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Advice on the *Law Enforcement Integrity Commissioner Bill 2006 (Cth)*

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About Dr A J Brown

A J Brown holds law and politics degrees from UNSW, a graduate diploma in legal practice from the ANU, and a PhD from Griffith University. He is admitted as a barrister in Queensland and a barrister and solicitor in Australia's federal courts. From 1993 to 1997 he worked for the Commonwealth Ombudsman, primarily as Senior Investigation Officer (Major Projects), Canberra. In 1998 he served as Associate to Justice G. E. (Tony) Fitzgerald AC, President of the Queensland Court of Appeal; and in 1999 as ministerial policy advisor to the Hon Rod Welford MLA, then Queensland Minister for Environment Heritage and Natural Resources.

In 2003-2004 Dr Brown was a Senior Research Fellow and director of the integrity and corruption research program of the Key Centre for Ethics Law Justice & Governance, Griffith University. He was lead author of the report of the Australian National Integrity System Assessment, 'Chaos or Coherence?' (2005), and currently leads the national Australian Research Council Linkage project on whistleblower management and protection, 'Whistling While They Work' (2005-2007). He researches and teaches in a range of areas of public accountability, public policy and public law.

Submissions and Recommendations regarding the *Law Enforcement Integrity Commissioner Bill 2006 (Cth)*

Submissions relating to the jurisdiction of the Commission

1. The restricted jurisdiction of the proposed Integrity Commission (i.e. law enforcement agencies only) does not deliver on the public expectations of an 'independent national anti-corruption body' 'with the powers of a royal commission' created by the Government's announcement of June 2004

See especially Attachments A and B.

In many respects, the decision to restrict the jurisdiction of the Commission has the hallmarks of a simple mistake in understanding the framework of like agencies at State level. The Government's announcement indicated that it intended to differentiate itself from the Victorian Government by instituting "a properly-formulated independent Commission – similar to those in WA, New South Wales and Queensland" – as a supplement to the existing but reactive complaints-based model of Ombudsman investigation in relation to official corruption matters.

However, in all these jurisdictions the anti-corruption agency is not limited to police but rather has a general jurisdiction over public officials. NSW is a variation on this theme having in turn supplemented the ICAC with a specialist Police Integrity Commission. The ICAC nevertheless remains. The limited jurisdiction of the Commonwealth body will leave the Commonwealth framework in much the same shape as the current Victorian framework, which was the one that the Government was specifically criticising when trying to take this initiative in June 2004.

In NSW, Queensland and WA part of the rationale for a standing royal commission of this type is to remove the need for governments to establish one-off, expensive, sometimes messy and unnecessarily politically damaging inquiries. On this model however, should allegations arise again of building industry corruption, unlawful detention or deportation of Australian citizens, or an AWB scandal, the Government would still need to establish a one-off inquiry despite the existence of the new body.

Figure 1. Some Core Public Integrity Institutions in Australia (based on Brown & Head 2004, 2005)

<table>
<tr><th></th><th>Auditor-General</th><th>Ombuds-man</th><th>Police Complaints Authority</th><th>Police Integrity Comⁿ</th><th>Anti-Corruption Comⁿ</th><th>Crime Comⁿ</th></tr>
<tr><td>NSW</td><td>1</td><td>2</td><td colspan="2">3</td><td>4 (ICAC)</td><td>5</td></tr>
<tr><td>Queensland</td><td>1</td><td>2</td><td colspan="4">3 (CMC)</td></tr>
<tr><td>WA</td><td>1</td><td>2</td><td colspan="4">3 (CCC)</td></tr>
<tr><td>South Australia</td><td>1</td><td>2</td><td>3</td><td></td><td></td><td></td></tr>
<tr><td>Commonwealth</td><td>1</td><td>2</td><td></td><td></td><td></td><td>3</td></tr>
<tr><td>Victoria</td><td>1</td><td colspan="3">2 (inc. Office of Police Integrity)</td><td></td><td></td></tr>
<tr><td>Tasmania</td><td>1</td><td>2</td><td></td><td></td><td></td><td></td></tr>
</table>

NB This table does not include Health Care Complaints Commissions and a range of other specialist independent integrity bodies, other than those dedicated to police.

2. Unless broadened, the restricted jurisdiction of the proposed Integrity Commission will represent a missed opportunity to properly strengthen the public integrity regimes of the Commonwealth Government in a manner which comparative research indicates is now overdue

See especially Attachments B and C.

The Commonwealth no longer leads Australian governments in the resources it places behind independent core integrity agencies with general jurisdictions. The clearest gap is in anti-corruption prevention and investigation mechanisms. However the current legislative proposal will not address this gap other than in relation to police (arguably already comparatively overscrutinised).

An anti-corruption agency with limited jurisdiction is also likely to become either (a) a repository of high level specialist anti-corruption resources that are nevertheless being wasted, given they cannot be readily devoted to anything other than law enforcement; or (b) a small, languishing body without the ability to achieve 'critical mass' in capacities and skills, forced to work in a reactive rather than proactive fashion (see also submission 5).

3. The ability of the government to bring any Commonwealth agency with 'law enforcement functions' within the jurisdiction of the Commission by regulation (cll. 5 & 224) is not an acceptable alternative to creating a general jurisdiction, because it is operationally illogical and compromises the independence of the Commission by making all such decisions 'political' decisions

Part of the function of an independent statutory authority to handle anti-corruption strategies, is to remove key discretions to investigate and report on corruption matters from the day-to-day business of the Legislature and Executive. The more that the Executive retains formal control over what or whom the body may or may not investigate:

- the more it defeats its own purpose of trying extracting itself from party-political criticism over the way it institutes inquiries into corruption and other serious/complex breaches of duty (vis-à-vis Palmer Inquiry, Cole Commission);
- the more it leaves the Commission open to criticism as a 'lame duck' dependent on the Government's 'okay' before it can investigate matters.

It is certainly logical that if the AFP and ACC are deemed to possess the powers and corruption risks that require additional scrutiny, other Commonwealth law enforcement functions not be excluded (e.g. Customs, ASIC, ATO) (as emphasised in Attachments A and C). However in addition to the above issues, it is highly likely that the distinction between the 'law enforcement' functions of such bodies, and non-law enforcement functions, will become operationally problematic; and that some agencies will naturally use the 'law enforcement' distinction to seek to avoid scrutiny even when the Government feels it desirable to initiate an inquiry into them – necessitating either legislative amendment or establishment of a separate inquiry.

Examples:

- Australian Taxation Office – taxpayer audits? advisory/binding rulings?
- Department of Immigration – compliance & detention? visa discretions?

4. Unless broadened, the restricted jurisdiction of the proposed Integrity Commission will force governments to continue down the inadequate roads of (a) relying on the Australian Federal Police, (b) relying on the Commonwealth Ombudsman or (c) commissioning major costly royal commissions such as the Cole Inquiry on AWB, each time that major or complex corruption issues arise other than involving law enforcement agencies

See especially Attachments A and C.

A key part of the rationale for limiting the agency's jurisdiction to law enforcement, is the presumption that corruption in all other agencies can safely continue to be dealt with by the AFP. However this presumption is itself flawed:

- This presumption only works in relation to criminal offences. However the definition of corruption provided for in the Bill is, sensibly, much wider than criminal offences ('conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency': cl. 6(1)(a)). Corruption of this kind, including serious or systemic corruption, which nevertheless does not point clearly to an existing criminal offence, does not fall within the responsibilities of the AFP (examples include conflict of interest, favouritism, improper use of position etc).

- The Commonwealth Ombudsman has dabbled in major corruption investigations, but with mixed success, especially given the constant pressures on its resources from other more consumer-based complaint handling roles. The present Ombudsman takes the logical view that the office is not equipped to undertake such investigations.

- Mechanisms for the investigation of non-criminal misconduct exist under the *Public Service Act 1999* (breaches of the APS Code of Conduct) but are purely internal, and only apply to APS agencies. This leaves out about half of the Commonwealth public sector and providing no real mechanism for information to be supplied to, or investigations to be carried out by, an independent external body, given the current roles and resources of the Australian Public Service Commission in relation to misconduct matters.

- The existing reliance on the AFP may <u>appear</u> to some to have worked, but the most obvious explanation for this is that in recent years, Commonwealth fraud control guidelines have defined 'corruption' as a subset of 'fraud' despite this being illogical (it should be the other way round: see Attachment C). Certainly mechanisms for detecting and investigating fraud against the Commonwealth are strong; and therefore by definition, it is currently widely assumed that mechanisms for detecting and investigating other forms of corruption are also strong, when in fact it is by no means clear that this is the case.

Recommendations:

I. That the Bill be amended so as to give the new agency a general jurisdiction in relation to Commonwealth Government corruption issues, as per Recommendation 1 of the National Integrity System Assessment (Attachment C).

II. That the title of the Bill be amended to "Commonwealth Government Integrity Commission Bill".

III. That the qualifying words "law enforcement" be deleted from the Bill wherever they currently appear, with associated amendments and redrafting.

IV. That if it is deemed necessary to ensure that the Commission is not sidetracked into other matters to the extent that it neglects anti-corruption efforts in the AFP and ACC, that this be specifically provided for in a manner similar to cl. 16 of the existing Bill ('Integrity Commissioner to give priority to serious corruption and systemic corruption').

V. That if it is deemed necessary to help prevent the Commission from being tied up with responding to non-serious or misplaced complaints regarding a wider range of agencies (which will happen anyway of course), that cll. 23, 25, 26, 52, 58, 68 and like provisions be reviewed in order to give the Commission greater discretion in its ability to deal with, including filtering, public complaints. This needs to happen anyway - see also further submission 6 and recommendation VII below.

Submissions relating to the functions of the Commission

5. The Bill currently provides insufficient legislative support to the 'proactive' detection and prevention functions of the Commission.

See especially Attachment A.

As at January 2005, the Government proposed to introduce legislation titling the agency the 'Inspector-General of Law Enforcement', indicating a reactive complaints-based model of scrutiny. Although the title has now changed to something more comprehensive and proactive, the Bill continues to provide specifically only for investigation of matters brought to the Commission's attention by agency heads or other persons. There is little to indicate how the objects in cl. 3(1)(a)(i), (c) and (d) will be achieved:

(a)(i) – 'to facilitate… the detection of corrupt conduct…'
(c) – 'to prevent corrupt conduct…'
(d) – 'to maintain and improve the integrity of staff members…'.

This is particularly the case given that these objects have no parallel in cl. 15 setting out the functions of the Commission – other than through the relatively passive function cl. 15(e) 'to collect, correlate, analyse and disseminate information and intelligence on relation to corruption' relating to law enforcement agencies, the mandatory reporting obligations of agency heads regarding corruption issues (which is admittedly a strong feature of the Bill), and the general deterrent and demonstration effects of corruption investigations.

In fact the language of 'corruption prevention' is also no longer regarded as 'state of the art' in NSW and Queensland, because it is difficult or impossible to measure how much corruption has been prevented. The preferred objective is now the development or enhancement of 'corruption resistance', because this can be measured empirically in a variety of ways (see published work by Angela Gorta).

How should modern legislation attempt to institutionalise corruption detection and resistance-building? Examples include:

- Amendment of cl. 15 to be more consistent with cl. 3.
- Specific provision in the Bill that the Commission's establishment must include particular divisions or units dedicated to its different functions, e.g. through establishment of an Assistant Commissioner (Investigations) and an Assistant Commissioner (Intelligence, Research and Corruption Resistance).

  This is one of very few ways in which legislative support can help ensure that resources are devoted to these objects, in the face of inevitable pressure to devote most/all resources to expensive investigation and complaint-handling.
- Conveying specific statutory functions on the Commission to:

  -- independently assess levels of corruption resistance in the agencies within its jurisdiction, e.g. through annual surveys and reports (akin to the statutory responsibility of the APSC to complete State of the Service Reports);

  -- ensure that staff and clients of relevant agencies are aware of the Commission's existence and their responsibilities to report corrupt conduct;

  -- formulate and deliver training and education programs to agency staff on integrity and corruption issues;

  -- undertake, coordinate and/or supervise integrity testing programs relating to agency staff; and so on.
- Placing specific statutory obligations on the heads of agencies to:

  -- to cooperate with the Commission's awareness raising and education strategies;

  -- supply the Commission with whatever information it reasonably requests regarding the operations of the agency including personal information regarding any/all staff, as part of its intelligence functions, in the absence of specific corruption issues.
- Placing statutory obligations on the Commission to liaise with other integrity agencies (particularly Ombudsman, APSC, ANAO) in formulating research, education and resistance-building strategies in relation to agencies (see also heads of agencies to:

6. The Bill currently appears to provide the Commission with little ability to control its own investigative caseload through appropriate discretions as to what should or should not be investigated or referred.

Currently the Bill reads as if the Commission has no such discretion, see e.g. cl. 26 which provides that the Commissioner "may" deal with corruption issues by investigating or referring them, but is silent on whether it may deal with them by determining that they do <u>not</u> need to be investigated or referred.

This does not represent legislative best practice when it comes to investigative agencies. Given the broad definition of corruption in cl. 5, the lack of clear discretion appears to mean the Commission would/could currently be forced to formally investigate or refer every allegation of misconduct brought to its attention, from whatever source, irrespective of its significance. This is in contrast to the responsibilities on agencies which differ depending on whether or not it is a 'significant' corruption issue.

Relevant sections of the Ombudsman Act 1976 provide examples of suitable discretions; as does cl. 22(2)(b) of the Bill (agency heads need not investigate insignificant corruption issues if satisfied that the matter is frivolous or vexatious).

7. The Bill currently includes inappropriate and potentially counterproductive provisions in relation to the encouragement of professional reporting or 'whistleblowing'.

Cl. 22(2)(c) (agency heads need not investigate insignificant corruption issues if satisfied that the allegations was not made "in good faith") is a meaningless provision. What is meant by "in good faith"? The use of such terms in equivalent State legislation and reporting procedures has proved highly problematic.

This term can only function to confuse agencies and informants as to reporting requirements, and act as a disincentive to report corruption by internal witnesses (whistleblowers) who have, or may appear to have, mixed motives for making the report. Many whistleblowers fall into this category, providing true and significant information about the misconduct of others even though they may be doing so out of motives of revenge, self-enhancement or a desire to embarrass or damage the organisation.

This provision is also unnecessary, given that cl. 22(2)(b) already deals with frivolous or vexatious information. What is missing is a sanction against persons making false or misleading allegations, or providing false information. This is all that is reasonably needed to dissuade would-be dishonest informants, including internal witnesses or whistleblowers, from abusing the process by making false corruption allegations; but this does not appear to be included anywhere in the Bill.

8. The Bill limits the Commission's independence by confining it to narrow reporting procedures via the Government and Parliament.

Cll. 54-59, 73-74, 169-173 and 201-206 govern the ability of the Commission to make reports. In all cases the only procedure for publication of any reports is via provision to the Minister, President of the Senate or Speaker of the House of Representatives, explicitly or presumably for presentation to Parliament; and then presumably for incorporation in Hansard and general publication. Often the provisions regarding publication are vague. Even where the Minister is under a specific obligation to table reports within 15 sitting days, in a period of parliamentary recess this may mean that a report will only become publicly available long after the point of greatest public interest.

Given that public reporting is the only way that the Commission can ultimately have any effect on anyone, an additional power of reporting is needed by which the Commission may publish its views on any matter at any time, where it considers it to be in the public interest to do so, provided it satisfies normal requirements of natural justice and not releasing sensitive or dangerous information. This power would also enable the release of interim reports or other statements that facilitate the work of the Commission, without any concern as to whether the Commission has power to do so. Section 35A of the *Ombudsman Act 1976* provides an example of a suitable, proven provision.

Recommendations:

VI. That the Bill be amended, following further consideration of the functions and intentions behind the creation of the agency, so as to properly refect what is intended in relation to proactive corruption detection and resistance-building functions.

VII. That cll. 23 and 26 of the Bill be amended to provide the Commission with clear discretion <u>not</u> to investigate or refer a corruption issue where appropriate, e.g. based on the issues's significance, the public interest, or the Commission's resources.

VIII. That cl. 22(2)(c) (agency heads need not investigate insignificant corruption issues if satisfied that the allegations was not made "in good faith") be deleted.

IX. That Part 15 of the Bill be amended to include a provision making it an offence to intentionally/knowingly make a false or misleading allegation of corruption, or intentionally/knowingly provide false information to the Commission (or for the purposes of being conveyed to the Commission) in relation to corruption matters.

X. That Part 13, Division 4 of the Bill be amended through addition of a provision similar to s.35A Ombudsman Act 1976, providing a general power of direct public reporting and release of information where deemed by the Commission to be in the public interest (subject to normal procedural constraints to ensure natural justice and protection of sensitive information).

Submissions relating to the place of the Commission within the national integrity system

9. The Bill should provide a formal guarantee that the new Integrity Commission will cooperate administratively with the existing elements of the Commonwealth government integrity system, rather than leaving this up to individual personalities and/or chance.

See especially Attachment C.

Whatever form it takes, the Bill involves the single most significant development in the Commonwealth's integrity systems for over 20 years. As in some States, the addition of another 'core' integrity body to the existing framework creates a need for active consideration of how the legislative, policy, jurisdictional and operational requirements of all integrity agencies will be coordinated in the interests of a coherent system.

At present the Administrative Review Council is the nearest thing to a standing mechanism for such coordination. Alternatively the Bill could provide for establishment of a new committee comprising the heads of key integrity agencies (including Ombudsman, ANAO, APSC) to ensure effective coordination and cooperation.

10. Why is the Bill (Part 14) creating yet another parliamentary committee to oversight this agency, when its functions will be almost identical to at least one existing parliamentary committee, and other key integrity agencies – notably the Ombudsman – do not have the benefit of <u>any</u> such committee?

See especially Attachment C.

Given the similarity between the roles of this committee and the existing Joint Parliamentary Committee on the Australian Crime Commission, it would seem logical if, at least, these roles were given to a single committee with a title such as 'Joint Parliamentary Committee on Law Enforcement Integrity'. Better still, however, would be the creation of a 'Joint Parliamentary Committee on Accountability and Integrity in Commonwealth Administration', dovetailing with the work of the JCPAA to oversight and support not just the ACC and the new Commission but other key integrity agencies, especially the Ombudsman.

Recommendations:

IX. That the Bill be amended to either include the Integrity Commissioner as a member of the Administrative Review Council and/or as a member of a newly created standing committee of the heads of Commonwealth integrity agencies.

X. That Part 14 of the Bill be reconsidered with a view to amendment to ensure that the proposed parliamentary oversight of the new Commission occurs in a more coherent, consistent, efficient and rational way, vis-à-vis oversight of related Commonwealth bodies.