

INTEGRITY ... BUT NOT BY TRUST ALONE

alrc recommends new watchdog for federal crime fighters

The 1990s have been a turbulent decade for Australian police. Scandals in a number of jurisdictions and at all levels have fed public cynicism about police integrity. The revelations of inquiries like the Wood and Fitzgerald Royal Commissions have left observers wondering about the apparent breadth of problems with police misconduct and police cultures.

Australia's commonwealth law enforcement agencies, the Australian Federal Police (AFP) and the National Crime Authority (NCA) have not escaped concerns about corruption, a fact which is of particular concern given the powers possessed by these agencies and their key role in combating organised crime and the international drug trade.

The Australian Law Reform Commission (ALRC) has recently completed a review of the complaints and disciplinary systems of the AFP and NCA. The report, entitled *Integrity ... but not by trust alone* (ALRC 82) argues that reform of this area is vital in ensuring that these law enforcement agencies perform according to high standards of integrity and accountability. **Michael Barnett**, team leader on the review, provides an overview of the report and explains why the ALRC has recommended the establishment of an external complaints and anti-corruption body.

■ The review

In 1995, the then federal Attorney-General, the Hon Michael Lavarch MP, asked the ALRC to review the complaints and disciplinary systems of the AFP and the NCA to consider whether they meet the expectations of the public in terms of police accountability, effectiveness and efficiency.

This review arose out of long-standing concerns that the NCA had no mechanisms for external review of complaints and that the complaints and disciplinary systems of the AFP were outdated and ineffective.

Responsibility for scrutiny of the AFP is divided between two internal agencies, the Internal

Investigation Division (IID) and Internal Security and Audit (ISA). Limited external supervision is provided by the Commonwealth Ombudsman. The major problem is that there is no one entity who accepts, or who can be identified as having, responsibility for the integrity of the system. The ALRC also found problems with the standard of investigations into complaints against police officers, lack of accessibility of the complaints system, confusion and inefficiencies in the coordination of resources and data, and undue delay in resolving complaints.

The NCA was established in 1984 to counteract organised crime, often by working in partnership with other agencies.

It has never had a formal complaints system. Instead all complaints are dealt with by the Chairperson on an ad hoc basis. The ALRC considers that this arrangement is deficient in that it lacks any formal process or any consistent external scrutiny and does little to create public confidence in the accountability or integrity of the NCA. Consideration of the NCA complaints and disciplinary process is complicated by the diversity of its workforce which includes public servants, legal counsel and police officers seconded from other law enforcement agencies. The current system is particularly inadequate for the majority of citizens who do not have the resources and time to mount expensive court challenges to the exercise of NCA powers.

In November 1995, the ALRC published and distributed an Issues Paper entitled *Under the Spotlight: Complaints against the AFP and NCA* (IP16). This generated significant media interest, which has been maintained throughout the course of this review.

During February and March 1996 the ALRC held public meetings in all Australian capital cities, Norfolk Island and Jervis Bay. The ALRC consulted closely with AFP and NCA personnel Australia-wide, State and Territory Police Services and complaints bodies, academics, legal practitioners, community legal centres and a wide range of organisations representing different groups in the community. The ALRC also investigated the complaints systems of a number of overseas countries including England, the United States of America, New Zealand, Canada and the Scandinavian countries.

A Draft Recommendations Paper (DRP 2) was published in July 1996 and formed the basis for further consultation. In all, the ALRC received about 140 submissions in the course of this inquiry.

Complaints and disciplinary systems in context

Complaints and disciplinary systems exist to receive, investigate and resolve allegations made against police officers — ranging from complaints of incivility to accusations of corruption or serious misconduct. These systems give support to the overall objectives of law enforcement agencies, namely that there is effective and efficient law enforcement and that law enforcement powers are exercised according to law.

Recently greater attention has been given to complaints as a source of information for law enforcement agencies: not only about the conduct of individual officers, but also about problems with agency practice and procedure. The causes of misconduct are often to be found in these organisational shortcomings. Rather than being viewed in a negative and defensive fashion, complaints should be seen as indicators of systemic difficulties, providing essential information about the health of an organisation as well as its problem areas.

One of the great failings of police management to date has been the tendency to 'segmentalise' issues and areas; to take narrow compartmentalised perspectives on problems and draw rigid and artificial distinctions between them. The coordination of all information about complaints and corruption in an agency is necessary to build up a full picture of the level and nature of misconduct in that agency and to identify trends and problem areas. Even minor complaints may provide indirect, but highly relevant information about serious corruption.

Internal and/or external oversight?

One major task in this review has been to determine the best mix between internal and external responsibilities in both the NCA and AFP complaints and disciplinary systems.

Internal responsibility refers to the extent and manner in which AFP and NCA should investigate complaints and make disciplinary decisions. It is concerned with the appropriate level of managerial responsibility — to what degree

each agency is responsible for putting its own house in order. Special responsibilities in this regard must always rest with the Commissioner of the AFP and the Chairperson of the NCA.

A fully internal investigation model would mean that the particular law enforcement agency would have sole responsibility for investigating complaints against it or its staff. This concept of police investigating themselves is an outdated one in Australia and fails to meet vital objectives such as ensuring public confidence.

The main aim of external responsibility is to ensure that complaints, investigations and disciplinary matters are conducted fairly, impartially and with appropriate levels of transparency. The system must be credible to complainants and to officers who are the subject of a complaint. It must also be credible to the agencies themselves and to the general public.

A fully external investigation model would see an outside agency conducting all functions of the complaints system, with the role of the AFP or NCA essentially limited to passing on information. While superficially attractive, such a model raises serious concerns about the law enforcement agencies absolving themselves of responsibility, which could also stifle internal reforms. There are also problems of finding sufficiently experienced staff, extra costs, duplications and delays and the possibility of the unit becoming an alternative police force with its own undesirable culture of defensiveness and insularity.

A third model sees internal police investigators working under the oversight of an external agency. It relies on the

internal investigation unit dealing with the bulk of cases and the external overseer investigating only in exceptional cases. This model broadly describes the current AFP system and those of the Australian States and Northern Territory. It is also used widely overseas.

The ALRC considers that while this model may have been innovative in the 1970s it is now ill-equipped to cope with the increasing demands for greater accountability of the police. Many of external agencies investigate such a small number of cases that it is inadequate for the effective and credible working of the system. Many external agencies do not fund their own operations so that their 'monitoring' of internal investigations tends to be patchy and confined to a review of the papers.

As discussed below, the ALRC favours a fourth option, the introduction of a single external agency to deal with serious complaints and corruption, with the capacity and responsibility to manage or oversight the complete AFP and NCA complaints process.

Balancing different demands

The actions of law enforcement agencies have great potential to affect the rights and liberties of citizens. In maintaining social order, these agencies are regularly faced with complex and sometimes competing demands to protect and promote certain rights. Depending on their actions, rights and liberties may be violated as well as protected and enforced. The review's terms of reference refer to the need to achieve a proper balance between the protection of the community by practical and effective law enforcement and the protection of human rights and civil liberties in compliance with Australia's international obligations.

It is also necessary to balance integrity and accountability with operational demands. A common police view is that complaints and disciplinary systems interfere with, and divert resources from 'real' police work.

The ALRC recognises that the AFP and NCA face challenges in meeting their law enforcement objectives in the context of limited budgets and contracting staff levels and that any time or money directed towards complaints and discipline must be well spent. The ALRC considers that achieving and maintaining high levels of integrity and accountability should be regarded as core goals. They are not supplementary to operational considerations, that should only be brought into effect when something major goes wrong. The AFP and the NCA should be continually considering integrity and accountability issues and their ramifications in every facet of their work.

It is also recognised that the AFP and NCA have genuine and understandable concerns about complaints or corruption investigations interfering with their operations and their own managerial responsibility. The ALRC's recommendations deal with those concerns by providing for the establishment of lines of communication, protocols and a mechanism to resolve disputes between those investigating allegations of misconduct and operational law enforcement officers.

■ Objectives of a complaints and disciplinary system

The ALRC has found general agreement that the major objectives of the AFP and NCA complaints systems are to

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- ensure public confidence in the agencies
- be credible to the agencies and their officers
- be accessible
- promote appropriate standards of conduct from officers
- provide feedback to management
- take into account other agency priorities
- be timely in process and outcome
- use resources efficiently

The ALRC has also determined that an effective complaints system must also deal specifically with corruption issues and provide adequate preventative and proactive measures with effective external scrutiny.

Ensuring public confidence in the AFP and the NCA is a key objective. A paramount principle of Australian law is that the system must be sufficiently transparent. The public must be able to see how complaints are dealt with and whether the outcomes are satisfactory. A failure to ensure public confidence may lead to public mistrust of the AFP and NCA. This may deter people from reporting crimes, from seeking the assistance of law enforcement agencies or assisting them, from giving evidence or appearing as witnesses. Furthermore this public mistrust can spill over and effect public perceptions of other aspects of government, sometimes leading to widespread rumour and distortion and providing sustenance to all-enveloping conspiracy theories.

Key recommendations

The ALRC has recommended increasing the level and effectiveness of external scrutiny

and instituting a single and comprehensive framework of accountability to replace the present fragmented system.

This would be achieved through a proposed new external complaints and anti-corruption authority, the National Integrity and Investigations Commission (NIIC). It would be located in Canberra and have a staff of about 30 with about 15 investigators divided into two sections: the Office of the Commissioner for Complaints and the Office for Anti-Corruption.

The NIIC would be an auditor of the AFP's and NCA's performance in relation to integrity and accountability with royal commission powers and full access to all relevant information. It would have a research and policy role that includes keeping under continuous review trends and issues relating to AFP and NCA integrity and accountability, including complaints and disciplinary data. The NIIC would also audit AFP and NCA anti-fraud and anti-corruption plans and measures, as well as assisting the AFP and NCA in the development of suitable training and education.

The NIIC's operations would be subject to, the *Privacy Act 1984* (Cth), *Freedom of Information Act 1982* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It would also be accountable under its specific legislation to the Attorney General with protocols established for monitoring the NIIC's performance and for handling any complaints against it.

The NIIC itself would conduct investigations into the most serious complaints and corruption matters. It would have the capacity for overall direction and

control of less serious matters but tailor its involvement to meet the particular circumstances of the case, including managing, supervising or reviewing investigations conducted by the AFP or NCA. It would also audit the handling of minor complaints by the AFP or NCA

The NIIC would determine categories for complaints according to seriousness and public interest which would act as guidelines for determining the level of NIIC and AFP or NCA involvement in the investigation and handling of particular complaints as follows:

- Category A (serious criminality corruption and significant public interest): To be investigated by the NIIC itself.
- Category B (misconduct): The NIIC to decide on the appropriate response:
 - investigating the matter itself
 - establishing a joint investigation with the AFP or NCA
 - require the AFP or NCA to conduct an internal investigation subject to the NIIC's supervision
 - refer the matter to the AFP Commissioner and NCA Chairperson for consideration and response.
- Category C (customer service): to be dealt with by informal resolution provide by the AFP or the NCA, The NIIC would be advised of all such complaints and have powers of review and audit.
- Category D (internal management matters): to be referred back to AFP or NCA management for appropriate action. The NIIC could review any decisions if required.

Miscarriages of justice

The NIIC should develop a procedure for dealing with cases where it forms the view that an AFP or NCA officer may have been guilty of obstructing the course of justice. The procedure should include efforts to determine the extent of the suspected corruption and those who may have been adversely affected by it. Persons affected should be notified, as well as any relevant authorities such as the Attorney-General and the DPP. Consideration should also be given to whether the Commonwealth *Crimes Act* should have provision for reviewing convictions, for example, similar to the NSW *Crimes Act* provisions for reviewing unsound convictions.

Prejudice to operations

The NIIC's legislation should provide that the AFP Commissioner or the NCA Chairperson may serve a certificate on the Chairperson of the NIIC if they are satisfied that a course of action contemplated or undertaken by the NIIC would seriously prejudice or is seriously prejudicing, an operation and that appropriate consultation with the NIIC has not resolved this concern.

Where such a certificate is issued the NIIC Chairperson should not undertake or continue the action in question unless satisfied that its necessity outweighs the concerns expressed. The service of these certificates would have to be reported immediately to the Attorney-General. The issues of certificates, and the NIIC's response would also be reported in the NIIC's annual report.

Alternative Dispute Resolution

The ALRC has recommended that NIIC, in consultation with the AFP, NCA and peak alternative dispute resolution (ADR) bodies should develop a series of principles and

guidelines to determine the use of ADR for complaints. Informal resolution should be encouraged and its use and effectiveness monitored and audited by the NIIC. Complainants should not be required to agree or be pressured into agreeing to any form of ADR. With the exception of minor matters, the consent of the officer who is the subject of complaint should also be required. Statements or answers made by subject officers in the course of ADR should not be admissible in any proceedings nor should they be available for employment related purposes.

Disciplinary systems

Disciplinary systems are intended to ensure that agency personnel comply with appropriate standards of conduct. There is a policy imperative that law enforcement agencies must only employ officers who meet the standards expected and demanded by these agencies.

While the AFP currently has its own disciplinary system, the ALRC considers that it retains many elements of the traditional paramilitary model with its quasi-criminal focus. This model is outdated and unsatisfactory.

At present, the NCA has no formal disciplinary process. Staff who are employed under the *Public Service Act 1922* (Cth) are subject to Australian Public Service disciplinary proceedings. However these proceedings do not apply to other categories of NCA staff, including seconded police. The ALRC considers that the NCA should have its own disciplinary code that should apply to all members and staff.

In the place of the traditional approach to discipline, the Commission is recommending a new managerial model that gives the AFP Commissioner and the

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NCA Chairperson primary responsibility for imposing discipline on their personnel.

Their decisions would be subject to review on the merits by the Administrative Appeals Tribunal (AAT) which would take the place of the Federal Police Disciplinary Tribunal which currently has jurisdiction in relation to AFP disciplinary matters. The one exception to AAT review would be decisions by the AFP Commissioner or the NCA Chairperson to terminate an officers's appointment for 'loss of confidence', a term which would be statutorily defined.

The ALRC has made a number of other recommendations in relation to disciplinary matters, including allowing AFP and NCA supervisors to take informal action for minor matters (eg by issuing cautionary notices) and ensuring that Complainants and officers the subject of disciplinary proceedings are given proper notification of, and reports on, complaints investigations and disciplinary proceedings.

Prevention of the causes of complaints and corruption

An effective and efficient complaints system may help to reduce the incidence of corruption and other serious offences or help to detect them. However it is highly unlikely that such a system by itself could achieve a dramatic reduction. For example, parties to corruption are unlikely to lodge complaints as they are involved in a 'transaction' whereby each gains some benefit. Moreover fellow law enforcement officers may be reluctant to blow the whistle for fear of victimisation or because of the solidarity of police culture

which frowns on 'rolling over'. Civilians may fail to lodge or pursue complaints because of fears of retaliation.

It is obvious, then, that dealing with the root causes of complaints and corruption is preferable to acting after complaints have been made or corruption has occurred. This may involve considerable change to the substantive criminal law and to the role of law enforcement agencies. There have been increasing calls for redefining the goals and capacity of policing. It is suggested by some commentators that laws which are concerned with morality or which prohibit conduct on which the community is divided need re-examination.

Drug laws and corruption

Of particular interest is what appears to be a causal link between current drug laws that are based on a policy of prohibition and significant police misconduct and corruption, for example:

- High levels of demand for illicit drugs coupled with policies and laws prescribing drug prohibition have created lucrative blackmarkets. Law enforcement officers must work within this environment to implement the laws. This invariably exposes them to opportunities to profit from drug-related misconduct.
- The community's heavy use of both illicit and legal drugs places law enforcement officers in a difficult position where they must balance enforcing the current laws against their perceptions of how fair and practical those laws are.

- Misconduct and corruption which is drug-related is likely to be more difficult to detect than many other forms of misconduct.
- Under current drug laws law enforcement officers often have difficulty in proving drug offences on the evidence available to the necessary standard of proof. This may cause frustration and may lead to officers acting either contrary to policing practice or illegally in order to secure convictions.
- The increase in powers given to law enforcement agencies to enforce effectively the current drug laws has raised concerns about the erosion of traditional civil liberties.

This connection between prohibition and corruption has been noted by a number of royal commissions, inquiries and reports. The Fitzgerald report made the following observation:

[A]ttempts to stamp out the illegal drug trade have failed all over the world, and have consumed more and more resources. Wider powers have been granted to police, customs officers, and other law enforcers. More jails have been built and more people jailed. As well, drugs have caused more incursions on the civil liberties of ordinary people, more corruption and more interference in normal life than almost anything else.

... One thing is certain: the conventional method of giving the job to police, on top of all their other responsibilities has failed all over the world and a new approach is needed.

During proceedings before the NSW Royal Commission into the NSW Police Service, Justice

Wood said that the most obvious consequence of the 'drug problem was its enormous capacity to corrupt police'. He made the following comment:

It seems to me that the drug problem and its ramifications is such that there has to be a national organised and cooperative solution to the problems which may involve bold and innovative thought.

... It is destroying the police on a State and Federal level. and there is absolutely no reason to think that it stops at NSW boundaries.

There have been many other calls to relieve much of the strain being placed on law enforcement agencies through a national effort to consider innovative drug policy options. The Commission believes that this issue deserves serious further consideration.

Other measures

The ALRC has noted a number of other preventative measures, including

- organisational change to the law enforcement agencies
- recruitment and promotion including greater 'civilianisation' of staff
- education and training
- promotion and lateral entry
- pay and conditions
- ethics training and practice.

Possible extension to other law enforcement agencies

The AFP and the NCA are not the only federal agencies with law enforcement powers. The Australian Securities

Commission, for example, has the responsibility for investigating offences under the corporations legislation and can conduct investigations, including surveillance and public hearings. Other agencies with investigative powers and a role in dealing with federal criminal offences include the Australian Customs Service, the Australian Taxation Office, the Department of Social Security and the Australian Competition and Consumer Commission.

In the report, the ALRC has raised the possibility of the NIIC's jurisdiction being extended to cover all federal agencies who have law enforcement powers. This would be on the basis that the same general issues of individual civil liberties and the need for practical and effective law enforcement are raised. This extended federal role for the NIIC might assist in achieving a cost effective, appropriate and consistent federal approach to complaints and corruption for all these agencies.

The ALRC has also recommended that consideration be given to developing national standards for law enforcement complaints and disciplinary processes as well as a national scheme for investigations including accreditation for investigators with appropriate skills and integrity checks. Arrangements for the interchange or sharing of information, facilities, equipment and other resources should also be considered.

The report, Integrity: but not by trust alone (ALRC 82), is available from the Australian Law Reform Commission at cost of \$20 plus \$5 postage and handling. It can also be accessed through the ALRC's home page, <http://uniserve.edu.au/alrc/>