Commonwealth
OMBUDSMAN

Submission by the Commonwealth Ombudsman

CONSULTATION ON VICTORIA'S ANTI-CORRUPTION COMMISSION

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INTRODUCTION AND SUMMARY

Thank you for the opportunity to make a submission on the Victorian Government's proposed anti-corruption commission. I have taken the opportunity to make some general observations in relation to anti-corruption agencies and to provide a more detailed response, at the attachment, to some of the more specific questions.

BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Commonwealth Ombudsman's complaint handling, investigation and audit functions make an important contribution in identifying potential areas that could foster misconduct or corruption.

- The Ombudsman's complaints handling and investigation provides a window into maladministration and possible corruption issues across government.
- The Ombudsman can, by his own motion, investigate and expose systemic administration issues that can undermine the integrity and probity in government.
- The Ombudsman strengthens agencies' administrative systems by, for example, meeting regularly with agencies to discuss complaint issues and trends, and to participate in integrity training programs of these agencies. The office also publishes education material such as Better Practice Guides and fact sheets.

The Commonwealth Ombudsman is also the Law Enforcement Ombudsman and is responsible for looking into police officer conduct and other law enforcement matters that do not amount to corruption.

A further role envisaged for the Ombudsman is that of public interest disclosure oversight.[1] The Australian Government has committed to developing legislation to facilitate public interest disclosures in the Australian public sector being made by public officials. It also committed to establishing the Commonwealth Ombudsman as the integrity agency for oversighting all public interest disclosures, other than those

[1] See the report from the inquiry and the Government Response at: http://www.aph.gov.au/house/committee/laca/reports.htm.

relating to Commonwealth intelligence and security agencies. Public interest disclosures may include matters of corruption, misconduct and maladministration. If the Commonwealth Ombudsman was to oversight this area, disclosures will provide another valuable insight into public administration.

GENERAL COMMENTS AND OBSERVATIONS

While I acknowledge the importance of the questions posed, there are some more fundamental questions that also need to be answered, notwithstanding the commitments already made by the Victorian Government. These include the objectives of the Corruption Commission and the model upon which it will be based.

While the NSW Independent Commission Against Corruption provides an example of an effective anti-corruption commission, there is no single best model or a universal type of anti-corruption agency.[2] It is important that the model is chosen to work within the local context, taking into consideration:

- Estimated level of corruption – for example, a low level of corruption would not necessarily mandate a response in the form of a strong multi-purpose agency with extensive powers.

- Integrity, competence and capacities of existing institutions – the anti-corruption institution should perform or strengthen those functions that are missing or particularly weak in the existing overall institutional framework.

- Constitutional framework – there are issues around the separation of powers that must be considered.

- Existing legal framework and the system of criminal justice – criminal justice systems differ significantly in competencies and responsibilities among different actors – police, prosecution, investigative magistrates.

- Available financial resources – reforming or creating new institutions can be a costly task. It is important to assess beforehand whether the budget and other sources can provide sufficient and sustainable funding for such an institution, especially in cases when a decision is taken to establish a strong central multi-purpose agency.

In the Australian Government, and this would generally apply to each state, there exists a relatively strong integrity framework within which maladministration, misconduct and fraud are managed, to a certain extent, and the precursors to corruption are minimised. Often it is a lack of coordination and focus on corruption that is missing and an anti-corruption commission can play an important role in bringing the integrity agencies together as a framework to fight corruption. Similarly, there is a strong legal framework, again, perhaps lacking in coordination on the corruption front, and research, policy development and coordination will be an important function.

While the NSW ICAC is active in corruption prevention, investigation and education, often it is the investigative aspect of an anti-corruption agency's activities is seen and perceived to be the primary function. My concern, and it applies at the national level

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[2] Brown A J, *Towards a Federal Integrity Commission: The Challenge of Institutional Capacity-Building in Australia*, p.13

in addition to the Victorian, is that there is a real danger in assuming that an anti-corruption agency should be based on a law enforcement model and given a narrow mandate to investigate corruption with a view to prosecution. Even a body with a broader mandate, but with a focus and culture that prioritises investigation in order to prosecute individuals will largely fail in the primary goal of corruption prevention.

There is a place for anti-corruption agencies based on a law enforcement model, and they can be an effective means of addressing corruption where corruption is rife and a strong response is required. The prominence of high profile prosecutions can help to mobilise reform. However, they tend to be reactive, and act to prevent corruption only through deterrence.

I would therefore like to make a request, and that is for the Consultation Panel to consider the answers to each submission in the context of corruption prevention. 'Prevention' is about engaging proactively to stop corruption from occurring in the first place. Corruption prevention is about understanding systemic weaknesses in Government administration that give rise to opportunities for corruption. It is about working with and as part of the Government to address those weaknesses. It is about building, over time, safeguards, controls and a culture that resists corruption.

Although he was not speaking specifically about anti-corruption agencies, Charles Sampford, in his recent paper on integrity systems, captures the problem of such agencies being built around a law enforcement model:[3]

> *Firstly, prosecutions take a long time and are frequently inconclusive. Even if successful they will not bring back the destroyed shareholder wealth, the stolen money, the uncollected revenue or even a significant proportion of it. Even for the few who are brought to justice, most of the wealth that has been destroyed or stolen will be irrecoverable. This is not just because it cannot be traced but often because it no longer exists.*
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> *Secondly, as we all know, laws whose purposes are not internalised are rarely effective. This is why many emphasise the importance of ethics. Thirdly, they do not address the key institutional questions of why the 'bad apples' got to such positions of power and were tempted to abuse that power for their own ends. If there are a lot more crooked politicians or CEOs, it is not because there are more bad people in a particular country. It is because its corporate, bureaucratic and/or political institutions generate a lot of temptations and opportunities for corruption and tend to promote those who will give in to those temptations.*
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> *The point is that many of the problems are essentially institutional rather than individual and you cannot fix institutional problems by punishing individuals.*

My position in this consultation is built around the need to look at institutional issues and address institutional problems as the primary responsibility of an anti-corruption agency.

Strong coercive powers are required, though they do not always need to be used, to garner cooperation. This allows administrative investigations to be conducted that get to the bottom of a matter and for the investigator to understand the institutional problems and address those problems at an institutional level. At the same time, I

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[3] Charles Sampford, *Parliament, Political Ethics and National Integrity Systems,* p.2

have advocated for these powers to go hand in hand with strong protections and privileges for those who appear before the Commission. Coercive powers should be used to inquire in an administrative forum, not as another means to secure evidence for prosecution.

In a similar vein, I have expressed my view that strong powers warrant strong oversight. But that oversight needs to be more than just oversight by an inspector and parliamentary committee. A corruption commission is part of the integrity system and therefore needs to be part of a framework of mutual accountability. Agencies should not shy away from oversight; it is more often a shield to adverse comment than a basis for such comment. Where there is insufficient oversight, an agency that may have done nothing wrong will lack the means to refute allegations and protect its own reputation.

I have not made any detailed submission in relation to the definition of the Public Sector. My understanding of the Victorian situation is far more limited than others. However, as a general principle, I would suggest as broad a jurisdiction as is reasonably practical. Corruption is most often found at the points of interaction between government officials and the private sector, and sufficient jurisdiction and powers need to be granted to properly explore both sides of that interaction. Corruption makes use of gaps in rules and jurisdictions and this can best be addressed by avoiding the temptation to closely define boundaries.

Again, thank you for the opportunity to make a submission and I would be happy to discuss the issues I have raised in more detail.

RESPONSE TO SPECIFIC QUESTIONS

Coercive powers of the Commission

Public hearings

Coercive powers are not given for the primary purpose of public education or the bolstering of public confidence in an organisation, although these may be consequential benefits of a public hearing. The public interest is served by a public hearing if the hearing elicits important evidence from those who are unknown to the investigator, but who are likely to come forward if they are aware that such an inquiry is taking place and that their evidence is required for a just outcome. That of course needs to be weighed against the risk of unduly prejudicing a person's reputation and the impact upon privacy.

The danger of a public hearing is that it encourages those who may be subject to adverse findings, even if minor and not warranting sanction, to pursue the point in the interests of protecting their own reputation. This can cause an inquiry to take far longer than necessary and in the process the issues can become confused and the main line of inquiry side-tracked. The default position should be for inquiries to be conducted in private and for public hearings to be held, taking into account the public interest, where it is necessary for the purposes of gathering sufficient evidence.

Protections and privileges available to persons who are asked to provide evidence to the Commission

Coercive information gathering powers are an important administrative and regulatory device. However, they need to be applied in such a way as to balance the objectives of using the powers with the rights of those who are subject to those powers. While I support the grant of strong powers, with such powers must come accountability and procedural safeguards against misuse. That said, procedural safeguards can go too far, and it is important to ensure that they do not invite witnesses, without fear of repercussion, to unreasonably delay proceeding.

Use of evidence obtained via coercive powers

It is important to make a distinction between coercive and covert information gathering powers. Coercive information gathering powers are given with certain protections, and while the privilege against self-incrimination is usually abrogated, that information cannot be used against the person in a court of law. Coercive powers are, as such, an administrative tool. They help to establish facts upon which intelligence can be built and administrative action taken.

No such protection applies to the use of covert powers, and the information provides direct and often critical evidence in a criminal proceeding. Although covert powers may provide intelligence, the grant of the power is usually based on the existence of criminal activities. These powers are designed to gather evidence for the purposes of prosecution.

It is where coercive powers are used for the purposes of bringing evidence before a court and covert powers are used in an administrative context that problems arise. In my view, the boundaries are too often tested by those who may exercise the powers and clear limitations and strong protections need to be afforded those who are subject to these powers.

It is with concern that I note a tendency by some agencies to use coercive powers specifically to obtain self-incriminating evidence for derivative use or for introduction into court as prior inconsistent statements. The effect is to circumvent the rule in *Hammond v Commonwealth* (1982) 152 CLR 188 and the privilege against self-incrimination. In my view, the use of coercive powers for the primary, or even a substantial, purpose of securing evidence in a criminal proceeding is a misuse of those powers.

That said, I am generally not against the derivative use of information. If, as part of an effort to understand how corruption occurred (so that it may be prevented) a witness gives evidence that allows a line of investigation to be taken that may lead to the charging of that person for a criminal offence, that information should not be ignored. My concern lays more with the objectives of the investigation.

How does one ensure that the objectives of an investigation are appropriate and coercive powers are not misused? There is no easy answer. However, some things to consider are:

- Limiting the power to cause an investigation to the Commissioner or the most senior officers in the Commission
- Requiring specific and detailed terms of reference for each investigation
- Requiring reasons to be recorded for the issue of each notice (although consideration should be given to restricting review of those reasons lest this be used by a witness as an opportunity to delay appearing before the Commission)
- Limiting the ability to delegate coercive powers to those agency officers who have received the necessary training (and perhaps achieved accreditation) and have the requisite experience and seniority
- Establishing in house audit and review mechanisms
- Putting in place oversight with the jurisdiction and responsibility to ensure that coercive powers are used appropriately

Fairness

I have found the principles set out by the Administrative Review Council[4] (ARC) very helpful in determining whether coercive powers have been exercised fairly and that sufficient arrangements and safeguards exist.

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[4] ARC, The Coercive Information-Gathering Powers of Government Agencies, Report No.4 May 2008

As a starting point and before using coercive information-gathering powers, agency officers should consider alternative means of obtaining the information sought and weigh up whether the importance of information sought through using coercive information-gathering powers is justified, having regard to the cost of compliance for the witness.

All coercive information-gathering notices should:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- set out the general nature of the matter in relation to which information is sought
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege
- specify how the information or how the document should be produced and to whom
- advise whether a lawyer or third party may also attend
- advise on the time frame for compliance

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To promote transparency and community confidence in the use of coercive information-gathering powers, information about the use of the powers should be regularly published. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or expose important investigatory methods.

Functions and powers of oversight bodies for the Commission

Strong powers warrant strong oversight. A joint Parliamentary Committee and an Inspector are appropriate measures. Their powers to access records and information relating to the decisions and activities of the Commission should not be limited. However, while the Commissioner needs to be accountable, he or she needs to be able to act independently and oversight should be just that – oversight. A Parliamentary Committee or Inspector should not have any power to reconsider decisions made by the Commissioner.

I believe it is entirely appropriate that a Parliamentary Committee examine expenditure. Firstly, this is expenditure of public monies and the Commissioner is accountable for that expenditure to the public. Secondly, the Commission needs to ensure that sufficient resources are allocated to education and prevention. I have spoken about the need for the Commission to focus on corruption prevention and not lose its way in the pursuit of individual prosecutions. A safeguard against this is the

open discussion before a Parliamentary Committee on how funds are allocated for the purposes of achieving outcomes.

While I support the creation of an Inspector role, I do have concern that this will, as it has in other states, result in yet another statutory oversight body. Is there a reason that an existing organisation, such as the Victorian Ombudsman, cannot perform this role? The Ombudsman already has complaint and public interest disclosure mechanisms in place and a track record of getting to the bottom of problems.

I understand the immediate concern that many would voice, namely that such an arrangement would place the Ombudsman in a superior position to that of the Commissioner and that there is no wish to subordinate one organisation to another. Further, that through this arrangement, the Ombudsman would be able to influence the Commission. That concern is not well founded.

A Government's 'integrity system' is its institutions, laws, procedures and practices that support openness and accountability. The integrity system ensures that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, institutions and individual office-holders.[5] A corruption commission is part of the integrity system. One of the key strengths of such a system is the framework of mutual accountability that it provides. It is where one agency is placed beyond this framework that problems arise.

Further, oversight is more often a shield to adverse comment than a basis for such comment. Where there is insufficient oversight, or oversight by a body that is not recognised by the public as independent, an agency that may have done nothing wrong will lack the means to refute allegations and protect its own reputation. Oversight of course provides an excellent learning and feedback mechanism. I find it greatly perplexing that many agencies shy away from oversight – it should be welcomed.

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[5] *Chaos or Coherence? National Integrity Systems Assessment*, Griffith University, December 2005. Pg 1.