overseeing the results of these actions and advising complainants of the outcomes of their complaints. This model is underpinned by a requirement that the AFP advise the Ombudsman of all but the most minor of complaints made against the AFP by members of the public. There is no requirement on the AFP to advise the Ombudsman of complaints made by an AFP member against another.

The Complaints Act provides that the Ombudsman may require the AFP to take further action on a complaint, take over an AFP investigation, undertake special or joint investigations and make recommendations, or report on these matters to the Minister or the Parliament. The Ombudsman may also investigate complaints in his own right, or undertake own-motion investigations into systemic issues.

In 2004-2005 this office received 696 complaints about AFP conduct. In 63% of cases the AFP attempted to conciliate the matter, they investigated a further 19% of complaints, and in the remainder this office agreed that no action was required on the complaint. Final reports were provided to this office in all conciliated and investigated matters for review. In a small number of these matters this office requested further action be undertaken by the AFP. This office also commenced four special investigations under powers conferred under the Act.

### **The Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006**

The proposed legislation would repeal the Complaints Act, and replace it with a more flexible and efficient model. The new oversight model would differ from the current oversight model by allowing:

- all complaints, including those made by AFP officers, to be categorised by the level of seriousness.
- minor complaints, such as those about rudeness, to be dealt with quickly and informally by AFP management.
- more serious complaints to be investigated by the Professional Standards Unit. These would include serious one off conduct such as assault, but may also include persistent low-level misconduct that would normally attract managerial action. All serious complaints could lead to employment action being taken against the officer.

The types of matters that fall into each category are described in general terms in the Bill, with specific matters within each category to be agreed between the AFP Commissioner and the Ombudsman. These agreements would be legislative instruments and subject to tabling in and disallowance by the Parliament.

All complaints will be subject to an audit by the Ombudsman, at least annually, and all serious matters will be notified to the Ombudsman at the time they are received by AFP Professional Standards.

The Commonwealth Ombudsman would be designated as the Law Enforcement Ombudsman.

### **Comments on the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006**

The Ombudsman has been closely involved in the development of the Bill and supports the reform of the AFP complaints system and the proposed model contained in the Bill. The Ombudsman considers that it would provide a more efficient and flexible framework while maintaining the strong independent oversight role of his office.

The Bill improves efficiency by permitting the AFP to deal with minor matters, such as customer service issues, managerially, thereby providing a timely response to complainants. The removal of the need for the Ombudsman to be involved in all complaints would allow this office to focus on more serious complaints and systemic issues.

The Bill would also achieve increased flexibility through a range of strategies. Agreements between the AFP Commissioner and the Ombudsman on what matters fall within the various categories would allow for adjustment over time, for instance, where new issues arise. The model also contemplates that much of the framework for oversight of complaints about the AFP would be agreed between the AFP and the Ombudsman's office, with only core responsibilities included, around which these arrangements would be constructed.

For instance, the notification requirement for serious complaints would allow the AFP and the Ombudsman to settle arrangements on how these matters are to be referred, and potentially to agree on how the Ombudsman would be further involved in the oversight of these investigations. If no such agreement were made, it would be open to the Ombudsman to undertake own-motion investigations into the conduct of the AFP investigation using the powers contained in the Ombudsman Act.

The Bill would achieve improvements in the Ombudsman's oversight role by allowing greater flexibility in investigating matters, through the new audit function and the new focus on practice and procedure contained in the Bill.

The Complaints Act requires that the Ombudsman oversee all matters. This has resulted in a disproportionate amount of resources being dedicated to minor matters. The proposed Bill would remove this obligation, which would allow the Ombudsman to focus on more serious and systemic matters. Scrutiny of minor matters would continue to occur through the new auditing function.

Serious complaints would be notified to the Ombudsman; however, it would be for the Ombudsman to decide whether to oversee these complaints. Considering their serious nature, it is anticipated that final reports on all these complaints would be reviewed and in certain cases the Ombudsman would oversee the investigation as it is undertaken. Investigations could be undertaken either through an agreement with the AFP or by exercising the powers contained in the Ombudsman Act.

The new Bill would also provide greater focus on AFP practice and procedure than is currently the case under the Complaints Act. The Complaints Act is mainly concerned with the conduct of individual officers, which has tended to limit both the scope of AFP investigations and the range of outcomes considered. The new Bill would correct this bias by requiring AFP investigations to consider practice and procedure matters. This would allow for better continual improvement through improved feedback.

The new focus on practice and procedure would also provide the Ombudsman with the opportunity to look at broader administrative practice within the AFP, subject to resources. It is the intention of the Ombudsman to undertake a greater number of own-motion investigations, to improve strategies for identifying systemic issues, for instance through statistical analysis, and to provide greater oversight of investigations into serious allegations.

### **Implications**

The Bill would remove the obligation to oversight all complaints, allowing greater flexibility to apply available resources to more serious and complex complaints and systemic issues. However, the Bill also provides for a new auditing function for minor matters and also refocuses the Ombudsman on the broader practice and procedure issues that will require more in-depth work and high-level analysis.

### **Resources**

My office was given additional funding when we assumed the responsibilities of the Immigration Ombudsman and the Postal Industry Ombudsman roles because of the added responsibilities and additional functions.

It is expected that the creation of a new Law Enforcement Ombudsman role, with a new audit function and the development of an enhanced own motion program, with the requirement to report at least annually, will place additional demands on my office. We anticipate that our resourcing requirements will need to be reviewed in light of these additional responsibilities.

## **Law Enforcement Integrity Commissioner Bill 2006 (ACLEI Bill), the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 (ACLEI Consequentials Bill)**

The ACLEI Bill provides for the establishment of an Australian Commission for Law Enforcement Integrity, headed by a statutory Integrity Commissioner, as an independent body with special investigative powers to detect, investigate and bring to prosecution criminal conduct in law enforcement agencies, to prevent such conduct and promote the integrity of staff of law enforcement agencies. The ACLEI Consequentials Bill amends other legislation, including the Ombudsman Act and the legislation under which the Ombudsman has a function of inspecting the records of law enforcement agencies, namely the *Telecommunications (Interception) Act 1979* (TI Act), Part 1AB of the *Crimes Act 1914* (Crimes Act) in relation to law enforcement controlled operations and the *Surveillance Devices Act 2004* (SD Act).

As a result of the new legislation the Australian Commission for Law Enforcement Integrity (ACLEI) and the Integrity Commissioner will have the same powers and record keeping duties under the TI Act, the Crimes Act and the SD Act as the Australian Federal Police and the Australian Crime Commission and their respective chief officers have under those Acts.

The Ombudsman will accordingly have the same inspection function vis-a-vis the Integrity Commission as the Ombudsman now has vis-a-vis the Australian Federal Police and the Australian Crime Commission. As with other proposed legislation recently before the Parliament, the Ombudsman's inspection and reporting role will be an important safeguard in ensuring that the powers given to the new agency are not misused and that public confidence in the integrity of the new regime is maintained.

### **Implications**

The ACLEI Consequentials Bill proposes an amendment to s 6 of the Ombudsman Act to provide for the Ombudsman to transfer matters to ACLEI. Whether the Ombudsman may or must do so depends on the Ombudsman being satisfied that the matter raises 'a corruption issue' or 'a significant corruption issue' as the case may be. For clarity, the Bill should ensure that not only complaint investigations but also own motion investigations may be transferred to ACLEI on the same basis.

A more general point relating to this amendment to s 6 of the Ombudsman Act is the fact that it compounds a problem created by the already long and unwieldy nature of the section. The generic approach taken in sections 6, 6A and particularly 6B of the *ACT Ombudsman Act 1989* is to be preferred. Section 6B of the ACT Ombudsman Act provides simply that 'if the Ombudsman decides that it would be more appropriate for a complaint to be investigated by any of the following entities, the Ombudsman must refer the complaint to the entity' and then lists the relevant entities.

It is important that each agency keep the other informed about matters referred by the other agency. The Bills contain no express requirement for

ACLEI to notify the Ombudsman of the outcome of a referred investigation, and indeed, once a matter is referred by the Ombudsman, it is the person who has raised the corruption issue with the Ombudsman who will have an entitlement to be kept informed if they so choose (cl 25). The Ombudsman would be able, in the course of an investigation, to request or require that information but it may not always be appropriate to undertake an investigation of ACLEI for this purpose.

The Integrity Commissioner may disclose information publicly about an investigation by the Commissioner if it is in the public interest to do so. Otherwise ACLEI staff would be able to disclose to the Ombudsman information disclosed or obtained for the purposes of the ACLEI Act only where the information did not relate to a corruption issue and would be more appropriately dealt with by the Ombudsman (cl 208(3)(a) refers). It would be desirable to provide in the Bill for the Ombudsman to be able to obtain information about a referred corruption issue without having to mount an investigation to do so.

### **Resources**

The new function of inspecting ACLEI records will expand the inspection program of the Ombudsman. New methodologies will need to be developed for Integrity Commission inspections and Ombudsman staff will need to become familiar with the Integrity Commissioner's policies and procedures as they affect record keeping; however, the work involved in each inspection is likely to be less than the work involved in inspecting ACC and AFP records. Our current expectation is that our resource requirements in this area would increase by about 30%.

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Commonwealth Ombudsman